State of New Jersey
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NEW JERSEY
SCHOOL LAW DECISIONS
Indexed

January 1, 1976 to December 31, 1976

vol. 1

State of New Jersey
Department of Education
Trenton

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FRED G. BURKE
COMMISSIONER OF EDUCATION

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DECISIONS RENDERED BY THE STATE BOARD OF EDUCATION, SUPERIOR COURT AND SUPREME COURT
1976

COMMISSIONER OF EDUCATION

DECISIONS

1976

Audrey Siegfried,

Petitioner,

v.

Board of Education of the Borough of Shrewsbury and Curtis Bradley, Superintendent, Monmouth County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Ruhlman and Butrym (Paul T. Koenig, Jr., Esq., of Counsel)

For the Respondents, Crowell and Otten (Robert H. Otten, Esq., of Counsel)

Petitioner is a teaching staff member in the public schools operated by the Board of Education of the Borough of Shrewsbury, hereinafter "Board." She appeals an action of the Board denying her personal leave with pay for September 16, 1974, a day on which school was in session. The Board avers that she was not entitled to personal leave with pay for that date.

The matter is submitted jointly for Summary Judgment by the Commissioner of Education on the pleadings, a single exhibit in evidence and Briefs. The facts are as follows:

Petitioner, on September 3, 1974, requested personal leave with pay for Monday, September 16 through Wednesday September 18, 1974. Petitioner, who is Jewish, was granted personal leave with pay for September 17 and 18 to observe the Jewish holiday of Rosh Hashana. The Superintendent and the Board denied petitioner's request for personal leave with pay for Monday, September 16 on the grounds that the request was contrary to the provisions of the Board's policy statement which specifies that:

"Leave for Personal Emergencies"

"Every full-time employee shall be eligible for a maximum of five days' leave per year for personal business at full pay. Except for emergencies, reasons for such leave shall be given to the superintendent two working days prior to the requested date. Unused days shall not be allowed to accumulate. One two-hundredths (1/200) of his year's salary shall be deducted from an employee's salary for each day of such leave taken by the employee beyond the five days. This policy does not permit the use of such days at the beginning or termination of the school year or to extend vacation or holiday periods.

> "In addition to the five days for personal business allowed annually on a non-cumulative basis, each employee will be allowed a maximum of 5 days leave in any school year in the event of a death in the immediate family." (J-1)

Petitioner did not work on September 16, and, when she was not paid for that day, she grieved the matter as provided by the grievance policy. Her grievance was denied at all levels, whereupon the Verified Petition of Appeal was filed before the Commissioner.

The Board holds that petitioner was not entitled to personal leave with pay on September 16 for the reason that its policy precludes the taking of personal leave on a day contiguous to September 17 and 18 which, for petitioner, were religious holidays. (Respondent's Brief, at p. 4)

Petitioner does not argue that the Board's policy on personal leave is invalid or void, but asserts that the Board's interpretation of its policy was unreasonable and arbitrary. Petitioner argues that, since the Board's promulgation of its official school calendar did not designate Rosh Hashana as a vacation or holiday period, it may not properly consider it to be so for purposes of determining personal leave entitlement. In this regard petitioner cites *Albert D. Angell, Jr. et al. v. Board of Education of the City of Newark, Essex County,* 1959-1960 *S.L.D.* 141, wherein it was stated by the Commissioner that:

> "***A rule, in order to be valid, must be reasonable. Boards of education cannot exercise the authority given to them in ways that are arbitrary, capricious or unreasonable, overworked and difficult of precise definition as these words may be. *N.J. Good Humor, Inc. v. Bradley Beach*, 124 *N.J.L.* 162 at 164.***" (at p. 143)

Petitioner argues that, were the Board's interpretation to prevail, no two personal leave days could be taken consecutively at any time, since to do so would be an extension of a holiday or vacation period. (Petitioner's Brief, at p. 4) It is further contended that the terms "vacation" and "holiday" as used in the Board's policy must be interpreted to mean *official vacation and holiday periods* set forth in the official school calendar promulgated by the Board. (*Id.*, at p.4) Petitioner maintains that nearly every day that school is in session is a holiday for some religious or secular group or individual, and that recognition of these in administering the Board's personal leave policy would result in such obscure or vague interpretations as to be clearly unreasonable. (*Id.*, at p. 5)

For these reasons petitioner seeks an order of the Commissioner directing the Board to pay her one day's salary for September 16, 1974, and to charge her account with one day of personal leave.

Conversely, the Board maintains that the holiday periods referred to in its policy are not limited to days on which school is closed but include Jewish holidays or other religious holidays on which school is in session. (Respondent's Brief, at pp. 1,4) Thus, it is argued that when a teacher requests and is granted

personal leave for two days to observe Rosh Hashana, that holiday period may not be extended by one or more days by granting personal leave for days contiguous to Rosh Hashana.

The Board argues that such restriction is necessary to prevent abuses which would result in its regular teachers being absent from the classroom for lengthy periods at the Board's expense and to the detriment of the instructional program. The Board avers that it was under no statutory obligation to grant its teachers personal leave but that, having done so, it has interpreted its policy on personal leave reasonably as applies to petitioner. In this regard, the Board asserts that it is under obligation to interpret its policy uniformly and consistently for all of its teachers regardless of religious affiliations or observances of religious holidays. (*Id.*, at p. 4) It is argued that to do otherwise would be contrary to *Ebler v. City of Newark,* 54 *N.J.* 487 (1969) wherein the Supreme Court determined that the City of Newark improperly allowed its Jewish employees six principal holy days per year as leave time without charging such days against their accumulated leave time, while at the same time charging each of its non-Jewish employees with each and every day of leave taken throughout the entire year. Therein, the Supreme Court stated that:

"***all members of the force must be treated equally.***" (at p. 491)

Thus, the Board concludes that personal leave time is limited to those days in the school year which will not extend religious holidays for persons of any religious persuasion regardless of whether school is open or closed on those holidays. (Respondent's Brief, at pp. 5-6)

In support of its contention that the interpretation of its policy was reasonably applied to petitioner, the Board cites *Florence P. Greenberg v. Board of Education of the City of New Brunswick, Middlesex County*, 1963 *S.L.D.* 59.

The Commissioner has carefully considered the facts in the record and the arguments and citations of law and equity set forth by the parties. The Commissioner finds the three-pronged test of validity of a board's rule as set forth in *Angell*, *supra*, is applicable herein. This test of validity requires that a rule be reasonable, consistent with the provisions of both the education laws and the rules of the State Board, and directed toward maintaining and supporting a thorough and efficient system of public education. Angell at 143-147 It logically follows that the interpretation and application of a rule or policy by the Board must pass these same tests.

In *Greenberg*, *supra*, the Commissioner examined a rule of the New Brunswick Board which stated that a teacher who took personal leave without pay on December 21 and 22 prior to the Christmas holidays automatically forfeited pay for December 23 which was designated as a paid holiday in the yearly calendar. (at p. 60) Therein, the Commissioner determined that the rule was reasonable and consistent with the education laws and the rules of the State Board. He further determined that:

> "***[T]he rule meets the third test, stated above, in that its effect is toward the maintenance and support of a thorough and efficient system of public schools. The purpose of the rule is to prevent breakdowns in the operation of the school program occasioned by excessive staff absence. That this is a valid purpose appears obvious.***" (at p. 61)

In the instant matter, the policy of the Board similarly meets this three-pronged test, *ante*, and represents a reasonable and valid exercise of the Board's discretionary authority. It is the Board's interpretation of its established policy as applied to the factual context of petitioner's absence on September 16, 1974, which remains to be carefully scrutinized.

The Board's interpretation of its policy is obviously aimed at maintaining a thorough and efficient educational program by discouraging its regular teachers from being absent continuously for more days than the Rosh Hashana holiday itself. In this respect the Board's interpretation is consistent with a restriction upheld as reasonable by the Commissioner in *Greenberg, supra*. Similarly, the Commissioner finds no inconsistency in the Board's interpretation with respect to either the education statutes, Title 18A, Education, or the State Board rules as found in *N.J.A.C.* 6. However, it must also be determined whether the Board's interpretation of its personal leave policy is reasonable.

The Board clearly has the authority to establish a policy regarding personal leave. *N.J.S.A.* 18A:11-1 *et seq*. Such authority to enact rules and regulations embraces the power to administer them. The Commissioner will not substitute his judgment for that of a board of education in such matters when a board acts in good faith, free from arbitrariness, capriciousness and unreasonableness. *Boult and Harris v. Board of Education of Passaic*, 1939-49 *S.L.D.* 7, affirmed State Board 15, affirmed 135 *N.J.L.* 329 (*Sup. Ct.* 1947), affirmed 136 *N.J.L.* 521 (*E. & A.* 1948) However, in *James McCabe v. Board of Education of the Township of Brick, Ocean County*, 1974 *S.L.D.* 299, affirmed State Board 315, affirmed Docket No. A-3192-73 New Jersey Superior Court, Appellate Division, April 2, 1975 (1975 *S.L.D.* 1073), it was stated that:

> "***The Commissioner has in numerous instances been called upon, in his quasi-judicial capacity, to make determinations regarding the reasonableness of the actions of local boards of education. The Commissioner will, in determining controversies under the school laws, inquire into the reasonableness of the adoption of policies, resolutions, or bylaws, or other acts of local boards of education in the exercise of their discretionary powers, but will not invalidate such acts unless unreasonableness clearly appears.***" (at pp. 307-308)

See also *Alfred Zitani v. Board of Education of the Township of Willingboro, Burlington County*, 1975 *S.L.D.* 439.

It is clear that a stated policy of a board of education must be reasonable. It follows that the interpretation and implementation of that policy must also be reasonable. Guidelines for interpretation of a policy were set forth in *Harry A.*

Romeo, Jr. v. Board of Education of the Township of Madison, Middlesex County, 1973 *S.L.D.* 102, as follows:

> "***In ascertaining the meaning of a policy, just as of a statute, the intention is to be found within the four corners of the document itself. The language employed by the adoption should be given its ordinary and common significance. *Lane v. Holderman*, 23 *N.J.* 304 (1957) Where the wording is clear and explicit on its face, the policy must speak for itself and be construed according to its own terms. *Duke Power Company, Inc. v. Edward J. Patten, Secretary of State, et al.*, 20 *N.J.* 42, 49 (1955); *Zietko v. New Jersey Manufacturers Casualty Ins. Co.*, 132 *N.J.L.* 206, 211 (*E. & A.* 1944); *Bass v. Allen Home Development Co.*, 8 *N.J.* 219, 226 (1951); *Sperry & Hutchinson Co. v. Margetts*, 15 *N.J.* 203, 209 (1954); 2 *Sutherland, Statutes and Statutory Construction* (*3rd ed.* 1943), *section* 4502***" (at p. 106)

A careful examination of the Board's policy on personal leave reveals that no reference is made therein to religious holidays. Nor is there a restriction that indicates that a teacher may not take three or more personal leave days in succession. Absent a clear statement of such restrictions within the four corners of the policy statement itself, it is not reasonable to assume that such restrictions apply. If the prior Board which wrote and adopted the existing policy on personal leave had intended to restrict the use of personal leave on days contiguous to religious holy days, it could and should have clearly stated such intention. Absent such restriction and absent a stated limitation which would prevent a teacher from taking three consecutive personal leave days with pay, petitioner was entitled to personal leave for September 16, 1974. The Commissioner so holds.

Policy statements are for the benefit of the Board, its administrative agents, other teaching staff members and the public. As such they must be explicit, easily understood, free from ambiguity and fully comprehensive of the intent of the employing board of education. As changing patterns develop within staff relationships, these policies must frequently be reviewed and modified to meet emerging conditions.

The Commissioner is not unsympathetic to the Board's commendable desires to curb unwarranted lengthy personal leaves for its regular teaching staff members. Accordingly, the Board is encouraged to modify its policies in such manner as to explicitly make known to its employees and others those restrictions which are found to be necessary in the interests of a thorough and efficient educational program. In this regard, while not suggesting that a policy statement such as that in *Greenberg, supra,* would best meet the educational needs in the Shrewsbury School District, the Commissioner calls attention to the explicit detail shown in that policy which serves as an example of the specificity which such policies should exhibit.

The Commissioner, having previously determined that under existing Board policy petitioner is entitled to the relief she seeks, directs the Board of

Education of the Borough of Shrewsbury to pay petitioner her salary for September 16, 1974, and to charge her account with one day of personal leave for that date.

COMMISSIONER OF EDUCATION

January 8, 1976

Joan Driscoll,

Petitioner,

v.

Board of Education of the City of Clifton, Passaic County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Goldberg & Simon (Theodore M. Simon, Esq., of Counsel)

For the Respondent, Sam Monchak, Esq.

Petitioner was employed by the Board of Education of the City of Clifton, hereinafter "Board," as a substitute teacher for the entire 1973-74 academic year, and was paid at the *per diem* rate of twenty-three dollars. She asserts that her employment and rate of pay was improper considering that she taught full time. She alleges, also, that the Board did not notify her that she would not be reemployed, in violation of statutory requirements.

A hearing was conducted on December 9, 1974 in the office of the Somerset County Superintendent of Schools, Somerville, before a hearing examiner appointed by the Commissioner of Education. Briefs were filed thereafter. The report of the hearing examiner follows:

There is no disputed issue of material fact. Petitioner holds a standard teaching certificate issued by the State Board of Examiners, and she applied for a teaching position in Clifton in January or February 1973. There was no employment offer; however, she received a call in August to sign for substitute teaching which she did. (Tr. 19-21,23)

She received another call on Wednesday, September 5, 1973 to report for the first day of school, Thursday, September 6, as a substitute teacher. She accepted this appointment and the salary of twenty-three dollars a day as a substitute teacher. (Tr. 20-24) She taught first grade in School No. 15 for the

entire academic year which terminated on June 30, 1974. She was not offered a contract, according to the Superintendent of Schools, because there was no vacancy. (Tr. 56-57)

Petitioner understood she was a substitute teacher; she was paid as a substitute teacher; she was not paid for any holidays, and she was not paid for one and one-half days' absence when she was ill. She was not notified prior to April 30, 1974 about her employment status for the 1974-75 academic year. (Tr. 25-27)

The record shows that a tenured teacher, hereinafter "E.V.," was originally employed to teach first grade in School No. 15. She was granted a maternity leave of absence by the Board which should have terminated on August 31, 1974; however, she requested that her leave be shortened to August 31, 1973, and the Board granted her request. E.V. thereafter refused her assignment as first grade teacher in School No. 15, demanding instead a teaching position in School No. 5. There being no vacancy in School No. 5, E.V.'s request was turned down; therefore, she requested that the Board extend her leave to August 31, 1974, its original termination date, but the Board refused. (R-3A, B, C, and D; Tr. 57-59, 62) E.V. was directed to report for work or, otherwise, resign. (Tr. 60)

The Superintendent testified that petitioner was assigned temporarily as a substitute teacher because of E.V.'s anticipated return. The record shows that E.V. was directed to report for work the day before school opened for pupils and that she did not report. (R-3B; Tr. 59) Thereafter, on September 13, 1973, E.V. was sent the following letter:

> "The Board of Education last evening reviewed your case and reaffirmed its decision approving your request for early return from maternity leave to take effect September 1, 1973. Your request for rescission was not approved.
>
> "Your assignment to School No. 15, Grade 1, for 1973-74, is proper and legal and necessary for the best interests of the school system. *However, your failure to report to your assignment as directed is deemed as absent without leave and can be legally declared as abandonment of position.* In view of your past service, this is a position the Board would be loathe to take.
>
> "Therefore, *please notify this office immediately following receipt of this communication that you will report within two working days to your 1973-74 assignment to avoid the necessity of taking the legal steps outlined.* However, due to your past service, should you desire to resign, a letter to that effect *received within the time period outlined* will be accepted without prejudice and your personnel record noted that the matter of resignation was voluntary on your part." (*Emphasis added.*) (R-3D)

This letter advised E.V. that her refusal to report to work would be "legally declared as abandonment of position." It also directed E.V. to "report within two working days to your 1973-74 assignment to avoid the necessity of taking the legal steps outlined." Despite this warning, E.V. did nothing until August 17, 1974, when she sent in her resignation letter (R-3E) which was accepted by the Board on September 20, 1974. (R-3F)

In the light of these circumstances, petitioner asserts that she was the regular teacher for grade one in School No. 15 and not a substitute as initially employed.

The issue to be decided herein is whether or not petitioner was a regular or substitute teacher during 1973-74; and, if she was a regular teacher, whether she was entitled to notice pursuant to *N.J.S.A.* 18A:27-10 which reads as follows:

> "On or before April 30 in each year, every board of education in this State shall give to each nontenure teaching staff member continuously employed by it since the preceding September 30 either
>
> > a. A written offer of a contract for employment for the next succeeding year providing for at least the same terms and conditions of employment but with such increases in salary as may be required by law or policies of the board of education, or
> >
> > b. A written notice that such employment will not be offered."

In the hearing examiner's judgment, petitioner's original employment was that of a substitute teacher. She knew this and accepted the terms of that employment. However, it is equally clear that the Board knew by mid-September 1973 that it had an employment problem with E.V. This is evidenced by the Superintendent's letter (R-3D) of September 13 warning E.V. of legal abandonment of her position and demanding that she report to work in two days. In spite of the fact that the Board received no communications whatever from E.V. until her August 17, 1974 resignation letter practically a year later, it never declared the grade one position at School No. 15 vacant, nor did it take the implied affirmative legal action against E.V. The Board simply accepted the *status quo*, almost as if E.V. could return to her position any time she chose to do so, and continued petitioner as a *per diem* substitute for the remainder of the school year.

This inaction by the Board, done apparently without malice or bad faith, in the hearing examiner's judgment nevertheless resulted in the inequitable employment of petitioner. The Board should have known on or soon after September 15, 1973, or certainly by October 15, 1973, more than a month after it demanded that E.V. return to work, that E.V. had for all practical purposes, abandoned her position. Her August 17, 1974 letter of resignation appears to be no more than a self-serving document designed to protect her reputation as a teacher employee.

The record shows quite clearly that petitioner carried out all the duties of a regular teacher for a year, missing only one and one-half days for which she was not paid. She marked and graded papers, prepared and distributed report cards, filled out cumulative records at the end of the year, prepared two assembly programs, attended PTA meetings, held parent conferences, made lesson plans, gave remedial help to pupils after school, attended a reading seminar sponsored by the Board, attended faculty meetings, and was evaluated by her supervisor. (Tr. 13-15) The Board does not deny that she performed these duties.

The Commissioner and the courts have previously considered the distinction between a substitute and a regular teacher.

In *Juanita Zielenski v. Board of Education of the Town of Guttenberg, Hudson County,* 1970 *S.L.D.* 202; reversed State Board of Education, 1971 *S.L.D.* 664; affirmed Superior Court, 1972 *S.L.D.* 692, the State Board of Education said in the course of its opinion, which reversed the decision of the Commissioner that:

> "****Schulz v. State Board of Education,* 132 *N.J.L.* 345 (*E. & A.*, 1945) held that substitute teachers were not included in the phrase 'all teaching staff members including all teachers' as used in the tenure statute. Nevertheless, other cases make it clear that whether an employment is as a regular teacher or substitute teacher is not to be determined by the designation given the employment by an employing board, but by an examination of the factual picture presented. *Downs v. Board of Education of Hoboken*, 13 *N.J. Misc.* 853 (1935); *Board of Education of Jersey City v. Wall et al.,* 119 *N.J.L.* 308 (*Sup. Ct.* 1938) The testimony was polaristic as to whether the five-month employment of petitioner was as a regular teacher or as a substitute. *We must,* therefore, *turn* our *attention* to the evidence concerning the *nature of that employment* and a review of pertinent statutes and judicial decisions to determine the character of that employment.***" (*Emphasis supplied.*) (1971 *S.L.D.* at p. 665)

The "nature" of petitioner's employment has been discussed, *ante*. However, in support of its view that petitioner was a substitute, the Board cites *Schulz, supra; Zielenski, supra; Zimmerman v. Board of Education of the City of Newark,* 38 *N.J.* 65 (1962); and the minority opinion of the State Board of Education in *Nicoletta Biancardi v. Board of Education of the Borough of Waldwick*, 1974 S.L.D. 360, affirmed State Board of Education 368, minority opinion 368 (now pending before Superior Court, Appellate Division).

In *Wall v. Board of Education of Jersey City, Hudson County,* 1938 *S.L.D.* 614, reversed State Board of Education 618, affirmed 119 *N.J.L.* 308 (*Sup. Ct.* 1938), the State Board said:

> "***It is a misnomer to apply the name 'substitute' to teachers who are steadily employed. We agree with the following statement in the Commissioner's opinion:

> 'The word 'substitute' does not describe adequately the type of employment of petitioner***. It denotes one put in the place of another, or one acting for or taking the place of another. The petitioner and other so-called substitutes were not acting in place of teachers who were absent, but were assigned to positions in practically the same manner as teachers under tenure in the school system.***' (at p. 619)

> "***The statute is silent as to the rate or method of payment. It simply requires 'employment' for the period stated. The appellant was certainly 'employed' during the period of her teaching in Jersey City. She taught the same classes in the high schools through the years of her employment. That she was paid at a per diem rate instead of by the month or the year does not change the fact that she had regular, continuous employment.*** (at p. 621)

> "***[T]he *statute* provides a certain probationary period during which boards of education may determine whether the work of the teacher is of a character to induce it to employ her beyond that period.
>
> "They cannot *** 'legally evade' the statute *** by providing for a further probationary period.***" (*Emphasis in text.*) (at p. 622)

> "***[T]hough the appellant was termed a 'substitute,' her regular continuous teaching of the same classes in the same schools for over three years made her in fact a regular steadily employed teacher regardless of the terms used to describe her position. It is the actual realities of the situation which count, not the words used to describe them.***" (at pp. 622-623)

In the hearing examiner's judgment, petitioner was employed as a substitute but should have been offered a regular contract on, or soon after, October 15, 1973. That date is selected for the reason that it is thirty days after the Board's demand (R-3D), dated September 13, 1973, that E.V. report to work within the next two days. Thirty days is more than a fair period of time in which to expect an answer from an employee. As stated earlier, E.V. did not respond to this demand and the Board took no further action.

The hearing examiner recommends, therefore, that petitioner was entitled to a regular employment contract as a first-year teacher beginning October 15, 1973 with all the emoluments attached to such employment. However, having made this recommendation, the hearing examiner recommends also, that petitioner's prayer for a 1974-75 contract based on the fact that she did not receive written notice from the Board concerning her non-reemployment, be dismissed. The Board acted in good faith and believed petitioner was a substitute. (At the time of the hearing she was working occasionally as a substitute teacher in Clifton.) (Tr. 16)

This concludes the report of the hearing examiner.

* * * *

The Commissioner has read the report of the hearing examiner and the exceptions filed thereto by counsel pursuant to *N.J.A.C.* 6:24-1.16.

The Commissioner rejects any consideration of the documents submitted by petitioner which are attached to her exceptions. Such a submission is improper. If these referred to documents warranted consideration, they should have been offered to the hearing examiner during the hearing and subjected to scrutiny by the Board.

In all other regards, the Commissioner adopts the report of the hearing examiner with minor modification. The record makes it quite clear that E.V. had completely disregarded the Board's directive that she notify it within two working days of September 13, 1973, whether or not she would return to work as directed. (R-3D) E.V.'s refusal to respond coupled with the Board's inaction, in effect, was prejudicial to petitioner in that petitioner was, as the hearer asserted, performing the duties of a regular teacher with none of the emoluments of that position. Therefore, it is entirely reasonable to conclude, at the very least, that petitioner was entitled to a regular teaching contract beginning one month after E.V. had refused to respond to the Board's directive. E.V. had, in effect, abandoned her position. She had no entitlement to be absent and the Board's inaction in filing tenure charges against E.V. pursuant to *N.J.S.A.* 18A:6-10 *et seq.* cannot now be defended so that petitioner would effectively remain a "substitute" teacher for the entire school year. If E.V. had, in fact, resigned under one option given her by the Board (R-3D), there would clearly have been a vacancy and petitioner clearly would not have been a substitute even by the Board's standards. The Board draws a distinction between E.V.'s refusal to offer her resignation and the fact that she ignored the Board and its directives for more than an entire school year while petitioner worked regularly as a substitute. She was not even paid for one and one-half days for illness.

The applicable law cited, *ante*, clearly establishes petitioner as a regular teacher and not a substitute. The modification to the hearing examiner's report is that the effective date of petitioner's contract award is to be October 15, 1973. This date is approximately thirty days following the "two working days" deadline given to E.V. by the Board in which E.V. was directed to respond. (R-3D)

The Commissioner, therefore, directs the Board to pay petitioner the difference between the salary she received as a substitute and what she would have received as a regular teacher at her appropriate step on the teachers' salary guide for the period of October 15, 1973 through June 30, 1974. Petitioner is entitled, also, to all other emoluments granted regular teachers during the 1973-74 academic year.

Petitioner's reliance on *N.J.S.A.* 18A:27-10 to support her demand for a contract to teach for the 1974-75 academic year is without merit, although she was continuously employed by the Board since the preceding September 30. It may be stated that the failure of a Board to give "written notice" that employment will not be offered results in an automatic contract for the teacher for the

next academic year. *Thomas Aitken v. Board of Education of the Township of Manalapan, Monmouth County*, 1974 *S.L.D.* 207; *Ronald Elliott Burgin v. Board of Education of the Borough of Avalon, Cape May County*, 1974 *S.L.D.* 396 However, *N.J.S.A.* 18A:27-10 must be read *in pari materia* with *N.J.S.A.* 18A:27-11 and 12 which read as follows:

> *N.J.S.A.* 18A:27-11
>
> "Should any board of education fail to give to any nontenure teaching staff member either an offer of contract for employment for the next succeeding year or a notice that such employment will not be offered, all within the time and in the manner provided by this act, then said board of education shall be deemed to have offered to that teaching staff member continued employment for the next succeeding school year upon the same terms and conditions but with such increases in salary as may be required by law or policies of the board of education."
>
> *N.J.S.A.* 18A:27-12
>
> "If the teaching staff member desires to accept such employment he shall notify the board of education of such acceptance, in writing, on or before June 1, in which event such employment shall continue as provided for herein. *In the absence of such notice of acceptance the provisions of this article shall no longer be applicable.*" (*Emphasis added.*)

Therefore, even in the case of an automatic award of a contract pursuant to statute, there must be an acceptance of that contract by the teacher. The record herein discloses that there was no acceptance of the contract by petitioner. The Commissioner commented about contract awards in an earlier decision as follows:

> "***Once the employment was offered and accepted, the action of the parties effectively established a contractual relationship.***" *Cossaboon v. Board of Education of the Township of Greenwich, Cumberland County*, 1974 *S.L.D.* 706, 708

The Commissioner determines, therefore, that petitioner's prayer for relief in the form of an employment contract for the 1974-75 academic year must be denied. The Board of Education of the City of Clifton is directed to compensate petitioner as hereinbefore stated.

COMMISSIONER OF EDUCATION

January 8, 1976

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, January 8, 1976

For the Petitioner-Appellee, Goldberg, Simon & Selikoff (Theodore M. Simon, Esq., of Counsel)

For the Respondent-Appellant, Sam Monchak, Esq.

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

May 5, 1976
Pending before Superior Court of New Jersey

James W. Dennis,

Petitioner,

v.

Board of Education of the City of Long Branch, Monmouth County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Joseph N. Dempsey, Esq.

For the Respondent, McOmber & McOmber (Richard D. McOmber, Esq., of Counsel)

This matter is before the Commissioner of Education on a Motion for Summary Judgment and Memoranda of Law submitted by counsel.

Petitioner, a mathematics teacher in the school system operated by the Board of Education of the City of Long Branch, hereinafter "Board," preferred charges before the Board on May 8, 1975, against his mathematics department chairman, pursuant to *N.J.S.A.* 18A:6-10 *et seq.* The thrust of the charges was that on November 18, 1974, while in the school building conferring with the department chairman, petitioner was struck about the body, pushed, and wrestled to the floor by the chairman.

