SCHOOL LAW DECISIONS

OF

Commissioner of Education

AND

State Board of Education

1939-1949

PREPARED BY THE
COMMISSIONER OF EDUCATION
TRENTON

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SCHOOL LAW DECISIONS

CONTRACT MADE BY AN AGENT OF A BOARD OF EDUCATION WITHOUT PROPER AUTHORIZATION IS NOT BINDING UPON THE BOARD OF EDUCATION

WILLIAM HIBBLER,

Petitioner,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF DOVER, OCEAN COUNTY,

Respondent.

For the Petitioner, John J. Ewart.

For the Respondent, Russell G. Conover.

DECISION OF THE COMMISSIONER OF EDUCATION

The petitioner was engaged to teach agriculture in the Dover Township public schools and entered into three contracts with the board of education as follows:

The first dated May 19, 1937, for employment from August 1, 1937 to June 30, 1938, at a salary of $1600.00 to be paid in eleven monthly installments.

The second dated March 28, 1938, for employment from July 1, 1938, to June 30, 1939, at a salary of $1700.00 to be paid in eleven equal monthly installments.

The third dated March 30, 1939, for employment from September 1, 1939, to July 31, 1940, at a salary of $1800.00 to be paid in eleven equal monthly installments.

The testimony shows that the petitioner performed the services and was paid in accordance with both the first and second contracts. Under the third contract which was dated March 30, 1939, the petitioner's employment was from the first day of September at the rate of $1800.00 per year payable in eleven monthly installments. Without any evidence of employment by the board of education, petitioner worked during the month of July, 1939, and was paid at the monthly rate of the third contract. Following the August vacation, the petitioner continued through the school year to June 30, 1940, at which time he received the full amount of the ten additional salary installments which, added to the installment for July, 1939, made a total of $1800.00. On or about July 1, 1940, the petitioner consulted the Supervising Principal about his duties and was told to continue to perform certain duties during the first two weeks of July and to take the last two weeks of that month as vacation. Some minor services were rendered during the first two weeks of July, 1940, as suggested by the Supervising Principal. The petitioner claims that he is entitled to receive compensation for the month of July, 1940, in

the amount of a monthly installment under the third contract, while respondent contends that it had not engaged his services except as set forth in the three contracts, and that he was paid the total amount of the three contracts.

Petitioner worked in July, 1939, without any authority from the board of education and the testimony indicates that the officers of the board in making the payment considered the service as part of the 1939-1940 contract. The board did not enter into any contract for this service nor was any testimony presented to show that the board had knowledge of it except as may be indicated by the fact that the voucher was signed by the officers of the board. Since salary payments on teachers' contracts may be made monthly without approval by the board, there is a clear inference that the board had no knowledge of Mr. Hibbler's services other than its contractual agreement for eleven months during the school year 1939-1940. When it came to the month of July, 1940, the petitioner neither spoke to the board of education regarding his work of the preceding July nor asked about his assignment for the then current month, but consulted the Supervising Principal as to the services he should perform. There is no evidence that the Supervising Principal investigated the contractual relationship, but evidently upon the assumption that there was another month's work to be performed under the original contract, he assigned to Mr. Hibbler certain duties to be performed during the first two weeks of July.

A person dealing with a public officer is assumed to know the limitations of the officer's legal authority. Accordingly, the petitioner is assumed to know that the Supervising Principal could not employ him and make such employment binding upon the board of education. It is true that the third contract included the month of July, 1940, but there was no contract for the month of July, 1939, during which time the petitioner worked and was paid with the apparent understanding that it was in lieu of the July comprehended by the third contract.

Justice Minturn in delivering the opinion of the Supreme Court in the case of Giardini *vs.* Town of Dover, 101 N. J. L. 444, in ruling upon recovery for unauthorized contracts, cites the following:

> "The legal principle cannot be too often repeated, that a public corporation is not bound by acts of its agents coming within the apparent scope of their power and authority. Their authority to act must be explicit and direct that the corporation be bound." 1 Abb. Mun. Corps. 812, and cases. To the same effect is 19 R. C. L. 354, viz.: "A municipal coproration is not bound by a contract made in its name by one of its officers or by a person in its employ, though within the scope of its corporate powers, if the officer or employe had no authority to enter into such a contract on behalf of the corporation."

In Ballagh Realty Company *vs.* Dumont, 111 N. J. L. 36, Chancellor Campbell in delivering the opinion of the Court of Errors and Appeals made a similar ruling, as follows:

> "If he was authorized to negotiate, the result, therefore, became a contract binding upon the municipality only, if and when the latter acted thereon in the manner required by statute. If he was not authorized to negotiate and enter into a contract his acts were not binding upon the borough unless and if they were ratified by action of the latter within the power conveyed and bestowed by statute."

Mr. Hibbler was paid an amount equivalent to that provided in his contractual salaries, and the service rendered in excess of that for which he was definitely employed by the Dover Township Board of Education does not make the board liable. The petition is dismissed.

October 24, 1940.

BOARDS OF EDUCATION MAY NOT CONTINUE EMPLOYMENT OF MEMBERS OF PENSION AND ANNUITY FUND AFTER THE AGE OF COMPULSORY RETIREMENT

TEACHERS' PENSION AND ANNUITY FUND,

Petitioner,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF BOONTON, MORRIS COUNTY,

Respondent.

For the Petitioner, Walter D. Van Riper, Attorney General of the State of New Jersey (John F. Bruther, of Counsel).

For the Respondent, Duane D. Minard, Sr.

DECISION OF THE COMMISSIONER OF EDUCATION

The petitioner in this case is the Teachers' Pension and Annuity Fund, an agency of the State of New Jersey. The petitioner says that John F. Kelly, a janitor employed by the Board of Education of the Township of Boonton, was retired on April 14, 1943, by the Board of Trustees of the Teachers' Pension and Annuity Fund, pursuant to Section 18:13-53 of the Revised Statutes for the reason that he had attained the age of seventy-one years. Notwithstanding this action of the Pension and Annuity Fund, Mr. Kelly has continued as a janitor in the employ of the respondent board. The petitioner prays, therefore, that a mandatory order may issue directed to the Board of Education of the Township of Boonton, compelling the board to dismiss forthwith John F. Kelly from his employment by said board as school janitor.

The respondent, the Board of Education of the Township of Boonton, says that it has been unable to find a qualified person to fill the position held by John F. Kelly and that he was reemployed on April 15, 1943, upon the advice of counsel that such reemployment was lawful until a qualified successor could be found because of the board's obligation to keep the school in uninterrupted operation, and because Mr. Kelly has not accepted pension payments from the Pension and Annuity Fund, pursuant to Section 43:3-1 of the Revised Statutes.

This matter is submitted to the Commissioner for determination on the verified petition and answer and the exhibits attached thereto.

The pertinent statutes are Sections 18:13-53 and 43:3-1 of the Revised Statutes, which read as follows:

18:13-53: "Each and every member who has attained or shall attain the

age of seventy years shall be retired by the board of trustees from service forthwith or at such time within a year thereafter as it shall deem advisable."

43:3-1: "Any person who is receiving or who shall be entitled to receive any pension or subsidy from this or any other state or any county, municipality or school district of this or any other state, shall be ineligible to hold any public position or employment other than elective in the state or in the county, municipality or school district, unless he shall have previously notified and authorized the proper authorities of said state, county, municipality or school district from which he is receiving or entitled to receive the pension that, for the duration of the term of office of his public position or employment his pension shall remain unpaid. . . ."

The first question to be decided is whether a board of education is authorized to employ, reemploy, or continue the employment of a janitor who has attained the age of compulsory retirement. It is the opinion of the Commissioner that the Legislature, in enacting the provisions of Title 18, Chapter 13, Article 3, did not intend to confer such authority upon a board of education. By the terms of Article 3, it is mandatory for a newly appointed janitor to become a member of the Pension and Annuity Fund, but by the terms of the same Article, it is the duty of the Board of Trustees of the Pension and Annuity Fund to retire the janitor immediately upon his attainment of the compulsory age. Therefore, the employment or reemployment of an over-age janitor would be of no avail to him or to the board because his employment would needs be followed by his immediate retirement. If a board of education may continue the services of a janitor beyond the compulsory retirement age, then the requirement of compulsory retirement provided in Section 18:13-53 will become an empty gesture and the legislative intent will be defeated.

The Commissioner believes that, if the Legislature had intended to provide for the employment or reemployment of school janitors beyond the compulsory retirement age, it would have made provisions therefor in Chapter 219, P. L. 1921, which restored janitors to membership in the Pension and Annuity Fund after their membership had been repealed through inadvertance. It should be noted that this law was enacted one week after the enactment of Chapter 109, P. L. 1921, (Sections 43:14-1 to 43:14-48 of the Revised Statutes) which established the State Employees' Retirement System. This chapter includes the following provision whereby a head of a department may continue an employee in service after the date of retirement:

43:14-35 (b): "A member who shall have reached seventy years of age shall be retired by the board from service forthwith, or at such time within ninety days thereafter as it deems advisable, *except that an employee reaching seventy years of age may be continued in service from time to time upon written notice to the Comptroller by the head of the department where the employee is employed.*"

Since both laws were considered and enacted by the same Legislature, the omission of a similar provision in Chapter 219, P. L. 1921, relating to janitors' membership in the Pension and Annuity Fund, seems significant.

The next question to be decided is whether a board of education is authorized under the terms of Section 43:3-1 to continue the employment of a janitor beyond the compulsory retirement age. To find such authority, it must be shown that

Section 18:13-53 was repealed by implication through the enactment of Section 43:3-1 by reason of the fact that Section 43:3-1, the latest legislative expression, cannot be given effect while Section 18:13-53 remains in operative existence.

The following quotation from *Sutherland Statutory Construction, 3d Edition (Horack)* Vol. 1, Sec. 2012, pages 461 and 463, is applicable:

> 461: "The legislature is presumed to intend to achieve a consistent body of law. In accord with this principle subsequent legislation is not presumed to effectuate a repeal of the existing law in the absence of that expressed intent, and conversely, where a consistent body of laws cannot be maintained without the abrogation of a previous law, a repeal by implication of previous legislation or the common law is readily found in the terms of a later enactment."
>
> 463: "When a subsequent enactment, covering a field of operation coterminus with a prior statute cannot by any reasonable construction be given effect while the prior law remains in operative existence because of irreconcilable conflict between the two acts, the latest legislative expression prevails and the prior law yields to the extent of the conflict."

The Commissioner believes that the legislative intent in enacting Section 43:3-1 can be accomplished without the repeal by implication of Section 18:13-53, because an examination of both statutes reveals that there is no conflict in the purpose of the acts and that, therefore, both can be given effect.

The purpose of Section 18:13-53 is to make a member of the Pension and Annuity Fund ineligible for further employment after he has attained the compulsory retirement age. This provision of law must be read in the light of the public policy which the establishment of the Pension and Annuity Fund was intended to advance. Section 18:13-24 contains the preamble, the last paragraph of which reads as follows:

> "WHEREAS, it is recognized as an established state policy that the teachers of our public schools should be given protection against disability and old age and that such protection should be provided by a retirement system established on a scientific basis that will truly advance the *best interests of our educational system* and protect the future well-being of the teachers; . . ."

Evidently, provisions for compulsory retirement by reason of age were written into the law because the Legislature believed such provisions would "advance the best interests of our educational system."

By the terms of Chapter 219, P. L. 1921, the provisions of Article 3, relating to the Pension and Annuity Fund, became applicable to school janitors.

The Commissioner can take judicial notice of the existence of a severe economic depression at the time Chapter 259, P. L. 1932 (Section 43:3-1) was enacted. It is well known that there was public sentiment in favor of spreading and against permitting the same person to receive dual compensation from public funds. It is equally well known that in some political subdivisions of this State a policy was adopted of retiring employees eligible for a pension in order to make positions available for the unemployed. Accordingly, the prior enactment requiring compulsory retirement (Section 18:13-53) was not an obstacle to achieving the underlying purpose of the subsequent enactment (Section 43:3-1); in fact, the continued operative existence of Section 18:13-53 contributed to the accomplishment of the purpose. The repeal by implication of the provisions for compulsory retire-

ment would have aggravated the condition which the Legislature was endeavoring to remedy through Section 43:3-1. Therefore, it seems inconceivable to the Commissioner that there was a legislative intent, through the enactment of Section 43:3-1 to repeal Section 18:13-53, providing for the compulsory retirement of school janitors.

The final question to be decided is whether it is lawful for the respondent board to continue the employment of John F. Kelly beyond the compulsory retirement age on the grounds that an emergency created by the manpower shortage makes it necessary in order to keep the Powerville School in operation. In determining this question, the Commissioner cannot give consideration to the wisdom of a law requiring compulsory retirement in a period of manpower shortage; his consideration must be restricted to a determination as to whether the law makes retirement mandatory. The suspension of the compulsory retirement law for the duration of the manpower shortage is solely the prerogative of the Legislature.

While the Commissioner agrees that the prime duty of a board of education is to keep its schools in operation, he wishes to point out that a board of education should exercise emergency powers with extreme caution, lest it be charged with an attempt to defeat the provisions of a statute by declaring an emergency when none exists.

The exact extent of a board's emergency powers has not been defined, but the following definitions of "emergency" are in point:

> 29 C. J. S. 761: "Some pressing necessity out of the ordinary state of things which can only be remedied by the use of unusual expedients." Samuels *vs.* City of Clinton, 211 S. W. 567, 568. 184 Ky. 97.
>
> 29 C. J. S. 762: "An unforseen combination of circumstances which calls for immediate action." Mayor and Council of the City of Baltimore *vs.* Bofrichter, 11 A. 2d. 375, 379.
>
> "Something sudden, unexpected, calling for immediate action, urgent, pressing." Belt Line Ry. Corporations *vs.* City of New York, 195 N. Y. S. 203.
>
> "Some sudden or unexpected necessity requiring immediate or at least quick action." Colo.—First State Bank of Sulphur Springs *vs.* Becker, 242 P. 678, 679. 78 Colo. 436.
>
> 43 C. J. 235: "This doctrine rests on the reasoning that the Legislature in granting the power and prescribing methods of and conditions to its exercise could not have intended such conditions and methods to apply to cases where it is impossible to meet them. The important thing is that the municipality has the power; the method of its exercise is a secondary consideration. And in times of stressing emergency, when prompt action is required for the public welfare, it is better that methods and conditions be unfulfilled than that the municipality should fail to act." Brooklyn City R. Co. *vs.* Whalen, 191 App. Div. 737, 742. 182 N. Y. S. 283. (Affirmed 229 N. Y. 510) 128 N. E. 215.
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> Words and Phrases, p. 299: "An emergency is a sudden or unexpected occurrence or condition calling for immediate action." Frank *vs.* Board of Education of Jersey City, 100 A. 211, 212. 90 N. J. L. 273.
>
> "An emergency is a condition of things appearing suddenly or unexpectedly; that is, it is an unforeseen occurrence. As relating to the law of negligence, it may properly be defined as any event or combination of circumstances which

call for immediate action without giving time for the deliberate exercise of judgment or discretion, in short, an emergency." Mayott *vs.* Norcross, 52 A. 894, 896.

Common to these definitions is the element of the sudden, the unexpected, and the unforeseen. The necessity of replacing Mr. Kelly could have been foreseen far in advance of his reaching compulsory retirement age. Therefore, the element of the sudden, the unexpected, and the unforeseen is not found in this case.

The record upon which this case is submitted does not disclose what means have been taken by the respondent to replace Mr. Kelly. It is the opinion of the Commissioner that it is the duty of the respondent board to take the same energetic measures to secure a new janitor as it would take to continue the education of the children in case the present janitor should resign.

The Commissioner concludes that the employment of John F. Kelly by the Board of Education of Boonton Township is without authorization of law. Therefore, the respondent is hereby ordered forthwith to take the necessary measures to discontinue the employment of John F. Kelly.

February 21, 1945.

BOARD OF EDUCATION NOT REQUIRED TO OBTAIN CONSENT OF COMMISSIONER OF EDUCATION PRIOR TO CLOSING A SCHOOL

SARAH BOULT AND GERTRUDE HARRIS,

Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF PASSAIC,

Respondent.

For the Petitioners, Gurtman & Schomer.

For the Respondent, Riskin & Riskin.

DECISION OF THE COMMISSIONER OF EDUCATION

The petitioners in this case are mothers of children who heretofore attended Columbia School No. 9, one of the elementary school units in the public school system of the City of Passaic. On June 28, 1945, the Board of Education of the City of Passaic ordered that the Columbia School No. 9 be discontinued as an elementary school unit in the Passaic school system. Petitioners allege that this action of the Board is contrary to the best interests of the City of Passaic, that the Board was without authority in law to direct the discontinuance of the school, and that the action was taken in a manner contrary to law. They pray that an order be issued by the Commissioner restraining the discontinuance of Columbia School No. 9 as an elementary school and directing the Board of Education of the City of Passaic to continue said Columbia School No. 9 as an elementary school unit.

The respondent in answering the petition states that the discontinuance of the school is necessary for the proper conduct and maintenance of the public schools of Passaic, that the action followed a recommendation in a report made by certain

professors of Teachers College, Columbia University, and by three superintendents of schools of the city over a period of eight years, that the action was taken after full opportunity to be heard was given at public meetings of the Board, and that the action was for the best interests of the City of Passaic and the school children, and that the Board acted in harmony with the laws of New Jersey, the rules and regulations of the State Board, and the regulations and by-laws of the Board of Education of the City of Passaic.

A hearing was held on Wednesday, November 7, 1945, in the Passaic County Court House, Paterson, New Jersey. At the hearing the petition of appeal was amended to include an allegation that there had been an unreasonable exercise of and an abuse of discretion on the part of the Board of Education of the City of Passaic in closing Columbia School No. 9.

The Assistant Commissioner of Education announced that proofs to establish an unreasonable exercise of discretion would be limited to evidence adduced to prove that the alleged abuse consisted of dishonest or illegal actions of the respondent Board of Education. Counsel for petitioners stated that the petitioners did not charge dishonesty, fraud, or illegality on the part of the Board, but intended to present composite testimony to establish that the Board of Education had exercised its discretion unreasonably and had been guilty of an abuse of discretion. When the Assistant Commissioner asked what showing of unreasonable exercise of discretion the petitioners would make, counsel replied that they would show that the Board's action to close the school was the result of an erroneous conclusion based upon incorrect information and that all the estimated savings and other advantages claimed in the recommendations had not been accomplished. He ruled that evidence adduced to show that the Board of Education had reached an erroneous conclusion based upon incorrect information would not assist the Commissioner in determining the issues in this case.

The counsel for the petitioners took due exception to this ruling. Thereafter, whenever counsel for the respondent objected to questions put to the witnesses, including the petitioners and members of the Board, intended to disclose the reasons why the Board closed the school and how the school system was affected thereby, the objections were sustained and exceptions duly taken. The counsel for petitioners in taking exception to the rulings of the Assistant Commissioner restated the proposition that the testimony was introduced to establish that the Board of Education had exercised its discretion unreasonably and had been guilty of an abuse of discretion, and that the ruling precluded the petitioners from proving the facts upon which unreasonable exercise of an abuse of discretion by the Board could have been founded.

It was then stipulated that if the remaining Board members present in the court room should be called to testify, similar questions would be asked, similar objections taken, similar rulings made, and similar exceptions taken. It was further stipulated that the consent of the Commissioner to discontinue Columbia School No. 9 had not been obtained.

At the conclusion of the hearing, it was agreed that, in order to save the expense of a transcript of the record in the event of an appeal, the Commissioner's decision should be based upon these two legal propositions to be presented to him in briefs:

1. That the authority to close a school is vested exclusively in the Commissioner of Education and, therefore, the Board of Education of the City of

Passaic was not authorized to discontinue the Columbia School No. 9 as an elementary unit in the Passaic School system.

2. That there was error in sustaining objections to the introduction of certain evidence intended to establish that the Board's action in discontinuing Columbia School No. 9 was an unreasonable exercise of and abuse of discretion.

It has never been the practice in this State for boards of education to obtain the consent of the Commissioner of Education before discontinuing the use of a school building for educational purposes. Therefore, the first of these propositions raises a novel legal question.

While the precise question has never been presented for decision, the issue was involved incidentally in the cases of Horan *vs.* Board of Education of Kearny, 1938 School Law Decisions, 532, 11 N. J. Misc. 751, Board of Education of West Long Branch *vs.* County Superintendent of Schools of Monmouth County, 1938 School Law Decisions, 807, Downs *vs.* Board of Education of Hoboken, 1938 School Law Decisions, 515. The Commissioner said in the *Horan* case, *supra*, at page 534:

> "Moreover, the board of education decides where facilities shall be provided within the appropriations legally authorized. The respondent in this case acted within its authority in closing the Clara Barton School."

In the *West Long Branch* case, *supra,* the Commissioner said:

> "There is no question as to the right of a board of education to close a school and have the children transported to another school; it is thus furnishing, as the law commands, school facilities by taking the children to a distant school rather than having the school placed so as to be convenient of access to the children."

In the *Downs* case, *supra,* which resulted from the closing of a school, the failure to obtain the consent of the Commissioner was not questioned before the Commissioner, the State Board, the Supreme Court, or the Court of Errors and Appeals. These cases reveal the Commissioner's acquiescence in the school boards' interpretation of the law that the prior consent of the Commissioner to the closing of a school is not required. Contemporaneous construction of statutes by the agencies which administer them must be given weight. Corpus Juris 59 (p. 1023, sec. 608). Offhouse *vs.* Paterson, decision of the State Board of Education; State *vs.* Kelsey, 44 N. J. L. I, at p. 18. In the case of Sargeant Bros., Inc. *vs.* Brancati, 107 N. J. L. 84, it was held that:

> "Whenever there is a debatable question as to the proper construction of a statutory provision, the contemporaneous and long-continued exposition exhibited in the usage and practice under it justified the conclusion that the construtions thus put upon it by the courts is the true one."

The petitioners lean heavily upon Section 18:11-12 of the Revised Statutes to support their contention that the Commissioner of Education alone is vested with the power to order the discontinuance of a school. Section 18:11-12 reads as follows:

> "The commissioner of institutions and agencies shall upon the request of the commissioner of education, cause to be made a thorough examination of any

school building and report to the commissioner of education his findings thereon.

"The commissioner of education may direct the entire or partial abandonment of any building used for school purposes and may direct the making of such changes therein as to him may seem proper."

It should be noted that 18:11-12 is a section of Chapter 11, relating to Schoolhouses, Facilities and Accommodations. Other sections deal with the requirements to furnish suitable facilities, the withholding of school moneys for failure to provide such facilities, approval and filing of plans for school buildings, advertising for bids, etc.

Section 18:11-12 must be read in connection with Section 18:11-1 which reads as follows:

"Each school district shall provide suitable school facilities and accommodations for all children who reside in the district and desire to attend the public schools therein. Such facilities and accommodations shall include proper school buildings, together with furniture and equipment, convenience of access thereto, and courses of study suited to the ages and attainments of all pupils between the ages of five and twenty years. Such facilities and accommodations shall be provided either in schools within the district convenient of access to the pupils, or as provided in sections 18:14-5 to 18:14-9 of this title."

Thus, by the terms of Section 18:11-1, the duty is imposed upon the school districts either to provide school buildings convenient of access for the children or to transport the children to other schools. As long as suitable facilities, including proper buildings, are provided, the school board is free to open and close schools without the consent of the Commissioner. Section 18:11-12 along with Section 18:11-2, which authorizes the County Superintendent with the approval of the Commissioner to withhold school moneys from districts for failing to provide the accommodations and facilities referred to in Section 18:11-1, was intended to provide a means to enforce the provisions of Section 18:11-1. The power of the Commissioner under Section 18:11-12 can be invoked only when a school building, after an examination, has been found to be unsafe or unsuitable for school purposes.

Sections 18:5-27 and 18:5-28 furnish further proof of the intention of the Legislature that local boards of education be authorized to determine when school buildings are to be discontinued. These sections provide that a board of education shall determine whether school buildings are no longer desirable, necessary or required for school purposes before such building may be transferred to the municipality. If the Legislature had intended that the Commissioner make such a determination, it would not have used the word "determine" in connection with the duty of the boards of education with respect to ascertaining whether buildings are no longer needed for school purposes.

Boards of education in this State have broad powers in the administration of schools in local school districts. In Downs *vs.* Hoboken, 12 N. J. Misc. 348, the Supreme Court said:

"The powers of boards of education in the management and control of the school districts are broad. They are invested with the supervision, control and management of the public schools. They may make, amend and repeal rules and regulations, and by-laws not inconsistent with the school law or with the

rules and regulations of the State Board of Education, and, among other things, may employ and discharge teachers."

In the case of N. J. Good Humor, Inc. *vs.* Bradley Beach, 124 N. J. L. 162, the Court of Errors and Appeals said:

"A municipal corporation is the creature of the legislature and possesses only such rights and powers (a) as have been granted in express terms; (b) as arise by necessary or fair implication, or are incident to the powers expressly conferred, and (c) as essential to the declared objects and purposes of the municipality—not merely convenient, but indispensable."

If Sections 18:6-17 to 19 and 18:11-1 are read in the light of these decisions, ample authority exists for a board of education to discontinue a school without obtaining the consent of the Commissioner of Education.

The School Law specifically mentions the actions of school boards which require the Commissioner's approval. Accordingly, if the Legislature had intended the Commissioner to approve the discontinuance of a school, specific provision would have been made therefor in the School Laws. Therefore, the Commissioner concludes that the Board of Education of the City of Passaic was not required to obtain the consent of the Commissioner of Education prior to directing the closing of Columbia School No. 9.

It remains to decide whether there was error in sustaining objections to the introduction of certain evidence intended to establish that the Board's action in discontinuing Columbia School No. 9 was an unreasonable exercise of and abuse of discretion.

Section 18:3-14 of the Revised Statutes provides that:

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

"The facts involved in any controversy or dispute shall, if required by the commissioner, be made known to him by the parties by written statements verified by oath and accompanied by certain copies of all documents necessary to a full understanding of the question.

"The decision shall be binding until a decision thereon is given by the state board on appeal."

In the case of Sallie H. Thompson *vs.* Board of Education of the Borough of Elmer, 57 N. J. L. 628, it was held that the Commissioner of Education is a legally created tribunal of limited jurisdiction to hear and determine matters arising under the School Law, and his determinations thereupon have the conclusive quality of a judgment pronounced in a legally created court of limited jurisdiction acting within the bounds of its authority.

In exercising this judicial function in reviewing the administrative and managerial acts of boards of education, the Commissioner feels constrained to keep within the proper limits of judicial inquiry. The well established principles governing judicial interference with, control and review of actions of boards involving the expression of their discretion are found in the following excerpts from decisions of the State Board and the courts:

"Such a rule would produce chaos in the administration of the schools. The

School Law vests the management of the public schools in each district in the local boards of education, and unless they violate the law, or act in bad faith, the exercise of their discretion in the performance of the duties imposed upon them is not subject to interference or reversal." Kennedy *vs.* Board of Education of the Town of Montclair, 1938 Compilation of School Law Decisions, 647, at 653.

"Can we go behind the record of the proceeding and the action of the Board to question the motives which actuated its members? The general principle appears to be against such proposition.

> 'So long as a . . . board of education . . . acts within the authority conferred upon . . . it by law, the courts are without power to interfere with, control or review . . . its action and decisions in matters involving the exercise of discretion, in the absence of clear abuse thereof . . . nor is the wisdom or expediency of an act, or the motive with which it was done, open to judicial inquiry or consideration, where power to do it existed.' 56 C. J. 342, citing numerous authorities.
>
> 'Even though motive was corrupt or the act was done for the purpose of spite or revenge, an action of a board is immune from judicial interference if it is within the range of the board's legal discretion. (Iverson *vs.* Springfield, etc. Union Free High School Dist. 186 Wisc. 342; 202 N. W. 788.)'

"The right of a Board to transfer teachers being absolute, the fact that the Board had in view the closing of the school to which the teacher was transferred, and to terminate her employment does not affect the legality of such transfer, and we conclude that the transfers of the 26 teachers to Schools Nos. 4 and 7 were lawful." Downs *vs.* Hoboken Board of Education, 1938 School Law Decisions, 326.

"The board appears to have acted within the authority conferred upon it by law, and its action involved the exercise of discretion, and in the absence of clear abuse, its action ought not to be disturbed; so we conclude that the transfer of the twenty-six teachers to Schools Nos. 4 and 7 was lawful and that the board was justified in dismissing the teachers as it did, subject to the reservation imposed by the state board." Downs *vs.* Board of Education of Hoboken, 12 N. J. Misc. 345.

"The action does not offend any statutory regulation. As held in Downs et al. *vs.* Hoboken, *supra,* the motives, reasons, and considerations of the local board in so acting are not evidence of bad faith." Liva *vs.* Lyndhurst, 126 N. J. L. 224.

"A reading of the record leads to the conclusion that probably neither party has been entirely frank and fair in the treatment of the other. But we are not persuaded that there has been shown bad faith or such a shocking abuse of discretion as to call for the intervention of this court in matters that are by statute delegated to the governing body of the municipality. We will not substitute our judgment for that of the commissioners. It is not our function to do so." Murphy *vs.* City of Bayonne, 130 N. J. L. 336.

"It remains to say a word upon that view of the case which assumes that it is within the judicial province to protect constituencies from the 'recreancy' of their representatives by undoing legislation that evinces 'bad faith.' To which

the answer is——first, that the power to so intervene has wisely been withheld from the judiciary; secondly, that if the power existed, its exercise would be most mischievous, and lastly, that the redress of the betrayed constituent is in his own hands, to be sought at the polls and not in the courts." Moore *vs.* Haddonfield, 62 N. J. L. 391.

"Faced with such a serious charge, and faced with the legal principle that courts do not substitute their judgment for the judgment of those selected by the people and charged with the duty of acting in good faith unless a clear showing of bad faith is disclosed (Blair *vs.* Brady, 11 N. J. Misc. R. 854, 857; 168 Atl. Rep. 668; Cohan *vs.* Township Committee of Hamilton Township, 15 N. J. Misc. R. 687, 690; 194 Atl. Rep. 436) I continued the cause, in fairness and justice to all parties, to the end that counsel for prosecutors be given every opportunity of supplying proof to substantiate their claim of bad faith and dishonesty.

"I desire to make clear that I express no opinion as to the policy employed by the majority in the selection which they made or in the manner in which they made their selection effective. *That is their responsibility to those whom they govern.* Courts cannot compel governing officials to act wisely, but it can and does compel them to act in good faith. *And to say governing officials must act in good faith is merely equivalent to saying that they must act honestly."* Peter's Garage, Inc. *vs.* City of Burlington, 121 N. J. 523, 527."

According to the principles established in the above-quoted decisions, it is not a proper exercise of a judicial function for the Commissioner to interfere with local boards in the management of their schools unless they violate the law, act in bad faith (meaning acting dishonestly), or abuse their discretion in a shocking manner. Furthermore, it is not the function of the Commissioner in a judicial decision to substitute his judgment for that of the board members on matters which are by statute delegated to the local boards. Finally, boards of education are responsible not to the Commissioner but to their constituents for the wisdom of their actions.

It is in the light of these principles that the rulings on evidence should be examined. Like the court in the case of Peter's Garage, Inc. *vs.* City of Burlington, *supra,* the petitioners were given every opportunity to substantiate any claim of dishonesty, fraud or illegality in the action of the Board. Counsel stated that the petitioners made no allegation except an unreasonable abuse of and exercise of discretion. The only showing of abuse of discretion which they were prepared to make was that the Board's action to close the school was the result of an erroneous conclusion, based upon incorrect information, and that all the estimated savings and other advantages claimed in the recommendations had not been accomplished.

It is the opinion of the Commissioner that such a showing does not constitute such a shocking abuse of discretion as to call for the intervention of the Commissioner in accordance with the principle established in the case of Murphy *vs.* City of Bayonne, *supra.* Inasmuch as it is not the purpose of a judicial inquiry into matters which are by statute delegated to local boards of education to enable the reviewing tribunal to form an independent judgment to be substituted for that of the Board, no useful purpose would have been served by hearing testimony that the Board of Education had reached an erroneous conclusion.

Petitioners complain that the rulings on evidence prevented proof that, as a

result of the discontinuance of the school, the health and welfare of the children were jeopardized, that the action of the Board created a condition which would lower the standard of education in the district because of overcrowding of available classroom space, and that the action of the Board made it necessary for children to attend a school far less desirable physically than the one which was discontinued.

The suitability of the facilities and accommodations of the schools to which the pupils were transferred is not an issue in this case. The sole prayer of the petition is that the Commissioner direct the Board of Education of the City of Passaic to continue the Columbia School No. 9 as an elementary school unit. The Commissioner should not decide issues not raised in the pleadings. Lastowski *vs.* Lawnicki, 115 N. J. L. 233, Adams *vs.* Atlantic City Electric Co., 120 N. J. L. 372. To prove the facilities and accommodations of these schools were unsuitable would not affect the decision in this case. Even if such proof were established, the Commissioner would be without authority to order the continuance of the Columbia School No. 9, because it would be discretionary with the Board of Education, according to the *Horan, West Long Branch,* and *Downs* cases, *supra,* where to provide the suitable facilities. Inasmuch as evidence adduced to show the conditions in other schools would not have assisted the Commissioner in determining the issues in this case, the sustaining of objections to the admission of such evidence was justified. Marsh *vs.* Newark Heating Machine Co., 57 N. J. L. 36.

Petitioners contend that in a proceeding under Section 18:3-14, the Commissioner is not bound by strict rules of evidence and procedure, and the fact that the testimony offered might ultimately turn out to be improper or illegal is not a bar to its reception. Consequently, they maintain that the refusal to hear testimony (even if illegal and objectionable) intended to establish unreasonable exercise of and abuse of discretion, was an obvious violation of the petitioner's rights.

Because it is not necessary to conduct a hearing with all the technical precision and niceties of a law court, it does not follow that the Commissioner is precluded from following established judicial procedures in so far as he deems advisable. Furthermore, he is not required to admit all evidence offered because the admission of such evidence is not grounds for reversal of his decision, if there is other competent evidence to support his findings.

According to accepted court procedure, the conduct of the hearing and examination of witnesses must rest in the sound discretion of the one who presides. State *vs.* Fox, 25 N. J. L. 566, Donnelly *vs.* State, 20 N. J. L. 463, aff. 26 N. J. L 601.

Before deciding whether to sustain objections to questions intended to show the basis for the Board's decision to close Columbia School No. 9, it was proper to ascertain whether the question would be relevant and material in proving an abuse of discretion so shocking as to call for the intervention of the Commissioner in accordance with the principle of the case of Murphy *vs.* Bayonne, *supra,* Middletown *vs.* Griffith, 57 N. J. L. 442. The ruling sustaining objections to questions put to Board members as to their reasons for deciding to close the school was correct, in view of the *Liva* decision *supra,* wherein it was held that, where an action of a board of education does not offend any statutory regulation, the motives, reasons, and considerations of the local board are not evidence of bad faith.

Proofs should be kept within reasonable bounds. Maisto *vs.* Maisto, 123 N. J. L. 401, aff. 124 N. J. L. 565. Otherwise, the record becomes voluminous and imposes an undue burden upon the Commissioner, the State Board, and the reviewing

courts. In the case of Offhouse *vs.* Paterson, the State Board made the following reference to the voluminous record:

> "Voluminous testimony was taken before the Assistant Commissioner of Education, consisting of 3368 pages, numerous exhibits were offered, and extensive briefs filed by appellants and respondent, all together imposing a great burden upon both the Commissioner of Education and the reviewing court. It should be remembered that the procedure prescribed by the Legislature for the determination of controversies arising under the School Law is intended to be simple and extensive, R. S. 1937, 18:3-14, and counsel in such cases should endeavor to reduce to a minimum the examination of witnesses and the creation of a record."

Also, counsel should not be permitted to waste the time and invade the privacy of witnesses by delving into matters which will have no bearing upon the decision of the Commissioner.

The Commissioner concludes that the rulings did not bar any evidence which would have assisted him in making a proper determination of the issues in this case.

It is the opinion of the Commissioner that the Board of Education of the City of Passaic, in discontinuing Columbia School No. 9, acted within the authority conferred upon it by law and, therefore, the Commissioner cannot interfere with its action.

The petition is dismissed.

January 8, 1946.

Affirmed by State Board of Education without written opinion September 13, 1946.

Affirmed by *New Jersey Supreme Court,* 135 N. J. L. 329.

DECISION OF COURT OF ERRORS AND APPEALS

Argued October 22, 1947. Decided January 29, 1948.

On appeal from the Supreme Court whose opinion is reported in 135 N. J. Law 329 (1947).

For Prosecutor-Appellants: William N. Gurtman; Gurtman and Schomer.

For Defendants-Respondents: John H. Bosshart, Commissioner of Education and State Board of Education: No appearance.

The opinion of the court was delivered by Schettino, Judge.

This is an appeal from a judgment in the Supreme Court dismissing a writ of *certiorari* on the merits.

The Board of Education of the City of Passaic determined to discontinue the operation of one of its schools. From that determination appellants herein appealed to the state commissioner of education who, after a hearing, affirmed the action of the local board. A further appeal was prosecuted to the state board of education which affirmed the action of the state commissioner of education.

The writ of certiorari was thereupon allowed. We agree with the Supreme Court that the local board of education "had jurisdiction, in its discretion and of its own motion to discontinue one of the public schools of that city." Boult *vs.* Board of Education of Passaic, 135 N. J. Law 329, 330 (Sup. Ct. 1947).

Appellants contend that the Commissioner of Education erred in rejecting an offer of proof in support of an allegation that the local board's action constituted an unreasonable exercise of and an abuse of discretion. The state of case does not contain a transcript of the hearing. In the opinion of the Commissioner of Education appears the following:

> "Counsel for petitioners stated that the petitioners did not charge dishonesty, fraud, or illegality on the part of the Board, but intended to present composite testimony to establish that the Board of Education had exercised its discretion unreasonably and had been guilty of an abuse of discretion. When the Assistant Commissioner asked what showing of unreasonable exercise of discretion the petitioners would make, counsel replied that they would show that the Board's action to close the school was the result of an erroneous conclusion based upon incorrect information and that all the estimated savings and other advantages claimed in the recommendations had not been accomplished."

The offer was rejected by the Commissioner.

R. S. 18:3-14 provides:

> "The commissioner shall decide without cost to the parties all controversies and disputes arising under the school laws, or under the rules and regulations of the state board or of the commissioner.
>
> "The facts involved in any controversy or dispute shall, if required by the commissioner, be made known to him by the parties by written statements verified by oath and accompanied by certified copies of all documents necessary to a full understanding of the question.
>
> "The decision shall be binding until a decision thereon is given by the state board on appeal."

R. S. 18:3-15 provides in part:

> "Decisions under section 18:3-14 of this Title are subject to appeal to the State board."

Neither of the quoted statutory provisions was intended to vest in the appellate officer or body the authority to exercise originally discretionary power vested in the local board. The review authorized of the local board's action here involved is judicial in nature. Thompson *vs.* Board of Education, 57 N. J. Law 628 (Sup. Ct. 1895). In exercising that reviewing power the commissioner was properly guided by the principles governing the scope of judicial review of municipal action. The reviewing officer was not empowered to substitute his discretion for that of the local board. The offer of proof, as it is described in the commissioner's opinion, amounted to nothing more than an offer to establish that the local board's determination was based upon erroneous factual material. Discretionary municipal action may not be judicially condemned on that basis. Downs *vs.* Board of Education, Hoboken, 12 N. J. Misc. 345 (Sup. Ct. 1934) affirmed *sub. tit.* Flechtner vs. Board of Education, Hoboken, 113 N. J. Law 401 (E. & A. 1934); Murphy *vs.* City of Bayonne, 130 N. J. Law 336 (Sup. Ct. 1943).

Judgment is accordingly affirmed. 136 N. J. L. 521.

Filed January 29, 1948.

BOARD OF EDUCATION MAY DESIGNATE CLASS OF INSURANCE COMPANY FROM WHICH BONDS WILL BE ACCEPTED

AMERICAN FIDELITY AND CASUALTY INSURANCE COMPANY, A CORPORATION,

Petitioner,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF BRIDGEWATER, SOMERSET COUNTY,

Respondent.

For the Petitioner, Charles A. Rooney.

DECISION OF THE COMMISSIONER OF EDUCATION

The petitioner, the American Fidelity and Casualty Insurance Company, a corporation of the State of Virginia and licensed to transact business in the State of New Jersey, sets forth that Thomas A. Romano entered into a contract with the Board of Education of Bridgewater Township, providing for the transportation of school children in said township, and offered in compliance with said contract to the Board of Education of Bridgewater Township a policy of liability insurance issued by the petitioner, as insurer, in due form and amount. The board refused to accept the policy and returned it to Mr. Romano for the reason that on May 8, 1939, the board adopted a resolution that contractors for transportation of pupils must have an insurance policy of a company having an "A plus" rating in the "Best Insurance Guide." The American Fidelity and Casualty Insurance Company does not have such rating. Petitioner charges that this resolution is illegal in that it is arbitrary, unenforceable, and discriminatory against the petitioner and other companies that do not have the "A plus" rating in the "Best Insurance Guide," and asks that an order be issued by the Commissioner of Education setting aside the aforementioned resolution of the Board of Education of Bridgewater Township adopted on May 8, 1939, and directing the board to accept the policy of the American Fidelity and Casualty Insurance Company offered by Thomas A. Romano.

The statutes (Section 18:3-14) provide that the Commissioner of Education shall decide controversies and disputes arising under the School Law or under the rules and regulations of the State Board of Education. The transportation contract between the Board of Education of Bridgewater Township, party of the first part, and Thomas A. Romano, party of the second part, sets forth that the party of the second part shall file with the party of the first part a policy of insurance. The petitioner in this case is not a party to the contract, and it is not shown in the petition that any legal situation exists between the petitioner and respondent under the School Law or rules of the State Board of Education. Accordingly, the American Fidelity and Casualty Insurance Company is without legal status to prosecute its alleged grievance before the Commissioner of Education. The appeal is dismissed.

January 4, 1940.

DECISION OF THE STATE BOARD OF EDUCATION

In compliance with the terms of a one-year pupil transportation contract expiring July 1, 1939, Thomas A. Romano in 1938 deposited with the school board of Bridgewater Township a policy of liability insurance issued by the appellant, which the board accepted. On May 8, 1939, the board passed a resolution which required that thereafter such policies must be in companies "having an A-plus rating with the Best Insurance Guide."

On or about June 10, 1939, Romano and the board of education signed an agreement which extended the 1938 contract for a year beginning July 1, 1939, but, pursuant to the resolution of May 8, provided that his insurer be rated A-plus in Best's Insurance Guide. Romano then filed a new policy of insurance issued by the appellant in the amount required by the extension agreement (which amount conformed to the rules of this Board), but the policy was returned to him by the district clerk with a letter, dated June 29, 1939, advising him that appellant's rating in Best's Insurance Guide is B-plus, and asking him to obtain a policy with an insurer rated A or A-plus in said Guide.

Appellant thereupon filed its petition with the Commissioner of Education, charging that the board's resolution of May 8, 1939, was illegal, arbitrary and discriminatory, and praying that the Commissioner issue an order setting aside the resolution and commanding the Bridgewater Board to accept its policies in connection with transportation contracts made by that board. The Commissioner has dismissed the petition solely on the ground that the appellant is "without legal status to prosecute its alleged grievance before" him. The appeal challenges this holding and the legality of the Bridgewater Board's rejection of the appellant's policy.

The respondent board filed a brief reply to appellant's points on appeal in which it stated that it did not "deem it advisable to spend public money for a lawyer to defend this matter" and, presumably for the same reason, did not appear at the hearing of the appeal by the Law Committee. This report therefore is rendered without such assistance as might have been received by the Committee from a brief or argument on respondent's behalf.

The Commissioner has jurisdiction over "all controversies and disputes arising under the school laws, or under the rules and regulations of the State Board or of the Commissioner." (Education Law Section 18:3-14.) The school laws provide that the "board of education of the district may make rules and contracts" for transportation (Section 18:14-8); that "the State Board of Education shall prescribe the amount of liability insurance to be carried by the contractor or bus driver as well as other rules and regulations applicable to pupil transportation" (Section 18:14-12); and that district boards "shall make, amend and repeal rules, regulations and by-laws not inconsistent with the rules and regulations of the State Board of Education for its own government, for the transaction of business, and for the government and management of the public schools and the public school property in the district," etc. (Section 18:6-19.)

Rule 16 of this Board's "regulations governing pupil transportation" requires transportation contractors to "file with the board of education liability insurance in a company authorized to insure in New Jersey" and prescribes certain minimum amounts of such insurance. The appellant's claim is that the rule prescribed by the Bridgewater Board's resolution of May 8, 1939, is inconsistent with this regulation

and beyond the lawful authority of district boards. It directly alleges a violation of the school laws and the aforesaid regulation of this Board.

We cannot concur in the view expressed in the Commissioner's opinion that he was without jurisdiction because the petitioner-appellant was not a party to this transportation contract and it is not shown that "any legal situation exists" between the parties under the school law or the rules of this Board. The terms of the statute conferring jurisdiction upon the Commissioner and this Board over disputes are very broad. They include every controversy which arises under the school laws or the rules and regulations of this Board or of the Commissioner. The Courts have held that the jurisdiction thus conferred is of "wide scope." Ridgway *vs.* Upper Freehold Board of Education, 88 N. J. L. 530. (See also Montclair *vs.* Baxter, 76 N. J. L. 68; Buren *vs.* Albertson, 54 N. J. L. 72). It is not confined to disputes between parties who have a direct relation one to the other, by statute or contract, but includes controversies which involve the right of parties who may claim to be injured by an alleged unlawful action in the administration of the public schools by a board of education or a person or corporate body engaged in that administration. Since the dispute now before us is of that character and in our opinion arises under the school laws and the regulations of this Board, it is within the jurisdiction conferred on the Commissioner by Section 18:3-14.

This being the case, it becomes necessary to consider the legality of the action here complained of. Appellant contends that the Bridgewater Board exceeded its authority. Its contention is based on the proposition that the board's resolution of May 8, 1939, was "inconsistent" with Rule 16 of the transportation rules and regulations of this Board and therefore is unlawful and unenforceable.

As above stated, the education statute (Section 18:6-19) empowers district boards to make rules and regulations "not inconsistent with the rules and regulations of the State Board." The only rule of the State Board on the subject (Transportation Rule No. 16) is that the contractors shall obtain and file their liability insurance in companies authorized to insure in New Jersey. The 1938 contract of the board with Romano so provided and the requirement of an A-plus rating in the Best Guide in the extension argeement of 1939 did not repeal or cancel that provision.

It is clear that neither the board's resolution nor the extension agreement were incompatible with or repugnant to Rule 16. What the Bridgewater Board did was to impose a further requirement. In our opinion, this was within its discretion. Such requirements are not contrary to or in conflict with Rule 16. That rule is in the nature of a minimum requirement and district boards are within their rights when they see fit to impose further conditions which are not unreasonable or contrary to some statutory provision or some other regulation of this Board.

It is well recognized that district boards may prescribe higher standards than those required by the rules of the State Board of Education. For example, in the case of Wall *vs.* Jersey City Board of Education, School Law Decisions (1938 Ed. 614) it was held by this Board that the Commissioner was correct in his holding that the Jersey City Board had authority "to make rules demanding further qualifications for teaching than those prescribed by the State Board of Education." The decision was affirmed by the Supreme Court (119 N.J.L. 308). The statement was in the nature of *dictum,* but correctly states the rule, which has been applied in other situations.

"Inconsistent" used in a statute of this character is generally held to mean "in conflict with" or "repugnant to." (See In re Robinson, 20 Fed. Supp. 270, 272.)

In this proper sense, the requirement of the Bridgewater Board was in no way, "inconsistent" with Rule 16.

The appellant contends also that it was arbitrary and unreasonable for the board to specify the rating of Best's Guide in its resolution. Its counsel asserts that by its action the board delegated its power and authority to the Guide. We see no such delegation. The Board designated the rating published in Best's Guide to be the standard of financial responsibility it would require of corporations furnishing contracts of insurance in connection with the transportation of its pupils. It was admitted at the argument that the ratings of the Best Guide are among those recognized as reliable in insurance circles and are generally accepted in determining the financial standing of liability insurance companies. It seems to us that under these circumstances the board's action here complained of was reasonable and prudent rather than arbitrary and unreasonable. As far as the record discloses, it was a proper and legitimate business precaution.

For the reasons stated, it is found that the action of the Bridgewater Board complained of by the appellant was within its discretion, lawful and reasonable, and not inconsistent with Transportation Rule 16 of this Board. It is therefore recommended that the case be remanded to the Commissioner, with the instruction that he take jurisdiction and dismiss the petition on the merits.

April 13, 1940.

Affirmed by *New Jersey Supreme Court,* 126 N. J. L. 210.

VOTE OF A BOARD MEMBER REFRAINING FROM VOTING IS NOT COUNTED IN THE AFFIRMATIVE; PROVIDED, HE ACTUALLY AND EXPRESSLY DISSENTS FROM AFFIRMATIVE ACTION PRIOR TO TAKING OF VOTE ON MOTION

A. GRACE KING,

Petitioner,

vs.

BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY,

Respondent.

For the Petitioner, William J. O'Hagan.

For the Respondent, Frankel & Frankel, (Charles Frankel, of Counsel).

DECISION OF THE COMMISSIONER OF EDUCATION

The petitioner served as Secretary-Business Manager of the Board of Education of the City of Asbury Park during the school years of 1939-1940 and 1940-1941, and claims to have been reappointed in the same capacity for the school year 1941-1942. The petitioner bases her claim primarily on the alleged passage of a motion to reappoint her at a meeting of the board of education held on June 21, 1941. The motion and the result of the vote thereon read as follows:

"Dr. Rockafeller offered and Dr. Villapiano seconded the following motion:

'That A. Grace King be reappointed Secretary-Business Manager of the Board of Education for the school year 1941-1942, at a salary of twenty-four hundred ($2400.00) dollars.'

"The roll call being called, the motion was declared by the following votes:

"YEAS: Dr. Rockafeller and Dr. Villapiano.
"NAYS: Mr. Rose and Mrs. Hunt.
"NOT VOTING: President Thomas."

Section 18:6-30 of the Revised Statutes reads in part as follows:

> "A secretary shall be appointed by the majority vote of all the members of the board, and shall be paid such salary as the board shall determine and may be removed from office, during his term, after a hearing on written charges proved, *by a majority vote of all the members of the board.*"

Since the respondent board of education consists of five members, an affirmative vote of at least three members is required to elect a secretary. The issue in the instant case grows out of the effect of the action of the board president in replying "not voting" when his name was called to cast his vote, after two members had voted in the affirmative and two in the negative. The precise question to be considered is: Should the effect of such a response be construed as an affirmative vote, resulting in passage of the motion, or did the motion fail to pass?

Of the four members of the board who testified at the hearing, three stated that at some time between the beginning and the end of the meeting of June 21, 1941, an executive session of the board was held. The evidence discloses that all members of the board were present at the so-called "executive session," at which the possible appointment of the petitioner for the ensuing year was the subject of the discussion. At the executive session, the president, being aware of the equal division among the other four board members concerning the reappointment of the petitioner, stated his unwillingness to vote for or against her reappointment until a majority of the other four members had come to a common conclusion. The testimony of Mrs. Hunt on this point is similar to the testimony offered by two other members of the board of education, Dr. Thomas and Dr. Villapiano:

> "The Commissioner: Can you give us the substance of it, Mrs. Hunt, in your own words but the substance of Dr. Thomas' statement?
>
> "The Witness: As always, he wanted the Board to decide before he made any decision. He'd like the decision first to be the majority of the Board just before he stepped in.
>
> "Mr. Frankel: Mrs. Hunt, after the meeting reconvened and when the vote was taken on the motion, do you recall what the vote was?
>
> "A. Yes.
>
> "Q. What was it please?
>
> "A. Dr. Rockafeller made the motion, Dr. Villapiano seconded the motion, and the roll was called. . . . They voted for her. Mr. Ross voted against her, I voted against her, and Dr. Thomas said, 'I am not voting.' "

The facts and issues of law in the instant case cannot be considered to resemble those in the case of Mount *vs.* Parker, 32 N.J.L. 341, in which the Supreme Court decision contains the following statement:

"It being well established law, that *where no specified number of votes is required, but a majority of a board regularly convened are entitled to act,* a person declining to vote is to be considered as assenting to the votes of those who do." (Underscoring ours)

In the instant case, *the law specified a required number of votes* while in the case cited by counsel for the petitioner *"no specified number of votes is required."* The second difference lies in the fact that to elect a secretary *a majority of the whole membership* is required in order that action might be legally taken, while in the case cited *"a majority of a board regularly convened are entitled to act."* In the instant case, the vote to reappoint petitioner was a tie. The board's president was not silent at the time of voting and had made clear the fact of his dissent and the reasons therefore. Pertinent excerpts of the testimony on this point follow:

"The Commissioner: . . . Dr. Thomas, at any time during this meeting before its adjournment did you indicate to the other members of the Board your position with reference to your failure to vote?

"The Witness: Very decidedly.

"The Commissioner: Did you offer some explanation indicating why you failed to vote?

"The Witness: To the Board members, yes. . . . .

Here is a statement 'Not voting: Dr. Thomas.' If he means that I kept quiet and made no response, it isn't true. My statement was 'Not voting.' It was audible.

"The Commissioner: Was there anything you said at the meeting to show dissent in any way to the content of the motion?

"The Witness: I tried to get a larger vote. I didn't feel that it was fair that Miss King remain as Secretary and Business Manager with two dissenting votes and I tried to get a, at least three votes one way or the other. Both sides thought they had three and I was willing enough it should go with either if they had it; they didn't, and my object was to block the vote."

"The Commissioner: That is, as the Court understands, your reply was that your failure to vote, your object was to stop the determination that night?

"The Witness: Exactly."

Neither acquiescence nor affirmance can be considered to be a part of Dr. Thomas' intent or actions. On the contrary, in view of the circumstances preceding and during the taking of the vote, Dr. Thomas' statements to the other board members and his response to the roll call can only be construed as a negative intent and action toward the passage of the motion at that meeting. The following quotation is found in the decision of the Supreme Court in the matter of Kozusko *vs.* Garretson, 102 N.J.L. 510:

"In this state it has been held that the vote of a member present who declined to vote at all should be counted in the affirmative. Mount *vs.* Parker, 32 N.J.L. 341. But that, in our view, is not this case. If there was one point on which the three non-voters expressed themselves, it was that they did not wish to be counted as in favor of the resolution. Under such circumstances the correct rule is that laid down by the Court of Chancery in the same year (1867) in Abels *vs.* McKeen, 18 N.J. Eq. 462 (p. 465), where Chancellor Zabriskie said:

'At such a meeting, if a vote is taken, and no one dissents, all who do not vote are considered as voting with the majority for the motion. And a vote of three ayes at a meeting of twenty, where no one dissents, is considered as the affirmative vote of all present.'

"But the obvious corollary is that when a member does dissent, his vote cannot properly be counted in the affirmative. The common sense of the matter seems to be that it should be recorded in the negative.

"We conclude that in law and fact there were only three affirmative votes of six present in favor of the resolution, and that it was not legally adopted."

The Court of Errors and Appeals of this State decided similarly in the case of State of New Jersey *vs.* Goodfellow, 111 N.J.L. 604, at pages 606 and 607:

"It should be noted here that counsel stipulated in open court below that the three objecting councilmen were in the meeting room at the time of the appointment of the respondent and expressed their dissent before quitting the council table. Their refusal or failure to vote justified recording them in the negative. Kozusko *vs.* Garretson, 102 N.J.L. 508."

The evidence clearly supports the belief that Dr. Thomas actually and expressly dissented from affiirmative action both prior to and during the vote on the motion. In view of the foregoing, it must be concluded that the motion to reappoint A. Grace King as Secretary-Business Manager of the Asbury Park Board of Education failed of passage. Although three affirmative votes were necessary for her appointment, only two were received. The petition is, therefore, dismissed.

June 30, 1942.

DE FACTO SUPERVISING PRINCIPAL IS ENTITLED TO RECEIVE COMPENSATION IN ACCORDANCE WITH THE PROVISIONS OF SECTION 18:5-50 OF THE REVISED STATUTES

CALVIN F. DENGLER,

Petitioner,

vs.

BOARD OF EDUCATION OF THE BOROUGH OF CARTERET, MIDDLESEX COUNTY,

Respondent.

For the Petitioner, Martin & Riley, (J. H. Thayer Martin of Counsel).

For the Respondent, Elmer E. Brown.

DECISION OF THE COMMISSIONER OF EDUCATION

The petitioner, Calvin F. Dengler, was employed by the respondent for the academic years of 1936-1937, 1937-1938, and 1938-1939 under admittedly valid contracts. His employment was in a supervisory capacity and with the exception of the early part of the first year was as Supervising Principal.

In the spring of 1939, due to the death of one of the board members, there arose a four to four division of the board and the faction in favor of Mr. Dengler's election for the school year 1939-1940 was unable to secure the necessary five votes for his election (Section 18:7-58). In that situation and prior to the opening of school, the teachers' committee met and as a result of the conference a letter was written by the chairman of the committee to Mr. Dengler under date of September 7, 1939, stating:

> "In accordance with the decision of the Teachers' Committee held yesterday, you are herewith instructed to resume your duties as Supervising Principal when our schools reopen next week, pending the issuance of a formal contract by the Board at its next regular meeting. Your salary in that capacity will remain the same as last year, namely, $4500.00 per annum."

Mr. Dengler resumed his duties as Supervising Principal in accordance with the instructions from the chairman of the teachers' committee.

At the next regular meeting of the board on September 13th, all the recommendations of the teachers' committee were approved by a majority vote, with the exception of the nomination of Mr. Dengler as Supervising Principal, upon which there was a tie vote. Until the annual meeting in February when new members were elected to the board, the faction in favor of Mr. Dengler could secure only four votes for his election and those opposed to him could not obtain a majority vote to instruct him to discontinue his services. Under the instructions contained in the letter of September 7, 1939, Mr. Dengler continued to perform the duties of the position and to make monthly reports to the board until February 21, 1940. Certain members of the board objected at first to his attendance at the meetings and to his submission of reports, but these members were unable to secure majority support to make effective their objections. After several meetings the board by resolution adopted specific recommendations of Mr. Dengler with affirmative votes of one or more "dissenting members" and in some instances the motions were made or seconded by one of them. On February 21, 1940, following the annual meeting at which a ninth member was elected, a resolution was adopted by a vote of five to four, authorizing a contract with Mr. Dengler as Supervising Principal effective as of July 1, 1939, for the school year 1939-1940. The contract was executed by the president and district clerk of the board and by Mr. Dengler (Section 18:13-7) and thereafter Mr. Dengler continued with his duties as Supervising Principal until the end of the school year.

Subsequent to the resolution of February 21, 1940, ratifying Mr. Dengler's appointment, one of the members of the board was declared to be ineligible to membership, and again the board was left with two factions of four members each. Under this situation, Mr. Dengler completed the work of the school year without salary, since a majority vote of the board could not be secured to authorize payment for his services.

Petitioner appeals to the Commissioner for an order directing the board to make payment in the sum of $4,500.00 with lawful interest thereon after deducting appropriate amounts for his proper contributions to the Teachers' Pension and Annuity Fund and to the municipal relief fund, and further directing said board to pay said Teachers' Pension and Annuity Fund and to pay said municipal relief fund the proper amounts due them, respectively, by virtue of petitioner's employment.

The important point to be decided in this case is the right of the petitioner to compensation for services rendered under the conditions above set forth.

The legal acts of boards of education are those performed under legislative authority while the board is in session and by a majority vote of the quorum with those not voting considered to be acquiescing, thus having the effect of voting with the majority (Mount *vs.* Parker, 32 N.J.L. 341); except that in cases where a majority of the entire board is required by law for the adoption of a resolution, then there must be an actual affirmative vote by more than one-half of the membership. In the absence of a motion duly adopted by legal vote, it makes no difference what individuals or groups may think concerning matters before the board.

While it is true that the petitioner served without a formal contract prior to February 21, 1940 and with only the authorization contained in the letter signed by the Chairman of the Teachers' Committee, no motion was ever adopted by the board demanding the discontinuance of his service. It is clear that the Chairman of the Teachers' Committee had no authority to employ the petitioner, since such employment required an affirmative vote of five of the eight members then constituting the board. There appears to be no dishonesty or fraud concerning petitioner's performance of the duties of his office even though he was aware of the obection of four members. While the contract given to him by the board after the reorganization meeting in February was authorized by the inclusion of the vote of a member who was later held to be disqualified and, therefore, a de facto officer, naturally, the petitioner would consider the contract to be valid as that of a de jure board until the ineligibility of the new member had been determined; and even then it would follow that he would consider that the act of the de facto board authorized him to continue unless some official act was taken to disavow the contract.

Chief Justice Magie, delivering the opinion of the Court of Errors and Appeals in the case of Erwin *vs.* Jersey City, 60 N.J.L. 141, in which the issue concerned a de facto officer's right to compensation, said:

> "That doctrine applied to the case before us requires us to hold that one who becomes a public officer de facto without dishonesty or fraud, and who has performed the duties of the office, may recover such compensation for those services as is fixed by law from the municipality which is by law to pay such compensation."

The State Board of Education in the case of Scull *vs.* Board of Education of Somers Point, 1938 Compilation of School Law Decisions, 269, held that a city superintendent is a public officer. The Supreme Court in Board of Education of Cedar Grove *vs.* State Board of Education, 115 N.J.L. 67, ruled that a medical inspector of schools is an officer and not an employee or the holder of a position. The Commissioner of Education in Gordon *vs.* Jefferson Township, 1938 Compilation of School Law Decisions, 283, decided that a Supervising Principal is the holder of an office. This decision was affirmed by the State Board of Education, 286. The foregoing cases lead to the definite conclusion that Mr. Dengler occupied an office in which his services were acknowledged in a number of instances by the adoption of his recommendations. The contract which was executed on February 21, 1940, made his employment effective as of the beginning of the school year, and was within the legal rights of a de jure board. Therefore, Mr. Dengler held office throughout the school year under at least a de facto board's election and since he fulfilled the duties of the office of Supervising Principal for the school year he is entitled

to a salary of $4,500.00, which the board of education of the preceding year had fixed as just compensation for the services rendered during that year.

The Board of Education of the Borough of Carteret is directed to pay to Calvin F. Dengler $4,500.00 with interest from July 1, 1940 less the legal contributions to the Teachers' Pension and Annuity Fund and to the municipal relief fund, and to pay those funds, respectively, the amounts due on the basis of the salary of $4,500.00.

November 7, 1940.

DECISION OF THE STATE BOARD OF EDUCATION

The respondent was employed by the board for three successive academic years as teacher and supervising principal. On September 7, 1939, he was instructed by letter from the Teachers' Committee to "resume" his duties the following week pending the issuance of a formal contract by the board at its next meeting. He did so but, because of a deadlock in the board, he was not appointed at the next meeting and continued in office without further appointment until February 21, 1940. On that date a successor board ratified his acts by resolution and, it is alleged, made a contract with him bearing date of October 3, 1939. The Commissioner states that he "continued to perform the duties of the position under the instructions contained in the letter" of September 7. The report of the minority of the Law Committee seems to put a different construction on that letter.

In the course of the performance of his duties, respondent attended the board meetings and made reports and recommendations incidental to his duties. At first the four members of the board opposed to his reappointment objected to the reception of his reports at its meetings and on one occasion one of them left the meeting rather than recognize his authority. Later on, they made no objections and participated in the actions taken by the board on his recommendations. No other person was appointed in his place and throughout the entire period he was the only person with whom the pupils and members of the school organization or the public could or did deal as the supervising principal and the executive head of the administration of the school system in Carteret. The minority report narrates the facts more in detail.

The appellant has conceded that respondent is entitled to payment for the services he rendered subsequent to February 21, 1940. The question now presented is whether he can recover for those performed between September 7 and February 21.

It is provided by statute (R. S. 18:5-50) that "a person who shall hold *de facto* any office or position in a school district and shall perform the duties of such office or position" is entitled to the compensation appropriate to the position.

The section here quoted is derived from Chapter 239 of the Laws of 1925. As originally enacted, it did not specifically refer to offices or positions in the schools, but included broadly "any office or position in the public service of any county or municipality." That enactment is now Sec. 40:11-7 of the recent Revised Statutes. Section 18:5-50 is a special provision for a school district.

What is a *de facto* officer? In this country the leading case appears to be *State vs. Carroll,* 38 Conn. 471. The Court of Errors and Appeals (Erwin *vs.* Jersey City, 60 N. J. L. 141) and the United States Supreme Court (U. S. *vs.* Royer, 268 U. S. 394, 397) have so regarded this Connecticut decision and accepted its definitions of

various classes of circumstances which constitute a *"de facto"* office or position. In the Erwin case it was referred to as a "masterly and exhaustive review" of the subject.

The first class of *de facto* cases defined in the Connecticut case was one where persons not holding their positions by election or appointment were deemed to be officers *de facto*. The definition of that class follows:

"First, *without a known appointment or election,* but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be." (38 Conn. at 471.)

The rule in England was thus stated: "A steward *de facto* is none other than he who has the reputation of being the officer he assumed to be, although he is not such in point of law." Parker *vs.* Kett, 1 Raymond 658. (Italics ours.)

The board's counsel argue and the minority report of this Committee holds that to constitute an officer *de facto* there must be a color of right conferred by a body or person having an assumed or prima facie power to appoint. This contention was expressly considered and denied in the Connecticut case cited.

"It is not a necessary prerequisite that there shall have been an attempted exercise of competent or prima facie power of appointment or election." U. S. *vs.* Royer, 268 U. S. at 394.

A definition approved by the Supreme Court in the case just cited was: "A *de facto* officer is one who is surrounded with the *insignia* of office, and seems to act with authority." Jay *vs.* Board of Education, 46 Kan. 526. (Emphasis as in Supreme Court's quotation of same sentence.)

"An officer de facto is one who has the reputation of being an officer." Brown *vs.* Lunt, 37 Me. 322. (Emphasis ours.)

These definitions rest upon the justice and fairness inherent in the necessity that the public in dealing with the holder of an office be able to rely on his apparent authority to perform its functions and must not be compelled to investigate his right to hold the office before dealing with him.

Erwin *vs.* Jersey City (supra) is cited in appellant's brief and in the minority report as authority for the proposition that there must be apparent authority to appoint to a public office in order to constitute an officer *de facto* and enable him to recover compensation for his services. We do not so understand that decision. In that case, an appointment had been made by a board which had or claimed the right to apoint and the definition given by the Court at page 144 of 60 N. J. Law was directed solely at that particular class of defacto officers and did not rule out the other classes defined in the approved Connecticut case. Chief Justice Magie said that decision "plainly discloses the difficulty of an exact definition, including *all* circumstances in which the law, because of public convenience and necessity, treats one as a public officer although not such, and calls him an officer *de facto,"* and further that the case "plainly falls within at least *one* of the *classes* defined by Chief Justice Butler in the Connecticut case" (Emphasis ours).

This is true of the instant case. For it falls plainly as it seems to us, within the first class defined by Chief Justice Butler and might be said also, in view of the Teachers' Committee letter of September 7, to come within the "Third" class, which as the Chief Justice defined it, includes cases where the duties of the office were exercised, "under color of a known election or appointment, void because . . . there was a want of power in the electing or appointing body" such want "being unknown to the public."

It also seems to us that the decision in the Erwin case was actually put on a broader ground than the one relied on by the appellant. The opinion stated that "the right to the emoluments of the office arose, not out of the title to the office, but out of the *actual rendition of services* for which such emoluments were designed to be compensatory." (Emphasis ours.) The final holding of the Erwin case was "that one who becomes a public officer *de facto* without dishonesty or fraud and who has performed the duties of the office, may recover such compensation for those services as is fixed by law, from the municipality which is by law to pay such compensation." Erwin *vs.* Jersey City, 60 N. J. L. at 149, 150.

It seems to a majority of the Committee that the application of the principle of the authoritative definitions above set forth to the present case leads to the conclusion that the respondent was *"de facto"* supervising principal of the Carteret schools between September 11, 1939, when the school year began, and February 21, 1940.

It is true that the Teachers' Committee was not officially empowered to appoint him. The record throws little light on the functions delegated by the board to that committee; it contains enough however, to indicate that its customary and recognized practice was to deal with and instruct the supervising principal and the teachers of the system in a manner not uncommon in the school districts of the State. Contracts appear to have been executed in usual course by the board some time after the principals and teachers, pursuant to the Teachers' Committee's direction, entered on their duties later contracted for. There was no meeting of the board prior to September 13, and matters relating to the conduct of the schools pending the meeting were attended to by the Teachers' Committee. We think that under these circumstances the respondent had the right to assume that he could and should comply with the instructions of that committee.

Irrespective of the nature of his appointment, the record shows that respondent performed all the duties and assumed all the responsibilities of supervising principal of the Carteret schools during the period in question. No motion was adopted by the board, or offered by any member, to demand or require the discontinuance of his services because he had not been appointed by the board. No notice of dismissal was given him by any one. No attempt was made to oust him. No other person was elected or appointed to the office. The public and all persons dealing with the school system and the teachers and pupils of the schools appear to have regarded and treated him as supervising principal. Nothing is shown to indicate that the board would not have been bound by acts he performed in the course of his duties. In all respects he was the reputed and actual holder of the office even though, because of the deadlock in the board, he had not received its appointment. In the words of one of the decisions heretofore quoted he was "surrounded with the *insignia*" of the office of supervising principal and appeared to "act with authority."

It does not seem to the majority of the Committee that the mere fact that for a limited period acceptance of reports and recommendations he made to the board was objected to by some of its members is sufficient to negative his *de facto* capacity. It is true it was not incumbent on the dissenting members of the board to use force to prevent respondent from assuming the duties of the office, or to eject him, but protests at board meetings were not sufficient to admonish the public and those connected with the schools not to treat and deal with him as supervising principal, or to forestall his becoming the reputed holder of that office. No warning was issued to the teachers, the pupils, or the public that he could not be dealt with as the principal and no court action was taken to prevent his acting as such.

It is to be considered that it was highly important to the welfare of the Carteret schools that there be a supervising principal in charge of its activities. The provisions of the School Laws and the rules of this Board show that the office is regarded as essential to the proper and efficient conduct of the school systems of the size of this one. It is not surprising that respondent's natural regard for the welfare of the system, combined with the instruction of the Teachers' Committee, that he "resume" his duties at a named salary "per annum," and the evident desire of half of the members of the board should have induced him to continue in the position.