N.J.S.A. 18A:6-11 provides that:

> "If written charge is made against any employee of a board of education***the board shall determine by majority vote of its full membership whether or not such charge and the evidence in support of such charge would be sufficient, if true in fact, to warrant a dismissal or a reduction in salary, in which event it shall forward such written charge to the commissioner, together with certificate of such determination."

The Board took no action for a period of forty-five days to certify the charges preferred by petitioner and now holds that, pursuant to *N.J.S.A.* 18A:6-13, it may no longer act upon these charges. This statute provides that:

> "If the board does not make such a determination within 45 days after receipt of the written charge, *** the charge shall be deemed to be dismissed and no further proceeding or action shall be taken thereon."

Petitioner prays the Commissioner to certify the charges on his own Motion or, in the alternative, to direct the Board to certify the charges in order that the matter may proceed to a hearing pursuant to *N.J.S.A.* 18A:6-16.

Petitioner argues that the character of the charges embracing physical assault between faculty members, if proven to be true in fact, would indeed be of sufficient import to justify reduction in salary or dismissal. In support of this contention, petitioner cites *James McCabe v. Board of Education of the Township of Brick, Ocean County*, 1974 *S.L.D.* 299, affirmed State Board 315, affirmed New Jersey Superior Court Docket No. A-3192-73, Appellate Division April 2, 1975 (1975 *S.L.D.* 1073).

The Board opposes petitioner's Motion for Summary Judgment on the grounds that petitioner's charges are insufficiently severe to warrant dismissal or reduction in salary of its department chairman.

Similarly, the department chairman, allowed by common consent of petitioner, the Board and the Commissioner to submit a memorandum of law, argues that the charges are of a minor nature and insufficient, even if true, to warrant dismissal or reduction in his salary. He has been a respected member of the Board's teaching staff for many years. Counsel further argues that, absent certification of the charges by the Board, the Commissioner is without authority to conduct a hearing in the matter.

It is apparent that the Board, confronted by the preferment of charges by petitioner against its department chairman, exercised its discretion by not acting on those charges for a period of forty-five days. Having made no determination during that time, the Board, in effect, dismissed the charges pursuant to *N.J.S.A.* 18A:6-13.

The Commissioner is confronted with the narrow issue of whether this exercise of discretion on the part of the Board was reasonable or, in the alternative, whether the within Petition of Appeal has merit.

The Commissioner has consistently held that:

> "***[I]t 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.***" *Boult and Harris v. Board of Education of Passaic*, 1939-49 *S.L.D.* 7, 13, aff'd State Board of Education 15, aff'd 135 *N.J.L.* 329 (*Sup. Ct.* 1947), 136 *N.J.L.* 521 (*E. & A.* 1948)

Similarly, the Courts have stated that:

> "***When an administrative agency created and empowered by legislative fiat acts within its authority, its decision is entitled to presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable.***" *Thomas v. Morris Township Board of Education*, 89 *N.J. Super.* 327, 328 (*App. Div.* 1965), aff'd 46 *N.J.* 581 (1966)

And,

> "***When an administrative agency has acted within its authority, its actions will not generally be upset unless there is an affirmative showing that its judgment was arbitrary, capricious or unreasonable. ***" *Quinlan v. Board of Education of North Bergen,* 73 *N.J. Super.* 40, 47 (*App. Div.* 1962)

However, the Commissioner has likewise stated in *Ruch v. Board of Education of Greater Egg Harbor Regional High School District,* 1968 *S.L.D.* 7, dismissed by the State Board of Education, 1968 *S.L.D.* 11, affirmed by the New Jersey Superior Court, Appellate Division, 1969 *S.L.D.* 202, that

> "***A board of education's discretionary authority is not unlimited, however, and it may not act in ways which are arbitrary, unreasonable, capricious or otherwise improper ***." (at p. 9)

Similarly it was said in *John J. Kane v. Board of Education of the City of Hoboken, Hudson County*, 1975 *S.L.D.* 12 that:

> "***[T]he Commissioner will not substitute his judgment for that of a local board when it acts within the parameters of its authority. The Commissioner will, however, set aside an action taken by a board of education when it is affirmatively shown that the action was arbitrary, capricious, or unreasonable. See *Eric Beckhusen et al. v. Board of Education of the City of Rahway et al., Union County,* 1973 *S.L.D.* 167; *James Mosselle v. Board of Education of the City of Newark, Essex County,*

1973 *S.L.D.* 176; *Luther McLean v. Board of Education of the Borough of Glen Ridge et al., Essex County*, 1973 *S.L.D.* 217, affirmed State Board of Education March 6, 1974.***" (at p. 16)

A comprehensive resume of the Commissioner's authority to review the determination of a board of education with such a factual context as that present herein is set forth in *McCabe, supra.* Therein it was found that a board of education had abused its discretionary rights by improperly determining not to certify charges of unprofessional conduct preferred against a professional staff member. Thereupon, the Commissioner ordered that board to certify those charges. That determination was affirmed by the State Board and the New Jersey Superior Court, Appellate Division. Similarly, herein, the reasonableness of the Board's action is subject to review pursuant to *N.J.S.A.* 18A:6-9 *et seq.* The Commissioner has jurisdiction. He so holds.

The charges preferred allege that the department chairman in violent manner accosted petitioner during a conference relative to the transfer of a pupil. On occasion the Commissioner has been called upon to determine disputes which have arisen in the public schools as the result of anger and violent action. Without exception, the Commissioner has voiced disapproval when tenured employees have inflicted corporal punishment in violent manner upon pupils. In certain instances it has been found that such actions were so gross as to merit dismissal. *In the Matter of the Tenure Hearing of Walter Kizer, School District of the Borough of Haledon, Passaic County,* 1974 *S.L.D.* 501 In other instances the Commissioner has determined that the lesser penalty of reduction in salary was warranted. *In the Matter of the Tenure Hearing of Ronald Puorro, School District of the Township of Hillside, Union County*, 1974 *S.L.D.* 755 In yet other instances it was determined that neither penalty was appropriate.

The Commissioner considers a charge of physical abuse by a professional employee of a school district against a fellow professional to be no less meritorious of administrative review and determination than is a charge of corporal punishment upon a pupil. Such review must be made by the Commissioner. *In the Matter of the Tenure Hearing of David Fulcomer, Holland Township, Hunterdon County*, 93 *N.J. Super.* 404 (*App. Div.* 1965); *McCabe, supra*

The Board, herein, was called upon to consider what must be characterized as substantial charges against its tenured employee. Given this charge and the applicable body of case law hereinbefore set forth, the Commissioner must hold as he did in *McCabe, supra,* that:

"***[I]n the Commissioner's judgment the charges are sufficient, if found true as the result of a plenary hearing, to warrant the penalties of dismissal or reduction in salary.***"

(at p. 314)

The Commissioner similarly determines in the instant matter that, absent mitigating factors, charges preferred before the Board are sufficient, if found to be true in fact, at a plenary hearing, to warrant the penalty of dismissal or

reduction in salary. The charges are, therefore, remanded to the Board of Education of the City of Long Branch which Board is directed to certify the said charges to the Commissioner of Education within forty-five days of the date of this decision. It is so ordered.

COMMISSIONER OF EDUCATION

January 20, 1976

Board of Education of the Township of Weehawken,

Petitioner,

v.

Municipal Council of the Township of Weehawken, Hudson County.

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Le Roy D. Safro, Esq.

For the Respondent, Farmer and Campen (George B. Campen, Esq., of Counsel)

Petitioner, hereinafter "Board," appeals from an action of respondent, hereinafter "Council," taken pursuant to *N.J.S.A.* 18A:22-37, certifying to the Hudson County Board of Taxation a lesser amount of appropriations for the 1975-76 school year than the amounts proposed by the Board in its budget, which was rejected by the voters. The facts of the matter were submitted in the form of written exhibits, and a hearing was held on September 16, 1975 at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner of Education. Prior to the hearing, the Board filed supplemental written data and testimony. The report of the hearing examiner follows:

At the annual school election held March 11, 1975, the Board submitted to the electorate proposals to raise $3,034,823 by local taxation for current expense and $59,044 for capital outlay costs of the school district. These items were rejected by the voters and the Board subsequently submitted its budget to Council for determination of the amounts necessary for the operation of a thorough and efficient public school system in the Township of Weehawken for the 1975-76 school year, pursuant to the mandatory obligation imposed on Council by *N.J.S.A.* 18A:22-37.

After consultation with the Board, Council made its determination and certified to the Hudson County Board of Taxation a total sum of $2,868,867 for current expense and capital outlay costs for the 1975-76 school year. This total sum was a reduction of $225,000 from the amount the Board had determined was required and the Board then filed the instant Petition of Appeal.

The Board contends that Council's action was arbitrary and capricious and documents its need for the reductions recommended by Council with written testimony and further oral exposition at the time of the hearing. Council maintains that it acted properly and after due deliberation, and that the items reduced by its action are in the best interest of the Township and will provide a thorough and efficient educational system for the school year 1975-76.

The Board's budget is submitted as a Planned Programmed Budgeting System (PPBS), as well as specific line item accounts as prescribed by "The Chart of Accounts," financial coding system published by the Department of Education, Division of Administration and Finance.

As part of its determinations, Council suggested items of the budget in which it believed economies could be effected without harm to the educational program as follows:

J-1 CURRENT EXPENSE:

Item or Program	**Recommended Reduction**
Salaries–All Divisions	$125,000
Instruction	
Libraries and Audiovisual Materials	5,000
Operation	
Supplies	2,500
Maintenance	
Replacement of Equipment	4,000
New or Additional Equipment	5,000
Fixed Charges	
Other Fixed Charges	50,000
Student Body Activities	1,500
Total	$193,000

L CAPITAL OUTLAY:

Buildings	5,000
Equipment–Regular	5,000
Total	$ 10,000

CURRENT EXPENSE:

Appropriation Balance	$ 22,000

These reductions will be considered by the Commissioner's representative in the body of this report. At this juncture, however, the hearing examiner finds that a review of the principles and guidelines for determining budget appeals is necessary for a better understanding of the budget herein.

In *Board of Education of East Brunswick v. Township Council of East Brunswick*, 48 *N. J.* 94 (1966), the Court commented as follows:

> "***The governing body may, of course, seek to effect savings which will not impair the educational process. But its determinations must be independent ones properly related to educational considerations rather than voter reactions. In every step it must act conscientiously, reasonably and with full regard for the State's educational standards and its own obligation to fix a sum sufficient to provide a system of local schools which may fairly be considered thorough and efficient in view of the makeup of the community. Where its action entails a significant aggregate reduction in the budget and a resulting appealable dispute with the local board of education, it should be accompanied by a detailed statement setting forth the governing body's underlying determinations and supporting reasons.***" (at pp. 105-106)

The hearing examiner does not find the reduction of the budget by Council to be arbitrary or capricious; therefore, the hearing examiner will deal *seriatim* with Council's proposed reductions and will make recommendations to the Commissioner.

J-1 CURRENT EXPENSE:

Salaries – All Divisions *Reduction $125,000*

The total recommended reduction of $125,000 is spread among all of the budgeted salary sub-categories. Council asserts "***that Weehawken enjoys one of the lowest teacher-student ratios in the country including private schools even after the contracts of ten teachers were terminated.***" (Council's Answer to Petition, par. 15) This reduction in staff is due, in part, to the loss of pupils from the receiving district of Secaucus.

The Board avers that the reduction of the above-mentioned teaching staff positions was taken into consideration at the time of the submission of the original budget in March 1975. Testimony by the Superintendent revealed that the actual number of positions reduced was nine, rather than ten, as stated by Council. (Tr. 8, 95)

Council, in its Answer to Petition, continues:

> "***Further, the above mentioned salary reductions can also be effectuated by granting no salary increases to any personnel for the coming year. This is in line with the respondent's policy with the municipal employees where no municipal employee was given a salary raise for the coming year, and it should further be pointed out that the unemployment

> rate in Weehawken has exceeded ten percent and at this time it would be unfair and unjust to the taxpayers to allow for any increases in personnel's salaries.***" (at par. 15)

The hearing examiner opines that such an argument fails to meet the prescription of the *East Brunswick* decision to make an independent judgment related to educational considerations rather than voter reaction in its argument.

The Superintendent testified that a negotiated agreement was reached and accepted by the teachers' association in March 1975 at a cost of $109,000, representing approximately a five percent increase exclusive of increments and fringe benefits. Further testimony revealed that negotiations with noninstructional personnel and administrators were continuing at the time of the hearing. Further, Council's proposal that no salary increases be granted is counter to the mandate to negotiate, in good faith, with the employees pursuant to *N.J.S.A.* 34:13A-1 *et seq.* In *Board of Education of the Township of South Brunswick v. Township of South Brunswick*, 1968 *S.L.D.* 168, 172, the Commissioner said:

> "***It is clear that the funds necessary to the implementation of salary policies adopted by the board of education must be provided and are not subject to curtailment. *N.J.S.* 18A:29-4.1 See also *Board of Education of Cliffside Park v. Mayor and Council of Cliffside Park* [1967].***"

The hearing examiner finds that the need for the funds proposed for reduction has been established by the Board. Accordingly, the hearing examiner recommends the restoration of $125,000 to all salary accounts.

INSTRUCTION

Libraries and Audiovisual Material *Reduction $5,000*

The testimony revealed that the Board recently joined into membership with the newly formed Hudson County Audio Visual Aids Commission. The amount of $1,620 is necessary to meet this obligation. This was computed by using the base figure of 2,160 pupil enrollment at the rate of $.75 per pupil.

The hearing examiner therefore recommends the restoration of $1,620 to the J230 line item account. The Board having put forth no further convincing defense in the instant matter, the hearing examiner recommends that the remaining $3,380 reduction stand.

Operation

Supplies *Reduction $2,500*

Council recommended a $2,500 reduction for supplies, while the Board in its budget presentation reduced line items J240 Teaching Supplies and J250A Miscellaneous Supplies for Instruction by $10,030 in the 1975-76 budget as compared with the 1974-75 annual budget.

The hearing examiner finds that the Board has established its need for the funds proposed for reduction herein and, accordingly, recommends the restoration of $2,500.

Maintenance

Replacement of Equipment	*Reduction $4,000*
New or Additional Equipment	*Reduction $5,000*

Council recommended an unspecified reduction of $9,000 in these line item accounts.

The Board argues that the total amount budgeted represents the funds necessary for the replacement of equipment and furniture for both instructional and noninstructional uses. The Board asserts that, if the proposed reduction is sustained, its educational standards would be affected in a negative manner.

The hearing examiner finds that the Board has established its need for the funds proposed for reduction herein and, accordingly, recommends the restoration of $4,000 for replacement of equipment and $5,000 for new or additional equipment.

Fixed Charges

Other Fixed Charges	*Reduction $50,000*

Council objects to the inclusion of funds in the line item account J830 Judgment, and recommends that the $50,000 budgeted be reduced. Council asserts that the funds reflect the amount of potential judgments against the Board, expressing doubts that the Board will ultimately be responsible for this amount at the conclusion of the litigation.

The Board countered this argument by stating that the amounts might be understated. It was further revealed that one case for judgment was under arbitration while six other cases were in various stages of litigation; *i.e.*, hearings before the Commissioner and appeals to the State Board of Education. Representatives of the Board admitted, however, that the precise amounts of funds, if any, necessary for the 1975-76 budget were uncertain.

The Board expended $200 for this line item in 1973-74, with no funds budgeted in the 1974-75 academic year. In the judgment of the hearing examiner, a $50,000 reduction in this line item will not jeopardize the educational program.

The hearing examiner recommends, therefore, that the reduction of $50,000 be sustained.

Student Body Activities *Reduction $1,500*

The hearing examiner finds that $34,988 was expended from the Student Body Activities Account during the 1973-74 academic year, although the Board had budgeted only $22,740. A similar situation was repeated during the 1974-75 academic year with a budget of $25,550 and expenditures of $37,000. The Superintendent testified that the Board attempted to reflect a more realistic budget for these activities by establishing the amount of $30,517 for 1975-76 (Tr. 82-83)

In keeping with these findings, the hearing examiner recommends that $1,500 be restored to this account.

L CAPITAL OUTLAY:

Buildings *Reduction $5,000*

The hearing examiner finds that the age of the newest building providing classroom space to the pupils of the district is thirty-five years. Testimony of the Superintendent, in addition to photographic exhibits, is convincing that extensive efforts to restore and maintain safe and healthful conditions in these older buildings requires the use of these moneys. In keeping with these findings, the hearing examiner recommends that $5,000 be restored.

Equipment – Regular *Reduction $5,000*

This line item has been increased from $72,050 in 1974-75 to $78,251 in the 1975-76 academic year to continue ongoing programs and for two new major projects. The first new project concerns the purchase of food service equipment to expand the existing school lunch program. This expansion will provide an equal opportunity for all children to have a well-balanced lunch on a daily basis under the provisions of *N.J.S.A.* 18A:33-4 and *N.J.A.C.* 6:79-1.8.

The second major budgeted item under this heading involves the purchase of a computer to be used in the instructional program, as well as for business purposes in budgeting and payroll functions. Testimony revealed that through the use of this equipment, an annual savings of $5,000 would be afforded to the Board with the elimination of the contracted payroll service. It was found that although Council argued for the elimination of the computer to reduce this portion of the budget by the $5,000, the equipment under question has been installed and is operative.

Other items were introduced as necessary for the maintenance of safe and desirable conditions of the buildings in use.

The hearing examiner has weighed the arguments set forth by the respective parties and recommends that $5,000 be restored to the capital outlay accounts.

CURRENT EXPENSE:

Appropriation Balance *Reduction $22,000*

The hearing examiner has reviewed the testimony and documentation of the respective parties relative to the unappropriated balance remaining in the Board's current expense account as of June 30, 1975. Testimony revealed that the Board has consistently appropriated the greater amount of its free balance to subsequent budgets, allowing little or no room for emergencies or contingencies. The Superintendent testified that the free unappropriated balance as of june 30, 1975, was "a little over $5,000." (Tr. 44)

The hearing examiner notes the amount remaining in the Board's current expense account and, therefore, recommends that the Commissioner make no further appropriation therefrom in his final determination of the controverted items. The hearing examiner recommends that the $22,000 reduction be restored.

The following table summarizes the recommendations of the hearing examiner:

J-1 CURRENT EXPENSE:

Item or Program	**Restored**	**Not Restored**
Salaries–All Divisions	$125,000	$ – 0 –
Instruction		
Libraries and A-V Materials	1,620	3,380
Operation		
Supplies	2,500	– 0 –
Maintenance		
Replacement of Equipment	4,000	– 0 –
New or Additional Equipment	5,000	– 0 –
Fixed Charges		
Other Fixed Charges	– 0 –	50,000
Student Body Activities	1,500	– 0 –
L CAPITAL OUTLAY:		
Buildings	5,000	– 0 –
Equipment – Regular	5,000	– 0 –
CURRENT EXPENSE:		
Appropriation Balance	22,000	– 0 –
Totals	$171,620	$53,380

In summary, the hearing examiner recommends that $171,620 be restored to the Board's budget, and that a $53,380 reduction by the Council be sustained.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record, the hearing examiner's report and the exceptions thereto filed by both parties pursuant to *N.J.A.C.* 6:24-1.16.

The Board takes exception only to the recommendation of the hearing examiner that Council's reduction of $50,000 in other fixed charges be sustained in full. In this exception the Board argues that the restoration of the funds is necessary due to a decision of the Commissioner to reinstate a tenured teacher, summarily removed by the Board, with all salary benefits and other emoluments due the tenured teacher retroactive to the date of September 1, 1973. *Weehawken Education Association and John J. Corbett v. Board of Education of the Town of Weehawken, Hudson County*, 1975 *S.L.D.* 505, aff'd State Board of Education 512

The Commissioner is constrained to say as he did in *Corbett v. Weehawken, supra*, that the Board knew or should have known that the teaching staff member satisfied the statutory requirements for the accrual of tenure under *N.J.S.A.* 18A:28-5. The expense of this obligation must be met through the use of funds in the unappropriated free balance or through the curtailment of other programs or activities.

Council takes exception to all of the recommendations made by the hearing examiner and argues that the restoration of these funds was made to offset the Board's loss of anticipated State aid funds for the 1975-76 school budget. The Commissioner holds however that Council's total reduction may not be sustained on the basis of such an argument and need not be considered since, as the Commissioner said in *Board of Education of the Township of Madison v. Mayor and Council of the Township of Madison, Middlesex County,* 1968 *S.L.D.* 139:

> "***The problem is one of total revenues available to meet the demands of a school system." (at p. 142)

The Commissioner determines, therefore, that the certification of appropriations necessary for current expense and capital outlay school purposes for 1975-76 made by Council is insufficient by an amount of $171,620 for the maintenance of a thorough and efficient system of public schools in the district. He directs, therefore, that the Hudson County Board of Taxation add the sum of $171,620 to the previous certification of a tax levy for school purposes for the 1975-76 school year made by Council.

COMMISSIONER OF EDUCATION

January 20, 1976

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, January 20, 1976

For the Petitioner-Appellee, LeRoy D. Safro, Esq.

For the Respondent-Appellant, Farmer & Campen (George B. Campen, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

May 5, 1976

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, January 20, 1976

Decided by the State Board of Education, May 5, 1976

For the Petitioner-Appellee, LeRoy D. Safro, Esq.

For the Respondent-Appellant, Farmer & Campen (George B. Campen, Esq., of Counsel)

The Notice of Motion for Reconsideration of this matter is denied.

June 2, 1976
Dismissed Superior Court of New Jersey June 23, 1977

Board of Education of the Township of Lakewood,

Petitioner,

v.

Township Committee of the Township of Lakewood, Ocean County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Rothstein, Mandell & Strohm (Edward M. Rothstein, Esq., of Counsel)

For the Respondent, Ronald E. Burgess, Esq.

Petitioner, the Board of Education of the Township of Lakewood, hereinafter "Board," appeals from an action of the Township Committee of the Township of Lakewood, hereinafter "Committee," certifying to the Ocean County Board of Taxation a lesser amount of appropriations for the 1975-76 school year than the amount proposed by the Board. The facts of the matter were presented at a hearing conducted on October 20, 1975 at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner is as follows:

At the annual school election held March 11, 1975, the voters rejected the Board's proposal to raise $6,656,779 for current expenses and $71,500 for capital outlay by local taxation. The budget was subsequently submitted to the Committee pursuant to *N.J.S.A.* 18A:22-37 for determination of the amounts of funds required to maintain a thorough and efficient school system.

During the course of the consultations between the parties, the Board submitted an interim financial report which provided a detailed analysis of the operating budget for the 1975-76 academic year. The Committee examined this document, made a detailed examination of the Board's rejected budget for 1975-76 and reviewed the Board's previous record with regard to unexpended balances. This action, in the opinion of the Committee, provided the rationale for reducing the Board's $6,656,779 appropriation request to $6,156,779 which comprised a net reduction of $500,000 for the current expenses of the school district.

The pertinent amounts in dispute in this matter may be shown as follows:

	Board's Proposal	Committee's Certification	Amount Reduced
Current Expense	$6,656,779	$6,156,779	$500,000
Capital Outlay	71,500	71,500	– 0 –

The Board alleges that the action of the Committee in so reducing the budget was arbitrary and capricious and that the amount certified will be insufficient to maintain a thorough and efficient system of public education in the district. The Board further alleges that the Committee failed to include a detailed statement setting forth its underlying determinations and supporting reasons for its action to reduce the budget.

The Committee maintains that its action was taken with full regard for the State's education standards in the context of the ability of citizens to pay the cost. They further aver that the underlying reason for the reduction was its determination that, in each instance, past budget experience indicated that the Board's appropriations were in excess of the sums actually required or expended in previous years. The Committee further avers that it did not reduce the line item budget rejected by the voters, but rather arrived at its determination to reduce the total amount for current expenses through the use of free appropriation balances in the current expense, capital outlay and debt service accounts.

It is evident from the testimony of the Committee that its rationale for reducing the budget was not grounded in programmatic criticism but that it was grounded instead in a scrutiny of the amount of free appropriation balances available to the Board and the Board's public announcement in December 1974 of a free balance of approximately $1,457,416. (Answer to Petition of Appeal)

Further testimony revealed that the Board had experienced an accumulation of free balances in prior budgets over a five year period. The school business administrator testified with respect to the audited free balance, available to the Board on June 30 of each year of this period. He listed these balances as follows:

Fiscal Year Ending June 30	**Unappropriated Free Balance**
1970-71	$ 553,266.02
1971-72	699,848.15
1972-73	1,090,843.43
1973-74	1,627,383.40
1974-75	1,781,882.11 (not audited)

(Tr. 5-6, 14)

The Board argues that it applied $600,000 to the 1975-76 budget to reduce the total tax impact on the public and that the remaining unappropriated free balanced is necessary to meet projected contingencies; *i.e.*, the implementation of a desegregation plan with an approximate cost of $100,000 and the withdrawal of Manchester Township pupils during the course of the 1976-77 academic year with a loss of tuition estimated to be $380,000. Additionally, the Board avers it was notified that the State aid formula was decreased in the total amount of approximately $232,700 in current expense and debt service.

The school business administrator testified that salary negotiations had been completed with the major units; *i.e.*, teachers, library personnel, nurses,

custodians, bus drivers, and maintenance personnel, with sufficient funds appropriated to meet these obligations. It was further testified at the hearing, however, that salary negotiations had still not been completed with administrators, secretarial/clerical and security personnel.

It is clear, since both parties agree that the establishment and continuation of programs in the Board's budget is not under question, that the main issue in the instant matter is concerned with the amount of the unappropriated free balance necessary to be maintained in the Board's current expense account for the conduct of an efficient program of education in Lakewood schools in the 1975-76 academic year. The Commissioner has, on prior occasions, considered similar issues and he said in *Board of Education of Penns Grove-Upper Penns Neck Regional School District v. Mayor and Council of the Borough of Penns Grove and Township Committee of the Township of Upper Penns Neck, Salem County,* 1971 *S.L.D.* 372:

> "***The Commissioner is reluctant to set rigid parameters limiting the amount of surplus to a percentage of the school budget; however, he notes with concern the practice of many boards of education in establishing and maintaining surplus to protect against all unforeseen fiscal crises. This practice in an inflationary economy, which is also troubled by unemployment and heavy competition for public funds, could be counter-productive to the idea of a healthy school budget fully-funded and supported by municipal officials.***" (at pp. 374-375)

Thus, while there are no fixed parameters with respect to the amount of an unappropriated free balanced to be maintained by a local board of education, there is an expressed caution against the maintenance of a balance sufficient to fund all possible contingencies. The balance must be a reasonable one. The judgment to be employed in an assessment of unappropriated balances is subjective and not objective in scope.

Such judgment must be exercised in the instant matter and in exercising it the hearing examiner concludes that the Board's free balances are adequate reserve for unanticipated expense. Such balances may be shown as follows:

Current Expense	
Free Balance June 30, 1975	$1,781,822*
Balance Appropriated 1975-76	600,000
Subtotal	$1,181,822
Amount of Committee reduction	500,000
Amount of State Aid reduction	232,700
Subtotal	$ 732,700
Net Free Balance	$ 449,122

*This balance, according to testimony, was unaudited but in the context of the October hearing date it would appear to be an accurate figure. (See R-1.)

Thus, the Board's request herein is, in effect, not a request for the restoration of funds required to be expended but for a restoration of money which may be necessary. The hearing examiner cannot, however, on the basis of the evidence before him under these circumstances recommend a restoration which is grounded in such a reason. There is no evidence that a thorough and efficient school system cannot be conducted by the Board during the 1975-76 academic year with funds which are now available. Absent such evidence there is no reason to justify a restoration. *Board of Education of East Brunswick v. Township Council of East Brunswick,* 48 *N.J.* 94 (1966)

Accordingly, the hearing examiner recommends that the Petition be dismissed.

* * * *

The Commissioner has reviewed the report of the hearing examiner and concurs in all respects with the recommendation for dismissal of the Petition of Appeal contained therein. The evidence clearly indicates that the Board does have sufficient funds for the thorough and efficient operation of its schools in the 1975-76 academic year.

Accordingly, the Petition is dismissed.

COMMISSIONER OF EDUCATION

January 20, 1976

In the Matter of the Special School Election Held in the Cumberland County Regional High School District, Cumberland County.

COMMISSIONER OF EDUCATION

DECISION

The announced results of a special school election held on December 9, 1975 in the Cumberland County Regional High School District authorizing the Board of Education, hereinafter "Board," to proceed with a capital project for the acquisition of lands and construction of a properly equipped new regional high school on such lands and to expend therefore a sum not to exceed $10,230,000, which sum was proposed to be raised through the issuance of bonds, were as follows:

Voting District	Place	Proposal Yes	Proposal No	Void
No. 1	Deerfield Township	172	112	19
No. 2	Fairfield Township	123	25	2
No. 3	Fairton Township	126	132	23
No. 4	Greenwich Township	43	150	1
No. 5	Hopewell Township	214	300	1
No. 6	Shiloh Borough	87	45	– 0 –
No. 7	Stow Creek Township	114	108	– 0 –
No. 8	Upper Deerfield Township	424	422	1
	Subtotals	1,303	1,294	47
	Absentee Ballots	2	1	– 0 –
	Grand Totals	1,305	1,295	47

Subsequent to the election the Commissioner of Education received a written request for a recount of the ballots cast. Thereafter, a recount was authorized by the Commissioner and was conducted by a representative appointed by the Commissioner at the office of the Cumberland County Superintendent of Schools, Bridgeton, on December 29, 1975.

At the conclusion of the recount one hundred fifty-one (151) ballots were reserved for determination by the Commissioner and the tally of uncontested ballots stood as follows:

	Yes	No
Ballots Recounted and Uncontested	1,266	1,227
Absentee Ballots	2	1
Totals	1,268	1,228

It was agreed by the respective parties present at the recount that the 151 contested ballots would be separated and classified as exhibits for consideration by the Commissioner. The Commissioner's representative has done this and sets forth a description of each of the resulting sixteen exhibits in narrative form as follows for consideration by the Commissioner. The Commissioner's representative has also set forth his recommendations.

Exhibit A – 75 Ballots – C-1 through C-75

All of the ballots in this exhibit are deficient in one principal respect - none of them contains a mark in the appropriate square to the left of the words "yes" and "no."

Accordingly, the Commissioner's representative recommends that the ballots not be added to the tally, since there are no marks "***substantially within the square***" as required by statute. (*N.J.S.A.* 19:16-3g) *In the Matter of the Annual School Election Held in the School District of the Borough of Bradley Beach, Monmouth County,* 1969 *S.L.D.* 44

Summary of Recommendation	Add to Tally Yes – 0 No – 0

Exhibit B – 11 Ballots – C-76 through C-86

Eight of the ballots herein have the requisite check, plus or cross-mark in the designated square to the left of the word "no" and three ballots contain a cross-mark in the square to the left of the word "yes." However, all ballots contain some indication of erasure, either within the designated square or outside it.

The Commissioner's representative recommends that all of these ballots be added to the tally since the erasures, herein in contest, were clearly minor and provide no indication that there was an attempt to identify or distinguish the ballot. *In re Recount of Ballots Cast at the Annual School Election in the Borough of Union Beach, Monmouth County,* 1955-56 *S.L.D.* 108; *In the Matter of the Recount of Ballots Cast in the Annual School Election in the Township of East Greenwich, Gloucester County,* 1954-55 *S.L.D.* 108; *In re East Rutherford Annual School Election,* 1938 *S.L.D.* 183

Summary of Recommendation	Add to Tally Yes – 3 No – 8

Exhibit C – 1 Ballot – C-87

This ballot contains a check-mark that is properly made and substantially within the appropriate square, to the left of the imprinted "no" but the check is "backward." Nevertheless, the Commissioner's representative believes the intent of the voter is clear and he recommends that this ballot be added to the tally.

Summary of Recommendation	Add to Tally Yes – 0 No – 1

Exhibit D – 1 Ballot – C-88

This ballot contains a joined cross-mark, to the left of the imprinted "yes", perhaps as the result of hasty writing. However, in the judgment of the Commissioner's representative, there is no attempt herein to identify or distinguish this ballot; therefore, the ballot must be added to the tally. *In re Recount of Ballots Cast at the Annual School Election in the Borough of Union Beach, supra*

Summary of Recommendation	Add to Tally Yes – 1 No – 0

Exhibit E – 8 Ballots – C-89 through C-96

Each of these ballots contains the requisite check, plus, or cross-mark in the designated square. However two ballots, C-95 and C-96, have the imprinted word "no" encircled and one ballot, C-94, has the imprinted "no" underlined. Additionally, the five ballots, C-89 through C-93, have the printed word "yes" encircled. However, the Commissioner's representative finds no reason to justify a finding that the extra marks were intended to identify or distinguish the ballot, and he recommends that it be added to the tally. *In re Recount of Ballots Cast at the Annual School Election in the Borough of Union Beach, supra*

Summary of Recommendation	Add to Tally
	Yes – 5
	No – 3

Exhibit F – 12 Ballots – C-97 through C-108

Each of these ballots contains a proper cross or check-mark in the appropriate square before the imprinted word "no" and additionally a repetition of this mark in the square containing the imprinted word "no." However the Commissioner said *In the Matter of the Recount of Ballots Cast at the Annual School Election in the Borough of Sayreville, Middlesex County,* 1951-52 *S.L.D.* 47:

> "***It is quite common to find in recounting ballots that the voters express certain idiosyncrasies. It is the opinion of the Commissioner that these marks were not intended to identify the ballots.***" (at p. 48)

Accordingly, the recommendation, herein is that these ballots be counted.

Summary of Recommendation	Add to Tally
	Yes – 0
	No – 12

Exhibit G – 15 Ballots – C-109 through C-123

These ballots contain no cross, plus or check-mark, but, instead, contain the word "yes" or "no" written in the appropriate box to the left of the imprinted word. However, it is clear that the written "yes" or "no" cannot substitute as the "proper mark" which the statute requires. (*N.J.S.A.* 19:16-3e) Nor can the word "yes" or "no" be conceivably held to be a mark which is substantially a cross (X), plus (+) or check (✓) (*N.J.S.A.* 19:16-3g)

Accordingly, the Commissioner's representative recommends that these ballots be adjudged invalid.

Summary of Recommendation	Add to Tally
	Yes – 0
	No – 0

Exhibit H – 6 Ballots – C-124 through C-129

The ballots C-124 through C-127 contain a proper mark in the appropriate box to the left of the word "no" and, additionally, a handwritten spelling of the word. Two "yes" ballots, C-128 and C-129 are also similarly marked. However, the Commissioner's representative does not find reason to hold that the reiteration is other than a firm avowal and expressed intention and, accordingly, he recommends that the ballot be added to the tally.

Summary of Recommendation	Add to Tally
	Yes – 2
	No – 4

Exhibit I – 1 Ballot – C-130

This ballot contains a proper cross-mark except that the mark is heavily drawn. It lies substantially within the"no" box. The Commissioner's representative researched previous decisions with respect to this deficiency, noted herein, and recommends that the ballot be counted. This recommendation is founded on a series of prior decisions by the Commissioner of Education in this regard. *In the Matter of the Ballots Cast at the Special School Election in the Township of Tewksbury, Hunterdon County,* 1939-49 *S.L.D.* 96; *In the Matter of the Recount of Ballots Cast at the Annual School Election in the Borough of Watchung, Somerset County,* 1960-61 *S.L.D.* 170; *In the Matter of the Annual School Election Held in the School District of the Borough of Bradley Beach, supra* In this latter decision, the Commissioner said, with respect to similar marks:

> "***It is the Commissioner's judgment that these votes must be counted. Although the marks are poorly and crudely made, they are substantially those required by *R.S.* 19:16-3g which provides in part as follows:
>
> > 'If the mark for any candidate or public question is substantially a cross x, plus + or check ✓ and is substantially within the square, it shall be counted for the candidate or for or against the public question, as the case may be***.'
>
> "Such marks as these are not uncommon and are obviously the result of unskilled calligraphy, infirmity, poor vision or visibility, rough writing surface or some other cause rather than any attempt to distinguish the ballots.***" (at pp. 45-46)

Summary of Recommendation	Add to Tally
	Yes – 0
	No – 1

Exhibit J – 2 Ballots – C-131, C-132

These ballots contain a cross (X) in each of the appropriate boxes opposite the imprinted words "yes" and "no". Such contradiction makes it impossible to determine the true intent of the voter and therefore the Commissioner's representative recommends that these ballots be adjudged invalid.

Summary of Recommendation	Add to Tally
	Yes – 0
	No – 0

Exhibit K – 1 Ballot – C-133

This one ballot contains a check-mark in the appropriate square before the imprinted word "yes" and additionally shows a line crossing the shank of this mark. The Commissioner's representative recommends that this ballot be included in the tally for reasons as stated *ante* with respect to Exhibit D.

Summary of Recommendation	Add to Tally
	Yes – 1
	No – 0

Exhibit L – 1 Ballot – C-134

This ballot contains a word or name written in the appropriate square opposite the imprinted word "no" but does not contain the requisite check, plus, or cross.

It has been consistently held by the Commissioner in numerous election decisions that a ballot cannot be counted when the statutory requirements that a cross (x), plus (+), or check (√) mark must be made in the square to the left of the voters' choice has not been met. *In the Matter of the Recount of Ballots Cast in the Annual School Election in the Township of Union, Union County,* 1939-49 *S.L.D.* 92; *In the Recount of Ballots Cast at the Annual School Election in the Borough of Stratford, Camden County,* 1955-56 *S.L.D.* 119; *In the Matter of the Annual School Election Held in the Township of Lower Alloways Creek, Salem County,* 1968 *S.L.D.* 47

Accordingly, the Commissioner's representative recommends that this ballot be removed from consideration as an addition to the tally.

Summary of Recommendation	Add to Tally
	Yes – 0
	No – 0

Exhibit M – 12 Ballots – C-135 through C-146

Each of these ballots is characterized by multiple marks of cross, plus, or check within the appropriate box opposite the imprinted word "yes" or "no".

(C-136, C-137, C-139, C-143, C-144, C-145, C-146) Additionally, one ballot, C-135, has the imprinted word "yes" encircled; ballot C-142 has the word "no" written and underlined in the box containing the imprinted word "no"; ballot C-141 has the word "no" written in the box containing the imprinted word "no" with four (4) cross-marks within this same box; ballot C-140 has cross-marks written in the box containing the imprinted word "no" and ballot C-138 has the initials OK printed in the appropriate box before the word "yes," as well as the aforementioned multiplicity of marks. However, the Commissioner's representative finds no reason to justify a finding that the extra marks were intended to identify or distinguish the ballot, and he recommends that these ballots be added to the tally. *In re Recount of Ballots Cast at the Annual School Election in the Borough of Union Beach, supra*

Summary of Recommendation	Add to Tally
	Yes – 5
	No – 7

Exhibit N – 3 Ballots – C-147 through C-149

These ballots are characterized by a cross-mark not being substantially contained within the appropriate square in front of the imprinted "yes" or "no". The Commissioner's representative recommends that these ballots not be included in the tally for the reasons stated in Exhibit L *ante*.

Summary of Recommendation	Add to Tally
	Yes – 0
	No – 0

Exhibit O – 1 Ballot – C-150

This ballot has a cross (x) marked in the appropriate square before the imprinted word "no". Additionally, there is elsewhere on the ballot and specifically in front of the printed instructions for voting, another cross (x). However, for reasons stated in Exhibit D, *ante*, the Commissioner's representative recommends that this ballot be included in the tally.

Summary of Recommendation	Add to Tally
	Yes – 0
	No – 1

Exhibit P – 1 Ballot – C-151

This ballot is completely unmarked and therefore cannot be included in the tally.

Summary of Recommendation	Add to Tally
	Yes – 0
	No – 0

Thus a summary of uncontested votes and the recommendation of the Commissioner's representative is set forth as follows:

SUMMARY

Recounted Ballots	Add to Tally Yes	No	Void
Ballots Recounted and Uncontested	1,266	1,227	
Absentee Ballots	2	1	–
Exhibit A	–0–	–0–	75
Exhibit B	3	8	–
Exhibit C	–0–	1	–
Exhibit D	1	–0–	–
Exhibit E	5	3	–
Exhibit F	–0–	12	–
Exhibit G	–0–	–0–	15
Exhibit H	2	4	–
Exhibit I	–0–	1	–
Exhibit J	–0–	–0–	2
Exhibit K	1	–0–	–
Exhibit L	–0–	–0–	1
Exhibit M	5	7	–
Exhibit N	–0–	–0–	3
Exhibit O	–0–	1	–
Exhibit P	–0–	–0–	1
TOTALS	1,285	1,265	97

This concludes the report of the Commissioner's representative concerning the results of the vote on this issue. However, the Commissioner's representative also finds the physical composition of the ballot to be unusual in format and leaves a scrutiny of such format to the judgment of the Commissioner.

* * * *

The Commissioner has reviewed the report of his representative in the instant matter and concurs with the recommendations expressed therein. Accordingly, the Commissioner finds and determines that the proposal set forth on the ballots submitted to the voters of the Cumberland County Regional High School District on December 9, 1975, is affirmed.

However, the Commissioner is constrained to comment on the unwieldy and therefore confusing physical conformation of the printed ballot used in this election.

Instructions to the voters are printed above the block containing the proposal and the designated "yes" or "no" voting spaces. These instructions are quoted as follows:

> "To vote in favor of the Proposal make a cross (x) or plus (+) or check mark (√) in the *square* to the left of and opposite the word 'YES'. *(Emphasis supplied.)*
>
> "To vote against the Proposal make a cross (x) or plus (+) or check mark (√) in the *square* to the left of and opposite the word 'NO'. *(Emphasis supplied.)*

Each word "yes" or "no" is imprinted in a large rectangle with excessive open space above and below the imprinted word. Immediately to the left of each imprinted word "yes" or "no" is an empty rectangle of equal size for the specific purpose of having each voter place an appropriate mark indicating his choice with respect to the public question to which the instructions refer. The square specifically mentioned in the instructions is nonexistent. The Commissioner, therefore, cautions each board of education to be more meticulous in the preparation of the physical configuration of the ballot printed and presented to each voter and to furthermore exhort the secretary of the board of education to make every effort to thoroughly instruct and educate each voter in the necessary mechanics of voting to insure that each voter who exercises his franchise can have his vote properly and expeditiously recorded.

Accordingly, the Commissioner determines that the outcome of the recount of the ballots cast in the public question proposed to the voters on December 9, 1975 in the Cumberland County Regional High School District has been reaffirmed.

COMMISSIONER OF EDUCATION

January 20, 1976

Board of Education of the City of Perth Amboy,

Petitioner,

v.

Mayor and Council of the City of Perth Amboy and Board of School Estimate, Middlesex County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Antonio & Flynn (Alfred D. Antonio, Esq., of Counsel)

For the Respondent, Robert P. Levine, Esq.

The Board of Education of the City of Perth Amboy, hereinafter "Board of Education," appeals from an action of the Mayor and Council of the City of Perth Amboy, hereinafter "Council," certifying to the Middlesex County Board of Taxation a lesser amount of appropriations for school purposes for the 1975-76 academic year than the amount proposed by the Board of Education. The facts of the matter were adduced at a hearing conducted on October 16, 1975 at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner is as follows:

The City of Perth Amboy is organized as a Type I school district. *N.J.S.A.* 18A:9-2 Accordingly, as mandated by statutory authority, *N.J.S.A.* 18A:22-7, the Board of Education prepared its budget of proposed expenditures for the 1975-76 academic year and delivered it to the Board of School Estimate for review and for subsequent certification to Council.

This budget proposed that a total of $7,695,887 be raised in local taxation for the support of the Perth Amboy schools. After deliberation, however, the Board of School Estimate determined that a sum of $210,000 might be deleted from the Board of Education's proposal without harm to the school system and thereafter it certified a tax requirement of $7,485,887 to Council. Council concurred with this reduced amount and certified this latter sum to the Middlesex County Board of Taxation. The Board of Education appealed.

The pertinent amounts in dispute are shown as follows:

	Current Expense
Board's Proposal	$7,695,887
Council's Certification	$7,485,887
Amount of Reduction	$ 210,000

The Board avers that Council's action was arbitrary, capricious and unreasonable and it requests a restoration of the total reduction by the Commissioner. Council maintains that it acted properly and after due deliberation and that the items reduced by its action are only those which are not necessary for a thorough and efficient educational system in Perth Amboy. As part of its determination Council suggested specific line items of the budget in which it believed economies could be effected as follows:

Account Number	Item	Board's Proposal	Council's Proposal	Amount Reduced
CURRENT EXPENSE:				
J110	Sals. Adm. Secys.	$214,949	$211,949	$ 3,000
J130a	Bd. Mem. Exp.	7,150	3,600	3,550
J130b	Bd. Secy. Off. Exp.	11,225	9,625	1,600
J130f	Supt. Off. Exp.	2,500	1,300	1,200
J212	Sals. Supvrs.	246,628	228,164	18,464
J214a	Sals. Lib.	127,973	98,534	29,439
J215c	Sals. Lib. Secy.	8,906	–0–	8,906
J220	Textbooks	140,000	100,000	40,000
J230	Lib. Books, A-V Mats.	87,816	69,185	18,631
J410a3	Sals. Nurses	145,606	135,382	10,224
J700	Maint. Bldgs.	288,661	282,661	6,000
J720b	Window Shades	1,500	–0–	1,500
J730a	Fluid Duplicator	740	–0–	740*
J730c	Whirlpool Bath	1,200	–0–	1,200
J730c	Snow Plow	5,500	–0–	5,500*
J1100	Special Projects	60,046	–0–	60,046
	TOTAL			$210,000

*NOTE: At the hearing the Board of Education abandoned its appeal of these reductions.

At the hearing the Board of Education presented testimony in support of its need for each of the line item amounts contained in its original budget proposal, except that, as noted, reductions totaling $6,240 were agreed to be proper. Council presented no testimony at the hearing but avers that the total sum of $210,000 is not required by the Board of Education and rests such avowal on its Answer to the Board of Education's Petition of Appeal and on answers to questions of the witnesses for the Board of Education on cross-examination.

The hearing examiner finds merit in the arguments and testimony of the Board of Education with respect to its need for certain of the expenditures deemed appropriate for reduction by Council and in particular those expenditures budgeted by the Board of Education for textbooks, library books, and special projects. However, in the context of the Board of Education's total

financial position the hearing examiner finds no clear necessity for an increased levy from local taxes.

The Board Secretary testified at the hearing that an audit of the Board's books disclosed a total sum of $391,883.95 was available to the Board as a free unappropriated balance on June 30, 1975. (Note: The unappropriated balance available on June 30, 1974 was $326,591.73, of which sum a total of $20,000 was appropriated in the budget for the 1974-75 academic year.) There was no appropriation from balances in the 1975-76 academic year. The Secretary testified further, however, that unexpected contingencies had already depleted such balances this year and he listed these contingencies as follows:

Insurance Obligations	$ 57,245
Tuition Costs	22,588
Salary Agreements (Approx.)	27,000
TOTAL	$106,833

He testified that there was also a revenue loss in State aid funds that totaled $12,428. Thus, the total depletion of balances available to the Board of Education on June 30, 1975, is $119,261. The Secretary testified that all contract salary commitments for staff personnel—except as noted—were now known.

The instant Appeal must be considered in the context of this testimony of the Board Secretary and the relevant figures may be shown as follows:

Free Balance June 30, 1975	$391,883.95
Less New Expense, Reduced Revenue	$119,261.00
Free Balance Remaining	$272,622.95
Total Reduction of Council	$210,000.00

Thus, it is clear that the instant Petition of Appeal by the Board of Education is one in which the Board requests a decision by the Commissioner to restore funds not "required" to be raised but in order that a larger free balance for contingencies might be assured. In the circumstances of the Appeal, however, the hearing examiner cannot find that a restoration of any of Council's line item reductions is required for the conduct of a thorough and efficient school program in Perth Amboy. All of the funds that the Board of Education avers it needs are already available. While the available unappropriated free balance of approximately $62,000 is certainly a small one when viewed as part of a total budget exceeding $9,000,000, it would appear to be adequate and particularly so since all salary commitments are known, or reasonably anticipated, at this juncture. If emergencies do in fact occur which require an expenditure of funds greater than those remaining in free balances, the Board of Education has a recourse in law to secure additional appropriations. *N.J.S.A.* 18A:22-21 *et seq.*

Accordingly, the hearing examiner recommends dismissal of this Petition.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and the exceptions pertinent thereto filed by the Board. Such exceptions are concerned with the parameters of consideration in budget matters, with the precise amount of free balances available to the Board on June 30, 1975, and with hearing procedure. In particular, the Board takes exception to any consideration of free balances available to the Board since Council gave no such consideration and the Board questions whether in any event a balance of less than one percent is adequate.

The Commissioner finds no merit in such exceptions and concurs in all respects with the report of the hearing examiner. Local boards of education must, of course, be permitted and encouraged to maintain reasonable contingency funds, but such funds are properly a subject for review by the Commissioner in budget disputes. As the Commissioner has said in a number of decisions, the problem in such disputes is one "*** of total revenues available to meet the demands of a school system***." *Board of Education of the Township of Madison v. Mayor and Council of the Township of Madison, Middlesex County,* 1968 *S.L.D.* 139, 142 Free unappropriated balances comprise a part of the "total revenues" available and they may, indeed must, be considered in instances which require budget review. The Commissioner so holds.

Further, the criteria for restoration of funds to boards of education in budget disputes are grounded in the proven necessity for the funds for the conduct of a thorough and efficient educational program. Absent proof of such necessity—and there is none herein, there is no authority for the Commissioner to substitute his discretion for that of Council. Indeed, a review of the official audit of the Board's 1974-75 academic year on file in the State Department of Education indicates that the Board had a free appropriation balance on June 30, 1975, even greater than that set forth by the hearing examiner. The hearing examiner established the free balance on June 30, 1975, as $391,883.95. The audit report indicates that the balance was $435,935.06.

Accordingly, the Commissioner determines that the Board has adequate funds at its disposal to conduct a thorough and efficient educational program. The Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

January 20, 1976

Rudolph Nowak,

Petitioner,

v.

Board of Education of the Borough of Manville, Somerset County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Rudolph Nowak, *Pro Se*

For the Respondent, Raymond R. & Ann W. Trombadore (Raymond R. Trombadore, Esq., of Counsel)

Petitioner, a resident citizen of the Borough of Manville, alleges that certain actions of the Board of Education of the Borough of Manville, hereinafter "Board," granting salary increases to administrative personnel on March 17, 1975, were illegal. The Board denies any illegality or impropriety on its part.

This matter, as originally submitted, was entitled *Manville Citizens and Taxpayers Association and Rudolph Nowak v. Board of Education of the Borough of Manville, Somerset County.* Respondent, on July 21, 1975, moved to disqualify Rudolph Nowak from representing the Manville Citizens and Taxpayers Association by reason of the fact that Mr. Nowak is not an attorney and may not represent a person or organization other than himself pursuant to *N.J.S.A.* 2A:170-79. Mr. Nowak did not resist this motion and on July 28, 1975, agreed to appear individually as petitioner, *pro se.* Thereafter, for lack of representation, the Manville Citizens and Taxpayers Association was dropped as a party petitioner to the controversy.

This matter comes directly before the Commissioner of Education in the form of Briefs, an affidavit of the Secretary to the Manville Board of Education (C-3) required at the conference of counsel on July 14, 1975, and documentary evidence received on that date by the Division of Controversies and Disputes. (C-1; C-2) The facts are these:

The annual school election was held on March 11, 1975 at which time three incumbent candidates were reelected to the Board for regular three-year terms. At this election the voters defeated both the current expense and capital outlay proposals of the Board by a substantial majority of negative votes.

Thereafter, on March 17, 1975, the Board convened a meeting at 8:00 p.m. with all members present at which time the business conducted included, *inter alia,* the following:

1. Employed a teacher to fill a position on April 1, 1975.

2. Confirmed purchase orders for supplies and services.

3. Approved use of facilities for nonschool hours.

4. Appointed a head school nurse for the 1975-76 school year at a stipend of $400.

5. Appointed a financial secretary for the student activity fund at a $1,000 stipend for the school year 1975-76. (C-1, at p. 87)

6. Established various substitute salaries for the 1975-76 school year. (C-1, at p. 87)

7. Abolished a principalship and established in its place a teaching principalship for one school for the 1975-76 school year. (C-1, at p. 87)

8. Adopted the negotiated agreement between the Board and its administrators setting forth, *inter alia,* 1975-76 salaries by name and position for principals and psychologist. (C-1, at p. 88)

9. Amended the Superintendent's tenure contract adopted February 24, 1970 to establish a salary of $28,609 for the 1975-76 school year, representing an increase of $2,112 in salary over his 1974-75 salary. (C-1, at p. 89; C-3)

10. Amended the Board Secretary-Business Manager's tenure contract adopted January 21, 1974 by establishing a salary schedule and a 1975-76 salary of $20,000, which figure represents an increase of $2,000 over his 1974-75 salary. (C-1, at p. 89; C-3)

11. Established bus drivers' salaries by name and step on scale for 1975-76.

The meeting of the Board was adjourned at 9:41 p.m. on March 17, 1975. (C-1, at p. 91)

At 10:00 p.m. on the same date the Board convened for the purpose of conducting its organization meeting pursuant to *N.J.S.A.* 18A:10-3. At this organization meeting the three successful incumbent candidates were administered oaths of office, and the Board President who had previously so served was reelected, as was a vice-president. Business conducted at this organization meeting included, *inter alia,* the appointment and in certain instances, fixing of rates of compensation for persons in the following positions: school medical inspector, assistant board secretary, custodian of school funds, school attendance officers, Board attorney and school psychologist. (C-2)

Subsequent to March 11, 1975, the Board and the municipal governing body of Manville met to discuss the defeated budget and mutually agreed to reduce the current expense portion of the Board's budget by $50,000. (C-3)

Petitioner argues that the Board's meeting at 8:00 p.m. was illegal. He further argues that the Board's organization meeting held at 10:00 p.m. was similarly illegal for failure to comply with *N.J.S.A.* 18A:10-3 which states that:

> "Each board of education shall organize annually at a regular meeting held not later than at 8 p.m. -
>
> "a. ***
>
> "b. In Type II districts on any day of the first week commencing on the first Monday following the annual school election***."

Petitioner contends that the defeat of the Board's budget removed from its authority the power to legally grant the administrative increases, *ante*. Petitioner asserts that on March 17, 1975, the Board had no approved negotiated agreement with its administrator and that it was without authority to finalize such an agreement until the budget was certified by the municipal governing body, subject only to appeal to the Commissioner. (Petitioner's Brief, at pp. 1-4)

Petitioner argues further that the salary increases granted by the Board to its administrators of up to 11.1 percent were excessive and beyond reason in the face of an overwhelming defeat of the budget by the voters. (Petitioner's Brief, at pp. 4-5)

For the foregoing reasons petitioner asks that the Commissioner set aside the acts of the Board taken on March 17, 1975 in respect to salary increases for administrators and take such further action as may be deemed appropriate.