No dishonesty or fraud is charged against the respondent. Nor was he an usurper or intruder. He resumed his duties on or about September 7 at the direction of a committee which had been accustomed to exercise such authority and which he had no reason to believe was exceeding its authority. After September 13, he continued in the position with the assent and approval of half of the members of the board and apparently at their behest. That he ran the risk a majority of the board might oust him did not, in our opinion, alter the fact that he performed the duties of the office with the tacit consent of the board. The schools, the community and the board received the benefit of his services throughout the period in question. On several occasions, some time subsequent to September 13, the board adopted specific recommendations of respondent, with affirmative votes of one or more of the dissenting members, and sometimes on motion of one of those members.

The majority of the Committee does not find it necessary to pass on the question, ably presented by counsel for both sides and fully discussed in the minority report, with respect to the resolution passed by the board on February 21, 1941, whereby the respondent's services for the period from July 1, 1939, were ratified and confirmed, or with respect to the alleged contract dated October 3. Whether or not these acts of the board are sufficient by themselves to support respondent's right to recover, they constitute a recognition by the board that during the period after September 7 respondent was the reputed and acting supervising principal, and therefore a *de facto* official.

With respect to the opinion expressed in the minority report, in line with the argument advanced on behalf of the board, that the respondent did not hold his position under a color of right, there is one consideration, nowhere heretofore mentioned, which seems to us to be of some importance in this connection. Tenure of office is acquired by operation of law upon employment for three consecutive academic years and then for a fourth academic year. Respondent had held his position for three academic years. The question whether he was employed for the fourth academic year in the contemplation of the tenure statute is not presented here and we express no opinion on that subject. The respondent however might have *believed* he had tenure under the circumstances, and, if so, even though he were mistaken, regard it his right, and perhaps his duty, to resume his position, particularly when he was instructed to do so by the Teachers' Committee which had a "wide latitude" in such matters. Some of the board evidently thought he had tenure of office because it was testified by one of the dissenting members that Mr. Hagen, President at that particular time, told the board "that in his opinion Mr. Dengler had already tenure." Under these circumstances respondent seems to have had a color of right to retain his position even if tenure did not actually exist as matter of law.

It seems to a majority of the Law Committee that on the facts of the case, and

according to the law as we understand it, respondent was a *de facto* officer and therefore entitled to receive his compensation by virtue of the Statute (18:5-50).

The minority report of our esteemed colleague has received our careful attention. Our regard for his opinions makes us hesitate to disagree with the views he has so clearly and carefully expressed, but nevertheless we cannot agree with him and adhere to the conclusion we have reached.

It is recommended that the Commissioner's decision be affirmed, that appellant be directed to pay respondent as specified in that decision, and that this report be filed as the opinion of the Board along with the dissenting minority report.

February 15, 1941.

INCREASED TUITION RATE, IN ABSENCE OF OTHER GOOD REASONS, IS NOT GOOD CAUSE FOR A CHANGE OF HIGH SCHOOL DESIGNATION

THE BOARD OF EDUCATION OF THE TOWNSHIP OF SPARTA,

Petitioner,

vs.

BOARD OF EDUCATION OF THE TOWN OF NEWTON, SUSSEX COUNTY,

Respondent.

For the Petitioner, Vanderbach and Vanderbach, (Lewis W. Vanderbach of Counsel).

For the Respondent, Morris, Downing and Sherred, (Willis H. Sherred of Counsel).

DECISION OF THE COMMISSIONER OF EDUCATION

For a number of years the Newton High School has been designated by the Board of Education of Sparta Township for the attendance of its high school pupils. Over a period of years the tuition charge of the Newton High School has been less than the actual cost allowed by law for fixing tuition rates. The tuition charge for the school year 1945-1946 was one hundred and fifty-five dollars ($155.00). For the year 1946, the Board of Education of the Town of Newton increased the tuition rate to one hundred and ninety-five dollars and forty-nine cents, ($195.49) which is the maximum allowed by law. Thereupon the consent of the Board of Education of the Borough of Franklin was secured to accept the Sparta pupils at a tuition rate of one hundred and forty dollars ($140.00). On the basis of an estimated one hundred and two (102) high school pupils, the difference in the tuition rate of fifty-five dollars and forty-nine cents ($55.49) per pupil between Newton and Franklin would result in a saving to the taxpayers of Sparta to the amount of five thousand, six hundred and fifty-nine dollars and ninety-eight cents, ($5,659.98). The Sparta Board of Education claims that further saving of five hundred dollars ($500.00) can be effected in transportation costs.

The Board of Education of the Township of Sparta now petitions for a change of designation for its high school pupils from Newton High School to Franklin

High School under the terms of Section 18:14-7 of the Revised Statutes which reads in part as follows:

> "18:14-7. Any school district heretofore or hereafter created, which has not heretofore designated a high school or schools outside of such district for the children thereof to attend, and which district lacks or shall lack high school facilities within the district for the children thereof, may designate any high school or schools of this state as the school or schools which the children of such district are to attend. No such designation of a high school or schools heretofore or hereafter made by any district either under this section or under any prior law shall be changed unless good and sufficient reason exists for such change and unless an application therefor is made to and approved by the Commissioner."

In considering an application for a change of designation, the Commissioner must keep in mind the purpose of the high school designation law. In this State there are one hundred and sixty-six (166) school districts which maintain high schools for pupils of all the high school grades. These high schools also receive tuition pupils from neighboring school districts which do not maintain high schools. This arrangement is mutually advantageous. The sending districts obtain high school facilities much cheaper than they can provide similar facilities for themselves and the additional pupils make possible an expansion of their educational offerings and a reduction in overhead.

Prior to 1929 when the first high school designation law was enacted, boards of education sometimes transferred their pupils to secure a lower tuition rate after the receiving district had erected buildings and otherwise provided for their education. Receiving districts hesitated, under such circumstances, to bond themselves to erect buildings and to expand their facilities to provide education for tuition pupils. The high school designation law was enacted to protect districts which had provided facilities for pupils of other districts from the withdrawal of these pupils without good cause. This statute benefits the sending district as well as the receiving district. If this law had not been enacted, sending districts, either individually or by uniting with other districts, would have been compelled to burden themselves with the erection and maintenance of high schools.

In order to provide for cases where good and sufficient reason exists for the transfer of pupils to another high school, the Legislature charged the Commissioner with the responsibility of determining when such good and sufficient reason for a change of designation does exist. The Commissioner feels constrained to exercise his discretion under this statute with great caution. Otherwise the law will not accomplish the salutary purpose intended by the Legislature. Only in cases where educational benefits will accrue to the pupils sufficient to offset the financial loss to the receiving district is it clearly the duty of the Commissioner to grant an application for a change of designation. Where financial conditions alone are involved, a change should be granted only in cases where the financial condition of the petitioning district relative to the receiving district is so unfavorable and its financial plight so desperate that relief through a transfer to a district with a lower tuition rate is imperative.

The stipulation of facts and briefs of counsel disclose that only financial conditions are involved in the request for the change of designation to Franklin. The sole reason for the change appears to be the lower tuition rate of the Franklin High

School. The Franklin Board of Education can give no assurance that the tuition rate of the Franklin High School will remain at one hundred and forty dollars ($140.00).

The potential tuition rate of Franklin High School is the actual cost of education which, according to the latest available figures, is two hundred and thirty-five dollars and eighty-five cents ($235.85). The policies of boards of education with respect to charging the full amount of tuition sometimes change with the advent of new board members and local pressure. It is so well established as to require no citation of authority that a board of education cannot bind its successor without legislative authority. No authority exists for a board of education to fix a tuition rate beyond the period of one year.

A previous commissioner, in an early case arising under this law, (Stafford Township *vs.* Barnegat, 1931 New Jersey School Report at page 111), held that an increased tuition rate not in excess of the cost of education was not good cause for a change of designation. The Commissioner said:

> "It is quite possible for a receiving district to fail to provide adequate facilities demanded by a sending district, and a failure to provide proper facilities would appear to be good cause for the approval by the Commissioner of Education of a transfer to another high school, but where the only relevant reason is the increased tuition charge which is not in excess of the cost, the district providing the facilities should be protected."

The Commissioner cannot satisfy himself from the statistics agreed upon in the stipulation and available in the records of this Department, that the financial position of Sparta relative to Newton is such that financial relief for Sparta at the expense of Newton is indicated. It seems to the Commissioner that the change of designation requested in this case is the kind which the law was enacted to prevent.

Accordingly, the Commissioner feels he must deny the application of the Board of Education of the Township of Sparta for a change of designation for its high school pupils from Newton High School to Franklin High School.

October 11, 1946.

Decision of the State Board of Education

The appellant has no high school in its district and has for a number of years past sent its high school pupils to Newton High School. During the year 1945-1946, the number of pupils from Sparta who attended at Newton High School was 86. Sparta estimates the number of its high school pupils in the year 1946-1947 at 105. The tuition rate for such students in 1945-1946 was $155.00 each. Sometime before March 5, 1946, Newton advised Sparta that the tuition rate for the year 1946-1947 would be $196.40 per pupil, which is an increase of $40.49 per pupil over that of the previous year. Being dissatisfied with the proposed increase in cost for the tuition of its high school pupils, Sparta applied to the Board of Education of Franklin whether that district could accommodate the pupils from Sparta, with the result that Franklin proposed to accept them at a tuition rate of $140.00 per pupil, which would mean a saving to Sparta of $56.40 for each pupil or approximately $5,922.00 in the whole. The proposed change of designation was submitted to the voters of the Township of Sparta who voted 218 in favor of

the change as against 21 opposed. There was and is no legal authority for such submission and it is mentioned as indicating the sentiment of the voters. Sparta also claims such change would result in a saving of approximately $500.00 per year in transportation costs.

Petition to the Commissioner of Education was filed by appellant for his approval of the proposed change of designation, and a copy served upon the Newton Board in June last.

Respondent answered substantially admitting the facts alleged in the petition, but denying that the facilities of the Franklin High School are adequate and that the teaching staff is capable and adequate to handle the additional students from Sparta without crowding or impairing the academic standing of the pupils. It alleges that the respondent has prepared its budget for the school year 1946-1947; that the budget has been voted upon; that teachers and administrative staff have been employed for the ensuing year on the assumption that students from Sparta would continue at Newton; that in previous years it has accepted pupils from Sparta at a cost of less than one-half which would have been permitted by statute. It alleges further that for the purpose of defraying the cost of facilities for residents of Newton and other districts sending pupils to Newton, it has issued bonds, restirement of which was based partly on the continued payment for use of the facilities by the sending districts and the discontinuance of such pupils will unjustly burden the taxpayers of Newton if such discontinuance is permitted.

It was agreed between the parties that if a change of designation was permitted, the students of Sparta already entered at Newton may complete their education there, but that the high school at Franklin receive the first year or ninth grade high school students of Sparta in the year 1946-1947 and to receive all first year students thereafter as well as those already enrolled.

The petition herein was filed pursuant to the provisions of Chap. 210 P. L. 1944, which enacts that

> "No designation of a high school or schools heretofore or hereafter made by any district either under this section or any prior law shall be changed *unless good and sufficient reason* exists for such change and unless an application therefor is made to and approved by the Commissioner, etc."
>
> "In the event that the said Commissioner shall refuse to approve the application of a district to make a change of designation . . . the district may appeal from the determination of the Commissioner to the State Board and in its discretion that body may affirm such determination or may approve the change of designation."

The Commissioner denied approval. In his decision he reviews the purposes and history of the law relating to a change of designation of high schools. He says that "The high school designation law was enacted to protect districts which had provided facilities for pupils of other districts from the withdrawal of these pupils without good cause. This statute benefits the sending district as well as the receiving district. If this law had not been enacted, sending districts, individually or by uniting with other districts would have been compelled to burden themselves with the erection and maintenance of high schools."

He says further, "Only in cases where educational benefits will accrue to the pupils sufficient to offset the financial loss to the receiving district is it clearly the duty of the Commissioner to grant an application for a change of designation.

Where financial conditions alone are involved, a change should be granted only in cases where the financial condition of the petitioning district relative to the receiving district is so unfavorable and its financial plight so desperate that relief through a transfer to a district with a lower tuition rate is imperative."

In the instant case it appears the potential tuition rate of the Borough of Franklin High School is the actual cost of education which is $235.85. There is no assurance that the rate of $140.00 per pupil proposed by Franklin can or would be long maintained. Each succeeding board may require a change. There would be no advantage to pupils in educational standards and facilities. The distance from Sparta is substantially alike to either Newton or Franklin. The only reason upon which the change of designation is based is the increased tuition charge, which is not shown to be in excess of the actual cost. It was held in the case of Stafford Township *vs.* Barnegat, 1931 New Jersey School Report, page 111, where it is said "where the only relevant reason (for requested change of designation) is the increased tuition charge, which is not in excess of the cost, the district providing the facilities should be protected."

We agree with the conclusions of the Commissioner of Education and recommend that his decision be affirmed.

January 3, 1947.

EARLY ADJOURNMENT OF MORNING SCHOOL SESSION ONE DAY EACH WEEK TO PERMIT USE OF BUILDING FOR RELIGIOUS INSTRUCTION OF PUPILS ILLEGAL

FRED A. PATTERSON, *et al.*,

Petitioners,

vs.

BOARD OF EDUCATION OF THE BOROUGH OF MILLTOWN, MIDDLESEX COUNTY,

Respondent.

For Petitioners, Powell & Parker.

For Respondent, Philip Blacher.

DECISION OF THE COMMISSIONER OF EDUCATION

The petitioners in this case are taxpayers and residents of the Borough of Milltown, New Jersey, and are the parents of children attending the public schools of that borough. Petitioners appeal from the adoption by the board of education of a resolution which provides that during the year 1942-1943 the sessions of the school shall close each Wednesday at 11:10 A.M. and reopen at 11:45 A.M., and which permits the use of the school building and school rooms during the period between 11:10 A.M. and 11:45 A.M. on each Wednesday for the purpose of giving instruction in matters of religion, morals and other social studies to those persons desiring such instruction. Petitioners allege that this resolution is contrary to the Constitution of the State of New Jersey and the School Laws of this State,

and pray that an order be issued by the Commissioner of Education declaring said resolution to be contrary to law, void, and of no effect, and directing that the teaching of religion shall not be conducted in the public schools of the Borough of Milltown.

This case is submitted on a Stipulation of Facts supplemented by a hearing held by the Assistant Commissioner of Education in the Court House at New Brunswick on April 12, 1943. The Stipulation of Facts and testimony of witnesses reveal the following:

1. On or about March 9, 1942, a committee of the Council of Religious Education of Milltown addressed and mailed the following letter to the parents of the school children of Milltown:

"Milltown, N. J.
March 9, 1942.

"Dear Parents:

"The purpose of this letter is to acquaint you with a movement designed to bring to children of Milltown a program of religious and moral education.

"In these times of war and unrest, and with the criminal age steadily being lowered, the committee in charge feels the vital necessity for some program to strengthen and fit them for the possibilities of the future as well as the necessities of the day.

"Through the cooperation of the churches and school authorities this instruction will be given regularly each week at a designated period. Three groups of classes will be provided and each child will be given an opportunity to receive instruction in his own faith, or in such of these religious classes as you desire. For those who do not enroll in one of several religious classes, a class of moral training will be open to them.

"The success of this project will depend very largely upon the wholehearted cooperation of the parents. Please have this form signed and returned to the school as soon as possible.

"Sincerely yours,
"The Council of Religious Education.

"Parent's name .....
"Address .....
"Indicate your choice of class by marking an X your preference
"Protestant .....
"Catholic .....
"Character Education ....."

2. The Chairman of the Council of Religious Education, who at the time was also President of the Parent-Teacher Association, testified that she secured the records from someone in the school office without disclosing the purpose for which they were desired. The testimony further discloses that the Supervising Principal and teachers did not participate in distributing the letters and in tabulating the returns, although some of the returns were left on teachers' desks and collected by the Chairman of the Council of Religious Education.

3. It is agreed in the Stipulation that the number of children involved was 526, and that there were replies covering 489 children. Only three replies were received in opposition to the program.

4. On June 4, 1942, the Board of Education of Milltown adopted the following resolution:

> "WHEREAS, representatives of Milltown Parent-Teacher Association, St. Paul's Reformed Church, Milltown Methodist Church, Our Lady of Lourdes Roman Catholic Church, and other citizens have appeared before this Board of Education and have requested that sessions of the Milltown Public School be adjourned for one period on one day of each week, and have further requested that representation of the aforementioned organization be granted permission to use the school building and classrooms for the purpose of instructing such of the student body as may wish to be instructed in matter of religion, morals and other social studies during such period of adjournment, and
>
> "WHEREAS, a canvas has heretofore been made amongst the parents of the school children respecting such project which canvas has resulted in practically unanimous endorsement therefore, and
>
> "WHEREAS, this Board of Education basing its judgment upon representation made and the approval of the plan by the parents of the school children as aforesaid, is agreeable to grant the request made as above stated.
>
> "NOW THEREFORE BE IT RESOLVED by the Board of Education of the Borough of Milltown that sessions of the Public School in the municipality during 1942-1943 School Year shall close on each Wednesday at 11:10 A.M. and shall reopen at 11:45 A.M., and
>
> "BE IT FURTHER RESOLVED that the Church and Social Organizations above mentioned be and they are hereby permitted the use of the school building and school rooms during the period between 11:10 A.M. and 11:45 A.M. on each Wednesday for the purpose of giving instructions in matters of religion, morals and other social studies to those persons desiring such instruction, and,
>
> "BE IT FURTHER RESOLVED that the aforegoing designated period of instruction be subject to change upon recommendation to the Board by the Supervising Principal to best fit the schedule of School Year 1942-1943."

5. It is stipulated that there is one school in the Borough of Milltown centrally located and that all the children walk to school. The few pupils who bring their lunches are assigned to one of the classrooms under the supervision of a teacher. Two or three teachers are on duty during the noon hour to supervise children who return to school early. The other teachers, except as stated above, are relieved of all responsibility during the noon hour. Pupils are free to go home during the noon hour and there is no compulsion to eat lunches in the building. There is no organized play or other school activities during the noon hour.

It appears from the stipulation and testimony that during the school year 1941-1942, and for many years prior thereto, the regular school hours for Wednesday morning sessions of the school were from 9:00 A.M. to 11:45 A.M. The lower grades were dismissed at 11:15 A.M., grades two and three at 11:30 A.M., and the upper grades at 11:45 A.M. The afternoon sessions were from 1:00 to 3:30 P.M.

The pertinent statutes are:

> 18:5-22. "The board of education of any school district may, subject to

reasonable regulations to be adopted by such board, or upon notification by the commissioner of education, permit the use of any school house and rooms therein, and grounds and other property of the district, when not in use for school purposes, for any of the following purposes:

"(a) by persons assembling therein for the purpose of giving and receiving instruction in any branch of education, learning or the arts, including the science of agriculture, horticulture, and floriculture.

"(c) for the holding of such social, civic, and recreational meetings and entertainments and for such other purposes as may be approved by the board of education."

18:5-23. "Any action taken by a board of education under section 18:5-22 of this title is subject to appeal to the Commissioner; as provided in section 18:3-14 of this title."

18:14-78. "No religious service or exercise, except the reading of the Bible and the repeating of the Lord's Prayer, shall be held in any school receiving any portion of the moneys appropriated for the support of public schools."

Article I, Paragraph 3, of the New Jersey Constitution reads as follows:

"No person shall be deprived of the inestimable privilege of worshipping Almighty God in a manner agreeable to the dictates of his own conscience; Nor under any pretense whatever may he be compelled to attend any place of worship contrary to his faith and judgment; nor shall any person be obliged to pay tithes, taxes, or other rates for building or repairing any church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right, or has deliberately and voluntarily engaged to perform."

In determining whether the resolution of June 4, 1942, is contrary to law, the following questions need to be considered:

1. Did the board of education, by adjourning school at 11:10 A.M. and by authorizing church organizations immediately to assemble most of the pupils for religious instruction, avoid the prohibition contained in R. S. 18:14-78, supra?

2. Is the school building being used for school purposes between 11:10 A.M. and 11:45 A.M.?

3. Was the action of the board of education in adjourning school between 11:10 A.M. and 11:45 A.M. an exercise of sound discretion under R. S. 18:5-22?

1. The board of education, with commendable candor, makes no attempt in the resolution of June 4, 1942, to conceal its purpose in adjourning school from 11:10 A.M. to 11:45 A.M. on each Wednesday. It is set forth plainly in the resolution that the board is closing the sessions of the school between 11:10 A.M. and 11:45 A.M. so that church organizations may use the building "for the purpose of instructing such of the student body as may wish to be instructed in matters of religion, morals, and other social studies during such period of adjournment." According to the plan under consideration, the pupils are dismissed as pupils of a

secular school at 11:10 A.M. and immediately, with some exceptions, the same pupils become members of a religious school. The laws of this State evidence a legislative policy to keep the public school system free of sectarian religious influences. In accordance with this policy, the Legislature has seen fit to forbid religious exercises in the public schools. The "Milltown Public School" is usually in session until 11:45 A.M. It is the opinion of the Commissioner that the dismissing of the pupils of a secular school through a technical adjournment and the immediate assembling of the same pupils in the same building for religious education does not constitute a sufficiently definite break to avoid the prohibition contained in R. S. 18:14-78.

2. The next question to be decided is whether the Milltown Public School is being used for school purposes between 11:10 and 11:45 A.M. A board of education, by virtue of Section 18:5-22, is authorized to permit the use of a schoolhouse for other purposes when not in use for school purposes. According to the testimony, pupils are permitted, but not required, to eat their lunches in the school building under the supervision of public school teachers. During inclement weather, it will be necessary to provide space and supervision in the school building for pupils who are not participating in the program of religious education and for those who wish to remain during the noon hour. Regardless of whether these pupils receive academic instruction, engage in activities, study, play, or are free to follow their own inclinations, it is the opinion of the Commissioner that, as long as they are in the public school building under the supervision of public school teachers, the building is being used for school purposes.

3. The last question to be decided is whether the board exercised sound discretion in authorizing the use of its school building for other than school purposes during this period. Section 18:5-23, supra, provides that any action taken by a board under Section 18:5-22, supra, is subject to appeal to the Commissioner of Education. In the case of Klein *vs.* Jersey City, 1938 Compilation of School Law Decision, 228, the Commissioner of Education said:

> "The custom of permitting the use of school buildings for other than school purposes is well established and has existed almost from the time of the erection of the first schoolhouse. I think such use should be permitted unless there is an express statutory prohibition. A board of education must use reasonable discretion in the exercise of this power, and must not permit a school building to be used for other than school purposes at any time when such use would interfere with the regular school sessions."

Evidently, the Board of Education of Milltown did not consider that the adjournment for thirty-five minutes would interfere with the regular school sessions. The adjournment of school on every Wednesday from 11:10 to 11:45 A.M. means that only four hours and forty minutes are available for regular instruction on this particular day. Rule 196 of the Rules and Regulations of the State Board of Education provides that:

> "For the *purpose of apportionment* a day shall consist of not less than four clock hours of actual school work. . . ."

This rule established a minimum number of hours for purposes of apportioning school moneys. The Commissioner is of the opinion that the inference cannot be drawn from this rule that the State Board of Education considers a four-hour day

adequate for an elementary educational program. This rule was intended to cover situations where occasionally it is desirable to shorten a school session and where overcrowded conditions necessitate the temporary use of classrooms for two four-hour sessions pending the provision of adequate school facilities. Under such circumstances, school districts, by virtue of Rule 196 of the State Board of Education, are not penalized by the loss of an apportionment for days' attendance. It is the opinion of the Commissioner of Education that the respondent cannot rely upon Rule 196 as a justification for planning a full year's program which provides only four hours and forty minutes of school on Wednesdays. Nor can the argument prevail that religious instruction constitutes "equivalent instruction" by reason of the fact that religious instruction is forbidden in the public schools. It is further the opinion of the Commissioner that the board of education did not use sound discretion in permitting the use of the school building from 11:10 to 11:45 A.M. for other than school purposes because such use would, in fact, interfere with the regular school sessions.

The petitioners allege that the resolution of June 4, 1942, is contrary to the Constitution of the State of New Jersey. The Commissioner has declined in the past to make determinations of constitutional questions. A full discussion of his reasons therefor may be found in the cases of Hering *vs.* Secaucus, 1938 Compilation of School Law Decisions, 828, and in Phelps *vs.* West New York, supra 427.

The Commissioner of Education in making this decision implies no criticism of the motive which actuated both the Milltown Board of Education and the Milltown Council of Religious Education. There was no attempt by either party to conceal the purpose of the resolution, and the postponement of the inauguration of the program until its legality could be determined is praiseworthy. This decision may not be interpreted as an indication of a lack of sympathy of the State Department of Public Instruction with religious and character education. This Department has prepared and encouraged a program of character education in the schools of the State, and the State Board of Education has ruled that public school children may be released to attend classes of religious instruction outside school buildings during school hours.

It is the opinion of the Commissioner of Education that the hereinbefore mentioned resolution adopted by the Milltown Board of Education on June 4, 1942, is contrary to law, void, and of no effect. The appeal is sustained.

June 28, 1943.

BOARD OF EDUCATION MAY EMPLOY COUNSEL CONCERNING CHARGES AGAINST PRINCIPAL UNDER TENURE

HERMAN G. ARNING,

Petitioner,

vs.

BOARD OF EDUCATION OF THE CITY OF PASSAIC,

Respondent.

For the Petitioner, Carl F. Nitto.

For the Respondent, Martin & Reiley (Mr. Blair Reiley, of Counsel).

DECISION OF THE COMMISSIONER OF EDUCATION

On April 18, 1940, the respondent board of education adopted a resolution to employ Mr. Blair Reiley, of the firm of Martin and Reiley, as counsel to advise and represent the board in all matters concerning charges to be filed by the Superintendent of Schools against Miss Alma L. Smith, Principal of the Thomas Jefferson Junior High School No. 1, following her suspension by the board on April 8, 1940.

Herman G. Arning, the petitioner, is now and has been since 1923 a resident and taxpayer of the City of Passaic, and since 1933 has been a member of the board of education of that city. He asks that an order be issued by the Commissioner immediately enjoining the respondent board from acting under its resolution of April 18, 1940. Petitioner alleges:

(1) That the board has no right to employ counsel under the circumstances set forth in the resolution without specifically designating the fee to be charged or the limit beyond which the fee will not go;

(2) That the board of education does not have funds available for paying counsel fees and has no right to place itself in the position of requiring an emergency appropriation without first fixing and determining the amount to be required;

(3) That the board has no right to defend the Superintendent of Schools in any action which he may institute against Miss Alma L. Smith, as principal.

No authority is granted to the Commissioner to issue an injunction against a board of education. The Commissioner is authorized to hear controversies and disputes which arise under the School Law and to render decisions to be binding upon the parties until reversed by an appellate court. Since no authorization is given to enjoin the board from acting, the prayer of the petitioner cannot be granted. However, the Commissioner deems it advisable to rule upon the issues raised in the petition concerning the employment of counsel.

Section 18:6-23 of the Revised Statutes provides that city boards of education may in their corporate name sue and be sued, and Section 18:6-27 authorizes such boards to employ officers and agents as may be needed and to fix their compensation and terms of employment.

In the case of Merry *vs.* Board of Education of the City of Paterson, 100 N.J.L.

273, the Supreme Court in ruling upon the authority of a board of education to employ counsel, said:

> "Section 94 of the School Act of 1903, supra, relating to district boards of education of townships, incorporated towns and boroughs, authorizes the employment of counsel by such boards, and it may be urged that the lack of such specific authority to city boards indicates an intent on the part of the legislature that such authority is to be withheld from such boards.
>
> "But we think that this cannot be successfully contended for in the face of the authority to sue and the liability of being sued, which naturally and reasonably imply the right of employing counsel to prosecute and defend, and in the fact of the positive legislative intention to make such boards separate and distinct bodies corporate as hereinbefore stated."

It, therefore, appears from the statutes and the rulings of the Court in the Merry case that the Passaic City Board of Education is authorized to employ counsel.

The resolution of the Passaic Board of Education provides for the employment of counsel and the payment of reasonable fees and necessary expenses to be incurred by him. The law does not require the board to enter into an agreement as to the exact amount of fees for professional services nor does it require the fixing of a limit for any kind of legal expenditure. If it were necessary to contract for the possible services that might be required of an attorney, then the compensation would be based upon the maximum of time; whereas, the service might be quickly concluded and under such a plan the board would pay an exhorbitant fee for it. If the charges of the attorney are in the opinion of the board excessive or unreasonable, such charges may be litigated; but if not litigated and the board has funds available for payment, the board is empowered to pay the fees.

The statutes relating to Chapter 6 school districts do not specifically provide for the employment of either counsel or an architect, but in the case of Sleight *vs.* Board of Education of the City of Paterson, 112 N.J.L. 422, the Court of Errors and Appeals held that the board of education had a right to employ an architect when it believed the services of such a person to be necessary in the preparation of plans for a school, and that even though the building was not erected it could pay for the reasonable worth of his services, which amounted to approximately $12,000. Judge Wells in delivering the opinion of the Court said:

> "Assuming that there is no *express* power conferred upon the board of education to engage the services of an architect without first obtaining an appropriation for that purpose, we think there may be an *implied* power, and a municipal corporation may be liable for services rendered to it when the contract for such is one that is within the scope of its implied power.
>
> "The appellant insists that the board of education was invested with the implied power to employ an architect in the case, although the amount required for such services was not included in the statement filed with the board of school estimate. . . .
>
> "It would seem to follow then that the board of education had implied power to incur *reasonable expenses* for obtaining such expert information as might be necessary to furnish a basis for an accurate estimate of the cost of the proposed school building and that this justifies the engagement by the board of education of an architect and that upon the performance of his serv-

ices the architect can maintain an action on the quantum meruit to recover reasonable compensation therefore. . . .

"We can see no valid reason why a board of education may not compensate an architect from its *general* funds for drawing plans and specifications for a contemplated school building where such building is not erected. . . .

"The burden of proof was on the defendant to show that there were no funds available from any source to pay the architect—if such fact affected the cause."

Counsel for petitioner contends that a board of education cannot spend money for any purpose unless specifically allocated in its budget, and since the tentative budget included no allocation of funds for counsel fees, the board is without power to make such payment without a specific authorization and appropriation for that purpose by the board of school estimate. The Supreme Court ruled quite definitely against this contention in the case of Townsend *vs.* State Board of Education, 88 N.J.L. 97, where the board of school estimate had attempted to strike out the solicitor's fees of $1,000 from the current expense appropriation. It was contended that the board thereby was denied the right to employ a solicitor. The court clearly sets forth that the spending of money within the current expense account is controlled not by the board of school estimate but by the board of education, and said in quoting from the case of Newark *vs.* Board of Education, 30 N.J.L. 374:

". . . It was held in the case cited that in that disbursement and distribution of the money the board of education were given exclusive management and control, and were in no way subject to the direction or interference of the council except in purchasing real estate.

"This decision has never been reversed or overruled, and we think is applicable to the case at bar. The general powers of boards of education under the School Act are substantially similar to those in the Newark Charter. They may appoint such officers, agents and employees as may be needed, and fix their compensation. (Section 50) Whether a permanent solicitor at a fixed salary is needed is a matter primarily for their determination."

Petitioner's contention that funds are not available for the payment of counsel is not supported by the evidence in this case. The board of education which organized on February 1, 1940, may spend for legitimate purposes any free balances of the current year and the entire appropriation and funds available for the school year beginning July 1, 1940. It is impossible to prove that the board of education does not have money available in either the balances of the current year or the appropriations for the ensuing year from which to pay an attorney's fees. The anticipated revenues amount to approximately one and one-quarter million dollars for current expenses, and while the board of education may have allocated this amount in its budget, it has a right to reduce any such allocation and transfer the amount of the reduction to meet the expenses of employing counsel if it cares to do so. The fact that an attorney's fees were not included in the list of current expenses does not prevent the board of education from using a part of the available funds for that purpose. Townsend *vs.* State Board of Education, supra.

The remaining contention of counsel is that the board has no right to expend money to defend the superintendent of schools in any action which may be instituted against him. Since no action has been instituted against the superintendent,

it is probable that counsel means that the board has no right to pay a counsel where a superintendent brings charges against a school principal. The Commissioner is of the opinion that the board has full authority to employ counsel to advise any of its officers when such officer is acting in his official capacity, but, as is pointed out by counsel for the respondent, the employment of counsel in this case was to advise and represent the board in all matters pertaining to the making and prosecuting of charges against Miss Alma L. Smith before it and the appellate courts, and this was also well within the board's legal authority.

Since the Passaic Board of Education acted within its legal authority in employing counsel under the conditions set forth in this case, the petition is dismissed.

June 6, 1940.

ELIGIBILITY FOR TEACHER'S CERTIFICATE DOES NOT SATISFY REQUIREMENT THAT A TEACHER HOLD A CERTIFICATE AS A PREREQUISITE TO TEACHING IN THE PUBLIC SCHOOLS

BARBARA J. SABOL,

Petitioner,

vs.

BOARD OF EDUCATION OF THE BOROUGH OF MANVILLE, SOMERSET COUNTY,

Respondent.

For the Petitioner, Mr. Myron L. Levy.

For the Respondent, Mr. William B. Rosenberg.

DECISION OF THE COMMISSIONER OF EDUCATION

This is an appeal from the action of the Board of Education of the Borough of Manville in terminating petitioner's employment for the reason that she was not in possession of a valid teacher's certificate. The case is presented to the Commissioner by a stipulation of facts and briefs.

It appears in the record that on September 8, 1947, the petitioner and the respondent entered into a written agreement, one clause of which required the petitioner to produce a teacher's certificate. It is agreed in the stipulation that the respondent board terminated petitioner's employment on December 16, 1947, and that she was notified by Dr. Everett C. Preston, Secretary of the State Board of Examiners, in a letter under date of December 19, 1947, that she was entitled to a provisional elementary teacher's certificate. The stipulation discloses that the petitioner showed the aforesaid letter of December 19th to the school principal, but, notwithstanding the contents thereof, he informed her that the action of the board would not be rescinded. A provisional certificate was finally issued to the petitioner on January 5, 1948.

The pertinent statutes and Rules and Regulations of the State Board are as follows:

"18:13-7. No contract between a board of education which has not made

rules and regulations under section 18:13-5 of this title and a teacher shall be valid unless the same be in writing, in triplicate, signed by the president and district clerk or secretary of the board of education and by the teacher.

"The contract shall specify the date when the teacher shall begin teaching, the kind and grade of certificate held by the teacher, the date when the certificate will expire, the salary, and such other matters as may be necessary to a full and complete understanding. . . .

"18:13-8. Any contract or engagement between a board of education and a teacher shall cease and determine and be of no effect against the board whenever the board shall ascertain by notice in writing received from the county or city superintendent or otherwise, that the teacher is not in possession of a proper teacher's certificate in full force and effect, notwithstanding the term or engagement for which the contract was made may not then have expired.

"18:13-14. No teacher shall be entitled to any salary unless he is the holder of an appropriate teacher's certificate."

The Rules Concerning Teachers Certificates, Sixteenth Edition, 1937, prescribed by the State Board of Education of New Jersey, effective January 1, 1937, read in part as follows:

"18. No person shall be employed as a teacher, principal, supervisor or superintendent by a board of education in this State unless at the time he or she begins service he or she holds a state certificate, which certificate shall be in full force and effect in this State and valid for the positions to be filled

"19. A person accepting a position as teacher, principal or supervisor in any school shall, before entering upon the duties of such position, exhibit his certificate to the county superintendent of schools of the county or city superintendent of schools of the city in which such school shall be situated.

"20. No salary shall be paid a teacher until he presents to the district clerk or to the secretary of the board of education of the district in which said teacher is employed a signed statement from the county superintendent of schools to the effect that said teacher is legally authorized to teach and to receive public school money for services when rendered.

"21. The responsibility for holding the proper form of certificate rests with the teacher."

It is apparent from the record that the petitioner at all times during her service in the school district possessed the qualifications for a provisional teacher's certificate, but that, because of delay in filing the essential credentials, no certificate was actually issued to her until after the termination of her employment.

The question to be decided is, therefore, whether the possession of the qualifications for a certificate satisfies the requirements of the School law and rules and regulations of the State Board of Education, cited above, that a teacher possess a teacher's certificate.

The petitioner contends that at all times she acted diligently in her efforts to obtain a proper teacher's certificate and that she should not be penalized for circumstances beyond her control. The respondent board contends that the petitioner was not diligent in her efforts to obtain a teacher's certificate, and, even assuming that she was diligent in her efforts, the board had the right to terminate her employ-

ment for failure to produce a proper teacher's certificate, regardless of the diligence or good faith of the teacher in attempting to secure it. The respondent maintains that, under the statute, the test is not the effort made by the teacher, but whether the certificate was actually in the teacher's possession when her employment was terminated.

The record shows that the petitioner was warned repeatedly to secure the certificate. The record also reveals that she made three applications to the State Teachers College, Bloomsburg, Pennsylvania, for a transcript of her college courses in order to obtain a proper teacher's certificate. The first date was August 10, the second October 15, and the third was on November 1, 1947. Some delay in securing this transcript seems to have been caused by petitioner's failure to understand the necessity of paying a fee for the transcript and by mailing the fee to the Commonwealth of Pennsylvania, Department of Public Instruction, instead of mailing the fee to the State Teachers College, Bloomsburg, Pennsylvania. It is also in the record that the petitioner sent a money order without an accompanying letter, to the New Jersey State Department of Education, which had to be returned to her because there was nothing to indicate for what purpose the money order had been sent.

The view which the Commissioner takes of this case makes it unnecessary to determine whether the petitioner was diligent. The Commissioner would observe, however, that in adopting the Rules Concerning Teachers Certificates, the State Board of Education considered that a teacher should be able to secure the credentials necessary to complete certification within two months of application. By the provisions of Rule 32 of the *Sixteenth Edition* of the Rules Concerning Teachers Certificates, employment as a teacher may be legalized for two months for a person who has the qualifications of a regular teacher, but who must have time to secure credentials.

By the terms of Section 18:13-8, *supra.,* a contract between a board of education and a teacher is without effect against the board when the teacher is not in possession of a proper teacher's certificate. Rule 21 *supra.,* places the responsibility upon the teacher to secure the certificate.

It has been decided in other cases before the Commissioner and the State Board of Education that the responsibility for holding a certificate rests with the teacher and that eligibility for a certificate is not equivalent to holding a certificate. McAuley *vs. Paterson,* decision of the State Board of Education, 1938 Compilation of School Law Decisions, 612; Shapiro *vs.* Paterson, decision of the Commissioner of Education, 3 Misc. Rep. 406; affirmed on September 12, 1925, in an unpublished decision; and Brown *vs.* Camden, decision of the Commissioner of Education on February 8, 1936, unpublished.

In the McAuley case, *supra.,* the teacher was eligible for a certificate, but did not obtain one. The State Board said:

> "The respondent could have gotten a renewal of her second grade certificate 'upon application' but she did not apply, and therefore did not get it.
>
> "The glaring fact that protrudes itself is that the respondent at the time of her dismissal had no teacher's certificate of any kind. It was her affair, her business to see to it that she had a certificate. Not having it she was not under tenure of service act, and the Board of Education was not only justified in dismissing her in January, 1914, but should not have employed her or paid her after the expiration of her second grade county teacher's certificate in

June, 1913. From that time on she was not entitled to teach in the public schools of New Jersey."

It is the opinion of the Commissioner that he is controlled by this decision, and, accordingly, must dismiss the petition.

July 22, 1948.

Affirmed by State Board of Education without written opinion November 5, 1948.

BOARDS OF EDUCATION MAY NOT SET UP AS GROUNDS FOR DEFENSE LACK OF CERTIFICATION DURING A PERIOD FOR WHICH SALARY WAS PAID

CAROLINE WALL,

Petitioner,

vs.

BOARD OF EDUCATION OF JERSEY CITY,

Respondent.

For the Petitioner, William G. Wall.

For the Respondent, Aloysius McMahon.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner was first employed in the Jersey City Schools on November 12, 1930, and was assigned to substitute work amounting to ninety-one and one-half days between January 19, 1931, and June 19, 1933. In September, 1933, Miss Wall was assigned to substitute for a teacher who was on leave of absence on a per diem compensation of $6.00, and continued as such substitute until the closing of schools in June, 1935. In September, 1935, she was assigned to the Lincoln High School until the end of January, 1936, when she was transferred to the Henry Snyder High School and taught until the close of that school year. In September, 1936, petitioner was assigned again to the Henry Snyder High School and taught during that year with the exception of absence for about one month beginning October 22nd. In September, 1937, Miss Wall was again assigned to the Henry Snyder High School with compensation increased $7.00 per day, and taught until January 31, 1939, when her services were terminated by a notice from the Superintendent of Schools dated January 22, 1938, which reads:

> "I regret to inform you that in accordance with the rules of the board, your place on the list of teachers-in-training has been changed. You will therefore not be given steady employment during the coming year."

The day following this termination of service, petitioner presented herself for service and was denied employment. On February 21, 1938, a formal protest of her dismissal was made to the board by her attorney, and on May 11, 1938, a formal petition of appeal was presented to the Commissioner of Education, a copy of which was served on the respondent on May 3, 1938.

The petition alleges that on or about September 7, 1936, the employments of

Miss Wall brought her within the protection of the Teachers' Tenure of Office Act and, therefore, her dismissal on January 31, 1938, was in contravention of that statute and accordingly illegal, and asks the Commissioner to require the respondent to reinstate her and to grant such further relief as may be just and proper.

Respondent, in its answer filed May 27, 1938, denies that petitioner's service entitled her to the protection of the Tenure of Office Act and alleges that she does not possess a valid license to teach.

Petitioner's employments cover all the time schools were open in the district for the beginning of the term in September, 1933, to January 31, 1938, a period of four and one-half years, with the exception of excused brief absences of two days, February 28 and March 1, 1936, when petitioner was absent due to a notice from her principal that she must remain away from school for two days. It is these absences of two days that respondent contends created a hiatus in her employment so that she did not possess the continuity of service to give her tenure protection.

All of the employments of Miss Wall are in practically the following form:

> "Resolved, that the following named persons be and they are hereby employed as substitute teachers and assigned to the schools herein indicated at compensation of $6.00 per day ($7.00 after September 1, 1937) except as noted. These employments to be effective on the dates herein set forth and to be subject to such further action as the board of education may direct."

Petitioner's employment from February 1 to June 30, 1936, was by action of the board of education. The statutes concerning the employment of teachers read:

> "No principal or teacher shall be appointed, transferred or dismissed . . . except by a majority vote of the whole number of members of the board of education."

The minutes of the Board do not disclose any action by it concerning the absences of February 28 and March 1, 1936. There was no dismissal of petitioner by the board to become effective February 27, and re-employment to begin March 2, 1936. Therefore, such absences do not constitute a legal hiatus in the employment as recognized by the State Board of Education and the Supreme Court in the case of Chalmers *vs.* Raritan Township, 1938 School Law Decisions, 562, and in the case of Paletz *vs.* Camden, decided by the State Board of Education, 1938 School Law Decisions, 407. These absenses are, however, of the type considered by the State Board of Education and the Supreme Court in the case of Margaret M. Wall *vs.* Jersey City Board of Education, 1938 School Law Decisions, 514, and 119 N.J.L. 308; and for the reasons set forth in the Margaret Wall decision, the absences of petitioner are not held to affect the continuity of her employment by the respondent.

Petitioner, having been employed for three academic years from September, 1933, to June, 1936, inclusive, and having been employed at the beginning of the academic year 1936-1937, has met the employment requirement for tenure protection. (Section 18:13-16 of the Revised Statutes)

Neither side in this case pressed the issue for an early hearing, apparently for the reason that the right of petitioner to a permanent certificate was pending before the State Board of Examiners.

Miss Wall has a New Jersey Limited Secondary Certificate, dated July 1, 1932, with renewals thereon extending it to July 1, 1936. Soon thereafter, she made application to the office of the Superintendent of Schools for the recommendation required by the State Board of Examiners as a prerequisite to making permanent her certificate. The Rules of the State Board of Education Concerning Teachers' Certificates, 16th Edition, provide as follows:

> "27. When application is made . . . . for the issuance of a permanent certificate, the county or city superintendent having jurisdiction shall file with the State Board of Examiners a written report of the applicant's fitness for teaching. In case such reports shall be unfavorable to the applicant, the county or city superintendent shall include therein a statement of the facts or reports upon which his conclusions are based. If an unfavorable report is submitted, the applicant shall be given an apportunity to appear before the said Board of Examiners and said State Board may in its discretion renew or make permanent the certificate of the applicant."

The law specifically requires the superintendent to file a written report with the State Board of Examiners for an applicant's fitness when application is made. The City Superintendent delayed in complying with the legal requirement. In fact, a letter to the County Superintendent from the City Superintendent under date of April 8, 1937, in which certain issues are raised about various certificates reads in relation to the petitioner, as follows:

> "Caroline Wall—We do not desire to do anything about this certificate at present."

Despite the requirement that the recommendations be made or refused by the City Superintendent, following petitioner's application for the permanent certificate, such recommendation was neither made nor did the City Superintendent submit to the State Board of Examiners the basis for his refusal of such recommendation until June 2, 1938. The State Board of Examiners at a meeting on October 18th considered the report of the City Superintendent and decided that the reasons set forth therein for not recommending the permanent certificate for the petitioner did not justify the denial of such certificate. Accordingly, it appears that the State Board of Examiners, believing that the certificate had been unjustly denied, gave to the petitioner the permanent certificate and determined its effectiveness as of the date of the expiration of the limited certificate; that is July 1, 1936.

Respondent now contends that the petitioner was not eligible to teach after July 1, 1936; yet, it employed her as a teacher from that time until October 19, 1938, paid for her services as a teacher, and made requisition for and secured State apportionments for her services. Respondent did not dismiss petitioner because of a lack of certificate, as is set forth by the notice of the Superintendent of Schools of January 22, 1938, and after continuing to pay her as a regular teacher from July 1, 1936, to January, 1938, cannot now come into court and claim her lack of eligibility to qualify as a teacher. The respondent being barred from a defense of lack of certificate by its continued employment of petitioner and the subsequent action of the State Board of Examiners in issuing a certificate dated as of July 1, 1936, eliminate the consideration of the certificate in relation to the tenure rights of the petitioner, who by her term of employment became protected under the Tenure of Office Act on July 1, 1936.

The Board of Education of Jersey City is directed to reinstate Caroline Wall as of February 1, 1938, and to pay her salary at the rate of $7.00 per day for each day school has been open since that date.

August 16, 1939.

INCREMENTS UNDER SALARY SCHEDULE ARE NOT AUTOMATIC UNLESS SO PROVIDED. LACHES DOES NOT APPLY IN COLLECTION OF DEBTS WITHIN STATUTORY LIMITATION

JENNIE L. BIDDLE,

Petitioner,

vs.

BOARD OF EDUCATION OF THE CITY OF JERSEY CITY,

Respondent.

For the Respondent, Aloysius McMahon.

DECISION OF THE COMMISSIONER OF EDUCATION

The respondent, board of education, during the school year 1932, reduced the salaries of all employees effective January 1, 1932, with the exception that no salary of $1,000.00 per year or less was reduced, and none above $1,000.00 was reduced to less than that amount. All teachers under tenure in the Jersey City school system signed waivers of the amounts by which their respective salaries were reduced for the year 1933 with waivers again filed by all tenure teachers with the exception of Miss Biddle. Increments were granted to nearly all teachers of the system for the year 1932-1933 and the percentage reductions were based upon the salaries so increased. Petitioner who was receiving $4,475.00 for the preceding year expected to receive the maximum for her type of service for the year 1932-1933, but no increment was granted to her by the board and none has since been given to her. During the month of July following the enactment of Chapter 12, P.L. 1933, the board reduced the salaries of all teachers for the remainder of the year 1933, and under the amendments to that act, salaries were reduced for the subsequent years to and including June, 1937. The legislative authority to fix salaries of tenure teachers terminated July 1, 1937. Nevertheless, the respondent board again reduced salaries for the year 1938, to which reduction the teachers of the school system with the exception of Miss Biddle consented. While it appears that petitioner complained about the reductions in her salary at meetings of teachers and to certain municipal officials, school principals, and teachers, she made no formal objection to the board relative to the salary reductions or the denial of the increment until she filed with the board during the month of June, 1938, a request for an accounting of all payments made to her from June, 1932, to June, 1938, inclusive. On or about June 30, 1938, Miss Biddle filed a petition with the Commissioner of Education asking that the board be required to give her an itemized statement of her salary account for the months extending from June, 1932, to June,

1938, inclusive, and that the board be ordered to pay and satisfy to the petitioner any amounts due her as shown by such accounting.

At the hearing held June 18, 1938, petitioner set forth her demands itemized as follows:

I. A contractural salary of $4,500.00, from July 1, 1932

II. Difference between the amount she was paid and that which she would have received based upon a salary of $4,500.00, without reduction from:

(a) June, 1932, to June, 1933, inclusive
(b) July 1, 1933 to June 30, 1937
(c) July 1, 1937 to June 30, 1938.

III. Salary for two months at the rate of $4,500.00 per year to which amount petitioner contends she is entitled due to the change from a ten to a twelve month payment plan adopted by the board several years ago.

The evidence presented does not show that petitioner was legally entitled in 1932 to the increment of $25.00 to bring her salary to the maximum of that classification, $4,500.00, but if such proof were presented at this time it would be of no avail. Persons dealing with public bodies may not wait six years to formally protest a claim to additional compensation. The courts have ruled in relation to the prosecution of such claims as follows:

Barhite *vs.* Board of Education of the Town of West New York, 86 N.J.L. 674:

"Obviously, the great delay bars the prosecutor unless this case differs from the usual one. Glori *vs.* Board of Police Commissioners, 72 N.J.L. 131. It is said the rule does not apply since the prosecutor seeks only to set aside the order of the State Board of Education made in July, 1913. This, however, is not the case. The writ brings up the resolution of June, 1910, and this is necessary in order to secure for the prosecutor the right he claims. Even if this were not so, we ought to look beyond the mere form. If we do so, we cannot fail to perceive that the prosecutor waited two and a half years before proceding to vindicate his rights. . . .

"It is true that the State Board was wrong in saying that he had had his day in court; he had not had it in a strict technical sense of the words as used by lawyers, and he has lost his right not by an adjudication against him, but by laches. The result is the same."

Love *vs.* Mayor, etc. of Jersey City, 40 N.J.L. 456:

"My opinion is, that by the power of appointment and control given to this board in the case of this officer, they had such authority; but it is not necessary to decide this point, for it will never be tolerated that a municipal officer shall receive for his full term, and at the end demand a higher rate named in some prior act. . . . His continuance in office was an assent to the reduction of his salary, and his receipt of monthly warrants and payments during the whole term is an estoppel against any error in the mode of reduction, or the amount fixed by the board of finance and taxation."

Regardless of the possible right to a salary increment in 1932, petitioner has no legal claim at this time to a salary of $4,500.00, instead of the salary of $4,475.00.

Petitioner's claim to an amount by which her salary was reduced for the year

1932-1933 is void for the reasons set forth above in relation to her claim for an increment as in this situation also, between five and six years have elapsed since the time when this claim should have been prosecuted.

The salary from July 1, 1933 to July 1, 1937, was reduced under the provisions of Chapter 12, P.L. 1933, and amendments thereto. The right to make such reductions was held valid by the Commissioner of Education in the case of Askam *vs.* Board of Education of West New York, and successively by the State Board of Education, the New Jersey Supreme Court (115 N.J.L. 310) and the Court of Errors and Appeals (116 N.J.L. 416) and by the United States Supreme Court under date of March 1, 1937. In accordance with these decisions, petitioner's salary was legally reduced during this time.

The salary reduction between July 1, 1937 and July 1, 1938 was without legislative authority. In the case of Cole *vs.* Board of Education of the City of Trenton, decided by the Commissioner of Education June 22, 1937, and affirmed by the State Board of Education March 12, 1938, it was held that the board was without legal authority to reduce the salary of tenure teachers after July 1, 1937. For the reasons set forth in the Cole decision the reduction in petitioner's salary for the year 1937-1938 is illegal. The Board of Education is hereby directed to pay to Miss Biddle the difference between that which she has received and that which she would have received for each year if her salary payments had been based upon $4,475.00.

As to the petitioner's right to additional payments to the present time due to the change from a ten to a twelve month payment plan, the evidence is insufficient to determine the right of petitioner to such additional payment.

With the exception of the right of petitioner to payments based upon her full contractual salary for the year 1937-1938, the petition is dismissed.

July 26, 1938.

Decision of the State Board of Education

The petitioner was employed by respondent as a teacher in its Dickinson High School before and since June 1, 1932. Her salary in the school year ending June 30, 1932, was $4,475.00. During 1932, respondent requested all its teachers to consent to certain deductions of salary for the year 1932 and to June 30, 1933. All the teachers, except the petitioner, gave such consent and signed writings authorizing the deductions.

Pursuant to the authority conferred upon it by Chapter 12, P.L. 1933, and the amendments thereof, respondent reduced the salaries of all its teachers, including the petitioner, for the succeeding school years, from July 1, 1933, to June 30, 1937. It further appears that the salary deductions, or some part thereof, were continued by respondent after July 1, 1937.

In her petition, the petitioner claimed the moneys deducted from her salary since July 1, 1932; she claimed a salary of $4,500.00 per year; during the course of a hearing held before the Assistant Commissioner of Education, she further claimed two months' salary, which she alleged had not been paid her some time since July 1, 1932, owing to the operation of the twelve-payment plan of respondent for the payment of its teachers.

The petition was filed with the Commissioner of Education in June, 1938, and a hearing held on July 19, 1938. The Commissioner of Education decided that

the petitioner was not entitled to a salary in excess of $4,475.00; that there was not sufficient evidence before him to find that petitioner was entitled to two months' salary due to the operation of the twelve-payment plan in force. He held that the petitioner was precluded from demanding the payment to her of the deductions from salary during the period from June, 1932, to June, 1933, inclusive, because she had waited too long; that "persons dealing with public bodies may not wait six years to formally protest a claim to additional compensation." The reduction of her salary from July 1, 1933, to June 30, 1937, under the provisions of Chapter 12, P.L. 1933, and the amendments thereto, he held to be legal, but the salary reduction during the period between July 1, 1937, and July 1, 1938, to be illegal, and directed the respondent to pay to the petitioner the difference between that which she had received and that which she would have received for such period if her salary payments had been based on $4,475.00 per annum. The petitioner appeals. We agree with the conclusions of the Commissioner of Education except as it deals with the petitioner's claim to the amount of money which was deducted from her salary during the period from June, 1932, to June, 1933, inclusive. That amount was due petitioner on her contract with respondent, and she has done nothing to relinquish or waive her right to it. On the contrary, she protested the reduction and consistently refused to sign any consent or waiver. While the contract was not produced, it was admitted her salary since June 1, 1932, was at the rate of $4,475.00 per annum. The Commissioner of Education bases his disallowance of this part of petitioner's claim on the time which elapsed before asserting it by action. Laches is an equitable defense and is not available in what is purely legal as differentiated from an equitable demand. The statute of limitations fixes six years as the period within which actions in the nature of actions upon contract without specialty should be brought. The cases cited by the Commissioner of Education are not applicable. They relate to the propriety of suspension from or abolition of positions or offices in the public service. We have been unable to find any such case which denies the right of action for a purely pecuniary demand based upon contract within the period fixed by the statute of limitations. It is within the period fixed by the statute of limitations. It is true that applications to the Courts for the prerogative writs (which were involved in the cases cited) are often denied within the time fixed by statute within which they may be allowed, but this is because the allowance of such writ is discretionary, and the Court may deem that intervening interests which may have arisen, or the presumption of acquiescence, which inaction may give rise to, or other circumstances, justify its denial. Petitioner's claim, to the extent of the amount deducted for the period from June, 1932, to June, 1933, inclusive, is within six years from the filing of her petition. It is a purely legal demand arising out of contract, and is not barred by the statute of limitations. R. S. of N.J. 2-24-1.

Except for the provisions of the School Law requiring one to prosecute his claim before the Commissioner of Education, who is constituted a special court to determine controversies arising under the School Law, we know of no reason why petitioner could not have maintained her action in the ordinary courts. Butler *vs.* Plainfield, 5 N.J. Misc. Rep. 170. Boyle *vs.* Freeholders, 120 N.J.L. 552. See also Vanderburgh *vs.* County of Bergen, 120 N.J.L. 444. Harley *vs.* County of Passaic, 121 N.J.L. 44.

It is recommended that the decision of the Commissioner of Education be affirmed except in so far as he denies the right of petitioner to payment of the

moneys illegally deducted from her salary at the rate of $4,475.00 per annum from July 1, 1932, to June 30, 1933, and that that part of his decision be reversed, and that the respondent be and hereby is directed to pay to petitioner, in addition to the moneys directed to be paid her by the Commissioner of Education, the difference between the salary which she received between July 1, 1932, and July 1, 1933, and her contractual salary at $4,475.00 per annum.

November 19, 1938.

SALARY OF TENURE TEACHERS MAY NOT BE REDUCED WITHOUT LEGISLATIVE AUTHORITY

MALCOLM M. STECK, *et al.*,

Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF CAMDEN,

Respondent.

For the Petitioners, Meyer L. Sakin.

For the Respondent, Firman Michel.

DECISION OF THE COMMISSIONER OF EDUCATION

This case comes to the Commissioner on stipulation of counsel which sets forth that all the petitioners are teachers in the employ of the Board of Education of the City of Camden, protected in their positions under the provisions of the Teachers' Tenure of Office Act, Revised Statutes 18:13-16 to 20, having been employed for more than three consecutive years, and that each is the holder of a valid teacher's certificate. Under the provisions of Chapter 12, P. L. 1933, and amendments thereto, the salaries of petitioners were reduced between July 1, 1933 and July 1, 1937, in amounts varying from 5% to 30%. On February 23, 1937, the Board of Education adopted a resolution, the second section of which reads as follows:

> "That one-third of the amount of reductions of salaries and compensations of all school teachers employed by the Board of Education of the City of Camden, New Jersey, deducted during the fiscal year 1934-1935, as established by resolution dated February 17, 1934, be, and the same is hereby restored as of July 1, 1937, so that the reductions for the school year of 1937-38 shall be two-thirds of what they were since the adoption of the resolution of February 17, 1934."

When their salaries became due under the foregoing resolution, the petitioners filed with the Secretary of the Board of Education, a letter which reads as follows:

"Camden, New Jersey
September 16, 1937

Board of Education
City Hall, Camden, New Jersey

Gentlemen:

This is to notify you that I do hereby protest any attempt by you to reduce the salary to which I am entitled as a teacher in the Public School System of

the City of Camden. There is no provision in the law which permits or authorizes the Board of Education to make any reduction in my salary.

I am hereby making demand of you to pay me the salary to which I am legally entitled without any reduction, and I do protest any action or attempt on your part to pay me less than the amount to which I am legally entitled.

It is distinctly understood that any money I receive from you which is less than the amount of salary to which I am legally entitled is being accepted only to apply as a credit on account of the amount due me and is in no way to be considered as a waiver by me of, or prejudicial to my right to, my full salary as such teacher in the Public School System of the City of Camden.

Very truly yours.

(Signature)"

These letters were filed prior to the payment of any compensation to the petitioners for the school year 1937-1938, and petitioners have not expressly or impliedly agreed to accept reduced salaries under the aforementioned resolution.

On December 27, 1937, the Board adopted a resolution, Section 2 of which reads as follows:

"That one-half of the amount of salary and compensation of all school teachers employed by the Board of Education of the City of Camden, New Jersey, deducted during the fiscal year 1937-38 as established by resolution dated February 23, 1937, be and the same is hereby restored as of July 1, 1938 so that the reductions for the school years of 1938-1939 shall be one-half of what they were during the school year of 1937-38."

The stipulation further states that city employees and other employees of the Board of Education accepted salary reductions before the acceptance of such reductions by the teachers of the school system during the year 1932, and that the City of Camden was seriously affected by the financial depression following the year 1930-1931 and has since that time been required to raise large sums for relief or for Federal projects.

On or about May 26, 1938, counsel for petitioners filed in their behalf, petitions asking that the Commissioner of Education make an order setting aside and declaring invalid the above cited sections of the resolutions adopted by the Board on February 23, and December 27, 1937, and direct payment to petitioners of sums due according to their respective basic salaries.

Counsel for respondent contends that a financial emergency still exists in the City of Camden, due to the economic conditions which have largely prevailed since 1931; that when the salaries of teachers were reduced uniformly and in harmony with reductions of other city employees, the Board of Education acted within its legal rights in making such reductions; that the resolutions when adopted did not reduce, but to the contrary, increased the salaries which petitioners were then receiving; and that the salaries, fixed by the Board during the emergency declared by the Legislature, did not automatically revert to the former basic salaries when the emergency legislation became inoperative, but could be restored only by specific action of the Board.

Counsel for petitioner holds that since the Legislature has not proclaimed that an emergency has existed since July 1, 1937, and has enacted no statutes authorizing

boards of education to reduce salaries since that date, petitioners are entitled to their full contractual salaries.

The facts in this case rest on all fours with that of Cole *vs.* City of Trenton, decided by the Commissioner of Education September 23, 1937, and affirmed by the State Board of Education March 12, 1938. In that decision the Commissioner held as follows:

> "In accordance with this constitutional mandate, the Legislature has created school districts and prescribed laws for their government. As a public policy for the welfare of the schools, it has denied by statute the right of a board of education to reduce the salary of, or to dismiss any teacher after three consecutive years of service in the district, unless the teacher has been adjudged guilty of charges preferred under the provisions of the Tenure of Office Act. The tenure law has been in effect for nearly three decades and its application has frequently been before the higher courts, and in no instance has any court indicated that the Legislature exceed its authority in adopting its provisions. The Supreme Court of the United States in the case of Phelps *vs.* Board of Education of the Town of West New York, decided March 1, 1937, indicates that the State Legislature was within its authority in enacting this statute which it could modify or repeal at its discretion. This decision of the United States Supreme Court, which acknowledges the constitutionality of the tenure act, supports the views expressed by the Supreme Court and the Court of Errors and Appeals of this State not only in the Phelps case, but notably in the following cases:

"Gowdy *vs.* State Board of Education, 84 N.J.L. 231, in which the court held as follows:

> 'The prosecutrix had served three consecutive years as such school teacher and, therefore, under section 106-a (C. S. 4763) she holds her employment during good behavior and efficiency *and is not subject to reduction of salary except for causes set forth in said section,* and they are not pertinent to the inquiry here.'

"Downs *vs.* Hoboken Board of Education, 12 Misc. Rep. 345, affirmed by the Court of Errors and Appeals, 113 N.J.L. 402, in which the Supreme Court held in part as follows:

> 'The powers of boards of education in the management and control of school districts are broad * * * These powers are limited as in the employment and discharge of teachers only to the extent provided by the Teachers' Tenure Law, Chapter 243, P. L. 1909.'

"All of the foregoing authorities upheld directly or indirectly the constitutionality of the Teachers' Tenure of Office Act and the right of the Legislature to modify or repeal it, but deny the right of a board of education to act in contravention thereof. If a board of education is without legal authority to reduce the salary of any tenure teacher, clearly it cannot reduce simultaneously the salaries of all teachers whether or not the action is without discrimination."

As to an emergency existing in a local district, which emergency is not recognized by the legislature, the Cole decision further reads:

> "Chief Justice Hughes in delivering the opinion of the Supreme Court of

the United States in the case of Home Building and Loan Association *vs.* Blaisdell, 290 U. S. Supreme Court Reports, 398, said:

> 'Emergency does not create power. Emergency does not increase created power, or remove or diminish restrictions created or power reserved.'
>
> "When the Legislature refused to declare that an emergency existed, the board of education or city officials were without power to do so, and were bound by the laws prescribed by the Legislature for school districts."

Chapter 12, P. L. 1933 and its amendments, authorized boards "to fix and determine the salaries and compensations *to be paid* * * * between the first day of July, 1933 and the first day of July, 1937." The Teachers' Tenure Act, Chapter 243, P. L. 1909 (Revised Statutes 18:13-16 to 19) has protected since its enactment the basic salaries of tenure teachers, except during the period of the emergency declared by the legislature, July 1, 1933 to July 1, 1937, and since from this latter date the Legislature has not declared the existence of an emergency and has not authorized boards to fix salaries *"to be paid,"* the salaries of tenure teachers on July 1, 1937, automatically reverted to those salaries in which they were protected by the Teachers' Tenure of Office Act on June 30, 1933, and reduction of such salaries after July 1, 1937, could be made only in the manner prescribed by that Act.

The Board of Education of the City of Camden was without authority to reduce the salaries of tenure teachers after July 1, 1937, and, therefore, any resolution of the Board making such provision is invalid in so far as it relates thereto. The Board of Education of the City of Camden is accordingly directed to pay to the petitioners the difference between that which they have received for the year 1937-1938 and that which they would have received if they had been paid the amounts which they allege to be their full contractual salaries.

August 8, 1938.

Decision of the State Board of Education

In this case, the Camden Board of Education, by resoution passed February 23, 1937, attempted to avoid the payment of the salaries of tenure teachers at the rate they were receiving prior to the enactment of the emergency legislation of 1933 and subsequent years authorizing reductions. The basis of the resolution is stated to be a financial emergency in the City of Camden. The Commissioner has held that the case is on all fours with that of Cole *vs.* City of Trenton. In our opinion, this is correct, and it is also directly in line with our decision in Barlow *vs.* Camden Board of Education. In these decisions, this Board held as to similar situations that in the absence of permissive legislation, the Tenure of Office Act must be observed.

It is recommended that the decision of the Commissioner, directing the Camden Board of Education to pay the petitioners the difference in salary between that which they have received for the year 1937-1938 and that which they would have received if they had been paid the amounts which they alleged to be their full contractual salaries, be affirmed.

November 19, 1938.

Affirmed by *New Jersey Supreme Court,* 123 N.J.L. 158, 125 N.J.L. 261.

Affirmed by *New Jersey Court of Errors and Appeals,* 124 N.J.L. 132.

SALARIES OF TEACHERS UNDER TENURE MAY NOT BE REDUCED WITHOUT SPECIFIC LEGISLATIVE AUTHORITY

HERBERT H. COLE,

Petitioner,

vs.

BOARD OF EDUCATION OF THE CITY OF TRENTON,

Respondent.

For the Petitioner, Josephson & Josephson and Frank I. Casey.

For the Respondent, Henry M. Hartmann.

DECISION OF THE COMMISSIONER OF EDUCATION

Herbert H. Cole, the petitioner, was employed under a contract dated June 2, 1932, to teach in the School District of the City of Trenton for a period of one year beginning September 1, 1932, and has been employed continuously since that time. His contractual salary was $2,000.00 for the school year 1935-1936, the year in which he acquired protection under the Tenure of Office Act, and has remained at that amount. During the two years ending June 30, 1937, his salary was reduced 20% by the respondent under authority of Chapters 6, P. L. 1935 and 27, P. L. 1936, which provide that for the respective years the board of education of every school district in this State may fix and determine the salary of its employees, notwithstanding their protection by tenure of office acts. This right to reduce salaries of employees of boards of education was in effect from July 1, 1933 (Chapter 12, P. L. 1933) to July 1, 1937, but the Legislature of 1937 made no such provision for the current year.

The Teachers' Tenure of Office Act (Chapter 243, P. L. 1909) as amended, provides in relation to the salaries of teachers who are protected in their positions:

> "No principal or teacher shall be dismissed or subjected to a reduction of salary in said school district except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause, ..."

The respondent board, cognizant of this provision of law and also of the lack of statutory authority for the reduction of teachers' salaries, and with the advice of counsel submitted to the Board of School Estimate a budget in the amount of $1,798,930.40, which included provision for the payment of full contractual salaries of all employees protected by tenure of office acts. The Board of School Estimate refused to appropriate the amount requested by the board of education and reduced the total appropriation to $1,506,250.00. The statutes provide that the Board of School Estimate

> ". . . . shall fix and determine the amount of money necessary to be appropriated for the use of the public schools in such district for the ensuing year . . . ."

The testimony shows that the appropriation was not an amount "necessary . . . . for the use of the public schools" if the schools were to be conducted in compliance with the statutes. It appears that the appropriation was determined without

due consideration to the needs of the schools and the laws applicable thereto, and that the Board of Education, without having the adequacy of the appropriation ruled upon by the courts, decided to reduce salaries in order to come within the appropriation. Accordingly, on April 1, 1937, it adopted a resolution reading as follows:

> "WHEREAS, the Board of Education of the City of Trenton presented its budget for 1937-1938 to the Board of School Estimate, and whereas the Board of School Estimate met on February 15, 1937 for the consideration of the said budget and reduced the amount requested from $1,798,930.40 to the sum of $1,506,250.00 making a total reduction in the amount requested of $292,-680.40, and whereas it is the judgment of the Board of Education that in order to operate the school system for the year 1937-1938 it will be necessary to eliminate certain items and curtail other items from the budget originally adopted by the School Board in order to be within the amount fixed and determined by the Board of School Estimate for the operation of the school system for the school year beginning July 1, 1937, now
>
> "THEREFORE be it resolved that the budget heretofore adopted for the year 1937-1938 by this Board be altered, changed, and amended by reducing the same by the amount of $292,680.40, and that said reduction be made by eliminating entirely from the budget as originally adopted the sum of $26,-049.50 for the operation of the Evening High School, by the elimination of two elementary principalships amounting to $2,600.00, by the elimination of $10,581.16 for the operation of the Skelton School, and by reducing in the sum of $2,500.00 the amount set forth for textbooks, by reducing $2,500.00 from the amount set forth for supplies, and by reducing the sum of $5,199.60 from the amount set forth for maintenance, and by reducing the salary account in the sum of $243,250.14, which last item represents a restoration of 5% of salaries instead of a restoration of 20% as set forth in the original budget."

Prior to June 30, 1937, a petition was filed by Mr. Cole asking that the foregoing resolution be declared invalid and in violation of Chapter 243, P.L. 1909. Said petition was dismissed by the Commissioner of Education on the ground that it was presented prematurely, but its dismissal was held not to prejudice the petitioner's right to appeal anew in the school year to which the resolution has application. On July 7, 1937, a new petition was filed with the Commissioner of Education again asking that the above cited resolution of the board be set aside and that respondent be directed to pay to the petitioner a salary of $2,000.00 for the school year 1937-1938.

Respondent contends that the Tenure of Office Act, under the construction sought to be applied by the petitioner, is unconstitutional; that it does not preclude the respondent from enacting the resolution in question, and it was not the intention of the Legislature to prohibit the regulation of salaries with uniformity and without discrimination; that if the tenure act be construed in accord with its spirit rather than literally, the board had ample authority to pass the resolution by virtue of the fact that an emergency existed and had existed for a long time in the City of Trenton; and that the petitioner by accepting the position waived any rights which he may have had. Counsel for petitioner holds that these contentions are untenable and without merit, that the resolution is illegal, and that petitioner is accordingly entitled to his full contractual salary.

Article IV, Section VII, paragraph 6 of the State Constitution provides in part as follows:

> "The legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools . . . ."

In accordance with this constitutional mandate, the Legislature has created school districts and prescribed laws for their government. As a public policy for the welfare of the schools, it has denied by statute the right of a board of education to reduce the salary of, or to dismiss any teacher after three consecutive years of service in the district, unless the teacher has been adjudged guilty of charges preferred under the provisions of the Tenure of Office Act. The tenure law has been in effect for nearly three decades and its application has frequently been before the higher courts, and in no instance has any court indicated that the Legislature exceeded its authority in adopting its provisions. The Supreme Court of the United States in the case of Phelps *vs.* Board of Education of the Town of West New York, decided March 1, 1937, indicates that the State Legislature was within its authority in enacting this statute which it could modify or repeal at its discretion. This decision of the United States Supreme Court, which acknowledges the constitutionality of the tenure act, supports the views expressed by the Supreme Court and the Court of Errors and Appeals of this State not only in the Phelps case, but notably in the following cases: Gowdy *vs.* State Board of Education, 84 N.J.L. 231, in which the court held as follows:

> "The prosecutirx had served three consecutive years as such school teacher and, therefore, under section 106-a (C.S. 4763), she holds her employment during good behavior and efficiency *and is not subject to reduction of salary except for causes set forth in said section* and they are not pertinent to the inquiry here."

Downs *vs.* Hoboken Board of Education, 12 Misc. Rep. 345, affirmed by the Court of Errors and Appeals, 113 N.J.L. 402, in which the Supreme Court held in part as follows:

> "The powers of boards of education in the management and control of school districts are broad . . . These powers are limited as in the employment and discharge of teachers only to the extent provided by the Teachers' Tenure Law, Chapter 243, P.L. 1909."

All the foregoing authorities uphold directly or indirectly the constitutionality of the Teachers' Tenure of Office Act and the right of the Legislature to modify or repeal it, but deny the right of a board of education to act in contravention thereof. If a board of education is without legal authority to reduce the salary of any tenure teacher, clearly it cannot reduce simultaneously the salaries of all teachers whether or not the action is without discrimination.

The Legislature in its modification of the salary provisions of the tenure act between July 1, 1933, and July 1, 1937, set forth that an emergency existed in the State. Evidently, the Legislature does not consider that such emergency now exists. The testimony discloses that the present tax rate in the City of Trenton is $3.96 per $100 of valuations; that by paying full contractual salaries to all employees of the board of education, the rate would be increased to $4.12 and that by paying full contractual salaries to city employees as well as to those of the board

of education, the rate would be increased to $4.28. Even if it were granted that all property in the city, both real and personal, is assessed in accordance with the statutes and even if it were admitted that a tax rate as high as $4.28 per $100 is more than property owners should be required to pay and should be avoided if legally possible, such financial condition does not give to public officials the right to declare an emergency and thereby disregard the laws of the State.

Chief Justice Hughes in delivering the opinion of the Supreme Court of the United States in the case of Home Building and Loan Association *vs.* Blaisdell, 290 U.S. Supreme Court Reports, 398, said:

> "Emergency does not create power. Emergency does not increase created power, or remove or diminish restrictions created or power reserved."

When the Legislature refused to declare that an emergency existed the board of education or city officials were without power to do so and were bound by the laws prescribed by the Legislature for school districts.

The Commissioner cannot agree with the view of respondent's counsel that the petitioner by accepting employment for the year thereby waived his right to full contractual salary. He filed a petition before the beginning of the school year, and it was then contended that his action was premature. In the instant case, the action was filed on July 7th, within one week after the beginning of the current school year. Actual work for the petitioner was not available until the opening of schools about September 7th, two months after the filing of the petition, and the first salary payment was not due for several weeks thereafter. The petitioner indicated by his appeal that if compensation should be offered to him in less amount than his contractual salary, he would render service under protest as to salary.

In the case of Cheesman *vs.* Gloucester City, 1 Misc. Rep. 318, Miss Cheeseman, who had been transferred to another school, refused the transfer and upon advice of counsel did not work, awaiting the decision in her case. The Supreme Court held:

> "It is further contended that Miss Cheesman could not be guilty of insubordination and dismissed pending her appeal of the order of transfer to the State Commissioner of Education. We do not think this point well taken. Miss Cheeseman could have taken up the work in the Cumberland Street School to which she was transferred under protest pending her appeal. Such a course would not have prejudiced her appeal."

Under the conditions in this case, petitioner has neither expressly nor impliedly waived his rights to his full contractual salary.

The Legislature in creating school districts and in prescribing their government, provided that the salaries of teachers protected by the Tenure of Office Act could not be reduced. Such provision has been held by the courts to be within the authority of the Legislature and, therefore, constitutional. No statutes have been enacted which now modify or repeal the salary provision of the tenure act. An arbitrary judgment that an emergency exists without determination of such emergency by the Legislature does not authorize a board of education to act in contravention of the statutes. The respondent was without legal authority to reduce the salaries of tenure teachers and, accordingly, the resolution of April 1, 1937, in so far as it relates to such reduction is invalid. The Board of Education of the City

of Trenton is, therefore, directed to pay to the petitioner his salary when and as due at the rate of $2,000.00 per year.

September 23, 1937.

DECISION OF STATE BOARD OF EDUCATION

The Trenton Board of Education has appealed from the decision of the Commissioner that it had no right to reduce the petitioner's salary on account of the reduction of the total appropriation for the support of the Trenton schools for the year 1937-1938 by the Board of School Estimate. The Commissioner has sustained the petitioner's contention that notwithstanding such reduction he is entitled to the protection of the Tenure of Office Statute, which prohibits reduction of salary. The petitioner had served in the Trenton schools for more than three years continuously before 1937.

The board of education maintained before the Commissioner and now urges that the Tenure of Office Act is unconstitutional; that it does not prevent the board from reducing salaries with uniformity and without discrimination; that the board had authority to pass the resolution because of the emergency existing in Trenton; and that the petitioner by accepting the position, waived his rights to object to the reduction. The Commissioner has held against the appellant on all of these points. We agree with the conclusions stated in his opinion and recommend that it be affirmed.

March 12, 1938.

Reversed by *New Jersey Supreme Court*, 122 N.J.L. 585.

SALARIES OF JANITORS UNDER TENURE MAY NOT BE REDUCED WITHOUT SPECIFIC LEGISLATIVE AUTHORITY

FREDERICK H. KRISER, THOMAS CLARK, *et al.*,

Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF TRENTON,

Respondent.

For the Petitioners, Josephson & Josephson and Frank I. Casey.

For the Respondent, Henry M. Hartman.

DECISION OF THE COMMISSIONER OF EDUCATION

The petitioners in this case are protected in their employment by the Janitors' Tenure Act (Chapter 44, P.L. 1911) which reads in part:

> "No public school janitor in any municipality or school district shall be discharged, dismissed or suspended, nor shall his pay or compensation be de-

creased except upon sworn complaint for cause and upon a hearing had before such board."

Under Chapter 12, P.L. 1933, and amendments thereto effective until July 1, 1937, which modified the tenure salary provisions during that time, the salaries of petitioners were reduced. The legislature of 1937 did not continue the authority of boards of education to reduce the salaries of their employees after July 1, 1937, but due to the fact that the Board of School Estimate of the City of Trenton refused to appropriate a sufficient amount of money to make possible a full restoration of salaries, respondent passed a resolution which in effect reduces the salaries of all employees by 15% for the school year 1937-1938. On or about July 7, 1937, Mr. Kriser presented a petition to the Commissioner of Education and served a copy upon counsel for respondent, and on July 19th service was made of the petition of Thomas Clark, et al. Both petitions alleged that the board of education had no legal right to pass the resolution reducing the salaries 15% and ask that the resolution in so far as it affects the salaries of petitioners be set aside and that respondent be required to make payments when and as they become due on the basis of their full salaries.

The facts and laws in this case are in most instances identical with those of the case of Herbert H. Cole *vs.* Board of Education of the City of Trenton, decided this day by the Commissioner of Education, except that the latter is based upon the Teachers' Tenure of Office Act instead of the Janitors' Tenure Act, and that while Mr. Kriser filed his petition on the same day that the Cole petition was filed, that of Thomas Clark, et al. was not filed until July 20th, after they had received salary checks for work which began July 1st.

On the date of receiving checks, July 15, 1937, all of the petitioners signed and caused to be transmitted to the respondent the following:

> "We, the undersigned employees of the public school system of the City of Trenton, employed as janitors in said school system, do hereby protest against the salary reduction of 15% below our contractual salaries made by you for the school year 1937-1938, and for which we have this date received the first payment.
>
> "This is to advise you that said payment is accepted under protest, and as payment on account of the full contractual salary due us.
>
> "We further advise you, that the acceptance and cashing of the checks recevied by us from you, as aforesaid, is not to be deemed or regarded as a waiver of the contractual and legal amount due us."

The courts have considered the Teachers' Tenure Law to have been enacted by the Legislature as a public policy for the welfare of the schools, and the Janitors' Tenure Act to be one of personal privilege which might be waived by the acceptance of a definite term contract. When there is no waiver, as in the present case, the courts have indicated the constitutionality of the act by holding janitors to be protected against reduction of salary or dismissal, except as provided in the act. Ratajczak *vs.* Board of Education of Perth Amboy, 114 N.J.L. 577, unanimously affirmed by the Court of Errors and Appeals, 116 N.J.L. 162, and Shepherd *vs.* Seaside Heights Board of Education, 15 Misc. Rep. 394.

Mr. Kriser's petition was filed within one week after the beginning of the school year and a week before a salary check was offered to him. He had filed a

similar petition prior to July 1st, which was held to have been presented prematurely. (Decision of Commissioner of Education dated June 22, 1937). There appears to be no valid basis for holding that Mr. Kriser waived any rights by undertaking his duties on July 1st and filing his petition on July 7th.

Thomas Clark, et al. gave notice to the board on the same day the salary checks were received that they were accepting the lesser amount under protest and did not consider their action as constituting a waiver of their right to contractual salaries.

Counsel for respondent cites the case of Edmondson *vs.* Jersey City, 48 N.J.L. 121, which makes reference to Love *vs.* Mayor and Aldermen of Jersey City, 40 N.J.L. 456, as suporting his contention that petitioners by beginning work with knowledge of the board's resolution of April 1, 1937, waived any rights they may have had to contest the validity of the resolution or their rights to full contractual salaries. In the latter case, Mr. Love was elected city collector of Jersey City and after legislation permitting a reduction in his salary, it was fixed at a lower amount, which he accepted in monthly warrants for the remainder of the term, and after its expiration brought suit for the difference between the original amount and that which he was paid. The court held:

> "A public officer is no less strongly bound by his active consent to the terms of his employment, where he has *every month received his salary at the reduced rate,* with nothing more than an informal notice to some member of the board of finance and taxation that he shall claim a greater compensation. He had the simple remedy in his own hands, if he felt aggrieved by the action of the legislature and board of finance. If he continued in office his acquiescence establishes his consent to the terms fixed by the board."

and in the case of Edmondson *vs.* Jersey City, where salary had been accepted for several months in an amount less than that petitioner contended was due him, the court ruled:

> "If, after the act of 1884, he continued to accept monthly payments at the rate of $1,390 per annum, it is evidence of his assent and agreement with the commissioners to receive his salary at a rate less than that fixed by the law of 1873."

It is to be noted that in the Love case salary payments had been received every month for a substantial part of his term as collector without protest to the employing board, and in the Edmondson case several monthly payments had been similarly accepted. These cases are, therefore, not in point with the instant case where protest was made to the employing body on the very day that the reduced salary checks were received. Moreover, in the instant case, the statute had definitely determined the salary to be paid, so that the petitioners had a legitimate right to believe that regardless of the fact a resolution had been passed which proposed to reduce salaries, other action might be taken by the board so that salaries would be fully restored. That semi-monthly payments based on full salaries would not be made could not have been definitely known until the checks were actually received; therefore, a protest and a petition were not required prior to that time in order to protect petitioners' rights.

In a much later case than those of Love and Edmondson and more nearly in point; namely, Muhlenbeck *vs.* Town of West Hoboken, 99 N.J.L. 198, the plain-

tiff was elected collector of taxes of the Town of West Hoboken and his salary having been fixed by ordinance at $4,000 per annum and he having been paid $2,750, brought suit for the balance of the yearly salary. At the trial the defense interposed was that plaintiff had entered monthly bills of $250 for full satisfaction of his salary under agreement with the town that he accept $3,000 per annum in lieu of the salary fixed by ordinance. No contract was offered in evidence nor was there proof of any resolution or other municipal action which could be construed as an acceptance of the alleged contract for a reduced salary. The trial court granted a non-suit on the theory that a contract existed and that plaintiff's conduct in sending vouchers for the reduced amount was a waiver of a right to exact more than the amount of such voucher. The court reversed the trial court and held:

> ". . . . in the absence of the competent legal proof of a waiver, tantamount to a contract, the plaintiff's right to recover the unpaid salary may be accepted as legally established."

In the case of Rose *vs.* American Paper Company, 83 N.J.L. 707, Justice Trenchard in delivering the opinion of the Court of Errors and Appeals said:

> "To constitute an accord and satisfaction in law, dependent upon the offer of the payment of a less sum than that claimed, it is necessary that the money should be offered in full satisfaction of the demand and be accompanied by such acts or declarations as amount to a condition that if the money is accepted it is to be in full satisfaction, and be of such character that the creditor is bound to understand such offer."

The salaries of petitioners, being protected by statute and there being no evidence to show that salary checks or letters accompanying them contained any declaration amounting to a condition that if they were accepted they would be in full satisfaction of any obligation due, petitioners did not waive any rights to full salaries by rendering service and accepting under protest on the same day they were received salary checks in lesss amount than that claimed to be due.

Respondent sets forth the same reasons and arguments for holding petitioners are without valid claim to their full contractual salaries as are presented in the Cole case, and for the reasons set forth in the decision of the Commissioner in that case and those expressed above in relation to the Janitors' Tenure Act and the question of waiving protection under it, the resolution of April 1, 1937, as it relates to the reduction of the salaries of petitioners, is held to be invalid. The Board of Education of the City of Trenton is hereby ordered to pay to each of the petitioners when and as due the proportionate part of his full contractual salary, and also to pay the difference between the amount which has been paid for work performed during this school year and that which each would have received if payments had been based upon fully restored salaries.

September 23, 1937.

Decision of State Board of Education

The questions at issue in this case are substantially the same as those referred to in the accompanying memorandum in the case of Cole *vs.* the Trenton Board of Education. The Commissioner has held that the petitioners, janitors in the Trenton

schools, to the number of sixty or more, should be paid at the rate named in their contracts at the time their salaries were reduced and that they did not waive their rights by accepting, under protest, payment of the reduced amounts. We agree with the Commisioner's conclusions in these cases also and recommend that his decision be affirmed.

March 12, 1938.

Modified by *New Jersey Supreme Court,* 122 N.J.L. 323.

TENURE TEACHERS PROTECTED AGAINST SALARY REDUCTION IN ABSENCE OF LEGISLATIVE AUTHORITY

LINA M. BELLANY, *et al.,*

Petitioners,

vs.

BOARD OF EDUCATION OF THE TOWN OF HAMMONTON, ATLANTIC COUNTY,

Respondent.

For the Petitioner, Clifford A. Baldwin.

For the Respondent, Bolte & Miller (C. Arthur Bolte, of Counsel).

DECISION OF THE COMMISSIONER OF EDUCATION

The principals and teachers represented in this petition have been protected in their posttions under the provisions of the Tenure of Office Act from and prior to 1931, and no charges have been made against them for causes set fourth in Section 18:13-17 of the Revised Statutes. Subsequent to the time when Chapter 12, P.L. 1933 and amendments thereto were operative (July 1, 1933 to July 1, 1937) the petitioners waived expressly for the year 1937-1938 a part of their contractual salaries; but when reductions from such contractual salaries were suggested by the board of education for the year 1938-1939, a controversy ensued and the board was notified that nothing in the way of a waiver of their rights for that year was to be assumed against the petitioners, pending an agreement in relation to salaries, and that any payments received were to be applied merely on account of the annual contractual salaries until such time as an agreement should be reached. It was decided by the petitioners that the proposed reduction in salaries could not be accepted, and an action was instituted before the Commissioner of Education for the full contractual salaries for the school year 1938-1939.

The respondent contends:

(1) The financial condition of the district is just cause for the reduction of salaries of the petitioners, due to the fact that an economic depression still exists in the Town of Hammonton.

(2) The budget is not sufficient for payment of full contractual salaries and the amount necessary cannot be raised by taxation since a proposal for the restoration was defeated by the legal voters of the Town of Hammonton.

(3) Petitioners are guilty of laches and are estopped from protesting since action was not taken when the budget for the year was passed by the legal voters in February, 1938.

(4) The provisions of the Teachers' Tenure Act are intended to protect individuals from arbitrary and unjust action, but do not prevent a reduction applicable to all consistent with anticipated revenues, and that reductions made in good faith for effecting economy are legal.

While the evidence shows that the Town of Hammonton is in poor financial condition, there is no statute which authorizes the board of education to declare the existence of an economic depression so as to relieve it from financial obligations imposed by legislative action. The Legislature in its modification of the provisions of the Tenure Act between July 1, 1933 and July 1, 1937, set forth that an emergency existed in the State. The Legislature had authority to declare an emergency and to relieve boards of education of obligations during its declared prevalence.

Chief Justice Hughes in delivering the opinion of the Supreme Court of the United States in Home Building and Loan Association *vs.* Blaisdell, 290 U. S. Supreme Court Reports, 398, said:

> "Emergency does not create power. Emergency does not increase created power, or remove or diminish restrictions created or power reserved."

When the Legislatue refused to declare an emergency existed, the board of education or city officials were without power to "remove or diminish restrictions" and were bound by the laws prescribed by the Legislature for school districts.

Justice Perskie in delivering the opinion of the Court in the case of Steck et al. *vs.* Board of Education of the City of Camden, which opinion was filed August 14, 1939, said:

> "It was in pursuance of the permissive right granted by the aforesaid enabling acts (Chapter 12, P.L. 1933 and amendments thereto) that prosecutor was empowered to reduce, by resolutions, salaries of its teachers between July 1, 1933 and July 1, 1937. But when, as here, that permissive right lastly expired on July 1, 1937, prosecutor could not thereafter bring it to life and invoke it in support or justification of its exercise. It simply was non-existent."

Accordingly, regardless of the financial condition of the school district, there was no authority to reduce the salaries of petitioners for the school year 1938-1939.

The fact that the board of education submitted for the approval of the voters a budget insufficient to provide funds for full contractual salaries, or that at a subsequent election the voters refused to make additional appropriation for that purpose has no effect upon the rights of the petitioners to contractual salaries for the year 1938-1939. There may have been ways of re-organizing the schools so as to have brought the amount necessary for salaries within the budget, but even if a re-organization could not have effected such a result, the Legislative protection of petitioners in their contractual salaries was thereby not annulled. The Supreme Court in the Steck case supra, in which the facts in relation to the contractual salaries are on all fours with the instant case, held that the teachers were entitled to the basic or contractual salary which they enjoyed prior to the time when reductions were made.

There is no valid ground for holding that the petitioners are guilty of laches and are estopped from protesting the action of the board for the reason that they did not appeal immediately after the budget was passed in February, 1938. It was not the obligation of the petitioners to determine whether sufficient funds had been authorized to meet all of the school expenditures, including their full contractual salaries. The petitioners could not be assumed to know the plans of the board in reference to the reorganization of other expenditures to determine the inadequacy of the budget. Their protest was in ample time when made as early installments became due, and since the evidence shows that the board had full knowledge that salary installments in less than the amount claimed to be due were being accepted by the petitioners under protest, the acceptance of such payments does not relieve the board of its obligation for the full contractual salaries.

The decisions of the courts do not appear to support the contention that boards may reduce salaries of employees as a group consistent with anticipated revenues, if the action is taken in good faith. In the Steck case, Justice Perskie referring to the contention that reductions were necessitated because of the stringent financial condition of the district, said:

> "It appears to us that all this is beside the point. The question here is not whether prosecutor acted in good faith or bad faith. Conceding, in our view of the case, that prosecutor acted in good faith, the question still remains whether prosecutor's action in reducing respondent's salary, in the manner stated, can be supported or justified under the law. We do not think so."

The Justice sets forth, further, that the enabling acts expired July 1, 1937, and that the salaries of teachers protected by the Tenure of Office Act could be reduced thereafter only upon proved charges of "inefficiency, incapacity, conduct unbecoming a teacher or other cause."

The Board of Education of the Town of Hammonton was without authority to reduce the salaries of petitioners for the school year 1938-1939, and it is, therefore directed to pay to petitioners the difference between the amount of salary each received for the school year 1938-1939, and that which each would have received if full contractual salaries had been paid.

September 22, 1939.

Decision of State Board of Education

The Hammonton Board of Education appeals from the Commissioner's decision that it was without authority to reduce the salaries of the principals and teachers who filed their petition in this proceeding and directing the board to pay the appellees the difference between the amount of salary each received for the school year 1938-1939, and that which they would have received if full contractual salaries had been paid.

At the time of the reduction of these salaries, the permission to make such reductions, granted by enabling acts passed by the Legislature in 1933 and subsequent years had expired. The appellant board contends that economic conditions and the financial situation of the Town of Hammonton justified the reduction, notwithstanding the provisions of the tenure of office statute.

The Commissioner holds that the decision of the Supreme Court in the case

of Steck *vs.* the Camden Board of Education must govern the decision of the present proceeding. In that case, the Court affirmed the decision of this Board and the Commissioner to the effect that the permissive right to reduce salaries conferred by the enabling acts, above referred to, having expired the salary reductions in force up to July 1, 1937 could not be questioned. After careful consideration of the brief of the counsel for the appellant, who did not request oral argument, we see no distinction between this case and the Camden case. . .

Appellant's attempt to sustain its position on the ground that the stringent, financial condition of Hammonton justifies the salary reductions by virtue of the clause "or other just cause" in the tenure statute, is without foundation, in our opinion. In the Steck case the Supreme Court specifically held to that effect in the same situation. In reference to the section in question (R.S. 18:13-17) and the clause thereof which provides that the salary of a school teacher can be reduced only after proved charges of "inefficiency, incapacity, conduct unbecoming a teacher or other just cause," it said that the language there used "is unambiguous; it is clear; it means just what it says." "Under such circumstances there is no reason in law for judicial construction." (Steck *vs.* Camden Board Education, 8 Atl. Rep. (2d) 124.)

Appellant also invokes the decision of the Supreme Court in Adams *vs.* Plainfield, 109 N.J.L. 280 (affirmed 110 N.J.L. 377). It was there held that the city authorities of the City of Plainfield could reduce the salaries of certain city employees under the provisions of the statutes defining the right of such officials in that respect. The provisions of the teachers' tenure statute are not comparable to those considered by the Court in the case cited and therefore that decision, and others to the same general effect cited by the appellant, cannot affect the holding in the Camden case. . .

Furthermore, it is provided in the teachers' tenure statute (Sec. 18:13-19) that the number of teachers in a district may be reduced when the reduction is due to a natural diminution of the number of pupils in the district. It seems clear that if the Legislature had intended to permit the reduction of teachers' salaries by municipalities in straitened financial circumstances as well as the number of unnecessary teachers, it would have so provided. Another indication that stringent financial conditions were not intended to permit salary reductions is the further fact that it was deemed necessary to pass the acts which authorized such reductions between 1934 and 1937. The position of the board of education and of the municipal authorities of Hammonton can well be appreciated but, as the Supreme Court held, the statute is clear and cannot be escaped.

The appellant also contends that the proceeding was barred by Chapter 200 of the Laws of 1938, a six months' statute of limitations. In our opinion, this statute is not in point since the reduction in salary by the Hammonton Board was not made pursuant to a statute of this State.

As we agree with the conclusions of the Commissioner on these and the other contentions of the appellant passed on in his decision, it is recommended that it be affirmed.

January 13, 1940.

IN ABSENCE OF SALARY SCHEDULE, GRANTING OF SALARY INCREASES IS WHOLLY WITHIN DISCRETION OF BOARD OF EDUCATION

SYLVIA LIVA,

Petitioner,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF LYNDHURST, BERGEN COUNTY,

Respondent.

For the Petitioner, Herman Marx.

For the Respondent, William F. Gallagher of the Teachers' Committee.

DECISION OF THE COMMISSIONER OF EDUCATION

The respondent board of education on April 11, 1939, adopted a resolution presented by the Committee on Teachers' Salaries which reads as follows:

> "Chairman Gallagher offered a plan for teachers' increases totalling $2,765.-00. It provides an increase of approximately $25.00 for each year of service, using $1,200.00 as the elementary school basic salary and approximately $16.00 for each year of service using $1,500.00 as the high school basic salary as per the following schedule . . . . "

This resolution includes the names of teachers in the elementary school receiving between $1,200 and $1,500, and teachers in the high school receiving between $1,500 and $1,600. The name of petitioner, who is married and receives a salary of $1,200, was not included and she was not granted the increase which was given to the single teachers. It is admitted by the board members testifying at the hearing in this case that Mrs. Liva did not receive the increase due to the fact that she is married.

Petitioner asks that the resolution of 1938 granting the salary increments be adjudged to be discriminatory and illegal on the allegations: (1) That it is in violation of a salary schedule adopted by the board of education in 1928 an still in effect: (2) That it is discriminatory against married female teachers and, therefore, in violation of the Fourteenth Amendment to the United States Constitution.

The Legislature in 1925 enacted Chapter 238, P.L. 1925, which later became Section 18:13-10 of the Revised Statutes and reads as follows:

> "18:13-10. No discrimination based on sex shall be made in the formulation of a scale of wages, compensation, appointment, assignment, promotion, transfer, resignation, dismissal, or other matter pertaining to the employment of teachers in any school, college, university, or other educational institution supported in whole or in part by public funds. Where any such school, college, university, or other educational institution is open to members of one sex only, teachers of that sex may be employed exclusively."

At the time of the passage of this act, higher salaries were paid to men than to women equally qualified and performing the same type of teaching service. The purpose of the statute was to prohibit salary discrimination based on sex. It has no

application to the marital status of a teacher. While the schedule of 1928 makes no reference to sex and is accordingly in compliance with Chapter 238, P.L. 1925, it appears to be the contention of petitioner that she has some rights to increments under it. Rights could accrue to the petitioner only on condition that the salary schedule is still in effect and there has been discrimination based on sex.

Salary schedules are a part of the rules of the board of education and must formally or tacitly be adopted by succeeding boards in order to give teachers rights under them. There is no evidence of any formal or tacit adoption of the 1928 salary schedule since 1930; but on the contrary, its repeal by implication is clearly established by the failure of the board to make any increments in accordance with the 1928 rules after the year 1930, together with the fact that the board adopted rules in 1938 and 1939 delegating to the Teachers' Committee the recommendation as to salary increases when it provided, as follows:

> "Article V. Teachers' Committee. . . . . shall be empowered to recommend to the board of education the appointment of any teacher providing such applicant possesses the necessary qualifications after consulting the Supervising Principal, shall recommend the increase or decrease of compensation, transfer, promotion, dismissal, or other change in status of any member of the faculty personnel."

It is the opinion of the Commissioner that no salary schedule exists in the School District of the Township of Lyndhurst, but that the increments given for the year 1939-1940 were based upon the recommendation of the Teachers' Committee and prescribed for that year without any subsequent application. This resolution does not constitute a salary schedule as contemplated by Section 18:13-10 of the Revised Statutes.

The State Board of Education in the case of Morgenweck *vs.* Board of Education of Gloucester City, at page 422 of the 1938 Compilation of School Law Decisions, said:

> ". . . . In our opinion what is contemplated by the language of the statute above quoted, is the formulating (putting into an established or permanent form) of a scale or schedule of wages which is to have prospective operation, with or without definite annual increments for certain positions or employments, the adoption of which would deprive the adopting board of education in fixing future salaries in conflict therewith, except by formal amendment or repeal of the action adopting the scale or schedule. . . . In the present case it appears the respondent board, in adopting the salaries for the year 1929-1930, was acting independent of any action by its predecessor boards of education and according to its judgment and discretion."

The statute does not require that a board of education adopt a salary schedule, but prohibits sex discrimination subsequent to March 21, 1925. In relation to this, the Supreme Court in the case of Regan et al *vs.* Board of Education of the City of Elizabeth, 109 N.J.L. 1, said:

> "It is the 'formulation of a scale of wages' after the passage of the act (March 21, 1925) with which the statute deals. There is no direction by the statute to local boards of education to formulate a scale of wages placing men and women on the same wage level, but rather a command that 'in the formulation' that is to say, when in the future the board shall undertake the

'formulation of a scale of wages,' there shall be no discrimination based on sex."

No evidence is submitted to show an increase in salary to a male married teacher under the resolution of April 11, 1939. The discrimination under the April, 1939, resolution is based upon the marital status of the teacher. Since there is no salary schedule in effect in the Lyndhurst public schools, the sole question remaining is the right of a board of education to discriminate as between married and single women in giving salary increments.

The State Board of Education in the Morgenweck case, above cited, in which there is alleged discrimination due to sex and marriage, said:

> "Inasmuch as it is our opinion the respondent board was under no duty or obligation to increase the salary of any particular teacher, the motive which actuated the members of the board in their official action in failing to grant increases to the appellants, cannot be inquired into and evidence of actual or supposed hostility to married teachers was irrelevant."

and the Supreme Court in the case of Downs et al *vs.* Hoboken, 12 N. J. Misc. 348, in referring to discrimination based upon marriage and residence, said:

> ". . . . . we cannot say, even though they dismissed married or non-resident women teachers, giving preference in continued employment to residents of the district and to those who would normally be dependent upon themselves for livelihood that such action was an abuse of discretion or evidence of bad faith."

There is no statute prohibiting discrimination in the fixing of salaries as between married and unmarried female teachers. In the absence of such statutory provision, the State Board of Education in the Morgenweck case and the Supreme Court in the Downs case indicate that "discretion" resides in the board of education. Under the conditions in this case, the Board of Education of the Township of Lyndhurst is not required to increase the salary of the petitioner. The petition is accordingly dismissed.

August 9, 1939.

Decision of the State Board of Education

Appellant, Sylvia Liva, a teacher in the employ of respondent board of education who is, by reason of length of service in that district within the protection of the teachers' tenure law, filed a complaint with the Commissioner of Education that on or about April 11, 1939, respondent adopted a plan for increases in the salaries of certain teachers to be paid during the school year 1939-1940, and did not include her in the number of teachers to whom an increase was granted. That her exclusion was because she was married and that such exclusion constituted unlawful discrimination. She prays that respondent be ordered and directed to grant her an increase in salary upon the same basis as the other elementary teachers who were granted increases, or, that the resolution granting salary increases be adjudged to be discriminatory and void. The Commissioner of Education concluded she was not entitled to relief and dismissed the petition and she appeals.

There is no salary schedule in operation in respondent district. In June, 1928,

rules were adopted which fixed minimum and maximum salaries for elementary school and high school teachers, but made no provision for periodical increments. In 1938, and in 1939, rules were adopted which empowered the Teachers Committee to recommend

> "The increase or decrease of compensation, transfer, elevation, dismissal or other change in status of any member of the faculty personnel."

It has been the practice for the district clerk to prepare from year to year for submission to the board by its Teachers Committee a schedule or list of teachers in the employ of the board and a recommendation of the salary each is to receive during the ensuing year. This course was followed in the present instance and the resolution of April 11, was adopted in pursuance thereof. The action was substantially the same as that followed in the case of Morgenweck *vs.* Board of Education of Gloucester City, 1938 Compilation of School Law Decisions, where on page 422, in language quoted by the Commissioner of Education, this Board held such action not to be the adoption of a salary schedule within the purview of Chapter 28, P.L. 1925, which prohibits discrimination by reason of sex in the formulation of scales of wages of teachers.

There being no salary schedule in effect by force of which appellant was entitled to increase in salary for length of service or otherwise, the granting of increases in salary was wholly within the discretion of respondent board of education. The resolution complained of recites no reason or basis upon which the increases granted were voted. It apears that, in the discussion preceding the adoption of the resolution, it was agreed by a majority of the members that the increases to be granted should be limited to teachers who were in the low salary bracket, under tenure and unmarried, although the board was not unanimous in these views. There were sixteen teachers, who, although unmarried and in the low salary bracket did not receive increases because they were not under tenure. Evidence of discussion before the adoption of the resolution was admitted over protest and objection. The objections were well taken. The motive which actuated a member of the board in his vote is irrelevant. In the case of Morgenweck *vs.* Gloucester City hereinbefore referred to, it was said

> "Inasmuch as it is our opinion the respondent board was under no duty or obligation to increase the salary of any particular teachers, the motive which actuated the members of the board in their official action in failing to grant increases to the Appellants, cannot be inquired into and evidence of actual or suposed hostility to married teachers was irrelevant."

Although the act of the board in the present case was administrative in character rather than Legislative, it may be appropriate to quote the Court of Errors and Appeals of New Jersey, in a case where the motives of the members of a municipal council were questioned. Said the Court

> "It remains to say a word upon that view of the case which assumes that it is within the judicial province to protect constituencies from the 'recreancy' of their representatives by undoing Legislation that evinces 'bad faith.' To which the answer is—first, that the power so to intervene has wisely been withheld from the judiciary; secondly, that if the power existed, its exercise would be most mischievous, and lastly, that the redress of the betrayed constituent is

in his own hands, to be sought at the polls and not in the Courts." Moore *vs.* Haddonfield, 62 N.J.L., page 391.

Appellant further contends the action of respondent in adopting the resolution complained of its invalid in that it denies to her the equal protection of the laws and therefore violates Art. XIV, sec. 1 of the Constitution of the United States, which provides:

"Nor shall any state * * * * deny to any person within its jurisdiction the equal protection of the Laws."

The resolution is one within the express power of respondent board. It contains no provision discriminating against married women as a class or individually, and the motives, reasons, and considerations which move the members of the board to vote for its adoption not being a proper subject of inquiry, the constitutional prohibition has no application.

It is recommended that the decision of the Commissioner of Education be affirmed.

January 13, 1940.

Affirmed by *New Jersey Supreme Court,* 126 N.J.L. 221.

SALARY SCHEDULE ADOPTED BY PRECEDING BOARD MAY BE ABROGATED BY FAILURE OF SUCCEEDING BOARDS TO OBSERVE A RULE RELATING TO SALARY INCREASES

THOMAS A. FRASER, *et al.,*

Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,

Respondent.

For the Petitioners, Eisenberg & Spicer.

For the Respondent, Robert H. Doherty.

DECISION OF THE COMMISSIONER OF EDUCATION

The petitioners are fifty-three teachers, employees of the Board of Education of the City of Jersey City in the County of Hudson. It is admitted that these teachers have acquired tenure, that they are holders of proper teachers' certificates in full force and effect, and that none of them has been charged with inefficiency, incapacity conduct unbecoming a teacher, or other just cause for disciplinary action as provided by R. S. 18:13-17. Two separate petitions, each on behalf of individual teachers, were filed originally. These two petitions, by stipulation, have been consolidated into a single action, entitled as above.

The petitioners allege that on May 8, 1929, the respondent adopted rules and regulations governing the engagement and employment of teachers, their salaries, and the mode of payment thereof; that the petitioners are entitled to the payment of their salaries in the amount and in the manner provided by the rules and regulations

adopted by the respondent; and that the respondent has unlawfully refused and still refuses to abide by and conform to the rules and regulations adopted by it in respect to the amount of salary payable to the petitioners, and has unlawfully withheld from the petitioners a part of the salary to which they were and are severally entitled.

The petitioners pray that an order be made by the Commissioner of Education, directing the respondent to make payment forthwith to the several petitioners of the difference between the salary paid to each by the respondent and the salary to which each claims to be entitled for the school years 1937-1938 and the school years subsequent thereto, pursuant to the rules and regulations adopted by the respondent; to make payment forthwith to the several petitioners of the respective salaries of each of them at the rate of salary provided in the rules and regulations adopted by the respondent as determined by such rules and regulations; and to compel the respondent in the future to abide by and to conform to the provisions of the rules and regulations adopted by it in respect to the payment of salaries of the petitioners.

The respondent denies that the petitioners are entitled to moneys over and above the sums which they have received and are presently receiving and alleges that the petitioners were paid their salaries in full. It denies the adoption or existence of a salary schedule which is automatic in operation during the period of time claimed by the petitioners, and alleges that, if a salary schedule calling for increases was in effect at any time, such increases were not automatic and that conditions precedent to their becoming operative and effective in the case of the appellants for the period of time claimed were never met.

The respondent alleges that, if a salary schedule calling for automatic increases was in effect at any time, it expired or was revoked, or rescinded prior to the time covered by the claims, by operation of law, by its abandonment by separate boards of education, or by the conduct of the separate boards inconsistent with the existence of the salary schedule.

The respondent further alleges that the petitioners by written agreement with it waived and released all rights to salary from February 1, 1937, to July 1, 1939, in excess of the salary actually received during that period of time; that petitioners, having accepted such payments of salaries as were made to them, in full payment of their salaries and without protest or disavowal, and such payments having been made as and for payment in full satisfaction of claims for salaries, there was a complete accord and satisfaction; and that petitioners are barred from presenting this action for the reason that they are guilty of laches.

This case is brought before the Commissioner by a stipulation of facts and by testimony taken at hearings conducted by the Assistant Commissioner of Education in the Court House at Jersey City. Briefs were submitted wherein counsel for the petitioners argued in support of the following propositions, and counsel for the respondent presented arguments in refutation thereof:

I. The undertaking of the respondent to pay salaries to the petitioners in the manner provided by the schedule of May 8, 1929, was contractual in nature, and the respondents' alleged repeal or rescission of the schedule violates Article I., Section 10 of the Constitution of the United States.

II. The respondent has no power under the statutes of this State to make any change of its rules or regulations disadvantageous to tenure teachers.

III. The respondent's salary schedule is still in full force and effect.

IV. The petitioners have not waived or released their rights.

V. The petitioners are qualified for increments under the salary schedule.

VI. The petitioners did not enter into an accord and satisfaction with the respondent.

VII. The petitioners are not guilty of laches.

It apears from the stipulation that on May 8, 1929, a general schedule of teachers' salaries was adopted to become effective September 1, 1929. This schedule provided for minimum and maximum salaries and annual increments. To be eligible for promotion to the next higher grade of salary, it was required that the teachers have a written recommendation made to the board of education by a committee consisting of the Superintendent of Schools, the local committee, and the principal of the school in which the teacher last taught. In the case of the principals, the written recommendation of the superintendent and the local committee was required. The promotions did not become effective until the board of education approved the recommendations by the affirmative votes of at least five members of the board of education. On September 1, 1936, the board made some changes in the membership of the recommending committee, but retained the requirement that increases in salaries should be made only by the board of education upon the favorable recommendation of the superintendent and a committee.

From 1922 to June, 1933, it is agreed that the procedure for carrying into effect the foregoing was as follows: The principal of the school signed a "Certificate of Promotion" based upon the evidence of efficiency shown by the teacher, which was approved or disapproved by the superintendent of schools and the committee on schools. The board of education would then act upon these recommendations. It is further agreed that the superintendent of schools, having been advised by the board of education that no increases would be forthcoming, prepared no certificates of promtion after June, 1933, and the procedure for making increases was discontinued. The following is an excerpt from a resolution of the board of education adopted on June 15, 1939:

> "BE IT FURTHER RESOLVED, that the policy of this Board to grant increments, up to a certain maximum, in teachers' salaries shall not be deemed to be restored under this resolution, and that such restoration shall await the further action of this Board. . . . ."

The stipulation discloses that there were instances during the period under litigation when the board of education and the superintendent used the words "salary schedule" in the proceedings of the Board and in the administration of the schools. At each organization meeting of the respondent from 1921 to date, a resolution was passed continuing the old rules in force until new rules were adopted by the new board. The stipulation reveals that not all teachers were granted yearly increases. For a typical year (1932-1933) the teachers failing to be promoted were classified as follows:

Not promoted because of absence
Not promoted because of inefficiency
Promotion witheld because of inefficiency—granted later
Not promoted because of failure to sign waiver card.

On January 28, 1937, the respondent distributed, and the teachers signed at the request of the board, a document whereby the teachers agreed "for valuable consideration and in further consideration of the voluntary deductions authorized by other employees . . . . to the making of which these presents are considered an inducement" to authorize a voluntary deduction from their salaries for the period from February to June 30, 1937, and from July 1 to December 31, 1937. The following excerpt is taken from the document:

> ". . . and I hereby expressly waive any and all claims or demands whatsoever in and to all the moneys deducted as aforesaid and all my right, title and interests therein; and I hereby voluntarily contribute the total of the above deductions to the said Board of Education of the City of Jersey City, New Jersey."

Similar documents were signed for the period from January 1, 1938, to December 31, 1938, and for the period from January 1, 1939, to June 30, 1939. Testimony was adduced by the petitioners purporting to show that these documents were signed under duress and the respondent presented testimony to refute the allegations.

The first contention of the petitioners is that the respondent's alleged repeal or rescission of its salary schedule violates Article I., Section 10 of the Constitution of the United States. The Commissioner of Education has repeatedly declined to decide constitutional questions. A full discussion of his reasons may be found in the decision of the Commissioner in the case of Hering *vs.* Secaucus, 1938 Compilation of School Law Decisions, 828, and in the decision of the State Board of Education in the case of Phelps *vs.* Board of Education of West New York, 1938 Compilation of School Law Decisions, 427. The State Board of Education declined recently to decide a similar question raised in the case of Offhouse *vs.* Board of Education of the City of Paterson.

Petitioners argue in the second proposition that the respondent has no power to make any change in its rules disadvantageous to tenure teachers. The Commissioner in determining this issue considers himself bound by the decision of the Court of Errors and Appeals in the case of Greenway *vs.* Board of Education of the City of Camden, 129 N.J.L. 461, wherein the Court said:

> "It is maintained that the 'true intention' of a schedule of increments is that 'the teacher's annual compensation shall be the average or mean between the minimum and maximum salaries stated in the schedules;' and that this is the essence of the 'bargain' between the teacher and the local board. The argument pre-supposes that the protection of sec. 18:13-17, *supra.,* covers not alone the current salary, but extends as well to all future increases of salary, regardless of the number or amount provided in a salary schedule enacted as a mere rule or regulation of the district board. This would mean that the action of one board providing for salary increases *in future* would bind all its successors. The statute is not so framed. The legislature has not invested the local boards with contractual power of such sweep. Such an interpretation would constitute a palpable distortion of the letter and spirit of the enactment. It is one that is not to be accepted in the absence of language admitting of no doubt of that purpose. A rule providing for increments is a mere declara-

tion of legislative policy that is at all times subject to abrogation by the board in public interest. . . . ."

The petitioners' third proposition is that the respondent's salary schedule is still in full force and effect. They argue that the board of education must change, amend or repeal its rules and regulations as authorized by R. S. 18:13-5 and that it cannot permit a salary schedule to become inoperative and ineffective by mere failure to act in accordance with it. It is the opinion of the Commissioner that the decision of the State Board of Education in the Offhouse case, *supra.,* is dispositive of this issue. The State Board said:

> "Appellants further contend that the salary schedule of respondent did not lapse; that it was not rescinded by operation of law, or abandoned. The cases cited by appellants on this point in support of their argument are not, in our opinion, applicable. It is established law that the rules and regulations of a non-continuous body, such as a board of education, organized under our statutes, do not bind successor boards unless they are expressly adopted or tacitly by acting thereunder. The evidence in the instant case conclusively shows that the several boards of education since July 1, 1933, have not observed the rule relating to salary increases, in fact, by their disregard of such rule it may be said it was abrogated by 'negative action.'"

The Supreme Court took a similar view in the cases of Liva *vs.* Board of Education of the Borough of Lyndhurst, 126 N.J.L. 221, and in Greenway *vs.* Board of Education of the City of Camden, supra.,

The petitioners further contend that, even if the State Board is correct in the opinion quoted above from the Offhouse decision, it has no application to the instant case in that the respondent each year continued its rules and regulations in full force and effect by resolutions adopted at successive organization meetings. The Supreme Court held in the case of Regan *vs.* State Board of Education, 109 N.J.L. 1, affirmed 112 N.J.L. 196, that a similar resolution adopted by the Elizabeth Board of Education was merely a parliamentary motion and that such a motion did not have the effect of creating a new schedule each year. Since the resolution contained in paragraph 27 of the stipulation does not refer specifically to the continuation of a salary schedule, it is the opinion of the Commissioner, based upon the Regan case, *supra.,* that the resolution is merely a parliamentary motion and has not had the effect of keeping alive the provisions of the salary schedule.

The petitioners maintain that the respondent gave evidence of express or tacit recognition of the existence of a salary schedule in its minutes contained in paragraphs 10, 12, and 14 of the stipulation. The respondent in its brief does not claim the non-existence of the salary schedule of 1929, but does claim that the provisions of the salary schedule as to yearly increases have not been in effect since 1933. Respondent cites the resolution of the board adopted on June 15, 1939, to the effect that "the policy of this board to grant increments, up to a certain maximum in teachers' salaries shall not be deemed to be restored under this resolution" to prove that the salary schedule as to increments had become inoperative. Further support of this contention is found in paragraph 48 of the stipulation, wherein it is stated that the superintendent discontinued the preparation of certificates of promotion after June, 1933, because the board advised him that no increases would be forthcoming. The Commissioner takes the view that, if, in accordance with the

opinions of the Supreme Court and the State Board of Education, all the provisions of a salary schedule may be abrogated by "negative action," then one provision of the schedule may be so abrogated.

Moreover, even if the salary schedule did remain in existence, progress on the schedule could take place only by a vote of a majority of all the members of the board of education upon the favorable recommendation of the superintendent of schools, the local committee, and the principal of the school. Previous reference has been made to the fact that this procedure was not followed subsequet to June, 1933. The petitioners argue that the recommendation of the superintendent was merely a ministerial act and, therefore, was not a prerequisite for advancement on the schedule. According to the petitioners, satisfactory service is the sole condition precedent to advancement on the salary schedule.

A similar question was raised in the Offhouse case, *supra.* In this connection the State Board of Education said:

> "It is further argued by appellants that satisfactory service was actually the sole condition for advancement on the salary schedule and they empassize the testimony of the superintendent of schools that whenever a report upon a teacher was favorable, he recommended an increase of salary. Appellants conclude from this fact that the recommendation by the superintendent was wholly perfunctory and ministerial. It appears, however, the superintendent did consider the principal's report upon the teacher and his determination, that he or she was entitled to an increase in salary, involved an exercise of judgment and the same is true of the committee on education. There is nothing in the rules and regulations which makes satisfactory service the sole condition for granting an increase; whereas, the imperative condition therein contained is the recommendation of the superintendent and the committee on education. The superintendent's statement that no funds were available for increases in salary was true and whatever else may have influenced his decision, that was a valid ground for his failure to make a recommendation."

The petitioners maintain that the Commissioner, in deciding the instant case, is controlled by Weber *vs.* Board of Education of Trenton, 127 N.J.L. 279, rather than by Offhouse *vs.* Board of Education of Paterson, *supra.,* with reference to qualifying for yearly increases in salary. The Commissioner in the Offhouse case, in deciding that the salary schedule of the Paterson Board of Education was not automatic in operation, distinguished between the situation in that case and in the Weber case, *supra.* Since the Commissioner is of the opinion that the instant case is similar to the Offhouse case with respect to the granting of yearly increases, he considers it unnecessary to repeat the discussion of that issue in this decision.

The foregoing disposes of the petitioner's claim that, despite the emergency statutes in force from July 1933 to July 1, 1937, authorizing local boards of education to reduce the salaries of tenure teachers, the progression of the teachers on the salary schedule was not interrupted so that, for the school year 1937-1938, they were entitled to their 1932-1933 salaries plus the aggregate of increments which they claimed had accrued during the period of the emergency legislation. Since the Commissioner has decided that the salary schedule of the Board of Education of Jersey City is not automatic and since it is further agreed that the conditions precedent to increases during this period were not met, it is the opinion of the Commissioner that the petitioners are not entitled to increments for the period

covered by the emergency legislation. It is not necessary to decide whether the petitioners would have continued to progress on the schedule during this period if the schedule had been automatic in its operation.

In the fourth proposition contained in their brief, the petitioners argue that they have not waived or released their rights. They contend that teachers cannot waive their rights to salary because it is against public policy for them to do so. Justice Heher in the Greenway case, *supra.,* said:

> "It is vigorously contended, that the judgment is directly opposed to public policy. Such policy must needs be of legislative ordination; it can have no other derivation."

In enacting Chapter 119, P.L. 1937, which is still in force and effect, the Legislature clearly indicated that there was no legislative policy against the voluntary authorization of deduction from the annual salary or compensation by school employees. This statute permits members of the Teachers' Pension and Annuity Fund of the State of New Jersey, or any employees' fund, who voluntarily authorize salary deductions, to pay their pension contributions on their full salary and permits the members, or their beneficiaries, to receive benefits on the basis of the full salary.

The Supreme Court in the Weber case, *supra.,* held that:

> "School teachers may waive their right to a portion of their salary. A teacher, in the public school system, having acquired tenure, may not suffer a reduction in salary except by waiver or as the legislature may provide."

In the case of VanHoughton *vs.* Englewood, 124 N.J.L. 425, involving patrolmen who sought to recover salary for years in which they accepted less than their normal salary, the court said:

> "We believe that the plaintiffs in the cases at bar, by their acceptance of salary paid until September 20th, 1938, and even until December 31st, 1938, are estopped and have waived their right to any claim for a larger salary for the year 1938; and even if they now contend that the action of the municipality was improper, they entered absolutely and unreservedly into cooperative sacrifice for the common good in a time of great public danger and widespread anxiety. Based upon such acceptance the City of Englewood made its budget and assessed its taxes. To permit the plaintiffs now to repudiate their action of accepting their salaries and giving a receipt in full for the payments made, would upset all that the city has done in reliance upon their acceptance of pay at these rates. These plaintiffs, appointed to the force in December, 1931, had accepted throughout the entire term of their services, a salary which, because of the difficult times, was less than they would have had in normal times. They had done this voluntarily for 1937, the city no doubt reasonably understood they would do this voluntarily in 1938, and made its annual budget and other fiscal arrangements accordingly. These plaintiffs accepted the pay at that rate for the greater part of 1938, receipting for it twice a month 'in full for all services.' By their action in 1938, in the light of their action in prior years, they have agreed, or are estopped to deny that they have agreed, that for the year 1938 their salary should be $2,100, and they cannot now claim or be awarded in these suits any additional pay for that year, and hence their judgments for the year 1938 will be reversed, with costs."

The Court of Errors and Appeals took a similar view in VanderBurgh *vs.* County of Bergen, 120 N.J.L. 444.

In view of the act of the Legislature and the decisions of the courts cited above, the Commissioner is of the opinion that it was not against public policy for the petitioners to accept less than their normal compensation.

It remains to consider the argument that the waivers are void because they were obtained under duress. The petitioners contend that duress may be economic as well as physical. In support of their contention, they cite Muller *vs.* Esiele, III N.J.L. 268, and Pompton Stationery Corporation *vs.* Passaic County News Company, 127 N.J.L. 235, and affirmed 129 N.J.L. 99. In the Muller case, the Court said:

> "We are constrained by the weight of authority to adopt the view which holds that to constitute duress which in contemplation of the law will recognize as sufficient to make or render a payment of money involuntarily there must be some actual or threatened exercise of power possessed, or supposed to be possessed, by the party exacting payment, from which the party making the payment has no other means of immediate and adequate relief of his person or of his property."

After weighing the evidence in the light of the rule laid down by the court in the case cited above, the Commissioner concludes that the petitioners have not established economic duress within this rule.

Since the Commissioner has reached the conclusion that the petitioners, by reason of the fact that the salary schedule as to increments has been inoperative, are not entitled to increments and since the Commissioner has reached the further conclusion that the waivers signed by the petitioners were valid, it is not necessary to decide the other questions raised and argued in this case. The petition is dismissed.

September 16, 1943.

Decision of the State Board of Education

The facts involved in the controversy in this case have been fully stated in the decision of the Commissioner of Education. He has dealt with the contentions advanced on behalf of the appellants and finds them to be without merit. We agree with his conclusions. The decision of the Commissioner of Education is affirmed.

January 7, 1944.

Affiirmed by *New Jersey Supreme Court,* 132 N.J.L. 248, 133 N.J.L. 15.

Affirmed by *New Jersey Court of Errors and Appeals,* 133 N.J.L. 597.

SALARY SCHEDULE MAY BECOME INOPERATIVE BY FAILURE OF SUCCESSIVE BOARDS OF EDUCATION TO ACT IN ACCORDANCE WITH IT

CHARLES D. OFFHOUSE, *et al.*,

Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF PATERSON,

Respondent.

For the Petitioners, Eisenberg & Spicer. (Jerome C. Eisenberg, of Counsel)

For the Respondent, Harold D. Green.

DECISION OF THE COMMISSIONER OF EDUCATION

The petitioners are three hundred fourteen teachers and principals employed by the Board of Education of the City of Paterson in the County of Passaic. It is admitted that all have acquired tenure protection.

The petitioners allege that the Board of Education of the City of Paterson in July, 1927, adopted a salary schedule providing for regular annual progression from a stated minimum salary to a stated maximum salary, the amount of compensation dependent upon the number of years of employment by the Board. The petitioners charge that since 1932 the respondent has refused to pay salaries according to this schedule, and seek an order from the Commissioner of Education directing the Board of Education of the City of Paterson to pay the difference between the salaries actually received by them and the salaries to which they claim they are entitled under the salary schedule, and further directing the respondent to abide by the schedule in the future.

The petitioners contend that increments, which are conditioned solely upon satisfactory service, are part of a teacher's salary and hence the failure of the respondent to pay an increment is tantamount to a salary reduction. It is further contended that the power of a board to "change, amend or repeal" its rules under provisions of R. S. 18:13-5 cannot be legally invoked to alter a salary schedule so as to withhold increments from teachers and principals under tenure. According to petitioners' interpretation of the pertinent statute, only the Legislature can empower a board of education to withhold increments provided by a salary schedule from employees under tenure.

Petitioners make no claim for the difference between the salaries provided by the schedule and the amounts actually received by them during the years 1933 to 1937, since legislation was enacted empowering boards of education to reduce the salaries of tenure teachers during that period. The petitioners do claim, however, that on July 1, 1937, they had advanced five stages on the salary schedule and that for the year 1937-1938 and for subsequent years they are entitled to increments prescribed in the salary schedule based upon their respective number of years of service in the district as if legislation empowering salary reductions for the years 1933 to 1937 had never existed.

The respondent contends that the salary schedule did not provide for automatic increments, but rather that from 1905 to 1932 the recommendation of the Super-

intendent of Schools had been a condition precedent to the payment of salary increases. Furthermore, reduction of Board of Education's budgets by the Board of School Estimate for the school years from 1931-1932 to 1940-1941, inclusive, left the school system without sufficient funds for its operation during the period under litigation. Consequently, the respondent was prevented from granting increases in salaries since the school year 1931-1932 and the petitioners were precluded from receiving such increases. The respondent further contends that by reason of the fact that no board of education in existence since July 1, 1933, and particularly since 1937, had revived the salary schedule which had become inoperative from 1932, no board in existence since 1937 was bound legally to make payments under the terms of the schedule.

The evidence discloses that the Board of Education of Paterson from April 28, 1905, to July 14, 1937, adopted several salary schedules and amendments thereto. Exhibit P-6, found on page 8 of the "First Day's Record" gives a resolution adopted by the Board of Education of the City of Paterson under date of July 14, 1927, providing for new maximum salaries as of July 1, 1927. The following is an excerpt from this resolution:

> "AND BE IT FURTHER RESOLVED: That all other rules and regulations which have governed increases of salary in the past shall continue in full force and effect."

The schedule of July 14, 1927, was in fact an amendment to a schedule adopted by resolution of the Board of Education on October 13, 1921. This resolution is marked P-1 and is found on page 8-A of the "First Day's Record." The following quotation appears on page 8-I of the same day's record:

> "The rules which have governed salary increases and promotional certificates in the salary schedule of 1906 and 1916 shall be continued, subject to such modifications as may be necessary to adjust them to the new salary schedule."

The 1916 schedule, to which reference is made in the above-mentioned quotation, was adopted on July 10, 1916 and is entered on page 1899 of the "Fifteenth Day's Record" as Exhibit R-51-A to C. The following excerpts from this resolution may be found on pages 1902 and 1903 of the same day's record:

> "RESOLVED: That the requirements for teachers' licenses as found on pages 278 and 289 inclusive, in Annual Report of 1918, be adjusted to the figures in the new salary schedule; and be it further
>
> "RESOLVED: That the salary schedule as recommended be adopted and become effective September 1, 1918, subject to such adjustment and subject to the approval of the Board of School Estimate."

The pages of the Annual Report of 1918, referred to in the salary schedule of July 10, 1918, constitute Exhibit R-52-A to D which appears on page 1911 of the "Fifteenth Day's Record." The following is quoted from this report:

> "The salary of a principal or teacher shall not be increased except on the recommendation of the Superintendent and the Committee on Education, and the increases in salary carried with License No. 6 shall become effective on the first of the month following the filing of evidence of the completion of all requirements entitling the teacher to such certificate. Adopted October 27, 1911."

It appears from the testimony that the present Superintendent of Schools has served in the Paterson school system as superintendent and principal for forty years and has been Superintendent of Schools since 1905. He testified that during this superintendency up to 1932, the recommendation of the Superintendent and Committee on Education was necessary for a teacher to receive an increase in salary. The secretary of the Board of Education, who was assistant secretary from December, 1913, and has been secretary since December, 1930, testified to the same effect.

The testimony reveals that the Superintendent of Schools in 1932 discontinued recommendations to the Board for increases in teachers' salaries in the terms of the salary schedule, and the Board of Education granted no such increments after 1932. The secretary of the Board testified that available funds were not sufficient to pay scheduled increases.

It has been held by our Supreme Court that a board of education may amend or repeal a salary schedule. In the case of Wilton D. Greenway *vs.* Board of Education of the City of Camden, decided September 17, 1942, it was held that the Camden Board of Education had a right so to do. The following are the pertinent quotations from this decision:

> "The question before us in this certiorari proceeding is whether a board of education may suspend or repeal its salary schedule as to increments in the case of a teacher who has tenure. The Commissioner of Education decided that a board of education has power to do so with which conclusion the State Board of Education concurred. Its decision is before us for review. We are in accord with that view. . . .
>
> "The failure to receive an increase in salary does not constitute a reduction. . . . We find no statutory provision requiring boards of education to adopt a salary schedule or schedule of increments. We think that if such schedules are adopted that they are not irrepealable. . . . In the absence of statutory inhibitions we think that boards of education have the power to enact and to repeal salary schedules, in fact, it has an express right to do so under N.J.S.A. 18:13-5, supra. . . . A teacher with tenure has a legislative status but not a contractual status which may not be modified."

It remains to be decided whether the "Schedule of Teachers' Salaries" adopted by the Board of Education of the City of Paterson on October 13, 1921, effective September 1, 1922, and amended on July 14, 1927, effective September 1, 1927, was operative during the period under litigation.

The resolutions of the Board of Education hereinbefore mentioned included a provision that the recommendation of the Superintendent of Schools and Committee on Education was a condition precedent to the granting of a salary increase to a teacher or principal. It appears from the testimony that since 1932 appropriations were not made for salary increases. It also appears that since 1932 the Superintendent of Schools has made no recommendations to the Board of Education for increases as provided in the salary schedule. The Board of Education has granted no salary increases under the schedule since 1932 and consequently the salary schedule became inoperative during the year 1932-1933 and during subsequent years.

In the case of Sylvia Liva *vs.* Board of Education of the Borough of Lyndhurst, decided March 15, 1941, the Supreme Court stated:

> "It is also urged that a salary schedule adopted by the local board on June 26, 1933, was still in effect, and thereunder prosecutor was entitled to an increase in salary. The uncontradicted evidence is that no increases in salary based on the 1928 schedule were granted after 1930 to any teacher. The reviewing authorities held that the local board, having failed either to adopt or to act under the 1928 schedule for many years, it was not in effect. We agree with this conclusion."

In the Greenway case, supra, the salary schedule was suspended for the *whole year of* 1937-1938 by action of the board. There was no formal action to suspend the schedule for the years 1938-1939, 1939-1940, and 1940-1941, but no increments were paid to the teachers during these years. On January 27, 1941, the Board of Education of the City of Camden formally abolished the schedule. The Commissioner in discussing this action made the following observation:

> "The resolution of January 27, 1941, abolishing salary schedules appears to be somewhat superfluous since prior suspensions made them inoperative and denials of increments since 1937 gave further proof that no salary schedule was in effect."

The decision in the Greenway case points to the fact that the Supreme Court took a similar view when it held:

> "So it seems that when the resolution was adopted on January 27, 1941, abolishing the salary schedule, it was unnecessary because of the previous action in suspending same."

The petitioners rely upon the opinion of the New Jersey Court of Errors and Appeals in the case of Addie L. Weber, et al. *vs.* Board of Education of the City of Trenton, decided September 19, 1941. After considering the applicability of the Weber case to the issues involved in the Greenway case, previously decided, the State Board of Education reached the following conclusion:

> "The case of Weber *vs.* Board of Education of Trenton, decided September 19, 1941, involved the attempt of the Board of Education of Trenton to deny to teachers an increment which had become vested as provided by its salary schedule. The salary schedule was admitted to be in force and effect and, it cannot be denied, that so long as that fact continues to exist, increments provided thereunder become due and payable 'in the various stages of time spaced by the schedule.' The question whether a board of education was empowered under the School Law to abolish the salary schedule was not an issue; and observations of the Court, which were not necessary to the decision of the controversy before it, are obiter dicta, and not controlling in subsequent adjudications. Crescent Ring Co. *vs.* Travellers Idemnity Co., 102 N.J.L. 85, on p. 89."

This opinion was affirmed by the Supreme Court as follows:

> "The prosecutor chiefly relies on Weber *vs.* Board of Education of the City of Trenton, 127 N.J.L. 270. In that case the court held that 'annual increments were integral part of the salaries, effective when the designated year of service had been attained, and having been the contract with the teachers'. The Weber case is clearly distinguishable from the case at bar because the

> increase there had become effective as the school year had already started so that the increment bound up with the work of that year made an integral element in the whole situation, which state of fact does not obtain here."

It is the opinion of the Commissioner that the Weber case is likewise distinguishable from the instant case. The Board of Education of the City of Trenton admitted that the salary schedule was in force and effect and also that the recommendation of the Superintendent of Schools was not a condition precedent to receiving an increment under the schedule. In the instant case, the *Board of Education of the City of Paterson* did not admit that the salary schedule was in force and effect, and, in fact denied that the schedule had been in operation since 1932. The said Board maintained that the recommendations of the Superintendent of Schools and the requisite appropriations by the Board of School Estimate were required for the granting of salary increases. In the Weber case, the Board of Education of the City of Trenton granted increments to some teachers and withheld them from other teachers. In Paterson, after the year 1932, no recommendations were made by the Superintendent of Schools and no increases in salary were granted by the Board of Education.

In the case of Louisa S. DeOlden *vs.* Board of Education of the City of Paterson, decided on November 17, 1938, the Commissioner held that

> "the salary schedule which was in effect in the City of Paterson prior to July 1, 1933, has been inoperative since that time."

After examining the evidence in the instant case, the Commissioner sees no reason to change his previous determination.

On the facts appearing in the evidence and in accordance with the decisions cited above, the Board of Education of the City of Paterson was within its powers in allowing its salary schedule to lapse. Since it is the opinion of the Commissioner that the salary schedule became inoperative, the petitioners are not entitled to increments. Having reached this conclusion, it is not necessary to rule upon other questions presented and argued. The petition is hereby dismissed.

January 18, 1943.

Decision of the State Board of Education

This is an appeal of 314 teachers, principals and supervisors of the public schools of the city of Paterson, all of whom are under tenure, from a decision of the Commissioner of Education.

The appellants alleged that respondent has adopted rules and regulations governing the employment of teachers and principals, the terms and tenure of their employment, promotion and dismissal, and their salaries and the time and mode of payment thereof, and that the appeallants are individually entitled to the payment of their salaries in the amount and in the manner provided by said rules. The respondent refuses to abide by and conform to the rules and regulations adopted by it in respect to the amount of salary payable to appellants and has unlawfully withheld from them a part of the salary to which they are and were severally entitled, despite the demands and objections of appellants.

They pray an order be made requiring and directing respondent to pay to the

several appellants the difference between the salary paid to each by respondent and the salary to which each claims to be entitled pursuant to the said rules and regulations and to make payment to the several appellants of the respective salaries of each of them at the rate of salary provided in the rules and regulations of respondent as determined by such rules and regulations and to compel respondent in the future to abide by and conform to the provisions of the said rules and regulations in respect to the payment of salaries to the appellants.

Respondent denies it has unlawfully withheld any salary payable to the appellants and denies they are entitled to any moneys over and above such sums as they are presently receiving.

It denies the adoption of a salary schedule which is automatic in operation; the existence of a salary schedule since July 1933; and alleges that its salary schedule was revoked or rescinded by operation of law, or it lapsed and is of no force or effect or it was abandoned.

Voluminous testimony was taken before the Assistant Commissioner of Education, consisting of 3368 pages, numerous exhibits were offered, and extensive briefs filed by appellants and respondent, all together imposing a great burden upon both the Commissioner of Education and the reviewing court. It should be remembered that the procedure prescribed by the Legislature for the determination of controversies arising under the School Law is intended to be simple and inexpensive, R.S. 1937, 18:3-14, and counsel in such cases should endeavor to reduce to a minimum the examination of witnesses and the creation of a record. By a conservative estimate, at least three fourths of the typewritten record in this case consists of argument of counsel as to the competence of evidence offered and colloquy between counsel and court. An earnest effort by counsel to agree upon facts involved will do much to reduce the size of a trial record and the expense to litigants.

The rules and regulations of respondent referred to are those which comprise a schedule of salaries to be paid to teachers, principals, and supervisors employed by it. The schedule was adopted October 13, 1921, page 6-A of record, and amended July 14, 1927, page 8-J of record, and provided for salaries beginning at a stated minimum and increasing annually until a stated maximum had been attained.

The salary schedule adopted October 13, 1921, and amended July 14, 1927, replaced earlier schedules embodied in rules and regulations governing salaries of teachers, which rules and regulations contained, either by incorporation in the rule or by reference, a provision, in effect, that the salary of a principal or teacher should not be increased except on the recommendation of the superintendent and the committee on education. See record pp. 8-8A-1899-1902-1903-1911-1914. These excerpts from the rules are set forth at length in the decision of the Commissioner of Education.

It was contended by appellants that the right of a teacher to the annual increases or increments depended wholly on the rendition of satisfactory service; that such annual increments are an integral part of the salary, and that respondent was without power to withhold them from teachers under tenure, as such withholding would be tantamount to a reduction in salary.

The Commissioner of Education held that the salary schedule of respondent was not automatic in operation; that the recommendation of the superintendent of schools and committee on education was a condition precedent to the granting of an increase and that such had been the unbroken practice for many years until

July, 1933, after which no recommendations for increases in salary were made and none were granted, the respondent having no funds available for that purpose.

He held further that the salary schedule in the instant case had not been in operation since July 1933, that appellants were not entitled to increments, and he dismissed the petition.

Appellants maintain the decision of the Commissioner of Education should be in all respects reversed and they advance several grounds in support of their contention.

Appellants argue first, that the admission in evidence and consideration of the salary schedule, adopted October 13, 1921, Exh. P 1 to P 5, inclusive, and the amendment thereto, adopted July 1, 1927, Exh. P 6 and 7, as they appear in the minutes of respondent, was error and that the printed pamphlet Exh. P-8, which contains a list of the salaries to be paid to teachers in various grades and positions, is the only competent evidence of the content of the salary schedule; that the promulgation and distribution of the pamphlet creates an estoppel precluding respondent from asserting the conditions precedent contained in the resolutions of respondent, to the granting of a salary increment or increase to a teacher, inasmuch as such conditions precedent are not included in the matter set forth in the pamphlet.

In our views there is no merit in this contention. The resolution of respondent, containing the schedule of salaries adopted October 13, 1921, contained the statement that "the rules which have governed salary increases x x x in the salary schedules of 1906 and 1916 shall be continued." Likewise the resolution of respondent adopted July 14, 1927, amending the salary schedule of October 13, 1921, contained the provision,

> "That all other rules and regulations which have governed increase of salary in the past shall continue in full force and effect."

These references made the rules and regulations previously in force relating to the conditions precedent to the granting of increases in salary, a part of the resolutions of 1921 and 1927 and they having been admitted in evidence upon the offer of appellants, it was competent for the trial tribunal to receive further evidence of what the rules and regulations referred to contained relating to the conditions precedent to the granting of increases.

The printed pamphlet, Exh. P-8, it is true, contained a statement of the salaries appertaining to the various teaching positions in respondent's system, but it did not purport to be a copy of a resolution of which the schedule is a part. The resolution was a public record and open to the examination of any person interested. There was no duty upon respondent to publish its proceedings other than by its official minutes. The resolution was not an offer to induce persons to contract with respondent, but merely the exercise of a power conferred upon it by the Legislature to provide for its own guidance and convenience. The pamphlet is entitled "General Statement of Application of New Salary Schedule" and was doubtless issued by respondent for general information regarding salaries becoming effective by force of the resolution. There was no misrepresentation or concealment and no one was induced by it to act to his or her prejudice. There was no estoppel and the Commissioner of Education properly admitted and considered the Exhibits P-1 to 7 and the evidence of the conditions precedent to the granting of increases in salary.

It is next contended, the Commissioner of Education erred in holding there were conditions precedent to the rights to an advance on the salary schedule. This

argument is partly answered by the discussion of the first contention. Appellants point out that the resolution of July 14, 1927, provides

> "that teachers, etc., shall advance from their present salaries to the new maximum salary by the regular annual increment which has governed regular increase in salary for such teachers, etc., during the preceding five years";

and a further provision in the same resolution

> "that all other rules and regulations which have governed increase of salary in the past shall continue in full force and effect."