The Board argues that the defeat of the budget by the voters did not divest it of authority to grant the controverted increases in salary, and that both the negotiation process and the awarding of contracts are typically and properly carried out and frequently finalized prior to the annual school election. (Brief of Respondent, at p. 1)

Thus the Board avers that it may properly schedule and conduct a regular meeting following the annual school election prior to its organization meeting. The Board asserts that a contrary view would result in the intolerable situation of a school district being without a viable board of education during this period. The Board argues that it complied with the statute in respect to both meetings held on March 17, 1975. (Brief of Respondent, at pp. 2-3)

Finally, the Board states that the increases granted were not excessive and the mere fact that a minority of Board members expressed an opposing opinion, as reflected in the minutes (C-1, at p. 86), in no way negates the fact that a majority of the full membership of the Board voted in favor of these increases. The Board maintains that, absent proof that it violated its discretionary authority or acted in an arbitrary or capricious manner, these actions should not be set aside. (Brief of Respondent, at pp. 3-4)

Petitioner advances the argument that the increments of its administrators were excessive and should be set aside by the Commissioner. These increases in salaries voted by the Board average 8.2 percent, and are neither unusually high nor low when compared to known increments and adjustments granted by boards to administrative personnel throughout the State for the 1975-76 school year. The Commissioner finds no evidence of frivolity, shocking abuse of discretion, or an exercise of bad faith on the part of the Board. Absent such a showing, the Commissioner will not interpose his judgment for that of the Board. It has been said by the Commissioner and affirmed by the State Board of Education and the Courts that:

> "***The School Law vests the management of the public schools in each district in the local boards of education, and unless they violate the law, or act in bad faith, the exercise of their discretion in the performance of the duties imposed upon them is not subject to interference or reversal.***" *Kenney v. Board of Education of Montclair,* 1938 *S.L.D.* 647 (1935), affirmed State Board of Education 649, 653

And,

> "***[I]t 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.****" *Boult and Harris v. Board of Education of Passaic,* 1939-49 *S.L.D.* 7, 13, affirmed State Board of Education 15, affirmed 135 *N.J.L.* 329 (*Sup. Ct.* 1947), 136 *N.J.L.* 521 (*E.&A.* 1948) *(Emphasis supplied.)*

Petitioner's further argument that the Board was without authority to act on March 17, 1975 on a negotiated agreement or to fix salaries by reason of the defeat of the budget at the polls by the voters is similarly without merit. While a board of education in such circumstances should be reasonably responsive to the will of the electorate, it must keep as its first goal the continuance of the system of free public education for the pupils of the school district. It may not be shorn of its powers to act. The confirmation of purchase orders for supplies and services, the conclusion of the negotiation process, the filling of vacancies, and a plethora of routine matters may not be delayed unduly while awaiting the action of the municipal governing body, the determination of the Commissioner, or, on appeal, the decision of the State Board or the Courts. To hold otherwise would, in the sometimes lengthy process of litigation, threaten the constitutional guarantee of a thorough and efficient system of public education.

The Commissioner knows of no restriction that prevents a board of education from conducting a *sine die* meeting between the annual school

election and its organization meeting held pursuant to *N.J.S.A.* 18A:10-3. There are frequently matters which the outgoing board should conclude or matters that cannot reasonably await action at the organization meeting of a succeeding board of education. Certain actions of the Board, herein, at its 8:00 p.m. meeting, such as the confirmation of purchase orders, the filling of a known 1974-75 teaching vacancy, and the approval of use of facilities are, without question, matters that were deserving of attention and could properly be enacted at a *sine die* meeting such as that conducted at 8:00 p.m. March 17, 1975 by the Board.

The Board, however, acted additionally to award stipends and to fix 1975-76 school year salaries of principals, Superintendents, and Board Secretary-Business Manager for the succeeding school year. No known vacancy existed in any of these positions, nor was there any immediate urgency for taking official action thereon. The law is clear that in this State a board of education is a noncontinuous body that may legally obligate its successor only in such ways as are provided by statute. The law is similarly clear that a board may, indeed is now obligated, to enter into negotiation sessions which, if successful, may be finalized prior to the time of its successor board's organization meeting. *N.J.A.C.* 19:12-2.1 It may not, however, prior to its organization meeting, appoint administrators or other employees to positions in which no known vacancies exist. In the herein controverted matter, the Board at its March 17 *sine die* meeting was statutorily empowered to negotiate agreements with its continuing employees pursuant to *N.J.S.A.* 34:13A-1 *et seq.* However, it had no statutory authority to bind its successor Board by issuing individual contracts to those same individual employees for the ensuing school year prior to the seating of its successor Board. To do so would be to usurp the rightful prerogatives of its successor as conferred by *N.J.S.A.* 18A:11-1 *et seq.*

The Board's action herein in appointing bus drivers, and appointing and awarding salary adjustments and increments to administrators a matter of minutes before the successor board's organization meeting was improper and without valid reason. The Commissioner so holds. *Charles H. Knipple v. Board of Education of the Township of Egg Harbor, Atlantic County,* 1971 *S.L.D.* 210; *Edwin Holroyd et al. v. Board of Education of the Borough of Audubon et al., Camden County,* 1971 *S.L.D.* 214; *Henry S. Cummings v. Board of Education of Pompton Lakes et al., Passaic County,* 1966 *S.L.D.* 155; *Edmond M. Kiamie v. Board of Education of the Township of Cranford, Union County,* 1974 *S.L.D.* 218; *Skladzien v. Bayonne Board of Education,* 12 *N.J. Misc.* 602 (*Sup. Ct.* 1934), affirmed 115 *N.J.L.* 203 (*E.&A.* 1935)

The Commissioner determines further that the Board's organization meeting, beginning as it did at 10:00 p.m. on March 17, 1975, failed to comply with statutory prescription which plainly requires that a board's organization meeting must begin no later than 8:00 p.m. It is a well-established principle of law that statutes are to be given their ordinary meaning. *U.S. v. Chesbrough,* 176 *F.* 778 (*D.C.N.J.* 1910); *State v. Sperry & Hutchinson Company,* 23 *N.J.* 38 (1956); *Duke Power Company v. Patten,* 20 *N.J.* 42 (1955) The meeting was improperly scheduled and held.

The facts are plain, however, that only incumbents were to be sworn in at the organization meeting; therefore, no change in membership on the Board could have resulted from that meeting. Nor it is conceivable that the votes of those three members, who had been continuously serving and were present at the 8:00 p.m. session, would in any way have altered voting alignments or positions on the controverted salary increases or other matters if the meeting had been held on a later date. Since this is so, the Commissioner can perceive no improper or ulterior motives to the fact that the actions on appointments and salaries of Board employees were taken at the 8:00 p.m. session rather than during or following the organization meeting. Therefore, the Commissioner determines that it was only through nescience that matters were scheduled and acted upon at the *sine die* session, and that the Board's reorganization meeting was scheduled at a time other than that prescribed by *N.J.S.A.* 18A:10.3.

The Commissioner deplores such casual disregard of statutory and case law as herein shown by the Board and cautions this Board and all other local boards of education to adhere rigidly to that which is prescribed by the Legislature, the State Board of Education, and the body of educational case law in conducting the important affairs of operating the public schools. Had the precise sequence of events, herein, with votes of five to four occurred in conjunction with a change in Board membership, it could only have resulted in a determination that certain acts of the Board were *ultra vires.* However, the Commissioner can conceive of no useful purpose being served by such a declaration in view of the fact that the actions at both the 8:00 p.m. and the 10:00 p.m. sessions were taken by the same members who were all present at both sessions. (C-1; C-2) Therefore, it is determined that the acts taken at each of these sessions have full and complete validity and legality as though they had been taken in full compliance with statutory and case law. The Commissioner so holds.

While the Commissioner finds no valid reason to grant the relief which petitioner seeks, he commends petitioner for bringing to light the Board's *modus operandi,* which in altered circumstances could have resulted in confusion and financial disadvantage to the Board, its employees, and the community it serves. In such matters it is important for a board of education to avoid the very appearance of noncompliance. See *James v. State of New Jersey,* 56 *N.J. Super.* 213, 218 (*App. Div.* 1959); *Hoek v. Board of Education of Asbury Park,* 75 *N.J. Super.* 182, 189 (*App. Div.* 1962).

The Commissioner having determined that there is no basis on which the prayers of petitioner may reasonably be granted, the Petition is dismissed.

COMMISSIONER OF EDUCATION

January 20, 1976

Board of Education of the Manalapan-Englishtown Regional School District,

Petitioner,

v.

Mayor and Council of the Borough of Englishtown and Mayor and Township Committee of the Township of Manalapan, Monmouth County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Dawes and Gross, (John I. Dawes, Esq., of Counsel)

For the Respondent Borough Council, Schaefer and Crawford (Marvin E. Schaefer, Esq., of Counsel)

For the Respondent Township Committee, Sam Matlin, Esq.

The Board of Education of the Manalapan-Englishtown Regional School District, hereinafter "Board," appeals from an action of the Mayor and Township Committee of the Township of Manalapan and the Mayor and Council of the Borough of Englishtown, hereinafter "Governing Bodies," taken pursuant to *N.J.S.A.* 18A:22-37 certifying to the Monmouth County Board of Taxation a lesser amount of appropriations for school purposes for the 1975-76 school year than the amount proposed by the Board in its budget which was rejected by the voters. The facts of the matter were adduced at a hearing conducted on June 23, 1975 at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner is as follows:

At the annual school election held March 11, 1975, the Board submitted to the electorate proposals to raise $3,850,767 by local taxation for current expenses and $13,365 for capital outlay costs of the school district. These items were rejected by the voters and, subsequent to the rejection, the Board submitted its budget to the Governing Bodies for their determination of the amounts necessary for the operation of a thorough and efficient school system in the Regional School District of Manalapan-Englishtown in the 1975-76 school year, pursuant to the mandatory obligation imposed on the Governing Bodies by *N.J.S.A.* 18A:22-37.

After consultation with the Board, the Governing Bodies made their determinations and certified to the Monmouth County Board of Taxation an amount of $3,752,767 for current expenses and $1,365 for capital outlay. The pertinent amounts in dispute are shown as follows:

	Current Expense	Capital Outlay
Board's Proposal	$3,850,767	$13,365
Governing Bodies' Proposal	3,752,767	1,365
Amount Reduced	$ 98,000	$12,000

The Board contends that the Governing Bodies' action was arbitrary, unreasonable, and capricious and documents its needs for the recommended reductions with written testimony and further oral exposition at the time of the hearing. The Governing Bodies maintain that their actions were proper and reached after due deliberation, and that the items reduced are only those which are not necessary for a thorough and efficient educational system. The Governing Bodies also document their position with written and oral testimony. As part of their determination, the Governing Bodies suggested specific line items of the budget in which it believed economies could be effected as follows:

Account Number	Item	Board's Proposal	Gov. Bodies' Proposal	Amount Reduced
CURRENT EXPENSE:				
J110F	Sals. – Supt. Off.	$ 109,483	$ 94,483	$15,000
J110I	Sals. – Bus. Adm. Off.	90,945	85,545	5,400
J130D	Oth. Exps. – Sch. Elect.	3,500	2,500	1,000
J130F	Oth. Exps. – Supt. Off.	9,000	7,000	2,000
J130I	Oth. Exps. – Bus. Adm. Off.	10,000	8,500	1,500
J130M	Oth. Exps. – Prtg. & Publ.	6,000	4,500	1,500
J215	Sals. – Secys. & Clrks.	100,744	95,544	5,200
J240	Teaching Supls.	186,326	176,326	10,000
J550A	Fuel – Pupil Trans. Veh.	42,750	32,750	10,000
J610A	Sals. – Cust. Ser.	301,035	293,635	7,400
J620B	Contr. Servs. – Oper. Plnt.	56,450	36,450	20,000
J660D	Misc. Exp. – Oper. Plnt.	4,000	3,000	1,000
J720A	Contr. Servs. – Grnds.	7,000	6,000	1,000
J720B	Contr. Servs. – Maint. Bldgs.	20,000	19,000	1,000
J730A	Repl. of Instr. Equip.	16,890	13,890	3,000
J730B	Repl. of Noninstr. Equip.	10,000	6,000	4,000
J730C	Purch. New Instr. – Equip.	63,577	56,577	7,000
J740D	Oth. Exp. – Grnds.	4,500	2,500	2,000
	TOTALS	$1,042,200	$944,200	$98,000

CAPITAL OUTLAY:

L1220C Impr. to Sites	$26,165	$14,165	$12,000
TOTALS	$26,165	$14,165	$12,000

The hearing examiner observes that a dispute concerned with the amount of $20,000 reported above with respect to J620B, Contracted Services for Operation of Plant, has been settled by the parties. The Board withdraws its request for that money. (Tr. 78-79) Consequently, the total amount of money in dispute with respect to current expense costs now stands at $78,000.

The hearing examiner also observes that the Board anticipated an unappropriated free balance of $100,000 at the conclusion of the 1974-75 academic year and that such sum would be available in the 1975-76 year. (Tr. 60, 63)

There appears no necessity to deal *seriatim* with each of the areas in which the Governing Bodies recommended reduced expenditures. As the Commissioner said in *Board of Education of the Township of Madison, Middlesex County,* 1968 *S.L.D.* 139:

> "***The problem is one of total revenues available to meet the demands of a school system***. The Commissioner will indicate, however, the areas where he believes all or part of Council's reductions should be reinstated. It must be emphasized, however, that the Board is not bound to effect its economies in the indicated items but may adjust its expenditures in the exercise of its discretion as needs develop and circumstances alter.***"
>
> (at p. 142)

However, the hearing examiner will report the respective positions of the parties on certain substantial items in dispute and set forth his specific recommendations to the Commissioner with respect to the proposed reductions of each of these items as follows:

J110F Salaries, Superintendent's Office *$15,000*

The Board avows in its testimony that the amount of $15,000 is necessary to employ an additional person on the Superintendent's staff. The position itself was created in 1972, although it has been vacant since the Spring of 1974. (Tr. 21-22) The hearing examiner finds, however, that the Board has not established the need for the amount of money controverted herein. Accordingly, he recommends that the Governing Bodies' reduction in the amount of $15,000 be sustained.

J110I Salaries, Business Administrator's Office *$5,400*

The Board's budget with respect to this line item indicates that its 1974-75 budgeted amount was $72,500. The Board's 1975-76 proposal is $90,945. The Board avers that it requires the $5,400 in dispute to employ a clerk to fill one of

two vacant positions in the Business Administrator's Office. The hearing examiner finds, however, that the Board has not established its need for such sum. Accordingly, he recommends that the Governing Bodies' reduction be sustained.

J240 Teaching Supplies *$10,000*

The Board budgeted $170,703 in this account for 1974-75, while for 1975-76 the Board proposes an amount of $186,326. The testimony of the Board indicates that it requires the moneys in dispute here to provide the funds necessary to increase an enrichment program in reading for grades seven and eight, to adopt a paperback reading center, to open four new science labs in one of its schools, to support a social studies program, and to enlarge its investigative science program. The hearing examiner finds that the Board established its need for this amount. Accordingly, he recommends that the $10,000 reduction be restored.

J550A Gasoline, Pupil Transportation Vehicles *$10,000*

The Board budgeted $42,750 for this account which is a $2,250 reduction from its 1974-75 budgeted amount. If the Governing Bodies' reduction of $10,000 were sustained, the Board would have fewer dollars to expend on fuel than it had prior to the present budget despite an increase in costs. The hearing examiner recommends the restoration of the Governing Bodies' reduction of $10,000.

L1220C Improvement to Sites *$12,000*

The Board has set forth projects for five of its schools which, in its judgment, are all necessary to insure their proper operation. The hearing examiner finds that the Board has established its need for the amount in this line item. Accordingly, he recommends that the reduction of $12,000 imposed by the Governing Bodies be restored.

The remaining recommendations of the hearing examiner, including those specific items set forth above, are reflected in the following table:

Account Number	Item	Amount of Reduction	Amount Restored	Amount Not Restored
CURRENT EXPENSE:				
J110F	Sals. – Supt. Off.	$15,000	$ – 0 –	$15,000
J110I	Sals. – Bus. Adm. Off.	5,400	– 0 –	5,400
J130D	Oth. Exps. – Sch. Elect.	1,000	1,000	– 0 –
J130D	Oth. Exps. – Supt. Off.	2,000	– 0 –	2,000
J130I	Oth. Exps. – Bus. Adm. Off.	1,500	1,500	– 0 –

Account Number	Item	Amount of Reduction	Amount Restored	Amount Not Restored
J130M	Oth. Exps. – Prtg. & Publ.	1,500	– 0 –	1,500
J215	Sals. – Secys. & Clrks.	5,200	5,200	– 0 –
J240	Teaching Supls.	10,000	10,000	– 0 –
J550A	Fuel – Pupil Trans. Veh.	10,000	10,000	– 0 –
J610A	Sals. – Cust. Serv.	7,400	7,400	– 0 –
J660D	Misc. Exp. – Oper. Plnt.	1,000	– 0 –	1,000
J720A	Contr. Servs. – Grnds.	1,000	– 0 –	1,000
J720B	Contr. Servs. – Repp. Bldgs.	1,000	1,000	– 0 –
J730A	Repl. of Instr. Equip.	3,000	3,000	– 0 –
J730B	Repl. of Noninstr. Equip.	4,000	4,000	– 0 –
J730C	Purch. New Instr. – Equip.	7,000	7,000	– 0 –
J740A	Oth. Exp. – Grnds.	2,000	2,000	– 0 –
	TOTALS	$78,000	$52,100	$25,900
CAPITAL OUTLAY:				
L1220C	Impr. to Sites	$12,000	$12,000	– 0 –
	TOTALS	$12,000	$12,000	– 0 –

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and the record in the instant matter, as well as the exceptions filed to the report by the Mayor and Township Committee of the Township of Manalapan.

The Commissioner is constrained to observe that *N.J.S.A.* 18A:36-1 establishes that the school year "***shall begin on July 1 and end on June 30." Furthermore, it is observed that *N.J.S.A.* 18A:23-1 provides that every "***board of education *** shall cause an annual audit of the district's accounts *** to be made *** not later than three months after the end of the school fiscal year."

In the instant matter, the 1974-75 annual audit of its accounts was submitted to the Board by its accountants by cover letter dated September 4, 1975. A copy of that audit was also filed in the Commissioner's office pursuant to *N.J.S.A.* 18A:23-3 by cover letter dated September 29, 1975.

The Commissioner notices that the hearing date in this matter was June 23, 1975. The 1974-75 school year had not yet been completed. Consequently, at that time the Board could only anticipate what its unappropriated free balance would be as of June 30, 1975, and as reflected in its audit report.

The hearing examiner reported that the Board had anticipated a current expense unappropriated free balance of $100,000 at the conclusion of the 1974-75 school year. However, the Board's audit report, filed in the Commissioner's office and made part of his official records, shows that the Board's accurate current expense unappropriated free balance as of June 30, 1975 was $348,868.

The Commissioner observes that subsequent to the voters' defeat of the Board's current expense proposal for 1975-76 the Governing Bodies reduced that proposal by an amount of $98,000. In view of the healthy fiscal position of the Board as set forth in its 1974-75 annual school audit, the Commissioner will not accept the recommendation of the hearing examiner to restore $52,100 of the Governing Bodies' total reduction for current expense purposes. Rather, the Commissioner does hereby sustain the entire reduction of $98,000 for current expense purposes as imposed upon the Board by the Governing Bodies.

Next, the Commissioner observes that the Board's 1974-75 annual school audit shows a capital outlay unappropriated free balance of $17,062 as of June 30, 1975, of which $14,000 had been appropriated for the 1975-76 budget. The hearing examiner reports that the Board established need for the $12,000 reduction imposed upon it by the Governing Bodies. The Commissioner agrees with this recommendation of the hearing examiner and adopts this finding as his own. Consequently, the Commissioner directs that the Monmouth County Board of Taxation add to the certification of appropriations the sum of $12,000 for capital outlay purposes of the school district for the 1975-76 school year.

COMMISSIONER OF EDUCATION

January 20, 1976

Gail T. Fishberg, Beverly Corson, Clyde Rue, Hedwig Haley and Aminta Marks,

Petitioners,

v.

Board of Education of the Princeton Regional School District, Mercer County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Rothbard, Harris & Oxfeld (Emil Oxfeld, Esq., of Counsel)

For the Respondent, Smith, Cook, Lambert, Knipe & Miller (Thomas P. Cook, Esq., of Counsel)

Petitioners, formerly employed during the 1973-74 academic year as teaching staff members by the Board of Education of the Princeton Regional School District, hereinafter "Board," individually allege that they are entitled to reemployment for the succeeding 1974-75 academic year for failure of the Board to comply with the provisions of *N.J.S.A.* 18A:27-10 and by virtue of the Board violating their rights to due process with respect to their non-reemployment. The Board denies the allegations set forth herein and asserts that its determination not to reemploy petitioners for 1974-75, collectively and individually, is in all respects proper and legal.

Subsequent to the joining of the pleadings herein, the Board moved for Summary Judgment in its favor on the grounds that petitioners have failed to state a cause of action upon which relief could or should be granted. Petitioners' oppose the Motion for Summary Judgment arguing that substantial issues of material fact exist which require a plenary hearing. The parties, in support of their respective positions on the Motion, filed Briefs and exhibits and the Board also filed an affidavit and a Reply Brief. The matter is now before the Commissioner of Education for adjudication.

Petitioners Fishberg, Corson, Rue, Haley and Marks, none of whom had acquired a tenure status, were employed as teaching staff members by the Board during the academic year 1973-74. By letters (P-3, P-4, P-5) dated March 27, 1974, Petitioners Corson, Rue, and Haley were notified by the Board Secretary that the Board determined, in executive session held prior to its meeting of March 26, 1974, not to renew their employment for the 1974-75 academic year. Petitioners Fishberg and Marks were notified by similar letters (P-1, P-2) from the Board Secretary that their employment would not be continued for the 1974-75 academic year. The letters to Petitioners Fishberg and Marks differed from the other letters only to the extent that they were dated April 3, 1974, and informed petitioners that the decision not to reemploy them was made on April 2, 1974.

Petitioners challenge the action of the Board of not offering them reemployment on the grounds that it violated the notification provisions of

> "***the Education Act, the Administrative Procedures Act, and the agreement between the Board of Education and the Princeton Regional Education Association *** in that said actions were not consummated within the time provided by law, nor at public meetings as designated by the law, nor based upon material with which petitioners should have been confronted and given an opportunity to answer***." (Petition of Appeal, par. four)

With respect to petitioners' complaint that the Board violated the notification provisions of the Education Act, the Commissioner observes that *N.J.S.A.* 18A:27-10 provides:

> "On or before April 30 in each year, every board of education in this State shall give to each nontenure teaching staff member continuously employed by it since the preceding September 30 either
>
> > "a. A written offer of a contract for employment for the next succeeding year providing for at least the same terms and conditions of employment but with such increases in salary as may be required by law or policies of the board of education, or
> >
> > "b. A written notice that such employment will not be offered."

Petitioners do not deny the individual receipt of the letters (P-1-5) from the Board Secretary notifying them of the Board's determination. Petitioners Corson, Rue and Haley were notified by letters dated March 27, 1974; Petitioners Fishberg and Marks were notified by letters dated April 3, 1974. The statute of reference requires that boards of education shall give notice of non-reemployment on or before April 30. Clearly, this Board afforded timely and proper written notice to petitioners with respect to their non-reemployment for the subsequent year. When a board of education determines not to offer reemployment for the subsequent year to one or several of its nontenured teaching staff members, that decision may be transmitted, in writing, to the teaching staff member or members by any designated school administrator or the board secretary. *Ronald Elliott Burgin v. Board of Education of the Borough of Avalon, Cape May County,* 1974 *S.L.D.* 396

With respect to petitioners' complaint that the Board violated unspecified provisions of the Administrative Procedure Act, *N.J.S.A.* 52:14B-1 *et seq.*, the Commissioner is constrained to observe that local boards of education are bound by that Act only to the extent that the State Board of Education, in its capacity as the policy-making board of a principal department (Education) in the executive branch of State Government promulgates its own rules and regulations consistent with the Administrative Procedure Act, to carry out its responsibilities set forth in *N.J.S.A.* 18A:4-10. The rules and regulations which have been adopted by the State Board of Education, by which all boards of education are bound, are set forth in Title 6, New Jersey Administrative Code.

The Commissioner does notice, however, that petitioners fail to cite a specific provision of the Administrative Procedure Act which the Board allegedly violated. While the Commissioner does not view local boards of education as being bound by the specific requirements set forth therein, it is that Act on which petitioners appear to ground their argument that the Board was (1) required to make the determination with respect to their non-reemployment at a public meeting (Petitioners' Brief, at pp. 6, 11-14) and (2) that the Board was required to present reasons underlying its determination and to afford them a subsequent hearing with respect to those reasons. (Petitioners' Brief, at pp. 8, 14)

Notwithstanding the inapplicability of the Administrative Procedure Act, the Commissioner once again will iterate that the determination by a board of education not to offer continued employment to one or several of its nontenure teaching staff members may be made at a public or private session of the board. In this regard, it has been consistently held by the Commissioner that the best interest of pupils, the teaching staff members, the entire school system, and the community at large requires that discussion of staff personnel not be held in public. *Ronald Elliott Burgin, supra*; *Marilyn Frignoca v. Board of Education of the Northern Highlands Regional High School District, Bergen County,* 1975 *S.L.D.* 303; *Barbara Hicks v. Board of Education of the Township of Pemberton, Burlington County,* 1975 *S.L.D.* 332

With respect to petitioners's allegations that the Board failed to provide reasons and a subsequent hearing thereon, the Board argues that it is under no obligation, legal or otherwise, to do so. In support of their position that they are entitled to reasons for non-reemployment petitioners rely on Article 19 (P-8) of the then existing agreement between the Board and the Association which provides that the principal or supervisor who recommended non-reemployment may be requested by the affected employee to set forth his/her reasons.

The Commissioner observes that the pleadings herein were joined on July 16, 1974, approximately one month subsequent to the New Jersey Supreme Court decision on June 10, 1974 in *Donaldson v. Board of Education of the City of North Wildwood, Cape May County,* 65 *N.J.* 236 (1974). Therein the Court held that boards of education are to provide, if requested, a statement of reasons for the non-reemployment of nontenure teaching staff members and, additionally, provide the affected teacher the opportunity to present his views in an effort to change the collective mind of the Board with respect to his/her continued employment.

In the matter herein the Board made its determination not to reemploy petitioners no later than April 2, 1974. The Board argues that the Court mandated that *Donaldson, supra,* was to be prospective from June 10, 1974, the date of its issuance. Consequently, the Board argues that *Donaldson* is not applicable herein. Petitioners argue that the Court does not specifically address the issue of retrospective or prospective application. Consequently, petitioners, by way of analogy, point to the retrospective application of *N.J.S.A.* 18A:6-14 as applied by the Courts in *Pietrunti v. Board of Education of Brick Township,*

128 *N.J. Super.* 149 (*1974); In re Tenure Hearing of Paula Grossman,* 127 *N.J. Super.* 13 (*App. Div.* 1974).

The Commissioner is constrained to observe that the issue of proper application of the *Donaldson* mandate has been addressed in *Joan Sherman v. Malcolm Connor and Board of Education of the Borough of Spotswood,* Docket No. A-2122-73, New Jersey Superior Court, Appellate Division, January 28, 1975, wherein the Court held:

> "*** We consider the foregoing as an indication that *Donaldson* be given only a prospective application. To give it retrospective application so as to impose an obligation on Boards of Education as to determinations prior to *Donaldson,* which neither law, administrative policy nor labor contracts imposed on them would, in our opinion, be unwise. We therefore conclude that *Donaldson* is to be applied only prospectively and petitioner, in this case, is not entitled to a statement of reasons. Since that is so, we do not reach the question as to whether she is entitled to a hearing.***"

See also *Nicholas Karamessinis v. Board of Education of the City of Wildwood*, Docket No. A-1403-73, New Jersey Superior Court, Appellate Division, March 24, 1974.

Here, however, the record is clear that Petitioners Fishberg, Corson and Rue had, shortly after being notified of their nonrenewal of employment, indeed requested reasons of the Board, or its agents, why their employment was not being continued.