It is argued that the one provision is specific and the other general and that the specific should prevail.

It is indisputably established by the evidence that the invariable practice of respondent during nearly forty years past has been to grant increases of salary only upon recommendation of the superintendent of schools and its committee on education. Nor is there anything in the evidence to indicate that any teacher had a different understanding. The practical interpretation by respondent of its rules and regulations acquiesced in by all parties interested is determinative. The cases cited by appellants on this point relate to the interpretation of contracts. The rules and regulations of respondent are not contracts. The purpose of the quoted language is clearly to limit the right to increases in salary to those recommended by the superintendent and committee on education.

It is further argued by appellants that satisfactory service was actually the sole condition for advancement on the salary schedule and they emphasize the testimony of the superintendent of schools that whenever a report upon a teacher was favorable, he recommended an increase of salary. Appellants conclude from this fact that the recommendation by the superintendent was wholly perfunctory and ministerial. It appears, however, the superintendent did consider the principal's report upon the teacher and his determination, that he or she was entitled to an increase in salary, involved an exercise of judgment and the same is true of the committee on education. There is nothing in the rules and regulations which makes satisfactory service the sole condition for granting an increase; whereas the imperative condition therein contained is the recommendation of the superintendent and the committee on education. The superintendent's statement that no funds were available for increases of salary was true and whatever else may have influenced his decision, that was a valid ground for his failure to make a recommendation. Nor is failure to pay the annual increases provided by the schedule tantamount to a reduction in salary. The increments or increases provided by the salary schedule are not an integral part of the salary until they accrue under the rules and regulations making the provision. Greenway *vs.* Board of Education of the City of Camden. Decided January 22, 1943, Court of Errors and Appeals of New Jersey. No increment or increase in salary having been granted by respondent to any of the appellants upon the recommendation of the superintendent and the committee on education, appellants are not entitled thereto.

Appellants further contend the salary schedule of respondent did not lapse; that it was not rescinded by operation of law, or abandoned. The cases cited by appellants on this point in support of their argument are not, in our opinion, applicable. It is established law that the rules and regulations of a non-continuous body such as a board of education, organized under our statutes, do not bind successor boards

unless they are expressly adopted or tacitly by acting thereunder. The evidence in the instant case conclusively shows that the several boards of education since July 1, 1933, have not observed the rule relating to salary increases, in fact by their disregard of such rule it may be said it was abrogated by "negative action." The Commissioner of Education has dealt with this contention in his decision and we agree with his conclusion that the salary schedule has not been operative in respondent district since July 1, 1933.

Appellants further contend the case of Greenway *vs.* Board of Education of the City of Camden, 129 N.J.L. 46, is not controlling in the present case upon the question of the right of respondent to abrogate the salary schedule. The Supreme Court, in that case said:

> "The question before us in this certiorari proceeding is whether a board of education may suspend or repeal its salary schedule as to salary increments in the case of a teacher who has tenure. The Commissioner of Education decided that a board of education had power to do so with which conclusion the State Board of Education concurred. Its decision is before us for review. We are in accord with that view."

The decision of the Supreme Court was affirmed by the Court of Errors and Appeals on January 22, 1943. Court, speaking by Justice Heher, said:

> "We are in accord with the reasoning and result of the deliverance by Mr. Justice Porter for the Supreme Court."
>
> We deem further discussion on this point unnecessary.

Finally, appellants maintain the repealing, rescinding or revoking of the salary schedule insofar as it provides for increases, by respondent violates Art. 1, Sec. 10, of the Constitution of the United States.

This Board has repeatedly held it will not decide constitutional questions, where any doubt exists, deferring in that respect to the superior courts of law. Phelps *vs.* Board of Education of the Town of West New York, School Law Decisions, 1938, on page 428.

The decision of the Commisioner of Education is affirmed.

July 9, 1943.

Petition for Writ of Certiorari dismissed by *New Jersey Supreme Court,* 131 N.J.L. 391.

APPEAL TO COMMISSIONER INVOLVING APPROVAL OF CURRENT EXPENSE ITEM ON ANNUAL SCHOOL ELECTION BALLOT MUST BE MADE PROMPTLY

ROBERT A. DUNCAN, *et al.*,
IN RE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE BOROUGH OF EAST RUTHERFORD, BERGEN COUNTY.

DECISION OF THE COMMISSIONER OF EDUCATION

The petition filed in this cause was received by the Commissioner of Education on March 2, 1942, and is in the nature of a protest against the annual school election

held on February 10, 1942, in the School District of the Borough of East Rutherford. Proof of service of a copy of the petition on the Board of Education of the Borough of East Rutherford was received on March 6. The petition prays that the election be set aside as to "the alleged approval of the appropriation for current expenses for the school year 1942-1943."

Whenever failure to effect a favorable vote on appropriations occurs at the annual school election in a Chapter 7 school district, the legal procedures are prescribed in R.S. 18:7-81, 18:7-82 and 18:7-83, as follows:

> 18:7-81. "If the voters in a district shall reject the entire budget or any items of appropriation necessary to meet the annual cost of education in the district submitted at the annual district school election, the board shall within fifteen days submit again at a special district school election called for that purpose, the items rejected in the annual district school election. The items to be submitted at this special district meeting may be in the same or less amounts than those submitted at the annual election."
>
> 18:7-82. "Should the voters at the second election reject any of the items submitted, the governing body of the municipality in which the district is located, or in consolidated school districts the governing bodies of the municipalities comprising such school district, after consultation with the board, shall within ten days after receipt of the proposed school budget from the board of education, certify to the county board of taxation the amount or amounts which the governing body or governing bodies determine to be necessary to provide a thorough and efficient system of schools in the district. The amount or amounts so certified shall be included in the tax levied for such municipality or municipalities for such purposes."
>
> 18:7-83. "Should the governing body or bodies of such municipalities fail to certify to the county board of taxation within such time mentioned in section 18:7-82 of this title, an amount which in their judgment is necessary for any of the items which the voters had rejected at the second election, or should the governing body or bodies of the municipalities comprising a consolidated school district fail to agree and certify different amounts, then in either such case the commissioner shall determine and certify to the county board of taxation the amount or amounts which in his judgment shall be necessary to provide a thorough and efficient system in such district. The amount or amounts so certified shall be included in the tax levied for such municipality or municipalities for such purposes."

R. S. 18:7-81 requires that a rejected budget be resubmitted to the voters within fifteen days after its rejection. The time limits established in this statute and in the other two laws above quoted were fixed by the Legislature so as to insure a clear determination of the amount of local school tax to be raised for the ensuing school year in time for submission to the County Board of Taxation as required by R. S. 54:4-45.

An appeal of the kind found in the petition in this cause must be filed immediately after the school election or within sufficient time so that, with prompt disposition of the matter there may be compliance with requirements of pertinent laws. However, in this case, petitioners waited three weeks after the election before requesting the Commissioner of Education to invalidate it. Under these circumstances, it would have been impossible to have resubmitted the budget to the voters within

the period prescribed by R. S. 18:7-81, as well as insufficient time to effect with timeliness the provisions R. S. 18:7-82, 18:7-83 and R. S. 54:4-45, supra., should the budget have been resubmitted and again rejected. To permit delay in filing a protest in matters in which time is critically of the essence would lead to confusion and fiscal chaos.

The petitioners, must, therefore, be considered to be guilty of laches in not filing their protest with sufficient promptness. The plurality in favor of the current expense appropriation, as determined at the annual school election, is declared to be valid. The petition is hereby dismissed.

March 31, 1942.

WHEN THERE ARE TWO CLAIMANTS TO AN OFFICE, THE DISPUTED TITLE TO OFFICE CAN BE DETERMINED ONLY BY QUO WARRANTO

RUBY BENZ,

Petitioner,

vs.

BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY,

Respondent.

For the Petitioner, Leland P. Perry.

DISMISSAL OF PETITION OF APPEAL

The petition of Ruby Benz is dismissed for the reason that the Commisioner of Education lacks jurisdiction to determine title to an office. In the present instance there are two claimants to the office, one, the petitioner who claims the right to exercise the office notwithstanding the fact that the majority of the remaining members of the board of education found she had moved out of the school district; and, two, the new member appointed to fill out the unexpired term of the petitioner. The Commisioner finds that under the circumstances the only way in which this disputed title to office can be determined is by quo warranto.

December 15, 1944.

DECISION OF THE STATE BOARD OF EDUCATION

Ruby Benz, hereinafter referred to as "appellant" was elected a member of respondent in February, 1944, for a term of three years, and duly qualified as such member. In October, 1944, she became a resident of the Borough of New Milford, a municipality adjoining Teaneck.

On November 8, 1944, respondent, at a meeting held on that date, adopted a resolution, which, after reciting that appellant has ceased to be a resident of the territory embraced in the school district of the Township of Teaneck and has acknowledged she is now a resident of the Borough of New Milford and no longer a resident of the Township of Teaneck, and by reason thereof has vacated her office and ceased to be a member of the board of education of said last men-

tioned school district, that a vacancy existed in the membership of said board in the office formerly held by Mrs. Ruby Benz.

Thereafter appellant was denied participation in the proceedings of respondent and at a meeting of respondent held on November 27, 1944, it adopted a motion that a Mrs. Quigley be appointed to fill the vacancy existing in the Board.

Appellant conceiving the actions of the respondent herein referred to to be illegal and improper appealed to the Commissioner of Education. He deemed the question involved a contest between two contenders for an office and that the only way the title to the office can be determined is by quo warranto. He thereupon dismissed the appeal. Appellant appeals from that decision to this Board. We think the Commissioner of Education reached the right conclusion, although he might properly have retained jurisdiction. He is authorized to decide *"all* controversies and disputes arising under the School Laws, or under the rules and regulations of the State Board or of the Commissioner." The case of O'Brien *vs.* The Board of Education of the Town of West New York, reported in the 1938 compilation of School Decisions, page 31, is an instance of its exercise. The case of Koven *vs.* Stanley, 84 N. J. Law, page 446, where Justice Swayze, of the Supreme Court, held it was discretionary with that Court to issue a writ of quo warranto although the remedy under the School Laws had not been exhausted, does not deny jurisdiction in the Commisioner, but points out that the action of the Commissioner and the Board (on appeal) cannot be either final or effective; that the State Board cannot oust the incumbent of a public office.

In the present case there is an incumbent and a claimant to the office of member of the respondent board. Mrs. Quigley, the incumbent is not a party to these proceedings. She is entitled to be heard. No judgment, in these proceedings, affecting her status as a member of respondent is binding upon her.

Appellant should be referred to the only tribunal where her claim to the office in dispute can be speedily and finally determined. Du Four *vs.* State Superintendent 72 N. J. Law, on page 371 (375).

It is recommended the appeal be dismissed and the decision of the Commissioner of Education affirmed.

March 2, 1945.

BALLOTS SHOULD BE COUNTED IF PROPERLY MARKED IN THE SQUARES, EVEN THOUGH OTHER MARKS OR ERASURES APPEAR ON THE BALLOTS, UNLESS THE OTHER MARKINGS ARE INTENDED TO MAKE THEM OTHER THAN SECRET BALLOTS

IN THE MATTER OF THE RECOUNT OF BALLOTS CAST IN THE ANNUAL SCHOOL ELECTION IN THE TOWNSHIP OF UNION, UNION COUNTY.

DECISION OF THE COMMISSIONER OF EDUCATION

The following are the announced results of the annual meeting of the legal voters held on February 10, 1948, for the election of members of the Board of Education of the Township of Union in the County of Union.

Candidate	No. of Votes
George B. VanBuskirk	1138
H. Arthur Barnes	1106
Charles W. Hendry	1102
Philip Barnes	1096
George A. McCartney	1078
Harold J. Quis	1025

Philip Barnes and George A. McCartney petitioned the Commissioner for a recount on the grounds that sufficient ballots were counted or rejected erroneously to have changed the result of the election.

A recount was conducted by the Assistant Commissioner of Education on March 19, 1948, in the Union County Court House.

The following shows the result of the recount of the uncontested ballots:

Candidate	No. of Votes
H. Arthur Barnes	1066
Philip Barnes	1070
Charles W. Hendry	1066
George A. McCartney	1047
Harold J. Quis	984
George B. VanBuskirk	1113

One hundred forty-seven ballots were contested during the recount, but, by agreement of counsel, 10 of these ballots were voided. One hundred thirty-seven ballots were referred to the Commissioner for determination.

In a conference with counsel, the referred ballots were classified into categories and marked as follows:

EXHIBIT A. Check marks instead of cross or plus marks in the squares before the names of the candidates.

EXHIBIT B. Erasures and scratches in the squares before the names of certain candidates with cross or plus marks in the squares before the names of other candidates.

EXHIBIT C-1. No marks in the squares but cross marks to the right of the candidates' names.

EXHIBIT C-2. No marks in the squares but cross marks to the left of the candidates' names.

EXHIBIT C-3. No marks in the squares but check marks to the right of the candidates' names.

EXHIBIT D. Cross marks in the squares for two candidates and a cross mark to the left of the name of a third candidate but not in the square.

EXHIBIT E. One bar or diagonal line in the squares, but no cross or plus marks in the squares.

EXHIBIT F. Cross marks in the squares and also cross marks to the left of candidates' names outside the squares.

EXHIBIT G. A "2" and a "6" in the squares before the names of two candidates and either a "4" or a cross mark in the square before the name of a third candidate.

EXHIBIT H. Cross marks in the squares before the names of three can-

didates and a bar or diagonal line in the square before the name of a fourth candidate.

EXHIBIT I. Cross marks in the squares for three candidates and a "yes" to the left of the names of other candidates outside the squares.

EXHIBIT J. Cross marks in the squares for three candidates and a line drawn through the name of another candidate.

EXHIBIT K. Cross marks in the squares and also a mark which looks like a check mark.

EXHIBIT L. Doubtful markings—not included in the foregoing categories.

The following tabulation shows the number of votes which each candidate would receive, if all the ballots in the categories were counted:

		VOTES FOR					
Exhibit	No. of Ballots	Barnes H. Arthur	Barnes Philip	Hendry Charles W.	McCartney, Geo. A.	Quis Harold J.	Van Buskirk Geo. B.
A	41	20	18	22	24	19	18
B	27	8	20	4	21	6	21
C-1	5	1	4	2	3	1	4
C-2	1	1	0	1	0	0	1
C-3	1	0	1	0	1	0	1
D	1	0	1	0	1	0	1
E	2	1	1	2	1	1	0
F	1	0	1	0	1	0	1
G	1	0	1	0	1	0	1
H	1	0	1	1	0	1	0
I	1	0	1	0	1	0	1
J	1	0	0	1	0	1	1
K	17	8	8	6	11	6	11
L	37	25	10	26	14	25	9

Section 18:7-30 of the Revised Statutes reads in part as follows:

> "To vote for any person whose name appears on this ballot, mark a cross (×) or place a plus (+) mark with black ink or black pencil in the place or square at the left of the name of such person. To vote for any person whose name is not printed upon this ballot write or paste the name in the blank space and mark a cross (×) or a plus (+) mark with black ink or black lead pencil in the place or square at the left of the name of such person. Do not vote for more candidates than are to be elected."

The Commissioner has held in a number of cases that a ballot cannot be counted unless a cross or a plus mark appears in the square before the name because this is explicitly required by statute. See *In re. Annual School Election in Tabernacle Township, Burlington County,* 1938 *Compilation School Law Decisions, at p.* 190.

The Commisioner has held also that "in the absence of any provision in the School Law regarding other marks on the ballot or erasures, ballots should be counted if properly marked in the square even though other marks or ereasures appear on the ballot, unless the other markings are extremely irregular with intention to make it other than a secret ballot." *In re. East Rutherford Annual School Election,* 1938 *Compilation of School Law Decisions, at p.* 186.

While the General Election Law is not binding at any annual school election, the Commissioners of Education in counting and voiding ballots in school election controversies have looked to the General Election Law for guidance.

The referred ballots have been examined in the light of the foregoing.

EXHIBIT B. These ballots are properly marked for the candidates voted for, but cross or plus marks have been erased or scratched out by pencil in the squares before the names of other candidates. It is the opinion of the Commissioner that

the erasures and scratches were not used as a device to distinguish the ballots with the intention of making them other than secret ballots. Having reached this conclusion, these ballots must be counted. This determination is in line with the previous decisions of Commissioners of Education referred to in this decision and Section 19:16-4 of the Revised Statutes, which reads in part as follows:

> "No ballot which shall have, either on its face or back, any mark, sign, erasure, designation or device whatsoever, other than is permitted by this title, by which such ballot can be distinguished from another ballot, shall be declared null and void, unless the district board convassing such ballots or the county board, justice of the supreme court or other judge or officer conducting the recount thereof, shall be satisfied that the placing of the mark, sign, erasure, designation or device upon the ballot was intended to identify or distinguish the ballot."

EXHIBIT C-1, 2, 3. These ballots cannot be counted because there are no cross or plus marks in the squares to the left of the names of the candidates. See *In re. Clementon Township Annual School Election,* 1938 *School Law Decisions, at p.* 181. Also, see Section 19:16-3c of the Revised Statutes.

EXHIBIT D. This ballot has proper marks in the squares for two of the candidates, but the mark for the third candidate is not in the square. This ballot must be counted for the two candidates for whom it is properly marked, but cannot be counted for the candidate for whom it is improperly marked. See *In re. East Rutherford Annual School Election, supra., at p.* 186.

EXHIBIT E. This ballot has a diagonal mark, but no cross or plus, in the square. It cannot be counted for the reasons set forth under EXHIBIT C.

EXHIBIT F. This ballot is properly marked with a cross mark in the square, but also is marked with cross marks to the left of the candidates' names. This ballot must be counted because, in the opinion of the Commissioner, the extra cross marks were not intended to distinguish the ballot.

EXHIBIT G. There is a "2" in the square at the left of the name of one candidate and a "6" at the left of the name of another candidate. In the square before the name of a third candidate, there is a difference of opinion as to whether the mark in the square is a "4" or an "×". It is the opinion of the Commissioner that the mark is an "×" and that the ballot should be counted.

EXHIBIT H. A diagonal mark is in the square at the left of the name of one candidate and three proper marks in the squares before the names of three other candidates. It is the opinion of the Commissioner that the voter did not complete a vote for a fourth candidate and did not intend to distinguish his ballot by the use of the diagonal mark. For this reason, the ballot must be counted for the three candidates who are properly voted for.

EXHIBIT I. This ballot has proper markings in the squares for three candidates and the word "yes" to the left of the names of three other candidates. In the absence of any intention to use the word "yes" to distinguish the ballot, the ballot must be counted for the candidates properly voted for.

EXHIBIT J. This ballot is properly marked for three candidates, but a line was drawn through the name of a fourth candidate. This ballot must be counted. See *In re. Middlesex Borough Annual School Election,* 1938 *School Law Decisions, at p.* 162.

EXHIBIT K. The markings in the squares on these ballots appear as if one part

of the "x" is a check mark and the other part an ordinary stroke of an "x" mark or as an extra flourish on one part of the "x". All of them are crossed in the square. It should be noted that these ballots are rather evenly distributed among all the candidates. Such ballots have been counted in other recounts because the marks in the squares were deemed to be substantial crosses and not intended to identify the ballots. See *In re. Annual School Election in the Borough of Wood-Ridge, decided April* 2, 1947 (not published.) Also see Section 19:16-3g of the Revised Statutes.

EXHIBIT L. All these ballots have crosses or plus marks in the squares, but with peculiar markings of a type frequently observed in counting ballots. These peculiar markings are distributed among all the candidates and there is no reason to suspect that the peculiar markings are distinguishing devices. They must be counted for reasons set forth under EXHIBIT B.

Without considering ballots in EXHIBIT A, the following is the tabulation of the referred ballots:

	VOTES FOR					
	Barnes H. Arthur	Barnes Philip	Hendry Charles W.	McCartney, Geo. A.	Quis Harold J.	Van Buskirk Geo. B.
Ballots Recounted at Elizabeth	1066	1070	1066	1047	984	1113
Exhibit B	8	20	4	21	6	21
Exhibit D	0	1	0	0	0	1
Exhibit F	0	1	0	1	0	1
Exhibit G	0	0	0	1	0	0
Exhibit H	0	1	1	0	1	0
Exhiibt I	0	1	0	1	0	1
Exhibit J	0	0	1	0	1	1
Exhibit K	8	8	6	11	6	11
Exhibit L	25	10	26	14	25	9
Total	1107	1112	1104	1096	1023	1158

EXHIBIT A. All these ballots have check marks instead of an "×" or a (+) in the squares. By the provisions of Chapter 104, Laws of 1947, ballots with check marks in the squares must be counted in general elections. A bill introduced at the 1947 session of the Legislature, authorizing the use of check marks in school elections failed to become law. The use of check marks is not a determining factor in this election because, if all the ballots with check marks were added to the above tabulation, there would be no change in the relative order of the candidates.

It is the opinion of the Commissioner that George B. VanBuskirk, Philip Barnes, and H. Arthur Barnes were duly elected members of the Board of Education of the Township of Union, in the County of Union, at the annual school election held on February 10, 1948.

April 19, 1948.

RECOUNT OF BALLOTS CAST AT SPECIAL SCHOOL BONDING ELECTION

IN THE MATTER OF THE RECOUNT OF BALLOTS CAST AT A SPECIAL SCHOOL ELECTION IN THE TOWNSHIP OF TEWKSBURY, HUNTERDON COUNTY.

DECISION OF THE COMMISSIONER OF EDUCATION

A special meeting of the legal voters was held in the School District of the Township of Tewksbury on May 16, 1949, to vote on a proposal to purchase a plot of

ground and to erect thereon a new school building. The results of the election as announced show 311 votes for the proposal and 306 votes against it Three ballots were rejected in Polling District No. 2 for the reason that they were improperly marked.

Upon petition of ten taxpayers of the School District, there being no objection to the petition by the Board of Education of the district, a recount of the ballots cast in the special election was conducted by the Assistant Commissioner of Education in Charge of Controversies and Disputes on Thursday, June 2, 1949, at 7:00 P. M., in the Hunterdon County Court House.

After checking the results of the recount and examining the ballots referred to him for determination, the Commissioner is of the opinion that the election board counted the ballots correctly and that the three ballots not counted were properly rejected.

The twelve ballots which were referred to the Commissioner were classified into categories and marked Exhibits A, B-1 and B-2. These referred ballots have been examined in the light of precedents established in previous recounts by Commissioners of Education. While the General Election Law is not binding at any school election, Commissioners of Education in counting and voiding ballots in school election controversies have looked to the General Election Law for guidance.

EXHIBIT A. Three ballots with no plus, cross, or check mark in the squares or spaces opposite the words "Yes" and "No." Two of these ballots had cross marks over the "No" and one had a cross mark under the space opposite the "No." These ballots cannot be counted. Ballots without proper marks in the squares have always been voided in recounts by Commissioners of Education. In the case of Evans *vs.* Clementon Township Annual School Election, 1938 School Law Decisions, 181, the Commissioner said:

> "Even though it might be considered that the intent of the voter could be ascertained in the ballots, *they do not meet the statutory requirement of having the plus or cross mark in the square before the name.*"

This is in accord with N.J.S.A. 19:16-3g which reads in part as follows:

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

Also see Meyer *vs.* East Rutherford Annual School Election, 1938 S.L.D. 186; Annual School Election in the Township of Union, Union County, decided April 19, 1948; Annual School Election in the Borough of Lodi, decided May 23, 1948, Annual School Election in the Borough of Fairview, Bergen County, decided March 11, 1949.

While the word "space" is used in N.J.S.A. 18:7-47 instead of the word "square," the legal principle involved is equally applicable.

EXHIBIT B-1. Three ballots properly marked opposite the words "Yes" or "No" but with additional marks on the ballots. The word "Yes" was written on one ballot after the printed word "Yes" and there were cross marks over the word "No" on two ballots. These ballots will be counted because it is the opinion of the Commissioner that the marks on these ballots were not made with the intention of making them other than secret ballots. In a case involving a school election, the Commissioner held "that in the absence of any provision in the School Law re-

garding other marks on the ballot or erasures, ballots should be counted if properly marked in the square even though other marks or erasures appear on the ballot, unless the other markings are exeremely irregular with intention to make it other than a secret ballot." *In re. East Rutherford Annual School Election,* 1938 *Compilation of School Law Decisions, at p.* 186. The Commissioner's determination to count these ballots is in accord with N.J.S.A. 19:16-4, which reads in part as follows:

> "No ballot which shall have, either on its face or back, any mark, sign, erasure, designation or device whatsoever, other than is permitted by this Title, by which such ballot can be distinguished from another ballot, shall be declared null and void, unless the district board canvassing such ballots, or the county board, justice of the supreme court or other judge or officer conducting the recount thereof, shall be satisfied that the placing of the mark, sign, erasure, designation or device upon the ballot was intended to identify or distinguish the ballot."

Also, see *Annual School Election in the Township of Union, Union County,* decided April 19, 1948; *Annual School Election in the Borough of Lodi,* decided May 25, 1948; *Annual School Election in the Borough of Fairview, Bergen County,* decided March 11, 1949.

EXHIBIT B-2. Six ballots, five with crosses opposite the word "Yes" and one with a cross opposite the word "No," with additional peculiar markings. Such markings are frequently observed in counting ballots and do not void the ballots unless, in the judgment of the Commissioner, the eccentric markings are intended to identify the ballots. The Commisioner is satisfied that the voters did not intend to identify the ballots and they will be counted. See *Annual School Election in the Township of Union, Union County,* decided April 19, 1948; *Annual School Election in the Borough of Lodi, decided* May 25, 1948; N.J.S.A. 19:16-4.

The Commissioner finds and determines that 311 votes were cast for and 306 votes were cast against the proposal submitted to the voters at the special school election held in the School District of the Township of Tewksbury on May 16, 1949.

June 7, 1949.

DECISION OF THE COMMISSIONER OF EDUCATION ON PETITION FOR REHEARING

For the Petitioners, Henry F. Schenck

For the Respondent, Anthony M. Hauck, Jr.

On May 16, 1949, a special election was held in the Township of Tewksbury, County of Hunterdon, for the purpose of approving or disapproving the erection of a consolidated school. The results of the election as announced were 311 votes for the proposal and 306 votes against the proposal. A recount of the ballots cast in the election was held on Thursday, June 2, 1949. In a decision under date of June 7, 1949, the Commissioner of Education decided that the results as announced by the election officers were correct.

In asking for a rehearing, the petitioners say:

> "1. The decision in this matter is of vital importance in the first instance since it involves the issuance of bonds, the legality of which may be questioned

at a later date, and the entire proceedings upset for various reasons.

"2. Your petitioners duly filed a petition with the Commissioner of Education praying for a recount of ballots in the matter upon the ground, among others, that illegal votes were counted in a number which petitioners fairly believe sufficient to change the result of said election.

"3. On June 7, 1949, the Commissioner handed down his decision, but confined his findings to the question of whether or not said ballots were illegally marked, and no finding was made as to whether or not illegal votes were counted as alleged in the petition. The decision of the Commissioner was handed down without a hearing upon this phase of the matter.

"4. Your petitioners seek a rehearing upon the following grounds:

"(a) Illegal votes were cast in a number sufficient to alter the result of the election in accordance with the allegation contained in the original petition filed herein in that

"(1) They were cast by persons ineligible to vote by reason of conviction of disfranchising crimes pursuant to law.

"(2) They were cast by persons registered by a person or persons not qualified to register voters in accordance with law.

"(3) They were cast by persons not registered a sufficient length of time prior to said election in accordance with law.

"(4) They were cast by persons disqualified by non-residence within New Jersey, County of Hunterdon, as required by the New Jersey Constitution of 1947.

"(b) The ballots used at the election of May 16, 1949 called for the purchase of certain lands by said Township for the sum of $3,250.00, but said ballots did not inform the voters correctly and legally of the source of said funds, with the result that said voters could not correctly and intelligently vote upon the same.

"(c) The ballots did not conform to the requirements of Revised Statutes 18:7-47, in that statutory requirements with respect to the parallelogram were not complied with.

"(d) The entire ballot was confusing and unintelligible and by reason thereof it was impossible for the voters to vote intelligently thereon: For example, paragraphs (a) and (b) thereof were inconsistent in that paragraph (a) provides for the expenditure of $3,250.00 for the purchase of said land, including incidental expenses; and the construction, etc., of a schoolhouse among other things for a sum not exceeding $175,000.00. Paragraph (b), however, speaks of the raising of $175,000.00 as the 'said aggregate sum of $175,000. needed for said *purposes.*' (Underling ours)

"(e) The notices of said election required by law to be posted were insufficient in that they did not inform the voters whether the polls would be open from 4 P.M. to 8 P.M. on the basis of Eastern Standard Time or Eastern Daylight Saving Time.

"(f) The aforementioned ballots (both sample and official), did not inform the voters of the correct time for said election."

The respondent board of education, in its answer, contends that the petitioners should confine this appeal to the matters set forth in the original petition under

date of May 26, 1949, wherein they applied for a recount of ballots cast at the said special election, and that all matters set forth in the petition for rehearing, except for the question of the ballots not being legally marked, are not proper subjects for the petition. Respondent also contends that, according to the requirements of R. S. 18:7-89, the matters set forth in the petition should have been brought before the Commissioner within twenty days after the election.

Counsel for the respondent, in his memorandum to the Commissioner, maintains that to allow the introduction of any new evidence in the appeal of recount would be the equivalent of extending the time allowed for contesting the election, pursuant to R. S. 18:7-89, and would deprive the respondent board of its defenses.

Counsel for the petitioners states that no attempt is being made to introduce any new evidence on appeal. He contends that under the Rules of the Superior Court (Rule 3:15-2), which are a general guide, amendments may be made to pleadings where issues not raised by the pleadings are tried without objection of the parties at any time after judgment. He denies that petitioners are attempting to amend after the time referred to in R. S. 18:7-89 has elapsed. He alleges that proofs were introduced to show that the ballots were illegal. He alleges further that in the original petition claim was made that votes were illegally cast and that supporting evidence was offered at the hearing, that petitioners had two witnesses present, who inspected the election books in Hunterdon County, and were ready to testify that many of the votes cast were cast by persons illegally registered. He asserts, however, that the Assistant Commissioner rejected the testimony when it was offered.

Counsel for respondent counters with the statement that no attempt was made to introduce any testimony or to produce witnesses, that nothing took place officially except the recount of the votes, and that reference to illegal ballots consisted merely of an informal discussion with the Assistant Commissioner.

It is the opinion of the Commissioner that the original petition asked merely for a recount. The following is quoted from the original petition of appeal:

> "Your petitioners have reason to believe that errors were made in counting and declaring the vote upon said public question in that said ballots were improperly marked and illegal votes were counted in a number which your petitioners fairly believe sufficient to change the result of said election upon recount."

It should be pointed out that a recount and a contest of an election are two different things. This may be shown by referring to the General Election Law, Title 19, of the Revised Statutes, Chapters 28 and 29, which, while not binding in a school election, may be used as a guide. If the petitioners had desired to contest the election, they should have used the words "illegally cast" rather than "illegally counted," in the preceding quotation. The Commissioner interpreted the petition to refer merely to a recount, and the order for the recount, prepared by counsel for the petitioners and signed by the Commissioner, was confined to a recount.

It is the recollection of the Assistant Commissioner of Education in Charge of Controversies and Disputes, who conducted the recount, that no formal evidence was offered or rejected, and that no exceptions were asked by or granted to counsel for the petitioners. It is his recollection that the question of the parallelogram or illegal voting was discussed after the recount informally. However this may be, the Assistant Commissioner could not have heard testimony on any other point at

the hearing, even if such testimony had been formally presented, because the original petition falls completely short of the requirements to contest an election.

The requirements of a petition to contest an election are well established in the case of In re. Clee, 119 N.J.L. 310. A cardinal principal is that the pleading must be sufficient to permit the respondent to present his defense. *Supra.* 326. The petition should state in what districts the votes were illegally cast, how many were cast, the names of persons who voted illegally, *Supra.,* 324. It is also the duty of the contestant, alleging the reception of illegal votes or the rejection of legal votes, to make some effort to identify by description or otherwise and indicate in what districts illegal votes were accepted or legal votes rejected. It is the opinion of the Commissioner that the respondent could not be expected to prepare a defense for a contested election on a petition alleging merely that illegal votes were counted and legal votes were rejected.

Next must be considered petitioners right to amend under Rule 3:15-2 of the Supreme Court, which counsel for the petitioners says can be used as a guide in these proceedings. Rule 3:15-2 reads as follows:

> "When issues not raised by the pleadings are tried by consent or without the objection of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence."

This rule has been interpreted by the new Supreme Court in the case of Brown *vs.* Brown, 2 N.J. 252. In this case, Mr. Justice Burling, speaking for the Court, said at p. 255:

> "Liberal as our new rules are for the promotion of substantial justice, they still require that a defendant be fairly apprised of the claim he is called upon to meet. . . . While we are mindful of the fact that both under the former practice and under the new rules, liberality exists in the amendment of the pleadings even after judgment to conform to the evidence where issues not raised by the pleadings are tried by consent or without objection by the parties. Succhierelli *vs.* Suchierelli, supra., at pp. 36 and 37, this has never been construed to permit a litigant to plead and try his case upon one theory and then, if unsuccessful, advance another theory upon appeal."

The Commissioner's view is that the petitioners proceeded on the theory of a recount and, being unsuccessful, now wish to contest the election. After the recount, they could have contested the election by appeal to the Commissioner, if their grounds satisfied the requirements of the principles established in Clee *vs.* Moore, supra., and if the petition had been made within twenty days of the election.

R. S. 18:7-89 reads as follows:

"No action, suit, or proceeding to contest the validity of the election ordering the issue of bonds shall be instituted after the expiration of twenty days from the date of the election."

It is the opinion of the Commissioner that the petition for a contest is too late.

The petition fails to meet the requirements for a new hearing. The legal principles to be applied in determining an application for a rehearing are clearly set forth in the case of Helen Christie, Respondent, *v.* Joseph Petrullo, Appellant, 101 N.J.L. 492:

"1. A court will not grant a new trial upon the ground of newly-discovered evidence unless it be shown—first, that such evidence would probably have changed the result of the trial; second, that it was unobtainable by the exercise of due diligence for use at the trial; third, that the evidence is not merely cumulative.

"2. New trials are not favored. The law requires that litigants make the fullest preparation possible of their cases before trial."

No allegation is made that evidence unobtainable at the time of the original proceeding is now available.

The Commissioner concludes: (1) That the original petition asked for a recount and not a contest or investigation of an election; (2) that the time to institute a proceeding to contest the validity of a bonding election, pursuant to R. S. 18:7-89 has expired; (3) that granting the petition would be tantamount to extending the time allowed under R. S. 18:7-89; (4) that grounds for granting a rehearing do not exist. The petition is dismissed.

August 11, 1949.

Affirmed by State Board of Education without written opinion October 7, 1949.

Affirmed by Superior Court March 28, 1950—7 N.J. sup. 141.

DISTRICT CLERK ACQUIRES TENURE UPON COMPLETION OF THREE SUCCESSIVE TERMS OF OFFICE

GERARD DEPHILLIPS,

Petitioner,

vs.

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

Respondent.

For the Petitioner, Chandless, Weller and Kramer.

For the Respondent, Harry A. Accomando.

DECISION OF THE COMMISSIONER OF EDUCATION

The petitioner asks the Commissioner of Education to determine that he holds the position of District Clerk of the Board of Education of the Borough of Fair-

view, which position the respondent alleges is now held, and has been held since February 15, 1943, by Charles Em. This matter is presented to the Commissioner on a stipulation of facts and briefs.

It appears from the stipulation that the petitioner was elected district clerk by three successive boards of education on February 20, 1940, February 17, 1941, and February 16, 1942, respectively. On February 15, 1943, the respondent passed a resolution abolishing the full time office of district clerk, for purposes of economy, and reestablishing the part time office of district clerk at a salary to be determined by the board of education. On February 15, 1943, by a separate resolution, Charles Em was appointed district clerk for the *school year* 1943-1944 to hold the office part time at an annual salary of $1,000.00. On March 15, 1943, the respondent passed a resolution amending the resolution of February 15, 1943, so that Charles Em's appointment would be for the term of one year, commencing February 15, 1943. The resolution also ratified and affirmed the acts of Charles Em from February 15, 1943, to March 15, 1943.

The pertinent statutes read as follows:

> 18:7-68. "Every board shall by a majority vote of all its members appoint a district clerk, who may be elected from among such members, and shall fix his compensation and term of employment. . . "
>
> 18:5-51. "No secretary, district clerk, assistant secretary, business manager of any board of education in any municipality devoting his full time to the duties of his office, after three years' service, shall be dismissed, discharged, or suspended from office, nor shall his compensation be decreased, except upon a sworn complaint for cause and upon a hearing had before the board."

The first question to be determined is whether the petitioner has acquired tenure by the terms of R. S. 18:5-51, supra. Before this question can be determined, however, it must be ascertained whether the petitioner held the position of district clerk full time. The above-mentioned resolutions of February 20, 1940, and February 17, 1941, clearly set forth that the district clerk was to hold office full time. The resolution of February 17, 1941, fixes the hours at 9:00 A.M. to 3:00 P.M. The stipulation of facts discloses that on March 4, 1941, the respondent adopted "By-laws, Rules and Regulations," Section 3 of which provides that:

> "He (the district clerk) shall be on full time duty between the hours of 9:00 A.M. and 3:30 P.M. during the school year."

The above-mentioned resolution of February 16, 1942, also fixes the hours from 9:00 A.M. to 3:30 P.M. It is evident that the board of education considered the office to be full time prior to February 15, 1943, because on this date the board undertook by resolution to abolish the full time office of district clerk and to reestablish the office on a part time basis.

Subject to the objection of petitioner's counsel as to the materiality and relevancy thereof, it was stipulated that during the summer months the petitioner engaged in other employment from 7:00 P.M. to 12:00 midnight, and on three Saturdays, and for a few weeks from 4:00 P.M. to 12:00 midnight during the school year. The respondent board relies upon these facts to support its contention that the petitioner did not devote his full time to his duties as district clerk. The Commissioner finds this contention to be without merit.

In "Words and Phrases," 2d Series, "Full time" is defined as follows:

> "A provision in a contract of employment by which the employee was to give his 'full time to the company's service' is in its nature ambiguous. It does not require twenty-four hours a day nor every moment of his waking hours. On the other hand, it undoubtedly does require that he shall make that employment his business to the exclusion of the conduct of another business such as usually calls for the substantial part of a manager's time or attention. Where the managing officer of a corporation devotes his entire business days of approximately nine hours and about one-half of his evenings to the company's service, it could not be said that he failed to give his full time to the company, though he at the same time looked after his mother's estate and the finances of another company and occupied a place on the directory of a bank. Johnson *vs.* Stoughton Wagon Company, 95 N.W. 394, 397; 118 Wis. 438."

Since the petitioner's additional employment occurred after the hours designated by the By-laws, Rules and Regulations of the Board of Education of the Borough of Fairview, it is the opinion of the Commissioner that the petitioner was a full time district clerk.

Before it can be decided whether the petitioner acquired tenure, it must be determined whether he served three years in accordance with R. S. 18:5-51, supra. The petitioner was first apointed on February 20, 1940, and served during the life of three boards of education. The fourth board of education on February 15, 1943, did not reappoint the petitioner, but undertook to abolish the office of full time district clerk. Whether the petitioner acquired tenure depends upon the meaning of the word "year" in R. S. 18:5-51. If "year" means a *calendar year,* the petitioner on February 15, 1943, had not served three years; if "year" means a *term of office,* the petitioner had served three terms and thus acquired tenure of office.

The respondent relies upon a paragraph of R. S. 1:1-2 which reads:

> ". . . . and the word 'year' means a calendar year."

The respondent contends that the determination of the question must be controlled by the decision of the Commissioner in the case of Carroll *vs.* Board of Education of the Township of Matawan, 1938 Compilation of School Law Decisions, 383, affirmed by the State Board of Education and by the Supreme Court of New Jersey.

The petitioner contends that the paragraph of R. S. 1:1-2 quoted by the respondent must be read in conjunction with the paragraph of R. S. 1:1-2 which reads:

> "Unless it be otherwise expressly provided or there is something in the subject or context repugnant to such construction, the following words and phrases, when used in any statute and in the Revised Statutes, shall have the meaning herein given to them. . . ."

He further contends that the word "year" as used in reference to the service of the district clerk means the period of time between organization meetings, because to construe it as either a calendar year or as a school year would be repugnant to the context or the subject of the legislation.

In the case of Barr *vs.* Board of Education of the Borough of North Arlington, 1938 Compilation of School Law Decisions, 76, the Commissioner decided that the term of the district clerk was co-terminous with the life of the appointing board. The Commissioner was controlled in this decision by the case of Burgan *vs.* Civil Service, 84 N.J.L. 219, wherein the Supreme Court said:

> "We think that the term of the secretary is definitely fixed by law for one year, by the statute, as if the act had in express terms stated that the term of employment of the secretary shall be one year."

The Court of Errors and Appeals in the case of Evans *vs.* Gloucester City, 1938 Compilation of School Law Decisions, 166, said:

> "Prosecutor's term of office was either fixed by the resolution creating the office for one year, or if not fixed, in the absence of statute, presently in force, or ordinance or rule under legislative action, the term was for *one year being co-terminous with that of the appointing power.*"

R. S. 18:7-4 provides that "three members of the board shall be chosen at each annual school meeting and shall hold office for the term of three years." R. S. 18:7-53 provides that "the organization meeting shall be held at eight o'clock P.M. on the first Monday following the annual meeting in February. . . . Upon the organization of such new board the term of the retiring members shall immediately expire." Obviously, the word "year" when used with reference to the term of office of board members cannot mean a calendar year because over a period of years the organization date will occur so that board members will serve a few days more or less than three calendar years.

The Carroll *vs.* Matawan case, supra, referred to the employment of a teacher. The Commissioner thinks that the position of teacher may be distinguished from the office of district clerk. The latter is more analogous to that of a board member than to that of a teacher. R. S. 18:7-68, supra, gives every board a right to appoint a district clerk. The Supreme Court in the case of Burgan *vs.* Civils Service, supra, and the Court of Errors and Appeals in the case of Evans *vs.* Gloucester City, supra, have interpreted a year to be co-terminous with the life of the board. Therefore it seems reasonable that the legislature in enacting R. S. 18:5-51 meant "year" to mean the life of each board of education. Added weight may be given to this reasoning by comparing the language of Sections 18:5-51 and 18:6-27. Section 18:6-27, providing tenure for clerical employees, uses the words "calendar year." Section 18:5-51, providing tenure for full time district clerks, omits the word "calendar" from the word "year." The legislature amended Section 18:5-51 on May 25, 1938, but did not choose to use the word "calendar" although the word "calendar" is used in Section 18:6-27, passed April 4, 1938. Thus it seems reasonable to conclude that if the Legislature had intended "year" to mean "calendar year," it would have so specified when Section 18:5-51 was amended. A study of the calendar dates of the Monday following the second Tuesday in February over a period of twenty years shows that if "year" were construed to be a "calendar year," ten district clerks serving the period between organization meetings would acquire tenure by three appointments, and ten by four appointments. The Commissioner cannot believe that the Legislature intended that the number of appointments for the acquisition of tenure should vary with the calendar. Therefore, it is the opinion of the Commissioner that the word "year" in Section 18:5-51 means the period of the *life of a board of education.* Since the petitioner has served three terms as full time district clerk, it is further the opinion of the Commissioner that he acquired tenure prior to the passage of the resolutions of February 15, 1942, and of March 15, 1943.

The next question to be decided is whether the abolishment of the position of

full time district clerk removes the protection of the full time incumbent. The Commissioner thinks not. In the case of Seidel *vs.* Board of Education of Ventnor City, 110 N.J.L. 31, the Supreme Court said:

> ". . . . Granting that apart from the statute, a school board may in the interest of economy reduce the number of teachers, the protection afforded by the statute would be little more than a gesture if such board were held entitled to make that reduction by selecting for discharge teachers exempt by law therefrom, and retaining the non-exempt. . . . ."

The State Board of Education in the case of Davis *vs.* Overpeck, 1938 Compilation of School Law Decisions, 466 (at 468) said:

> "We do not believe that we should place a construction on a statute which will so readily enable boards to evade its provisions.
>
> "In a very recent case, Standard Sanitary Mfg. Co. *vs.* United States, 226 U.S., the Supreme Court of the Court United States, in construing the Sherman Law, wrote:
>
> > 'This court has had occasion in a number of cases to declare its principle. Two of those cases we have cited. The others it is not necessary to review or to quote from except to say that in the very latest of them the comprehensive and thorough character of the law is demonstrated and its sufficiency to prevent evasions of its policy "by resort to any disguise or subterfuge of form," or the escape of its prohibitions "by any indirection." ' "

If the Commissioner were to construe Section 18:5-51 to mean that the incumbent of a full time office of district clerk would lose tenure protection if the office were to become a part time one, the doors would be wide open to boards of education for evasion and the statute would be merely a gesture.

Since the petitioner had acquire tenure prior to the adoption of the resolution of February 15, 1943, wherein Charles Em was appointed district clerk, it is the opinion of the Commissioner that the said resolution is null, void, and of no effect. Accordingly, the Board of Education of the Borough of Fairview is directed to reinstate the petitioner with pay at the rate of $1,575.00 per annum from the date of his dismissal.

June 23, 1943.

BOARD OF EDUCATION MAY, IN GOOD FAITH, ABOLISH THE POSITION OF A SUPERVISOR UNDER TENURE WITHOUT A HEARING

STEPHPN K. WERLOCK,

Petitioner,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF WOODBRIDGE, MIDDLESEX COUNTY,

Respondent.

For the Petitioner, Lewis J. Jacobson.

For the Respondent, J. H. Thayer Martin.

DECISION OF THE COMMISSIONER OF EDUCATION

The petitioner was a high school teacher in the Woodbridge School System for 22 years prior to his appointment as Supervisor of Elementary Education on April 15, 1946. On May 19, 1948, the Board of Education adopted two resolutions abolishing the position of Supervisor of Elementary Education, effective July 1, 1948, and restoring the petitioner to his former position of high school teacher at a salary of $3,800 per annum, an increase of $550 over his salary as teacher for the school year 1945-1946, but a decrease of $700 from his salary as Supervisor of Elementary Education. The petitioner has asked the Commissioner to review the legality of the actions of the Board, represented by the two resolutions, and to afford him such relief as may be proper under the laws and practices of this State.

The case is presented to the Commissioner by a Stipulation of Facts and briefs of counsel. The stipulated facts follow:

> "1. At a meeting of the Board of Education of the Township, held on April 15, 1946, the position of Supervisor of Elementary Education was created by resolution. By said resolution, the appellant was appointed to the position, and it provided that he remain at his then salary until July 1, 1946, when his salary was to be changed to $4,500 per annum. A copy of said resolution is attached hereto, made part hereof and marked Exhibit A. (Includes also a statement as to membership of the Board.)
>
> "2. At a meeting of the Board of Education of the Township, held on May 19, 1948, a resolution, offered by the teacher's Committee, was adopted, abolishing said position of Supervisor of Elementary Education, effective July 1, 1948. A copy of said resolution is attached hereto, (with another), made part hereof and marked Exhibit B, (first part of B).
>
> "3. A further and subsequent resolution, also offered by the teacher's committee, was adopted at said meeting, restoring the appellant as of July 1, 1948, to his former position of high school teacher, and raising the salary of that position to $3,800.00 per annum, from the rate of $3,250.00 per annum which he was receiving for that position during the year 1945-1946. A copy of said resolution is attached hereto, made part hereof and forms the last part of Exhibit B.
>
> "4. No notice of said meeting of May 19, 1948, was given to the appellant

by the Board, nor were charges ever preferred against him. An opportunity to be heard on any school subject is afforded any interested citizen at any board meeting. No person applied to be heard at the meeting of May 19, 1948.

"5. At a regular meeting of the Board, held June 21, 1948, over an hour was devoted by the Board to listening to citizens who objected to the abolition of said position.

"6. At the time of the abolishing of the position, there were seven teachers who were not under tenure, and the position of principal of the Iselin schools was unfilled. Respondent does not admit that this paragraph is relevant.

"7. On May 19, 1948, a further resolution was adopted directing that notice be given through the principals that the position of principal of Iselin Schools was vacant and that any employees who can be certificated may forward a written application to the supervising principal. Such notice was sent on May 20, 1948, to the apellant, and he did not forward any application for that position. The notice stated the starting salary of that position of principal to be $4,200. The position was not filled until June 28, 1948.

"8. The appellant was a High School Teacher for 22 years in the Woodbridge school system before his appointment as Supervisor of Elementary Education.

"9. A chart or list of Woodbridge Township School Employees for the school year 1947-1948 was prepared by the supervising principal for the use of the Teachers Committee of the Board of Education, several days before the meeting of May 19, 1948, and on May 18, 1948, at the direction of a joint meeting of the teacher's committee and the finance committee, the listing on said chart relating to the appellant was changed, and new mimeographed copies of the changed part were made. Neither the original nor the revised chart as such was ever approved or adopted by the respondent, and no admission or stipulation is made by the respondent with respect to said chart or list except as above.

"10. Disposition of this case may be predicated on the above state of facts; but if any unexpected inferences are drawn in the argument or brief of either party, then the other party reserves the right to intoduce such evidence as may be required to clarify such inferences."

The petitioner is under tenure and is protected by the provisions of Sections 18:13-16 to 19 inclusive of the New Jersey Statutes Annotated. The first question to be decided is whether the position of an incumbent protected by the provisions of Sections 18:13-16 to 19 inclusive may be abolished. This question must be answered in the affirmative. It is well established that a position, regardless of the tenure protection of the incumbent, can be abolished in good faith in the public interest for the betterment of the public service or to effect economics. It has been held that tenure protection cannot interfere with the abolition of a position for the purpose of carrying into effect those changes in the administration of public affairs which past experience or new conditions demonstrate are necessary for the public welfare. Gordon *vs.* Jefferson Township Board of Education, 1938 School Law Decisions, 283; Spears *vs.* Board of Commissioners of North Bergen, 10 Misc. 962; Beirne *vs.* Jersey City, 60 N.J.L. 109; Harker *vs.* City of Bayonne, 85 N.J.L. 176; Reck *vs.* Board of Commissioners of North Bergen, 110 N.J.L. 173; Weider *vs.* Board of Education of the Borough of High Bridge, 112 N.J.L. 289.

The next question for decision is whether charges must be preferred against the incumbent of an abolished position and whether he must be granted a hearing before the position is abolished. The answer to this question must be in the negative. Tenure protection against discharge except upon charges after hearing does not cover the abolition of a position in good faith. (See quotation from 28 Cyc. 445 in the decision of the Commissioner in the case of Gordon *vs.* Jefferson Township Board of Education, 1938 School Law Decisions 283 at page 284. Also Reck *vs.* Board of Commissioners of North Bergen, 110 N.J.L. 173.)

Next, it must be determined whether there was any bad faith or abuse of discretion on the part of the respondent board. There is no evidence to show that the position was abolished because of the residence, age, sex, marriage, race religion or political affiliation of the petitioner in contravention of the provisions of N.J.S.A. 18:13-19. No showing was made that the abolished position is still in effect under a different title. Whether there was bad faith must be determined in the light of the rules established in court decisions. The following excerpts from court decisions are quoted:

> "Can we go behind the record of the proceeding and the action of the Board to question the motives which actuated its members? The general principle appears to be against such proposition.
>
> 'So long as a . . . board of education . . . acts within the authority conferred upon . . . . . it by law, the courts are without power to interfere with, control or review . . . . its action and decisions in matters involving the exercise of discretion, in the absence of clear abuse thereof . . . . . , nor is the wisdom or expediency of an act, or the motive with which it was done, open to judicial inquiry or consideration, where power to do it existed.' 56 C.J. 342, citing numerous authorities.
>
> 'Even though motive was corrupt or the act was done for the purpose of spite or revenge, an action of a board is immune from judicial interference if it is within the range of the bard's legal discretion. (Iverson *vs.* Springfield, etc. Union Free High School Dist. 186 Wisc. 342; 202 N.W. 788.)'
>
> "The right of a Board to transfer teachers being absolute, the fact that the Board had in view the closing of the school to which the teacher was transferred, and to terminate her employment does not affect the legality of such transfer, and we conclude that the transfers of the 26 teachers to Schools Nos. 4 and 7 were lawful." Downs *vs.* Hoboken Board of Education, 1938 School Law Decisions, 326.
>
> "The board appears to have acted within the authority conferred upon it by law, and its action involved the exercise of discretion, and in the absence of clear abuse, its action ought not to be disturbed; so we conclude that the transfer of the twenty-six teachers to Schools Nos. 4 and 7 was lawful and that the board was justified in dismissing the teachers as it did, subject to the reservation imposed by the state board." Downs vs. Hoboken Board of Education, 12 N.J. Misc. 345.
>
> "The action does not offend any statutory regulation. As held in Downs et al *vs.* Hoboken, supra., the motives, reasons, and considerations of the local board in so acting are not evidence of bad faith." Liva *vs.* Lyndhurst, 126 N.J.L. 224

"A reading of the record leads to the conclusion that probably neither party has been entirely frank and fair in the treatment of the other. But we are not persuaded that there has been shown bad faith or such a shocking abuse of discretion as to call for the intervention of this court in matters that are by statute delegated to the governing body of the municipality. We will not substitute our judgment for that of the commissioners. It is not our function to do so." Murphy *vs.* City of Bayonne, 130 N.J.L. 336.

"It remains to say a word upon that view of the case which assumes that it is within the judicial province to protect constituencies from the 'recreancy' of their representatives by undoing legislation that evinces 'bad faith.' To which the answer is first, that the power to so intervene has wisely been withheld from the judiciary; secondly, that if the power existed, its exercise would be most mischevious, and lastly that the redress of the betrayed constitutent is in his own hands, to be sought at the polls and not in the courts." Moore *vs.* Haddonfield, 62 N.J.L. 391.

"Faced with such a serious charge, and faced with the legal principle that courts do not substitute their judgment for the judgment of those selected by the people and charged with the duty of acting in good faith unless a clear showing of bad faith be disclosed (Blair *vs.* Brady, 11 N.J. Misc. 854, 857; 168 Atl. Rep. 668; Cohen *vs.* Township Committee of Hamilton Township, 15 N.J. Misc. 687, 690; 194 Atl. Rep. 436) I continued the cause, in fairness and justice to all parties, to the end that counsel for prosecutors be given every opportunity of supplying proof to substantiate their claim of bad faith and dishonesty.

"I desire to make clear that I express no opinion as to the policy employed by the majority in the selection which they made or in the manner in which they made their selection effective. *That is their responsibility to those whom they govern.* Courts cannot compel governing officials to act wisely, but it can and does compel them to act in good faith. *And to say governing officials must act in good faith is merely equivalent to saying that they must act honestly."* Peter's Garage, Inc., *vs.* City of Burlington, 121 N.J.L. 523, 527."

The only evidence offered to support the charge of bad faith and abuse of discretion is item No. 9 of the agreed state of facts which reads in part as follows:

"A chart or list of Woodbridge Township School Empolyees for the school year 1947-1948 was prepared by the supervising principal for the use of the Teachers Committee of the Board of Education, several days before the meeting of May 19, 1948, and on May 18, 1948, at the direction of a joint meeting of the teacher's committee and the finance committee, the listing on said chart relating to the appellant was changed, and new mimeographed copies of the changed part were made."

Petitioner contends that this item of the stipulation is evidence that the abolition of the position was decided upon by some members of the board in a secret meeting before the regular meeting when it was adopted and was, therefore, not the product of open minds and the result of mature deliberation.

It is not unusual for a supervising principal or a school board committee to prepare a tentative salary list in advance of a board meeting. Nor is it unusual for a committee to discuss school problems outside the regular board meeting. Any

action of a supervising principal or a committee is not binding upon the board of education unless and until it becomes the action of the board itself in a regular meeting or a meeting called for that purpose. Sooy *vs.* State, 41 N.J.L. 399. It is stipulated that neither the original nor the revised chart as such was ever approved or adopted by the board. It is the opinion of the Commissioner that the action of the board of education with respect to the abolition of petitioner's position cannot be set aside because it was discussed by a committee or a group of board members prior to the board meeting. It is further the opinion of the Commissioner that the proof fails to show bad faith according to the rules for determining bad faith established in the quotations from the cases cited above.

It is well known in the field of educational administration and supervision that there are two patterns for supervising elementary education. One pattern is for the supervising principal to exercise his supervisory function directly through the principals of the schools. The other pattern is for the supervising principal to work through a supervisor of elementary education who may coordinate the work of the elementary grades and assist the principals in their supervision. It is not unusual for school systems to change patterns in the light of experience.

A board of education has a legal right to use its discretion in determining which of several methods shall be adopted to attain a desired educational result; provided, such action is not in violation of a statutory provision. Williams *vs.* Board of Education of Madison, 1938 School Law Decisions, 552. A tenure statute was never intended to interfere with carrying into effect those changes in the administration of public affairs which result from the discontinuance of old methods and the adoption of new ones in their places. Beirne *vs.* Jersey City, 60 N.J.L. 110. The decision to change the supervisory pattern of elementary education in the Woodbridge School System is an administrative action. In the absence of bad faith and dishonesty, it is not a court function to review the exercise of judgment of an administrative body. Boult *vs.* Board of Education of Paterson, 135 N.J.L. 329.

Petitioner in his reply brief argues that by training, education, or experience, the members of the board of education were neither qualified nor equipped to pass judgment upon the question as to whether the continuance of the position of Supervisor of Elementary Education would be beneficial or detrimental to the interests of the school system. It is so well established as to require no citations of authority that the board of education is charged with the management and conduct of the public schools and the appointment, transfer, and dismissal of school personnel. An erroneous conclusion by a board of education in a matter before it for administrative determination is not an abuse of discretion. Boult *vs.* Passaic, 136 N.J.L. 521. The Commissioner's review of a local board's action is judicial in nature. In exercising the reviewing power, the Commissioner must be guided by the principles governing the scope of judicial review of municipal action. He cannot in administrative matters substitute his judgment for the judgment of the members of the board of education elected by the people to manage the schools of the district, Thompson *vs.* Board of Education of the Borough of Elmer, 57 N.J.L. 628. Boult *vs.* Passaic, 136 N.J.L. 521; Peter's Garage, Inc., *vs.* City of Burlington, 121 N.J.L. 523, at 527. The Commissioner finds that there is no proof of bad faith and abuse of discretion so shocking as to require the Commissioner to intervene according to the rule laid down in the case of Murphy *vs.* City of Bayonne, 130 N.J.L. 336.

Next, it must be determined whether the respondent board erred in not assign-

ing the petitioner to a vacant principalship. The position of Supervisor of Elementary Education is not mentioned specifically in the tenure statute. The positions mentioned are those of supervising principal, principal and teacher. The word "teacher" in the tenure statute is broad enough to include supervisors. Williams *vs.* Madison, 1938 School Law Decisions, 552. The tenure protection enjoyed by the petitioner was that of "teacher" and not of supervising principal or principal. It is the opinion of the Commissioner that he cannot read into the seniority provisions of N.J.S.A. 18:13-19 any requirement that the board of education assign to a principalship the petitioner, who was protected by the tenure act as a "teacher."

It remains to decide whether the board of education was empowered to reduce the petitioner's salary when he was assigned to a position in the high school. A similar question was decided in an unpublished decision of the Commissioner of Education on January 7, 1941, in the case of Elizabeth A. Kelly *vs.* Board of Education of Red Bank. The then Commissioner held that when a special type of service abolished is in a different classification than that of a high school teacher of regular subjects, the board of education is within its legal rights in fixing the salary according to the prevailing high school rate of pay. To decide that the petitioner is entitled to the same salary as a high school teacher as an elementary supervisor would be contrary to this precedent. The Commissioner feels that he should follow the precedent of the Kelly case in deciding this issue. The Commissioner of Education is a legally created tribunal of limited jurisdiction to hear and determine matters arising under the School Law, and his determinations thereupon have the conclusive quality of a judgment pronounced in a legally created court of jurisdiction acting within the bounds of its authority. Thompson *vs.* Board of Education of the Borough of Elmer, 57 N.J.L. 628. When a rule has once been deliberately adopted and declared, it ought never to be disturbed by the same court, except for very urgent reasons, and upon a clear manifestation of error. Fraser *vs.* State Board of Education and Board of Education of Jersey City, 132 N.J.L. 248.

The stipulation discloses that the petitioner, upon the abolition of the position of Supervisor of Elementary Education, was, by resolution, restored to his former position on the list of high school teachers at a salary of $3,600 per annum, plus $200 for his Master's Degree. This total salary of $3,800 as a high school teacher for the school year 1948-1949 is to be compared with the salary of $3,250 per annum which he received before his apointment to the supervisory position. It is the opinion of the Commissioner that the respondent board, in accordance with the rule established in the *Kelly* decision, *supra.,* was within its legal rights in paying the petitioner the salary of a high school teacher instead of the salary he received as Supervisor of Elementary Education.

The Commissioner finds and determines (1) that the Board of Education of the Township of Woodbridge was within its legal rights in abolishing the position of Supervisor of Elementary Education; (2) that the Board was not required to prefer charges against the petitioner and conduct a hearing; (3) that the Board did not err in assigning the petitioner to a teaching position instead of a principalship; and (4) that the action of the Board in fixing the petitioner's salary according to the high school rate of pay was legal.

The petition is dismissed.

November 26, 1948.

IN THE MATTER OF A PETITION FOR LEAVE TO INTRODUCE ORAL TESTIMONY

For the Appellant, Lewis S. Jacobson.

For the Respondent, J. H. Thayer Martin.

The appellant appealed to the Commissioner from the action of the respondent Board abolishing his petition of Supervisor of Elementary Education. The Commissioner dismissed the petition. He then appealed to the State Board of Education pursuant to R.S. 18:3-15. Before a decision was rendered by the State Board, appellant requested that "the matter now on appeal before the State Board of Education be re-referred to the Commissioner of Education, to the end that the case be re-opened to permit present appellant to introduce testimony upon the issue of the justification in fact for the abolition by the Woodbridge Board of Education of the position of Supervisor of Elementary Education." The Law Committee of the State Board referred the application for the "re-hearing" to the Commissioner and advanced neither suggestion nor opinion as to how the Commissioner should determine such application. The Commissioner is now asked to permit the introduction of oral testimony in a case which he has previously decided.

To ask permission to introduce oral testimony in a case after a decision has been rendered is tantamount to an application for a new trial. It is the opinion of the Commissioner, therefore, that this application must be determined in the light of legal principles governing the determination of such applications. These legal principles are clearly set forth in the syllabus of the case of Helen Christie, Respondent, *vs.* Joseph Petrullo, Appellant, 101 N.J.L. 492:

> "1. A court will not grant a new trial upon the ground of newly-discovered evidence unless it be shown—first, that such evidence would probably have changed the result of the trial; second, that it was unobtainable by the exercise of due diligence for use at the trial; third, that the evidence is not merely cumulative.
>
> "2. New trials are not favored. The law requires that litigants make the fullest preparation possible of their cases before trial."

In applying these principles to the application under consideration, the first question to be answered is whether the oral testimony which it is sought to introduce would probably change the result of the decision. The petitioner states in his petition that he is desirous of proving, and is ready and able to prove: "(a) that the creation of the position of 'Supervisor of Elementary Education' resulted in substantial and tangible improvement in the education furnished in the district; (b) that continuation of such position did, in fact, promise sufficient benefit to justify the expense thereof, and that such position had proved itself an indispensable adjunct to the elementary education facilities in the school district, so much so that its abolition was manifestly false economy; (c) that the members of the respondent board had not sufficiently informed themselves as to the tangible results of the creation of such position to be qualified to make the findings embodied in such resolution; and (d) that there was no fact basis whatever for such finding and recitals."

It is the opinion of the Commissioner that even if the petitioner were to prove to the satisfaction of the Commissioner all the allegations set forth above, there could be no change in the previous decision. The Commissioner pointed out in his

decision that the Board of Education had a legal right to determine whether the Supervising Principal should exercise his supervisory function through a Supervisor of Elementary Education or directly through the principals of the schools. How schools are to be supervised is an administrative matter. The Commissioner cited authorities to show that, in the absence of bad faith and dishonesty, it is not a court function to review the exercise of judgment of an administrative body.

Even if the testimony introduced to show that tangible improvement resulted from the creation of the position of "Supervisor of Elementary Education" should convince the Commissioner that improvement did result, he would nevertheless have no legal right to substitute his judgment for that of the Board. Assuming that some improvement might be shown, it might be the judgment of the Board that better results would flow from the Supervising Principal's working directly with the principals rather than through an elementary supervisor. Assuming further that the Commissioner were convinced that the abolition of the position would be false economy, it is not the judgment of the Commissioner which is decisive but that of the local board. Furthermore, the Commissioner cannot correct the mistakes of boards of education which result from insufficient and erroneous information. This was settled in the case of Boulte *vs.* Board of Education of Passaic, decided by the Commissioner, January 8, 1946, affirmed by the State Board of Education without written opinion September 13, 1946, affirmed by the Supreme Court, 135 N.J.L. 329; affirmed by the Court of Errors and Appeals, 136 N.J.L. 521, wherein the Commissioner was upheld in refusing to hear testimony to prove that a board of education had reached an erroneous conclusion, because an erroneous conclusion is not an abuse of discretion subject to correction by the Commissioner, and, therefore, any testimony introduced to prove a mistaken conclusion would serve no useful purpose. It is well established in the law and in the educational tradition of this State that the local board of education is charged with the management and conduct of the public schools and the appointment, transfer, and dismissal of school personnel. If the legal voters of a school district elect board members who make mistakes and use faulty judgment, the situation must be corrected by the voters at the polls rather than by the Commissioner of Education.

In his decision, the Commissioner quoted authorities to show that only in case of bad faith, dishonesty or clear or shocking abuse of discretion could an administrative action of a board of education be set aside. It is the opinion of the Commissioner that, even if all the allegations in the application were supported by testimony, he would not be able to set aside the action of the board because of bad faith, dishonesty, or abuse of discretion.

Next, it should be considered whether the evidence sought to be introduced could have been obtained by due diligence before the decision was rendered. This case was presented to the Commissioner by stipulation and briefs.

The opening portion of the stipulation reads as follows:

> "It is herby stipulated and agreed by and between counsel for the appellant and counsel for the respondent that the matter on appeal be submitted on the following stipulated state of facts, which facts were agreed to at a pre-trial conference before Chester Robbins, Esquire, Assistant Commissioner of Education, on Thursday, September 23, 1948.

Paragraph 10 of the stipulation reads as follows:

"Disposition of this case may be predicated on the above state of facts: but if any unexpected inferences are drawn in the argument or brief of either party, then the other party reserves the right to introduce such evidence as may be required to clarify such inference."

After reviewing the respondent's brief, the appellant sent a letter to the Commissioner on October 23, 1948, asking to introduce evidence because facts were inserted in the brief of the respondent and inferences drawn which were not warranted by any facts contained in the stipulation. Petitioner says that an opportunity to introduce evidence as to the factual basis of the recitals of the aforementioned resolution was not afforded to him before the adverse decision of the Commissioner. It is true that no hearing was held prior to the Commissioner's decision. The reason is that counsel for the petitioner withdrew his request verbally to the Assistant Commissioner of Education who, pursuant to N.J.S.A. 18:3-2e, hears all controversies and disputes which may arise under the school laws. The verbal withdrawal of his application was confirmed by his submitting his reply brief on November 3, 1948, without pressing further his application.

For the reason that the evidence could have been obtained before the decision was rendered and that the evidence sought to be introduced at this time would not change the result of the decision, the application is denied.

March 11, 1949.

Affirmed by State Board of Education without written opinion June 3, 1949.

Affirmed by *New Jersey Superior Court,* Appellate Division, 5 N.J. Supr., 140.

WHEN CHANGE IS MADE FROM A NON-TEACHING TO A TEACHING PRINCIPALSHIP, THE INCUMBENT PRINCIPAL, IF UNDER TENURE, MUST BE OFFERED THE TEACHNG PRINCIPALSHIP

EDMUND H. VIEMEISTER,

Petitioner,

vs.

BOARD OF EDUCATION OF THE BOROUGH OF PROSPECT PARK, PASSAIC COUNTY,

Respondent.

For the Petitioner, Milton A. Feller.

For the Respondent, Saul R. Alexander.

DECISION OF THE COMMISSIONER OF EDUCATION

The question for decision in this case is whether a board of education in changing from a non-teaching principalship to a teaching principalship must continue the incumbent non-teaching principal as the teaching principal.

The following are the essential facts as stipulated:

"During the school year, 1947-1948, and for some time prior thereto, respondent Board of Education conducted and operated its school system under

the provisions of R.S. 18:7-1, et. seq. and functioned under what is commonly known as an Article VII (now Chap. VII) school district. Its Board consists of nine members.

"On May 11, 1948, (the date of the adoption of the resolutions in question), the school system consisted of an enrollment of four hundred two (402) pupils, sixteen (16) teachers, a principal, petitioner herein, who devoted his time exclusively to supervising and who performed no teaching duties, and a vice-principal who taught classes and in addition acted as principal in absence of petitioner. There is only one school building.

"Petitioner has been employed in the system since 1937 as a principal and has acquired tenure within the meaning of R.S. 18:13-16 and is entitled to the benefits of that statute. His qualifications are not in issue. His salary is Thirty-five hundred ($3,500.00) Dollars plus a Two hundred ($200.00) Dollar cost of living bonus which was the maximum set in the salary schedule then in force in the system.

"On or about May 11, 1948, the Board of Education after due deliberation, by unanimous vote abolished the position or office of principal and in its place created a new position of Teaching Principal whose duties it became to combine the functions of both teacher and principal. Miss Amelia Borden, the Vice-Principal, was appointed to the newly created position. This procedure took the form of three (3) formal resolutions all adopted at the same meeting and all receiving unanimous approval, to take effect on June 30, 1948.

"No formal charges were made against petitioner nor was there any hearing of any charges held. The legality of the procedure was questioned by the petitioner; he offered his services at the opening of the school term in September, 1948, which was refused by the respondent.