On March 29, 1974, Petitioner Corson submitted a letter (R-3) to the Board Secretary which, in the Commissioner's judgment, is a letter request for reasons for her non-reemployment. On April 4, 1974, Petitioner Fishberg submitted a letter (R-2) requesting of her principal the reasons why she did not recommend her for reemployment. In an undated letter (R-1), the Superintendent advised Petitioner Rue that he would recommend to the Board that it explain to him the reasons for non-reemployment.

The Commissioner is fully aware of the contents of the affidavit (P-6) of the Board Secretary in which it is stated that he never received a "formal request" from petitioners for a statement of reasons. In the Commissioner's judgment, such a position of the Board Secretary places form over substance when, in fact, Petitioners Corson, Fishberg, and Rue obviously requested reasons in writing (R-2, R-3) or, in Petitioner Rue's case, was led to believe the Board would provide him the reasons for its action by virtue of the Superintendent's letter (R-1) to him. There is no evidence before the Commissioner that Petitioners Haley or Marks ever requested reasons from the Board.

In similar prior decisions in which a non-reemployed teacher had a request pending for a statement of reasons at the time the Court decided *Donaldson, supra,* the Commissioner held that since the request had been pending, as was the case for Petitioners Corson, Fishberg and Rue, *Donaldson* triggered the

requirement that petitioner be given the previously requested statement of reasons. *Hicks, supra; Virginia Bennette et al. v. Board of Education of the Township of Hopewell, Cumberland County,* 1975 *S.L.D.* 746

Accordingly, to the extent that the Board of Education of the Princeton Regional School District is directed to provide Petitioners Corson, Fishberg, and Rue with a statement of reasons for its determination not to reemploy them for the 1974-75 academic year, the Board's Motion for Summary Judgment is denied. In all other respects, however, the Board's Motion for Summary Judgment is granted on the basis that no justiciable issue exists for which the Commissioner of Education could grant relief.

COMMISSIONER OF EDUCATION

January 23, 1976

Mary C. Donaldson,

Petitioner,

v.

Board of Education of the City of North Wildwood, Cape May County,

Respondent.

COMMISSIONER OF EDUCATION

ORDER

This matter having been opened before the Commissioner of Education by Marvin D. Perskie, Esq., counsel for plaintiff-appellant in the above-captioned matter, by letter dated January 7, 1975; and

It appearing that the decision of the New Jersey Supreme Court in the above-captioned matter was rendered on June 10, 1974 (65 *N.J.* 236), wherein the Court at page 246 held that Petitioner Donaldson "*** was entitled to an order at his [the Commissioner's] hands directing the respondent Board to give the reasons for her non-retention ***" (65 *N.J.* 236, 246); and

It appearing that counsel for Petitioner Donaldson requested in writing as of June 13, 1974, that the Board furnish such reasons in writing; and

It appearing that respondent Board replied in writing under date of June 24, 1974, stating in sum that no member of the present Board was in office in 1969 at the time of the non-retention of Petitioner Donaldson, and that the former Superintendent of Schools, Board Secretary, and solicitor for the Board are no longer associated with the School District, and therefore no Board member or official is able to furnish the requested statement of reasons; and

It appearing that respondent Board is an agency of the State and a body corporate entrusted with the conduct of the affairs of the School District (*N.J.S.A.* 18A:10-1), including the employment, regulation of conduct, and discharge of its employees (*N.J.S.A.* 18A:11-1 and 18A:27-4); and

It appearing that respondent Board is now required to make a sufficient effort to comply with the aforesaid request for a statement of reasons for the non-retention of Petitioner Donaldson; therefore

IT IS HEREBY ORDERED that the Board of Education of the City of North Wildwood make a diligent effort to provide such statement of reasons which effort shall include, but not be limited to, a search of the official Board minutes, a review of Petitioner Donaldson's personnel file, a review of written communications and/or recommendations from the office of the Superintendent of Schools to the Board, the securing of affidavits from former members of the Board, the former Superintendent, and the former Board Secretary.

IT IS FURTHER ORDERED that the statement of reasons which the Board secures from such efforts shall be delivered to counsel for Petitioner Donaldson immediately following respondent Board's determination that it has exhausted all available sources for such information.

Entered this 7th day of February 1975.

COMMISSIONER OF EDUCATION

Mary C. Donaldson,

Petitioner,

v.

Board of Education of the City of North Wildwood, Cape May County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Perskie and Callinan (Marvin D. Perskie, Esq., of Counsel)

For the Respondent, George M. James, Esq.

Petitioner, a nontenured teacher in the employ of the Board of Education of the City of North Wildwood, hereinafter "Board," during the 1968-69 academic year failed to receive a contract of employment from the Board for the

succeeding year and requested a statement of reasons from the Board for its lack of affirmative action to renew such contract. The Board refused petitioner's request and was sustained in its action by decision of the Commissioner of Education on August 21, 1969. *Mary C. Donaldson v. Board of Education of the City of North Wildwood, Cape May County,* 1969 *S.L.D.* 127, aff'd State Board of Education 1970 *S.L.D.* 450, aff'd New Jersey Superior Court, Appellate Division, 1971 *S.L.D.* 1

Thereafter on June 10, 1974, the Supreme Court of New Jersey reversed these decisions and held that petitioner "*** was entitled to an order at his [the Commissioner's] hands directing the respondent board to give the reasons for her [petitioner's] nonretention." 65 *N.J.* 236, 246

Petitioner subsequently addressed a letter to the Board on June 13, 1974, demanding a statement of reasons for her non-rehire and the Board replied by letter on June 24, 1974. The Board's letter, hereinafter identified as R-1, recited a listing of difficulties concerned with the affording of reasons but did mention an attached list of excerpts from Board minutes which the Board indicated might be construed as reason for its action. A copy of this letter (R-1) was sent to the Commissioner but the referenced attached list was not.

On February 7, 1975, however, in response to the instant Petition of Appeal, but without the attached list of reference in R-1, the Commissioner issued an Order which directed the Board to

> "*** make a diligent effort to provide such statement of reasons which effort shall include, but not be limited to, a search of the official board minutes, a review of Petitioner Donaldson's personnel file, a review of written communications and/or recommendations from the office of the Superintendent of Schools to the Board, the securing of affidavits from former members of the Board, the former Superintendent, and the former Board Secretary."

Subsequent to the issuance of the Order a delay ensued and on July 22, 1975, petitioner advanced a Motion for Summary Judgment in her favor by the grant of a tenure contract. An oral argument on the Motion was conducted on September 24, 1975 by a hearing examiner appointed by the Commissioner of the State Department of Education, Trenton. The report of the hearing examiner is as follows:

The Board presented a series of affidavits to the hearing examiner immediately prior to the oral argument which were in fact specifically responsive in one respect to the Commissioner's Order of February 7, 1975, and, thus, as petitioner correctly observed, the question for consideration herein is whether or not the Motion for Summary Judgment is appropriate. (Tr. 5) (Note: The transcript of the oral argument is of poor quality and replete with errors. It appears to the hearing examiner that reliance on it should be limited to considerations of a broad expression of views and not to verbatim quotations.) In petitioner's view the affidavits should be disregarded as untimely in their

submission and she avers that if this view were adopted by the Commissioner, the Motion would be appropriate. Petitioner maintains, however, that if the affidavits are to be considered there is a fact question which renders the Motion as inappropriate. (Tr. 5)

The Board recites a great number of reasons for consideration of the affidavits in the total complex fabric of this litigation. It states that what is believed to be the reasons for petitioner's non-rehire, as expressed in minutes of the Board, were sent to petitioner on June 24, 1974 (R-1) and that no reply from petitioner with an avowal that the reasons were not sufficient was received until January 27, 1975. (See Tr. 18, 24.) The Board avers that subsequent to that date it has proceeded with diligence to contact former school administrators and Board members but that such persons were not subject to its authority and were generally resentful of further implication in a matter that had previously been of personal and emotional vexation. (See Tr. 20.)

An appraisal of these arguments in terms of relevance to the Motion depends in part on an appraisal of the documents allegedly sent by the Board to petitioner on June 24, 1974. (R-1) If such documents may be adjudged as an affording of reasons to petitioner pursuant to the mandate of the Supreme Court, the Board's argument that the affidavits offered as a supplement were not unduly delayed is not without merit, since it is evident that the present Board members have no direct knowledge of the matter, *sub judice,* and former officials were reluctant to be involved. (See Tr. 20-22.) The documents allegedly sent by the Board to petitioner on June 24, 1974 (R-1) are thus excerpted as follows:

> Minutes of the Board, March 4, 1969
>
> "Mr. Griffith [President of the Board] stated that the entire board knows both sides of the situation and speaking for himself opposed rehiring of Mrs. Donaldson . . . When pressed for reasons for dismissal, Mr. Griffith stated that Mary [Donaldson] was not interested in the school and lacked school spirit."
>
> Minutes of the Board, March 31, 1969
>
> "Mr. Errickson [former Superintendent] stated Mrs. Donaldson's teaching ability was not being questioned as he has said her teaching ability was acceptable but she is not a proper person to have on staff.***
>
> "Mr. Bradway [Counsel for the Board] *** explained that Mr. Errickson's recommendations are proper and valid in stating that she does not fit in."
>
> Minutes of the Board, April 18, 1969
>
> "Mr. Griffith went on to elaborate that he was not in favor of Mrs. Donaldson from the very beginning when she quibbled about salary and hiring procedure.***

> "Mr. Griffith stated that he would not tolerate insubordination from any teacher and even if it meant the Board must take the matter to Court.***"

The Board avers that such reasons were sufficient but that in an effort to be more specific in response to petitioner's request and the Commissioner's Order, it did attempt in February 1975 to obtain the affidavits which were ultimately offered at the oral argument. (See Tr. 18.) Petitioner does not deny at this juncture that she received the Board's letter on June 24, 1974 although she avers that the attachments, excerpted *ante,* were not attached. In fact, however, at the oral argument counsel for petitioner specifically referred to the attachments and stated they were considered to be part of the record. (Tr. 33) Such reference was concerned with the merits of the reasons as excerpted from the minutes of the Board in the context of the affidavits which petitioner now avers are contradictory. (Tr. 33-34) (See also Tr. 36.)

The hearing examiner has considered such facts and argument and concludes that the Board did in fact afford petitioner some reasons, albeit general in nature and subjective, in the attachments excerpting minutes of the Board which accompanied the Board's letter of June 24, 1974 to petitioner. He further concludes that although the instant Petition of Appeal was filed on January 29, 1975, and contains a statement that the attachments of reference, *ante,* were not received with the letter of the Board dated June 24, 1974 (R-1), there was no inquiry by petitioner with respect to the allegedly missing attachments although the letter, which petitioner admits receiving, clearly mentions them. The letter recited in pertinent part states:

> "*** I have attached hereto a list of each reference in its [the Board's] minutes which might conceivably be construed to be a 'Reason' for the decision.***" (R-1)

Thus, the hearing examiner concludes that petitioner knew, or ought to have known, at the time the instant Petition was filed in January 1975 that the Board had afforded "reason" to her for the failure to renew her contract, although no corollary conclusion is made with respect to the adequacy of the reason. He further concludes at this juncture that, in the circumstances of this lengthy litigation, the efforts of the Board to secure affidavits and to further delineate its reasons for petitioner's non-rehire were diligent and that such affidavits properly stand *in pari materia* with the attachments excerpted, *ante,* as a presentation by the Board to petitioner in conformity with the mandate of the Court.

Accordingly, the hearing examiner finds no basis for a recommendation in favor of petitioner on the Motion for Summary Judgment "*** because of the willful failure of the Board to comply with Rules and Regulations and directives of the State Board of Education providing the reasons for the non-renewal of her contract for the school year 1969-1970.***" He recommends, therefore, that the Motion be dismissed.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and the letter of exception pertinent thereto filed by petitioner. This letter does not dispute the basic finding of the hearing examiner that "reasons" have now in fact been afforded petitioner by the Board with respect to the Board's decision in 1969 that her contract would not be renewed. Petitioner does aver, however, that there "***still has to be a plenary hearing in this matter***." Such avowal, while not precisely delineated, is apparently founded in a desire to attack the sufficiency of the reasons afforded petitioner by the Board. The Board maintains that this litigation "***should be terminated with the filing of the Hearing Examiner's Report" and further maintains that

> "*** The holding of such a hearing [as referenced *ante*] would be the final step in eliminating all distinction between tenured and non-tenured teachers.***"

Thus, there is no dispute with respect to whether or not reasons have been afforded to petitioner for her non-reemployment by the Board in 1969. The question that remains is concerned with whether or not she is now entitled to an adversary hearing on the sufficiency of the reasons. The Commissioner has considered such a question in a number of decisions and he said in *Barbara Hicks v. Board of Education of the Township of Pemberton, Burlington County,* 1975 *S.L.D.* 332:

> "*** When a teaching staff member alleges that a local board of education has refused reemployment for proscribed reasons (*i.e.* race, color, religion, etc.) or in violation of constitutional rights such as free speech, or that the board was arbitrary and capricious or abused its discretion, and is able to provide adequately detailed specific instances of such allegations, then the teaching staff member may file a Petition of Appeal before the Commissioner which will result in a full adversary proceeding. *Marilyn Winston et al. v. Board of Education of Borough of South Plainfield, Middlesex County,* 1972 *S.L.D.* 323, aff'd State Board of Education 327, reversed and remanded 125 *N.J. Super.* 131 (*App. Div.* 1973), aff'd 64 *N.J.* 582 (1974), dismissed with prejudice Commissioner of Education November 1, 1974***" (at p. 336)

There are no such allegations before the Commissioner at this juncture and, thus, there is no entitlement to an adversary hearing. The Commissioner so holds.

Finally, the Commissioner concurs with the finding and recommendation of the hearing examiner which is specifically concerned with the Motion for Summary Judgment. Petitioner has been afforded reasons for her non-reemployment and there is no basis for the grant of a Summary Judgment in her favor.

The Petition is dismissed.

COMMISSIONER OF EDUCATION

January 23, 1976

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, January 23, 1976

For the Petitioner-Appellant, Perskie and Callinan (Norman L. Zlotnick, Esq., of Counsel)

For the Respondent-Appellee, George M. James, Esq.

The decision of the Commissioner of Education is affirmed for the reasons expressed therein; however, we wish to note that this decision is without prejudice to petitioner's right to file a new petition of appeal challenging the reasons given by the Board of Education for nonrenewal of petitioner's contract of employment.

October 6, 1976

Dismissed Superior Court of New Jersey August 2, 1977

In the Matter of the Tenure Hearing of Walter Campbell, School District of the Borough of Manasquan, Monmouth County.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Anton & Ward (Donald H. Ward, Esq., of Counsel)

For the Respondent, Morgan & Falvo (Peter S. Falvo, Jr., Esq., of Counsel)

Three charges of unbecoming conduct were filed with the Commissioner of Education by the Manasquan Board of Education, hereinafter "Board," against Walter Campbell, hereinafter "respondent," a teaching staff member in its employ. Respondent was suspended without pay on April 16, 1974 after certification by the Board that charges would be sufficient, if proven true in fact, to warrant his dismissal or reduction in salary.

The original hearing in this matter was conducted on August 6, 1974 at the office of the Monmouth County Superintendent of Schools by a hearing examiner appointed by the Commissioner. Subsequent to the completion of the Board's testimony and evidence in support of its charges, respondent moved to dismiss each of the charges for failure of the Board to carry the burden of proof.

On May 16, 1975, the Commissioner granted respondent's Motion to Dismiss to the extent that two of the three charges certified by the Board were dismissed for insufficient proof. (See *In the Matter of the Tenure Hearing of Walter Campbell, School District of the Borough of Manasquan, Monmouth County,* decided on Motion, May 16, 1975.) With respect to the one charge not dismissed, the Commissioner held that the Board presented a *prima facie* case in support thereof which required a defense to be entered by respondent. A hearing with respect to respondent's defense thereto was held on August 20, 1975 at the State Department of Education, Trenton, by the same hearing examiner who had originally been assigned to hear the Board's proofs. The report of the hearing examiner with respect to the one charge not dismissed is as follows:

> "You [respondent] were late to school [on April 11, 1974] and left your first class (sixth period) unattended which necessitated another teacher taking charge of your class, and further compounded said unauthorized absence by stating an untruth as to the actual time of arrival, characterizing said lateness as ten minutes when it was, in fact, one hour."

A brief recital of the events surrounding this charge is pertinent here. Respondent was absent from his teaching duties on April 9, 1974. Upon his return to school on April 10, 1974, he received a memo from the Superintendent of Schools which advised "***[p] lease see me tomorrow before classes concerning your absence on April 9th." (P-1)

Respondent normally reported to school and signed in (P-3) by 10:30 a.m. (Tr. I-20) Between 10:30 a.m. and 11:25 a.m., when his first class was scheduled, he was not assigned any teaching duties. (Tr. II-11)

On April 11, 1974, the department chairman testified he was informed that respondent's first class was unattended. The department chairman checked respondent's classroom at 11:30 a.m., found two pupils there (Tr. I-12), and confirmed that respondent was not present. (Tr. I-7) After placing the two pupils with another teacher, the department chairman testified he went to the high school principal's office and telephoned respondent's home, the Superintendent's office, and also Zuber's Boat Works in an unsuccessful effort to locate respondent. The hearing examiner observes that respondent purchased the Boat Works as a private business venture. (See *In re Campbell, supra.*) Finally between approximately 11:45 a.m. and 12 noon, the department chairman testified he heard the high school principal state: "Mr. Campbell is coming in now. He is in the hall." (Tr. I-9)

The department chairman testified that he did not know exactly how late respondent was for his first class. (Tr. I-19)

The Superintendent testified that on April 11, 1974, he telephoned the high school at 10:00 a.m. to locate respondent in order to have the requested conference (P-1) with respect to his absence on April 9, 1974. The Superintendent testified that he was informed respondent had not yet reported or signed in (Tr. I-28) The Superintendent testified he telephoned the high school

again at 10:30 a.m. and 11:30 a.m. or 11:45 a.m. (Tr. I-63) and was again informed respondent had not yet signed in. Finally, the Superintendent testified, he was informed that respondent had not met with his sixth period class. The Superintendent testified he left his office at noon and went to the high school (Tr. I-28), a two-minute drive. (Tr. I-63) Upon arriving at the high school, the Superintendent met the high school principal in the corridor and requested his presence in the conference to be held with respondent. At that moment, respondent was walking down the hall, apparently toward the principal's office. (Tr. I-29)

Thereafter, the Superintendent's requested meeting (P-1) with respect to respondent's absence on April 9, 1974, took place in the principal's office. (Tr. I-29-30; Tr. II-13-14)

It is these events as set forth and respondent's answers to the Superintendent's queries during the meeting in the principal's office which give rise to the charge herein. Subsequent to the meeting of April 11, 1974, the Superintendent prepared a compilation of notes he had taken during the conference. That compilation, insofar as the charge herein is concerned, is as follows:

> "***Campbell (respondent) had been late for school. He had not met his first (6th period) class. He did not call or report that he would be late. The superintendent inquired after him at 10 o'clock, 10:30 and 11:45. The high school office had called and indicated that he had not checked in nor met his first class.
>
> "Superintendent Miller asked Campbell:
>
> "S: Were you late?
>
> "C: I was 10 minutes late.
>
> "S: You did not call and say you would be late.
>
> "C: (No response)
>
> "S: What time are you supposed to report for school?
>
> "C: 10:30.
>
> "S: What time did you get here?
>
> "C: Ten minutes after my first class began (This would have been 11:25, one hour late.)
>
> "S: Why didn't you meet your class?
>
> "C: I was there but the class wasn't there. (Department Chairman Bitsko had transferred the class)***" (P-2)

The hearing examiner views the essence of the charge herein as being that respondent is alleged to have reported late to school on April 11, 1974, and that he left his first scheduled class unattended for an unspecified period of time. It is further alleged by the Board, in the hearing examiner's view, that respondent compounded the gravity of his lateness by stating an untruth as to the actual time of arrival, characterizing said lateness as ten minutes when it was, in fact, one hour.

In regard to the Superintendent's handwritten compilation (P-2) of the April 11 conference, that document was offered as evidential by the Board without objection by respondent. (Tr. I-85) Furthermore, while the Superintendent's compilation states that respondent indicated he was ten minutes late for his first class, the Superintendent's testimony at the first day of hearing herein reflects that respondent told him he was twenty minutes late. (Tr. I-30)

Notwithstanding the position adopted by respondent that he arrived at school "***Ten minutes after my first class began***" (P-2), or 11:35 a.m., his later testimony in defense of the charge herein reflects that he arrived at school sometime after 10:30 a.m. but does not know how long after. (Tr. II-6) He testified that he then reported to the office to sign in and saw that he had already received a red check mark. (Tr. II-18)

In regard to the sign-in procedure, the principal testified that teachers were expected to place a check in the box on the sign-in sheet (P-3) next to their name when they arrived. If a teacher did not arrive on time, the secretary placed a red check mark in the box next to his name and he was expected to write in the time he finally arrived.

The sign-in sheet (P-3) for April 11, 1974, reflects a red check mark opposite respondent's name. There is no written time as to when he arrived. (Tr. I-92-93)

Respondent then testified that upon his noticing the red check mark, he proceeded to his mailbox, then to the teachers' room "for a while." (Tr. II-6) Thereafter, respondent testified he then proceeded to go to the bank a couple of blocks away to cash his paycheck. (Tr. II-6-7) According to respondent's testimony, teachers were customarily allowed to leave the school building during their unassigned period or lunch period to cash paychecks. (Tr. II-32) While respondent admitted having knowledge that teachers were to sign-out at the principal's office when leaving the school building for such a purpose, he testified that on this occasion he did not. (Tr. II-37) Respondent explained further that his failure to sign out resulted from a habit of not doing so when he left the building to cash paychecks. (Tr. II-37)

Respondent testified he could not recall the time he left the building to cash his check nor how long he was out of the building. (Tr. II-38) He recalled, however, that between 11:00 a.m. and 11:30 a.m. he stopped at the Superintendent's office to discuss his absence on April 9, 1974. (Tr. II-41-42) Respondent testified that the Superintendent was not there (Tr. II-6), so he

returned to the school and reported for his 11:25 a.m. class. (Tr. II-6) Respondent testified that while he was at the Superintendent's office, he, respondent, knew that he was already five minutes late for class. (Tr. II-6)

Contrary to respondent's testimony that he went to the Superintendent's office between 11:00 a.m. and 11:30 a.m. only to find that the Superintendent was not in, the Superintendent definitely recalled being in his office during that period of time on April 11, 1974. (Tr. II-50) In this respect, the hearing examiner finds the Superintendent's testimony more credible than that of respondent. The hearing examiner is not convinced that respondent reported to the Superintendent's office as he asserts. In fact, the hearing examiner is not at all convinced that respondent reported to school at all before at least 11:35 a.m. as is set forth in the uncontroverted compilation (P-2) of the Superintendent.

Respondent testified that upon reporting to his class at 11:35 a.m., he found no pupils present. (Tr. II-8) He recorded that fact in his roll book and proceeded to the principal's office. (Tr. II-13) On the way, he met the Superintendent whereupon the meeting of April 11, 1974, then began.

In the hearing examiner's view, the truth or falsity of the charge herein rests on the credibility of the witnesses heard and their observed demeanor. In this regard, the hearing examiner is convinced by the testimony of respondent, the principal, and the department chairman that the meeting of April 11, 1974, began before noontime, probably around 11:45 a.m. The hearing examiner is not convinced by the Superintendent's testimony that it began after noon.

In regard to respondent's explanation of events on April 11, 1974, the hearing examiner finds that respondent did not report to his teaching post at all until sometime after 11:30 a.m. In the hearing examiner's judgment, respondent did not report to his scheduled class until close to 11:45 a.m.

Consequently, to the extent that the charge herein alleges that respondent reported late to school by one hour, that portion of the charge is found to be proven true. To the extent that the charge alleges respondent stated an untruth as to the actual time of his arrival that portion is found not to be proven true. This is so because the Board's own proofs, specifically the Superintendent's compilation (P-2) of his notes taken at the meeting of April 11, 1974, is the acknowledgment by respondent that he arrived at school ten minutes after his first class began.

Accordingly, the hearing examiner refers to the Commissioner his finding that respondent reported late to school by at least one hour on April 11, 1974.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and the record in the instant matter, and takes notice that neither party filed exceptions or objections thereto.

The Commissioner adopts as his own the hearing examiner's finding that respondent did in fact report late to school by at least one hour on April 11, 1974. In the Commissioner's view, it is of little moment that no pupils were present in his classroom when respondent finally arrived at 11:55 a.m. This is so, because had respondent been present at the beginning of the class at 11:25 a.m., there would have been no need for the department chairman to transfer the pupils who were present to another teacher's classroom for proper supervision.

Furthermore, the Commissioner is constrained to observe that respondent's actual time to report to school to assume his responsibilities as a teaching staff member is 10:30 a.m. The fact that respondent may not have teaching duties assigned him until 11:25 a.m. does not diminish his responsibility to report to school on time.

While the Commissioner will not condone behavior as exhibited by respondent herein, dismissal from his employment would be too harsh a penalty to impose for the offense committed. However, respondent shall forfeit one week's salary for the infraction of reporting late to school on April 11, 1974. Such forfeiture of salary shall be computed based on respondent's annual salary for the 1973-74 academic year.

The Commissioner hereby directs the Board of Education of the School District of the Borough of Manasquan, Monmouth County, to reinstate Walter Campbell to his former position with all salary and emoluments, less mitigation, which he would have received had he not been suspended on April 16, 1974, except forfeiture of one week's salary.

COMMISSIONER OF EDUCATION

January 23, 1976

Board of Education of the Township of Holmdel,

Petitioner,

v.

Mayor and Township Committee of the Township of Holmdel, Monmouth County,

Respondent.

COMMISSIONER OF EDUCATION

ORDER

This matter having been opened before the Commissioner of Education by William L. Russell, Jr., Esq., counsel for petitioner, through the filing of a Petition of Appeal on April 17, 1975, and the filing of a formal Answer on May 7, 1975 by the Mayor and Township Committee of the Township of Holmdel, hereinafter "Governing Body," S. Thomas Gagliano, Esq., counsel for the respondent; and

It appearing that the Board's proposed current expense budget for the 1975-76 school year was defeated at the polls by the voters at the annual school election conducted on March 11, 1975, subsequent to which the Governing Body reduced the Board's proposed budget by $102,000; and

It appearing that the Board appealed this reduction to the Commissioner of Education; and

It appearing that the Board and the Governing Body amicably settled the dispute; and

It appearing that a signed Stipulation of Dismissal was entered by the parties on December 19, 1975; and

It appearing that the Governing Body agrees to restore to the Board $71,000 of its original reduction; NOW, THEREFORE,

IT IS HEREBY ORDERED on this 28th day of January 1976 that the amount of $71,000 be added to the certification of taxes to be raised for school purposes for the 1975-76 school year previously filed by the Governing Body with the Monmouth County Board of Taxation.

COMMISSIONER OF EDUCATION

Newark Teachers Union, Local 481, A.F.T., AFL-CIO, Carole Graves, President,

Petitioner,

v.