"At the time of the adoption of the resolutions in question, Miss Amelia Borden had been in the employ of the respondent Board for thirty-six (36) years; she too was protected by the provisions of R.S. 18:13-16 which long antedated that of the petitioner. Her salary at the time was Three thousand ($3,000.00) Dollars per annum, and by the terms of the resolution appointing her Teaching Principal, her salary was increased to Three thousand One hundred ($3,100.00) Dollars. With the opening of the school term in September, 1948, no additional teaching position has been created nor has any new teacher been engaged by the Board to fill the position hitherto held by Miss Borden. She continued and continues in her position of Eight Grade Teacher and Principal."

A principal of a school under tenure cannot be removed from his position except as provided in N.J.S.A. 18:13-17 to 19, inclusive. The position of principal cannot be abolished as long as the school continues, because it has been held that every school must have a principal. Kelly *vs.* Lawnside, Decisions of the Commissioner and State Board of Education, 1938 School Law Decisions, 320 and 323. Walker *vs.* Wildwood, Decisions of the Commissioner and State Board, 1938 School Law Decisions, 324 and 327, affirmed by the Supreme Court, 116 N.J.L. 395, 120 N.J.L. 408.

The respondent board contends that, in abolishing the position of principal and creating simultaneously the position of teaching principal, the services of the petitioner were automatically terminated. The Commissioner cannot agree that the

principalship was abolished by assigning teaching duties to it. Nor can he agree that a new position is created whenever a board of education adds to or changes the prescribed duties of a principal.

Three tenure classifications are established in N.J.S.A. 18:13-19, supervising principal, principal, and teacher. There is no reference to teaching principals and non-teaching principals. If the Legislature had desired to give a separate status to non-teaching principals, it would have made provision for such a status as was made in the case of supervising principals. Inasmuch as the Legislature has provided no such separate status, the Commissioner is of the opinion that no sub-classification, such as non-teaching principal, teaching principal, etc., can be read into the law in so far as tenure is concerned.

The tenure protection afforded to a principal is as "principal" and not as some sub-classification of principal. Therefore, within the purview of the tenure law, a principal has status as a "principal" and it must follow, then, that any assignment of teaching duties to the principalship and any change of title from "principal" to "teaching principal" cannot affect the principal's rights under the tenure law.

The principle established in the decision of the Supreme Court in the case of Seidel *vs.* Ventnor City, 110 N.J.L. 31, affirmed by the Court of Errors and Appeals, 111 N.J.L. 240, is applicable to the case under consideration. In the *Seidel* case, a teacher under tenure had been generally employed to teach and was assigned to a special class of backward and troublesome pupils. Subsequently, this class was abolished and the pupils absorbed into the regular classes. The board of education felt no obligation to assign the teacher to a regular class and dismissed her. The Supreme Court, however, took the view that the teacher must be offered a regular teaching position in preference to a non-tenure teacher.

The Court said:

> "Granting that apart from the statute, a school board may in the interest of economy reduce the number of teachers, the protection afforded by the statute would be little more than a gesture if such board were held entitled to make that reduction by selecting the discharged teachers exempt by law therefrom and retaining the non-exempt."

The words of the Court are very apropos in the present case. If a board of education were held to be under no legal obligation to continue the incumbent principal whenever it assigns teaching duties to the principalship, then the tenure protection afforded to principals would be indeed little more than a gesture.

The respondent argues that the tenure rights of the teacher who was appointed teaching principal in place of the petitioner are equal, if not superior, to those of the petitioner. In retaining the teacher with thirty-six years of service instead of the principal with eleven years of service, the board believes that it exercised its discretion in the most equitable fashion. In the opinion of the Commissioner, the board of education was mistaken in its belief that it was necessary to choose between the petitioner and the teacher. No such choice was necessary. Only in the event that it would have been necessary to change the assignment of the teacher in the reorganization for economy purposes would she have been even inconvenienced. Her rights were as "teacher." She had not acquired any tenure rights as "principal" and no duty was imposed upon the board to upgrade her to the rank of "principal" in order to save her from possible inconvenience. The principal's tenure rights were as "principal" and hence superior to those of the teacher in so

far as the principalship was concerned. However reluctant the board might be to inconvenience the teacher by a transfer to another grade, it had the power to do so. Cheeseman *vs.* Gloucester City, Decisions of the Commissioner, State Board of Education, and Supreme Court, 1938 School Law Decisions, 496, 503. Therefore, the respondent board was without authority to save from possibe inconvenience the teacher who was not protected by the tenure act from a transfer at the expense of the tenure rights of the principal who was protected in the position of principal.

Respondent further contends that it was not actuated by ulterior motives. It is not necessary to impugn the motives of the board members or to impute to them ulterior purposes to hold that an illegal procedure cannot be followed to accomplish a purpose however good the motives. The board asserts that its purpose was to economize. Economy could have been effected within the law by terminating the services of a non-tenure teacher or those of the tenure teacher with the least number of years of service, if the assignment of teaching duties to the principal made one less teacher necessary.

Respondent doubts whether the petitioner would have been satisfied to fill the teaching principalship because it is not a position of equal dignity. The view which the Commissioner takes of this case makes unnecessary any determination as to the relative dignity which attaches to a non-teaching principalship and a teaching principalship. The Commissioner would observe, however, that the certification requirements of the State Board of Education for the principalship of the Prospect Park School are the same, regardless of whether the principal teaches. Inasmuch as the petitioner was removed from his position before the opening of the school year, it is mere speculation to say that he would not have accepted the principalship with a teaching assignment. It was the duty of the board to notify him of his newly designated duties after which he was free to continue in his position or to give the required sixty days' notice of his intention to relinquish his position. It is stipulated that he offered his services on September 1, 1948, at the opening of school and that his services were refused by the respondent.

Courts have felt called upon to safeguard tenure statutes against any possible weakening through subterfuge and evasion. Evans *vs.* Freeholders, 53 N.J.L. 585, Seidel *vs.* Ventnor City, 110 N.J.L. 31, Hunziker *vs.* Kent, 111 N.J.L. 565, Jersey City *vs.* Wall, 119 N.J.L. 308, Schultz *vs.* State Board of Education, 132 N.J.L. 345, Sastokas *vs.* Freeholders, 134 N.J.L. 308, Downs *vs.* Hoboken, 13 N.J. Misc. Rep. 853, Rein *vs.* Riverside, 1938 School Law Decisions, at p. 308. The Commissioner feels that it is his duty to protect the tenure of principals from any possibility of evasion. If the respondent were to prevail in this case, tenure for principals would be meaningless because the purposes of principals' tenure legislation could be defeated by the device of assigning teaching duties to the principal and appointing a teacher to a teaching principalship in place of the incumbent principal.

The Commissioner finds and determines that the position of principalship in the School District of Prospect Park was not abolished in fact and, hence, the removal of the petitioner from his position was not in accordance with law. As Justice Oliphant said in the *Sastokas* case, *supra.*, relating to the tenure of a policeman:

> "To hold otherwise would be to give municipal authorities power to prevent a policeman appointed to the regular force acquiring a tenure status for as long as they choose, and thus avoid the protection accorded him by statute. What cannot be done directly cannot be accomplished by indirection."

The Board of Education of the Borough of Prospect Park is directed to reinstate the petitioner to the position of principal and to pay him the same compensation to which he would have been entitled had he been serving as principal since July 1, 1948.

December 22, 1948.

Affirmed by State Board of Education without written opinion April 1, 1949.

Affirmed by *New Jersey Superior Court,* Appellate Division 5 N.J. Sup. 215.

HIGH SCHOOL PRINCIPAL UNDER TENURE MAY NOT BE DISMISSED FOR FAILURE TO PERFORM DUTIES NOT ORDINARILY PERFORMED BY HIGH SCHOOL PRINCIPAL, UNLESS BOARD OR SUPERVISING PRINCIPAL, ACTING IN REASONABLE AND SOUND DISCRETION, HAS IMPOSED SUCH DUTIES UPON HIM

JOHN E. BENNETT,

Petitioner,

vs.

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

Respondent.

For the Appellant, King and Vogt.
For the Respondent, Edward W. Currie.

DECISION OF THE COMMISSIONER OF EDUCATION

John E. Bennett was first employed as a teacher in the public schools of the Township of Matawan in 1922 and was made principal of the high school in 1923. Accordingly, he has tenure protection in his position and salary of $2,300.00 per year. After hearings had been held upon charges preferred against the appellant by Clarence E. Stultz, a member of the Board of Education of the School District of the Township of Matawan, a resolution was adopted by the board on January 19, 1943, by which the appellant was dismissed from his employment as high school principal. The vote on the resolution was five to one in favor of dismissal. From this dismissal, Mr. Bennett appeals to the Commissioner of Education for reinstatement and salary. Briefs have been submitted by counsel and argument was heard on June 15, 1943.

The charges include inefficiency, incapacity, and conduct unbecoming a principal. Thirty-six charges were grouped under the headings of Public Relations, Leadership, Supervision of Instruction, Administration of the School, Discipline, Educational Standards, and Other Acts. The appellant was acquitted of charges No. 3, No. 21, and No. 34, and was adjudged guilty of the other thirty-three charges.

Counsel for appellant contends:

1. Bias and prejudice are the reasons for the appellant's dismissal rather than a fair consideration of the legal evidence.

2. Many of the charges are trivial, and the attitude of the witnesses against the appellant justifies his contention that bias and prejudice were present.

3. The record is filled with hearsay and evidence otherwise illegal.

4. The guilt of the appellant was not established by the greater weight of the credible legal evidence.

5. Incidental acts during administration and supervision were permitted to be exaggerated in order to dignify them as legitimate grounds for dismissal.

6. The action of the board of education on July 2, 1942, in suspending the appellant forthwith was unjustified and its purpose was to discredit appellant as far as the teachers were concerned so that the teachers might testify with the full knowledge that Mr. Bennett was no longer connected with the school system.

Counsel for respondent contends:

1. The appellant was given a fair and impartial hearing, and the findings of the Matawan Township Board of Education should not be set aside nor reversed by reason of the ruling made in respect to the admission or rejection of evidence.

2. The charges and proofs before the Matawan Township Board of Education were so serious and so complete that the dismissal of the appellant was proper under the law, and the action taken by the board was required to fulfill the duty of its members to the pupils, teachers, parents, taxpayers, and citizens of the school district.

It is well established in a case of this kind that an appellate tribunal should not weigh the evidence before it in order to reach an independent conclusion, that it should not substitute its judgment in the place of that of the board of education, and that in the absence of passion or prejudice on the part of the local board, it should not interfere with the determination reached by the local board. Reilly *vs.* Jersey City, 64 N.J.L. 508; Martin *vs.* Smith, 100 N.J.L. 50; Fitch *vs.* South Amboy, 1938 Compilation of School Law Decisions, 173. It is equally well established that an appellate tribunal has a right and duty to determine whether the decision of a local board of education was the result of passion and prejudice rather than an honest judgment, whether the charges were such, if found true in fact, would justify dismissal, and whether there existed a rational and reasonable basis for the dismissal of an employee. Reichenstein *vs.* Board of Commissioners of the City of Newark, decided by the New Jersey Supreme Court on May 4, 1943; Conrow *vs.* Board of Education of Lumberton, 1938 Compilation of School Law Decisions, 462; Rein *vs.* Board of Education of Riverside, Ibid., 402.

Section 18:13-17 of the New Jersey School Law provides:

"No teacher, principal, or supervising principal under tenure referred to in section 18:13-16 of this title shall be dismissed or subjected to a reduction of salary in the school district except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause . . . ."

Thus, in order to dismiss a principal, it is not sufficient to prove a charge, but it is necessary to prove that the charge constitutes "inefficiency, incapacity, conduct unbecoming a teacher or other just cause." Furthermore, it must be proved that the charges preferred against the principal pertain to duties and responsibilities which

have been prescribed by statute, by the rules of the local board of education adopted pursuant to statute, and by the supervising principal in accordance with the rules of the State Board of Education.

The following are quotations from the Revised Statutes and the Rules and Regulations prescribed by the State Board of Education pursuant to statute governing the power and responsibility of boards of education, supervising principals, and principals with respect to the conduct of the public schools:

> Section 18:7-56. "The board may make, amend and repeal rules, regulations and by laws, not inconsistent with this title or with the rules and regulations of the state board of education, for its own government, the transaction of business, the government and management of the public schools and the public school property in the district, and for the employment and discharge of principals and teachers."
>
> 18:7-57. "A board may:
>
> . . . . . .
>
> (b) Enforce the rules and regulations prescribed by the State Board of Education;
>
> . . . . . .
>
> (d) Prescribe, in connection with the county superintendent of schools, the course of study to be pursued in the schools; . . ."
>
> 18:7-58 " . . . . no course of study shall be adopted or altered, and no textbooks selected, except by a majority vote of the whole number of members of the board."
>
> 18:7-70. "A board may, under rules and regulations prescribed by the state board, appoint a supervising principal of schools and define his duties and fix his salary . . . . "

Rule 133 of the Rules and Regulations of the State Board of Education reads as follows:

> "It shall be the duty of a supervising principal to visit the schools under his control, to supervise instruction in the classrooms of such schools and *to consult with and advise the principals and teachers* in procedures, methods, and materials of instruction so that the best results may be obtained by the pupils. He shall be responsible for the discipline and conduct of the schools. He shall also advise concerning child accounting, behavior and personality problems and needs, educational and other adjustments to individual abilities, problems of guidance, programming, class and school organization and management. He shall exercise such other functions of educational and administrative leadership, supervision, and guidance as may be necessary for producing best possible educational conditions and outcomes."

The powers and duties of a principal prescribed by statute are:

> 1. (Section 18:13-114) Make an annual report to the county or city superintendent on blanks furnished by the Commissioner of Education.
>
> 2. (Section 18:13-116) Suspend pupils and report same to the board of education.
>
> 3. (Sections 18:14-106-107) Conduct fire drills and see that furnace room and fire doors are closed during school hours, and require teachers to keep doors and exits unlocked.

From the foregoing, it appears that very few duties of a principal are prescribed by statute. It is apparent, therefore, that, while certain powers and duties may be deemed to be inherent in the principalship, the board of education and the supervising principal must, in the main, delegate and define the duties and responsibilities of the principal. A reading of the charges, the record, and the brief of respondent's counsel creates the impression that the complainant in making the charges assumed that the duties and responsibilities of the high school principal are inherent in the principalship regardless of the size of the school and the local school organization and, therefore, any delegation and any definition of the duties and responsibilities of the high school principal are unnecessary.

The 2413 pages of testimony in this case have been read carefully. The charges are too numerous and the testimony too voluminous to permit individual consideration of each charge. Consideration will be given to the charges by types and by groups.

As one reads the charges and the testimony, he gathers the impression that some of the charges and the proof thereof were drawn from the content of university courses in education, articles in educational periodicals, the Evaluative Criteria, and the Manual for Secondary Schools. The language of charge No. 4 is similar to that of function No. 20 on page 136 under section "L" subsection "D" of the 1940 Edition of the Evaluative Criteria. The charge reads as follows:

"He has failed to give proper attention to the induction of new teachers into the school and community."

Apparently, the Matawan Township Board of Education, in finding the appellant guilty of this charge, concluded that the functions listed on the above-cited page of the Evaluative Criteria are inherent in the principalship and, hence, appellant's failure to perform these functions made him subject to charges for failure to do so.

It must be decided whether a principal may be dismissed for failure to perform functions which, according to the Evaluative Criteria and articles in educational periodicals, are commonly made the responsibility of the high school principal. These Criteria were developed by the Cooperative Study in which the several accrediting associations for secondary schools and colleges participated. Effective use of the Criteria for the purpose of evaluating schools can be made only by well trained school visitors who are competent to interpret the functions in terms of the situation obtaining in the particular high school which is being evaluated.

It is well known that, in some high schools, the supervising principal shares the functions of the high school principal and that in smaller high schools effective results are secured with less complicated administrative machinery than obtain in larger high schools. The following quotation, found on page 136 of the Evaluative Criteria, wherein the functions of the high school principal are listed, cautions users of the Evaluative Criteria to take cognizance of the above mentioned condition:

> "The following functions are made the special responsibility of the principal of the secondary school, *but their performance may be delegated to other competent persons.*"

The Criteria also make clear at page 134 that is is the responsibility of the board of education to vest authority and responsibility in certain officials, to delegate authority commensurate with responsibility, and to make certain that the individuals within the school system understand their duties and relationships and function as parts of an integral system. Therefore, conclusions as to individual responsibility for

a low rating and for failure to perform certain functions cannot be drawn safely without knowing precisely what delegation of duties, powers and responsibilities has been made in the school system.

The Evaluative Criteria and the contents of educational periodicals do not form part of the New Jersey School Act and the Rules and Regulations of the State Board of Education. Therefore, it is the opinion of the Commissioner that the functions contained in the Criteria are not binding upon a high school principal unless and until either the board of education, by formal action, or the supervising principal, in accordance with Rule 133 of the Rules and Regulations of the State Board of Education, supra., has, in good faith, directed him to perform these functions and has clothed him with authority and has provided him with means adequate to the performance of the functions.

Charge No. 17 deals with the failure of the appellant to give demonstration lessons in teaching. Consideration is given to this charge because it is typical of the charges preferred against Mr. Bennett for failure to perform some duty which had not been prescribed by action of the board of education or by the direction of the supervising principal, but which must have been deemed to be a duty inherent in the high school principalship with respect to supervision of instruction. In refutation of this charge, Louis A. Rice, former Assistant in Secondary Education, whose duties made him familiar with the supervisory practices in the high schools of this State, testified that it is not the practice of high school principals to give demonstration lessons. Other witnesses, who were not connected with the Matawan school system and who had similar opportunities to become familiar with supervisory practices in the high schools, corroborated this testimony.

If boards of education can dismiss high school principals for failure to perform a duty which is not performed ordinarily by high school principals and which has never been delegated to them by proper authorities, then any high school principal can be removed from office, and tenure will cease to have meaning for principals. It is the opinion of the Commissioner that a principal cannot be dismissed for failure to perform a duty of this type, unless the board of education or the supervising principal, acting in a reasonable and sound discretion, has directed him to perform such a duty.

One group of charges refers to the failure of the appellant to maintain educational standards. According to the testimony, the policy of the high school with respect to educational standards had been established by the supervising principal. It was the principal's duty, as a loyal subordinate, to require pupil accomplishment in conformance with the established standards. It was not within his powers to change these standards.

Some of the charges indicate a lack of mutual understanding between the respondent and the appellant as to the interpretation of the meaning of certain policies. Charge No. 1, which has reference to the failure of the principal to promote proper and suitable public relations programs, is typical. One gains the impression from the testimony that the board of education expected the principal to advance the public relations of the high school by appearances on his part in the community and by participating prominently in civic affairs and service clubs. Mr. Bennett apparently understood that a suitable public relations program consisted of interpreting the schools to the public through other means. In the opinion of the Commissioner, the appellant cannot be dismissed for failing to carry out a public relations program which has never been defined clearly. It is not necessary to decide whether a board

of education would be within its powers in requiring a principal to participate in community affairs.

It appears from the testimony that circumstances beyond the appellant's control were responsible for some of the failures alleged in the charges. One group of charges deals with the failure of the appellant to give and furnish proper supervision of the teaching and the other work of the school. The testimony discloses that prior to the school year 1941-1942, the year in which the charges were preferred, the appellant's heavy teaching load had made it impossible for him to devote much time to supervision. The load was not reduced until Assistant Commissioner White indicated that he would not be able to recommend the Matawan High School to the State Board of Education for approval because of the principal's excessive teaching load. Thus, it appears that for only a brief period did the appellant have time to supervise. The charges in this group also have some of the vices characteristic of the charges hereinbefore discussed. Previous reference has been made to the responsibility of the board of education or the supervising principal to inform the principal concerning failures and to make a precise definition of the responsibilities, duties and functions of the principal with relation thereto before holding the principal responsible for their performance. The Commissioner is aware that, since members of boards of education are laymen and school administrators are professionally trained, some boards of education deem it wise to permit their school administrators to develop their own policies and to interpret their duties without any prescription by the board of education. The board of education, through acquiescence in such formulation of policies and interpretation of duties, gives tacit approval.

Whenever a board of education, having acquiesced in certain policies and having given tacit approval to the manner of performing certain duties, considers changes to be advisable, it should, with the advice of the professional head of the school system, formulate new policies and prescribe new duties. These new policies and duties should be clearly explained to the individuals in the school system, and these individuals should be given an opportunity to show whether they can succeed in the performance of these duties. After policies have been explained clearly, duties delegated fairly within the powers of the board of education, and sufficient authority and means granted to the high school principal to enable him to perform his duties, he is properly chargeable for failure to perform such duties in an efficient manner.

Changes in policies and duties made by a board of education should be adopted when the board is legally assembled. An informal suggestion of a board member, even though it represents the opinion of a majority of the individual board members, has no binding effect until it is incorporated in the formal action of the board in legal session. In the case of Sooy *vs.* State 41, N.J.L. 394, the Supreme Court said:

> "An act assented to by every one of them (individual members) is not a corporate act, unless, at the time of assent, they are convened in organized form . . . . It reposes no trust or authority in them, save when regularly assembled, nor holds them out as charged with any power or duty on its behalf."

Furthermore, the only competent evidence of the official action of a board of education is found in its written records. Campbell *vs.* Hackensack, 115 N.J.L. 209.

This is the application of the foregoing to the instant case: Mr. Bennett had been principal of the Matawan High School since 1923. Successive boards of education had retained him in office and thus had given tacit approval to his interpretation and performance of his duties. The record discloses no official action of the board to define his duties and, prior to the events which preceded the preferring of the charges, no official admonition of appellant with reference to the unsatisfactory performance of his duties. According to the ethics of his profession and the best practice of school administration, Mr. Bennett's contacts with the board of education were through the supervising principal who, under the rules of the State Board of Education, supra., was charged with the duty of advising the principal when his interpretation of his duties and his performance thereof were unsatisfactory. No evidence was produced to show that the supervising principal had advised or admonished appellant concerning the unsatisfactory interpretation and performance of his duties. On the contrary, the supervising principal testified as follows:

> "Q. Mr. McCurdy, as supervising principal of this school what is your opinion as to the quality of principalship that has been given to this school by Mr. Bennett during the approximately twenty years that he has been there?
>
> "A. In view of the heavy teaching load which the man had, I should say he did very well."

Both the former and present county superintendent of schools gave testimony favorable to the appellant in refutation of certain charges. Louis A. Rice, former Assistant in Secondary Education and Charles W. Hamilton, the present incumbent of the position, testifled that their ratings of the Matawan High School, for approval by the State Board of Education, were favorable with respect to the items in which Mr. Bennett had some part. In fact, in these items, the last rating of the school showed some improvement over the first rating. These items, dealing with some of the aspects of high school work covered by the charges, include citizenship on the part of pupils, attitude of the community, guidance plan, placement and follow-up, program of extra-curricular activities, community contacts, cooperative activities, program of information, and the work of the pupils in class.

In view of Mr. Bennett's years of service, the favorable rating of the aspects of school work in which he participated, the tacit approval by successive boards of education and the supervising principal of his interpretation and performance of his duties, the Commissioner thinks that, in the absence of any charge involving flagrant misconduct or inefficiency, the board of eduation, before dismissing him, should have defined his duties, admonished him concerning any apparent weakness in their performance, and given him an opportunity to demonstrate his ability to perform the duties in the manner prescribed by the board of education or the supervising principal.

Consideration, so far, has been given to the charges preferred against the appellant for failing to perform duties which were not prescribed and precisely defined by the board of education or the supervising principal with respect to Mr. Bennett's responsibility for their performance. Some charges refer to inefficiency in the performance of duties for which the appellant is made responsible by the provisions of the New Jersey School Act or by its own interpretation of duties tacitly approved by the board of education. The charges under Discipline and some of the charges under Administration fall into this group.

With the exception of the complainant, all the witnesses called to prove these

charges were teachers and former teachers who had served under Mr. Bennett. Some of the witnesses called to refute the charges were also teachers. Much of the teachers' testimony was opinion testimony. It is argued that these teachers, because of their professional training, experience, and oportunity for observation, can qualify as experts. It is contended further that teachers are the best witnesses as to discipline and administration because they are close to the daily happenings of the school and hence have the best opportunity to know and to judge. On the other hand, their nearness to and their participation in the happenings of the school present the danger that they will not view them with perspective and that they will not judge objectively. Assuming, but not deciding, that teachers may qualify as expert witnesses, and assuming that all these witnesses were not hostile to Mr. Bennett, or disposed in his favor, the testimony of employees of the board of education and present and former subordinates of the appellant, testifying as expert witnesses, should be examined with care. The State Board of Education in the *Rein* case, on page 300, said:

> "On our part we realize that if supervising principals and principals are to be encouraged in efforts to promote efficiency and to maintain discipline, charges made by and evidence submitted against them by former subordinates who may think they have a grievance must be examined with care. Perhaps there is not an efficient supervising principal or principal in this or any State who at some time has not had to prod a subordinate and the fact that all have some one or more who are or were under them and who have a fancied grievance may explain why the State Teachers' Association had eminent counsel appear before us to plead the cause of Mrs. Rein."

By listening to accounts of scattered and unusual episodes in the daily happenings of the school, members of the board of education may, without meaning to be unfair, permit these episodes to have a cumulative effect upon their minds to the point where their mental picture of conditions in the school represents the exceptional rather than the normal situation in the school.

The teachers in the school gave conflicting testimony, much of it opinion testimony, as to the administration and discipline of the school. The witnesses not connected with the Matawan school system, Louis A. Rice and Charles W. Hamilton, the former and present incumbent of the office of Assistant in Secondary Education, respectively, and William M. Smith and Thomas B. Harper, the former and present incumbent of the office of County Superintendent of schools of Monmouth County, respectively, who have had experience in visiting many high schools and hence are able to observe with perspective and with objectivity, commented favorably upon the discipline of the Matawan High School. Reference has already been made to the favorable ratings of the school by Messrs. Rice and Hamilton with respect to the items in which Mr. Bennett had a part.

A review of the charges and the testimony indicates to the Commissioner that individual acts were permitted to be exaggerated so as to be considered legitimate grounds for dismissal. In the Rein case, supra., the Commissioner said:

> "If incidental acts occuring in school administration and supervision are permitted to be exaggerated so as to be considered legitimate grounds for dismissal, then the tenure law gives no protection to teachers and fails to meet the purpose for which it was enacted by the Legislature."

The charges under Other Acts involve conduct unbecoming a principal. The Commissioner finds no testimony in proof of these charges which justifies the appellant's dismissal on the basis of these charges.

In the Reichenstein *vs.* Newark case, supra., the Supreme Court after reviewing the case on Certiorari, said:

> "Reviewing all the testimony we fail to find a rational and reasonable basis for his conviction."

In the instant case, the Commissioner fails to find a rational and reasonable basis for the dismissal of John E. Bennett as principal of the Matawan High School. Therefore, the decision of the Board of Education of the Township of Matawan is reversed, and the respondent is hereby directed to reinstate appellant as high school principal with pay from the date of his suspension.

August 11, 1943.

DECISION OF THE STATE BOARD OF EDUCATION

The conclusion reached by the Commissioner of Education in a careful and full opinion was that he did not find a "rational and reasonable basis" for the appellee's dismissal as principal of the Matawan High School. *Reichenstein vs. Board of Commissioners,* 31 Atl. Rep. 2nd, 814. After examination of the lengthy record and briefs this Board agrees with his conclusion. Further discussion or comment is unnecessary except to say that in our opinion the record does not exhibit that freedom from animus, bias or pre-judgment which is essential to a fair hearing and determination of charges preferred against a teacher or principal under the tenure of office statute.

On this appeal appellant's counsel maintains that Mr. Bennett is not entitled to receive salary if his reinstatement by the Commissioner is upheld, and also asks that in that event a proceeding be instituted to determine the amount Mr. Bennett has earned in other employment since he was suspended, such amount to be deducted from whatever salary may be finally awarded him. The law of this State is to the contrary and the request must be denied. 40:46-34; *State ex rel. Jardot vs. Rahway,* 3 N. J. Misc. 201, 2 N. J. Misc. 742.

The decision of the Commissioner of Education is affirmed and the Matawan Board of Education is ordered to comply with his direction to reinstate the appellee as principal of the high school with pay from the date of his suspension on July 2, 1942, at the rate he was receiving prior thereto.

February 4, 1944.

Application for Writ of Certiorari denied by Supreme Court April, 1944.

RIGHT OF TEACHER TO INCREMENTS UPON SALARY SCHEDULE DEPENDENT UPON RULES OF BOARD OF EDUCATION

JULIAN B. HONEYCUTT,

Petitioner,

vs.

BOARD OF EDUCATION OF THE CITY OF TRENTON,

Respondent.

For the Petitioner, Josephson & Josephson.
For the Respondent, Henry M. Hartmann.

DECISION OF THE COMMISSIONER OF EDUCATION

Julian B. Honeycutt, the petitioner, was employed by the Board of Education of the City of Trenton from July, 1929, to July 7, 1938, as a teacher and head of the history and social science department of the Trenton Senior High School.

The respondent, under authority of Chapter 12, P.L. 1933 and amendments thereto, made a 20% reduction in the salaries of teachers in its public schools from July 1, 1933, to June 30, 1937, and notwithstanding the lack of legislative authority for reductions after the latter date, the board continued a reduction of 15% of the salaries of tenure teachers, among whom was the petitioner, whose contractual salary was $4,050.00—$3,800.00 of which was based upon the teachers' schedule with $250.00 additional compensation as head of a department.

The tenure teachers of the city during the early part of the school year 1937-1938 appealed to the Commissioner of Education to determine their salary rights. The first appeal was presented by Herbert H. Cole and the second by George M. Krall, et al. which petition included all of the other tenure teachers of the school system. The Commissioner held in both cases that the petitioners were entitled to their full contractual salaries, which rulings were affirmed by the State Board of Education. The Cole petition is at present pending before the Supreme Court. It appears that during the process of the litigation the board of education was considering the revival of the salary schedule which had been inoperative since 1933, concluded that the city was not in a financial position to pay full contractual salaries, and decided that if the teachers were ultimately successful in the litigation and demanded full restoration, it would abandon the salary schedule and thereby discontinue increments. The possibility of the teachers' securing full salaries and of the board's abandoning the salary schedule led to an attitude of compromise, which resulted in the board of education sending to each teacher a form whereby she could elect to accept one of two options: (1) To withdraw from further salary litigation for the year 1937-1938; and for the year 1938-1939 to receive a restoration of 10% of the contractual salary plus one year's increment in accordance with the salary schedule; or (2) To withdraw from further salary litigation for the school year 1937-1938, and to receive for the current year the restoration of the 15% reduction, which would bring the salary to the full contractual amount. A teacher who did not desire to accept either of these two options was permitted to sign a statement setting forth that she elected to receive full salary restoration for the year 1938-1939, and to continue with the present litigation for the restoration of the deduction for the year 1937-1938.

Mr. Honeycutt, the petitioner, signed option number one. Following the selection of this option, officers of the board informed him that he was receiving the maximum provided for his position without the special recommendation of the superintendent of schools, and that he should accordingly confine his request to option number two, which he refused to do. On July 15th, the superintendent notified the petitioner that his salary for the ensuing year would be $4,050.00.

During the latter part of the school year 1937-1938, the superintendent of schools and the principal of the Senior High School informed Mr. Honeycutt that they were not satisfied with his work as head of the department of history and social science, and that they would recommend to the board that his work thereafter be limited to that of teacher of these subjects. On July 7th, the board of education adopted the recommendation of the superintendent, designating the petitioner as "teacher." Mr. Honeycutt, anticipating such action, was present with counsel and protested the action of the board.

On July 14, 1938, Mr. Honeycutt filed a petition, alleging his designation as "teacher" and the fixing of his salary at $4,050.00 to be in violation of the Teachers' Tenure of Office Act, and praying that the Commissioner set aside the board's action of July 7th, and require the respondent to reinstate him as head of the department of history and social science with salary in accordance with the option selected by him.

The two questions to be decided in this case are:

(1) Did the board act within its legal authority in designating the petitioner as "teacher" without a reduction in salary?

(2) Is the petitioner entitled to an increment and the restoration of 10% of his contractual salary in accordance with his selection of option?

In the case of Davis *vs.* Board of Education of Overpeck Township, 1938 Compilation of School Law Decisions, 464, in which the principal of a high school was assigned to a teaching position in the grammar school, Justice Parker in a decision dated May 21, 1913, ruled as follows:

> "I agree entirely with the State Board that Mr. Davis was protected by the act; . . . and that his attempted assignment as a teacher in the lower grade was legally tantamount to and in fact operated as an attempted dismissal as principal of the high school."

In Williams *vs.* Board of Education of the Borough of Madison, 1938 Compilation of School Law Decisions, 552, in which a supervisor of music was transferred to teach music and dramatics in a school of not exceeding eighty pupils, who were classified as backward and maladjusted, the Commissioner ruled such transfer to be tantamount to a dismissal and in violation of the Teachers' Tenure of Office Act.

It is to be noted that in the Davis and Williams cases, above cited, the actions of the boards resulted in the humiliation and embarrassment of the respective teachers.

In the case of Cheesman *vs.* Board of Education of Gloucester City, 1938 Compilation of School Law Decisions, 502, where the principal teacher of the seventh and eighth grades in one school building was assigned to the position of principal teacher of the fifth and sixth grades of another, the Supreme Court ruled:

> "Miss Cheesman could not be dismissed or her salary reduced except for causes mentioned in the Tenure of Office Act and in the manner prescribed

in said act. Her salary was not reduced and she was not dismissed. A transfer is not a demotion or dismissal. Transfers are often advisable in the administration of schools for many reasons."

In Tinsley *vs.* Board of Education of the Borough of Lodi, 1938 Compilation of School Law Decisions, 505, where a teacher was transferred from a junior high school organization to the fifth grade without a change in salary, the State Board of Education in sustaining the transfer, said:

". . . We know of no provision in the law which gives teachers rank other than the certificate which they hold. Teachers in New Jersey are holders either of elementary certificates, entitling them to teach the first eight grades, holders of secondary certificates, entitling them to teach in the high schools, or teachers holding special certificates. The statute, Section 68 of the School of Law, gives boards of education the right to transfer a teacher by a majority vote of the board. Appellant was receiving the maximum salary of an elementary teacher in the Borough of Lodi, and it appears that such maximum is the same whether one teaches the first grade or the eighth grade, and whether the class is part of the junior high school or not. She suffered no reduction of salary on account of the transfer, either immediate or prospective."

In view of all the above cited cases, it appears that the courts have differentiated between an extreme change of duties, tending to embarrass the employee, and an assignment which may constitute a slight demotion made within the discretion of the board of education for the welfare of the schools without an intention to humiliate or punish the employee.

Boards of education are appointed or elected to conduct the schools for the welfare of the pupils. The best interests of the schools would not be served if boards are denied the right to transfer or change the duties of a teacher when it deems such action will promote the efficiency of instruction or administration.

In the instant case, Mr. Honeycutt's immediate superior, the high school principal, and the chief educational executive of the city, the superintendent of schools, testified that they were not satisfied with the work of the petitioner as head of the department and that they deemed it advisable to recommend his assignment as "teacher" rather than as "head of the department of history and social science." There was no indication in the testimony of prejudice or of any desire to humiliate the petitioner. Under these conditions, the assignment of the petitioner as "teacher" is valid.

When the board of education offered to teachers an option between the restoration of 15% and a restoration of 10% with a salary increment, selections should have been made in consideration of the provisions of the salary schedule. If a teacher had reached her maximum under the salary schedule, the fact that she selected an increment and 10% did not give her a right to an increment not provided by the schedule. The testimony in this case shows that the maximum salary for a high school teacher is $3,800.00, that a super-maximum is created upon the recommendation of the superintendent of schools, and that the superintendent has at no time recommended the super-maximum for Mr. Honeycutt. Therefore, the maximum for his position is $3,800.00 as teacher and $250.00 as head of the department, a total of $4,050.00. His desire to have an increment to which he was entitled only upon the recommendation of the superintendent could not remove the conditional requirement of the recommendation. It appears to be a reasonable

procedure for the board, when ascertaining that Mr. Honeycutt's selection of an option assumed a right not available to him, to transfer the option from the one which he selected to the one for which he was qualified. Mr. Honeycutt is not legally entitled to a further increment nor to a salary in excess of $4,050.00.

The petitioner was not dismissed, the change of his duties does not constitute an action tantamount to a dismissal, his salary was not reduced, and there was accordingly no violation of Mr. Honeycutt's rights under the Teachers' Tenure of Office Act. The appeal is dismissed.

November 17, 1938.

TRANSFER OF HIGH SCHOOL PRINCIPAL UNDER TENURE TO A SUPERVISORY POSITION SUSCEPTIBLE TO LEGAL ABOLITION CONSTITUTES ILLEGAL TRANSFER

WILLIAM H. WYTHES,

Petitioner,

vs.

BOARD OF EDUCATION OF THE CITY OF CAMDEN,

Respondent.

For the Petitioner, Clifford A. Baldwin.
For the Respondent, Edward V. Martino.

DECISION OF THE COMMISSIONER OF EDUCATION

Prior to 1933, the petitioner was for several years a teacher in the public school system of Camden and since that time has been principal of its Senior High School. In this decision, any reference to the Senior High School or to the Woodrow Wilson Cosmopolitan High School applies to what was formerly designated the Woodrow Wilson High School. During the school year 1939-1940, Mr. Wythes, the petitioner, was paid a salary of $3,800.00 as principal of this school. On June 27, 1940, the Board of Education of the City of Camden adopted the following resolution:

> "VI. APPOINTMENTS AND TRANSFERS
>
> "In view of the fact that the Commercial and Practical Arts High School no longer exists, it is recommended that Mr. William H. Wythes' status as principal be enlarged to embrace the direction of secondary commercial education, effective September 1, 1940.
>
> "We further recommend that the following appointments and transfers be made to take effect September 1, 1940.
>
> Name, Dr. Everett B. Townsend, Jr; from Principalship, Woodrow Wilson Evening School; to Principalship Woodrow Wilson Cosmopolitan High School; salary $3,000.00
>
> . . . . ."

The petitioner contends that this resolution is invalid in that it deprives him of his rights as Principal of the Senior High School and prays that the Commissioner of Education require the Board to restore him to active service as principal of the school.

The position to be held by Mr. Wythes under the resolution is not clearly stated in the text, but must be deduced by its implications. The first paragraph of the resolution reads in part:

> "Mr. William H. Wythes' status as principal be enlarged to embrace the direction of secondary commercial education."

This would indicate that Mr. Wythes is still principal of the Senior High School and that his duties as such principal are enlarged to embrace the direction of secondary commercial education. However, the second paragraph of the resolution transfers Dr. Everett B. Townsend, Jr. from the principalship of the Woodrow Wilson Evening School to the principalship of the Woodrow Wilson Cosmopolitan High School. Since there cannot be two principals occupying the same position, it must be deduced that the board is creating the position of Director of Secondary Commercial Education, placing Mr. Wythes in that position and transferring Dr. Townsend to the principalship of the Senior High School. The rules of the State Board of Education require that in a school of five hundred pupils or more, the time of the principal shall be devoted to the administration and supervision of the school. Under this rule, the duties of the Principal of the Senior High School could not be enlarged beyond the administration and supervision of that school since the enrollment exceeds fifteen hundred pupils. This is a further indication that Mr. Wythes' duties as principal were not enlarged but that it was the intention of the board to remove him from the principalship.

The sole question to be determined in this case is the legality of the resolution of June 27, 1940, transferring the petitioner to the position of Director of Secondary Commercial Education.

The position of principal is one to which frequent reference is made throughout the School Law and one to which statutory duties are assigned. As stated by the Commissioner of Education in the case of Kelly *vs.* Lawnside, 1938 Compilation of School Law Decisions, 320, the position of principal of a school building is one recognized by what may be termed the "common law of public schools," and one that cannot be abolished as long as the school exists. In the case of Weekley *vs.* Board of Education of Teaneck, 1938 Compilation of School Law Decisions, 390, the Commissioner sets forth the importance of the position of principal. Both of these decisions by the Commissioner were affirmed by the State Board of Education.

The Teachers' Tenure of Office Act provides for the protection in their positions of "teachers, principals, and supervising principals" and accordingly the position held by Mr. Wythes during the past seven years is one from which he could not be dismissed. It is the contention of the respondent that Mr. Wythes was not dismissed but was transferred. A number of decisions under the School Law have held that principals cannot be transferred to positions of lower rank. (Decision of the Commissioner of Education in the case of MacNeil *vs.* Ocean City, 1938 Compilation of School Law Decisions, 374, affirmed by the State Board of Education and by the Supreme Court, 377; decision of the State Board of Education in Davis *vs.* Overpeck, 1938 Compilation of School Law Decisions, 466, affirmed by the Supreme Court 470 to 472.) The position of principal of a senior high school with an enrollment of more than fifteen hundred pupils is one of very high rank in the educational system; whereas, the position of Director of Secondary Commercial Education is not recognized either in the School Law or in the Rules of the State Board of Education Concerning Teachers' Certificates.

It appears from the testimony that the title of the position to which Mr. Wythes was transferred is that of "Director of Secondary Commercial Education." The Assistant in Secondary Education in the State Department of Public Instruction testified that he knows of three other school systems in the State; namely, Newark Elizabeth, and Union City, each of which has a position designated "Director of Commercial Education," in which the most important duty is supervision, and that the planning of the work for such courses and the selection of teachers may constitute supplementary duties. The specific duties of the position in the Camden schools have not been determined by the board of education, but the implications of the testimony are to the effect that they will be similar to those of the position of Director of Commercial Education in the three school systems above mentioned.

The type of certificate to qualify a person for the supervision of a secondary school subject is either a Special Supervisor's Certificate, confined to the subject, or the General Supervisor's Certificate, authorizing supervision of any department or field of education. There is no provision in the Rules Concerning Teachers' Certificates for a Director of Commercial Education. Concerning the professional status of a supervisor of a special subject in relation to the principal of a school, Dr. Ellwood P. Cubberley, who was for many years Professor of Education in the Leland Stanford Junior University and recognized by the teaching profession of this country as an outstanding authority on school administration, in his book: "The Principal and His School," at page 421, said:

> "When the special teacher or supervisor enters his building to work, he or she comes under the professional supervision of the principal, and the relationship now established lies somewhere between that of a teacher in the school and that of a visiting superintendent. The prime purpose of the special supervisor is to train the regular teachers, where this is possible, to do the special work, and to this end the special supervisor stands in much the position of an assistant principal whose function is that of improving instruction within the school."

There is nothing in the law or the court decisions of this State to indicate that the position of Director of Secondary Commercial Education could not be abolished at any time when, in the judgment of the board, it appeared to be advisable to do so.

The position of principal of a high school has three characteristics of major importance which do not apply to the position of Director of Secondary Commercial Education:

(1) It is recognized by the statutes and certificate rules.

(2) It is included in the positions specifically designated for tenure protection.

(3) It cannot be abolished so long as the school exists.

The professional and legal status of the position of Principal of the Senior High School in the City of Camden makes the transfer of Mr. Wythes from that position to that of Director of Secondary Commercial Education illegal. The resolution is, therefore, declared to be void and the Board of Education of the City of Camden is directed to reinstate William H. Wythes as Principal of the Senior High School.

October 7, 1940.

TEACHERS' TENURE OF OFFICE ACT PROTECTS PART-TIME TEACHERS AS WELL AS THOSE EMPLOYED FULL-TIME

ELIZABETH FOX,

Petitioner,

vs.

BOARD OF EDUCATION OF THE BOROUGH OF NEW PROVIDENCE, UNION COUNTY,

Respondent.

For the Petitioner, Norbert T. Burke.

For the Respondent, John L. Hughes.

DECISION OF THE COMMISSIONER OF EDUCATION

The petitioner, Elizabeth Fox, who holds a certificate authorizing her to teach cooking and sewing in the public schools of this State, had been employed as a teacher in the School District of the Borough of New Providence for approximately eleven years. At the beginning, she rendered service for one day each week, later one and one-half days per week, and since September, 1935, two days per week. The annual contracts for the period between September, 1933, and June, 1937, set forth that she is employed for the respective school years from the first day of September to the thirtieth day of June at an annual salary payable in ten equal monthly installments.

At the meeting of the board held May 20, 1937, all of the teachers were re-appointed except petitioner and one other teacher and the clerk was directed to write letters of appreciation to the two teachers not re-engaged explaining the reason and regretting inability to continue their services due to changes in organization. Under date of May 24, 1937, the district clerk notified Mrs. Fox that her services would not be required for the school year 1937-1938, and stated

> "A change in the school set up which will combine a regular teacher's position with that of a domestic science instructor has eliminated your part time position."

Petitioner appealed from the action of the board on September 13, 1937, and reported at the school regularly from its opening in September until the date of the hearing in this case.

The testimony discloses that while it may have been the intention of the board to abolish the position held by petitioner and create a combined position of special teacher and regular classroom teacher, no such new position was created. The classes in these subjects continue as heretofore and are being taught by a regular classroom teacher without a certificate qualifying her for the special work. After teaching a regular one session day during the morning, it appears that this teacher is donating her after school time for instruction of the special classes. While there may have been some economy under a hypothetical plan discussed by the board, the economy under the present situation is that an unqualified teacher is filling this position without compensation. Even if the present teacher were the holder of a proper certificate and either donated or received extra compensation for her

services, it would not change the situation which continues the position formerly held by the petitioner.

Counsel for the respondent contends that the board of education acted within its legal authority in terminating the services of the petitioner for the reasons: (1) a part-time teacher is not protected in her position under the provisions of the Teachers' Tenure of Office Act; and (2) even if she were protected by the tenure act, the position was abolished for justifiable economy.

Revised Statutes 18:13-16 (Chapter 243, P.L. 1909) provides:

> "The service of *all* teachers . . . . shall be during good behavior and efficiency after the expiration of a period of employment of three consecutive academic years together with employment at the beginning of the next succeeding academic year. . . . ."

The statute giving tenure protection to school nurses, Revised Statutes 18:14-64.1 (Chapter 120, P.L. 1937) provides:

"The services of all *full time* nurses of the public schools . . . . ." and then in almost identical language as that of the Teachers' Tenure Act gives tenure protection.

It is to be noted that in the Teachers' Tenure Act protection is afforded "all teachers" without reference to "part time" or "full time"; whereas, the nurses' tenure protection is definitely prescribed for "full time" employment only. The protection provided for teachers applies to "all" who have served in a school district for the time prescribed in the act.

If a teacher is employed for more than three consecutive academic years, she is protected in the type of position to which she is last promoted. MacNeal *vc.* Ocean City, School Law Decisions, 1938 Edition, p. 374, affirmed by the Supreme Court January 18, 1928. If her latest employment is one day a week, then she is protected in one day a week employment so long as that type of position continues. She cannot, because of employment for one or two days per week, successfully demand a full time position. Types of positions may be abolished in good faith to create other types, but so long as any position exists, the right to protection of the incumbent continues to the extent prescribed by the Teachers' Tenure of Office Act. Weider *vs.* High Bridge, 112 N.J.L. 289.

Counsel for respondent holds untenable the contention that a teacher may have tenure protection in more than one district at the same time. The Commissioner can see nothing incompatible with such tenure rights when teachers are employed for part time in more than one district. A teacher could teach one-third of her time in one district and two-thirds in another and if such employment continued for more than three consecutive academic years, tenure would be acquired in each district so long as those types of positions continue.

The petitioner was employed by the year for more than three consecutive academic years and is protected in accordance with her latest contract for two days' employment each week at an annual salary of $600 per year, unless her position has been legally abolished. The testimony clearly shows that the position held by the petitioner continues to exist. Its contemplated abolition has not become effective, and the services of Mrs. Fox were, therefore, illegally terminated.

Counsel for respondent seeks to invoke the provisions of Revised Statutes 18:13-13 (Chapter 117, P.L. 1937). The provisions of this statute are not an issue in this case.

The Board of Education of the Borough of New Providence is hereby directed to

immediately reinstate Mrs. Fox as teacher of domestic science and sewing and to pay her salary from the opening of school in September at the rate of $600 per year.

January 17, 1938.

SERVICES RENDERED AS SUBSTITUTE IN ACADEMIC YEAR IMMEDIATELY FOLLOWING THREE FULL ACADEMIC YEARS OF TEACHING ARE NOT CREDITE TOWARD ACQUISITION OF TENURE

MADELINE LANDIS SCHULZ,

Petitioner,

vs.

BOARD OF EDUCATION OF THE CITY OF NEWARK,

Respondent.

For the petitioner, Harkavy & Lieb, (A. J. Harkavy of counsel).

For the respondent, Jacob Fox.

DECISION OF THE COMMISSIONER OF EDUCATION

The petitioner, Mrs. Madeline Landis Schulz, is the holder of a New Jersey Permanent Special Teachers' Certificate issued in January 1935, "to teach and supervise art in any school district of this State." Based upon service rendered in the Newark schools beginning September, 1937, and the provisions of subsection (c) of Chapter 43, P.L. 1940 (R.S. 18:13-16), the petitioner claims tenure of office and appeals from alleged failure of the Newark Board of Education to grant her regular employment. It is admitted by the respondent that the petitioner taught only art throughout her several periods of employment in the Newark schools.

The petitioner's teaching service was continuous throughout the school year of 1937-1938, during which time she served at a salary of $120.00 per month in the place of a teacher who was absent on leave. Due to an existing vacancy, petitioner's service continued uninterruptedly during 1938-1939 at a salary of $160.00 per month. The petitioner also taught continuously for the third consecutive year, 1939-1940, under the same arrangements and at the same salary as in the previous year. Upon the completion of these three full years of teaching service, there was an hiatus in petitioner's employment from the end of the school year in June 1940, until November 1940. The stipulation entered into by counsel for petitioner and respondent shows petitioner's teaching service during the fourth consecutive academic year, 1940-1941, to consist of the following substitute teaching assignments:

Date	School	Days	Rate of Compensation	Subject
1940				
November	Madison Junior High	1	5.50	Art
December	Barringer High	1	7.00	Art
December	Franklin Elementary	½	5.50	Art
1941				
January	Cleveland Junior High	1	6.00	Art
January	Miller Street Elementary	1	5.50	Art
	Total	4½		

The last paragraph of the stipulation reads as follows:

> "Appellant's claim for tenure is confined to sub-division (c) of Section 18:13-16 of the Revised Statutes. It is stipulated that she is entitled to tenure if the time served by her during the academic year 1937-1938, plus at least one day of the four and one-half days during which she was employed in the academic year 1940-1941, can be added to the period of her services during the academic years 1938-1939 and 1939-1940, in computing the period constituting 'equivalent of more than three academic years' under sub-division (c) of Section 18:13-16 of the Revised Statutes; and that otherwise she does not have tenure status."

The pertinent parts of R. S. 18:13-16 (Chapter 43, P. L. 1940) above referred to read:

> "The services of all teachers, principals and supervising principals of the public schools, excepting those who are not the holders of proper teachers' certificates in full force and effect, shall be during good behavior and efficiency, * * * (c) after employment, within a period of any four consecutive academic years, for the equivalent of more than three academic years, some part of which must be served in an academic year after July first, one thousand nine hundred and forty; provided, that the time any teacher, principal or supervising principal had taught in the district in which he was employed at the end of the academic year immediately preceding July first, one thousand nine hundred and forty, shall be counted in determining such period of employment in that district."

It is to be noted that this act uses the words "the services of all teachers * * * except those who are not the holders of proper teachers' certificates in full force and effect * * *."

In the instant case, the petitioner had a permanent State art teacher's certificate in full force and effect at all times during the period under discussion, including the four and one-half days of substituting, and confined her teaching to the subject of art. Were any of this teaching service, whether regular or substitute, performed in grades or subjects for which the petitioner was not properly certificated, serious question might be raised as to the legality and validity of such service in view of the related provisions of Sections 18:13-8, 18:13-14 and 18:13-16 of the Revised Statutes.

This is not the case here, however.

Though counsel for respondent in his brief relies heavily on the decisions of the Commissioner and State Board of Education in the case of Stella C. Waters *vs.* Board of Education of the City of Newark, 1938, Compilation of School Law Decisions, 623, it must be noted that the cases are not comparable in view of two very essential differences: Unlike the petitioner in the instant case, Miss Waters did not hold a State certificate of any kind, but possessed only a limited city certificate which did not qualify her for regular appointment. The Commissioner's decision points out this difference clearly:

> "It is the opinion of the Commissioner of Education that appellant did not, at the close of the school year, June 30, 1931, hold a valid certificate for a permanent position. The broadest interpretation that can be given to the certificate held by the appellant is that it qualified for temporary substitute teaching, which is not classified as a permanent position and therefore the

certificate was for a position not protected by the provisions of the Tenure of Office Act.

"A regular substitute under full time employment who serves more than three consecutive years has tenure rights as long as the Board continues the service of full time substitutes."

The second significant difference is found in the amended provisions of the Teachers' Tenure Act. The Commissioner's decision in the *Waters* case was rendered in November, 1931, and was affirmed by the State Board of Education in April, 1932. At that time the method of acquiring tenure by means of the accumulation of an aggregate of more than three years of service in four successive years had not yet become a part of the statutes. Approximately eight years elapsed between the final disposition of the *Waters* case and the enactment of Chapter 43, P. L. 1940. Prior to this amendment, an hiatus in an employment relationship often became an effective bar to the acquisition of tenure by teachers.

In the instant case, it is admitted that Mrs. Schulz taught grades and subjects for which she was properly certificated for more than three years in four successive years, and that some of this service was rendered subsequent to July 1, 1940, as required by subsection (c) of Chapter 43, P. L. 1940. The New Jersey Teachers' Tenure Act, unlike somewhat similar statutes in several other states, does not now differentiate between regular and substitute teachers. Such differentiation could have been properly inferred when the only two legal methods of attaining tenure in New Jersey were through teaching continuously three consecutive calendar years or three successive academic years plus employment for the fourth year. Nor does any statute exempt substitute teachers from the necessity of holding a valid and appropriate teachers' certificate. The petitioner acquired tenure of office on November 8, 1940, upon the completion of a day of teaching in the Madison Junior High School. This day of service, added to the three previous complete years of employment in four successive years, meets the requirements of subsection (c) Chapter 43, P. L. 1940, and accordingly the benefits thereunder must accrue.

The Board of Education of the City of Newark is hereby ordered to reinstate Madeline Landis Schultz in a teaching position in art in the Newark public schools at a salary in accordance with the applicable rules and regulations of the board of education, and further to pay to Mrs. Schulz such balance of salary with interest as would have been paid to her had she been regularly employed as an art teacher during the period beginning November 9, 1940, to the present date. In relation to the seniority status of other art teachers in the school system, it is directed that the petitioner's date of acquisition of tenure be fixed as of November 8, 1940, in accordance with the pertinent implications of R. S. 18:13-19, with her seniority rank being placed superior to any art teacher who on November 8, 1940, had a lesser length of service in the district.

December 29, 1941.

DECISION OF THE COMMISSIONER OF EDUCATION

For the Petitioner, Harkavy & Lieb, (A. J. Harkavy, of Counsel)

For the respondent, Jacob Fox.

The December 29, 1941, decision of the Commissioner of Education in this case was the first written in relation to the provisions of subsection (c) of Chapter 43,

P. L. 1940, (R. S. 18:13-16). The most recent amendment to the Teachers' Tenure Act provides for the attainment of tenure status upon the completion of the equivalent of more than three academic years in four successive academic years, notwithstanding that there may have been a number of breaks in service during such four successive academic years. Because of the novel issues presented, counsel for the respondent, by agreement with counsel for the petitioner, requested leave to file a supplementary stipulation so that several additional specific issues might be considered and determined. The request was granted, and a stipulation was received, in paragraph 5 of which both parties request a supplementary decision with respect to the following questions:

1. Does tenure status already declared in favor of the petitioner extend to night schools as well as day schools?

2. Does tenure status relate to employment in elementary, junior high or senior high school levels or in all or any two of these?

3. What compensation should be fixed for future employment of the petitioner and for back salary which may be due to the petitioner?

As to the first question, it is the opinion of the Commissioner of Education that no determination is necessary for the purposes of this case. Moreover, the insufficiency of factual evidence on evening school matters would make it impossible to properly resolve this question even though a determination were not in the nature of *obiter dicta.* For the purposes of this decision, the petitioner's tenure status is declared to apply to day school service.

With respect to the particular school organization in which the petitioner attained tenure, this question is also immaterial except as it related to compensation due and to be fixed for future employment. Boards of education have the discretionary power to transfer teachers within the scope of their certificate rights; providing, no reduction of salary results in the cases of tenure teachers. Tinsley *vs.* Lodi Board of Education, 1938 School Law Decisions, 505; Greenway *vs.* Camden, decided by the New Jersey State Board of Education on December 19, 1941, and now pending on appeal to the Supreme Court. Mrs. Schulz has tenure rights in the Newark school system and not in a particular school organization within that system. However, she was teaching in an elementary school organization at the time of her acquisition of tenure. The salary schedule admitted to exist in Newark (Par. 4, Supplemental Stipulation) provides for an annual salary of $1,500 for regular teaching service in elementary schools, $1,900 in junior high schools, and $2,200 in senior high schools.

This is in the nature of a supplement to the previous decision in this matter. It affirms said decision and supplements it by fixing the amount of $1,500 per annum as the basis for back salary and reinstatement salary, in view of the fact that the present salary schedule in the Newark school system fixes $1,500 per annum for teachers in elementary schools, wherein the petitioner attained tenure status as a regular teacher. The change from a series of temporary service appointments, which finally resulted in tenure status, to permanent regular service would seem to place the petitioner on the same automatic salary basis as other teachers upon their "receiving a regular permanent appointment."

This supplemental decision will also deal further with the issue of laches. As to petitioner's claim for back salary, she cannot be held guilty of laches. Unlike the attainment of tenure upon the completion of three consecutive calendar years of

service or by means of three consecutive academic years of service or by means of three consecutive academic years plus employment for the fourth, it may not be immediately discernible to the employee or employer when tenure accrued, when its attainment through subsection (c) of Chapter 43, P.L. 1940, rests on an aggregate of months and days exceeding three academic years in four successive academic years with a number of periods of unemployment intervening at various times during said four years. Moreover, the petitioner taught at various times in December 1940 and January 1941. During a period of several months prior to filing the petition with the Commissioner of Education, Mrs. Schulz was diligent in unsuccessively protesting and trying to effect a settlement with the Newark Board of Education. Though the petition under review was received five and two-thirds months subsequent to the date on which the Commissioner decided that tenure had accrued, it was only approximately three months after the last date of petitioner's employment by the board of education. The petitioner was alert and timely in her protestations and appeals both to the Newark Board of Education and to the Commissioner of Education.

July, 2, 1942.

Decision of the State Board of Education

The petitioner-appellee, Madeline Landis Schulz, hereinafter referred to as "petitioner," has been since January 2, 1935, and still is, the holder of a State Permanent Special Art Certificate, for elementary and high schools. For several years before the school year beginning July 1, 1937, she was employed from time to time by respondent-appellant, hereinafter referred to as "appellant," as a substitute teacher. On September 1, 1937, petitioner was employed by appellant as a substitute teacher to fill the position of a regular teacher who was absent on leave. She occupied that position the entire school year of 1937-1938, at a salary of $120.00 per month. During the years 1938-1939 and 1940-1941, she was employed by appellant as a substitute teacher to teach art in the Arts High School, at a salary of $160.00 per month. This employment was due to a vacancy in a teaching position at Arts High School and not as the result of a temporary absence of a teacher.

On September 30, 1940, petitioner made application to appellant for assignment to work as a substitute teacher and during the school year beginning July 1, 1940, she was employed on five different occasions as a day to day casual and itinerant substitute teacher to fill the positions of permanent teachers temporarily absent. These employments were as follows:

1940		
Nov.	At Madison Junior High School	1 day @ $5.00 per day
Dec.	At Barringer High School	1 day @ $7.00 per day
Dec.	At Franklin Elementary School	½ day @ $5.50 per day
1941		
Jan.	At Cleveland Junior High School	1 day @ $6.00 per day
Jan.	At Miller Street Elem. School	1 day @ $5.50 per day

Petitioner claims that upon being employed in November, 1940, she became entitled to tenure status, having been employed by appellant during a period equivalent to more than three academic years within a period of four consecutive academic years, pursuant to Chapter 43, P. L. 1940, which amended Sec. 18:13-16 of the Revised Statutes of 1937, to read:

> "The services of all teachers, principals and supervising principals of the public schools, excepting those who are not the holders of proper teachers' certificates in full force and effect, shall be during good behavior and efficiency * * * after employment within a period of any four consecutive academic years, for the equivalent of more than three academic years, some part of which must be served in an academic year after July first, one thousand nine hundred and forty; provided, that the time any teacher, principal or supervising principal had taught in the district in which he was employed at the end of the academic year immediately preceding July first, one thousand nine hundred and forty, shall be counted in determining such period or periods of employment in that district. An academic year, for the purpose of this section means the period between the time school opens in the district after the general summer vacation until the next succeeding summer vacation."

The time during which petitioner was employed by appellant being conceded, the Commissioner of Education held that the day of employment in November, 1940, added to the three complete years of employment in four successive years, met the requirement of subsection (c) Chapter 43, P. L. 1940, and accordingly the benefits thereunder must accrue. He ordered that appellant reinstate petitioner in a teaching position in art in the Newark public schools at a salary in accordance with the applicable rules and regulations of the board of education, and further to pay to petitioner such balance of salary, with interest, as would have been paid to her had she been regularly employed as an art teacher during the period beginning November 9, 1940, to the present date. Furthermore, he directed:

> "In relation to the seniority status of other art teachers in the school system, it is directed that respondent's date of acquisition of tenure be fixed as of November 8, 1940, in accordance with the pertinent implications of R. S. 18:13-19, with her seniority rank being placed superior to any art teacher who on November 8, 1940, had a lesser length of service in the district."

By a supplementary decision the Commissioner of Education affirms his previous decision and supplements it by fixing the amount of $1,500.00 per annum as the basis of back salary and reinstatement salary and he also decides petitioner was not in laches in filing her petition, as argued by appellant.

The Newark Board of Education appeals from the decision of the Commissioner of Education to this Board.

The case is presented on a stipulation of facts by counsel of the parties, their briefs and oral argument.

It appears, by said stipulation, among other things, that:

During the period on which petitioner relies in her claim for tenure status, a board of examiners functioned in Newark under the provisions of Sec. 18:13-2 of the School Law, and that during that period the rules and regulations of the Board of Education of Newark provided that all licenses to teach in the public schools of Newark shall be granted solely by the board of examiners and the licensee shall hold a certificate of eligibility issued by the State Department of Education. Furthur provisions relate to the qualifications of applicants for license to teach, their examination, etc.

Each teacher employed in the public schools of Newark must serve a probationary period of three years before receiving permanent appointment. The services of a

teacher on probation may be dispensed with by the board of education upon recommendation of the superintendent of schools at any time it becomes evident that ultimate success is improbable.

Under the practice and procedure of the Board of Education of Newark, names of applicants who have passed examinations of the board of examiners, and who hold a license or certificate issued by the board, are placed on "eligible lists" which are kept in the office of the superintendent of schools and contain the names of all applicants for positions in the public schools of Newark. Separate lists are maintained for the teaching of art.

Names on the lists appear in the order of marks received in the examinations of the board of examiners and appointment for probationary terms are made in the same order.

During the said period, petitioner did not, and does not at the present time, meet the requirements for a license to teach and was not and is not at the present time the holder of a license or certificate to teach art, or any other certificate or license to teach in either the elementary or scondary schools of Newark issued or granted by the board of examiners of the Board of Education of Newark.

In addition to appointments for probationary terms leading to permanent appointments after three years of satisfactory employment, there is a classification under which services of teachers are engaged known as "substitute teachers." So far as practicable, except in the case of day to day substitutes, engagement for work as substitute teachers is made from among those whose names appear on the eligible list of candidates eligible to appointment for probationary terms leading to permanent employment, but applicants whose names do not appear on the eligible lists, who are otherwise qualified, are on occasion engaged as "substitute teachers."

Substitute teachers are employed either at a per diem or a monthly rate of pay. There are incidents of employment of substitute teachers which differ from that of permanent teachers or those serving the three year probationary period leading to permanent employment, they relate to deductions for absence due to illness or death in the family. There is a salary schedule with provision for increases applicable to permanent teachers and those serving probationary terms. None for substitute teachers. When one increase was granted during the past several years, no provision was made for substitute teachers.

Teachers appointed to serve for probationary terms and permanent teachers are appointed by the board of education.

Recommendations as to employment of substitute teachers at a monthly salary are submitted to the Committee on Instruction by the superintendent of schools, and after approval by the committee, the teacher may be employed by the superintendent pending formal action by the board.

Substitute teachers paid at a per diem basis are assigned from day to day by the superintendent as occasion requires. Substitute teachers are generally assigned to do the work of teachers temporarily absent. They are employed on a day to day basis only for the day of engagement. When employed from date of employment to the end of the academic semester, or for the balance of the academic year, they are employed only for the period of engagement, after which their services terminate until subsequently reemployed by affirmative action.

Appellant maintains that the Commissioner of Education erred in determining respondent had acquired tenure because she did not possess a certificate or license from the board of examiners of the Board of Education of the City of Newark to

teach art in the schools of that district. Appellant directs attention to the provision of Chapter 43, P. L. 1940, which excepts from the right to tenure "those who are not the holders of proper teachers' certificates in full force and effect."

Section 18:13-2 R. S. 1937, which authorizes the organization of a board of examiners in each city school district, empowers such board to grant certificates to teach which will be valid for all schools of such school district and provides that no teacher shall be employed in any of the schools of the district unless the teacher shall possess such certificate *"or a state or county certificate,"* etc., etc. Thus the holder of a State certificate is eligible for employment to teach the subject for which he or she is certificated. The rules adopted by the board of education may not be inconsistent with the tenure act R. S. Sec. 18:13-5. It is considered that respondent, being the holder of a proper State certificate to teach art in the elementary and secondary schools of the State, was eligible to perform the service for which she was employed by appellant and that its contention, in this respect, is without merit.

Although not included in the "points" filed by respondent, it was argued orally before this Board that the petitioner was not entitled to tenure status because she was not a "teacher" as contemplated by the School Law, R. S. 1937, 18:13-16 and 18:13-17 and Sections 18:13-5-6 and 7 of the School Law. By the sections of the law last noted, a board of education may pursue either of two methods in employing teachers, the first, by making rules and regulations not inconsistent with the provisions of the School Law, governing the engagement and employment of teachers, * * * the terms *and tenure* of the employment, etc., and the second, by a contract in writing which shall not be valid unless the same is in triplicate and signed by the president and clerk or secretary of the board of education and by the teacher. By Section 18:6-20, it is provided that:

> "No principal or teacher shall be appointed * * * nor the amount of his salary fixed * * * except by a majority vote of the whole number of members of the Board."

Petitioner was employed as a substitute teacher to teach art for the academic years 1937-1938, 1938-1939 and 1939-1940, at a monthly rate of compensation. Paragraphs 11, 12 and 13 of stipulation. During the academic year 1940-1941, she was employed on five different occasions as a day to day casual and itinerant substitute teacher to do the work of regular permanent teachers temporarily absent, as hereinbefore stated.

It is petitioner's contention that the mere fact of actual teaching service for a period of the equivalent of more than three academic years within a period of four academic years entitled her to tenure and the Commissioner of Education has so held. Petitioner has not shown any contract in writing whereby she was employed for any part of her service for appellant, nor has she called attention to any rule or regulation of appellant which is authority for her employment except as a substitute teacher. There are no general substitute teachers employed in appellant district on an annual basis and no position is known by that title. Employment of substitutes is for a definite period, namely, in the present case, during the absence, in the year 1937-1938, and the five days in 1940-1941 of the permanent teacher holding the positions she filled. Her employment during 1938-1939 and 1939-1940 was as a substitute inaptly so named, as there was no regular teacher whose place she filled but no evidence appears she was employed as a probationer, or even

that her employment was authorized by the board of education. In the absence of evidence of any rule or regulation of respondent showing the terms and tenure of her employment, other than as a substitute, at any time during the three academic terms from 1937 to 1940, or of a contract in writing between her and appellant, and in view further of the fact that no employment is shown by a majority vote of the whole number of members of appellant board, the conclusion seems irresistible that petitioner was not employed as a "teacher" within the purview of the tenure act. Her employment so far as appears by the sipulation filed, appears to have been by the superintendent of schools, particularly for the five days in the year 1940-1941.

Petitioner's employment for those five days was, so far as appears in the record, without knowledge of the appellant board, and it is contrary to the declared policy of the law that tenure status should be acquired by a teacher by the act of a subordinate and without appropriate action by the board. It is for that body to determine, in the manner prescribed by law, whether the teacher is satisfactory and a desirable or necessary addition to its teaching force for permanent employment.

The School Law recognizes a difference in the classification of teachers, for instance, in the allotments to school districts of State school moneys, for each *permanent* teacher employed in specified schools and a smaller sum for temporary teachers. R. S. 1937, 18:10-41. *Permanent* teachers are required to be citizens 18:13-9. R. S. 1937.

It is implicit in the School Law, R. S. 1937, Title 18, that to acquire tenure the teacher must have been employed for the requisite time, by a majority vote of all the members of the board of education of the district and that the terms and tenure of her employment must be governed by rules and regulations made by the board, or, in the absence of such rules and regulations, by a contract in writing, in triplicate, signed by the president and district clerk or secretary of the board and the teacher.

This view is not opposed to the determination of this Board or of the Supreme Court in the case of Wall *vs.* Jersey City, School Law Decisions, 1936, on page 614, 119, N.J.L. 308. In that case employment was by the board of education to teach, nominally as a substitute, but actually as a permanent teacher, she having taught a mathematics class continuously for three and one-half years, and it was held the board could not evade the statute by naming her a "substitute teacher" and by compensating her on a per diem basis.

Having reached the above conclusion it is not necessary to consider the questions of laches and the right to back pay.

The decision of the Commissioner of Education is reversed, the appeal sustained, and the petition of the petitioner dismissed.

November 14, 1942.

Decision of the State Board reversed by *Supreme Court* 131 N.J.L. 350.

DECISION OF COURT OF ERRORS AND APPEALS

No. 34. October Term 1944

Argued October 20, 1944. Decided January 4, 1945

On appeal from a judgment of the New Jersey Supreme Court whose opinion is reported in 131 N.J.L. 350.

For Prosecutrix-Respondent, Abraham I. Harkavy; Harkavy and Lieb.

For Respondent-Appellant, Board of Education of the City of Newark, Jacob Fox.

The opinion of the court was delivered by Case, J.