Board of Education of the City of Newark and Stanley Taylor, Acting Executive Superintendent and Maria M. Cardiellos, Acting Vice-Principal, East Side High School, Essex County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Liss and Meisenbacher (Raymond Meisenbacher, Esq., of Counsel)

For the Respondents, Robert T. Pickett, Esq.,

This matter having been opened before the Commissioner of Education (Daniel B. McKeown, Assistant Director, Division of Controversies and Disputes) by Liss and Meisenbacher, Esqs. (Raymond Meisenbacher, Esq., appearing), counsel for petitioner, on an Order to show cause, considered and treated as a Motion for *pendente lite* relief, filed on December 22, 1975, with supporting affidavits, requesting relief in the form of an order by which the Commissioner would declare vacant the position of vice-principal of East Side High School, hereinafter "High School," which is under the control and supervision of the Board of Education of the City of Newark, hereinafter "Board," in the presence of Robert T. Pickett, Esq. (Arnold Steinhaus, Esq., appearing), counsel for respondent Board; and

The arguments of counsel having been heard and documentary evidence entered into the record at an oral argument held on January 7, 1976, the circumstances of this matter are as follows:

The position of vice-principal of the high school is presently held by Maria M. Cardiellos, a teaching staff member who had been otherwise employed by the Board. The Commissioner has determined from his own official records that Maria M. Cardiellos possesses a standard teacher's certificate which entitles her to teach Spanish, English, and Portuguese at the secondary level. The Commissioner has also determined that Maria M. Cardiellos does not possess certification as a principal which is required for employment as a vice-principal. *N.J.A.C.* 6:11-10.4(b)

In an affidavit (C-2) dated November 11, 1975, the Acting Executive Superintendent of Schools, hereinafter "Superintendent," states that by virtue of his authority at *N.J.S.A.* 18A:17A-1 *et seq.* he appointed Maria M. Cardiellos as the acting vice-principal of the High School

> "**because of the school system's need to have the position filled by a competent person and to prevent administrative chaos at the high school until such time as I [the Superintendent] could recommend the filling of the Vice Principal's position at East Side on a *permanent* basis.***"
>
> (*Emphasis in text.*) (at p. 3)

Elsewhere in the same affidavit (C-2) the Superintendent states that if the position of the High School vice-principal is declared vacant the result would be "***irreparable injury to the sound and coordinated managerial operations of the school system and the children I [the Superintendent] serve.***" (at p. 4)

The appointment of Maria M. Cardiellos to the position of acting vice-principal was a unilateral action taken by the Superintendent based on what he perceived to be legislative authority vested in his position by *N.J.S.A.* 18A:17A-1 *et seq.* The Commissioner does not agree. The Commissioner observes that the statute of reference was introduced and passed by the Legislature as Senate Bill No. 3166, whose application is limited to districts in cities of the first class with a population over 325,000. At the present time, the only municipality which meets these standards is the City of Newark. The applicable law (*N.J.S.A.* 18A:17A-1 *et seq.*) vests authority in the position of executive superintendent, now occupied by the Superintendent, to appoint and fix the compensation of assistant executive superintendents as he deems necessary, subject to the approval of the Board. The law also provides that the executive superintendent shall propose to the Board for its approval all other employees and officers to be employed, transferred or removed from employment or their office.

Specifically, the statute provides, *inter alia:*

> "***the board of education***shall retain the power to perform all acts and do all things consistent with law and state board [of education] rules***including but not limited to appointing, transferring or dismissing employees***." (*N.J.S.A.* 18A:17A-7)

The Commissioner can find no provision in the statute, nor has any been cited to him, that would vest unilateral authority in the position of executive superintendent, or in the instant matter, in the Superintendent, to transfer or appoint employees of the Board.

Consequently, an adjudication of the instant matter requires a review of applicable statutes set forth in Title 18A, Education, and the rules and regulations of the State Board of Education set forth in *N.J.A.C.* 6.

N.J.S.A. 18A:26-2 provides, *inter alia,* that:

> "No teaching staff member shall be employed*** by any board of education unless he is the holder of a valid certificate to***administer ***as may be required by law."

The State Board of Education, through the promulgation of its rules and regulations, has established the certification requirements attendant to the position of vice-principal. *N.J.A.C.* 6:11-10.4(b) provides that the endorsement of principal on a certificate or an actual principal's certificate as issued by the State Board of Examiners, *N.J.S.A.* 18A:6-38, is requisite in order for an individual to qualify for employment as vice-principal in *any* public school.

Accordingly, the appointment of Maria M. Cardiellos to the position of High School vice-principal, albeit "acting," without her possession of the proper and appropriate certification, as set forth above, is null and void and hereby set aside. Had the Board determined there was good and sufficient reason for it to appoint an "acting administrator" without proper certification it could have exercised its options in this regard as set forth at *N.J.A.C.* 6:3-1.1.

It is clear to the Commissioner that the Board did not take any action at all in the transfer or appointment of Maria M. Cardiellos to the position of acting vice-principal as is required by the statutes. *N.J.S.A.* 18A:25-1; *N.J.S.A.* 18A:27-1 Even if proper certification were possessed by Maria M. Cardiellos, the Board would be the responsible party to appoint. The fact that the Superintendent stated in a later affidavit (C-1) dated January 6, 1976, that he intended to secure appropriate approval consistent with *N.J.A.C.* 6:3-1.1 to allow her to continue in her capacity as "acting" vice-principal is of no moment, for it is the Board which must seek such approval.

The Commissioner, having reviewed the arguments of the parties and the undisputed facts of the instant matter, finds and determines that the appointment of Maria M. Cardiellos to the position of acting vice-principal of East Side High School is an *ultra vires* action of the Superintendent and is hereby set aside. The Commissioner directs the Board of Education of the City of Newark to appoint to that position a person who is properly certificated and who meets or exceeds the qualifications it establishes for such appointment.

COMMISSIONER OF EDUCATION

January 30, 1976

Patricia Fallon,

Petitioner,

v.

Board of Education of the Township of Mount Laurel, Burlington County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION ON REMAND

For the Petitioner, Hartman, Schlesinger, Schlosser & Faxon (Joel S. Selikoff, Esq., of Counsel)

For the Respondent, Benjamin Marmer, Esq.

This matter has been remanded to the Commissioner of Education by action of the State Board of Education dated June 4, 1975 "***for the purposes of definition and clarification of the prevailing contract, in order to determine termination payment." The State Board decision directed also that this matter be determined "[i]n accordance with, and for the reasons set forth in ****Sarah Armstrong v. Board of Education of the Township of East Brunswick, Middlesex County* [1975 *S.L.D.* 112, reversed State Board of Education 117] ***."

In *Armstrong, supra,* the State Board determined that petitioner did in fact possess a 1974-75 teacher's contract pursuant to the statutory provisions embodied in *N.J.S.A.* 18A:27-10, 11, and 12; therefore, the State Board directed the local board to pay Armstrong sixty days' termination pay beginning September 1, 1974, pursuant to the terms of her unwritten contract, less mitigation of her earnings during that sixty day period.

The State Board in *Armstrong* cited the New Jersey Supreme Court decision in *Canfield v. Board of Education of Pine Hill Borough,* 51 *N.J.* 400 (1968) [1966 *S.L.D.* 152, aff'd State Board of Education April 5, 1967, aff'd 97 *N.J. Super.* 483 (*App. Div.* 1967)] which established the law regarding the termination of contracts under their cancellation clauses. The Court adopted the dissenting opinion of the Honorable Edward Gaulkin, J.S.C., as follows:

> "***If the contract contained no cancellation clause, and the board elected not to permit the teacher to teach beyond the date of notice of dismissal, it seems to me the teacher would, at most, be entitled to his salary for the full term of the contract, but not to tenure. If I am correct in this, I see no reason why the result should be different when the contract contains a cancellation clause but *the board's notice of dismissal is not given in accordance with the cancellation clause. Suppose here the board had simply discharged plaintiff and not even offered her the 60 days' pay? It seems to me that she would then be entitled to the 60 days' pay, under section 11, or, at most, damages for the breach of the contract, but not to tenure.****" (*Emphasis added.*) (97 *N.J. Super.* at 492)

The State Board also said:

> "***When a teacher is now given a contract by a board, or the teacher is the recipient of a contract by virtue of the board's inaction pursuant to *N.J.S.A.* 18A:27-10, that teacher acquires vested rights to the new contract. Likewise, the board acquires a vested right in that teacher's service beginning with the first day of that contract, in this case September 1, 1974. See *In the Matter of the Suspension of the Teacher's Certificate of Raymond F. Reehill, School District of Bernards Township, Somerset County*, 1966 *S.L.D.* 201. The termination of any contract between a nontenure teacher and the employing board must be made considering the rights of both parties beginning on the first day of the new contract year.***" (1975 *S.L.D.* at 118-119)

The matter herein is similar with the exception that Petitioner Fallon's unwritten contract provided a thirty day termination clause. Therefore, in accordance with the State Board's directive in *Armstrong, supra,* the Commissioner directs the Board of Education of the Township of Mount Laurel to pay petitioner thirty days' salary, less mitigation of her earnings during the month of September 1974.

COMMISSIONER OF EDUCATION

January 30, 1976
Pending before State Board of Education

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, February 28, 1975

Affirmed in Part/Reversed in Part and Remanded by the State Board of Education, June 4, 1975

Decision on Remand by the Commissioner of Education, January 30, 1976

For the Petitioner-Appellant, Goldberg, Simon & Selikoff (Joel S. Selikoff, Esq., of Counsel)

For the Respondent-Appellee, Benjamin Marmer, Esq.

The Application for Stay is denied. The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

June 2, 1976
Pending Superior Court of New Jersey

Board of Education of the City of Orange,

Petitioner,

v.

Board of Commissioners and Board of School Estimate of the City of Orange, Essex County,

Respondents.

COMMISSIONER OF EDUCATION

ORDER

This matter having been opened before the Commissioner of Education on a Petition of Appeal arising out of a dispute between the Board of Education of the City of Orange against the Board of School Estimate and the Board of Commissioners of the City of Orange, appealing the reduction of $800,000 in funds from the Board of Education's proposed 1974-75 school budget by the Board of School Estimate and the Board of Commissioners; and

The arguments of counsel and testimony having been heard at a hearing on April 24, 1975, regarding the allegations by petitioner that the action of respondents was arbitrary, capricious and unreasonable; and

It appearing that a subsequent Appeal was propounded by petitioner on April 15, 1975 with respect to the Board of Education's proposed budget for the 1975-76 school year against the Board of Commissioners; and

It appearing that a final determination with respect to the 1974-75 school budget was held in abeyance; and

It appearing that by resolution Number R112-75 adopted by the Board of Commissioners on March 31, 1975 (C-1), respondents restored $630,000 to the Board's 1974-75 school budget; and

It appearing that the Board of Education's certified audit for the 1974-75 school year disclosed an unexpended free balance in the current expense account of $72,818.69 as of June 30, 1975; and

The Commissioner having carefully examined the documentary evidence and testimony as set forth within the record; now, therefore

IT IS ORDERED on this 3rd day of February 1976, that the Petition of Appeal of the 1974-75 school budget of the Board of Education of the City of Orange is hereby dismissed.

COMMISSIONER OF EDUCATION

Donald Banchik,

Petitioner,

v.

Board of Education of the City of New Brunswick, Middlesex County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Rubin and Lerner (Frank J. Rubin, Esq., of Counsel)

For the Respondent, Terrill M. Brenner, Esq.

Petitioner, a nontenured principal in the New Brunswick Senior High School operated by the Board of Education of the City of New Brunswick, hereinafter "Board," appeals a determination of the Board on April 28, 1975, not to renew his contract of employment for the 1975-76 school year. He charges that the Board's determination was arbitrary, capricious and unreasonable, that the reasons given for nonrenewal were lacking in specificity, and that he was denied due process pursuant to *Mary Donaldson v. Board of Education of the City of North Wildwood,* 65 *N.J.* 256 (1974).

The Board maintains that petitioner was afforded due process and that its determination not to reemploy petitioner was in no way tainted by impropriety or illegality.

The matter comes directly before the Commissioner in the form of the pleadings and amended pleadings, a Motion to Dismiss filed by the respondent Board on September 29, 1975, and Briefs. The facts are these:

Petitioner was employed by the Board from August 1, 1972 until June 30, 1975. No tenure rights had accrued. On April 28, 1975, the Board voted not to renew petitioner's contract for the ensuing year. One member of the Board abstained from voting. Petitioner, when notified by letter dated April 29, 1975, that he would not be reemployed, requested a statement of reasons, which reasons were provided on May 9, 1975. Thereafter, petitioner requested an informal appearance before the Board. Petitioner, appearing before the Board on May 21, 1975, adduced testimony from witnesses whereby he sought to dissuade the Board from terminating his employment. The Board heard this testimony but advised petitioner by letter dated May 30, 1975 of its decision not to renew his contract of employment. The Board member who had abstained from voting on April 28, 1975, was present at the informal appearance but again abstained from voting.

The reasons for nonrenewal given by the Board to petitioner are enunciated in the Petition of Appeal as follows:

1. Failure to exercise proper leadership in the areas of curriculum, discipline, human relations, student activities and security.

2. Abdication of authority in the area of curriculum implementation and development.

3. Failure to maintain and supervise implementation of a satisfactory discipline policy.

4. Allowing activities which detrimentally affect the cleanliness and housekeeping of the school building and grounds.

5. Failure to exercise adequate initiative in establishing an updated school security plan.

6. Failure to properly utilize pupils' free time.

7. Taking numerous actions which exceeded the scope of authority of the principal.

8. Creating a hostile attitude in connection with the relationship with the Milltown sending district.

The Board, in moving for dismissal, asserts that it has afforded petitioner due process pursuant to *Donaldson, supra,* and *Barbara Hicks v. Board of Education of the Township of Pemberton, Burlington County,* 1975 *S.L.D.* 332. The Board avers that the reasons given petitioner for nonrenewal were not lacking in specificity but were in compliance with the guidelines set down in *Donaldson.*

The Board argues that petitioner's demands for greater specificity is tantamount to a demand that the Board prove its reasons, a burden which neither *Donaldson* nor the statutes impose in respect to a nontenured employee. The Board avers that the reasons given were clear, concise, convincing and adequate.

The Board further maintains that *Hicks, supra,* places on petitioner the responsibility to set forth adequate detailed specific instances in support of his allegations that the Board acted arbitrarily, capriciously and in violation of his constitutional rights. The Board maintains that petitioner's allegations, absent detailed specific instances of violations, are insufficient to form a basis upon which relief may be granted or to require a plenary hearing. (Respondent's Brief, at p. 4)

The Board cites *Board of Regents v. Roth,* 408 *U.S.* 564 (1972) in further support of its assertion that an evidentiary hearing is not warranted, herein. In this regard the Board maintains that petitioner neither has a property right to

continued employment nor has been stigmatized by charges of immorality or dishonesty which would place in jeopardy his future employment opportunities. *Perry v. Sindermann*, 408 *U.S.* 593 (1972) is similarly cited wherein it was said that:

> "***The Constitution does not require opportunity for a hearing before the nonrenewal of a nontenured teacher's contract, unless he can show that the decision not to rehire him somehow deprived him of an interest in 'liberty' or that he had a 'property' interest in continued employment, despite the lack of tenure or a formal contract.***" (at p. 599)

Thus, the Board maintains that, since petitioner was afforded both reasons and an appearance before the Board, neither of which were required by the United States Constitution, his further claims of violation of constitutional rights must be labeled frivolous and undeserving of relief. (Respondent's Brief, at p. 7)

Finally, the Board asserts that the presence during discussions on April 28, 1975, and on May 21, 1975 of a Board member who abstained from both discussion and voting was in no way illegal or prejudicial to petitioner and did not render those proceedings defective.

Conversely, petitioner argues that a mere statement of purported reasons is insufficient to satisfy the requirements of *Donaldson, supra,* which, he contends, requires a statement of reasons with stated facts sufficient to permit a conclusion that those reasons were made in good faith and were the true motivation of the Board. Petitioner argues that the conclusionary reasons given by the Board, absent a statement of their factual base are, in effect, no reasons and indicate that the Board's action was arbitrary, capricious, unreasonable and contrary to *Donaldson, supra.* (Brief on Behalf of Petitioner, at p. 3) Thus, it is argued that a full adversary proceeding is required in order that petitioner may prove that the Board's stated reasons were in fact a sham to conceal the actual, unstated motivations to terminate petitioner's employment.

Finally, petitioner asserts that the Board's proceedings on May 21, 1975, were tainted by the presence of that member who abstained from voting, *ante,* and that a hearing is required to determine her actual participation which may have been prejudicial to petitioner.

For these reasons petitioner prays that the Motion to Dismiss be denied and the matter proceed to a hearing.

The Commissioner addresses first petitioner's charge that he was deprived of due process. The Board, pursuant to *N.J.S.A.* 18A:27-10, notified petitioner on April 29, 1975, that he would not be employed for the ensuing school year. When he requested a statement of reasons, pursuant to *Donaldson, supra,* reasons were provided within ten days. An informal appearance was provided in timely fashion twelve days thereafter, at which time petitioner was afforded opportunity to speak and to call witnesses on his behalf. This procedure

followed by the Board is in full compliance with that which was enunciated in *Hicks, supra,* wherein it was said:

> "***[T]he nontenured teaching staff member's informal appearance before the board is definitely not an adversary proceeding. *The purpose is not for the board to prove its reasons.* Instead, the purpose is to permit the affected individual to convince the members of the board that they have made an incorrect determination by not offering reemployment.*** (*Emphasis supplied.*) (at p. 334)

> "***The teaching staff member may be represented by counsel*** and may present witnesses on his behalf. Such witnesses need not present testimony under oath, and should not be cross-examined by the board.***" (at p. 335)

Herein, the Board has complied precisely with the procedural due process requirements of *Donaldson, supra,* which were further detailed in *Hicks, supra.* Petitioner's charges that the Board's reasons were so lacking in specificity as to be no reasons at all must be examined. The Commissioner has carefully scrutinized and considered the eight reasons given by the Board as balanced against the charges of petitioner that, absent detailed statements of their factual base, they must be labeled arbitrary, unreasonable, capricious and conclusionary. The reasons given are indeed conclusionary but, as such, may not be labeled as improper. The very process of determining whether or not to reemploy a teaching staff member must of necessity be conclusionary in nature. The Commissioner determines that the statement of reasons given by the Board, *ante,* is as detailed as may be reasonable expected in such instances. The reasons specify areas such as leadership in curriculum, discipline, student activities, security, community relations, and cleanliness of building and grounds, in which the Board was dissatisfied with petitioner's performance as principal. All of these broad and important areas are within the scope of responsibility of a principal to whom the Board looks for leadership.

The Board has determined that the leadership provided by petitioner was not such as to justify issuing a tenure year contract. Such determination is entitled to a presumption of correctness, absent a showing of capriciousness, arbitrariness, bad faith, statutory violation or violation of constitutionally guaranteed rights. As was said in *Quinlan v. Board of Education of North Bergen,* 73 *N.J. Super.* 40 (*App. Div.* 1962):

> "***When an administrative agency has acted within its authority, its actions will not generally be upset unless there is an affirmative showing that its judgment was arbitrary, capricious or unreasonable.***" (at pp. 46-47)

See also *Thomas v. Morris Township Board of Education,* 89 *N.J. Super.* 327 (*App. Div.* 1965), aff'd 46 *N.J.* 581 (1966); *Boult and Harris v. Board of Education of Passaic,* 1939-49 *S.L.D.* 7, aff'd State Board of Education 15, aff'd 135 *N.J.L.* 329 (*Sup. Ct.* 1947), aff'd 136 *N.J.L.* 521 (*E.&A.* 1948)

It was stated in *Hicks, supra,* that:

> "***When a teaching staff member alleges that a local board of education has refused reemployment for proscribed reasons***or that the board was arbitrary and capricious or abused its discretion, *and is able to provide adequately detailed, specific instances of such allegations,* then the teaching staff member may file a Petition of Appeal before the Commissioner which will result in a full adversary proceeding.***" (*Emphasis supplied.*) (at p. 336)

A review of the Petition of Appeal and the Amended Petition of Appeal reveals no detailed, specific instances of unreasonableness, arbitrariness or capriciousness on the part of the Board. Absent such detailed instances in support of petitioner's allegations, the Commissioner finds no reason to require that the matter proceed to a plenary hearing.

Petitioner has no property right, as a nontenured employee, to continued employment. Nor does his termination or the reasons given therefor deprive him of the liberty to seek employment elsewhere. *Roth, supra; Sindermann, supra* See *Sallie Gorny v. Board of Education of the City of Northfield et al., Atlantic County,* 1975 *S.L.D.* 669. The matter of property rights of nontenure teachers to continued employment under New Jersey law are explicitly set forth in *Gorny* and need not be reiterated herein.

It was said by the Court in *Tidewater Oil Company v. Mayor and Council of the Borough of Carteret,* 44 *N.J.* 338 (1965) that:

> "***It is clearly not enough if the asserted question is only remotely or speciously connected to the Constitution by the loose or contrived use of broad constitutional terminology. Shibboleth mouthing of constitutional phrases like 'due process of law' and 'equal protection of the laws' does not *ipso facto* assure absolute appealability.***" (at p. 342)

Similarly, herein, petitioner's assertion that he performed his duties well as principal and that he adduced testimony to that effect from others at the informal appearance, provides insufficient reason to direct that the Board's determination be reviewed at a plenary hearing. While the Board could have been more specific in stating its reasons for non-reemployment, it was under no obligation to do so. The reasons given, related as they are to the broad areas of responsibility of a principal, are not frivolous and are entitled to a presumption of correctness. Absent a detailed listing of specific instances wherein the Board acted arbitrarily, capriciously or unreasonably, the Commissioner will not direct that the Board's determination be subjected to further review. As was said in *Boult, supra:*

> "***[I]t is not the function of the Commissioner***to substitute his judgment for that of the board members on matters which are by statute delegated to the local boards.***" (1939-49 *S.L.D.,* at p. 13)

The Supreme Court of New Jersey in *Donaldson, supra,* quoted with approval *George A. Ruch v. Board of Education of the Greater Egg Harbor Regional High School District, Atlantic County,* 1968 *S.L.D.* 7, appeal dismissed State Board 1968 *S.L.D.* 11, aff'd New Jersey Superior Court (*App. Div.*) 1969 *S.L.D.* 202 wherein the Commissioner, in dismissing a Petition of Appeal, stated that "****a bare allegation is insufficient to establish grounds for action.****" (at p. 10) (*Emphasis supplied.*)

Similarly, herein, petitioner's pleadings, when viewed within the context of the broad statutory powers granted to the Board to employ and to dismiss teaching staff members, demands no further action. The remaining charge that the continued presence of one member of the Board, who on two occasions voluntarily chose to abstain from voting, was prejudicial to petitioner is barren of such import as to warrant a hearing. A board of education member may not be barred from being present or participating in discussion. Nor may a member be barred from voting except in the case of conflict of interest. As was said in *Peter Contardo v. Board of Education of the City of Trenton, Mercer County,* 1974 *S.L.D.* 650:

> "***[T]he Legislature did not choose to make provision that a board of education should be empowered to temporarily reduce its numbers by suspending one or more of its members for either specific or indeterminate periods of time.***[T]o do so would be inconsistent with a harmonious interpretation of the statutes and would promote a possible decimation of boards of education that would render them for short or long periods of time less effective than was the intendment of the laws of the State of New Jersey.***" (at p. 653)

There is no showing that the Board member was in conflict of interest. The unsupported allegation that her presence was prejudicial to petitioner sets forth no rationale as to why she may have been in conflict of interest. The bare allegation provides no basis for action. The Commissioner so holds.

For the foregoing reasons, the respondent Board's arguments in support of its Motion to Dismiss shall prevail. Accordingly, the Amended Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

February 3, 1976

Board of Education of the Township of East Brunswick,

Petitioner,

v.

Township Council of the Township of East Brunswick, Middlesex County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Rubin and Lerner (Frank J. Rubin, Esq., of Counsel)

For the Respondent, Bertram E. Busch, Esq.

Petitioner, the Board of Education of the Township of East Brunswick, hereinafter "Board," appeals from an action of the Township Council of the Township of East Brunswick, hereinafter "Council," taken pursuant to *N.J.S.A.* 18A:22-37 certifying to the Middlesex County Board of Taxation a lesser amount of appropriations for school purposes for the 1975-76 school year than the amount proposed by the Board in its budget which was rejected by the voters. The facts of the matter were adduced at a hearing conducted on December 5, 1975 at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner is as follows:

At the annual school election held March 11, 1975, the Board submitted to the electorate proposals to raise $12,576,111 by local taxation for current expense and $462,535 for capital outlay costs of the school district. These items were rejected by the voters and, subsequently, the Board submitted its budget to Council for its determination of the amounts necessary for the operation of a thorough and efficient school system in the Township of East Brunswick in the 1975-76 school year, pursuant to the mandatory obligation imposed on Council by *N.J.S.A.* 18A:22-37.

After consultation with the Board, Council made its determinations and certified to the Middlesex County Board of Taxation an amount of $12,482,111 for current expenses and $56,535 for capital outlay. The pertinent amounts in dispute are shown as follows:

	Current Expense	**Capital Outlay**
Board's Proposal	$12,576,111	$462,535
Council's Proposal	$12,482,111	$ 56,535
Amount Reduced	$ 94,000	$406,000

The Board contends that Council's action was arbitrary and unreasonable and documents its need for the reductions recommended by Council with written testimony and a further oral exposition at the time of the hearing. Council maintains that it acted properly and after due deliberation and that the items reduced by its action are only those which are not necessary for a thorough and effficient education system. Council also documents its position with written and oral testimony. As part of its determination, Council suggested specific items of the budget in which it believed economies could be effected as follows:

CHART I

Program Element	Item	Board's Proposal	Council's Proposal	Amount of Reduction
CURRENT EXPENSE:				
334	Staff–Travel	$ 55,820	$ 17,946	$ 37,874
411	Misc. Supls.	517,202	510,806	6,396
461	New Equip.	139,044	89,314	49,730
TOTALS		$ 712,066	$618,066	$ 94,000
CAPITAL OUTLAY:				
310	Prof. Servs.	$ 122,000	$ – 0 –	$122,000
510	Grounds Impr.	53,705	8,290	45,415
520	Bldgs. Impr.	286,830	48,245	238,585
TOTALS		$ 462,535	$ 56,535	$406,000
GRAND TOTALS		$1,174,601	$674,601	$500,000

The matter comes directly before the Commissioner for a determination in the form of the pleadings, exhibits, and written and oral testimony marked into evidence on December 5, 1975. Both parties have waived a hearing examiner report in the interests of a timely determination. (Tr. 127) The Commissioner herewith sets forth, *seriatim,* an analysis of the six proposed reductions.

Program Element 334 Staff, Travel *Reduction $37,874*

Council avers that economic conditions resulting in high unemployment and rapid inflation require that the Board curtail its out-of-district travel and abolish any out-of-State travel, a policy which Council states it has itself adopted for municipal employees. (Exhibit I, at p. 44)

The Board states that the proposed $55,820 expenditure for travel which represents a $20,679 increase over 1974-75 expenditures of $35,141, is essential for the following reasons:

1. Negotiated agreements require an increase of $5,000 in mileage reimbursement.

2. Incorrect programmed budget code designations account for a $10,000 increase in program element 334. (Tr. 79)

3. Increased costs of fees, tuition and travel to conferences and workshops account for an increase of $5,679. (See Exhibit B.)

The Commissioner has carefully examined the exhibits before him and has weighed the respective arguments of the litigants. It is determined that, within the context of the budget defeat at the polls, the efforts of municipal government to curtail expenditures for travel, and the heretofore mentioned economic problems generally and on the Board's financial base in particular, travel expenditures should be kept at a minimum in the 1975-76 school year.

The Commissioner recognizes that district-wide travel must be compensated as negotiated policies direct; however, both district-wide travel and out-of-district travel should be curtailed to a reasonable minimum until the Board's budgetary crisis is past. Accordingly, the Commissioner, after careful examination of the Board's proposed expenditures (Exhibit B), determines that the reduction of Council shall be sustained in the amount of $23,432 and that $14,442 shall be restored to this program element.

Program Element 411 Miscellaneous Supplies *Reduction $6,396*

Council alleges that the Board, when asked, was unable or chose not to provide details of current inventory of supplies. (Exhibit I, at p. 4) For this reason Council questions the appropriation of as large a sum as $517,202 to an item labeled "miscellaneous supplies" and proposes a 1.23 percent decrease.

The Board maintains that no reduction is appropriate in view of inflationary costs of supplies.