Respondent, Madeline Landis Schulz, relying upon an alleged right of tenure, appealed to the State Commissioner of Education from the refusal of the Newark Board of Education to appoint her to regular employment. The Commissioner held that she occupied the *status* of a teacher under tenure. The State Board of Education, on appeal, reversed that finding. The Supreme Court, on *certiorari* proceedings reversed the decision of the State Board; and the present appeal is from the Supreme Court judgment.

The substantial question is whether a "substitute teacher" is a "teacher" within the purview of the tenure statute, R. S. 18:13-16 (as amended by ch. 43, P. L. 1940).

A state certificate of eligibility (R. S. 18:13-1) is a sufficient authority for the holder to teach except in districts where there is, in accordance with the law, an additional requirement. Such an excepted district is the City of Newark, where, under authority of R. S. 18:13-2, the rules and regulations provide that all licenses to teach in the public schools of that city shall be granted by the City Board of Examiners following oral, written and health examinations. The Board of Education maintains lists of those persons who have become eligible to appointment as teachers by reason of having passed the examinations of the City Board of Examiners. The lists are separately compiled for the elementary schools, the secondary schools and the teaching of art. The names on those lists are in the order of the marks received in the examinations; and appointments of teachers are made in the same order. The original appointments are probationary and are subject to termination for a period of three years. At the end of that time, under the city regulations as well as under the tenure statute, the appointments become permanent. The city has a second classification known as "substitute teachers." Substitute Teachers are generally assigned to do the work of teachers temporarily absent, although occasionally they "fill in" where there is a vacancy in a regular teacher's position and no regular teacher has yet been assigned. Ordinarily the selection of substitute teachers is made from the lists of candidates eligible for, but not yet appointed to, regular teaching positions, but the rules and regulations permit employment for that class of work of those who hold only the state certificate. Whether a substitute teacher has both the city license and the state certificate, or only the state certificate, the employment is merely as a substitute teacher.

There are fundamental differences between the *status* of persons employed as substitute teachers and that of persons employed in regular teaching positions. The engaging of teachers leading to permanent employment in the City of Newark is, in accordance with the local rules and under the direction of the statute, R. S. 18:6-20 (requiring action by a majority vote of the board), done by the Board of Education. The engaging of substitute teachers is otherwise if such are to substitute on a monthly basis, their names are recommended to the Committee on Instruction by the Superintendent of Schools; if they are to be on a *per diem* basis, they are assigned from day to day by the superintendent, as occasion requires. Other

differences have to do with seniority, with compensated absences, with the rate and unit of compensation, and with the schedules of increases.

Respondent held a state certificate of eligibility, but she did not have and was not entitled to have the city license. Therefore, under the rules, regulations and practices of the district board she was not authorized to teach, and her name was not on any of the lists of persons entitled to be appointed to teach in the City of Newark. During the academic year 1937-1938 she was engaged as a "substitute teacher" at a salary of $120.00 per month to take the classes of a regularly employed permanent teacher who, constantly on the payroll, was away on leave. The absent teacher returned with the opening of the schools after the summer vacation, and respondent's employment was terminated. For the academic year 1938-1939 respondent was employed as a "substitute teacher" at $160.00 per month for work made available by a vacancy; and for the year 1939-1940 she was again employed as a "substitute teacher" for work made available by a vacancy. On September 30, 1940, respondent signed a written request for employment in "substitute work," and during that academic year, namely, the school year 1940-1941, she was employed for a total of five different days "as a day to day casual and itinerant substitute teacher," each day at a different school on a *per diem* basis ranging from $5.50 for the first day (the day on which respondent completed, as she contends, the period necessary to constitute her a tenure teacher) to $7.00 for the most highly compensated day; one of the days of employment was in November; two of them were in December and the remaining two were in January; and each employment was to substitute for an absent teacher. Since then she has not been employed. Concededly, up to and after September 30, 1940, and until the one day of employment as a substitute in November, 1940, respondent had acquired none of the rights which she now asserts. If her earning capacity be determined by multiplying her compensation on the day she claims to have attained the *status* of a tenure teacher by the maximum number of teaching days (191) in the Newark academic year, the total for any year, assuming that she worked every school day, would be $1,050.00. The judgment under review finds that she did then, namely, on November 8, 1940, attain tenure, fixes her salary at $1,500 per annum, the salary paid permanently employed teachers in the grade where respondent attained tenure, and makes that salary retroactive, with interest, from that day.

It is respondent's contention that she is entitled to tenure by virtue of section "c" of R.S. 18:13-16, as amended by ch. 43, P.L. 1940. The statute reads:-

> "The services of all teachers, principals and supervising principals of the public schools, excepting those who are not the holders of proper teachers' certificates in full force and effect, shall be during good behavior and efficiency, (a) after the expiration of a period of employment of three consecutive calendar years in that district unless a shorter period is fixed by the employing board, or (b) after employment for three consecutive academic years together with employment at the beginning of the next succeeding academic year, or (c) after employment, within a period of any four consecutive academic years, for the equivalent of more than three academic years, some part of which must be served in an academic year after July first, one thousand nine hundred and forty; provided, that the time any teacher, principal or supervising principal had taught in the district in which he was employed at the end of the academic year immediately preceding July first, one thousand

nine hundred and forty, shall be counted in determining such period or periods of employment in that district."

The statute is popularly known as the Teacher's Tenure act; and although section 16, *supra* does not use the descriptive word "tenure," section 17 does, viz., "the tenure referred to in section 18:13-16."

The facts come to us by stipulation, appended to which is an undertaking by counsel that respondent is entitled to tenure if certain time computations are allowed in the manner there stated. We accept the facts as stipulated. We disregard the stipulation as to the law. We are called upon to construe an important and far-reaching public statute. The law as determined herein will apply not only to the present litigants, but to all other persons in like relationship confronted with a like state of facts. Our view, and not the agreement of counsel, must control the determination.

We find nothing in the facts presented to warrant the inference that respondent, at any time during the period in question, was employed as a teacher (as that word is used in the Newark rules and regulations and as distinguished from "substitute teacher") by, at the instance of, or with the ratification of, the Board of Education of the City of Newark. We are in some doubt, under the condensed wording of the stipulation, whether the assignments during the academic years 1938-1939 and 1939-1940 were strictly as of a substitute teacher; but, however that may be, the work of those years was not of sufficient duration to have brought tenure even to a person accredited for and occupying the position of teacher under regular employment. The work of the year 1937-1938 was that of a substitute and so was that of the year 1940-1941, which, while only a few days in duration, is—at least in part—essential to respondent's computation of time under the statute. During the years 1937-1938 and 1940-1941 the board was utilizing, through the usual channels, a substitute teacher for temporary work. Respondent knew that she was taking a temporary appointment and that she was working as a substitute teacher; indeed, that was the character of work that she applied for. She does not claim that she had a regular appointment, or that her designation as a substitute was incorrect, or that a subterfuge was resorted to by the board or any of its representatives to prevent her from obtaining tenure. Whatever authority the board may have conferred, either expressly or by implication, upon the Superintendent of Schools and whatever ratification by the board of the Superintendent's acts may be spelled from the events, that authority and that ratification may not be made to increase the employment beyond that which it was intended by the parties to be and in fact was, namely, an employment as substitute teacher. The logic of the facts leads to the conclusion that respondent's employment was just that—as "substitute teacher."

The argument is that even so she is entitled to tenure for the reason that during the period of four consecutive academic years, namely, the years between September of 1937 and June of 1941, inclusive, she was employed for the equivalent of more than three academic years; and that the statute makes that the qualification for tenure by "all teachers"—an expression which, it is contended, embraces substitute teachers. It is upon the force to be given to that contention, namely, that the expression "all teachers" includes "substitute teachers," that the decision turns; and respondent takes the position that the legislative language is so clear and the inclusion is so manifest that the meaning of the statute is not open to construction and that the "sole question" before this court is the "enforcement" of respondent's

tenure. That argument is untenable. The conception that the classification "teacher," as used in the school law and in school practice, is not comprehensive of the classification "substitute teacher" has support in our statutes, in school practices and decisions, and in the opinions of our courts.

First, looking at our statutes, it is to be observed that the clause "c," which is the part of the statute upon which respondent relies, was added by the 1940 amendment, *supra,* approved April 15, 1940. Six weeks before that time the Supreme Court had decided the case of Ahrensfield *vs.* State Board of Education, 124 N.J.L. 231, (subsequently affirmed by this court, 126 N.J.L. 543, partly upon the conclusive effect of the Supreme Court finding as to the facts) holding against the asserted right of tenure of Mrs. Ahrensfield, a regularly employed female teacher, because, at the suggestion of the supervising principal, she had broken the continuity of her employment by resigning one day before the three year period was complete and being re-employed in her position; this because the Board of Education had recently adopted a resolution opposing the placing of married female teachers on tenure and the teacher in question was a married woman. A comparison of the provisions of the amendment with the Ahrensfield facts leaves little doubt that the amendment was inspired by and was intended to apply to the incidents of that case, namely an artificial splitting of the period of employment to avoid the application of the tenure statute to a regularly employed, full-time teacher. We find nothing in the amendment to suggest a legislative purpose to remove any theretofore existing distinction between teachers and substitute teachers. There was nothing new in the use of the word "all" viz., "all teachers," in the 1940 amendment; that terminology had been in the statute from the very beginning, ch. 243, P.L. 1909, and the amendment merely preserved, in that respect, the structure of the statute as it had always been. That the legislative mind was not a stranger to the distiction between teachers and substitute teachers is shown by the precise language in the 1919 amendment (ch. 80, P.L., 1919) incorporating the pension fund feature in the general public school statute of 1903 (ch. 1, P.L. 1903-1904:- "No person shall be deemed a teacher within the meaning of this article who is a substitute teacher * * *" (now R.S. 18:13-25). We find significance in the legislative recognition, in any respect, of "substitute teachers" as a class distinct from "teachers" and particularly in a respect which carries in favor of teachers a benefit or a protection which is denied to substitute teachers. The pension fund legislation and the tenure act (ch. 243, P.L. 1909) were not isolated statutes; they were both enacted as integral parts of the same school law and therefore may be said to be *in pari materia.* So also, ch. 142, P.L. 1942, incorporated within Chapter 13 (re teachers) of Title 18, Revised Statutes, which grants certain sick leave and the retained benefit of minimum unused sick leave absences to teachers "who are steadily employed by the Board of Education on a yearly appointment or who are protected in their positions under the provisions of sections 18:13-16 to 18:13-19 of the Revised Statutes" appears to exclude substitute teachers serving on a daily or monthly basis. And it will hardly be argued that R.S. 18:13-118, which provides for compulsory permission to a teacher to be absent at the annual teachers' convention or full pay, R.S. 18:13-1, providing for the selection of representative teachers on the State Board of Examiners, applies to the classification just mentioned. A related instance of legislative intent not to give tenure universally upon mere time of service without regard for attendant circumstances is to be found in the provision (ch. 226, P.L. 1944) that the employment of persons temporarily filling the

positions of teachers absent on war service shall immediately cease when the incumbent shall return.

Passing to school practices, the City of Newark clearly, as we have seen, distinguished between teachers and substitute teachers. The distinction was drawn openly and honestly. It was known to every interested person, including the respondent, who sought and obtained employment as a substitute teacher. There was no abuse of that distinction—no use of it to evade the tenure statute.

Both the office of the State Commissioner of Education and the State Board of Education have been on record since 1938 (Waters *vs.* Board of Education of Newark, School Law Decisions, 1938, pp. 623 and 624) as construing the tenure statute not to include substitute teachers employed to do particular substitute work for absent teachers.

The courts have condemned evasions of the tenure statute and refused to countenance the subterfuge of designating a teacher as a substitute where the service rendered and intended to be rendered was that of a regular teacher. "It clearly appears from the record that the seven persons designated as special substitute teachers were actually continuously employed, the minutes notwithstanding. The action of the board was the merest subterfuge to defeat the legislative purpose * * *." Downs *vs.* Board of Education of Hoboken, 13 Misc. 853 (1935). "The petitioner, like many of the other so-called substitutes, was assigned to a regular position in the same manner as teachers with tenure. The device adopted cannot defeat the purpose of the act * * *. Had the proofs not shown continuous employment for the statutory period, the result would have been otherwise." Board of Education of Jersey City *vs.* Wall, 119 N.J.L. 308 (1938). But we think that the *Downs* decision assumes and that the *Wall* decision concedes the legality of employment and service, in good faith, as substitute teacher and, further, the cleavage between the *status* of such a substitute teacher and that of a regularly employed teacher. The offense in the cited cases was the attempt to conceal the real situation by employing in the guise of substitute teachers those who were really teachers, doing the work of teachers.

It cannot be soundly argued that the classification of substitute teachers separately from teachers is a distinction without a difference, or that the distinction is a frivolous reason for withholding various beneficial incidents, including that of tenure, from substitute teachers. Manifestly, all those who succeed in passing the necessary qualifying examinations do not make equally competent teachers. Those who have superior teaching ability and are able to obtain regular teaching positions elsewhere are not likely to withhold themselves from those permanent positions in order to take substitute work in Newark in the hope and on the chance that during some period of four consecutive academic years they may average a total teaching service equivalent to the teaching time of three academic years and thus attain regularity of employment; which means that as the result of the inevitable sifting process prospective teachers of most promise are not likely to be long found on the "substitute" lists. In an extensive school system like that in the City of Newark there must be many occasions, some of them emergent, some foreseen and others unforseen and unforseeable, for the employment and re-employment by the superintendent of substitute teachers, all of whom may not be of the aptitude desired for regular teaching positions, but who may, nevertheless, be acceptable for fill-in work; and all of whom, again, may not, for reasons of their own, be available for full-time work. The three year period which is, unless shortened by the employing board, a necessary antecedent to the acquisition of tenure, gives, if served under

conditions of regular employment, an opportunity for demonstration of character, teaching qualities and ultimate influence upon the personality and mentality of the student which is not afforded by the exigencies and distractions of substitute teaching; therefore, the advantage to the school system of full-time service as a test of teaching values and as a guide to the board in deciding whether to retain a teacher permanently or to end the employment before tenure attaches. There is substance in the distinction.

By the judgment below the Board of Education would be compelled to install the respondent in a teaching position on full salary with full seniority and with all the perquisites and benefits of a regularly employed wholetime teacher—a position that she never had. Our understanding of the tenure statute is that it was intended to save a teacher from loss of her position, not promote her to a position that she never has occupied. What was the old law? What the mischief? That takes us back to the enactment of the tenure provisions in 1909, ch. 243, P.L. 1909. Teachers, however efficient, however long their periods of service, were subject to discharge at the whim of the employing board. That, because it threw great uncertainty into the lives of those who had prepared for, been licensed for, and been long employed in, the work of teaching, reduced the morale of the teaching profession and lessened the ambition of competent young people to enter that calling; and this, in turn, served to impair the standard of the public schools. To remedy that defect, the tenure act was passed. And what did it do? It required a preliminary service of three years by a teacher, obviously to give the board ample opportunity for complete observation, and it gave at the end of that probationary period certain protection to the teacher. The protection is still the same, R. S. 18:13-7: "No teacher * * * under the tenure * * * shall be dismissed or subjected to a reduction of salary * * * except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause and after a written charge of the cause" has been made and hearing had. Clearly, the protection was not, and is not, intended to be a promotion. Yet here is an applicant who has been granted, under the theory of tenure (strictly a retention of that which one has) a large increase in the rate of compensation over what she was receiving at the time when, by her contention, her right of tenure matured, as well as other accretions, priorities and advancements—seniority, for illustration, over full time, regularly employed teachers who have not yet attained tenure. This illogical result of the application of the tenure statute to substitute teachers is accented in the case of Gordon *vs* State Board, decided simultaneously herewith.

Mere combination of another word with "teacher" does not necessarily extend the classification of "teacher" so as to include the addition. A student teacher, to use a familiar expression, is not regarded as, and is not, a teacher within the meaning of the statute. The word "substitute" usually presents the idea of something or some one substituting for another—not the real thing or the real person, but a "substitute." The word "teacher" does not, in ordinary use, signify "substitute teacher;" and since that is so the word "all" prefixed to the plural does not import that alien meaning.

We conclude that the word "teachers" as used in R.S. 18:13-16, amended by ch. 43, P.L. 1940, is to be distinguished from and is not inclusive of the expression "substitute teachers."

Furthermore, the tenure status does not bring tenure to a teacher who has not the necessary teacher's credentials. Section 16, quoted at length above, contains this

delimitation: "excepting those who are not the holders of proper teachers' certificates in full force and effect." In added emphasis of this exception the tenure statute, having provided in R.S. 18:13-17 for the making of charges against a teacher under tenure and in section 18 for hearings on such charges, provides in section 19—still dealing with teachers under tenure—: "The services of any * * * teacher may be terminated, without charge or trial, who is not the holder of a proper teacher's certificate in full force and effect."

Respondent did not, and does not, have the certificates necessary to qualify her as a teacher under the rules and regulations of the Newark Board of Education. For that reason, also, she is not entitled to tenure.

The judgment of the Supreme Court will be reversed.

Filed January 4, 1945.

TRANSFER PER SE OF TEACHER FROM SENIOR HIGH SCHOOL TO JUNIOR HIGH SCHOOL DOES NOT CONSTITUTE A DEMOTION

WILTON D. GREENWAY,

Petitioner,

vs.

BOARD OF EDUCATION OF THE CITY OF CAMDEN,

Respondent.

For the Petitioner, Meyer L. Sakin.
For the Respondent, Edward V. Martino.

DECISION OF THE COMMISSIONER OF EDUCATION

Wilton D. Greenway, the petitioner, was transferred from his teaching position in the Camden Senior High School to a teaching position in the Hatch Junior High School effective as of February 1, 1941. The transfer was made pursuant to action taken by the respondent at a meeting of the board of education held on January 27, 1941. The following resolution was also adopted at that meeting:

> "Be it resolved that any and all salary schedules heretofore adopted by the Board of Education of the City of Camden, and particularly the teachers, clerks and janitors respective salary schedules, be and the same are hereby abolished."

The petitioner contends that his transfer constitutes a demotion and discrimination in violation of his tenure rights. He further contends that, though his salary of $2,650 per annum has not been reduced, nevertheless his status is affected by the differences in teacher salary maximums between the senior and junior high school which are as follows:

Senior High School	$1,400 to $3,500 per annum
Junior High School	$1,400 to $2,800 per annum

The petitioner prays that the Commissioner of Education set aside and declare invalid the actions of the Board of Education of the City of Camden of January 27,

1941, pertaining to the transfer of petitioner and the abolition of the salary schedules.

Mr. Greenway has taught in various schools in Camden since 1925, his services in the senior high school having begun in 1938. It is admitted that he is under tenure as a teacher and is the holder of a secondary school teacher's certificate with a mathematics endorsement, which subject he was teaching in the senior high school prior to the transfer on February 1, 1941. This certificate qualifies the holder to teach in junior and senior high school organizations.

There was no evidence submitted to indicate a lack of good faith in the actions of the Camden Board of Education. There was a reduction by one in the number of mathematics positions needed in the Camden Senior High School and no one was employed to replace Mr. Greenway.

Section 18:13-19 of the Revised Statutes applies to the protection of the petitioner's seniority status in the Camden High School only if his transfer can be considered tantamount to a dismissal. This section reads in part:

> "Nothing contained in Sections 18:13-16 to 18:13-18 of this title shall be held to limit the right of any school board to reduce the number of supervising principals, principals or teachers employed in the school district when the reduction is due to a natural diminution of the number of pupils in the district. Dismissals resulting from such reduction shall not be by reason of residence, age, sex, marriage, race, religion, or political affiliation.
>
> "When principals, supervising principals or teachers under tenure are dismissed by reason of such reduction those principals, supervising principals or teachers having the least number of years of service to their credit shall be dismissed in preference to those having longer terms of service. Should any supervising principal, principal or teacher under tenure be dismissed as a result of such reduction such person shall be and remain upon a preferred eligible list in the order of years of service for reemployment whenever vacancies shall occur and shall be reemployed by the body causing dismissal in such order when and if a vacancy in position for which such supervising principal, principal or teacher shall be qualified."

The latter part of this section clearly indicates that these seniority provisions apply only to persons whom the board of education ceases to employ, rather than to teachers transferred to another teaching position within the school system.

The remaining issues to be determined are as follows:

> (1) Was there a salary schedule in full force and effect at the time of the board's action and the effective date of the transfer which actually or prospectively takes away legal tenure rights of petitioner as to salary?
>
> (2) Does the transfer of a tenure teacher from the senior high school to the junior high school (designated as an "intermediate school" in New Jersey —R.S. 18:15-4) constitute a demotion?

1. Testimony of the Secretary of the Camden Board of Education and of the Superintendent of Schools indicates that the salary schedule adopted in 1927 had been suspended at various times. Minutes of the respondent were submitted in evidence and disclosed that on February 8, 1937, by a vote of five affirmative to one in the negative, the salary schedule for teachers was suspended for the whole year of 1937-1938. The secretary further testified that the salary schedule had not

been restored since 1937 and that in the interim no increments had been paid to teachers. It must be concluded therefore, that no salary schedule was in full force and effect on either January 27, the date of the final abolition of the salary schedule, or on February 1, 1941, the effective date of petitioner's transfer. The resolution of January 27, 1941, abolishing salary schedules appears to be somewhat superfluous since prior suspensions made them inoperative and denial of increments since 1937 gave further proof that no salary schedule was in effect. A fine distinction in meaning might aptly be drawn as to the degree of finality between a "suspension" and an "abolition" of salary schedule. The effect of making the schedule inoperative is nevertheless the same. On somewhat similar facts the New Jersey Supreme Court, in the case of Liva *vs.* Board of Education of the Township of Lyndhurst, 126 N.J.L. 221, held the following opinion:

> "It is also urged that a salary schedule adopted by the local board on June 26, 1928, was still in effect and thereunder prosecutor was entitled to an increase in salary. The uncontradicted evidence is that no increases in salary based on the 1928 schedule were granted after 1930 to any teachers. The reviewing authorities held that the local board having failed either to adopt or to act under the 1928 schedule for many years, it was not in effect. We agree with this conclusion."

As to a prospective schedule, the only testimony on this point was given by the superintendent of schools, who stated that a single salary schedule was discussed at a board of education meeting as a possibility for future study and possible action, but that the board of education had taken no action in the matter. Since a single salary schedule establishes the same minimum and maximum annual increments for equal training and experience regardless of the organization wherein a teacher is employed, it cannot be held even supposititiously that a single salary schedule if adopted would affect adversely petitioner's potential salary attainment.

2. Though the statutes prohibit the demotion of school personnel who are under tenure, boards of education have the right to transfer teachers and other employees to positions of equal status in accordance with the provisions of Section 18:6-20 of the Revised Statutes which reads:

> "No principal or teacher shall be appointed, transferred or dismissed, nor the amount of his salary fixed, no school term shall be determined, and no course of study shall be adopted or altered, nor textbooks selected, except by a majority vote of the whole number of members of the board."

There is no legal basis for the assumption of the petitioner that "the senior high school is a school of higher rank and dignity than a junior high school;" neither is the greater apportionment of State school monies to senior high schools in certain school districts a valid index to their professional rank. The latter contention of the petitioner is based upon a false premise to the effect that the annual State apportionment for each teacher in Camden Senior High School is greater than that for each teacher in the Hatch Junior High School. The fact is, however, that the apportionment is the same in each case, viz., $315.00 in accordance with R.S. 18:10-41 which provides the same apportionment basis for junior and senior high schools in a school district which maintains both types of school organizations. The $400 apportionment is only granted in school districts which are organized on the 8-4

plan, unlike the Camden School System which is organized on the 6-3-3 plan. Revised Statutes, Section 18:10-41 reads in part as follows:

> "The county superintendent of schools of each county shall on or before April first in each year, apportion to the several school districts of the county the state school monies and the interest of the surplus revenue in the manner provided in this section and the section 18:10-42 of this title:
>
> "(e) . . . . . The sum of three hundred fifteen dollars for each permanent teacher employed in a high school or high school department or in an intermediate school associated therewith, when such schools together have a full six years' course following a full six years' primary and grammar school course, and such high school and intermediate school have been approved by the state board."

Petitioner further contends that the standards are higher in the senior high school than in the junior high school and that "the type of instruction, pupils, nature and kind of work is of a higher plane in the high school," which contention is in our opinion erroneous also, and must be considered only as unsubstantiated argument. Each year of a child's maturing is important, and the dignity and significance of the teacher's efforts in appropriately meeting the educational needs of a pupil during any given year of his educational maturation can well be considered as equal in status to the service rendered by the teacher during the pupil's earlier or later school years.

Previous decisions on this issue have held that a transfer per se from one school organization to another does not necessarily constitute a demotion. In Tinsley *vs.* Board of Education of the Borough of Lodi, Bergen County, 1938 Compilation of School Law Decisions, 505, the court held:

> "We know of no provision in the law which gives teachers rank other than the certificate which they hold. Teachers in New Jersey are holders either of elementary certificates, entitling them to teach the first eight grades, holders of secondary school certificates, entitling them to teach in high schools, or teachers holding special certificates. The statute, Section 68 of the School Law, gives Boards of Education the right to transfer a teacher by a majority vote of the Board."

Rule No. 50 of the "Rules Concerning Teachers Certificates, 16th Edition," as prescribed by the State Board of Education of New Jersey reads in part as follows:

> "To teach in grades seven and eight and high school *the subjects endorsed on the certificate.*
>
> "A college degree with twelve semester hours in English language and literature, twelve in social studies and six in science.
>
> "For endorsement on the certificate, thirty semester hours in a major teaching field and eighteen in a minor teaching field, provided that in place of one minor teaching field two minors may be presented with not less than twelve semester hours in each.
>
> "Eighteen semester hours in the study of secondary education, including: Health Education, 3; Educational psychology, 3; Aims and organization of secondary education, 3; Principles and techniques of teaching in the high school, 3; Curriculum organization and courses of study in one endorsed teaching field, 3; Elective, 3."

These rules require that teachers in an approved junior or senior high school hold the same kind of certificate, viz., a high school certificate. Such certificates are generally known as Limited or Permanent Secondary School Certificates with their range of applicability being from grade seven in an approved junior high school to grade twelve in an approved senior high school. It must, therefore, be held in the instant case that the transfer was properly made within the grade range of applicability of the secondary school certificate held by the petitioner.

There was no reduction in salary. A salary schedule was not in operation with the result that there could be no valid contention of a prospective loss of salary for the petitioner. Seniority status (R.S. 18:13-19) refers only to dismissals and not to transfers from one teaching position to another teaching position. The transfer of Wilton D. Greenway does not constitute a demotion as it is legally within the statutory powers of the Camden Board of Education. There is no evidence of bad faith or unwarrented abuse of discretion. The petition is hereby dismissed.

June 30, 1941.

Decision of the State Board of Education

The appeallant Wilton D. Greenway, a teacher in the Camden High School and admittedly protected from dismissal and reduction of salary by the Teachers Tenure Law (R.S. 18:13-17) filed his petition with the Commissioner of Education, in which he sets forth:

> (a) That on January 27, 1941, respondent by a resolution adopted by it on that date, transferred him from a position of teacher in the Camden High School to a position of teacher in the Hatch Junior High School, effective February 1, 1941.
>
> (b) That respondent, at the same time, adopted a resolution that:
>
> "Any and all salary schedules heretofore adopted by the Board of Education of the City of Camden, and particularly the teachers' clerks' and janitors' respective salary schedules, be and the same are hereby abolished."

That there are other persons teaching the subjects he was teaching and subjects which he is qualified to teach in the high school, over whom appellant has seniority and priority in law, none of whom have been demoted, transferred or changed, but continue to teach in the high school.

That he has never been charged with any infraction of rules or been guilty of any offense which would constitute just cause for the termination of his employment or reduction in rank.

That his transfer is a demotion and a reduction in rank and is discriminatory under the Teachers Tenure Law and unlawful, not made in good faith and is tantamount to a dismissal from a position of higher rank and appointment to a position of lower rank.

Further, that the abolition of the salary schedule in existence prior to the adoption of the resolution of January 27, 1941, is a violation of his contractual right; that he is lawfully entitled to the salary rights and amounts set forth in such schedule and that said resolution was not adopted in good faith and is illegal.

That the salary rating for the personnel of the Camden High School under the salary schedule of respondent is higher than the salary rating of the personnel of the

Hatch Junior High School to which he was transferred, the former being from a minimum of $1,400.00 to a maximum of $3,500.00, and the latter from the same minimum to a maximum of $2,800.00, and as a result of the transfer, his status is adversely affected.

He prays that an order be made to set aside and declare invalid the action of respondent whereby he was transferred and the salary schedule abolished, and that he be reinstated in the position as a teacher in the high school.

The Commissioner of Education held there was no evidence submitted indicating bad faith of respondent in making the transfer of appellant from the senior to the junior high school; that the transfer was lawful and did not constitute a dismissal; therefore R. S. 18:13-19 which gives rights to priority of employment where one or more teachers must be dismissed on account of a natural diminution of pupils, has no application; that no salary schedule was in effect on January 27, 1941, nor on February 1, 1941, when the transfer became effective, consequently, there was no reduction of salary and he dismissed the petition.

Appellant appeals from that determination.

We agree with the Commissioner of Education there was no evidence of bad faith of respondent in the adoption of the resolutions on January 27, 1941, whereby the appellant was transferred and the salary schedules abolished; that the transfer of appellant was within the power of respondent board. Downs *vs.* Hoboken, 12 N.J. Misc., 345, Aff. 113 N.J.L., 401. That the transfer was not a demotion tantamount to a dismissal of appellant from a higher to a lower position. Tinsley *vs.* Lodi Board of Education, School Law Decisions, (1938), page 505. That the provisions of Revised Statutes 18:13-19, which give a right to priority of employment where a teacher must be dismissed due to a natural diminution of the number of pupils to one having the longest term of service, has no application.

It is contended that the resolution to transfer appellant to the Junior High School operated to reduce his potential salary, because, as he says, in effect, a salary schedule had been adopted by respondent board of education sometime in or before February 1927. (At the oral argument before the State Board of Education, it was agreed by counsel that whatever appeared in the minutes of the respondent relating to the adoption or amendment of the salary schedule should be deemed to be in evidence as well as exhibit P1, which is the schedule appended to the transcript in this cause.) We have been furnished with an excerpt of the minutes of the board of education of March 22, 1920, which reads as follows:

> "This salary schedule is adopted to take effect as a rule of the board subject to revision and modification of the board as circumstances may require and as the appropriation made from year to year by the duly constituted legal body may necessitate.
>
> "This schedule shall be put into operation as hereafter provided and the salaries provided herein shall not be effective before July 1st, 1921, salaries to be effective in the school year 1920-1921 having been fixed by prior action of this board.
>
> "Mr. Sayrs moved that the board adopt the following schedule and rules effective July 1st, 1921. Motion was seconded and adopted by the following vote. Messrs. Bunting, Bryson, Branch, Carson, Garwood, Garland, Sayrs, Tuttle, Sharp, Prest."

It is also contended that the adoption of the salary schedule constituted a contract between respondent and the teachers in its employ and those who were thereafter employed by it which respondent was without power, as to teachers under tenure, to amend or repeal; therefore, the resolution to abolish the salary schedule is invalid. The resolution whereby the salary schedule was adopted which is hereinabove quoted makes it operative and effective subject to revision and modification of the board as circumstances may require and as the appropriation made from year to year may necessitate. This last does not include the repeal of the salary schedule, but, as will hereafter be pointed out, the Legislature has expressly authorized such action.

Upon the request of a large number of teachers throughout the State through their representative, permission was granted to file a brief as amicus curiae touching only upon the question of the power of respondent to amend or repeal the salary schedule claimed to be in force on January 27, 1941. It is further contended by appellant and amicus curiae that the adoption of a salary schedule created a vested right in appellant to receive the annual increments provided thereby at the various stages of time spaced in the schedule as part of his salary until he attained the stated maximum. That any attempt to lower the maximum *"which it originally agreed to pay"* withholds increments from the appellant and subjects him to an unlawful decrease in salary. That, if the transfer of petitioner from the senior to the junior high school has the effect of reducing appellant's potential maximum salary, it is invalid and that the respondent is without power to repeal its salary schedule in derogation of the rights of tenure teachers.

The School Law (R.S. 18:6-12) provides, as to boards of education in cities not of the first class, which includes Camden:

> "A board, except in cities of the first class to which Section 18:6-13 of this title applies, shall organize on February first of each year or on the following day, if that is Sunday, by electing one of its members as president and another as vice president, which officers shall serve for one year and until their respective successors are elected."

By Section 18:6-19:

> "A board shall make, amend and appeal rules, regulations and by-laws not inconsistent with this title or with the rules or regulations of the State Board of Education, for its own government, for the transaction of business, and for the government and management of the public schools and the public school property in the district, and also for the employment and discharge of principals and teachers."

And by Section 18:13-5.

> "A board of education may make rules and regulations not inconsistent with the provisions of this title governing the engagement and employ of teachers and principals, their terms and tenure of employment, the promotion and dismissal of teachers and principals and the salaries and the time and mode of payment thereof. *A board may from time to time change, amend or repeal such rules and regulations.* The employment of any teacher by a board and the rights and duties of a teacher with respect to his employment shall be de-

pendent upon and governed by the rules and regulations in force with reference thereto."

It has been held by the Court of Errors and Appeals in this State that boards of education are not continuous bodies and that each board may exercise all the powers granted it by the Legislature and it is not competent for a board by appointment or contract, to preclude its successor or successors from exercising such powers. Skladzian *vs.* Bayonne, 12 Misc., 602 Aff. 115 N.J.L., 203, Evans *vs.* Gloucester, 13 Misc., 506, Aff., 116 N.J.L. 448.

The adoption of a salary schedule by a board of education is the exercise of a power thus granted by the Legislature to each board successively. It is a rule or regulation governing the salaries of teachers which it makes for its own convenience and guidance and no board can, by the exercise of the power, preclude subsequent bodies from its exercise on their part. Skladzian supra; Evans supra.

The adoption of such a rule is not contractual but is legislative in character. Vroom *vs.* Bayonne, 79 N.J.L. 46.

Such rule will continue in effect until it is amended or repealed by a succeeding board and the rule is adopted either expressly by each board or is ratified by its acquiescence therein until it is amended or repealed, and so long as the rule remains in force, upon the commencement of each year of service the teachers' right to the increment provided in the schedule becomes fixed for that year, but future increments are subject to the express power given the board of education to amend or repeal the rule.

If the adoption of a salary schedule by the board of education under the power granted it by the Legislature to adopt rules, regulations, etc., to fix teachers' salaries can be said to constitute a contract with the teacher in its employ and those who will be employed in the future, then it seems clear that the same act of the Legislature which grants such power also grants to the boards of education the power to amend and repeal such rules and regulations.

In the case of Phelps *vs.* State Board of Education 115 N.J.L. 310. Aff. 116 N.J.L., 416 and affirmed also by the United States Supreme Court, Mr. Justice Parker, dealt with the subject of amendment and repeal. It was contended in that case the act of the Legislature authorizing boards of education to adjust salaries during the national emergency then existing, was an impairment of the contract with teachers under tenure. He said:

> "The argument for unconstitutionality proceeds on these lines; after three years of contract service the teachers are entitled generally to indefinite tenure under the act of 1909, chapter 243 (Pamph. L., p. 398: 4 Cum. Supp. Comp. Stat., p. 4763, para. 106 a); that tenure is contractual; and the legislature is powerless to interfere with it, or to authorize a board of education to interfere. All the prosecutors in the teacher group are in the indefinite tenure class.
>
> "The act of 1909, relating to tenure, provides, among other things, that no teacher shall be dismissed or subjected to reduction of salary except for certain causes after charges and a trial. That established a legislative status for teachers, but we fail to see that it established a contractual one that the legislature may not modify. If the argument now made is sound, the act of 1909 is irrepealable as to any teacher holding his position by tenure at any time thereafter. A board of education is a public body, created by the Legislature, with

certain powers conferred by statute. It is a municipal corporation, or at least a quasi-municipal corporation, and, as such, subject to supervision and control by the legislature. The act of 1933 is in purport and effect, though not so entitled, an implied partial repealer of amendment of the Tenure Act of 1909, and we are clear that it was well within the power of the legislature. The status of tenure teachers, while in one sense perhaps contractual, is in essence dependent on a statute, like that of the incumbent of a statutory office, which the legislature at will may abolish, or whose emoluments it may change. See Vroom *vs.* Board of Education, 79 N.J.L. 46. We are clear that the legislature could repeal the act of 1909. If it could repeal it, it can modify it as thought best, and that it did by the act of 1933."

If the argument on behalf of appellant is sound, the salary schedule, once adopted, however oppressive and unreasonable it may be in changing circumstances and conditions, is unchangable and irrevocable. It would be a contract which neither the Legislature nor the board of education could impair. Yet in 1933 and thereafter until July 1, 1937, boards of education were authorized by action of the Legislature to fix salaries without regard to the salary schedules then in force. If it was not an impairment of a contract by the Legislature to adopt these enabling acts from 1933 to 1936 inclusive, it is equally logical to say that the same power which the Legislature exerted to adjust salaries during that period except as to the redutcion of salaries presently being paid to teachers under tenure, has been delegated to boards of education by the statute hereinbefore quoted. The contention of appellant, if correct, would render nugatory the limitations imposed by the School Law upon the power conferred upon the board of estimate to determine the amount necessary to appropriate for the use of the schools of the district for the ensuing year. (R.S. 18:6-50), and the limitation of the appropriation for schools to not more than one and one-half per cent of the valuation of the assessable ratables of the municipality. (R.S. 18:6-53.)

In our view, the contract which arises when a teacher is employed by a board that has adopted rules and regulations governing the engagement and employment of teachers pursuant to R.S. 18:13-5, is subject to the right of amendment and repeal by subsequent boards, and the statute makes such rights of amendment and repeal a term of every contract of employment extending beyond the life of the board. The effect of repeal of the rules and regulations is to "freeze" the salary of teachers affected at their then amount. This is in harmony with the situation which arises when the teacher is employed by contracts in writing pursuant to R.S. 18:13-7 for successive years and acquires tenure. It is frequently the practice thereafter to continue the same salary without annual contracts. Having acquired tenure status the employment cannot be terminated nor can the salaries as then exist be reduced except for inefficiency, incapacity or conduct unbecoming a teacher or other just cause. (R.S. 18:13-17.)

In our opinion the cases cited by appellant and amicus curiae are not applicable to the facts herein involved. The Gowdy case, 84 N.J.L., 231, decided the board of education had no power to reduce the current salary due the teacher who was under tenure. It did not deal with any claim for potential future salary. The case of Weber *vs.* Board of Education of Trenton, decided September 19, 1941, involved the attempt of the Board of Education of Trenton to deny to teachers an increment which had become vested as provided by its salary schedule. The salary schedule was

admitted to be in force and effect, and, it cannot be denied, that so long as that fact continues to exist, increments provided thereunder, become due and payable "in the various stages of time spaced by the schedule." The question whether a board of education was empowered under the School Law to abolish the salary schedule was not an issue; and observations of the Court, which were not necessary to the decision of the controversy before it are obiter dicta, and not controlling in subsequent adjudications. Crescent Ring Co. *vs.* Travellers Indemnity Co. 102 N.J.L., 85, on page 89.

We conclude the arguments of appellant, and on his behalf, are without merit and that, for the reasons herein stated, the decision of the Commissioner of Education should be affirmed and it is so recommended.

December 19, 1941.

DECISION OF THE NEW JERSEY SUPREME COURT

No. 208, May Term, 1942.
Argued May 6th, 1942; Decided September 17, 1942.
On Certiorari.
Before Brogan, Chief Justice, and Justices Parker and Porter.
For the Prosecutor, Meyer L. Sakin.
For the Respondent, Gene R. Mariano, William J. Shepp, of Counsel.
For the Federated District Boards of Education, *Amicus Curiae,* Harold D. Green, Saul R. Alexander, of Counsel.
For the New Jersey Education Association, *Amicus Curiae,* Eisenberg & Spicer, Jerome C. Eisenberg and Israel Spicer, of Counsel.
The opinion of the Court was delivered by Porter, J.

The question before us in this certiorari proceeding is whether a board of education may suspend or repeal its salary schedule as to salary increments in the case of a teacher who has tenure.

The Commissioner of Education decided that a board of education had power to do so with which conclusion the State Board of Education concurred. Its decision is before us for review. We are in accord with that view.

The facts are not in dispute. Mr. Greenway, the prosecutor, has been employed for a number of years as a teacher by the Board of Education of Camden, respondent. He has tenure of office by reason of his length of service under the Statute, N.J.S.A. 18:13-16. He was teaching in the Senior High School and under date of January 27th, 1941, he was transferred from the High School to the Junior High School. On the same date a resolution was adopted by respondent abolishing the schedule of salaries. The action was within the authority of the Board of Education, N.J.S.A. 18:13-5. Mr. Greenway claims to have had vested rights to these salary increments which rights were violated. The Statute, N.J.S.A. 18:13-13, provides that a teacher who has acquired tenure status may not be reduced in salary. We think that there can be no question that there was no reduction of salary. The failure to receive an increase of salary does not constitute a reduction.

When Mr. Greenway was transferred the maximum salary for teachers in the High School was greater than for those in the Junior High School. But as the schedules were abolished his salary was not reduced nor was he domoted as a

matter of law. A transfer without reduction of salary and without affecting tenure rights gives no cause of action. Cheesman *vs.* Gloucester City, 1 N. J. Misc., 318; Downs *vs.* Board of Education of Hoboken, 12 N. J. Misc. 345, aff'd 113 N.J.L. 401. Moreover, we may not say that if and when a salary schedule is restablished the two schools may not be put on an equal footing.

We find no statutory provision requiring boards of education to adopt salary schedules or schedule of increments. We think that if such schedules are adopted that they are not irrepealable. It may be noted that the respondent in adopting its salary schedule in 1920 expressly provided for revision using these words—"This salary schedule is adopted to take effect as a rule of the Board subject to revision and modification by the Board as circumstances may require and as the appropriation made from year to year by the duly constituted legal body may necessitate." From the outset the Board thus clearly stated that its policy was to revise the schedule as may be found necessary. In pursuance with that policy it adopted a new schedule in 1925. In 1931, 1935 and 1936 the schedule was suspended for various periods. On June 18th, 1936 it was restored for the years 1937 and 1938. No increments were paid after that time. So it seems that when the resolution was adopted on January 27th, 1941, abolishing the salary schedule, it was unnecessary because of the previous action in suspending same. In the absence of statutory inhibition we think that boards of education have the power to enact and to repeal salary schedules, in fact it has an express right so to do under N.J.S.A. 18:13-5, supra. The repeal of the salary schedules did not constitute the impairment of any contractual rights of the prosecutor. He had tenure and as we have observed his salary may not be reduced but he is subject to the rules of the Board and when it repealed the salary increments, which was its right, such action was binding and effective. A teacher with tenure has a legislative status but not a contractual status which may not be modified. Phelps *vs.* Board of Education, 115 N.J.L. 310, aff'd 116 N.J.L. 412, and aff'd by the United States Supreme Court in 300 U.S. 319.

The prosecutor chiefly relies on Weber *vs.* Board of Education of City of Trenton, 127 N.J.L. 279. In that case the court held that "annual increments were integral part of the salaries, effective when the designated year of service had been attained, that having been the contract with the teachers." The Weber case is clearly distinguishable from the case at bar because the increase there had become effective as the school year had already started so that the increment bound up with the work of that year made an integral element in the whole situation, which state of fact does not obtain here.

The board acted within its power in transferring prosecutor from the high school to the junior high school in the absence of bad faith which was claimed but was not established by the testimony. Having concluded that no rights of the respondent were violated by the board in suspending the schedule of salaries it becomes unnecessary to pass upon the questions raised by respondents of estoppel and laches.

The judgment under review is affirmed.

September 17, 1942. 129 N.J.L. 46.

DECISION OF THE NEW JERSEY COURT OF ERRORS AND APPEALS

No. 40. October Term, 1942.
Argued October 22 and 23, 1942; Decided January 22, 1943.

On appeal from a judgment of the Supreme Court, whose opinion is reported in 129 N.J.L. 46.

For the Appellant: Meyer L. Sakin.

For the Respondent: Gene R. Mariano.

For New Jersey Education Association, *Amicus Curiae*: Eisenberg & Spicer, Jerome C. Eisenberg, of Counsel.

For State Federation of District Boards of Education of the State of New Jersey, *Amicus Curiae*: Harold D. Green and Saul R. Alexander.

The opinion of the Court was delivered by Heher, J.

We are in accord with the reasoning and result of the deliverance of Mr. Justice Porter for the Supreme Court.

It is vigorously contended that the judgment is "directly opposed to public policy." Such policy must needs be of legislative ordination; it can have no other derivation. And there is none such. Sec. 1 of ch. 243 of the Laws of 1909, now sec. 18:13-16 and 18:13-17 of the Revision of 1937, conferred upon teachers and principals in the appointed category a mere "legislative status," subject to legislative alteration and annulment, and did not give rise to an irrepealable "legislative contract." Under the subsisting school law, the district board is not bound by contract with the teacher having tenure in virtue of the cited statutory provisions "for more than the current year." Sec. 18:13-17, *supra* enjoining the local boards from reducing the teacher's salary or discharging him without cause, is "but a regulation of the conduct of the board and not a term of a continuing contract of indefinite duration with the individual teacher." Phelps *vs.* Board of Education, 115 N.J.L. 310, affirmed 116 N.J.L. 412, affirmed 300 U.S. 319, 57 S. Ct. 483, 81 L. Ed. 674. See, also, Vroom *vs.* Board of Education, 79 N.J.L. 46; Steck *vs.* Board of Education, 123 N.J.L. 158, affirmed 124 N.J.L. 132.

Conceding the power of the Legislature in the premises, the argument is made that the district board's establishment of a salary schedule providing for annual increments is a conclusive and irrepealable act. The delegated legislative function is not thus circumscribed.

The local boards are not under a statutory duty to lay down a schedule of salary increments. Indeed, increments as such have no statutory recognition. That is a device of local policy adopted in the exercise of the granted general managerial power. Sec. 106 of the General School Law of 1903 invested these local agencies with authority to "make rules and regulations governing the engagement and employment of teachers and principals, the terms and tenure of such employment, and the promotion and dismissal of such teachers and principals, the salaries and the time and mode of payment thereof," and "from time to time" to "change, amend or repeal such rules and regulations." Pamph. L. 1903 (2d Sp. Sess.) pp. 5, 42; Comp. Stat. 1910, p. 4762; R. S. 1937, 18:13-5. This local regulation of teachers' salaries is subject to a minimum requirement of $100. per month, for each and every month during the school year, when employed. R. S. 18:13-13. The salary schedule upon which appellant's claim is founded was enacted as "a rule of the board" in the exercise of this function; and it contained an express reservation of the power of amendment and repeal.

True, the right of revision and repeal is subject to the injunction against "reduction of salary" except for just cause, embodied in sec. 1 of the act of 1909, *supra,* now R. S. 1937, 18:13-17. But unaccrued increments under a salary schedule adopted pursuant to sec. 106 of the General School Law of 1903, *supra,* do not take the classification of "salary" within the intendment of sec. 18:13-17, *supra.* In the local legislative usuage the terms are mutually exclusive. Increments, as used here, are the periodic, consecutive additions or increases which do not become a part of the salary of the teacher until they accrue under the rule making such provision; and, until the accrual, the modification or repeal of the rule so providing does not constitute a reduction of the current salary.

It is maintained that the "true intention" of a schedule of increments is that "the teacher's annual compensation shall be the average or mean between the minimum and maximum salaries stated in the schedules;" and that this is the essence of the "bargain" between the teacher and the local board. The argument presupposes that the protection of sec. 18:13-17, *supra,* covers not alone the current salary, but extends as well to all future increases of salary, regardless of the number or amount, provided in a salary schedule enacted as a mere rule or regulation of the district board. This would mean that the action of one board providing for salary increases *in futuro* would bind all its successors. The statute is not so framed. The Legislature has not invested the local boards with contractual power of such sweep. Such an interpretation would constitute a palpable distortion of the letter and spirit of the enactment. It is one that is not to be accepted in the absence of language admitting of no doubt of that purpose. A rule providing for increments is a mere declaration of legislative policy that is at all times subject to abrogation by the board in public interest. The statute is necessarily to be viewed in relation to the provisions for annual appropriations to defray the cost of maintenance of the school system.

As pointed out by Justice Porter, the case of Weber *vs.* Board of Education, 127 N.J.L. 279, is not in point. It is to be read in the light of the point presented for decision. There, the question was whether the local board was empowered to rescind a provision for an increment for a given year after the employment for that year had commenced. The increment had accrued and become merged in the basic salary. It was then beyond recall.

And these considerations are likewise determinative of appellant's further contention that his transfer from the senior high school to a junior high school constituted "a reduction in salary" within the purview of the cited statute, in that the maximum salary prescribed by the schedule for the former exceeded that fixed for a teacher in a junior high or intermediate school, and "the range of the salary paid to teachers in the high school was higher than that paid to junior high school teachers." The salary then payable to appellant was in nowise affected by the transfer. The district boards are expressly invested with authority to transfer principals and teachers. R.S. 18:6-20. The exercise of the power rests in sound discretion, conditioned by the provisions of sec. 18:13-17. Cheeseman *vs.* Board of Education of Gloucester City, 1 N.J. Misc. 318; Downs *vs.* Board of Education of Hoboken, 12 N.J. Misc. 345, affirmed 113 N.J.L. 401. The transfer was in no sense a demotion; and there is no tangible basis in the evidence for appellant's insistence that it was otherwise motivated by bad faith.

Let the judgment be affirmed. 129 N.J.L. 461.

BOARD OF EDUCATION WITHOUT POWER TO RESCIND RESOLUTION OF PREVIOUS MEETING UNDER WHICH RIGHTS OF EMPLOYEE BECAME EFFECTIVE

MARION S. HARRIS,

Petitioner,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF PEMBERTON, BURLINGTON COUNTY,

Respondent.

For the Petitioner, Charles A. Rigg.

For the Respondent, Richard B. Eckman.

DECISION OF THE COMMISSIONER OF EDUCATION

The petitioner has been continuously employed in the School District of Pemberton Township since September 3, 1929. While some of the contracts do not contain definite dates of employment, an academic year is implied, and in fact, the third contract makes the employment from September, 1931, to June, 1932 at a salary of $1,800.00. The fourth contract is from the 6th day of September, 1932, to the 5th day of June, 1933, at a salary of $1,600.00. Petitioner's salary continued at the rate of $1,600.00 from the beginning of the last mentioned contract to and including the school year 1936-1937. The minutes of the meeting of the board of education held May 5th, 1937, contain the following resolution:

> "On recommendation of the Teachers Committee motion by Mr. Cramer seconded by Mr. Douglas that the clerk be authorized to send contracts to the following teachers at salaries shown for the year 1937-1938. Carried and so ordered.
>
> Mrs. Marion Harris $1,800.00
> Miss Ruth Carroll ..... 1,375.00"

The testimony discloses that the minutes of May 5th were approved at a meeting of the board held on June 2, 1937. The next reference pertinent to the case is a resolution which appears in the minutes of the board of August 16, 1937, and reads:

> "Motion made by Mr. Walton seconded by Mr. Douglas that the motion establishing teachers' salaries for the year 1937-1938 as shown in the minutes of this board of May 5, 1937, be rescinded. Carried and so ordered.
>
> "Motion was then made by Mr. Mantel seconded by Mr. Hornor that the following teachers be employed at salaries shown for the year 1937-1938, and that the clerk notify the teachers whose salaries were affected accordingly.
>
> Mrs. Marion Harris $1,600.00
> Miss Ruth Carroll ..... 1,300.00"

Petitioner was notified by the district clerk of the action of the board on August 17th by letter which reads:

> "At a special meeting of the board August 16th the motion of May 5th

establishing salaries was rescinded and a new salary schedule was established covering the teachers for the ensuing year.

"In the new schedule your salary has been set at $1,600.00 for the year 1937-1938.

"This is for your information."

The testimony shows that the board does not issue contracts to tenure teachers. Salary payments were offered to the petitioner for the current school year in accordance with the notice sent by the district clerk on August 17th.

The petitioner, alleging that she is entitled to a salary of $1,800.00 in accordance with the resolution adopted by the board on May 5th, 1937, filed with the Commissioner of Education on or about December 5th, 1937, a petition asking that the action of the board on August 16th, 1937, be declared invalid and that the board be required to pay her salary in accordance with the May 5th resolution.

It was held by the Court of Errors and Appeals in the case of Campbell *vs.* Hackensack, 115 N.J.L. 209, that in relation to minutes of municipal bodies, parol evidence may not be invoked to alter or supplement the written records, and, therefore, testimony in the present case which would tend to alter or supplement the record is declared to be void and of no effect.

A board of education may rescind at any meeting a resolution which it passed during the course of the meeting and, accordingly, persons do not acquire rights until the final action has been taken on such resolution prior to adjournment. The resolution of May 5th, above set forth, was the final action at the meeting on that date in relation to the appointment of teachers, and these minutes set forth to the public the business which had been transacted at that time. When the board met again on June 2nd, 1937, the minutes of May 5th were approved and the board thereby reaffirmed the record of its action on the former date.

If a teacher is under tenure, a board of education is authorized to increase her pay, but cannot reduce it except under the procedure set forth in the tenure statute, to which procedure the board has not reverted. When the Pemberton Township Board of Education, as shown by its minutes of May 5th, fixed the salaries of certain teachers, some of them were under tenure and others may not have served in the district sufficient time to be so protected. Any teacher who was under tenure in the district did not need a contract to establish her rights to the salary so determined by the board, (Chapter 243, P.L. 1909; Revised Statutes Section 18:13-16) but a teacher not under tenure in the district had no right to a position and salary fixed by resolution until a contract had been executed. (Chapter 1, P.L. 1903, S.S., Sec. 106; Revised Statutes 18:13-7) LaRose *vs.* Board of Education of Egg Harbor, 1932 Supplement to School Law Decisions, 852.

The testimony discloses that the district clerk did not notify the petitioner of the action taken by the Board on May 5th. There is no evidence presented to show that the petitioner was not present at either the meeting of May 5th, when the resolution was passed, or at the meeting of June 2nd, when the minutes were read and approved; nor was any testimony presented to show whether the petitioner had access to the minutes between the dates of May 5th and August 16th. The minutes of the board are public records and constitute a public announcement of the proceedings of such board. Whether or not they were examined for the purpose of securing information, the fact remains that the action of the board on May 5th fixed the salary of the petitioner, a teacher under tenure. An acquired right through the

adoption of a resolution by a board of education cannot be invalidated by a rescinding of the resolution at a subsequent meeting.

The Supreme Court in the case of Whitney *vs.* VanBuskirk, 40 N.J.L. 463, in considering the reconsideration of a resolution by which a resignation was accepted and a new appointment made, held in part as follows:

> "We have, then, a resignation tendered, the approval of the mayor, the vote of acceptance by the board of councilmen, the appointment of a successor, the adjournment of the board without an attempt to further revise their action, and the public announcement of their proceedings. It seems to me that the matter then was put beyond recall or reach of the board, by a reconsideration of their action at the meeting of December 11th. . . .
>
> . . . . .
>
> "The defendant's appointment is assailed through the reconsideration proceedings of December 11th. It is claimed that, as to his appointment, the proceedings of the board in confirmation were not a finality. The circumstances attending this appointment and reconsideration are substantially the same as those touching the resignation, and the same rules apply. It is claimed by the relator that they are varied in a respect which he urges as being material, to wit, that the proceedings for reconsideration were before any notice had been given to the appointee of his appointment. I am at a loss to see, however, that this circumstance is in anywise material in the case; it could only be so upon the idea that it was made part of their act of appointment, because if, without that the last act to be performed by them in the execution of their power had been performed, its promulgation had passed it beyond their control."
>
> . . . . .
>
> "No certificate of appointment or commission to the office is required, and I think when a vote of confirmation intended by them to be final, has been taken, and the result publicly proclaimed, they have performed their last act of duty and of power; the matter is no longer in fieri, but fully consumate."

It is admitted that Mrs. Harris is protected in her position by the Tenure of Office Act. The board acted within its authority in establishing her salary at $1,800.00. After the action of the board on May 5th in so establishing the salary and its subsequent approval on June 2nd, the board could not on August 16th rescind its prior action and thereby nullify petitioner's right to the salary of $1,800.00, in which she became protected by the provisions of Section 18:13-16 of the Revised Statutes. Accordingly, the Board of Education of the Township of Pemberton is directed to hereafter pay to Marion S. Harris her salary at the rate of $1,800.00 per year and also to pay the difference between the amount she has received since September, 1937, and that which she would have received if her salary payments had been based on the amount of $1,800.00 per year.

April 18, 1938.

PERSON APPOINTED TO PRINCIPALSHIP WHEN NO VACANCY EXISTS HAS NO TENURE OR SENIORITY RIGHTS WHEN A VACANCY OCCURS THEREAFTER

ALICE MARIE DEBROS,

Petitioner,

vs.

BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK,

Respondent.

For the Petitioner, Milton A. Feller.
For the Respondent, Francis A. Castellano, Jr.

DECISION OF THE COMMISSIONER OF EDUCATION

The petitioner prays that a resolution adopted by the respondent on or about March 6, 1945, purporting to rescind a previous resolution, whereby she claims to have been apointed a principal, be held to be void and without effect and that the Board of Education of the Town of West New York be directed to assign the petitioner immediately to a principalship created by a vacancy which has existed since on or about February 21, 1945.

Respondent, in its answer, says that the resolution adopted by the Board of Education of the Town of West New York on February 5, 1941, appointing the petitioner a principal was invalid and of no force and effect for the following reasons:

1. There existed no vacancy in the West New York School System at such time, as all the existing West New York Schools had principals duly appointed and assigned to them and actively engaged as such.

2. Petitioner, since February 5, 1941, has never acted as or performed any of the duties of principal over any school and, in fact, since February 5, 1941, petitioner was employed by respondent to perform the clerical work of making a statistical survey of the West New York School System, and since September, 1942, petitioner has been employed continuously as a teacher, receiving yearly the usual annual increments of salary as a high school teacher.

3. The adoption of such a resolution was and amounted to an usurpation of power and was an ultra vires act on the part of the Board of Education, as then constituted, in that an attempt was made to grant petitioner a preference over other teachers in the school system when a vacancy of principal might occur in the future in any of the elementary or grammar schools, thereby usurping the power, authority and jurisdiction of succeeding boards of education as to such appointments.

4. The passing of such a resolution, appointing petitioner a principal, was and constituted an act which is contrary to good public policy of school government and contrary to law and amounts to an unlawful abridgement of the powers, authority and jurisdiction of this respondent.

5. Respondent further alleges that upon the facts set forth herein, petitioner has never acquired tenure rights as a principal within the intent and meaning of R. S. 18:13-16; and that since September, 1942, she has been actually performing the work of and has been employed by respondent as a high school teacher, and, therefore, the resolution passed by this Board on March

6, 1945, clarifying petitioner's status was in every respect legal, proper and effective.

6. In any event, the vacancy occurring on February 21, 1945, by reason of the death of Mr. Carlos A. Woodworth, principal of Memorial High School is not a vacancy which may be open to petitioner or to which this Board of Education may be compelled to appoint her under any interpretation of the rights claimed by petitioner.

This case is presented on a stipulation of facts and briefs of counsel. It is agreed in the stipulation that no vacancy occurred in the principalship of any school in the school district between February 1, 1941, and February 21, 1945. The minutes show that on February 1, 1941, the petitioner was assigned to the office of the Superintendent of Schools for the purpose of conducting research work in connection with problems to be assigned by the Board of Education and that on February 5, 1941, she was appointed a principal in the public school system of the Township of West New York.

It is stipulated, also, that from February 1, 1941, until September 4, 1942, the petitioner was engaged in research and was making a statistical survey and inventory of the school system. Upon the completion of this assignment, she was assigned to the position of teacher in the Memorial High School for the year 1942-1943. The stipulation discloses that, in the resolutions and classifications appearing in the minutes with respect to salary and increments, petitioner was classified as an elementary principal for the school year 1941-1942 and as high school teacher for subsequent years.

It is further stipulated that on February 21, 1945, Mr. Carlos A. Woodworth, principal of the Memorial High School died, causing a vacancy in the high school principalship, and that on March 6, 1945, a resolution was passed by the Board of Education rescinding the resolution passed on February 5, 1941, which resolution appointed Miss DeBros to a principalship in the school system of the respondent.

To prevail, the petitioner must show that she has acquired tenure as a principal under the terms of Section 18:13-16 of the Revised Statutes, and must be able to invoke rights to the vacant principalship conferred by the provisions of Section 18:13-19 of the Revised Statutes.

Section 18:13-19 reads as follows:

"Nothing contained in sections 18:13-16 to 18:13-18 of this title shall be held to limit the right of any school board to reduce the number of supervising principals, principals or teachers employed in the school district when the reduction is due to a natural diminution of the number of pupils in the district. Dismissals resulting from such reduction shall not be by reason of residence, age, sex, marriage, race, religion, or political affiliation. When principals, supervising principals or teachers under tenure are dismissed by reason of such reduction those principals, supervising principals or teachers having the least number of years of service to their credit shall be dismissed in preference to those having longer terms of service. Should any supervising principal, principal or teacher under tenure be dismissed as a result of such reduction such person shall be and remain upon a preferred eligible list in the order of years of service for reemployment whenever vacancies occur and shall be reemployed by the body causing dismissal in such order

when and if a vacancy in a position for which such supervising principal, principal or teacher shall be qualified. Such reemployment shall give full recognition to previous years of service.

"The services of any principal or teacher may be terminated, without charge or trial, who is not the holder of a proper teacher's certificate in full force and effect."

This statute applies to situations where it has been necessary to reduce the number of principalships for valid reasons. It was intended to establish a "preferred eligible list" to regulate the *reemployment* of principles on the basis of seniority, but was not, in the opinion of the Commissioner, intended to establish a preferred eligibility list for a person who has never actually served as a principal in a given school district. Therefore, in order to ascertain whether the petitioner can invoke rights to a vacant principalship under the provisions of Section 18:13-19, it must be determined whether she had actually been a principal in the West New York system prior to the vacancy in the principalship caused by the death of the high school principal.

An examination of the stipulation of facts reveals that no vacancy existed in the principalship of any school when the petitioner was apointed principal. It also appears that she was not assigned to the principalship of any school, but was assigned to the office of the Superintendent of Schools for the purpose of conducting research work. It is necessary to decide, therefore, whether under such conditions the petitioner was, in actual fact, a principal as contemplated by the School Law, even though on the minutes of the Board for the school year 1941-1942 she was classified as "principal."

Bestowing the title of "principal" upon a person does not confer upon him the legal status of a principal. "Courts will not be controlled by the nomenclature the parties apply to their relationship." Capozzoli *vs.* Stone and Webster Engineering Corporation, 42 Atl. Rep. 2d Series, 524 at 525.

In the case of Phelps *vs.* State Board of Education, 115 N.J.L. 310, affirmed by Court of Errors and Appeals, 116 N.J.L. 412, in referring to the proper classification of so-called "teacher-clerks," the Supreme Court said:

"As to the two so-called 'teacher-clerks,' we think that one holding a teacher's certificate, but doing only clerical work is properly classified as a clerk. The question is what such a person is doing, not what he or she is certified as qualified to do."

An examination of the statutory powers and duties of a principal reveals that a principal, as contemplated by the statutes, is a person having charge of a school building with certain responsibilities with respect to the building, the teachers, and the pupils.

The following are some of the powers and duties of a principal, prescribed by statute:

1. In a school where more than one teacher is employed, the principal makes an annual report to the county or city superintendent on blanks furnished by the Commissioner of of Education. (Section 18:13-114)
2. In a school where there is more than one teacher employed, the principal alone may suspend a pupil. (Section 18:13-116)
3. When there is evidence of departure from normal health of any child,

the principal of the school shall, upon the recommendation of the school nurse, exclude such child from the building. (Section 18:14-59)

4. The principal is required to conduct fire drills and see that furnace rooms and fire doors are closed during school hours, and require teachers to keep doors and exits unlocked. (Sections 18:14-106 and 18:14-107)

5. The principal over a local school system serves as a public library trustee in the event that there is no city superintendent or supervising principal. (Section 40:54-9)

Rules 87, 90, 91, 95, and 109 of the Rules and Regulations of the State Board of Education, found in the 1938 Edition of the New Jersey School Law, also indicate that the State Board regards a principal as one who has charge of a school building.

It is the opinion of the Commissioner that a person, whose duties are those of a research worker, is not a principal as contemplated by the School Law.

The next question to be decided is whether the Board of Education in office February 21, 1945, when a vacancy occurred, was bound by an appointment to a principalship by a Board of Education in office on February 5, 1941, when no vacancy existed. It is well established that a board of education cannot bind its successors unless it is so empowered by statute. Skladzien *vs.* Bayonne, 12 N.J. Misc. Rep. 602, aff. 115 N.J.L. 203, State *vs.* Rogers and Adrain, 56 N.J.L. 480, Gulnac *vs.* Board of Freeholders of Bergen County, 74 N.J.L. 543, Greene *vs.* Freeholders of Hudson, 44 N.J.L. 388, Adams *vs.* Haines, 48 N.J.L. 25, Mathis *vs.* Rose, 64 N.J.L. 45. It is clear, therefore, that a board of education cannot appoint for a term beyond its own official life. In the case of State, *ex. rel.* Joseph W. Bownes, 45 N.J.L. 189, an outgoing board of freeholders undertook to fill an office that did not become vacant during the term of its official life. It was held that the act of the board of freeholders in making an appointment to an office which was not vacant was void.

In the case of Fitch *vs.* Smith, 57 N.J.L. 526, it was held that a board of trustees of public schools could not appoint a person to a principalship which did not become vacant during the official life of the board.

In Skladzien *vs.* Bayonne, supra., a medical inspector was appointed for a term of three years. In setting aside the action of the Board of Education, the Supreme Court said:

> "It was not the legislative intent, as we see it, to prevent a succeeding Board of Education from exercising its prerogative of appointing a medical inspector of its own selection."

Petitioner, in her brief, concedes that a local board of education has no authority to bind a succeeding board, but maintains that such actions of a board are voidable, and unless they are voided by a succeeding board of education, they have the same force and effect as if such actions were adopted by the said succeeding board of education. Petitioner further contends that the action of the 1941 Board should have been voided by one of the succeeding boards before the permanent vacancy occurred on February 21, 1945.

A distinction must be made between void and voidable contracts. (See *Bouvier's Law Dictionary*, 3 *Rev. p.* 3406, and *Anson on Contract, 4th Am. Copyrighted Edition*, 19.)

Assuming, but not deciding, that the appointment of the petitioner could have been ratified by a succeeding board, the Commissioner can find no evidence to show that any succeeding board by any action, express or implied, ratified the appointment of the petitioner as a principal. No opportunity to ratify such appointment occurred until February 21, 1945, when a vacancy in a principalship was created by the death of the high school principal. On March 6, 1945, a resolution was passed by the West New York Board of Education, rescinding the resolution passed on February 5, 1941, by which the petitioner was apointed principal in the school system of the respondent.

Inasmuch as the Commissioner takes the view that the petitioner never was, in actual fact, a principal, it is not necessary for the Commissioner to decide whether the Board in office in 1945 could rescind her appointment. The resolution does indicate, however, that even if the action of the 1941 Board could have been ratified, the Board in office in March, 1945, had no intention to ratify it.

It is the opinion of the Commissioner that the action of the Board, in appointing the petitioner on February 5, 1941, was void and, therefore, could not be ratified. In so holding, the Commissioner relies upon the reasoning of the Supreme Court in the case of State *ex rel.* Joseph W. Bownes, *supra.,* wherein it was held:

> "It would seem, therefore, that granting the contention in favor of the legal standing of this outgoing board when it made the appointment of the respondent, there being no vacancy, such act was void, as such body did not continue in the exercise of its public functions until the office in question fell in, but before that event had yielded up such functions to an adverse board, there was and could be no ratification, either express or implied, of such an appointment."

The Commissioner concludes that the action of the Board of Education of the Town of West New York in office on February 5, 1941, in naming Alice Marie DeBros a principal, when no vacancy existed, and in assigning her to research work, conferred no tenure and seniority rights as principal under Section 18:13-16 of the Revised Statutes, and that the Board of Education of the Town of West New York in office on February 21, 1945, was not bound by the action of the Board in office on February 5, 1941, in appointing the petitioner a principal.

The petition is dismissed.

February 5, 1946.

Affirmed by State Board of Education without written opinion June 7, 1946.

PAYMENT OF COMPENSATION BY BOARDS OF EDUCATION FOR SERVICES PERFORMED AS SUBSTITUTE TEACHER DOES NOT CONSTITUTE A RATIFICATION OF EMPLOYMENT OTHER THAN AS SUBSTITUTE

BEATRICE TRUBIN AND DORA GORDON,

Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF NEWARK,

Respondent.

For the Petitioners, Jerome C. Eisenberg.

For the Respondent, Jacob Fox.

DECISION OF THE COMMISSIONER OF EDUCATION

This case is presented to the Commissioner for decision on a stipulation of facts. The facts in the stipulation disclose that each of the petitioners taught by assignment by the superintendent of schools under the designation of "substitute" a total of 638 days in four successive academic years, 1937-1938, 1938-1939, 1939-1940, 1940-1941. In the academic year 1940-1941, the petitioners did not teach in the Newark public schools subsequent to May 19, 1941.

During the four academic years involved in this case, Dora Gordon taught a total of 638 days on assignment by the superintendent of schools to various schools for periods of time varying from 2½ hours to 154 consecutive days, at a per diem rate of $5.00 for 5½ hours. Four hundred forty-one days were spent in the rooms of permanent tenure teachers who were absent, and 197 days in rooms where there were no regular teachers. The period of greatest consecutive employment was from November 17, 1938, to June 30, 1939. There was no action on her employment by a majority vote of all the members of the Board of Education of the City of Newark or by any committee of the board.

It is agreed in the stipulation that by assignment of the superintendent of schools, Beatrice Trubin did all her teaching as a substitute for permanent regular teachers who were temporarily absent. She taught a total of 638 days, the longest consecutive assignment being for one academic year, and did a considerable amount of teaching in classes for sub-normals. Some of this teaching in sub-normal classes took place prior to April 12, 1939, when she was issued a special certificate by the State Board of Examiners, licensing her to teach sub-normal children in the schools of the State. During the academic years 1937-1938 and 1940-1941, the minutes of the Committee on Instruction show that the action of the superintendent was approved by the Committee in the case of one period of employment in each year. There was, however, no action on her employment by a majority vote of all members of the Board of Education of Newark.