This program element designation in fact incorporates all types of school supplies such as paper, art supplies, tests, workbooks, writing supplies and the numerous consumable items necessary to educate pupils in a comprehensive school. The Board budgeted $491,099 and actually spent $497,968 in this item of its budget in 1974-75. It proposes a 3.9 percent increased expenditure for the 1975-76 school year. Pupil enrollment decreased from 10,258 in September 1974 by 124 pupils to 10,134 in September 1975. This represents a decline of 1.2 percent. Applying this percentage decline to the Board's budgeted amount for 1974-75 and computing the proposed increase over that amount indicates that the per pupil increase would be only 6.5 percent, an increase less than the inflationary rise in the average costs of school supplies. It was said by the Commissioner in *Board of Education of the City of Plainfield v. City Council of the City of Plainfield et al., Union County*, 1974 *S.L.D.* 913 that:

"*** While the constitutional requirement which imposes on local school districts the obligation to conduct 'thorough and efficient' programs of education is nowhere precisely defined, the Commissioner holds that it

must be interpreted to mean that as a minimum *such programs are entitled to a continuing sustenance of support, one marked by constancy and not by vacillation of effort.****" (*Emphasis supplied.*) (at pp. 920-921)

There is ample evidence within the record that the Board has held appropriations in this item at the 1974-75 level in numerous programs. (Exhibit P, at pp. 17, 21, 49, 75, 95) In other programs it proposes increased expenditures. *(Id.,* at pp. 11, 13, 16, 19, 25, 43, 47, 53) In yet others it proposes reduced expenditures for supplies. (*Id.*, at pp. 2, 5, 29, 38, 55, 69, 87) It is not necessary to set forth detailed listings of the many various kinds of supply items included in this budgetary item. The record is indicative that the Board and its agents have seriously considered the needs of varied programs and made their determinations accordingly. Therefore, absent a rise in comparative expenditures higher than the inflationary rise in cost of supplies, it is determined that $6,396 shall be restored to this program element. The Commissioner also directs the Board to change the title of this line item to "teaching supplies."

Program Element 461 Instructional Equipment *Reduction $49,730*

Council proposes to reduce the Board's expenditure of $139,044 in this program element to $89,314. Council states that the Board has failed to maintain a current inventory of instructional equipment resulting in unwise overexpenditures. (Exhibit I, at p. 4)

The Board avers that its appropriation is necessary to implement "***planned curriculum and instructional improvement through the acquisition of equipment.***" (Exhibit C, at p. 1) The Board attributes this proposed increase of $40,036 to the following:

1. Correction of miscoding by building administrators previously unfamiliar with program budgeting: $7,855.

2. Improved storage facilities for materials and equipment and work areas: $6,903.

3. Additional equipment implementing a thorough and efficient education: $25,278. (Exhibit C)

The Board further presents written testimony supporting its needs for equipment which Council seeks to delete from the Board's proposed purchases. (Exhibit C, at pp. 1-22) These deletions are largely in the areas of storage cabinets for individual teacher use, audiovisual equipment, printing equipment, duplicators, television, risers, air conditioners and office equipment.

The Board overexpended its budget appropriation in this item for 1974-75 by $93,895 or 95 percent. This was but one of a number of budgetary items in which the Board overexpended its original budget appropriations. While sufficient unappropriated balances were available to the Board during 1974-75 to pay for this and other expenditures, they have been exhausted with the

appropriation of $226,274 to current expense revenue for 1975-76. (Exhibits G, J) Therefore, strict budgetary controls are imperative to insure that overexpenditures do not precipitate the Board into a deficit financing position in the 1975-76 school year.

The Commissioner has carefully weighed the arguments within the factual context of the record before him and determines that the Board's expenditures for new equipment and those items in program element 461 which are incorrectly coded should be limited in the aggregate to an expenditure not to exceed $111,813. This figure represents a ten percent inflationary increase over the 1974-75 budgeted figure and additionally provides for those items which through nescience were miscoded into this program element. Within this limitation the Board may establish priorities as its discretion. Accordingly, it is determined that $22,499 shall be restored to this program element and that the reduction shall be sustained in the amount of $27,231.

Program Element 310 Professional Services *Reduction $122,000*

It is essential to understand that the Board presented to the voters in December 1973 a referendum proposal for capital improvement totaling $2,063,000. The referendum was approved by the voters. The total of bids awarded and architects' fees exceeded the amount of bond authorization. Therefore, $111,000 of the architect's fee was, by agreement with the architect, deferred for payment from a subsequent budget. (Tr. 111, 116; Exhibit L)

Council vigorously objects to the Board's having obligated itself to an amount greater than that approved by the voters at the referendum. Council further objects to the Board's failure to use unappropriated balances available to it during the 1974-75 school year to meet its obligation to the architectural firm. (Exhibit I, at p. 5)

The Board recognizes that its remaining financial obligation to the architect resulted from the agreement to defer payment of fees but avers that such agreement, as opposed to rejection of bids and rebidding in a period of high inflation, was in the best interests of the school district. The Board asserts that the bids themselves were in fact less than the authorized bonded indebtedness of $2,063,000, and that the Board publicly announced its intent to pay architectural fees from the current operating capital outlay budget of 1975-76. (Exhibit K)

It is clear that the Board deferred payment of a legal obligation to its architect in an amount approximately $111,000, which amount is but a fraction of the total architectural fee. (Tr. 107) Without question this was a legal obligation which the Board, representing the school district, was required to meet regardless of the wisdom or propriety of transferring such obligation from bond funds to the annual school budget. It was revealed at the hearing that the Board has, to date, reduced that obligation to $77,000. (Tr. 107)

The Commissioner determines that it is in the best interests of the school district that this long deferred obligation be paid and restores to this program element $80,500, which amount includes $3,500 for a similar obligation paid during the 1975-76 school year. (Tr. 109) The record contains insufficient evidence that the Board has met its burden of proof as to need for restoration of the remaining $41,500, which amount of the reduction is hereby sustained.

Program Element 510 Grounds Improvement *Reduction $45,415*

Council asserts that such improvements as contemplated by the Board should be incorporated into a bonding referendum and thus be subject to the lower interest rates which generally apply to tax exempt investments. Council avers that such a procedure would spread the payments for these improvements over their useful life and decrease the current burden on the local taxpayer. (Exhibit I, at pp. 5-6)

Conversely, the Board argues that the most economical course of action is to pay for such improvements when the work is accomplished, thus obviating any interest payments at all. The Board proposes to expend $42,325 for paving of parking lots and driveways and to expend the remaining portion for fencing and landscape improvement. (Exhibit D, at pp. 3-5)

The Commissioner opines that such necessary capital improvements of lesser magnitude as are herein described may properly be scheduled for completion and payment within the Board's current operating budget. Thereby, their total cost will be less than that experienced through bonding. It is evident, however, that both the voters and Council seek to limit the current tax burden by postponing such projects as may be deferred.

The Commissioner, in full consideration of the arguments advanced by the Board and Council and the facts within the record, determines that $26,540 shall be restored to this program element and that $18,875 of the reduction shall be sustained.

Program Element 520 Buildings Improvement *Reduction $238,585*

Council proposes that the Board's expenditures during 1975-76 be limited to $48,245 and that additional necessary building improvements be bonded. In this regard Council's arguments are essentially identical to those set forth in the resume of Program Element 510 and need not be repeated here.

The Board proposes to expend $150,000 to purchase eight movable classrooms to alleviate alleged overcrowding at the high school. Additionally, the Board desires, *inter alia,* to alter, renovate and equip three classroom areas at a cost of $72,900. (Exhibit D, at pp. 1-6)

The Commissioner has carefully considered the arguments concerning the desirability of bonding the items of greater magnitude and concludes that, absent a pupil overload of serious proportions, a bond referendum would be an

appropriate course of action. A careful study of continuing enrollment trends is likewise indicated. There appears no imminence of an abrupt increase in high school enrollment in the near future, absent marked increase in resident population. Rather, it appears that high school enrollment will remain static for three years after which enrollment will decline.

Nevertheless, the Board must provide a viable program of education to its present enrollment. Certain proposed projects of lesser magnitude which Council seeks to eliminate should be provided. Among these is the proposed renovation of a storage area at a cost of $5,000 to permit its use as an instructional facility. (Exhibit D, at p. 2) Similarly, certain proposals which would contribute to the safety and health of pupils and staff should be approved without delay. In keeping with these determinations the Commissioner directs that $23,000 be restored to this program element and the reduction be sustained in the amount of $215,585.

A summary of those determinations heretofore set forth is found in Chart II:

CHART II

Program Element	Item	Amount of Reduction	Amount Restored	Amount Not Restored
CURRENT EXPENSE:				
334	Staff Travel	$ 37,874	$ 14,442	$ 23,432
411	Misc. Supplies	6,396	6,396	– 0 –
461	New Equip.	49,730	22,499	27,231
	TOTALS	$ 94,000	$ 43,337	$ 50,663
CAPITAL OUTLAY:				
310	Prof. Servs.	$122,000	$ 80,500	$ 41,500
510	Grounds Imp.	45,415	26,540	18,875
520	Buildings Imp.	238,585	23,000	215,585
	TOTALS	$406,000	$130,040	$275,960
	GRAND TOTALS	$500,000	$173,377	$326,623

The Board states that it has sustained a loss of anticipated State aid for 1975-76 operations of $758,044, of which $636,405 was in current expense and $105,639 was in building aid. (Exhibit A) A review of the Board's records in the files of the Commissioner reveals that this loss of anticipated revenue was experienced. It must likewise be recognized that the Board by letter dated January 28, 1975 was advised by the Commissioner to anticipate for revenue

purposes in its 1975-76 budget only those amounts which it had received in the 1974-75 school year. (Exhibit Q) In fact, as the result of the State's fiscal crisis, it is substantially these recommended amounts which have been authorized to be distributed to the Board. The Board, however, unfortunately chose to incorporate larger amounts of formula aid into the revenue portion of its budget. Therefore, it may not within the parameters of this budget dispute be awarded a greater restoration of funds than that which it has proven to be required in each contested program element for a thorough and efficient educational program. The Board must either use unanticipated revenues, of which there appear to be some substantial amounts (Tr. 36), plan a curtailment of expenditures, or hold a special budget referendum to bring its revenues and expenditures into balance.

Such fiscal control is, of course, of paramount importance in the absence of available unappropriated balances. Therefore, it is imperative that the Board and its agents follow the recommended procedures enunciated in the report of the chief auditor to the Assistant Commissioner in charge of Administration and Finance dated December 3, 1975, and referred to herein as Exhibit J.

The Commissioner finds and determines that the certification of the appropriations necessary for school purposes for 1975-76 made by Council is insufficient by an amount of $173,377 for the maintenance of a thorough and efficient system of public schools in the district. He therefore certifies the additional sum of $173,377 to the Middlesex County Board of Taxation, to be added to the certification of appropriations for school purposes made by Council, so that the total amount of the local tax levy for current expenses of the school district for the 1975-76 school year shall be $12,525,448 and for capital outlay $186,575.

COMMISSIONER OF EDUCATION

February 6, 1976

Board of Education of the City of New Brunswick,

Petitioner,

v.

Mayor and City Council of the City of New Brunswick, Middlesex County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Terrill M. Brenner, Esq.

For the Respondent, Joseph E. Sadofski, Esq., and Gilbert L. Nelson, Esq.

Petitioner, hereinafter "Board," appeals from an action of respondent, hereinafter "Council," certifying to the Middlesex County Board of Taxation a lesser amount of appropriations for current expenses for the 1975-76 school year than the amount proposed by the Board in the budget which it certified to the Board of School Estimate. The facts of the matter were submitted in the form of written testimony, and a hearing was conducted on September 25, 1975 at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner is as follows:

On February 25, 1975, the Board certified to the Board of School Estimate the amount of $8,719,209 to be raised by public taxation for current expenses for the 1975-76 school year. The Board of School Estimate, consisting of the Mayor, two members of Council and two members of the Board, on March 14, 1975, voted 3-2 to reduce the Board's budget for current expenses by $1,189,105. Council later certified the total amount of $7,571,207 to be raised by public taxation.

The Board avers that this reduction was arbitrary, capricious and unreasonable and deprives the Board of funds necessary to provide a thorough and efficient system of public education for the 1975-76 school year.

Council denies that the reduction of $1,189,105 in the Board's budgeted amount for current expenses threatens an adequate and efficient school system or that it was made without due regard for educational needs.

The hearing examiner has examined the entire record and finds no sufficient evidence to form a conclusion that Council acted in an arbitrary or capricious manner. He therefore proceeds to set forth in chart form the line item reductions proposed by Council:

CHART I

Account Number	Item	Board's Proposal	Council's Proposal	Amount Reduced
CURRENT EXPENSE:				
J110.01	Bd. Secy. Off. Sals.	$75,012	$69,012	$ 6,000
J110.04	Legal Servs. Sals.	12,921	12,190	731
J110.05	Supt. Off. Sals.	54,891	53,765	1,126
J110.08	Bus. Adm. Off. Sals.	41,443	39,117	2,326
J110.09	Bldgs. & Grnds. Sals.	24,771	23,416	1,355
J110.11	Personnel Off. Sals.	55,120	41,634	13,486
J110.13	Other Adm. Sals.	39,917	– 0 –	39,917
J130.02	Bd. Secy. Off. Exp.	12,980	12,930	50
J130.06	Supt.'s Off. Exp.	12,000	8,650	3,350
J130.09	Bus. Adm. Off. Exp.	1,650	1,500	150
J130.10	Bldg. & Grnds. Exp.	1,050	900	150
J130.12	Pers. Off. Exp.	2,200	1,750	450
J130.13	Prtg. & Publ.	34,080	32,180	1,900
J130.14	Misc. Exp. Adm.	21,322	17,272	4,050
J211.00	Prins. Sals.	432,514	394,230	38,284
J212.00	Supvrs. Sals.	185,338	175,137	10,201
J213.00	Teachers Sals.	5,121,283	4,248,198	873,085
J214.01	Librarians Sals.	115,429	108,896	6,533
J214.02	Guidance Sals.	221,680	209,232	12,448
J214.03	Psych. Sals.	59,446	56,080	3,366
J214.04	Soc. Workers Sals.	50,944	48,061	2,883
J214.05	Learn. Dis. Spec. Sals.	93,459	88,962	4,497
J215.01	Prins. Clks. Sals.	187,014	169,234	17,780
J215.02	Supvrs. Clks. Sals.	51,672	48,748	2,924
J215.03	Instr. Clks. Sals.	62,339	58,888	3,451
J216.00	Other Instr. Sals.	302,313	286,301	16,012
J640.04	Telephone	44,000	65,000	- 21,000*
J710.00	Bldg. Repair Sals.	122,302	72,302	50,000
	Unapp. Bal. & "Fringes"	93,600	– 0 –	93,600
	TOTALS	$7,532,690	$6,343,585	$1,189,105

*Council has increased appropriation in this line item by $21,000.

Herewith are set forth the respective positions of the parties relative to the major economies Council seeks to effect in the line items of the Board's budget, together with the recommendations of the hearing examiner to the Commissioner:

J110.11 Personnel Office Salaries *Reduction $13,486*

Council avers that this line item may be reduced by eliminating an automatic six percent increment ($2,897), eliminating one position ($8,499), and eliminating Code-a-phone charges by reason of a recently installed Centrex system.

The Board states only that it has committed salaries of $53,337, plus years of service awards of $333, and anticipates Code-a-phone costs of $2,000.

Absent a showing by the Board of why it must maintain the position Council suggests should be eliminated, the hearing examiner recommends that the reduction in the amount of $8,499 be sustained and that $4,987 be restored to this line item.

J110.13 Other Administrators–Salaries *Reduction $39,917*

Council argues that two administrative positions may be eliminated by more efficient use of other employed personnel.

The Board states that the major responsibilities of these administrators are soliciting funds and writing educational proposals, preparing central and State reports, conducting studies and evaluations, developing a community relations program, and maintaining liaison with community groups.

The hearing examiner finds the Board's rationale compelling and concludes that if Council's reduction is given effect, the burden of necessary work could not be absorbed by remaining personnel. It is further found that these two salaries will total $39,159. (C-1) Accordingly, it is recommended that the amount of $39,159 be restored in this line item and the reduction in the amount of $758 be sustained.

J211.00 Principals–Salaries *Reduction $38,284*

Council suggests that economies may be effected by eliminating an automatic six percent increment and eliminating the position of an administrative assistant which position is now vacant.

The Board lists committed salaries of $442,502 which figure is greater than the amount budgeted. Sabbatical costs for one one-half year and filling of the administrative assistant position plus years of service costs total an additional $30,331.

The Board has negotiated salaries with its principals, vice-principals, and administrative assistants which, under existing State law, must be provided for in the budget. *N.J.S.A.* 18A:29-4.1 As was said in *Board of Education of the Borough of Haledon v. Mayor and Council of the Borough of Haledon,* 1974 *S.L.D.* 712:

"***The adoption of a salary policy by a board of education for its employees is not limited to teaching staff members, but extends also to all employees of a board of education eligible to negotiate their salaries pursuant to *N.J.S.A.* 34:13A-1 *et seq.*" (at p. 717)

The Board is legally obligated to pay its principals, vice-principals, and administrative assistants the amounts negotiated. There is no reason to believe that the 3.6 percent reduction in pupil enrollment could be expected to sufficiently reduce the need for such administrative personnel to allow for a reduction of staff.

In view of the above findings and recognizing that the Board has budgeted an insufficient amount in this line item to meet its salary obligations of $462,993 (C-1), it is recommended that the full amount of the reduction of $38,284 be restored to this line item.

J213.00 Teachers–Salaries *Reduction $873,085*

Council seeks the reduction of forty-three teaching positions at a savings of $559,000 and includes the entire Gibbons School. Council avers that pupils in that school should be incorporated into other regular school facilities. Council desires to effect a savings of $280,296 by eliminating the six percent automatic increment, another $12,000 by eliminating sabbatical leaves, an additional $17,640 by eliminating four instructors in the "pregnant teen" program, and a final savings of $4,149 by eliminating normal increments for the aforementioned forty-three teaching positions.

The Board argues that the minimal amount necessary to meet its obligations under existing negotiated agreements and to meet the needs of maintaining a thorough and efficient program of education is $5,041,374.

The hearing examiner finds that the Board, in the context of the reduction in pupils which resulted from withdrawal of North Brunswick pupils, or otherwise, has reduced its teaching staff by forty teachers since the 1974-75 school year. Its actual pupil reduction since September 1974 is 203 which represents 3.6 percent of the total pupil population of 5,577. This contrasts with a teacher reduction of forty-three (10.4%) in the same period. However, at the direction of the Commissioner, a number of teachers remained in the employ of the Board during the 1974-75 school year upon the withdrawal of North Brunswick High School pupils. (Tr. 17) *Board of Education of the City of New Brunswick v. Board of Education of the Township of North Brunswick and Board of Education of the Borough of Milltown, Middlesex County*, 1974 *S.L.D.* 938 Thus, the teaching staff total in relation to the number of remaining pupils in the Board's secondary school program was abnormally high in 1974-75 and is being adjusted in the 1975-76 school year.

The Board's actions in reducing staff are indicative that it is mindful of the necessity to operate its schools economically. The Board seeks to maintain desirable pupil-teacher ratios. These ratios would by adversely affected if

forty-three additional teaching positions were eliminated. However, it is apparent that the Board anticipated a pupil enrollment of 5,612 in September and staffed its schools accordingly. The actual pupil enrollment on September 30, 1975, was 5,374, a figure 238 less than anticipated. (C-1) In the context of these enrollment figures, the hearing examiner finds that the Board may safely reduce its staff by six additional teachers without adverse effect upon its anticipated teacher-pupil ratios. This will effect a savings of $44,100, computing this possible savings at six-tenths of an average salary of $10,000 during the period January through June 1976 when such savings may yet be accomplished in the 1975-76 school year.

The Board, however, is obligated to provide in its budget sufficient funds to meet the salary requirements it has negotiated. *Haledon, supra; N.J.S.A.* 18A:29-4.1 It may not act in disregard of benefits such as sabbaticals which it has negotiated. Nor may it legally neglect the educational needs of its teenage pupils who become pregnant.

The acting Superintendent testified at the hearing that the Gibbons School maintains an alternative program where seventy-two students are taught by one principal and three teachers plus community resource volunteers. (Tr. 22-24) An analysis of this pupil-teacher ratio reveals that, if the Gibbons School were closed, those seventy-two pupils for whom a pupil-teacher ratio is maintained comparable to that in the entire district would necessitate additional teachers elsewhere. No savings could be afforded by such action even if it were assumed, *arguendo,* that such action was desirable.

In summary, the hearing examiner finds that the salaries of all teachers presently employed would require an amount of $4,995,221 (C-1) from which may be deducted the amount of $44,100, *ante,* thereby reducing the requirement to $4,951,121, an amount $170,162 less than the amount budgeted by the Board. Accordingly, it is recommended that the reduction be sustained in the amount of $170,162 and that $702,923 be restored to this line item.

J215.01 Principals Clerks–Salaries *Reduction $17,780*

Council seeks to eliminate the six percent automatic increment ($9,780) and eliminate the contingency for overtime which it believes unnecessary ($8,000).

The Board merely states that the minimum amount it requires in this line item, including the overtime contingency, is $181,802 of its originally budgeted $187,014.

Absent a stated rationale by the Board with respect to the maintenance of a contingency of $8,000, but in recognition that negotiated salaries must be provided for, the hearing examiner concludes that $173,802 must be provided. *Haledon, supra* Hence, it is recommended that the reduction be sustained in the amount of $13,212 and that $4,568 be restored to this line item.

J710.00 Building Repair–Salaries *Reduction $50,000*

Council states that in this line item the Board is overstaffed and may eliminate two and one-half positions at a savings of $50,000.

The Board states that expenditures in this line item in 1974-75 were $112,130 and that its anticipated expenditures, including an apprentice yet to be hired, will approximate in 1975-76 a lesser sum of $107,200. The Board's arguments that its present policies of staffing are economy oriented are convincing. The Commissioner has on numerous occasions stated that thorough and efficient education is marked by constancy as opposed to vacillation of effort. *Board of Education of the City of Plainfield v. City Council of the City of Plainfield et al., Union County,* 1974 *S.L.D.* 913 Within such a context, the hearing examiner recommends that the reduction be sustained in the amount of $15,122 and that $34,878 be restored to this line item.

Unspecified Accounts *Reduction $93,600*

Council avers that reductions in staff it has proposed, if effected, would result in further savings in fringe payments such as insurance and various employee benefits, as well as supplies, maintenance costs, and materials. Council further asserts that unappropriated balances are excessive.

The Board objects that Council has failed to specify which line items are reduced by $93,600 and states further that reductions of staff and salaries as suggested by Council, even if implemented, would not substantially reduce "fringes" such as F.I.C.A. payments and pension payments, since the Board is obligated in this sector only for nonprofessional employees.

Absent a reduction of specific line items, the Board's argument respecting "fringes" must prevail. *Board of Education of East Brunswick v. Township Council of East Brunswick,* 48 *N.J.* 94, 105 (1966)

It remains to consider Council's assertion that the Board's unappropriated balance in its current expense account may properly be reduced. In this regard the Board represented at the hearing that its July 1, 1975 current expense unappropriated balance approximated $222,000. (Tr. 27) This amount represents approximately 2.1 percent of the Board's proposed total current expense budget which exceeds $10,600,000.

It was further revealed at the hearing that the Board is obligated to pay legal expenses in condemnation litigation for which there is no budget line item provision. These costs will approximate $45,000. (Tr. 28) The Board is also experiencing a loss of revenue from tuition pupils by reason of declining enrollment from a sending district. The Board estimates this loss of revenue at $94,600. (Tr. 8)

In view of these substantial losses of revenue and legal obligations and in the context of the Board's limited reserves, the hearing examiner recommends

that the Board's unappropriated free balance be maintained intact. Consequently, it is recommended that the full amount of this reduction be restored in the amount of $93,600.

CHART II

Account Number	Item	Amount of Reduction	Amount Restored	Amount Not Restored
J110.11	Personnel Office Sals.	$ 13,486	$ 4,987	$ 8,499
J110.13	Other Adm. Sals.	39,917	39,159	758
J211.00	Principals Sals.	38,284	38,284	– 0 –
J213.00	Teachers Sals.	873,085	702,923	170,162
J215.01	Principals Clks. Sals.	17,780	4,568	13,212
J710.00	Building Repairs Sals.	50,000	34,878	15,122
	Unapp. Bal. & "Fringes"	93,600	93,600	– 0 –
	SUBTOTALS	$1,126,152	$918,399	$207,753

The hearing examiner has similarly examined the record before him and sets forth the following recommendations in chart form with respect to those remaining relatively small reductions deemed appropriate by Council:

CHART III

Account Number	Item	Amount of Reduction	Amount Restored	Amount Not Restored
CURRENT EXPENSE:				
J110.01	Board Secy. Off. Sal.	$ 6,000	$ 6,000	$ – 0 –
J110.04	Legal Servs. Sals.	731	731	– 0 –
J110.05	Supt. Off. Sals.	1,126	1,126	– 0 –
J110.08	Bus. Adm. Off. Sals.	2,326	1,505	821
J110.09	Bldg. & Grnds. Sals.	1,355	1,355	– 0 –
J130.02	Bd. Secy. Off. Exp.	50	– 0 –	50
J130.06	Supt. Off. Exp.	3,350	1,666	1,684
J130.09	Bus. Adm. Off. Exp.	150	– 0 –	150
J130.10	Bldgs. & Grnds. Exp.	150	150	– 0 –
J130.12	Pers. Off. Exp.	450	250	200
J130.13	Prtg. & Publ.	1,900	– 0 –	1,900
J130.14	Misc. Exp. Adm.	4,050	4,050	– 0 –
J212.00	Supvrs. Sals.	10,201	8,207	1,994
J214.01	Librarians Sals.	6,533	– 0 –	6,533
J214.02	Guidance Sals.	12,448	– 0 –	12,448
J214.03	Psych. Sals.	3,366	1,548	1,818

J214.04	Soc. Workers Sals.	2,883	2,786	97
J214.05	Learn. Dis. Spec. Sals.	4,497	– 0 –	4,497
J215.02	Supvrs. Clks. Sals.	2,924	– 0 –	2,924
J215.03	Instr. Clks. Sals.	3,451	3,095	356
J216.00	Other Instr. Sals.	16,012	16,012	– 0 –
	SUBTOTALS CHART III	$ 83,953	$ 48,481	$ 35,472
	SUBTOTALS CHART II	$1,126,152	$918,399	$207,753
	TOTALS	$1,210,105	$966,880	$243,225

This concludes the report of the hearing examiner.

* * * *

The Commissioner has thoroughly reviewed the entire record, including the hearing examiner report and the exceptions filed by the respective parties pursuant to *N.J.A.C.* 6:24-1.16.

Council takes exception to the hearing examiner's recommendations for line items J110.13 and J211. A thorough review of the Board's present and past staffing of administrators and principals convinces the Commissioner that the Board must maintain, for the present, a complement of principals and administrators comparable to that which existed in 1974-75 and compensate them in accord with existing salary policies. *Plainfield, supra*

Similarly, in respect to Council's objection concerning teachers' salaries awarded under line item J213, the Commissioner determines that the Board has negotiated in good faith a salary policy with its teachers. Such a policy, irrespective of any wage freeze for city employees which may exist, is entitled to a presumption of correctness. It is clearly stated in *N.J.S.A.* 18A:29-4.1 that:

> "A board of education of any district may adopt a salary policy, including salary schedules for ***all*** full-time teaching staff members***. *Every school budget adopted, certified or approved* by the board, the voters of the district, the board of school estimate, *the governing body of the municipality or municipalities, or the commissioner,* as the case may be, *shall contain such amounts as may be necessary to fully implement such policy and schedules for that budget year." (Emphasis supplied.)*

See also *Haledon, supra.* The Commissioner determines that the further teaching staff reduction proposed in respondent's exceptions is unwarranted. *Plainfield, supra* Nor will the Commissioner order reductions in such a nebulous category as "Unspecified Accounts." *East Brunswick, supra*

The Commissioner has also thoroughly reviewed the record concerning those six line items enumerated in the exceptions wherein the Board avers that further restorations are required. There is insufficient weight of evidence to conclude that the Board has sustained its burden of proof that further restorations are essential to meet the constitutional requirement of a thorough and efficient education.