It is further agreed in the stipulation that all of the employment of Beatrice Trubin and Dora Gordon during the period involved in these proceedings was by assignment under the designation "substitute" and by the procedure followed by the Newark School District in the assignment of teachers to serve as substitutes for permanent regular teachers temporarily absent. The principal question to be

decided is whether the periods of time which petitioners taught by assignment of the superintendent of schools under the designation of "substitute" may be credited toward the acquisition of rights to permanent employment as tenure teachers under the provisions of sub-section (c) of R.S. 18:13-16 as amended by Chapter 43, P.L. 1940. Chapter 43, P.L. 1940, reads in part as follows:

> "The services of all teachers, principals and supervising principals of the public schools, * * * shall be during good behavior and efficiency * * * (c) after employment, within a period of any four consecutive academic years, for the equivalent of more than three academic years, some part of which must be served in an acadamic year after July first, one thousand nine hundred and forty, * * *."

The State Board of Education on November 14, 1942, decided a similar question in the case of Madeline Landis Schulz *vs.* Board of Education of the City of Newark. The procedure followed by the Newark School District in the instant case in the assignment of teachers to serve as substitutes for permanent regular teachers temporily absent is similar to that which was examined by the State Board of Education in the Schulz case. After weighing the facts in the above cited case, the State Board held:

> "In the absence of evidence of any rule or regulation of respondent showing the terms and tenure of employment, other than as a substitute, at any time during the three academic terms from 1937 to 1940, or of a contract in writing between her and appellant, and in view further of the fact that no employment is shown by a majority vote of the whole number of members of appellant board, the conclusion seems irresistible that petitioner was not employed as a 'teacher' within the purview of the tenure act. Her employment, so far as appears by the stipulation filed, appears to have been by the superintendent of schools, particularly for the five days in the year 1940-1941.
>
> "Petitioner's employment for those five days was, so far as appears in the record, without knowledge of the appellant board, and it is contrary to the declared policy of the law that tenure status should be acquired by a teacher by the act of a subordinate and without appropriate action by the board. It is for that body to determine, in the manner prescribed by law, whether the teacher is satisfactory and a desirable or necessary addition to its teaching force for permanent employment. . . .
>
> "It is implicit in the School Law, R. S. 1937, Title 18, that to acquire tenure the teacher must have been employed for the requisite time, by a majority vote of all the members of the board of education of the district and that the terms and tenure of her employment must be governed by rules and regulations made by the board, or, in the absence of such rules and regulations, by a contract in writing, in triplicate, signed by the president and district clerk or secretary of the board and the teacher."

The Commissioner considers that the decision in the instant case is controlled by the ruling of the State Board of Education in the above cited case, namely that employment by a majority vote of all the members of the board of education for the requisite number of years is essential for the acquisition of tenure. Since no evidence has been submitted to show that Beatrice Trubin and Dora Gordon were

employed by a majority vote of all the members of the Board of Education of the City of Newark, the decision of the Commissioner, based on the ruling in the Schulz case, above cited, is that the petitioners have not acquired tenure.

The petition is dismissed.

December 22, 1942.

DECISION OF THE STATE BOARD OF EDUCATION

This is an appeal from a decision of the Commissioner of Education, whereby he held that the appellants had not acquired and were not entitled to tenure of employment in respondent district.

The facts involved in the controversy are set forth in a stipulation signed by counsel for the parties and it appears therefrom that:

Appellant, Beatrice Trubin, has since June 23, 1933, been the holder of a certificate issued by the State Board of Education authorizing her to teach grades one to eight, inclusive, in the elementary schools of New Jersey. On April 12, 1939, she was granted a limited special certificate by the State Board of Examiners to teach subnormal children. On May 16, 1934, and June 19, 1936, she was granted licenses by the Board of Examiners of the City of Newark to teach grades one to eight, inclusive, in that district. The two licenses last mentioned expired three years after being issued and they have not been renewed.

During the academic years 1937 to May 19, 1941, appellant, Beatrice Trubin, was employed as a substitute teacher by assignment of the superintendent of schools of respondent, a total of 627 days out of 731 days respondent's schools were in session during that period. During the year 1937-1938 she taught for 185 days a class of subnormal children, for which employment she was recommended by the superintendent of schools, which recommendation was approved by the Committee on Instruction of respondent, although appellant, at that time, had no qualifying certificate for such type of teaching. Her employment during the year 1937-1938, when she taught sub-normal children, was in one school. During the year 1938-1939 her employment was in two schools. During 1939-1940 in nine different schools, and in 1940-1941 she was employed in thirty different schools during a period of 123 days of employment in that year.

Before the commencing of each academic year of her employment she filed with respondent's superintendent of schools a "request for substitute work," the last of which request was filed on August 20, 1940.

Appellant, Dora Gordon, since June 13, 1936, has been the holder of a State certificate authorizing her to teach grades one to eight, inclusive, in the elementary schools of New Jersey, and on June 19, 1938, she was granted a license by the Board of Examiners of the City of Newark to teach the said grades in that district, which license was renewed on December 8, 1939, and is still in force and effect. During the academic years from 1937 to May 19, 1941, appellant, Dora Gordon, was employed as a substitute teacher by assignment of the superintendent of schools of respondent, a total of 640 days out of 752 days, during which respondent schools were in session. During 1937-1938 her employment was in thirteen different schools. The period of continuous employment in any of such schools varied from a minimum of 2½ hours to a maximum of 77 days. During 1938-1939 she was employed in seven different schools and in 1940-1941, she was employed in twenty-

four different schools, the period of continuous employment in any such school varied from a minimum of 2¾ hours to a maximum of seventy days. Likewise, before the commencing of each of such academic years, she filed with the superintendent of schools a "request for substitute work," the last of which request was filed on August 16, 1940.

All of the teaching done by each appellant in the respondent schools was as a substitute for permanent regular teachers under tenure and temporarily absent. No action was taken by respondent board of education at any time with reference to the assignments of appellants as substitute teachers by the superintendent of schools. Upon two occasions when Beatrice Trubin was recommended by the superintendent of schools to teach subnormal children, the recommendation was approved by the Committee on Instruction of respondent. Nor in the case of either appellant, except as above mentioned, was any action taken by any of the committee of the respondent board of education with reference to the assignment of appellants as substitute teachers.

Appellants claim that having taught the equivalent of more than three academic years, during a period of four academic years, some part of which was after July 1, 1940, they became entitled to tenure of employment, R.S. 18:13-16 as amended by Chapter 43, P.L. 1940, page 128.

The prayer of their petition is that the Commissioner of Education direct respondent:

(a) To recognize appellants as teachers possessing tenure of employment.

(b) To give them immediate assignment to classes which they are qualified to teach.

(c) To compensate them the sum which they would have been paid had they not been refused employment, and

(d) To permanently employ them in the future so long as there is need for their services.

As hereinbefore stated the Commissioner of Education denied the relief asked and dismissed the appeal.

It is further stipulated that the Newark Board of Education does not make individual contracts with teachers and all assignments and appointments of teachers are governed by general rules and regulations from time to time adopted by the board of education. No individual contracts were entered into with appellants and all of the assignments of appellants to employment were subject to the rules and regulations of respondent then in force.

The procedure in assignment of teachers to serve as substitutes is, when absences of regular teachers are reported by the school principal, assistants in the office of the superintendent ascertain which applicant for substitute work is available and the first available one is assigned. The assignment is subject to termination by the superintendent at any time. The substitutes are paid on a per diem basis, except in some cases where the compensation is on a monthly basis. The monthly basis is usually subject to the approval of the Committee on Instruction. All the employment of appellants, during the period hereinbefore mentioned was by assignment under the designation of "substitute" and by the procedure above mentioned.

Regular teachers are appointed on a probationary basis by the board of education, pursuant to the rules and regulations of the board, from among those who have passed the Newark Board of Examiners' examination and whose names appear on

the list of eligible applicants. "Regular teachers" appointed by the board of education are eligible for permanent appointment after three years of probationary service.

All apointments, promotions, and transfers of teachers are made by the board of education on a recommendation of the superintendent of schools, from the list of eligible applicants.

Respondent has no position in its system known as "general substitute." The employment of substitutes terminates when the occasion for their employment ends, and the position held temporarily is then no longer in existence.

The facts in this case are substantially similar to those of the case of Madeline Landis Schulz, *vs.* the Board of Education of Newark, decided by this Board on November 14, 1942, in which it was held, that the appellant, whose services were wholly as a substitute teacher, was not a "teacher" as contemplated by the Teachers' Tenure Law and that no tenure rights are acquired by one who is employed, from time to time, solely as a substitute to fill positions made vacant by the temporary absences of regular teachers.

The word "tenure" means to hold. To have tenure implies there is a position or office to which it applies. There is no "position" or "office" held by a substitute teacher in the system of respondent. Neither is a substitute teacher "dismissed" from a position. The "position" and employment held by them no longer exists when the occasion of their employment, the absence of the regular teacher, ends.

Appellants further contend that assuming they are not entitled to tenure for the reason their appointment was not made by a majority vote of the respondent board of education, they nevertheless acquire that status by virtue of R.S. 18:3-50, which provides that the person who shall hold de facto any office or position in a school district, and shall perform the duties of such office or position shall be entitled to the emoluments and compensation appropriate to such office or position for the time in fact so held, etc. They argue that the emoluments include all benefits appertaining to the position or office of which tenure of employment is one. It will be noted that the holder of such position de facto is entitled to the emoluments and compensation thereof only "for the time in fact so held," and appellants' argument fails when we remember that the position or employment held by appellants terminated upon the conclusion of each assignment of substitute work. It is deemed that the statute has no applicability to the present case.

Furthermore, appellants contend that the authority conferred by respondent upon the superintendent of schools to employ substitutes to discharge the duties of regular teachers during their absence is a delegation of power, the exercise of which is as effective as if performed by the board itself. That is true so far as concerns the rights of the teachers as "substitutes." The delegated authority is limited to that form of employment. The rules and regulations of respondent negative the authority of the superintendent to employ teachers on probation for permanent employment or teachers for permanent employment.

Neither does payment by the board of education of compensation to appellants for service performed as substitute teachers, constitute a ratification by respondent of any employment of appellants other than as substitutes.

Appellants were at no time employed by respondent other than as "substitute teachers" and held no position to which tenure could attach. It is concluded appellants were not teachers within the purview of the Teachers' Tenure Law, R. S.

1937, 18:13-16, as amended by Chapter 43, P.L. 1940. They are not entitled to the relief they seek.

The decision of the Commissioner of Education is affirmed.

April 9, 1943.

Decisions of Commissioner and State oBard reversed by Supreme Court April 12, 1944, not reported.

Supreme Court Decision reversed by *Court of Errors and Appeals,* 132 N.J.L. 356.

TEACHER UNDER TENURE MAY BE DISMISSED FOR GOOD CAUSE

W. CLIFFORD COOK,

Petitioner.

vs.

BOARD OF EDUCATION OF THE CITY OF PLAINFIELD,

Respondent.

For the Petitioner, W. S. Angleman.

For the Respondent, Edmund J. Kiely.

DECISION OF THE COMMISSIONER OF EDUCATION

The petitioner, W. Clifford Cook, a teacher in the public schools of the City of Plainfield and protected in his position by the provisions of the Teachers' Tenure of Office Act, (Revised Statutes 18:13-16 to 20) was suspended in accordance with the statutes (18:6-42) by the Superintendent of Schools on January 12, 1938. At a meeting of the board of education on February 8th, the suspension was ratified unanimously, of which action petitioner was notified under date of February 9, 1938. On February 17th, a notice of a hearing and specification of charges were filed with the secretary of the board and also served upon the petitioner. Hearings before the full board, attended by the petitioner and his counsel, were conducted for about ten evenings between March 9th and March 26th. There were twenty-eight specific charges submitted and W. Clifford Cook was found guilty of charges numbered 4, 9, 12, 13, 15, 16, 19, 21, 22, 23, 24, 26, and 27. These enumerated charges can be generally summarized as follows:

Charges 4, 12, 13, and 19 relate to failure to comply with instructions regarding supervision of teams and games and arrival at place of assigned duty at designated times.

Charges 9 and 21 allege failure to attend a staff meeting at a designated time without notice of cause for absence and also failure or refusal to make lesson assignments as directed.

Charges 15, 22, 23, and 24 relate to instruction of classes and disciplining of a pupil by petitioner when such classes and pupil were assigned to other teacher.

Charges 16 and 27 allege arbitrary refusal to sign inventory lists and insubordinate attitude at a conference with the high school principal and other members of the physical training department.

Petitioner in this case was subordinate in rank to Herbert A. Stine, who holds the position of Director of Health and Physical Education. His work was assigned by Mr. Stine and as a member of the school organization, it was Mr. Cook's duty to comply with the instructions of the Director of Health and Physical Education, unless such directions were set aside by those higher in rank; namely, the high school principal, the superintendent of schools, or the board of education.

In reviewing the testimony, special consideration is due that of the high school principal. The Commissioner of Education in the case of Weekly *vs.* Board of Education of the Township of Teaneck (Supplement to School Law Decisions of 1928, Edition of 1932, p. 840) in setting forth the position of the principal of a school, quoted from the work of H. H. Foster of Beloit University on high school administration, as follows:

> "As the responsible head of the school, the principal must see that the results for which the school exists are forthcoming. This means that he must be an organizer and supervisor of instruction as well as of management; that he must know what things should be done, how they should be done, and that they are done. . . . In fact his position is to see that things get done."

In relation to this, the Commissioner said:

> "In giving to the testimony of a high school principal the weight naturally incident to the important status universally conceded his office, it is of course assumed that such particular principal is not only unprejudiced but possesses himself the training, ability and experience necessarily implied in all such characterizations of his office as those above quoted; and in the present case the value of the testimony of the principal, Mr. High, was in no way impaired by any revelation on cross examination or otherwise of any lack on his part of the usual training, ability and experience necessary to the successful conduct of his office or of any prejudice whatever against the appellant. There is no question but that the testimony of the principal was highly adverse to the appellant's methods of conducting his classes and his maintenance of order and discipline."

The foregoing citations in relation to the testimony of the principal of the high school in that case apply with even greater effect in the instant case, due to the eminent qualifications of Dr. Galen Jones, principal of the high school, who holds the degrees of Master of Arts and Doctor of Philosophy conferred upon him by Columbia University, where he majored in high school administration. Dr. Jones has had exceptionally broad experience as a high school principal in several states and has taught the theory of high school administration at the summer sessions of several universities. After receiving his doctor's degree about four years ago, he accepted the principalship of the Plainfield High School, in which position he has continued to the present time. The testimony of Dr. Jones as to fact, as shown by the record, appears unprejudiced and carefully considered. A brief summary of Dr. Jones' testimony shows (record pages 257, 293, 294, 296, 297, and throughout cross examination) that because Mr. Cook failed to comply with the directions of Mr. Stine, and noting the incompatibility existing between the two, he endeavored to ascertain to what extent each was responsible. With personal knowledge of certain situations in which Mr. Cook failed to obey directions and written reports of others, Dr. Jones had several conferences with Mr. Stine and Mr. Cook to-

gether, and also with each in the absence of the other, and as a result of these conferences came to the conclusion that the blame for the conditions of which complaint was made was due ninety-nine per cent to the acts of Mr. Cook. Dr. Jones advised Mr. Cook on several occasions that when he was asked to perform work which he thought unjust he should bring the matter to him, but Mr. Cook failed to do this. Dr. Jones' testimony leaves no doubt that the conduct of the petitioner was detrimental to the best functioning of the school system.

While the record of testimony presents no evidence of inefficiency, as it relates to the teaching of pupils by Mr. Cook, it does show his inability to cooperate and comply with directions of his superiors which caused constant friction and ill feeling extremely detrimental to good school organization. The success of a school depends in large measure upon good organization and hearty cooperation. When a teacher finds it impossible to work harmoniously with his immediate superior officer and cannot convince the superintendent of schools and other administrative or supervisory officers that he, rather than his immediate superior, is right, then such person should either change his attitude or seek a position elsewhere. If he does neither, there appears only one course left to the board of education which is to conduct a full hearing and determine the action which in its opinion is best for the welfare of the school. The testimony in this case shows that the board conducted a fair hearing, as a result of which it dismissed the petitioner. In relation to such hearings, the State Board of Education and the Supreme Court have ruled as follows:

The State Board of Education in the case of Fitch *vs.* Board of Education of South Amboy, 1928 Compilation of School Law Decisions p. 173,

> "Mr. Fitch now urges that we should be convinced 'beyond a preponderance of evidence' that he was inefficient and incapable. As we have today indicated in another case, it is our opinion that we should not interfere with the determination of a local board of education unless it appears that its conclusion was the result, not of honest judgment, but of passion or prejudice. The Tenure of Service Act provides that all charges shall be examined into by the local board of education, and that if such board finds they are true in fact, the teacher may be dismissed. The Legislature has imposed the duty of determining if the charges are true in fact upon the local board. Where evidence against a teacher is clear, or where, if not entirely clear, there is room for an honest difference of opinion, we should not interfere with the determination of the local board. To do so would mean that we could substitute our judgment in place of its judgment, a substitution which, in our opinion, would be unauthorized and contrary to the intention of the Legislature."

The Supreme Court in Reilly *vs.* Jersey City, 64 N.J.L. 508:

> "In reviewing the action of a board of police commissioners this court will not weigh the evidence taken before them, for the purpose of reaching an independent conclusion on the question of the guilt or innocence of the prosecutor. It will only consider such evidence for the purpose of determining whether or not it affords a rational basis for the judgment against him. If it does, then no matter whether the evidence be weak or strong, this court will not interfere. Dodd *vs.* Camden, 27 Vroom 258. Tested by this rule, the evidence produced before the board, and sent up with the writ in this case,

supports the conviction which rests upon it, and the order of removal must therefore be affirmed."

The Supreme Court in Martin *vs.* Smith, 100 N.J.L. 50:

"If the court were not circumscribed and limited in its duty in this instance by the well-settled rule of law applicable to cases of this character, it might properly be urged to weigh the testimony, and, if possible, reach a conclusion different from that which has been reached by the trial tribunals. But the settled rule of law is that if there be evidence upon which the trial tribunal may reasonably found its conclusion of guilt or innocence, this court will not reverse the judgment by weighing the testimony for the purpose of forming an independent judgment. If the judgment of the trial court can be fairly supported by the record, the duty of this court is at an end so far as further investigation is concerned."

In accordance with the above citations, the decision of the court of original jurisdiction may be reversed only where prejudice or bias is evident and the decision cannot reasonably be supported by the record.

There is no evidence of prejudice or passion on the part of the board in the conduct of this case, and the testimony reasonably supports the decision of the Board of Education of the City of Plainfield in dismissing W. Clifford Cook.

The appeal is dismissed.

August 12, 1938.

Decision of the State Board of Education

The appellant, W. Clifford Cook, a physical training instructor in the Plainfield public schools, where, by reason of long service, he had acquired tenure of office, was suspended by the superintendent of schools on January 12, 1938. At a meeting of the board on February 8, the suspension was unanimously ratified. On February 17, 1938, charges against the appellant were filed by the superintendent of schools with the secretary of the board and served upon the appellant with notice of hearing. Ten sessions were held by the board between March 9 and March 26, which were attended by the appellant and his counsel, and many witnesses were examined. Some of the charges were withdrawn and others were somewhat modified.

After what appears to have been unusually careful consideration a written decision of a majority of the board was filed holding that the appellant was guilty of acts of insubordination, neglect of duty, interference with the authority of another teacher, and a general unwillingness and failure to cooperate with his superiors. The decision specified by number the particular charges of which he was held guilty, recited that the board felt "that if that same attitude (of unwillingness 'to cooperate fully and freely with his superior officers and his associates') prevailed among all other members of the Physical Education Department, or other departments of the High School, effectiveness of such departments would be seriously impaired," and ordered that he be dismissed. A minority opinion was filed by one of the members of the board in which he concluded "that the evidence and the acts committed were not of sufficient weight to warrant a dismissal."

The appellant filed a petition with the Commissioner of Education, alleging that his suspension was unlawful, and praying that the order for his dismissal made by

the Plainfield Board after the charges against him were sustained, be reversed and that he be restored to his position in the Plainfield school system with full pay from the time of his suspension and a full exoneration from the charges brought against him.

The Commissioner has held that the evidence before the board reasonably supports the Plainfield Board's decision, and that there being no showing of prejudice or passion on the part of that board in its conduct of the case, the appeal should be dismissed. In effect, he finds that the acts of which the appellant was held guilty were sufficient to justify the dismissal.

This appeal challenges the affirmance of the Plainfield Board's decision on the charges and also the legality of the suspension, with which question the Commissioner's opinion does not deal.

There was a full argument before the Law Committee, it has examined the briefs of counsel for both parties, and each of the three members of the Committee who heard the argument has read the lengthy record of the trial before the Plainfield Board.

The appellant received due notice of the charges preferred against him, and was given full opportunity to make his defense. Indeed his counsel was permitted to introduce testimony which, in our opinion, was entirely irrelevant to the matter at issue, namely, whether the appellant had committed the offenses charged against him. The board seems to have desired to leave no room for criticism on the ground that he had been hampered in the presentation of his defense. It may be observed, as *obiter* in this case, that assertions or evidence of misdoing on the part of other teachers in the same school system is not germane to, and should have no effect on, the determination of specific charges before a district board under the tenure of office statute.

It is now charged, on behalf of the appellant, that there was passion or prejudice on the part of a majority of the Plainfield Board, but no evidence is cited to sustain the assertion, and we find none in the record. There is no such allegation in the appellant's petition to the Commissioner, nor was there an attempt to prove any such allegation when the case was before him.

Appellant claims that the grounds upon which he was dismissed are not sufficient under the terms of the statute. The statutory grounds are "inefficiency, incapacity, conduct unbecoming a teacher, or other just cause." Neither inefficiency nor incapacity was charged against him. There was a charge of "conduct unbecoming a teacher," but his counsel vehemently asserted at the hearing before the Plainfield Board that the use of these words in the charges created a reflection upon the appellant's honesty, veracity, morality, etc., and on that account, "so that the public mind may not conceive that anything was intended than the desire to follow the words of the statute" it was stipulated that "other just cause" be substituted for "conduct unbecoming a teacher." Insubordination and some of the other charges sustained are included within the statutory phrase "conduct unbecoming a teacher" but they also constitute "just cause," and the attempt to upset the Board's decision on the ground that they do not must fail. Cases of this character are not to be decided on technicalities. For the benefit of the school system the statute is to be construed and administered liberally and so as to effect its intent.

It is urged on appellant's behalf and was, as stated above, held in the dissenting opinion of a minority member of the Plainfield Board, that the acts proved against

appellant were not of sufficient importance to warrant the appellant's dismissal (See Wallace *vs.* Greenwich Township Board of Education, School Law Decisions, 1932 Supplement, p. 55). We think otherwise.

Even if it be assumed that no particular act testified to have been committed by the appellant would of itself call for his dismissal, nevertheless, taken together the various offenses present a reasonable basis for the decision appealed from. Nor can insubordination, neglect of duty and lack of cooperation with superiors in office be said to be "picayune" or unimportant.

The tenure of office statute was not intended to prevent district boards of education from dismissing incumbents of positions in school systems whose conduct is fairly found to be such as to injuriously affect its proper functioning or the maintenance of the required standards of instruction or discipline. For the purpose of maintaining the efficiency of the schools, the act explicitly provides that when written charges are preferred, reasonable notice of them given, and "examined into and found true in fact by the *Board of Education,*" teachers and principals "may be dismissed." Thus the power to hear, determine the truth of the charges, and dismiss, is vested by the statute solely in the district board.

It is only when passion, prejudice or unfairness on the part of that board is shown, or it has failed to comply with the statutes, or the evidence in support of the charges does not present a reasonable basis for the board's decision that the Commissioner or this Board will overrule it. The fundamental principal for the determination of appeals of this character, to which this Board has long adhered, and which has many times been stated in its opinions, is that it will not weight the evidence taken before the district board for the purpose of reaching an independent conclusion on the question of the guilt or innocence of the incumbent, but will only consider the evidence for the purpose of determining "whether it affords a rational basis for the judgment against him." Reilly *vs.* Jersey City, 64 N.J.L. 508. If the judgment of the district board is fairly supported by the record, its decision is not to be disturbed. Fitch *vs.* South Amboy Board of Education, 1928 Ed. School Laws 173; Martin *vs.* Smith, 100 N. J. Law, 50.

The record contains evidence which supports the findings of the majority of the Plainfield Board and, therefore, on the principle above stated, those findings will not be reversed. In that connection it is to be noticed that the opinion of the minority member was not based on a belief that the evidence did not sustain the charges but on the ground that the acts committed were not of enough importance to justify the punishment inflicted.

The charges against the appellant being of sufficient importance to justify the action of the Plainfield Board, the board's hearing of those charges having been fair and impartial and the evidence and the record containing reasonable support for its determination, it is our opinion that the Commissioner's decision refusing to reinstate the appellant is correct.

There remains the question of the legality of the appellant's suspension by the superintendent of schools. The statute empowers superintendents to suspend teachers but requires that their action have the approval of the president of the board and be reported to the board "forthwith." (R.S. 18:6-42).

The record here shows that the superintendent was authorized by the president of the Plainfield Board to suspend Cook, but the suspension was not reported to the board until its next meeting a few weeks later. No report was made either to the

secretary or the office of the board. It is possible that the members of the board knew of the suspension, but that is not sufficient.

The nature of the statute is such as to require strict compliance with its mandate by all school officials, even though as in the present case the provision in question may appear to be technical. Its beneficent purpose is that the superintendent's arbitrary right of suspension shall not be exercised without the immediate knowledge of the board.

We find therefore, that the appellant's suspension was not in compliance with the statute and consequently he was in the employ of the Plainfield Board of Education until it dismissed him. In this connection, there has been some doubt in our minds whether the so-called ratification by the board of appellant's suspension by the superintendent of schools terminated his employment as of the date of such ratification, notwithstanding the absence of the required statutory notice to the board of such suspension, but have finally concluded that, under the terms of the statute, the attempted ratification was of no effect and the appellant is entitled to his salary until his dismissal.

It is recommended that the decision of the Commissioner be affirmed so far as it sustained the action of the Plainfield Board of Education in dismissing the appellant and that the Commissioner be instructed to direct that board to pay the salary of the appellant until the date of his dismissal.

February 18, 1939.

WHERE CHARGES JUSTIFY DISMISSAL OF TENURE TEACHER, IF PROVED, THE COMMISSIONER WILL NOT INTERFERE WITH THE BOARD'S DETERMINATION, IF THERE IS EVIDENCE TO SUPPORT IT

MABEL PALMER,

Appellant,

vs.

BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF THE BOROUGH OF AUDUBON, CAMDEN COUNTY,

Respondent.

For the Appellant, Waddington and Tilton (Howard S. Tilton of Counsel).

For the Respondent, John Claud Simon.

DECISION OF THE COMMISSIONER OF EDUCATION

This is an appeal from the action of the Board of Education of the School District of the Borough of Audubon in dismissing the appellant as a teacher in that district. The charges filed against the appellant by five members of the Board of Education are as follows:

"June 21st, 1945
"To the Board of Education of the School District
of the Borough of Audubon.
"Gentlemen:

"The undersigned, members of the Board of Education of the Borough of Audubon, New Jersey, have been the recipient of a number of complaints against Mabel Palmer, a teacher of the Fifth Grade in schoolhouse No. 3, and on May 17, 1945, interviewed approximately seventeen parents and a number of pupils from said school relative to said complaints, and on information and belief pursuant to the information obtained from said parents and pupils, do hereby request that the said Mabel Palmer be dismissed as a teacher of the Audubon School System, on the ground of inefficiency, incapacity, conduct unbecoming a teacher and striking pupils contrary to the Statutes of the State of New Jersey in such case made and provided, in that said Mabel Palmer, on numerous occasions in the school year beginning September, 1944, and down to the time of her suspension on May 11, 1945:

"1. Distributed to the pupils mimeographed lessons which were improperly mimeographed, and which the pupils were unable to understand and decipher, due to the improper mimeographing.

"2. In that the said Mabel Palmer did during said time humiliate pupils by calling them a liar: By making fun of them in the presence of other pupils. By calling them crackpot and nitwit. By having the other pupils ridicule the pupil who was the victim of her anger at a particular time. By ridiculing their work in the presence of the class. By unnecessary scarcasm in speaking to the pupils and in remarks made to the pupils entirely irrelevant to the teaching of her subject or unnecessary in the discipline of the school.

"3. By striking various male students of the class, to wit: Richard Turner, Wynn Kennedy, Joseph Barber, Richard Young, and Jerry Rowland, contrary to the provisions of the State Law of New Jersey.

"4. Lack of cooperation with the various parents of pupils who contacted her in the interest of the students of her class.

"Respectfully submitted
H. Emory Wagner
Florence E. Williams
Louise W. Witz
Ernest F. Doherty
A. K. Ward."

On September 18, 1945, the Board of Education found as true in fact the charges made against the appellant of inefficiency, incapacity, conduct unbecoming a teacher, and a lack of cooperation with the various parents and dismissed her as a teacher.

The appellant attacks her dismissal on the following grounds:

1. That the finding of the respondent Board that the charge of inefficiency, incapacity, conduct unbecoming a teacher and lack of cooperation with the various parents of the appellant's pupils who contacted her were true in fact was clearly against the weight of the evidence.

"2. That the charge of lack of cooperation with the various parents of the appellant's pupils who contacted her was not such as, if found true in fact, would justify appellant's dismissal.

"3. That the respondent Board erred in sustaining an objection to the following question (Transcript p. 160):

'Dr. Fidler, after your reinstatement as the result of the dismissal of these charges against you, to which I have referred, it is true, is it not, that on your recommendation Miss Lang was demoted from . . .

MR. SIMON: I object to that. That has nothing to do with this case, as is perfectly obvious to any intelligent person.

'Q. . . . . (continued) . . . grade supervisor to teacher, Miss Burkett from teaching supervisor to teacher, and Miss Feihman from teacher in the Junior High School to a teacher of remedial reading in the fifth and sixth grades?'

"4. That the Respondent Board erred in permitting the following witnesses to be sworn and to testify: Shirley Barber (Transcript pp. 62-64); Margery Norris (Transcript pp. 97-99); George William Robb (Transcript pp. 134-136); Doris Opie (Transcript pp. 189-191)."

The appellant prays that an order be issued directing her reinstatement and the payment of her salary from the date of her dismissal.

The pertinent statute is:

"18:13-17. No teacher, principal, or supervising principal under the tenure referred to in section 18:13-16 of this title shall be dismissed or subjected to a reduction of salary in the school district except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause and after a written charge of the cause or causes has been preferred against him, signed by the person or persons making the same, and filed with the secretary or clerk of the board of education having control of the school in which the service is being rendered, and after the charge has been examined into and found true in fact by the board of education upon reasonable notice to the person charged, who may be represented by counsel at the hearing. Charges may be filed by any person, whether a member of the school board or not."

In determining an appeal under the tenure law, the Commissioner is guided by the decision of the State Board of Education in the case of Georgia B. Wallace *vs.* Board of Education of Greenwich Township, 1938 Compilation of School Law Decisions at 495. The State Board said:

"As the procedure prescribed by the statute was followed, but two questions arise: first, was the charge such as, if found true in fact, would justify dismissal; and second, was the finding that the charge was true in fact so clearly against the weight of evidence as to lead to the conclusion that it was the result, not of honest judgment, but of passion or prejudice. (Conrow *vs.* Lumberton Township, New Jersey Law Decisions, 1928 Ed., p. 186)

"In Fitch *vs.* The Board of Education of South Amboy, decided on the same day (January 3, 1914) as the *Conrow* case, this Board laid down the rule which has ever since been followed and which is directly applicable to the present case, saying:

'"As we have today indicated in another case, it is our opinion that we should not interfere with the determination of a local Board of Education unless it appears that its conclusion was the result, not of honest judgment, but of passion or prejudice. The Tenure of Service Act provides that all charges shall be examined into by the local Board of Education, and that if such Board finds they are true in fact, the teacher may be dismissed. The

Legislature has imposed the duty of determining if the charges are true in fact upon the local Board. Where evidence against a teacher is clear, or where, if not entirely clear, there is room for an honest difference of opinion, we should not interfere with the determination of the local Board. To do so would mean that we could substitute our judgment in place of its judgment, a substitution which, in our opinion, would be unauthorized and contrary to the intention of the Legislature.' (Fitch *vs.* South Amboy, New Jersey School Law Decisions, 1928 Ed., p. 176.)

"In Cheesman *vs.* Gloucester City (1928 School Law Decisions, p. 159 it was said:

"'This Board will not disturb the findings of a local board on a question of this kind, provided it has reached its decision after giving a fair hearing and there is no showing of passion or prejudice on its part.' Affirmed by Supreme Court, Id. 159.

"In the present case, the county superintendent of education and the county helping teacher who had observed Mrs. Wallace's work, both appeared before the Board of Education and testified in support of the charges. It is true that, as pointed out in the Commissioner's opinion, their testimony does not establish an absolute failure on the part of the teacher, but we cannot say that it is not sufficient in connection with the other testimony which was before the Board, to warrant it in holding that there was sufficient evidence to justify them in sustaining the charges of inefficiency and dismissing the teacher. Nor, judging of their conduct by the record made before the Commissioner, can we say that they did not act in good faith, or that they were swayed by bias or prejudice. It might be that if the case were presented to us for our opinion on the evidence alone, we might disagree with their conclusion, but the power and duty of passing upon the charges was theirs under the law and we cannot say that there was no justification for the finding which they made."

The Supreme Court in the case of Redcay *vs.* State Board of Education, 130 N.J.L. at 371, said:

"An inefficient and incapable principal may do great injury to both pupils and teachers. When the charges of such conduct have been clearly proved, the removal should be easy and prompt. Devault *vs.* Mayor of Camden, 48 N.J.L. 433. Nor are we concerned in searching for more than to find that there was a rational basis for such determination if the proceedings were regular. Alcutt *vs.* Police Commissioners, 66 Id. 173. . . . . Unfitness for a task is best shown by numerous incidents. Unfitness for a position under the school system is best evidenced by a series of incidents. Unfitness to hold a post might be shown by one incident, if sufficiently flagrant, but it might also be shown by many incidents. Fitness may be shown either way."

The first question to determine is whether the charges are such as, if found true in fact, would justify dismissal. The Audubon Board did not find the fourth specification of the charges to be true in fact. It is the opinion of the Commissioner that the first specification of the charges standing alone, would not justify dismissal and that the fourth specification is too general. The Commissioner is of the opinion that if the second specification were found to be true in fact, dismissal would be justified.

Educators stress the fact that the concomitants of learning are important as well as the learning itself. A pupil not only learns subject-matter, but he learns to like or dislike it. He forms attitudes. His emotional life is affected. Regardless of how efficient a teacher is in teaching subject-matter and skills, she is not justified in doing so at the cost of unnecessary emotional upsets. Good mental hygiene is important in child growth and promotes intellectual achievement.

A good teacher can exercise better control and show better results in the pupils' acquisition of subject-matter than can the teacher who resorts to ridicule and sarcasm. Lack of respect for the personalty of the child produces inefficiency.

The local school system has a right to decide what kind of teacher-pupil relationships it desires. The record shows that a conference was held in the Supervising Principal's office some time in the fall preceding the dismissal of the appellant, in which a board member, the supervising principal, the principal of School No. 3, the appellant and a parent participated. The appellant was put on notice at this meeting that her methods of handling pupils did not meet with the approval of the local school authorities. The record shows that toward the end of the school year the complaints increased instead of decreased. Accordingly, if appellant persisted in this method of controlling pupils, she did so at her peril. Therefore, if this second specification of the charges were found true in fact, the Board would be justified in dismissing appellant for handling pupils in the manner described in the specification.

The next question to be answered is whether there is evidence of passion and prejudice on the part of the Board of Education. The Commissioner finds none. One forms the impression as he reads the record that the Board felt it was necessary to act upon the complaints, lest it be considered remiss in its duty. The charges were not signed until the Teachers Committee of the Board and two additional members had met with some of the parents to hear their complaints. The procedure laid down in Section 18:13-17, cited above, seems to have been followed and a fair trial held. It should be noted that all eight members who heard the case voted for dismissal.

Counsel for appellant contends that the Board erred in sustaining an objection to a question addressed to the Supervising Principal intended to show a settled course of retaliatory action on his part against teachers, including the appellant, who had testified in a proceeding against him. Counsel further contends that the question was proper, as an attack upon the credibility of the Supervising Principal as a witness and to show the bad faith of the prosecution of the appellant.

The Commissioner does not consider the sustaining of the objection by the Board to be a reversible error. All the testimony of the Supervising Principal could be excluded without weakening the case against the appellant. His testimony shows little more than that there had been complaints about the appellant. The principal's testimony is similar, and the Chairman of the Teachers Committee testified that he had received as many complaints directly from the parents as from the Supervising Principal.

The third question to be decided is whether the findings of the Board are clearly against the weight of the evidence. The procedure for the Commissioner to follow in reviewing dismissals under Section 18:13-17, *supra,* as developed in statutory and decisional law, is to ascertain whether there is a rational basis for a dismissal, rather than to weigh the evidence to determine whether he agrees with the findings of the Board. It is the Board's duty to weigh the evidence. It has an

opportunity to hear the testimony and to observe the demeanor of the witnesses. The Commissioner cannot substitute his opinion for that of the Board, if there is evidence to support the findings of the Board.

Objection was raised with respect to the competence of some of the children to testify because they did not understand the nature of an oath and the punishment which might be inflicted upon them for failing to testify truthfully. It is the opinion of the Commissioner that testimony of children, especially of those ten years of age, against a teacher, whose duty it is to discipline them, must be examined with extreme care. It is dangerous to use such testimony against a teacher; it is likewise dangerous not to use it. The necessities of the situation sometimes make it necessary to use the testimony of school schildren. If such testimony were not admissable, the children would be at a teacher's mercy because there is no way to prove certain charges except by the testimony of children.

To determine the capacity and responsibility of an infant witness is the duty of the trial court. LoBiondo *vs.* Allen, 132 N.J.L. 437. It is the duty of the Board of Education to weigh the testimony of young witnesses carefully. The Board had an opportunity to witness the demeanor of the children when they testified. In the absence of evidence of passion and prejudice on the part of the Board, the presumption is that the Board of Education performed its duty properly in weighing the testimony of the children.

However this may be, objections were not made to the testimony of all the children. Therefore, even if the testimony which was objected to were excluded, there would still be testimony of several other children to support the charge.

Objection was made to much of the parents' testimony on the grounds that it was hearsay. Counsel for the respondent contends that the statements of nervously upset children made to parents concerning occurrences in the school room are admissable testimony and not hearsay because they are part of the *res gestae.*

If the case against the appellant depended entirely upon the testimony of the parents, the Commissioner would feel called upon to determine whether the statements of the children were part of the *res gestae.* Since the testimony of the parents merely corroborates the direct testimony of the children, the Commissioner does not consider it necessary to decide this question as to whether the children's statements were part of the *res gestae.*

There is considerable evidence in favor of the appellant. As the Commissioner has pointed out, it is not his duty but that of the Board to weigh the evidence submitted. The Commissioner is not called upon to decide whether in his judgment the favorable evidence outweighs the unfavorable evidence.

The Commissioner finds that: (1) Specification number two of the charge is such as if found true in fact would justify appellant's dismissal. (2) There is no evidence of passion and prejuidce on the part of the Board of Education. (3) There was a fair trial. (4) There is evidence to support the findings of the Board with respect to the second specification of the charges.

Since the Commissioner cannot substitute his judgment for that of the Board, and since the State Board of Education in the case of John W. Eggers *vs.* Board of Education of the City of Elizabeth, 1938 Compilation of School Law Decisions, at 738, decided that the Commissioner cannot modify the action of the Board of Education, the Commissioner cannot set aside the action of the Board of Education of

the School District of the Borough of Audubon in dismissing the appellant. The appeal is dismissed.

July 11, 1946.

DECISION OF THE STATE BOARD OF EDUCATION

The appellant, Mabel Palmer, had been a teacher in the district of respondent for thirty-eight years past. For several years before September, 1945, she taught the fifth grade. During the school year 1944-1945, complaints were made by parents to the principal of the school where appellant taught, of her conduct and attitude toward their children, who were pupils in her class. The principal testified there were sometimes two or three complaints a week, then there might be a period of several weeks without any, but they were becoming more frequent toward the end of the year. The matter was brought to the attention of the supervising principal, with the result that appellant was called to his office, together with the principal and several parents, upon one or more occasions, and the supervising principal warned appellant if the complaints continued the matter would have to be referred to the Teachers Committee. In October or November, 1944, there was a conference between a member of the Teachers Committee, the principal, supervising principal, appellant and a parent. The attitude of appellant on this occasion was described as having been defiant. At the conclusion of the conference, appellant was again warned that if things were not bettered, then perhaps there would be more drastic action taken.

Charges were preferred against appellant on June 21, 1945, by five members of respondent board of education. The charges were numbered one to four and are fully set forth in the opinion of the Commissioner of Education. After a full hearing, which included six sessions at which evidence was heard, the respondent in its seventh session adopted a resolution finding as true the second charge which was of inefficiency, incapacity and conduct unbecoming a teacher, and the fourth charge of "lack of cooperation with the various parents of pupils who contacted her in the interest of students in her class." The resolution further ordered that appellant "is hereby dismissed as a teacher in the school system of the board of education of the school district of the borough of Audubon effective as of the date of this resolution."

Appellant appealed from this action of respondent to the Commissioner of Education, who dismissed the appeal, and from that determination she appeals to this Board.

The Commissioner of Education refers to the established principles which control the appellate body in reviewing the action of a local board of education, as declared in the case of Fitch *vs.* South Amboy, New Jersey School Law Decisions, 1928 Ed., page 176, where it is said "We should not interfere with the determination of a local board of education unless it appears that its conclusion was the result, not of honest judgment, but of passion or prejudice. The Legislature has imposed the duty of determining if the charges are true in fact upon the local board. Where evidence against a teacher is clear, or where, if not entirely clear, there is room for an honest difference of opinion, we should not interfere with the determination of a local board. To do so would mean that we could substitute our judgment for its judgment, which, in our opinion would be unauthorized and con-

trary to the intention of the Legislature."

The case of Cheeseman vs. Gloucester City cited by the Commissioner is to the same effect. There the State Board stated "This Board will not disturb the findings of a local board . . . . . provided it has reached its decision after giving a fair hearing and there is no showing of passion or prejudice on its part," 1928 School Law Decisions, page 159.

The Commissioner of Education held that if the charges contained in the paragraph numbered two were sustained, the board would be justified in dismissing the appellant. That there is no evidence of bias, prejudice or passion on the part of the board in the hearing and disposition of the charges. That there was not reversible error in excluding a question addressed to the supervising principal, the evident purpose of which was to impugn his credibility and that there was a rational basis for the conclusion of the board. The Commissioner also discusses the competency of evidence given by a number of child witnesses, and concludes such evidence was properly admitted. With the conclusions of the Commissioner of Education in these matters we agree. Evidence by parents of declarations made to them by their children, pupils of appellant, was admitted over objections as part of the *res gestae.* We consider such evidence to have been incompetent. It was wholly narrative of past occurrences, Greenleaf on Evid., Sec. 108, Castner *vs.* Sliker, 4 Vr. 95, 97. However, there was competent evidence, which was apparently accepted by the board as true, sufficient to support its findings. This is sufficient, Post *vs.* Anderson, 111 N. J. Law 303.

It is recommended the decision of the Commissioner of Education be affirmed.

November 1, 1946.

PERIODS OF ABSENCE OF TENURE TEACHER ON LEAVE OF ABSENCE ARE COUNTED FOR DETERMINATION OF SENIORITY STATUS

ROSE L. BERNSTEIN,

Petitioner,

vs.

BOARD OF EDUCATION OF THE CITY OF GARFIELD,

Respondent.

For the Petitioner, J. L. Bernstein.

DECISION OF THE COMMISSIONER OF EDUCATION

The petitioner, Rose L. Bernstein, was employed continuously as a teacher in the elementary schools of Garfield from September, 1928 to October 15, 1940, and was therefore protected by the Teachers' Tenure of Office Act. On October 15, the petitioner was dismissed from service due to alleged diminution in the number of pupils and her name was placed upon the preferred eligible list in pursuance of Section 18:13-19 of the Revised Statutes which reads as follows:

> "When principals, supervising principals or teachers under tenure are dismissed by reason of such reduction those principals, supervising principals,

> or teachers having the least number of years of service to their credit shall be dismissed in preference to those having longer terms of service. Should any supervising principal, principal or teacher under tenure be dismissed as a result of such reduction such person shall be and remain upon a preferred eligible list in the order of years of service for re-employment whenever vacancies occur and shall be re-employed when and if vacancies in a position for which such supervising principal, principal or teacher shall be qualified. Such re-employment shall give full recognition to previous years of service."

The minutes of a meeting of the Garfield Board of Education held on October 14, 1940 read in part as follows:

> "Motion by Kuzmack seconded by Chabora, Rose L. Bernstein is hereby notified that her position as a teacher is to terminate due to less service to her credit than any other teacher, effective at the close of school on Tuesday, October 15, 1940. Carried."

Accordingly, the respondent acted within the discretionary powers conferred upon it by statute in reducing the number of teachers due to a diminution of pupils, notwithstanding such teachers were under tenure.

There remains to be determined whether or not subsequent to October 15, 1940, other teachers with less terms of service in the Garfield school system were retained in teaching positions for which the petitioner is qualified. In this connection, occasional absences due to illness, accident, sabbatical leaves, and other causes, cannot be construed as affecting the apparent legislative intent to base seniority status upon years of service. To assume that such occasional absences should jeopardize the seniority of one's employment status is to distort the meaning and intent of the statutes. The basis, therefore, upon which the respondent predicated seniority status ratings of teachers, as shown on Exhibit A, cannot be held to be proper. Such absences must be interpreted as being inconsequential as related to continuity of employment and accumulation of seniority rights. To base seniority status upon the aggregate of days, hours and minutes which the teacher actually spent in the classroom and to exclude from such total days absence during periods of contractual employment, is to distort the meaning inherent in the terms used in the Revised Statutes, Section 18:13-19; namely, "number of years of service" and "longer terms of service."

The decision of the Supreme Court in the case of Board of Education of Jersey City *vs.* Wall, 119 N.J.L. 308, states:

> " . . . .the act . . . . was designed to give a measure of security to those who served as teachers three consecutive academic years. *A mere occasional absence of a teacher by reason of illness, or excuse could not disturb this right,* and the local board of education cannot evade the statute, notwithstanding the alleged employment by the day if a teacher actually serves for the requisite period of years."

This citation permits of the interpretation that the petitioner had eleven academic years and one and one-half months to her seniority credit at the time of her dismissal.

Bouvier's Law Dictionary, page 3042, defines "senior in office" as follows:

"one older in office, or whose entrance upon an office was anterior to that of another. State *vs.* Hueston, 44 Ohio St. 6, 4 N.E. 471."

The petitioner holds a Permanent New Jersey Normal School Certificate which empowers her to teach in grades one to eight inclusive in the elementary school. Exhibit P-5 submitted in evidence by the Secretary of the Garfield Board of Education contains a list of names of elementary school teachers in Garfield, allegedly showing the dates of their original appointments. Schedule A which was appended as a part of respondent's answer contains a list of elementary school teachers in the Garfield school with data showing total service credit within the school system, based upon days rather than years of service. Exhibits A and P-5 show the following facts concerning certain teachers now employed in the Garfield elementary schools whose first date of contractual service came after the beginning of regular teaching service of the petitioner:

Name of Teacher	Effective Date of Original Appointment	Length of Service Credit as of Oct. 15, 1940
Rose L. Bernstein (Petitioner)	September 4, 1928	12 years 1½ mos.
Miriam B. Popick	January 29, 1930	10 years 6½ mos.

Exhibit P-5 also shows that there are six teachers employed on a per diem basis in regular teaching positions (none of whom was originally employed prior to January 29, 1930) approximately one and one-half years after the original employment of the petitioner. Four other teachers with terms of service less than the petitioner's are shown to be on leave of absence, no dismissal order having been directed in their cases.

The method of employing six teachers on a per diem basis does not nullify the existence of regular positions which they are filling. Petitioner was within her rights in protesting the acceptance of such a position on a per diem basis because of infringement upon her tenure and salary rights.

The respondent in Exhibits A and P-5 admits the following facts:

1. Miriam B. Popick is now holding a teaching position to which petitioner has superior rights due to a length of service one year and five months in excess of that of Miss Popick.

2. Six other positions exist which are presently held by persons with lesser terms of service than the petitioner.

3. Of seven elementary school teachers on leaves of absence (p-5) only one (Sadie F. Shectman) has seniority rights superior to those of petitioner. Two of these teachers have seniority rights identical with those of petitioner, but the remaining four with whom the board of education has not caused severance of employment have terms of service inferior to those of petitioner.

For these reasons the Garfield Board of Education is declared to have failed to dismiss teachers in the inverse order of length of service. The respondent is hereby directed to reinstate Mrs. Bernstein in a teaching position in the Garfield Schools and to pay her salary from the date of her alleged dismissal at the annual rate which was in effect immediately prior to her dismissal.

April 14, 1941.

PERIODS OF ABSENCE OF TENURE TEACHER ON LEAVE OF ABSENCE ARE COUNTED FOR DETERMINATION OF SENIORITY STATUS

EDITH GORTZ BRIEFSTEIN,

Petitioner,

vs.

BOARD OF EDUCATION OF THE CITY OF GARFIELD, BERGEN CONTY,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

For the Petitioner, Saul R. Alexander.

The petitioner, Edith Gortz Briefstein, taught continuously under contract in the Garfield High School from September 1, 1933, to June 30, 1940. Tenure was admittedly acquired on the first school day in September, 1936.

Due to alleged diminution in the number of pupils, the petitioner was dismissed as a teacher effective as of June 30, 1940. Mrs. Briefstein protests the action of the board of education, contending that here are other teachers retained in the Garfield school system during the academic year of 1940-1941 who have lesser terms of service to their credit. Respondent denies this contention, but admits that the teachers allegedly holding a position or positions claimed by the petitioner are teaching grades and subjects for which the petitioner is certificated. The legal basis for the decision in this case rests primarily on the application of Section 18:13-19 of the Revised Statutes. This act reads as follows:

> "18:13-19. Nothing contained in sections 18:13-16 to 18:13-18 of this title shall be held to limit the right of any school board to reduce the number of supervising principals, principals, or teachers employed in the school district when the reduction is due to a natural diminution of the number of pupils in the district. Dismissals resulting from such reduction shall not be by reason of residence, age, sex, marriage, race, religion, or political affiliation. When principals, supervising principals or teachers under tenure are dismissed by reason of such reduction those principals, supervising principals or teachers having the least number of years of service to their credit shall be dismissed in preference to those having longer terms of service. Should any supervising principal, principal or teacher under tenure be dismissed as a result of such reduction such person shall be and remain upon a preferred eligible list in the order of years of service for reemployment whenever vacancies occur and shall be reemployed by the body causing dismissal in such order when and if a vacancy in a position for which such supervising principal, principal or teacher shall be qualified. Such reemployment shall give full recognition to previous years of service.
>
> "The services of any principal or teacher may be terminated, without charge or trial, who is not the holder of a proper teacher's certificate in full force and effect."

Data were submitted in evidence (Exhibt A) showing in detail the length of service of the petitioner and three other teachers currently employed in Garfield

High School who it is contended have shorter terms of service than the petitioner. The comparative length of service of these several teachers was computed by the inclusion of days of intermittent substitute teaching and by the exclusion of days' absence due to illness and leaves of absence.

The purpose of R. S. 18:13-19 is clearly to grant seniority rights to *tenure teachers, principals and supervising principals* based upon length of service within the district. Unrefuted evidence was submitted to the effect that the duties of Miss Frances Casella, now teaching in Garfield High School, consisted of clerical duties from the beginning of her service on October 27, 1931, until September 11, 1939, at which time actual teaching began except for intermittent substitute teaching aggregating one hundred days during the period from September, 1937, to April, 1939. The minutes of the board of education meeting of November 6, 1931, in referring to the duties assigned to Miss Casella read in part as follows: ". . . to take care of office work done by Miss Torvak." Though Miss Casella's contracts were as a teacher, the respondent was unable to establish that she had done any teaching until the beginning of the school year of 1939-1940. The record card for Miss Casella which is kept in the office of the secretary further indicates that the actual duties of Miss Casella were those of a clerk rather than a teacher.

R. S. 18:10-41 provides for an annual apportionment by the county superintendent of schools from State school monies of $80.00 for each temporary teacher employed at least four months during the school year. There was no evidence submitted by the board of education to indicate that Miss Casella taught sufficiently during any of the school year from 1931 to 1939 to warrant classification as either a temporary or permanent teacher, or to warrant a request for apportionment as a teacher. It would appear, therefore, that there is no more than one year of teaching service creditable to Miss Casella; whereas, there are seven academic years of teaching service creditable to the petitioner. Frances Casella probably attained tenure as a clerk when Chapter 78, P. L. 1938 became effective on April 4, 1938, while the petitioner attained tenure as a teacher in September 1936 and acquired seniority protection on the date that R. S. 18:13-19 (Chapter 136, 1935) became law, March 26, 1935. This act applies only to "supervising principals, principals or teachers under tenure" and seniority rights under this statute are gained only through services rendered in one or more of these three professional categories. In view of these facts, it must be held that Mrs. Briefstein's length of service as a teacher exceeds that of Miss Casella and that, therefore, petitioner possesses seniority rights superior to those of Frances Casella.

It must be held that the seniority rights of Mrs. Violet Breston are superior to those of Mrs. Briefstein. It is contended by counsel for the petitioner that the period of twenty-two and one-half days of intermittent substitute teaching service rendered by Mrs. Breston prior to the beginning of regular teaching service on November 16, 1932, should not be counted in determing the length of service. With this contention we can agree, since the obvious intention of the Legislature was not to permit the accrual of tenure or seniority of service whereby an intermittent substitute teacher could, through occasional non-contractual service, gain advantages over regular teachers employed through contractual arrangements.

We cannot agree to the contention of petitioner's counsel that leaves of absence granted regular teachers cannot be counted in determining length of service credits. During the leave of absence of one year granted by the respondent to Mrs. Breston, severence of an employment relationship did not occur. On the contrary, tenure and

seniority rights were maintained throughout the period of the leave of absence. To hold otherwise would result in unfair and oppresive penalties for teacher absences due to injury, illness, and other unusual circumstances. It must be held, therefore, that Mrs. Breston's rights are superior to those of the petitioner since the lengths of creditable service of these two teachers compare as follows:

Mrs. Briefstein—September 1933 to September 1940.
Mrs. Breston—November 1932 to September 1940.

As to the third teacher presently employed whose service record is described in Exhibit A, petitioner raises no question of superiority of seniority status. Such uncontested facts as were submitted in evidence indicates that this teacher, Ann Tomassello, has superior rights to the retention of her position.

Since Mrs. Briefstein has rights superior to those of Frances Casella, the Board of Education of the City of Garfield is directed to place the petitioner in the position now held by Frances Casella and to pay Mrs. Briefstein's salary from the date of her dismissal.

March 31, 1941.

Decision of the State Board of Education

Edith Gortz Briefstein was engaged as a teacher in its high school by the Board of Education of Garfield, in August 1933, her service to begin on September 6, 1933. She entered upon her duties on that date as a teacher of English and general science and continued in such service until June 30, 1940, when she was notified her services were no longer required. The reason assigned by the board of education for her dismissal is there was a natural diminution of the number of pupils, although no proof of that condition was presented. After September 6, 1936, it is admitted Mrs. Briefstein was under tenure. She complains that her dismissal was illegal and prays she may be be reinstated in a position and that she be paid the salary to which she was entitled in her employment, because, as she says, there were other teachers in the employ of the board, who had fewer years of service to their credit and were, therefore, first subject to dismissal, pursuant to R.S. 18:13-19, which provides:

> "Nothing contained in sections 18:13-16 to 18:13-18 of this title shall be held to limit the right of any school board to reduce the number of supervising principals, principals or teachers employed in the school district when the reduction is due to a natural diminution of the number of pupils in the district. Dismissals resulting from such reduction shall not be by reason of residence, age, sex, marriage, race, religion, or political affiliation. When principals, supervising principals or teachers under tenure are dismissed by reason of such reduction those principals, supervising principals or teachers having the least number of years of service to their credit shall be dismissed in preference to those having longer terms of service. Should any supervising principal, principal or teacher under tenure be dismissed as a result of such reduction such person shall be and remain upon a preferred eligible list in the order of years of service for reemployment whenever vacancies occur and shall be reemployed by the body causing dismissal in such order when and if a vacancy in a position for which such supervising principal, principal

or teacher shall be qualified. Such reemployment shall give full recognition to previous years of service."

The board of education denied there were other teachers employed in its school system who should have been dismissed prior to Mrs. Briefstein; and it says that her dismissal was due to a natural diminution of the number of pupils in the district and because she had the least number of years of service to her credit.

The Commissioner of Education, upon consideration of the evidence of the parties, concluded that Mrs. Briefstein's length of service as a teacher exceeded that of Miss Casella, and therefore, she was entitled, in September 1940, to the position and be paid the salary from the date of her dismissal. He further decided that Mrs. Briefstein's years of service were less than those of a Mrs. Violet Breston.

The board of education appeals from the decision of the Commissioner of Education as a whole, and Mrs. Briefstein appeals from that part thereof which holds that the seniority rights of Mrs. Violet Breston are superior to those accruing to her.

Counsel appear to have limited their computation of length of service to three teachers; namely, Mrs. Violet Breston, Frances Casella, and Mrs. Briefstein, and in such computation have considered the number of days, hours and minutes each actually taught from when employment began and also any substitute service before regular employment. The Commissioner of Education has also included in the period of service time during which the teacher was on leave.

The statute R.S. 18:13-19 gives the right to priority of employment to the teacher having "longer terms of service." We interpret this language to mean longer terms of actual employment under contract or of indefinite service when under tenure. We do not consider occasional and intermittent employment as a substitute as part of a "term of service," nor do we regard an occasional absence due to illness or other temporary cause as a diminution of a term of service. We hold the view that "service" means actual service and that, where a teacher has asked for and has been granted an extended leave of absence, service during such leave is suspended and such period should not be included in the term or period of service which results in the right to priority of employment.

So holding, a reading of the evidence indicates the terms of service of the respective teachers named to be as follows:

Miss Frances Casella was first employed as an unassigned teacher on October 27, 1931. The contract is not in evidence and it is assumed she was employed for the remainder of the school year. She continued in her employment without interruption until June 30, 1937. On July 1, 1937, her position was abolished. She was reengaged on April 1, 1939, and continued in her employment to June 30, 1940. From October 27, 1931, to June 30, 1937, when her position was abolished, is five years and eight months. She was reengaged on April 1, 1939, and continued in employment until June 30, 1940; a period of one year and three months. On the last mentioned date, therefore, she had to her credit terms of service aggregating six years and eleven months.

We cannot agree with the Commissioner of Education that Miss Casella was employed and served as a clerk until September 11, 1939. The minutes of the board of education state she was employed as an unassigned teacher. The only evidence that she did clerical work was a notation upon a record card kept by the secretary of the board for his convenience and having no official authority. Miss

Casella was not a party to this controversy and her rights should not be adversely affected except upon convincing proof and the evidence of the type of work she was assigned to perform as an unassigned teacher is most meagre. There is no dispute that she was employed as a teacher.

Mrs. Breston began her service on November 16, 1932, and continued her employment without interruption until June 30, 1939. From July 1, 1939, to June 30, 1940, she was on leave of absence. She resumed teaching in the high school, of subjects Mrs. Briefstein was certificated to teach, in September, 1940. Her term of service from when she was first employed under contract is six years and seven and one-half months. Mrs. Breston was not a party to this controversy and neither she nor Miss Casella appeared therein or were represented by counsel.

Mrs. Briefstein was first employed under contract on September 6, 1933, and taught without interruption of service to June 30, 1940, a period of six years and ten months.

In the foregoing computations service as a substitute while not under contract and temporary absences are disregarded.

It is evident, therefore, that of the three teachers named, on June 30, 1940, when one was to be dismissed, the order of such dismissal should have been: first, Mrs. Breston, she having had the shortest term of service; second, Mrs. Briefstein, she having had the next shortest term of service; and lastly, Miss Casella, who had the longer term of service.

We conclude the decision of the Commissioner of Education should be affirmed in so far as it holds that Mrs. Briefstein should be reinstated and that she be paid her salary from September 1, 1940, and we are not called on to give judgment as to Mrs. Breston or Miss Casella.

December 19, 1941.

ABSENCE DUE TO ILLNESS FOR APPROXIMATELY THREE YEARS INVALIDATES PRIOR TENURE RIGHTS

LILLIAN TURNER HANDCOCK,
Appellant,

vs.

THE BOARD OF EDUCATION OF THE BOROUGH OF HADDON HEIGHTS, CAMDEN COUNTY,
Respondent.

For the Petitioner, David F. Greenberg.
For the Respondent, Sidney T. Smith.

DECISION OF THE COMMISSIONER OF EDUCATION

The petitioner, Lillian Turner Handcock, was dismissed by the respondent board of education after a hearing held by the aforesaid board on April 25, 1938, the only charge being that petitioner had been absent for approximately three years. The case is submitted upon stipulation of counsel, the provisions of which are set

forth in a decision rendered on different grounds by the Commissioner in a former case between the same parties. This decision recites the facts as follows:

> "The petitioner, Mrs. Lillian Turner Handcock, was first employed by the respondent board of education as a teacher for the school year 1930-1931 and was so employed for each subsequent year up to and including March, 1935, at which time she became mentally disabled, ceased teaching in respondent's schools, and was confined in a hospital and sanitarium until the autumn of 1937. Due to her mental disability, she did not make a personal request for a leave of absence, nor was a request made by any one acting in her behalf. Although the board of education had knowledge of her inability to perform services, it continued to pay her salary at the rate of $1,800.00 per year until the close of school in June, 1935.
>
> "Respondent communicated with the husband of the petitioner in reference to securing her signature upon a renewal of her contract, and was informed that it was impossible to determine when Mrs. Handcock would be sufficiently recovered to resume her employment.
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> "At a meeting of the board held on August 13, 1935, without any request therefor, a motion was made to grant petitioner a leave of absence upon which there was no affirmative vote. The respondent at no time informed the petitioner that her position was available to her, nor was any hearing held upon charges against her.
>
> "Prior to the opening of schools for the term 1935-1936, the board of education entered into a contract with one Dorothy F. Burgin to fill the position formerly occupied by the petitioner. On April 7, 1936, Miss Burgin was tendered a contract to teach for the school year 1936-1937 and prior to the opening of school for the year 1937-1938, a similar contract was executed with Miss Burgin.
>
> "Petitioner was discharged from the sanitarium, and shortly thereafter but subsequent to the opening of school for the year 1937-1938, Mrs. Handcock had several conferences with the Supervising Principal, at which she represented herself to be ready and able to resume teaching. On December 2, 1937, upon the suggestion of the Supervising Principal, Mrs. Handcock submitted a written application for the position of teacher of the first grade in the respondent's school, in which there was to be a vacancy effective January 1, 1938. The application was accompanied by a certificate from petitioner's physician setting forth her ability to resume teaching; and it is admitted by the board of education that at that time petitioner was competent physically and mentally to perform her duties as teacher.
>
> "Since the board of education took no formal action relative to the application of December 2, 1937, attorney for Mrs. Handcock wrote to the board of education on February 16, 1938, stating that unless Mrs. Handcock was reinstated, he would take steps to determine her legal rights to which the attorney for the board of education replied that Mrs. Handcock had been absent for nearly three years and that it did not seem logical for her to assume that her tenure protection continued."

In the former case, the Commissioner held that since the petitioner had not been dismissed as provided in the Tenure of Office Act, she was entitled to her position; but prior to the rendering of that decision, the board of education brought

charges based upon Mrs. Handcock's continuous absence for nearly three years and, considering such absence as good cause for dismissal, terminated her services on April 25, 1938. Petitioner, alleging the dismissal to be in violation of the Teachers' Tenure of Office Act, appeals to the Commissioner for reinstatement and such other relief to which she may be entitled by virtue of the facts and laws aplicable thereto.

To determine the validity of the board's action, two questions are presented:

(1) Does absence of a teacher due to illness extending for a period of nearly three years constitute good cause for dismissal?

(2) If such absence is a valid cause for dismissal, does a delay in filing charges by the board until an appeal for the position is made by the teacher estop the board from dismissing such teacher?

The Teachers' Tenure of Office Act provides that a teacher may be dismissed for ". . . inefficiency, incapacity, conduct unbecoming a teacher or other just cause. . . ." The Supreme Court in the case of Wildwood *vs.* State Board of Education 185, Atl. 664, quotes with approval the decision of the State Board of Education in that case as follows:

> "The argument advanced for the prosecutor is that the clause in this statute reading 'or other just cause' will support a discharge on the ground of marriage; in other words, that the fact of marriage is a 'just cause' for dismissal. The State Board pointed out, and we think correctly, that 'those words in the tenure act must be read in conjunction with those immediately before them, and they imply a dereliction by the teacher, which may be the subject matter of a charge against her.'"

"Incapacity" is one cause for which dismissal is legal and it follows naturally that incapacity for nearly three years is not only a cause implied by the act, but one clearly set forth in it.

In the case of Sara P. Eastburn *vs.* the Board of Education of East Windsor Township, Mercer County, in which the petitioner was dismissed by the board because of mental ill-health and irrational acts during several months of the school year 1934-1935, the Commissioner in reversing the dismissal action of the board held as follows:

> "Mental illness which is recurrent, prolonged, or of a nature dangerous to others may constitute 'just cause' for dismissal as may similar conditions of physical illness, but the brief duration of Miss Eastburn's mental and physical illness under the condition in this case does not constitute inefficiency, incapacity, conduct unbecoming a teacher or other just cause for her dismissal."

This ruling was quoted with approval by the State Board of Education in the Eastburn case.

There must be some time beyond which a board of education can not be compelled to continue the employment because of absence of a teacher whether due to illness or not. A board of education should not be expected to provide a position for a teacher who has been absent for three years. A board of education should not dismiss a teacher because of brief illness and should be reasonable in allowing for absence due to illness, but as it is pointed out in the Eastburn case when the illness is prolonged or recurrent, it may constitute good cause for dismissal. When

a board accepts the service of a teacher after prolonged illness, her permission to return is due to the magnanimity of the board rather than to the legal right of the teacher.

Does the board's delay in bringing the action until April 25, 1938, give the petitioner legal right to the position? Counsel for petitioner cites a number of cases to show the effect of laches, principally in cases where people are dealing with public bodies and laches is charged against such persons. When a teacher is in a sanatarium for mental illness and is unable to be present to answer charges, it neither seems reasonable to say that a board must prefer charges at such time nor to hold that such charges should be brought during convalescence because of the possible deleterious effect upon recovery. The Commissioner sees no reason why action should be taken against an employee who is not offering service until there is a demand made upon the board to provide a position. In most cases, after such a lengthy illness, there would be no contention of right to a position and accordingly, no action would be taken by the board. There is considerable difference between delay in action against a public body where rights to immediate service are alleged, and an action by a public body against a person who may claim rights to a position but is making no demand therefor. It would appear that where no action is taken by the person claiming the position, the public body, so far as it is concerned, may apply the principle of the old adage: "Let sleeping dogs lie." When a demand is made for a position by a petitioner, the public body may at that time conduct a hearing on charges and render a decision.

Mrs. Handcock discontinued her services in March, 1935, and took no legal action for reinstatement until she filed a petition with the Commissioner on or about March 1, 1938. Her incapacity and absence during such interval is just cause for dismissal, and the board was within its legal rights in bringing charges on April 25, 1938.

Accordingly, Mrs. Lillian Turner Handcock was legally dismissed by the Board of Education of the Borough of Haddon Heights. The petition is dismissed.

July 18, 1938.

Decision of the State Board of Education

The appellant, a teacher in the Haddon Heights Schools, had acquired tenure prior to 1935. In March of that year, she became mentally disabled and she was in a hospital or sanitarium until the autumn of 1937, during which time neither she nor any one on her behalf was able to communicate with the board of education. It continued to pay her salary until the close of schools in June, 1935, notwithstanding her inability to teach, or apply for a leave of absence. Her place was held open by the board until shortly before the opening of the school year in the fall of 1935, when it engaged another teacher to fill the appellant's position. The contract with this teacher provided that she would be subject to dismissal without notice upon appellant's return.

The appellant was unable to present herself for the resumption of her duties during the school years 1936-1937, or prior to the opening of school in the fall of 1937. On December 2, 1937, the apellant submitted a written application for a position, and it is admitted that at that time she was competent physically and mentally to perform her duties as teacher. The board did not appoint her on ac-

count of her absence for nearly three years, believing that on that account her tenure protection had terminated. She appealed to the Commissioner, to whom the facts above stated were presented, and he held that since she had not been dismissed in the manner provided in the Tenure of Office Act, she was entitled to reinstatement.

Prior to the filing of his decision, however, written charges were filed with the board of education based upon appellant's continuous absence and inability to teach for nearly three years. These charges were heard by the board and sustained on April 25, 1938, whereupon the appellant petitioned the Commissioner for reinstatement and other relief. The Commissioner has held that the appellant's prolonged absence from her duties and incapacity to teach constituted good cause for dismissal under the statute. The facts above summarized are set forth fully in his opinion and are not in dispute.

The board of education here acted with due consideration for the rights of the teacher. It held her position open for a long time and paid her salary for the balance of the year of her contract. An absence of nearly three years is certainly a prolonged absence. The tenure of office statute does not require that a teacher's position be held open indefinitely, or for a period as long as that during which the appellant was unable to perform her duties. "Incapacity" is one of the grounds for dismissal specified in the statute, and the record establishes that appellant was incapable of teaching over a prolonged period. This being the case, there was good ground for the board's action.

The appellant further maintains that the delay in filing charges until appellant had appealed to the Commissioner for reinstatement estopped the board from dismissing her. Until the autumn of 1937 the appellant was in a sanitarium on account of her mental illness and would have been unable to answer charges if they had been preferred. Furthermore, she had been continuously absent from March, 1935, and the board had not been able to communicate with her and had no way of knowing whether or when she would recover or apply again for a position as teacher. Neither she nor anyone on her behalf had asked the board to keep her position open, and it seems to us quite natural that the board should have assumed that she would not return to her duties or attempt to claim tenure of office. We agree with the Commissioner that the fact that charges were not preferred and acted upon until April, 1938, after appellant had demanded reinstatement, does not work an estoppel. It is also our opinion that there is no basis in the record for appellant's contention that the board committed a material error as to the time at which it declared her position was vacated.

It is recommended that the Commissioner's decision be affirmed.

November 19, 1938.

DELAY OF FIVE AND ONE-HALF MONTHS IN FILING APPEAL CLAIMING SENIORITY RIGHTS DOES NOT CONSTITUTE LACHES, WHEN BOARD, BY STIPULATION, AGREES TO WAIVE DEFENSE OF LACHES PENDING DECISION OF OTHER CASES

BEATRICE FISH ROSENTHAL,

Petitioner,

vs.

BOARD OF EDUCATION OF THE CITY OF GARFIELD, BERGEN COUNTY,

Respondent.

For the Petitioner, Charles Bernstein.

For the Respondent, Edward Lukacsko.

DECISION OF THE COMMISSIONER OF EDUCATION

The petitioner, Mrs. Beatrice Fish Rosenthal, a teacher in the Garfield High School, appeals from an action taken by the Board of Education of the City of Garfield, dismissing her from a teaching position on November 1, 1940. The petitioner claims seniority rights superior to those of other high school teachers currently employed in positions for which she possesses certification qualification.

The respondent Board of Education contends that Mrs. Rosenthal is guilty of laches in that her petition of appeal was not filed until April 15, 1941, despite the fact she was dismissed from her position November 1, 1940. The respondent further contends that the petitioner had lesser years of service than the teachers in Garfield High School who were retained in positions.

The matter was submitted on stipulation of facts, the most important of which are as follows:

1. The petitioner first began service in the Garfield schools as a regular and properly certificated teacher on September 3, 1929.

2. Employment as a regular teacher continued uninterruptedly until her dismissal in November, 1940, except that petitioner was granted annual leaves of absence for the school years of 1936-1937, 1937-1938, 1938-1939 and 1939-1940.

Thus during the ten years and two months of an employment relationship, four academic years were spent in leaves of absence and seven years and two months in active teaching service. The period of active teaching service of the petitioner was six years and two months at the time of her dismissal.

As of November 1, 1940, the following table shows the stipulation of facts as to length of service credit of those teachers whose service is compared with the petitioner's:

Teachers	Date Service Began	Total Years	Years Leave of Absence Deducted	Years Net Length of Service November 1, 1940
Beatrice Fish Rosenthal	Sept. 3, 1929	11-2 mo.	4	7-2 mo.
Alice Martin	Sept. 8, 1931	8-2 mo.	....	8-2 mo.
Jeanette Eisen	Sept. 8, 1931	8-2 mo.	....	8-2 mo.
Edith Gortz Briefstein	Sept. 6, 1933	7-2 mo.	....	7-2 mo
Violet G. Breston	Nov. 1932	7-9½ mo.	1	6-9½ mo
Frances Casella	Nov. 1931	9 mo.	1-9 mo.	7-1 mo.
Anne Tomasello	Mar. 1, 1933	7-6 mo.	....	7-6 mo.

It would appear from the foregoing digest of certain of the stipulated facts that the petitioner's net service was lesser in length than the other teachers with the exception of Violet G. Breston and Frances Casella. However, the petitioner failed to file a petition of appeal until five and one-half months after her dismissal, and the stipulation was not filed until eight months after her dismissal. Though there may have been some value in deferring the filing of a petition for a short period of time, it would appear to be contrary to public policy to permit a delay as long as that of the petitioner's in prosecuting her case. The same question might properly be raised concerning the desirability of the board's delay in entering into a stipulation in view of the double jeopardy as to salary payments in which the Board of Education might be placed.

In view of these considerations, coupled with the added fact that other persons whose rights might be affected have not had an opportunity to be heard, the claims of the petitioner for back salary are hereby dismissed. The Board of Education of the City of Garfield is directed, however, to place the name of Beatrice Fish Rosenthal on an eligibility list for future employment and to give to her full credit for all prior teaching service including such service as has been rendered by her since the filing of this petition.

May 20, 1942.

Decision of the State Board of Education

This appeal was argued before the State Board of Education at its meeting held on November 14th. It is an appeal by Beatrice Fish Rosenthal, a teacher under tenure, from the decision of the Commissioner of Education, in so far as he judges appellant is not entitled to salary from the date of her illegal dismissal on November 1, 1940, from the position of teacher of English in the high school of respondent. She was dismissed for the reason, as stated in a letter from the secretary of respondent to her, dated October 29, 1940, "due to less total service credit to another teacher." This fact is also included in the "stipulation of facts" by counsel.

Appellant was protected from dismissal by the Teachers Tenure Act, except for inefficiency, incapacity, conduct unbecoming a teacher, or other just cause, and after written charges had been preferred against her, etc. R.S. 1937, 18:13-17, or, upon a reduction of the number of teachers employed in the school district when the reduction is due to a natural diminution of the number of pupils in the district, in which case those teachers shall be dismissed who have the least number of years of service to their credit and the dismissed teachers placed on a preferred eligible list in the order of years of service, for reemployment whenever vacancies occur in a position for which such teacher is qualified. R.S. 1937, 18:13-19. No charges

were preferred against appellant, and there is no evidence of a natural diminution in the number of high school pupils in the district. In the case of Edith Gortz Briefstein *vs.* Board of Education in the City of Garfield, decided by this Board on December 13, 1941, it was said:

> "The Statute, R. S. 18:13-19, gives the right to priority of employment to the teacher having 'longer terms of service.' We interpret this language to mean longer terms of actual employment under contract or if indefinite service where under tenure. We do not consider occasional and intermittent employment as a substitute as part of a 'term of service,' nor do we regard as occassional absence due to illness or other temporary cause as a diminution of a term of service. We hold the view that 'service' means actual service and that where a teacher has asked for and has been granted an extended leave of absence, service during such leave is suspended and such period should not be included in the term or period of service which results in the right to priority of employment."

Assuming, but not deciding, there was a natural diminution in the number of pupils in the district, and applying the foregoing method of determining the length of appellant's period or term of service, it, nevertheless, clearly appears by the stipulation of counsel there were one or more other teachers in respondent's high school who taught the same subject as appellant who had shorter periods of service in the district. We agree with the Commissioner of Education that the dismissal of appellant was illegal.

Commissioner of Education held, that although appellant had been unjustly dismissed, she was not entitled to salary from the date of her dismissal. He bases that conclusion on a finding appellant was in laches, because her petition of appeal was not filed until April 13, 1941, five and one-half months after she was dismissed. The stipulation of facts discloses that on November 1, 1940, after she had reported for work and been informed her position was given another teacher, she wrote a letter of protest to respondent to which it replied on November 15th. That appellant and her counsel appeared before respondent at its meeting on December 6th. At that meeting, a discussion between respondent and appellant and her counsel resulted in a stipulation being entered into whereby it was agreed:

> "Said teacher (appellant) shall not be considered in laches by reason of not appealing the above action of the Board (the dismissal of appellant) and said defense of laches is hereby waived by the board, pending the final decisions in the two cases, to wit: Bernstein against the board and Briefstein against board, respectively, which two cases are now being litigated.
>
> "Said teacher shall have the right, without being barred by the defense of laches, to file her appeal within a reasonable time after the rendering of the final decisions in the above two cases by the Court of Last Resort in this State."

This stipulation was in writing, its execution authorized by a resolution of the board, dated December 6th, 1940, signed by the board of education by five members of the board, and by appellant and her counsel. It was stated that upon the argument before this Board the Bernstein case referred to had been amicably settled. The Briefstein case was decided by this Board on December 13, 1941, and no review of its decision has been asked.

Appellant maintains that respondent cannot avail itself of the defense of laches, in view of the foregoing stipulation, and furthermore, because such defense was not pleaded by it in its answer to appellant's petition. The authorities support this contention. Unless the defense of laches is pleaded, it is deemed waived. Ruckman *vs.* Decker, 23 N. J. Eq. 283. Oliver *vs.* Autographic Register Company, 126 N. J. Eq., page 18 (28). We prefer, however, to disregard this technical objection and consider the merits of the contention. So doing, we find that appellant cannot be regarded as in laches in this case. Whatever delay there was in prosecuting the appeal herein was excusable. It was acquiesced in by respondent, and indeed occured pursuant to the agreement by it when it entered into the stipulation hereinbefore set forth.

> "A delay is excusable where it was induced by the adverse party; he cannot take advantage of a delay which he himself has caused or to which he has contributed. . . . So where plaintiff's delay has taken place in pursuance of an agreement with defendant that the latter will not take advantage of it, or under such circumstances as to show an acquiescences therein by defendant, no laches can be imputed to plaintiff for his failure sooner to commence the suit."
>
> 21 Corpus Juris, Title
> Equity, page 243, Sec. 240
> Cases cited.

The instant case comes squarely within the principle above stated. The case of Gleason *vs.* Bayonne, School Law Decisions (1933), page 138, and other cases cited by respondent are not applicable in the circumstances which appear here. The case of Aeschbach *vs.* Board of Education of Secaucus, School Law Decisions (1938), page 602, was somewhat similar to the case under consideration in the facts involved. There this Board sustained the right of a teacher to maintain her case where the delay was induced by the action of the board of education and held the teacher was entitled to reinstatement and payment of salary.

Respondent further contends the stipulation between it and appellant is illegal and not binding on the board which came into being in February, 1941. Not every action of a board of education can be disavowed by a succeeding board. Where, as here, rights have been created and one party has acted, or refrained from acting on the faith of the agreement in question, it is not within the power of a successor board to prejudice the party acting, or refraining from acting, pursuant to an agreement made by its predecessor. Nor has the board of education repudiated the stipulation.

Respondent further argues that the rights of appellant have been determined by the decision in the Briefstein case, supra. That is not so. Appellant is not bound by the decision of a case in which she was not a party. That is elementary.

It is ordered that the decision of the Commissioner of Education be reversed; in so far as it fails to decide that appellant be reinstated in her position and be paid her salary from the date of her wrongful dismissal; and that this cause be remanded to him; and that he order the Board of Education of the City of Garfield to reinstate Beatrice Fish Rosenthal as a teacher in its high school, and that it pay to

her the salary of the position from which she was dismissed on November 1, 1940, from that date, less any compensation paid to her for services rendered to it since that date.

December 11, 1942.

UNREASONABLE DELAY IN CONTESTING THE AWARD OF A TRANSPORTATION CONTRACT VALID CAUSE FOR DISMISSING APPEAL

WILBUR JACKSON,

Petitioner,

vs.

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

Respondent.

For the Petitioner, Vincent P. Keuper.

For the Respondent, William J. O'Hagen.

DECISION OF THE COMMISSIONER OF EDUCATION

The respondent board of education advertised for proposals to be received on August 3, 1936, for the transportation of pupils of Ocean Township. The advertisement set forth that specifications and bid forms could be secured upon application to the district clerk. Under the provisions of the advertisement, bids were to be received on a mileage basis, and while it appears that there were several routes in the district, prospective bidders were advised by the chairman of the transportation committee to submit bids on the basis of twenty miles. In conformity with the foregoing, the minutes of the board of education show that bids were received on August 3rd, as follows:

> "John R. King—50 cents per mile (20 miles), 20 cents each additional mile; Wilbur Jackson—37 cents per mile; Charles Bowne—41 cents per mile; Oliver Herbert—graded scale—20 miles—45 cents per mile; Fred Hibbets 41 cents per mile; Ross Hibbets—41 cents per mile; A. Parker Woolley—41 cents per mile; George Herbert—50 cents per mile."

Following the reading of the proposals, the transportation committee recommended re-engaging the men who had for some years transported pupils in the district. The minutes of the board upon the recommendations read:

> "Motion by Mr. Bonham and seconded by Mr. Slocum that the Board accept the bids of the four old drivers, namely; Ross Hibbets, Fred Hibbets, Parker Woolley and Charles Bowne, at the rates presented by them. Carried. 41 cents per mile." Six members voted "yes" and three did not vote.
>
> "Motion by Mr. VanNote and seconded by Mr. Bonham that the certified checks and cash deposits be returned to the unsuccessful bidders. Carried."

In accordance with these motions, the petitioner accepted the return of his certified check.

The testimony in this case shows that while no objection was made by petitioner at the board meeting on August 3rd in reference to having his bid rejected, he with Oliver Herbert, another bidder, consulted the County Superintendent of Schools and employed an attorney with the idea of contesting the award, but that for some reason Mr. Herbert later decided not to contest the action of the board, and the petitioner instituted no formal legal proceeding to determine the validity of the award of the contracts on August 3rd until he served a copy of his petition of appeal on the board of education on October 2nd, and filed the original with the Commissioner of Education on October 4th. The County Superintendent informed the board that the confusing specifications might be grounds for litigation and because of this opinion, the board, without consulting former bidders, decided to readvertise for proposals to be received on September 30, 1936. The advertisement appeared in the Asbury Park Evening Press of Saturday, September 19, 1936, after which petitioner requested information from the district clerk in order to submit a bid on September 30th, but was unable to secure specifications and bid forms. The testimony shows that no meeting of the board was held on September 30th, and indicates that after advertising, the board concluded that securing other bids would make the existing situation more confusing and decided to ignore the advertisement and to continue the provision of transportation in accordance with its action of August 3rd.

Petitioner appeals for the award of the transportation contract simply as a low bidder, since the pleadings do not show that he is a citizen and taxpayer of the district, and no testimony was presented to establish such qualifications. The specifications were ambiguous and did not establish a common ground of bidding and it is, therefore, difficult to tell whether bids were to be based upon any particular route. The ambiguity of the specifications would have been sufficient grounds to have the award of the contract set aside if, without submitting a proposal, a prospective bidder had objected to them prior to the meeting of August 3rd or if soon thereafter they had been attacked by a citizen or taxpayer of the district.

The sole question in the case, therefore, is whether Mr. Jackson under the conditions above set forth, is entitled to a contract for the transportation of pupils in Ocean Township on his low bid per mile of thirty-seven cents. Petitioner on August 3rd heard the board reject his bid and direct the return of his check; yet he did not formally protest this action until the first week in October, at which time transportation had been provided by those to whom contracts had been awarded at the meeting of August 3rd. The only action of the board that might have justified delay was the advertisement for new bids on September 19th, but even at that time transportation had been provided by the aforesaid contractors for a period of approximately two weeks. This delay is not only against public policy in relation to the school district, but it affects the rights of the contractors who had begun to render service and who, at least, should have been made co-defendants in the proceedings.

In the case of Livermore *vs.* Millville, 62 N.J.L. 222, the Court said in reference to a situation similar to the instant case:

> "It is evident that the People's Water Company is directly and vitally interested in the matter which the prosecutors desire to put at issue, but they have not made that company a party to the proceedings. In its absence the Supreme Court was not bound to affirm or reverse the resolution before it. . . ."

In Allen *vs.* Board of Chosen Freeholders of the County of Hunterdon, 71 N.J.L.

247, it was decided that upon the writs of certiorari brought to review certain resolutions of a Board of Chosen Freeholders, third parties having acquired contractual rights, the Court would defer judgment upon certiorari in order to permit the prosecutor to bring such parties before the court. While in the instant case, it would be possible to pemit a new trial by making the present contractors parties to the litigation, such would only further delay the time of legal attack and thereby establish additional grounds for the dismissal of the case upon the basis of laches.

The evidence shows that the petitioner submitted the lowest per mile bid and if the case had been promptly presented he would have had a right to a contract if the board had not been required to readvertise because of its ambiguous specifications. Petitioner delayed at his peril the filing of a formal petition.

In the case of Smith *vs.* Spencer, 81 N.J.E. 389, where action was delayed in contesting the erection of a building until after work had been begun upon it, the court held:

> "The complainants cannot in a situation like this protect their rights by claiming such right, however persistently, by mere correspondence. Legal proceedings must be taken before there has been a serious expenditure of money. . . . On this branch of the case I must hold that the complainants are guilty of laches."

Counsel for respondent cites the case of Gunne *vs.* Borough of Glen Ridge, 163 Atl. 554, where the court held that a delay of twelve days after an award of a garbage removal contract barred the complaining bidder from relief and said:

> "Under the circumstances, it was incumbent on the prosecutors to act with extreme diligence, if, either as disappointed applicants for the specifications, or as taxpayers, they desired to test the validity, either of the ward that was made, or of the refusal of the specifications. For eleven days the borough and the contractor were in ignorance of any attack on the award or the contract, the performance of which had to be begun with adequate equipment and working force within three weeks, during which time preparations by the successful bidder were in progress."

In Bullwinkel *vs.* East Orange, 133 Atl. 774, the Supreme Court ruled that where bids were received on April 12th and a contract awarded on April 26th for work to begin on July 1st, an attack made upon the contract a few days before June 23rd came too late, holding that an attack on a municipal action awarding a contract should be made with the utmost promptitude.

Mr. Jackson asks for the award of an annual transportation contract, but his petition comes after part of the contract had been performed. He should have refused the return of his certified check, but even granting that this would not prejudice his right to the award, he should have filed his petition promptly after August 3rd. His delay in instituting formal proceedings is both unfair to the taxpayers of the district and the present transportation contractors. If the award had been promptly contested, it is probable that the result would have been the rejection of all bids and a readvertising under which the present contractors as well as the petitioner in this case would have had an opportunity to bid on a common basis; and if the present contractors had been unsuccessful, there might have been opportunities for them to secure other contracts or employments not later available.

In Taylor *vs.* Bayonne, 57 N.J.L. 378, the Court said:

"In determining what will constitute such unreasonable delay regard should be had to circumstances which justify the delay to the nature of the case, and the relief demanded, and to the question whether the rights of the defendants or of other persons have been prejudiced by such delay."

Surely, the rights of the present contractors have been prejudiced by the delay of the petitioner in this case, and the taxpayers of the district would be adversely affected by a decision setting aside at this time an action of the board taken August 3rd. Mr. Jackson is accordingly guilty of laches. The appeal is dismissed.

December 7, 1936.

SPECIFICATIONS FOR TRANSPORTATION ROUTE MUST BE SUCH AS TO ENCOURAGE COMPETITIVE BIDDING

JESSE F. RANKIN,

Petitioner,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF EGG HARBOR AND MELISSA H. ADAMS,

Respondents.

For the Petitioner, Louis D. Champion.
For the Respondents, William Charlton.

DECISION OF THE COMMISSIONER OF EDUCATION

The petitioner seeks to have the Commissioner set aside the award of a transportation contract by the Board of Education of the Township of Egg Harbor, Atlantic County, to Melissa H. Adams, on July 17, 1945, and direct the Board to award the contract to him as the lowest responsible bidder.

The petitioner sets forth in his petition that at a meeting held on Monday, May 14, 1945, proposals were duly received and opened by the Board for the furnishing of transportation on Bus Route No. 8, as follows:

Melissa H. Adams	$6,400.00
Jesse F. Rankin	5,500.00

Both bids were rejected by the Egg Harbor Township Board of Education.

Proposals were received on Thursday, June 7, 1945, as follows:

Melissa H. Adams	$6,400.00
Jesse F. Rankin	5,300.00

Both bids were rejected by the Board of Education.

On Tuesday, July 17, 1945, proposals was received as follows:

Melissa H. Adams	$6,421.00
Jesse F. Rankin	5,500.00

Petitioner's bid was rejected and the Board of Education announced the award of the contract to Melissa H. Adams for a period of four years at the contract price of $6,421.00.

The petitioner alleges that the specifications prepared by the Board and submitted to the bidders violated the School Law and the Rules and Regulations prescribed by the State Board of Education for transportation contracts, for the reason that some of the requirements were in excess of the requirements for equipment prescribed by the Rules and Regulations of the State Board. He maintains that the Board of Education was without authority to require a certified check in a sum equal to five percentum of the total amount of the contract for the reason that Section 18:14-11 of the Revised Statutes requires a check only for five percentum of the annual amount of the contract. He maintains that the advertisement for bids to be received on July 17, 1945, was not properly advertised, as required by Section 18:14-11 of the Revised Statutes, and that the advertisement, as published, was defective in that it did not specify the area of the route or the number of the route in the township, nor did it reserve, in behalf of the Board of Education, the right to reject any or all bids.

Petitioner avers that he was and is ready and willing to accept the award of the contract, based upon his bid, and prays that the Commissioner will set aside the award of contract to Melissa H. Adams and direct the Board to award the contract to him as the lowest responsible bidder.

Respondent denies that the specifications were in violation of the School Law and the Rules and Regulations prescribed by the State Board for transportation and transportation contracts. The Board further denies that it was without authority to make requirements in excess of the requirements of the Rules and Regulations of the State Board of Education for the reason that it was not the intention of such rules that a local board of education might not supplement them by some reasonable requirement in the interest of the public safety and to assure itself that the bidder would be able to perform the contract.

The Board admits that it required a certified check for the entire period of the contract, but says that there was no objection by the bidders at the time the bids were submitted and that the suggested form, as found on page 18 of the Pupil Transportation booklet issued by the Commissioner of Education, was used. The Board maintains that there is no requirement in the statute to specify the area of the route or the number of the route, nor to reserve the right to reject any or all bids.

The Board of Education defends its rejection of bids on May 14, 1945, and June 15, 1945, on the grounds that prior to the opening of the bids, but after advertisement therefor, the Board decided to try to include an additional bus route to serve East Farmington in Egg Harbor Township. It was the intention to add that extra mileage that the Board rejected the bids on May 14, 1945. Subsequently, it was discovered that the additional route was two-tenths of a mile short of the requirements of the State Board of Education and accordingly bids were re-advertised for the original route. After bids were re-advertised for June 7, 1945, it was brought to the Board's attention that in war times, it is very difficult to obtain school buses. The Board was determined that the bidder should have a new bus, in the interest of safety of the pupils. It was also determined that whoever received the contract should have a new bus on the opening day of the school term and, accordingly, the Board rejected the bids as submitted on June 7, 1945.

Thereafter, the Board instructed its solicitor to draw new specifications containing

the requirements in excess of the requirements of the State specifications in order to insure the safety of the children and to make certain that the bus bid upon was used in performing the contract and available at the opening of the school year.

Respondent further says in its answer that on the evening of the day the proposals were received, Melissa H. Adams produced a bus which met the specifications. She also provided a priority certificate from the proper agency of the United States Government which gave her the right to purchase the very bus exhibited on the grounds of the school house and bearing the serial and engine numbers described on her bid. The petitioner produced a bus which did not meet the specifications and was unable to give any assurance to the Board that he could have a new bus on the day transportation was to commence. For these reasons, the petitioner was advised he did not meet the specifications. Accordingly, the bid of Melissa H. Adams was the only bid before the Board which met the specifications.

This case is presented on a stipulation of fact and testimony taken at a hearing in the Court Room in the Guarantee Trust Building, Atlantic City, New Jersey, on September 19, 1945.

It is agreed in the stipulation that:

1. "The appellant, Jesse F. Rankin, is a citizen and resident of the Township of Egg Harbor in the County of Atlantic and has been such a citizen and resident for upwards of 37 years.

2. "After receiving and considering bids at the meetings of the respondent board on May 14, 1945, and June 7, 1945, the bids of both bidders were rejected as set forth in the petition.

3. "On Tuesday, July 17, 1945, the said Board of Education received, pursuant to advertisement, sealed proposals for the transportation of pupils at Egg Harbor Township Hall, Bargaintown, New Jersey, at the hour of 8:15 P.M. A copy of said advertisement published by the District Clerk of said Board of Education is as follows:

'Sealed proposals for the transportation of pupils will be received by the Board of Education of the School District of the Township of Egg Harbor at 8:15 P.M., Eastern War Time, on Tuesday, the 17th day of July, 1945, at Egg Harbor Township Hall, Bargaintown, New Jersey. Specifications and bid forms for the route and a standard form of questionnaire to be answered by the bidder may be secured from

Stoy Nickles, District Clerk,
1500 Black Horse Pike, Cardiff, N. J.

Printer's fee $1.20 Order No. 973.'

"Said Board of Education opened and received two sealed proposals at said meeting as follows:

The bid of Melissa H. Adams for the four year period in accordance with the specifications autohrized by said Board, the sum of.....$6,421.60

The bid of Jesse F. Rankin, the appellant for the four year period in accordance with said specifications, the sum of $5,500.00

"The route details and specifications pursuant to which said bids were presented are annexed to the Petition of Appellant filed herein and are made a part hereof.

4. "The minutes of the Board of Education of the Township of Egg Harbor show the following:

"Steelmanville, N. J.
May 14, 1945.

"Specifications for bids on Route No. 8 were read. Bids were called for, opened and read.

Melissa H. Adams $6,421.60
Jessie Rankin 5,500.00

"Bids were referred to the transportation committee, who met and recommended that both bids be rejected and new bids be called for at the June meeting. Moved by Mr. Brown, seconded by Mr. Nickles that the report be approved. Passed.

"Moved by Mr. Brown, seconded by Mrs. Alexander, that the motion adopted April 5th that all basal contracts be extended for a period of one year, be rescinded to enable the transportation committee to consider them further. Board polled as follows:

Yes—Mrs. Alexander, Mrs. Dunlavey, Mrs. Klotz, Messrs. Brown, Jefferies, Nickles.

Not voting—Mr. Lee.

No—Messrs. Swift, McConnell. Passed."

"Farmington N. J.
June 7, 1945.

"Bids were called for on Bus Route No. 8. Two were offered.

Melissa H. Adams $6,421.60
Jesse F. Rankin 5,300.00

Referred to Transportation Committee.

"The Board recessed to permit consideration of transportation and waterproofing bids. On reconvening, it was moved by Mr. Brown, seconded by Mrs. Klotz, to reject both bids for Route No. 8.

"Mr. Brown reported that the transportation committee will meet and revise the specifications and report them back to the July meeting for approval by the Board. Motion passed. Moved by Mr. Brown, seconded by Mrs. Dunlavey, that the bids and deposits be returned to the bidders. Passed."

"Cardiff, N. J.
July 5, 1945.

"The Clerk read the specifications for bus route No. 8. Moved by Mr. McConnell, seconded by Mr. Swift that the 1 year experience requirement be stricken from the specifications. Vote called, Yes. Messrs. McConnell, Jefferies, Swift. Not voting, Mrs. Klotz, Mrs. Alexander, Mrs. Dunlavey, Mr. Lee, Mr. Brown. No. Mr. Nickles. Passed.

Moved by Mr. Nickles, seconded by Mr. Brown that the revised specifications be approved. Passed."

"Bargaintown, N. J.
July 17, 1945.

"Two buses were on display at 7:45 P.M. Mr. Jesse Rankin displayed a Ford chassis with a Wayne body and Melissa Adams displayed a Ford chassis with a Superior body. The members of the Board and Mr. Potter, County Supt. of Schools, inspected the buses.

"Meeting called to order at 8:30 P.M. The clerk read the bus specifications. Asked as to his legal interpretation of the specifications Mr. Potter stated that the Board had met the state requirements and that there were three unusual requirements but that the board had the right to incorporate these restrictions with good reason.

"Asked the following questions Mr. Brown, chairman of the transportation committee, answered as follows:

1—(Q) New bus? (A) To insure prompt and safe transportation.

2—(Q) Bus must have Superior all steel body, custom deluxe riveted and welded? (A) The board felt that this body offered the maximum of safety.

3—(Q) Must have bus on display? (A) This was done in view of existing war conditions to make sure that a new bus would be available and ready when school started.

"Mr. Potter then stated that he believed the specifications legal and satisfactory. The bids were opened and read. Mr. Rankin bid $5,500.00 with a deposit of $275 cash and Mrs. Adams bid $6,421.60 with a deposit of $321.08 certified check. The matter was referred to the transportation committee. They recessed to permit consideration of the bids. On reconvening moved by Mr. Brown, seconded by Mr. Nickles that Mr. Rankin's bid be rejected because his bus did not meet with the specifications. Motion passed. Mr. McConnell not voting with objections and Mr. Lee not voting. Moved by Mr. Brown, seconded by Mr. Jeffries that Mrs. Melissa Adams be awarded the contract. Passed. Moved by Mr. Nickles, seconded by Mr. Brown that Mr. Rankin's deposit be returned. Passed. Mr. Potter stated there were two things a board must do.

"1—Follow the specifications.

"2——Give the contract to the lowest bidder. Also that the board was at liberty and justified to specify the type and quality of equipment in the board's judgment was best."

5. "At the meeting of July 17, 1945, of said respondent, Board of Education, said board rejected the bid of appellant and awarded said contract to said Melissa H. Adams for the period of four years at the contract price of $6,421.60.

6. "The petitioner, Jesse F. Rankin, was ready and willing to accept the award of the contract for transportation for which bids were advertised at any of the meetings of May 14, 1945, June 7, 1945, and July 17, 1945, upon the basis of the respective bids submitted by him at these meeings, and that he was and is at all times willing to furnish a school bus conforming in all respects to the State School Law and the rules and regulations of the State Board of Education, seating the required number of pupils as stated in the specifications.

7. "That the respondent, Melissa H. Adams, exhibited to the respondent, Board of Education and the County Superintendent of Schools, a school bus which complied with the specifications adopted by said respondent Board of Education, for the said bids to be received on July 17, 1945, being a Superior all steel body, etc., and otherwise in her bid complied with said specifications.

8. "The appellant, Jesse F. Rankin, exhibited to the respondent, Board of Education, prior to the receipt of said bids, a school bus which complied in all respects with the specifications of the State Board of Education and the regula-

tions governing pupil transportation as adopted by the State Board of Education, with the exception that the said body was not a Superior make body, deluxe, riveted and welded."

J. Eugene Moyer, Ford dealer in Pleasantville, New Jersey, and dealer in school buses, over the objection of counsel for respondents on the grounds that the testimony was hearsay, was permitted to testify that the husband of Melissa Adams had asked him for the specifications of a Ford bus with a Wayne chassis so that the board could write the specifications around this particular bus. He further testified that Mr. Rankin could have produced a bus. On cross-examinaiton, he testified that Mr. Rankin could not apply for a priority until he had a contract, but could have obtained a priority for equipment on the dealer's floor within three days. He denied any ill-feeling against Mr. Adams, but stated Mr. Adams had promised to buy a bus from him and changed his mind.

Jesse Rankin testified that he was able and willing to perform his contract. On cross-examination, he testified that he was not certain whether he could get a bus now. He further testified on cross-examination that he was acquainted with the specifications, did not object to the specifications prior to July 17, and voiced no objection prior to the opening of the bids.

Robert Brown, Chairman of the Transportation Committee, gave as his reason for voting to reject the bids of May 14, 1945, the discovery that a change of route with extra mileage was necessary. The bids of June 7 were rejected because his attention was called to the difficulty of securing priorities and he wanted to be sure the successful bidder could secure a bus. The solicitor of the Board was instructed to draw the specifications, which, with minor changes, were used on July 17, 1945. He denied that Mrs. Adams' husband participated in drawing the specifications. The testimony of Mr. Stoy Nickles, District Clerk of the Board, was the same as that of Mr. Brown with reference to the rejection of the bids of May 14, and June 7, 1945.

Counsel for the respondent states that through inadvertance there was not attached to Exhibit R-2-A and B specifications of the school bus together with engine and body serial numbers. Rather than hold a new hearing so that these might be introduced, he requested that the *Specifications of the School Bus as Proposed to be Furnished by Melissa H. Adams* with the engine and body serial numbers and the accompanying affidavit of Stoy Nickles, the District Clerk, be considered as a part of the record in this case. Counsel for the petitioner does not consent to the use of the affidavit and the exhibit. His objection must be sustained.

It is not *necessary,* however, to hold a new hearing. The *Specifications for Bids to Transport Pupils of School District of the Township of Egg Harbor* are annexed to the petition of appeal and are made a part of the stipulation. It is also stipulated that Mrs. Adams has complied with the specifications.

The points in the argument of the petitioner's brief will be considered in order.

1. The bid of respondent, Melissa H. Adams, was informal and did not comply with the specifications.

Petitioner argues that an examination of Mrs. Adams' bid shows that the serial numbers were not stated in her bid nor on the questionnaire which she filed, as

required by the specifications. Therefore, he contends that her bid was informal and should have been rejected.

The Commissioner cannot set aside the award to Mrs. Adams on the basis of this argument. This issue was not raised in the petition. It was stipulated in paragraph 7 of the stipulation quoted above (paragraph 10 of the complete stipulation) that Melissa H. Adams complied with the specifications. The Commissioner considers himself bound to determine this cause on the issues presented in the pleadings and on the specifically agreed stipulation as submitted. (Lastowski *vs.* Lawnicki, 116 N.J.L. 230 at page 233).

> 2. The specifications under which bids were called for on July 17, 1945, were unlawful and the respondent board of education had no legal right to require compliance therewith.

The petitioner's argument is based upon the theory that a board of education in advertising for transportation bids cannot enlarge the specifications included in the "Regulations Governing Pupil Transportation" adopted by the State Board of Education on April 10, 1937, as amended to October 14, 1939.

The Commissioner rejects this theory. The specifications in the Rules and Regulations referred to above are not to be regarded as a prescribed set of standard or uniform specifications to be used in the school districts of the State as the sole and uniform basis for bidding. Not every detail of chassis and body construction is covered by the Rules and Regulations. These Rules were designed to guarantee in certain specific items at least a minimum of safety and comfort for the children transported.

Petitioner also contends that the respondent exceeded its authority in requiring the bidder to furnish a check for five (5%) percentum of the contract price in view of the fact that the statutes provide for furnishing a check for five (5%) percentum of the *annual* amount of the contract. Respondent explains that it interpreted a "Recommended Bid Form" found on page 18 of the pamphlet on Pupil Transportation, issued by the State Department of Public Instruction, to mean that five (5%) percentum of the entire contract price for four years was required. Whatever may be the merit of this argument, the petitioner, in failing to make any objection to this requirement, has waived any right to make an objection now.

It is the opinion of the Commissioner that it is too late for a bidder to object to alleged defects in specifications after the bid has been rejected. In a similar case, Lester James Davis *vs.* Board of Education of the Borough of High Bridge and Frank M. Wean, decided on October 5, 1934, the Commissioner said:

> "Neither the appellant nor Mr. Stryker, prior to the submision of bids, requested information about the meaning of the specifications, but submitted bids without objection to alleged defects in the specifications until their bids were rejected. The ruling of the Supreme Court in the case of Houghton *vs.* Jersey City, 90 N.J.L. 689, now precludes the appellant from coming into court to ask that the action be set aside because the specifications were improper."

The testimony reveals that Mr. Rankin made no objections to the specifications prior to the opening of the bids. Accordingly, the Commissioner holds that the decision in the case of Davis *vs.* Board of Education of High Bridge, supra., is applicable to the case under consideration.

3. The facts and circumstances in this case show that the respondent, Melissa H. Adams, was a favored bidder and that the award of the contract to her was the result of a definite and specific unlawful conspiracy for which reason the contract should be set aside.

The petitioner alleges in his brief that Mr. Brown, the Chairman of the Transportation Committee, moved at the meetings of May 14 and June 7 to reject both bids because he wanted to have the contract awarded to his sister-in-law, Mrs. Adams, and moved at the meeting of June 7 to have the Transportation Committee revise the specifications with no other purpose in mind than to revise them in such a manner as to prevent Mr. Rankin from bidding. For the reason that the petitioner failed to make timely objection to the rejection of his bids on May 14 and June 7, it is now too late to raise the issue of these rejected bids. As to the motives of the Chairman of the Transportation Committee and the board members, the Commissioner will not speculate.

A contention in the brief that Mrs. Adams was given more notice than the petitioner of the date for submitting bids so that she might have ample time to produce the Superior body for inspection is not supported by evidence and cannot, accordingly, be considered by the Commissioner.

For proof of a conspiracy, the petitioner refers to the testimony of Mr. Moyer, the Ford dealer, who testified that Mr. Adams, the husband of Mrs. Adams, consulted with him in an effort to make "air tight specifications in an attempt to cut out other bidders." Counsel for the respondent objected to this testimony at the hearing upon the ground that it was hearsay evidence. The objection was well taken. What Mr. Adams said to Mr. Moyer, not in the presence of Mrs. Adams or of any of the members of the Egg Harbor Township Board of Education, cannot be binding upon either of the respondents. The Assistant Commissioner of Education in Charge of Controversies and Disputes, in conducting hearings for the Commissioner, is not circumscribed by strict rules of evidence. Accordingly, he sometimes allows some latitude to counsel in presenting their cases and admits evidence of disputed admissibility so that the Commissioner may determine for himself its probative value. The Commissioner, however, must base his decisions upon legal evidence and, therefore, he cannot consider the testimony of Mr. Moyer. Moreover the evidence adduced in this case is not sufficient to support a charge of conspiracy. Furthermore, the issue of conspiracy was not raised in the original petition. According to Lastowski *vs.* Lawnicki, supra., the Commissioner should consider only issues raised in the pleadings.

4. Robert Brown, a member of the respondent board and chairman of the transportation committee was interested in the contract awarded to Mrs. Adams by reason whereof the said award is illegal and should be set aside.

This is another issue not presented in the pleadings. The Commissioner would make the observation, however, that no evidence was adduced to show that Mr. Brown would profit financially from the award of the contract to his sister-in-law, Mrs. Adams. In the case of O. B. Nichols and Henry R. Walton *vs.* Board of Education of the Township of Pemberton, 1938 Compilation of School Law Decisions, 48, it was decided by the Commissioner and affirmed by the State Board of Education, that a board of education could legally award a contract to the wife of a board member, since the husband, according to law, is not pecuniarily interested in such

a contract. If it be legal to award a contract to the wife of a board member, it would appear to be legal to award a contract to a sister-in-law in the absence of any proof of a pecuniary interest.

In the petition, it is contended that the advertisement as published was defective in that it did not specify the area of the route or the number of the route in the township and that in the advertisement the respondent board did not reserve the right to reject any or all bids. The Commissioner finds this contention to be without merit.

The respondent apparently followed the *Recommended Form of Newspaper Advertisement* found on page 19 of the pamphlet on Pupil Transportation. This recommended form does not include the description of the route and the reservation of the right to reject all bids because these items are set forth in the specifications which the bidder is advised in the advertisement to secure from the district clerk. There is no law which requires the route to be described in the advertisement and the petitioner was not injured by its omission. However this may be, the petitioner should have voiced his objections prior to the bidding.

The petitioner prays that the contract be awarded to him because he is the lowest responsible bidder. This prayer of the petitioner cannot be granted because his bid did not conform to the specifications. In such a case, the contract must be awarded to the next lowest bidder who conforms to the specifications. In the case of Ogburn Hewitt *vs.* Board of Education of the Township of Egg Harbor, Atlantic County, and Mary E. Schooley, decided December 11, 1942, the State Board said:

> "The board had no right to award or execute a contract different from that advertised.
>
> 'If one bidder is relieved from conforming to the conditions which impose said duty upon him, that bidder is not contracting in fair competition with those bidders who propose to be bound by all the conditions. This is the policy which prevents the modification of specifications after bids have been presented, and the awarding of the contract to one of the bidders based on such revised specifications.' Case *vs.* Trenton, 76 N.J.L. 696 (700). Armitage *vs.* Newark, 86 N.J.L. 5. International Motor Company *vs.* Plainfield, 96 N.J.L. 364. It was the duty of the board of education, upon failure of Mrs. Schooley to furnish a bus which complied with the requirements of the specifications, to award the contract to the next lowest bidder. Carll *vs.* Board of Education of Weymouth Township, School Law Decisions, (1938) page 792, which in this case was Mr. Hewitt."

Since the Commissioner has decided that the specifications of the Egg Harbor Township Board of Education were not illegal for the reasons alleged in the petition, that the petitioner could not object to the specifications after an award was made, that the petitioner did not conform to the specifications and that the respondent, Melissa H. Adams, did conform, the award of the contract to Mrs. Adams will not be set aside. The petition is dismissed.

November 9, 1945.

Decision of the State Board of Education

The petitioner is the thrice low and thrice unsuccessful bidder for a four-year transportation contract with the Board of Education of the Township of Egg

Harbor, Atlantic County. The respondents are the township board which awarded the contract and Melissa H. Adams to whom it was awarded. The Commissioner of Education in a ruling on November 8, 1945, sustained the award to Mrs. Adams.

It appears from stipulated or undisputed evidence that three successive requests for bids were issued by the board for transportation on bus route No. 8 in the township, and that such bids were received on May 14, 1945, June 7, 1945, and July 17, 1945; that each time the petitioner's bid was $900 or better below that of Melissa H. Adams; that Melissa H. Adams was the sister-in-law of the Chairman of the Transportation Committee of the board; that after the respondent, Melissa H. Adams, had been underbid twice the specifications were modified to insert requirements in excess of the specifications prescribed by the State Department of Education in a manner which made it difficult if not impossible for there to be any competition in bidding under these excess requirements; that in addition to prescribing specifications unauthorized by the State Department of Education the township board also required the physical production before it, in advance of awarding the contract, of the bus proposed to be used, and that under the conditions prevailing it was impractical if not impossible for any one other than Melissa H. Adams to produce such a bus.

It is unnecessary for the Board to consider all of the objections and defenses offered. The Board of Education is of the opinion that the local board exceeded its authority with respect to specifications prescribed and that the contract awarded to Melissa H. Adams is void.

Under Chapter 51 P.L. 1945, the present State Board of Education is a new board. It has adopted certain prior existing rules respecting proper transportation. Those rules are detailed in setting forth specifications which became "effective April 10, 1937, except as otherwise provided." They contain twenty-one categories of requirements determined by the Board of Education to be necessary and adequate for the protection of the transportation of pupils to and from schools throughout the State. They also contain a "prescribed form of questionnaire," "prescribed transportation specifications," a "recommended bid form," and a "recommended form of newspaper advertisement." The form of bids and the form of newspaper advertisements are merely "recommended" but the terms of the specifications are "prescribed."

It is not necessary to decide whether minor and unimportant variations from the language of the specifications prescribed by the State Board will in every case vitiate the validity of contracts awarded by local boards, but it is obvious that the State Board cannot permit or tolerate modifications which have a tendency to restrict healthy competitive bids or, as in the case under consideration, to exclude all competition whatever. The policy of the Legislature with respect to competitive bidding is clear in declaring that "all contracts shall be awarded to the lowest responsible bidder," School Law Chap. 6, 18:6-26.

It is also unnecssary for us to decide whether there was in fact collusion and cotruption in the present case. It is to be noted, however, that the legislative policy on this subject is also declared both in Chapter 12, 18:12-3 of the School Law which provides that "No county superintendent of schools, member of a board of education, teacher or person officially connected with the public schools shall be agent for, or be in any way pecuniarily or beneficially interested in the sale of any * * * apparatus or supplies of any kind, or receive compensation or reward of any kind for any such sale or for unlawfully promoting or favoring the same;" and also

Chapter 160, 2:160-8 makes such conduct a misdemeanor in this State. No question of personal liability or of penal guilt is before us for determination, but it is a matter of elementary law and morals—independent of such express statuatory provisions—that contracts with public bodies, where a relationship exists such as that of Mrs. Adams and the chairman of the Transportation Committee, are properly the subject of particular scrutiny.

Both the successful bid and the rejected bid in this case were in precisely the same "recommended bid form." They were in the same terms except that the bid of Mr. Rankin was for $5500.00 and the bid of Mrs. Adams was for $6421.60. Each bidder enclosed cash or a certified check for five per cent of the amount of the total bid and each stated in the same language "If I am awarded the bid, I agree to furnish a bus to meet your approval and that of the county superintendent of schools and to comply with all the rules and regulations of the State Board of Education relating to pupil transportation." It was also stipulated as a matter of fact, that "the petitioner, Jesse F. Rankin, was ready and willing to accept the award of the contract for transportation for which bids were advertised at any of the meetings of May 14, 1945, June 7, 1945, and July 17, 1945, upon the basis of the respective bids submitted by him at these meetings, and that he was and is at all times willing to furnish a school bus conforming in all respects to the State School law and the rules and regulations of the State Board of Education, seating the required number of pupils as stated in the specifications." The only pertinent deviation, except for the amount of the bid, was the fact that Mrs. Adams exhibited physically to the local board, as it had improperly required, a bus containing details of body specification which the board had unauthorizedly inserted in the specifications, while Mr. Rankin, unable because of priority governmental regulations which were entirely beyond his control, was unable to get another bus, in advance of being awarded the contract, to match these illegal requirements. He did in fact go beyond any duty legally required of him and produced a bus which actually complied with all of the specifications prescribed by the State Board for the proper protection of the transport of children.

We are not called upon to decide whether it is permissible in any case for a local board to require the production of specific objects to be constructed for or supplied to it in advance of the awarding of a contract. It is obvious that there is at least a reasonable limit to such requirements. Certainly if the board were advertising for the construction of a schoolhouse it could not require each bidder to produce the final schoolhouse before awarding the contract for its construction. A school bus is an expensive article designed for a specific and highly specialized purpose. To require a bidder to produce a bus for inspection before being awarded a transportation contract was, under the circumstances of this case, entirely unreasonable.

In the hearing before the Assistant Commissioner of Education on September 19, 1945, the Ford dealer in Pleasantville, New Jersey, was called as a witness by the appellant and testified that Mr. Adams, husband of the successful bidder, had called on him on two occasions, once after the first bidding took place and again just before the last bidding took place, and had consulted him about the number and other peculiarities of the particular bus for which he had obtained a priority and had stated that he wished the information in order to write up the board's specifications "in such a way that competition couldn't duplicate it." The Commissioner of Education in his opinion correctly ruled that in hearings before him he is "not circumscribed by strict rules of evidence." He stated, however, that he would not consider the testimony of the Ford dealer because it was not "legal evidence" and that he would

"not speculate as to the motives of the chairman of the Transportation Committee and the Board members." For the reasons already stated it is not necessary for this Board's present decision to take into consideration the testitmony of the Ford dealer. The Board recalls, however, the traditional standards exacted of the wife of Caesar and it thinks that Mrs. Adams was placed by this testimony in a position where her husband, if the testimony was not true, would have felt called upon to take the stand to refute it.

As to the impropriety of the excess and unauthorized requirements of the specifications in the third advertising of proposals, the Commissioner rested his opinion in supporting the local board upon the theory that the petitioner lost his rights by reason of failing to make timely objection to them until after his third bid was rejected. We disagree with the Commissioner both upon the law and the facts. It is a fair assumption from the testimony taken before the Assistant Commissioner on September 19, 1945, that the petitioner made many protests regarding the manner in which the proposals for bids were being conducted, and that if he did not offer specific objections respecting the terms of the last specifications drawn, it was only because he justifiably believed that further protests would be of no avail. He testified that he voiced repeated objections to the conduct of the matter, that he did it in at least one open meeting and that at the time of the last bid "they wouldn't even talk to me." Pressed by the Commissioner as to whether he made any objection to the last specications before his bid was rejected, he said "How could I? They didn't have no meeting," and then went on to testify that he complied as far as he could comply but that he couldn't get the particular type of bus "because there wasn't any to be gotten." The Ford dealer testified—and on this point at least his testimony is not hearsay and is uncontradicted—that it was impossible for the petitioner to procure a priority to acquire the particular kind of bus called for in the specifications until after he had actually received a contract but that he could have procured one within three days if he had been given the contract.

Even if the petitioner had not objected to the specifications until after his bid was rejected, this case presents an issue of fraud and collusion. Courts are liberal in permitting such an issue to be raised at any time in litigation while the case remains within their jurisdiction. We know of no sound public policy which precludes a bidder from attacking and award on grounds of fraud even if he failed to raise the issue before the fraud was completely consumated.

The general atmosphere of this case is not improved by the reasons now assigned by the board for rejecting the first two sets of bids. They are not persuasive and seem largely to be an afterthought. Neither in the minutes of the board meeting of May 14, 1945, nor those of June 7, 1945 is there any reason set forth for the rejection of the bids. The action of the board was apparently by a divided vote. The minutes record merely that it was decided to "reject both bids." At the June 7 meeting the minutes say that Mr. Brown, who was chairman of the Transportation Committee and the brother-in-law of Mrs. Adams, "reported that the Transportation Committee will meet and revise the specifications. * * * *"

Under all the circumstances and for the reasons above set forth, the action of the Board of Education of the Township of Egg Harbor in awarding the contract for route #8 to Melissa H. Adams was unauthorized and illegal, and the contract is a nullity. The respondent, Melissa H. Adams, has no rights under it. The continuation of any further payments to her is unauthorized and no public State funds will be made available for such a purpose. The Board of Education of the Township

of Egg Harbor will immediately call for new proposals respecting pupil transportation on this route under specifications as authorized by the State Board and in conformity with the legislative policy of the State, which requires and encourages free competitive bidding and the awarding of the contract to the lowest responsible bidder. The case is remanded to the local board with instructions to carry out this decision of the State Board of Education.

March 1, 1946.

Affirmed by *New Jersey Supreme Court* 134 N.J.L. 342.

Affirmed by *New Jersey Court of Errors and Appeals* 135 N.J.L. 299.

DISPUTES WITH REFERENCE TO PERFORMANCE OF PREVIOUS CONTRACT DO NOT CONSTITUTE GROUNDS FOR DECLARING BIDDER RESPONSIBLE, IF THE DISPUTED MATTERS CAN BE TAKEN CARE OF IN A PROPERLY DRAWN CONTRACT

WALTER R. CRATER,

Appellant,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF BEDMINSTER, SOMERSET COUNTY,

Respondent.

For the Appellant, Harry W. Stern

For the Respondent, Leon Gerofsky.

DECISION OF THE COMMISSIONER OF EDUCATION

This is an appeal from a Determination and a Finding of Fact by the Board of Education of the Township of Bedminster that the appellant is not a responsible bidder for transportation contracts in the school district of the Township of Bedminster.

The appellant, Walter R. Crater, has transported pupils in Bedminster Township for twelve years. On May 28, 1947, he submitted bids for transportation contracts for Routes 1, 2, and 3, pursuant to Section 18:14-11 of the Revised Statutes, and was the lowest bidder for Routes 1 and 2.

Objection was made to awarding the contract for Routes 1 and 2 to the appellent on the ground that he was not the lowest responsible bidder. The Board of Education thereupon served notice upon Mr. Crater that on June 4, 1947, he would be afforded an opportunity to be heard on the question of his resopnsibility. Public hearings were held on June 4 and June 9, 1947.

On June 11, 1947, the Board of Education made the following determination:

> "The Board of Education of the Township of Bedminster, having advertised for bids for three contracts to transport pupils over three different routes; and Walter R. Crater having submitted the lowest bids for contracts for routes one and two; and motions having been duly made, seconded and passed

by a majority of the Board, questioning the responsibility of said bidder; and the board having conducted a hearing on the 4th and 9th days of June, 1947, to afford the said bidder an opportunity to be heard; and witnesses having been produced for and against the said bidder; and the Board having fully considered all the evidence:

"It is determined that:

"1. The said bidder is presently under contract with the Board to transport pupils.

"2. That from the date of the inception of his contracts he has consistently failed to maintain time schedules which are a part of his contracts.

"3. That his failure to maintain time schedules is not justified.

"4. That the time schedules were reasonably tested and could be maintained.

"5. That he has submitted his bids in question for contracts requiring performance on the basis of the same time schedules he has evidenced his inability to maintain.

"6. That the said time schedules can be compiled with in a safe, reasonable and lawful manner.

"7. That a pupil, on alighting from the bidder's bus, engaged in a dispute with another pupil and sought to employ the use of a knife to settle the difference.

"8. That the said bidder intervened in the said dispute and, although he was required to report such an incident, by virtue of the rules of the Board, he, nevertheless, failed to do so.

"9. That said bidder conducted himself in an unwarranted, unjust and ungentlemanly manner toward a parent of one of the pupils engaged in said dispute.

"10. That said bidder did not desire to have a certain teacher ride on his bus and caused a petition to be signed by pupils of tender years for the removal of said teacher as a passenger.

"11. That said bidder, by circulating the said petition, aroused and inspired pupils of tender age with emnity toward their teacher.

"12. That the said bidder has engaged and supported a driver who has used profane language in the presence of pupils.

"13. That the said bidder, under existing contracts which are about to expire, has frequently violated the rules of the Board as indicated by numerous entries in the minute books of the Board.

"It is therefore found, as a fact, that Walter R. Crater is not a responsible bidder and that it is not for the best interests of the Township of Bedminster to award contracts to him for the transportation of pupils."

It is against this determination of the Board that Walter R. Crater now appeals. He prays that an order be issued by the Commissioner directing the Board of Education of the Township of Bedminster to award the contracts for Routes 1 and 2 to him as the lowest responsible bidder.

With regard to his failure to keep the time schedules, appellant contends that there is no legal or competent proof that the time schedules can be met in a safe, reasonable and lawful manner. He asserts that at no time during the school year 1946-1947 did any member of the Board of Education or its employees attempt or

suggest that he permit such a member or employee to ride on any of the school buses in an effort to ascertain why the buses were not operated according to schedule. The appellant claims that the conduct of the members of the Board and its employees in charge of the supervision of the transportation contracts was such as to create a reasonable inference that instead of calling his attention to the failures to perform the contract properly when the incidents occurred, the Board permitted the incidents to accumulate to be used to prove him an irresponsible bidder when the new contracts were to be awarded.

Mr. Crater contends that his failure to report the "knife dispute" to the Supervisor did not constitute a breach of regulations because the incident occurred after the pupils left the bus and he, accordingly, was without jurisdiction over the conduct of the pupils at that time. He denies conducting himself in an ungentlemanly manner toward a parent of one of the pupils engaged in the "knife dispute."

The appellant admits that he caused a petition to be circulated among the children in an attempt to ascertain how many of the children were opposed to the presence of the teacher in the bus, but says that after discovering the sentiment of the children he did nothing further about it and destroyed the petition. He maintains that it was not shown by any competent or legal evidence that the children were aroused and inspired with emnity toward their teacher as a result of the circulation of this petition, but, on the contrary, there was testimony by the Supervisor that the act of circulating the petition did not affect the teacher's classroom discipline with respect to the pupils involved.

With regard to the determination of the Board that the appellant engaged and supported a driver who used profane language in the presence of the pupils, Mr. Crater says that he had no knowledge or notice from any of the members of the Board that any driver employed by him was using profane language in the presence of the pupils.

Regarding the determination of the Board that he has frequently violated the rules of the Board as indicated by the minutes entered in the books of the Board, the appellant states that he has never willingly or knowingly violated any rule of the Board or has never been advised or informed of any such violation.

Appellant contends that the case against him is based entirely upon hearsay evidence and not upon facts, as required by the law, and that the "Determination of Fact" of the Board has no basis in fact or competent legal evidence. He further contends that the record will disclose the testimony of many residents and taxpayers of Bedminster Township that his reputation for competence as a bus driver is of a high degree.

The pertinent statute is Section 18:14-11 of the Revised Statutes which reads as follows:

> "No contract for the transportation of children to and from school shall be made, when the amount to be paid during the school year for such transportation shall exceed three hundred dollars, unless the board of education making such contract shall have first publicly advertised for bids therefor in a newspaper circulating in the school district once, at least ten days prior to the date fixed for receiving proposals for such transportation and shall have awarded the contract to the lowest responsible bidder.
>
> "Each transportation bid shall be accompanied by information required on a standard form of questionnaire approved by the state board of education

> and by a cashier's or certified check for five per cent of the annual amount of the contract, which deposit shall be forfeited upon the refusal of a bidder to execute a contract; otherwise, checks shall be returned when the contract is executed and a bond filed."

The Commissioner can find no case in this State wherein the Commissioner of Education was asked to review the proceedings of a board of education which resulted in a Determination and Finding of Fact that the lowest bidder for a transportation contract was not responsible. There are court decisions, however, in other situations, which establish the principles for the Commissioner to apply in reviewing the present case.

In the case of Paterson Contracting Company, Prosecutor, *vs.* City of Hackensack, et al., Defendants, 1 Misc. 171, the Supreme Court Justice, sitting alone, took the view that the judgment of the commissioners

> "is a judgment to be given upon what they find to be the facts in a particular case in view of the conditions to be met, and I am unwilling to say that they exercised their judgment either corruptly, fraudulently, or erroneously in any other way." He went on to say: "It is said that they were able to give a satisfactory bond, but something more is required in these cases than a mere bond, and the financial responsibility of the bidder, as well as its equipment, experience, and skill, are all considerations which enter into the determination as to whether the bidder is to be responsible in the sense intended by law."

Accordingly, the Justice refused to overrule the authority of the commissioners.

The Court of Errors and Appeals in the same case on appeal, 99 N.J.L. 260, at 263, took a different view. The Court said:

> "We do not think that it is necessary to prove corruption or fraud on the part of the commission. The question for their determination was whether the apellant was so lacking in the experience, financial ability, machinery and facilities necessary to perform the contract as to justify a belief upon the part of fair-minded and reasonable men that it would be unable to perform its contract."

At page 264 in the same decision, the Court said:

> "To encourage contractors to submit bids for public improvements should be the aim of every community. Numerous bidders create competition. Competition lowers the cost. If bids are rejected arbitrarily or capriciously contractors will not take the time and expend the money necessary to submit proposals. They will infer favoritism. This will result in few bidders and higher bids. The statute providing for the award of a contract for a public improvement to the lowest responsible bidder was enacted for the protection of bidders. To reject the bid of the lowest bidder there must be such evidence of the irresponsibility of the bidder as would cause fair-minded and reasonable men to believe that it was not for the best interest of the municipality to award the contract to the lowest bidder."

In the case of Peter A. Peluso, Prosecutor, *vs.* Commissioner of the City of Hoboken, New Jersey, Defendants, 98 N.J.L. 706, the Justice said:

"Responsible means ability to meet obligations. It involves accountability; that is, answerable. The testimony demonstrates the fact that the bidder, Peter A. Peluso, has the necessary equipment and financial responsibility to perform the contract. There is no attempt to controvert this fact in the testimony. Giving to the testimony full credit for all that is claimed it proves, it shows the bidder, Peter A. Peluso, had a previous contract with the City of Hoboken, which expired on May 31, 1923. During the time, there were frequent disputes in reference to the performance of that contract with the officials of the City of Hoboken, many of which involved controverted questions of fact, if not all. These matters should be and can be taken care of under a contract properly safeguarding the public interest, with a contractor who is financially responsible. This lack of ability to work in harmony, or to enforce the terms of a previous contract by the city officials, is now urged as a factor and a controlling factor in determining the bidders' responsibility. No New Jersey case is cited in support of this proposition. Some cases, however, from other jurisdictions, are cited in apparent support of this view. See 7 Words and Phrases 6178.

"The test, however, must be made under the New Jersey statute. As stated, the bidder's financial responsibility and the sufficiency of his equipment for the performance of the contract is not controverted. The conclusion reached, after reading and considering the testimony returned with the writ, is the award, as made to James J. McFeely, by the commissioners, is in violation of the statute which provides the award must be made 'to the lowest responsible bidder.' "

In the foregoing cases, the following principles seem established with regard to the determination by a board of education of the responsibility of a bidder and the review of a board's determination thereon:

1. The question for the determination of the board of education is whether the bidder is so lacking in experience, financial ability, machinery and facilities as to justify the belief upon the part of fair-minded men that he would be unable to carry out the contract if awarded to him.
2. To reject the bid of the lowest bidder, there must be such evidence of the irresponsibility of the bidder as would cause fair-minded and reasonable men to believe that it is not for the best interests of the school district and the public at large to award the contract to the lowest bidder.
3. The lack of ability to work in harmony or to enforce the terms of a previous contract by the board of education cannot be the controlling factor in determining the bidder's responsibility. Disputes involving controverted questions of fact with reference to the performance of a previous contract do not constitute grounds for declaring a bidder irresponsible if such disputed matters can be taken care of under a contract properly safeguarding the public interest, with a contractor who is financially responsible.
4. To set aside the determination of the board of education that a bidder is irresponsible, it is not necessary to prove corruption or fraud on the part of the board of education. The determination of the board of education must be set aside if the evidence in the record does not justify its determination according to the principles stated above.

It is stipulated that there is no question regarding the appellant's financial responsibility and equipment. His experience in transporting school children covers twelve years in the School District of Bedminster. There is no proof of bad faith or corruption on the part of the respondent Board.

The third principle stated above seems very applicable to the present case. The situation is similar to the one which obtained in the case of Peluso *vs.* Hoboken, supra. The record discloses disputes with reference to the performance of the previous contract, involving controverted questions of fact. It is apparent from the record that harmony did not prevail between the contractor and some of the school officials. The appellant's performance of the previous contract was the controlling factor in the Board's determination that he was not a responsible bidder.

It is the opinion of the Commissioner that the Determination and Finding of Fact of the respondent Board should be reviewed in the light of the principles stated above and especially in light of the holding of the Court in the case of Peluso *vs.* Hoboken, supra., at page 706, which reads as follows:

> "The test of whether a bidder is responsible is whether the bidder has the necessary equipment and financial responsibility to perform the contract, and the refusal to grant a contract to the lowest bidder on the ground that such bidder was not responsible, because in a prior contract there had been frequent disputes in reference to the performance of that contract, is in violation of the statute."

Items 1 to 6, inclusive, of the Determination and Finding of Fact deal with the failure of the contractor to maintain his time schedules under the previous contract and with the contention of the Board that the schedules were reasonably tested and could have been maintained safely. Rule No. 1 of the regulations of the Bedminster Township Board of Education, which were incorporated in the specifications for bidders, reads in part as follows:

> "Drivers are to follow the bus schedule and make the scheduled stops at the scheduled times, road conditions permitting."

The Commissioner cannot find in the record that the bus schedule was ever checked under actual pupil transportation conditions. The record discloses that, prior to the opening of school, the Chairman of the Transportation Committee, the Supervisor, and the appellant traveled over the route in the latter's car and that the appellant made no objection to the proposed schedule. It is also a matter of record that, for an unexplained reason, Mr. Crater refused a request to use his bus in making the tests. The Supervisor testified that, on the test run, actual transportation conditions were simulated as far as possible.

It is the opinion of the Commissioner that the reasonableness and safety of a bus schedule can be tested only under actual pupil transportation conditions. The Board of Education had ample authority to make such a test under Rule No. 8 of the Board's transportation regulations, which authorizes the Supervisor to make periodic inspections and to make recommendations for the Board's approval. Since no test was made under actual transportation conditions, the Commissioner is of the opinion that there was no competent evidence that the appellant violated the rule of the Board requiring him to maintain the schedule, *road conditions permitting.*

However this may be, a matter involving a difference of opinion between the school officials and the appellant concerning his ability to maintain the schedule under a previous contract cannot be a ground, according to the reasoning of the Peluso *vs.* Hoboken case, *supra.,* for declaring the contractor to be irresponsible.

It is the opinion of the Commissioner that such a contract can be prepared and enforced. The Board's specifications, which formed the basis of bidding for the contracts now under litigation, would, if enforced, take care of any dispute regarding the schedule. It should not be difficult, by tests under actual conditions, to determine whether the time schedule can be maintained. The appellant in his testimony expressed a willingness for such a test. He testified that he would like two or three members of the Board to go over the road with him. The Supervisor testified as follows:

> "One thing I would like to say and that is that I have always felt that if Mr. Crater and the transportation committee and I could get together that we could work it out. There is no problem that cannot be solved, but there has never been that type of meeting where we could talk the thing over and be practical about it."

The County Superintendent of Schools is always available to advise boards of education on transportation matters and, if called upon, would be willing to assist in determining the reasonableness of the schedule.

If a reasonable and safe schedule is agreed upon by all parties concerned or, if not agreed upon, it is determined by competent evidence based upon tests made under actual transportation conditions that the schedule can be maintained with safety, a financially responsible transportation contractor can be required to maintain such a schedule. The requirement to follow the schedule can be made part of the contract and a transportation contractor is bonded to perform and carry out faithfully all the terms and conditions of his contract. If the contractor does not meet a properly determined schedule, the board can look to the bondsmen. For the foregoing reasons, the Commissioner concludes that the failure of the appellant to maintain his schedule under a previous contract did not justify the Board in determining him to be an irresponsible bidder for a new contract.

Items 7 and 8 of the Determination and Finding of Fact relate to the failure of the appellant to report to the Supervisor an incident which occurred between two pupils upon alighting from the appellant's bus. There was a difference of opinion regarding the duty of the driver to report the incident to the Supervisor.

Rule No. 5 reads as follows:

> "If discipline is necessary during any scheduled bus run, drivers are not to leave any pupils off the bus along the road. Pupils are to be carried to their regular stop and the case is to be reported to the Supervisor."

The appellant explained his failure to report the incident on the ground that he had no jurisdiction over the pupils after they left the bus. Without passing on the merits of his explanation, such a misunderstanding can be avoided in future contracts by amendment or clarification of the rule. Therefore, the Commissioner cannot consider this incident as a ground for determining the contractor to be an irresponsible bidder.

Item 9 of the Finding of Fact refers to the appellant's ungentlemanly conduct

toward a parent of one of the pupils involved in the disciplinary incident mentioned above. He denies the allegation. There was no proof regarding his conduct except the uncorroborated testimony of the parent. Under the circumstances, the Commissioner is of the opinion that this episode does not constitute sufficient grounds for declaring a contractor irresponsible, who had served the school district for twelve years.

Items 10 and 11 of the Determination are concerned with the petition which the appellant caused to be circulated and signed by small children, asking for the removal of a teacher as a passenger. In this regard, the appellant erred in judgment. The record shows that this petition resulted from an unfortunate set of circumstances arising from the lack of a clear understanding as to whether the teacher was riding on the bus as a passenger and as to whether her authority over the pupils, when riding on the bus, superseded that of the driver. A number of parents of the children involved in this incident testified that in their opinion this single failure in judgment did not warrant finding the appellant to be irresponsible. It is not likely that the contractor would repeat his error, if awarded a new contract. The circumstances which resulted in this unfortunate incident can be avoided in the future. Therefore, it is the opinion of the Commissioner that this incident did not justify finding the appellant irresponsible for future contracts.

Item 12 relates to the finding that the appellant engaged and supported a driver who used profane language in the presence of pupils. The driver denied that her language was profane. The use of improper language by a bus driver in the presence of children is, of course, inexcusable. The record discloses that the alleged improper language was used in connection with the above-mentioned misunderstanding and disagreement between the teacher and the driver which might have been avoided if there had been the proper understanding on the part of the teacher and the driver as to their relative authority over the children.

By the terms of the transportation contract, the respondent Board could have called upon the contractor to remove the driver upon a showing that improper language was used. There is no proof that any demand was made by the Board of Education that the driver be replaced. The questionnaire submitted with appellant's bid, as required by law, shows that he did not intend to use the services of the controversial driver under the new contract. Since there is no evidence that the Board reported the driver's alleged offense and demanded her removal, since the appellant did not plan to use this dirver under the new contract, and since the Board can demand and enforce the removal of an unsatisfactory driver under a future contract, the finding of the respondent Board with reference to the use of improper language by the driver, even if true in fact, cannot be considered as a ground for rejecting his bid for a future contract.

Item 13 of the Determination finds that the bidder under existing contracts frequently violated the rules of the Board as indicated by numerous entries in the minute books of the Board. It is the opinion of the Commissioner that the alleged violations can be prevented under a future contract, vigorously enforced.

The Board of Education apparently considered the procedure in determining whether to continue the services of a bus contractor similar to the procedure often followed in determining whether to continue the services of a school employee. Instead of clearing up misunderstandings as they arise and, if necessary, enforcing the contract by calling upon the bondsman, the Board, with some exceptions,

evidently permitted the alleged violations to go unchecked, and then, when bids were received for a new contract, determined, upon the basis of its evaluation of the appellant's record during the previous year, not to continue his services for the ensuing year. A board of education which owns and operates its buses may still reemploy bus drivers on this basis. Prior to the enactment of Chapter 262, Laws of 1933, boards were free to enter into contracts for transportation service on the same basis. Evidently, abuses crept into this practice of awarding transportation contracts, which abuses the Legislature sought to correct by the enactment of Chapter 262, Laws of 1933.

Since the enactment of this law, a board of education is no longer free to base its decision as to the retention of the service of a bus contractor merely on its appraisal of his past services. It is now the duty of the Board to award contracts to the lowest responsible bidder and to determine the responsibility of the bidder on the basis of the principles derived from court decisions herein quoted. Assuming that the bidder is financially responsible and has the necessary equipment, a board of education, in determining his responsibility, is confronted not only with the question: How did the contractor perform under the previous contract, but also with this further question: Can a contract be drawn and enforced by the terms of which the contractor can be required to perform faithfully in the future?

The Commissioner feels that this law imposes upon him the duty to review very carefully, on appeal, cases in which the lowest bidder has been determined to be irresponsible. Otherwise, the law might become a dead letter and the purpose of the Legislature nullified thereby. There is further reason for the Commissioner to exercise extreme care in reviewing such cases. By the terms of subsection (2) of Section 6 of Chapter 63 of the Laws of 1946, a school district is entitled to seventy-five per centum (75%) of the cost to the district of transportation of pupils to a public school, when the necessity for such transportation and the cost and method thereof have been approved by the county superintendent of schools of the county in which the district paying the cost of such transportation is situated. The difference between the appellant's bid and that of the successful bidder for the two routes amounts to $651.90 annually, of which according to Chapter 63 of the Laws of 1946, the State must pay three-fourths. Therefore, the Commissioner has the further obligation to protect the State's interest in apportioning school moneys for transportation contracts. It is the opinion of the Commissioner that, by awarding the contract to the lowest bidder, the interests of the State and the local taxpayers could have been served without jeopardizing the welfare of the children.

The Commissioner has reached the conclusion (1) that the evidence fails to show that it was not for the best interests of the School District of Bedminster to award the contract to the lowest bidder; (2) that the matters in dispute under the previous contract could have been taken care of in a properly drawn contract and, hence, did not constitute grounds for declaring the lowest bidder irresponsible; and (3) that the evidence does not justify the determination and finding of fact of the Board of Education of the Township of Bedminster that the appellant was not a responsible bidder.

The Commissioner has examined the decision in the case of Sandfort *vs.* City of Atlantic City, 134 N.J.L. 311, referred to in the brief of counsel for the respondent. This case may be distinguished from the case under consideration. The bidder in the Sandfort case did not have adequate equipment or control of his

subcontractors, and the Court found no proof of previous disagreement between the parties to the contract. It was simply a case of failure to perform because of inability to control subcontractors. The decisions of the Commissioner and the State Board cited by counsel relate to cases arising under the tenure law and are not applicable to the situation in the present case.

The contracts awarded for Routes 1 and 2 will be set aside for the reason that they were not awarded to the lowest responsible bidder.

August 13, 1947.

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