The recommendations of the hearing examiner in respect to all controverted line items are accepted and incorporated herewith into the determination of the Commissioner. It must, however, be recognized that Council, in fact, reduced the Board's line item current expense appropriations by $1,210,105 (Chart III) while at the same time reducing the Board's certification for current expenses by the lesser amount of $1,189,105. The difference between these two amounts is $21,000, and is accounted for in Council's increase in line item J640.04. (See Chart I.) Therefore, an equitable determination requires that both the total amount of reduction and the amount restored as shown in Chart III be reduced by $21,000.

Accordingly, it is determined that Council's certification of appropriations necessary for school purposes in the Board's current expense account is insufficient by an amount of $945,880 to maintain a thorough and efficient system of schools in the district. The Commissioner hereby certifies the additional sum of $945,880 to the Middlesex County Board of Taxation. This additional certification, together with the original certification of $7,530,104 made by Council, results in a total amount of local tax levy for current expenses of the school district for the 1975-76 school year of $8,475,984. This amount, combined with the Board's capital outlay appropriation of $41,103, previously certified by Council, will cause the total certification for current expenses and capital outlay for 1975-76 to be $8,517,087.

COMMISSIONER OF EDUCATION

January 30, 1976

Board of Education of the Township of Willingboro,

Petitioner,

v.

Township Council of the Township of Willingboro, Burlington County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Kessler, Tutek and Gottlieb (Myron H. Gottlieb, Esq., of Counsel)

For the Respondent, Quinn and Jacobi (Allen S. Jacobi, Jr., Esq., of Counsel)

Petitioner, hereinafter "Board," appeals from an action of respondent, hereinafter "Council," certifying to the Burlington County Board of Taxation a lesser amount of appropriation for the school year 1975-76 than the amount proposed by the Board in its budget which was rejected by the voters. The facts of the matter were submitted in the form of written testimony, and a hearing was conducted on September 8, 1975 at County Building A-4, Mount Holly, and on September 11, 1975 at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner of Education. Briefs were submitted by the litigants subsequent to the hearing. The report of the hearing examiner is as follows:

At the annual school election held March 11, 1975, the voters of the school district rejected the Board's proposal to raise by public taxation $8,881,857 for current expenses and $238,850 for capital outlay of the school district for the 1975-76 school year. The proposed budget was then delivered to Council, pursuant to statute, for the determination of the amount of appropriations for school purposes to be certified to the County Board of Taxation. Subsequently, Council adopted a resolution certifying the amounts to be raised by public taxation as $8,746,857 for current expenses and $57,850 for capital outlay. The effect on Council's action with respect to the amounts to be raised by public taxation is summarized as follows:

	Proposed By Board	Certified By Council	Reduction
Current Expense	$8,881,857	$8,746,857	$135,000
Capital Outlay	238,850	57,850	181,000
Total	$9,120,707	$8,804,707	$316,000

The Board contends that the reduction deemed appropriate by Council will provide insufficient funds to conduct a thorough and efficient educational program. It labels Council's action as arbitrary and capricious and appeals to the Commissioner to restore to its budget the entire amount of each reduction. Council expresses a contrary view and avers that reductions may properly be made from five general areas of the Board's program budget. These proposed reductions and the proofs with respect to them will be reviewed in narrative form, *post,* by the hearing examiner. At this juncture, however, it is appropriate to consider the charge pressed by the Board that Council acted in an arbitrary and capricious manner in the certification of a lesser amount of appropriations than those set forth in the Board's budget.

The Board argues, *inter alia,* that Council's consideration of the budget was cursory. Council avers to the contrary that it gave serious consideration within the limits of the time schedule as modified by the Legislature in 1975 for such consideration.

The hearing examiner has considered and weighed the testimony and documentary evidence relative to this charge. (Exhibits J, K, L) It is found that the Board met jointly with Council on two occasions and that Council on at least three other occasions met separately to consider the defeated budget and make a determination on the amounts of appropriations to be certified. It is further found that Council gave serious consideration to vital educational matters in arriving at its determination. Absent a showing of frivolity, bad faith, or unreasonableness on the part of Council, the hearing examiner finds insufficient evidence to conclude that Council acted in a cursory, arbitrary or capricious manner.

The proposed reductions by Council in five areas of the Board's program budget are consolidated and expressed in the form of comparable line item reductions of a traditional budget as follows:

CHART I

Account Number	Item	Proposed By Board	Certified By Council	Reduction
CURRENT EXPENSE:				
J120	Legal fees	$ 8,000	– 0 –	$ 30,000*
J211	Prins. Sals	447,403	$ 402,403	45,000
J213	Elem. Tchrs. Sals.	5,207,410	5,156,410	51,000
J240	Teach. Supls.	337,579	328,579	9,000
	TOTAL	$6,000,392	$5,887,392	$135,000*

CAPITAL OUTLAY:				
L1230	Buildings	$ 238,850	$ 57,850	$181,000
	GRAND TOTAL	$6,239,242	$5,945,242	$316,000*

*Council chose to reduce item by amount greater than Board's appropriation.

Herewith are set forth *seriatim* Council's proposed reductions with the respective positions of the litigants, and the hearing examiner's recommendations to the Commissioner:

J120 *Legal Fees* *Reduction $30,000*

The Board budgeted $8,000 for legal fees for the 1975-76 school year. Council seeks to effect a reduction in excess of this amount on the basis of its understanding that the Board, in fact, anticipated an expenditure for legal services of at least $60,000 and made provision elsewhere in its budget at the time it was compiled. (Exhibit L, at p. 148)

In this regard, Council avers that the Board's legal fees should not exceed $30,000 and a savings of at least $30,000 may, therefore, be effected. (Exhibit L)

The Board denies making provision elsewhere in its budget for payment of legal fees. It holds that anticipated expenditures of $30,800 will necessitate reductions of other services by at least $22,800. (Tr. II-109, 120) The Board states that Council's reduction in excess of the amount budgeted for legal fees is unreasonable and that the reduction places the Board at a disadvantage since it will not be able to defend or so much as identify what other programs or services are labeled excessive by Council. In *Board of Education of East Brunswick v. Township Council of East Brunswick,* 48 *N.J.* 94 (1966), the Court commented as follows:

> "***The governing body, may, of course, seek to effect savings which will not impair the educational process. But its determinations must be independent ones properly related to educational considerations rather than voter reactions. In every step it must act conscientiously, reasonably and with full regard for the State's educational standards and its own obligation to fix a sum sufficient to provide a system of local schools which may fairly be considered thorough and efficient in view of the makeup of the community. Where its action entails a significant aggregate reduction in the budget and a resulting appealable dispute with the local board of education, *it should be accompanied by a detailed statement* setting forth the governing body's underlying determinations and supporting reasons.***" (*Emphasis added.*) (at p. 105)

The hearing examiner finds in this instance that Council has not sufficiently detailed those items of the budget which it seeks to reduce, to the extent of the difference between $8,000, which the Board did budget for legal fees, and the sum of $30,000 which Council seeks as a total reduction.

The hearing examiner finds, additionally, that the Board's legal fees in 1974-75 totaled $55,655 for which it had budgeted only $8,000. This stands in contrast to the preceding year when the Board's legal expenses exceeded the budgeted amount by only $3,840. (Exhibit M) A member of the Board testified that it was through inadvertent error of oversight that a sufficient amount was not budgeted for 1975-76. (Tr. II-120)

Testimony by this member of the Board's budgeting committee establishes that the Board has, in fact, contracted for attorneys' services to the extent of $30,800, which is $22,800 in excess of its appropriation. (Tr. II-116) Absent convincing evidence that conclusively shows the Board to have acted in devious manner or in bad faith in budgeting only $8,000 for legal fees, and absent a conclusive designation by Council as to which other items of the budget it believes may be reduced, it is recommended that the entire amount of the $30,000 reduction be restored.

J211 Principals, Salaries *Reduction $45,000*

Council recommends a consolidation of administrative staff in keeping with what it believes to be a significant downward trend in pupil enrollment. (Exhibit L, at pp. 147-148) Specifically, Council seeks the deletion of one high school assistant principal at a savings of $25,000 and one elementary school vice-principal at an additional savings of $20,000 (Tr. I-157)

The Board maintains that these administrative positions are essential.

The Superintendent testified that nine of a total of ten authorized positions for elementary principals and vice-principals had been filled and that it was his intention *not* to recommend filling the vice-principalship at the Country Club Ridge Elementary School. This school is the smallest elementary school in the district with 471 pupils. (Exhibit D; Tr. I-142, 145) The Superintendent stated that it was his intention to recommend that the money saved thereby be utilized to employ a director of guidance at the new Willingboro High School for which position no budgetary provision was made. (Tr. I-146)

In consideration of the testimony of the Superintendent that it is not essential to employ a vice-principal in one of its elementary schools and absent convincing showing of dire need for additional administrative personnel in the high school sector, it is recommended that this portion of Council's reduction to the extent of $20,000 be sustained.

With respect to Council's suggested reduction of one assistant principal at the new Willingboro High School, it is noted that each of the Board's secondary schools is allocated one principal, one vice-principal and one assistant principal. (Tr. I-138, 152) The Willingboro Senior High School was opened in September 1975 and has a pupil enrollment of 1,541 as compared to the John F. Kennedy Senior High School with an enrollment of 1,499. (Exhibit D) The hearing examiner finds that it is essential that both of these large educational units be provided with both a vice-principal and an assistant principal. There is evidence

that at the senior high school level the pupil enrollment is still on the increase in Willingboro, rather than in decline, as Council suggests. (Exhibit A, at pp. 10-12; Exhibit D) In keeping with the foregoing findings, it is recommended that this portion of Council's suggested reduction be restored in the amount of $25,000.

In summary, it is recommended that $20,000 of the reduction be sustained and $25,000 be restored.

J213 *Teachers, Salaries* *Reduction $51,000*

Council avers that declining pupil enrollment coupled with severe economic pressures on the taxpayers provide persuasive reasons for reducing the elementary school teaching staff by at least four teachers at a savings of $51,000 (Exhibit A, at p. 147; Tr. I-37, 106, 108, 112)

The Board holds that it is obligated by the terms of its negotiated agreement with its teachers to strive to achieve a teacher-pupil ratio of one to twenty-five. (Tr. I-68; Exhibit C) The Board argues that a decrease of elementary school teaching staff would be contrary to both the spirit of this agreement and a thorough and efficient education.

An analysis of the September enrollment figures of the Board's elementary schools (Exhibit D) reveals that in each of the Board's ten elementary schools an overall ratio of less than twenty-five pupils to one teacher has, in fact, been achieved. If a single teacher were to be taken from each of the ten schools, the overall teacher-pupil ratio in those schools would not exceed one to twenty-five. Were a total of four teachers to be taken from the ten elementary schools, the resultant overall ratio in the elementary schools would be one teacher to twenty-two and one-half pupils. It is apparent, therefore, that a reduction of four teachers would not threaten the goal of one teacher to twenty-five pupils.

In consideration of the above finding, the hearing examiner recommends that the entire amount of Council's reduction of $51,000 be sustained.

J240 *Teaching Supplies* *Reduction $9,000*

Council asserts that the reduction of $9,000 is justified by declining pupil enrollment and, in any event, is an insignificant amount in a line item for which the Board budgeted $337,579.

The Board avers that reduction in teaching supplies is a negative factor in teacher and pupil morale and causes nuisance complaints from parents. (Tr. II-22)

The hearing examiner notes that the Board's calculations were based on a projected 1975-76 pupil enrollment of 13,503. (Tr. II-11) This estimate was later reduced to 13,127. (Exhibit A, at p. 12) Enrollment as reported by the Superintendent on September 9, 1975 was 13,072, which figure the Superintendent expects to rise during the year, based on prior experience in the district. (Tr. II-29)

The Business Administrator testified that an expenditure of $27.79 per pupil was projected for 1975-76, which figure would provide for an eight percent increase over the prior year's expenditure as mitigation for inflation. (Tr. II-3) Assuming, *arguendo,* that pupil enrollment will rise to the Board's revised estimate of 13,127, it is found that the Board's budgeted figure of $377,979, when reduced by $9,000 to $368,979, is more than adequate for the proposed per pupil expenditure of $27.79 which would require $364,800. In view of this finding, it is recommended that the reduction by Council of $9,000 be sustained in full.

LI230 Buildings *Reduction $181,000*

The Board currently operates an alternative school program in a rented building which lease is not renewable for the 1976-77 school year. Forty-four pupils are currently enrolled in this program (Tr. II-52) but the coordinator of this program estimates that at least eighty pupils in the district would benefit therefrom (Tr. II-55) The Board desires to purchase five relocatable classrooms to house an expanded alternative school program at a cost of $135,000 on a site it presently owns. (Tr. II-66-67) In addition the Board budgeted $142,000 for renovations at the John F. Kennedy High School, in order to increase to a total of fifteen the vocational career cluster areas available to its senior high school pupils. Additional small renovations projects were planned at a cost of $3,850. The Board further lists as second priority items $125,000 of roadway and partitioning improvements that it avers should be accomplished. (Petitioner's Brief, at p. 4)

Council does not contest the desirability of the alternative school or renovations to the John F. Kennedy High School. It fact, it supports the projected improvements to the full extent of the Board's proposed capital appropriation of $238,850. Council contends, however, that $181,000 should be appropriated from the unappropriated free balance in its capital account and from the unexpended balance of $381,000 from the bond issue for the Willingboro High School. (Respondent's Brief, at p. 3) Council argues that unappropriated balances from the bond issue may legally be appropriated by the Board to its capital outlay account pursuant to *N.J.S.A.* 18A:24-54. Council argues that relocatable buildings are not permanent structures and come within the purvue of authorized expenditures from the Board's capital outlay account and that these funds, being available, should be used for such purpose to reduce the tax burden on the taxpayers. (Respondent's Brief, at pp. 3-8)

The Board argues, conversely, that its Willingboro High School, although it is now occupied, has not yet been completed and that when encumbrances are considered, the available unappropriated balance from the bond issue is only $286,709. The Board avers that impending litigation occasioned by delays of over eighteen months threaten this remaining balance. (Petitioner's Brief, at p. 15) The Board holds that only when it determines that the building project is completed and free of encumbrances may it legally transfer unappropriated funds from its bond issue to its capital outlay account. The Board asserts that it has not so determined, and that it cannot make this determination while faced with possible litigation and arbitration proceedings.

The hearing examiner finds the Board's logic compelling and knows of no reason why the discretion of the Board should not control in this regard. It was stated by the Commissioner in *Boult and Harris v. Board of Education of Passaic,* 1939-49 *S.L.D.* 7, aff'd State Board of Education 15, 135 *N.J.L.* 329 (*Sup. Ct.* 1947), aff'd 136 *N.J.L.* 521 (*E.&A.* 1948) that:

> "***[I]t 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***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.***" (at p. 13)

In the light of such clear law, it is recommended that the Commissioner *not* direct the Board to appropriate any portion of the remaining funds from the bond issue for the Willingboro High School at this time into its capital outlay account.

The Business Administrator testified that, in an effort to economize, the Board has assigned its fourteen maintenance employees to accomplish the desired remodeling at the John F. Kennedy High School which was accomplished at a cost approximating $70,000, excluding labor. For this project the Board had appropriated $142,000 in its proposed budget. The Business Administrator testified that, while this represented a substantial reduction in contract payments, the preventive maintenance program of the district was brought to a standstill and other projects had to be postponed. (Tr. II-88)

The hearing examiner finds that $110,000 was available to the Board in the unappropriated free balance of its capital outlay account as of July 1, 1975. The Board budgeted an additional $238,850 for capital outlay in 1975-76. The Board has expended $70,000 as a result of the renovation program, *ante.* It becomes clearly apparent that the Board will have available, if Council's reduction of $181,000 is fully sustained, insufficient funds to complete its remaining list of first priority projects, estimated at $138,000, for the relocatable buildings and smaller projects.

July 1, 1975	Unapprop. Free Bal.		$110,000
Board's 1975-76	Budget Approp.		238,850
			$348,850
Less Council's Reduction		$181,000	
Less Outlay for Renovations		70,000	
			251,000
Balance Available			$ 97,850

Remaining Priority Projects	$138,850
Balance Available	97,850
Amount Required for Completion	$ 41,000

Within the context of Council's agreement as to the essentiality of these high priority projects, it is recommended that $41,000 be restored to the Board's capital outlay account and that the reduction be sustained in the amount of $140,000. The hearing examiner knows of no reason why the Board's unappropriated free balance in its capital outlay account should not be utilized toward this end.

The recommendations of the hearing examiner are summarized below in Chart II:

Account Number	Item	Amount of Reduction	Amount Restored	Amount Not Restored
CURRENT EXPENSE:				
J120	Legal Fees	$ 30,000	$30,000	$ – 0 –
J211	Prin. Sals.	45,000	25,000	20,000
J213	Tchrs. Sals.	51,000	– 0 –	51,000
J240	Teach. Supls.	9,000	– 0 –	9,000
	TOTAL	$135,000	$55,000	$ 80,000
CAPITAL OUTLAY:				
L1230	Buildings	$181,000	$41,000	$140,000
	GRAND TOTAL	$316,000	$96,000	$220,000

This concludes the report of the hearing examiner.

* * * *

The Commissioner has thoroughly reviewed the entire record of the matter herein controverted, including the report of the hearing examiner and the exceptions thereto as filed by respective counsel pursuant to *N.J.A.C.* 6:24-1.16

Council takes exception to the fact that the hearing examiner did not accept Council's position that certain unallocated bond issue proceeds for a new construction project should be appropriated for the renovation and renewal of an older building facility. In this regard, Council cites *Botkin v. Mayor and Borough Council of the Borough of Westwood et al.*, 52 *N.J. Super.* 416 426-427 (*App. Div.* 1958), appeal dismissed 28 *N.J.* 218 (1958). The Board

argues that, therein, it was held that the municipal government may properly express its judgment in the matter of a defeated budget.

The Commissioner agrees that the governing body, in such an instance, may properly express its judgment; however, its judgment may not supersede the Board's discretion or mandate the reversal of the Board's best judgment. This determination is grounded in the opinion of the Court in *Botkin, supra.* Nor is the Commissioner bound by Council's judgment in such a matter. It was said by the Appellate Division of the New Jersey Superior Court in *Michael A. Fiore v. Board of Education of the City of Jersey City, Hudson County,* 1965 *S.L.D.* 177 that:

> "***The Legislature has committed the operation of local schools to district boards of education.*** The powers of boards of education in the management and control of school districts are broad. *Downs v. Board of Education, Hoboken,* 12 *N.J. Misc.* 345, 171 *A.* 528 (*Sup. Ct.* 1934), aff'd. *sub nomine Flechtner v. Board of Education of Hoboken,* 113 *N.J.L.* 401 (*E. & A.* 1934)*** Where a board, in the exercise of its discretion, acts within the authority conferred upon it by law, the courts will not interfere absent a showing of clear abuse.*** In short, we may not substitute our discretion for that of the local board, nor may we condemn the exercise of the Board's discretion on the ground that some other course would have been wiser or of more benefit to the parties or community involved. *Boult, supra* (136 *N.J.L.* at p. 523).***" (at p. 178)

See also *Quinlan v Board of Education of North Bergen Township,* 73 *N.J. Super.* 40, 46 (*App. Div.* 1962). Absent a showing of abuse of discretion, the Board's determination must prevail wherein it decided not to utilize bond proceeds from its yet uncompleted building project to renovate an older building. The Commissioner so holds.

Council takes further exception to the recommendation that $41,000 be restored to the capital outlay account, since the proposed relocatable buildings will not, in any event, be utilized during the 1975-76 school year.

Unquestionably, the Board does not propose that its alternative school occupy the relocatables until the ensuing school year. The Board is faced, however, with the absolute necessity of procuring alternate accommodations when its nonrenewable lease expires. In consideration of the necessary lead time to prepare the site and foundations and in further consideration of the uncertainty that would be engendered in the event of a defeat of the Board's 1976-77 budget at the polls, the Commissioner determines that provision shall be made in the 1975-76 budget for these relocatable structures. As was said in *Board of Education of the City of Plainfield v. City Council of the City of Plainfield et al., Union County,* 1974 *S.L.D.* 913:

> "***[A]s a minimum such programs are entitled to a continuing sustenance of support, one marked by constancy and not by vacillation of effort.***" (at p. 921)

The Board, for its part, takes exception to the fact that the hearing examiner failed to note that it expended for equipment and fixtures a total of $28,000 as part of the renovations at the John F. Kennedy High School. The exception has no merit since the record shows only that for this project the Board expended $70,000. (Tr. II-92) Accordingly, it is determined that the Board has not proven that an additional $28,000 should be added to the restoration of $41,000 in line item L1230. In this, as in all other points, the recommendations of the hearing examiner are determined to be valid.

Finally, the Board by letter dated December 23, 1975, prays the Commissioner to restore the entire amount of the reduction for the reason that the Board"***will not be receiving a substantial amount, in excess of $450,000, in State aid for the fiscal year 1975-76 which the State had indicated previously that the Board would receive.***" (Board's Letter of December 23, 1975)

A careful analysis of the Commissioner's own files reveals that the Board listed in its 1975-76 budget as anticipated revenue for atypical pupil aid $1,062,600. (C-4) It also reveals that the Board was notified on the SA-2 form from the State Department of Education on November 15, 1974 that, subject to legislative or judicial change, it could anticipate receipt of $1,265,000 in atypical pupil aid for the 1975-76 school year. (C-1)

The State Department relies initially, subject to audit, upon local school districts' A4-2 reports for their statements of actual expenditures for atypical pupil aid. The Board's A4-2 report due in August 1974, was not yet filed in November 1974 when the SA-2 report, *ante,* was prepared. Thereupon, an agent of the Commissioner notified the County Superintendent who, in turn, found it necessary to procure from the Board its 1973-74 expenditures for atypical pupils. Through error, the Board's total expenditure of $1,265,000 was reported rather than the fifty percent reimbursable amount. (C-2)

The Commissioner can only conclude that the responsibility for this unfortunate error rests with the Board or its agents, in view of the fact that the A4-2 report, due August 1974, was dated March 10, 1975 and, therefore, could not have been available to the County Superintendent in November 1974. (C-3)

In fact, the audited A4-2 report revealed that the Board was eligible for reimbursement for atypical pupil aid in the amount of $461,207 during 1975-76. (C-5) The Commissioner is not unmindful of the severe problem that is thereby engendered. Regardless of where fault may lie in the causing of such error, the distribution of atypical pupil aid by the State must be made on an equitable basis to all local school districts. Therefore, within the context of this factual exposition, the Commissioner can make no further restoration. The Board is not without recourse. It may appropriate such amounts as may be available from unanticipated income or from unappropriated balance; it may reduce such expenditures as may be reasonable; or it may present the voters with a supplementary budget referendum.

In conclusion the Commissioner finds and determines that the certification of the appropriations necessary for school purposes for 1975-76 made by Council is insufficient by an amount of $96,000 for the maintenance of a thorough and efficient system of public schools in the district. The Commissioner hereby certifies the additional sum of $96,000 to the Burlington County Board of Taxation so that the total amount of the local tax levy for current expenses of the school district for the 1975-76 school year shall be $8,801,857 and for capital outlay $98,850.

COMMISSIONER OF EDUCATION

January 30, 1976

Board of Education of the Borough of Verona,

Petitioner,

v.

Mayor and Council of the Borough of Verona, Essex County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Booth, Bate, Hagoort, Keith and Harris (George H. Buermann, Esq., of Counsel)

For the Respondent, Bannon, Rawding & Bannon (George T. Rawding, Esq., of Counsel)

Petitioner, the Board of Education of the Borough of Verona, hereinafter "Board," appeals from an action of the Mayor and Council of the Borough of Verona, hereinafter "Council," taken pursuant to *N.J.S.A.* 18A:22-37 certifying to the Essex County Board of Taxation a lesser amount of appropriations for school purposes for the 1975-76 school year than the amount proposed by the Board in its budget which was rejected by the voters. It is agreed between the parties to submit the matter directly to the Commissioner of Education for Summary Judgment on the pleadings and exhibits filed in support of their respective positions.

At the annual school election held March 11, 1975, the Board submitted to the electorate a proposal to raise $4,014,810 by local taxation for current expense costs of the school district. This item was rejected by the voters and, subsequent to the rejection, the Board submitted its budget to Council for its determination of the amounts necessary for the operation of a thorough and

efficient school system in the Borough of Verona in the 1975-76 school year, pursuant to the mandatory obligation imposed on Council by *N.J.S.A.* 18A:22-37.

After consultation with the Board, Council made its determination and certified to the Essex County Board of Taxation an amount of $3,965,123 for current expense costs of the schools, or an amount of $49,687 less than that originally proposed to the voters by the Board.

The Board contends that Council's action was arbitrary, unreasonable, and capricious and documents its need for the restoration of the reductions recommended by Council with written testimony. Council maintains that it acted properly and after due deliberation, and that the items reduced by its action are only those which are not necessary for a thorough and efficient educational system. Council also documents its position with written testimony.

Council argues that its total reduction of $49,687 from the Board's proposed current expense costs for the 1975-76 school year may be made by (1) a reduction of all Board employee salaries by at least one percent and (2) by appropriating $11,937 from its unappropriated current expense free balance.

At this juncture, the Commissioner observes that the Board by letter (P-1) dated July 18, 1975, does not seek restoration of the full amount of $49,687 reduced by Council. Rather, the Board explains that because of higher salary settlements with its employees than it had anticipated and because of a reduction in State aid it had originally anticipated, it does require the restoration of $36,909 of Council's reduction.

Council, by letter (R-1) dated July 31, 1975, argues that had the Board limited its employees' salary increases to five percent, as Council did, the Board would not have had to appropriate any moneys from its unappropriated current expense free balance thereby reducing those moneys to a relatively small level.

The Commissioner observes that the Board's 1974-75 school audit, a copy of which is part of the Commissioner's official records, shows that the Board had an unappropriated free balance in current expense on June 30, 1975 in the amount of $117,960. Also, the audit shows that the Board applied $50,000 of that amount to the 1975-76 budget controverted herein, leaving a balance of $67,960. It is also observed that the Board's total current expense budget for 1975-76, excluding the moneys reduced by Council, is $4,763,104. In the Commissioner's judgment, a further reduction of unappropriated current expense free balance would place the Board in a precarious fiscal posture.

The Commissioner finds and determines that the certification of the appropriations necessary for school purposes for 1975-76 made by Council is insufficient by an amount of $36,909 for the maintenance of a thorough and efficient system of public schools in the district. Therefore, he hereby certifies the additional sum of $36,909 to the Essex County Board of Taxation, so that

the total amount of the local tax levy for current expenses of the school district for the 1975-76 school year shall be $4,002,032.

COMMISSIONER OF EDUCATION

January 30, 1976

Ruth E. Sydnor,

Petitioner,

v.

Board of Education of the City of Englewood, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Saul R. Alexander, Esq.

For the Respondent, Wittman, Anzalone, Bernstein & Dunn (Walter T. Wittman, Esq., of Counsel)

Petitioner, a teacher employed by the Board of Education of the City of Englewood, hereinafter "Board," appeals the action of the Board terminating her employment as of January 19, 1974. She alleges that she had achieved a tenured status pursuant to *N.J.S.A.* 18A:28-5 and was not subject to termination without the certification of charges pursuant to *N.J.S.A.* 18A:6-10 *et seq.* She seeks an order from the Commissioner of Education declaring the Board's termination of her employment null and void and directing that she be reinstated with such further relief as may be appropriate.

The Board denies that petitioner acquired a tenure status and avers that her employment contract legally expired by its own terms on January 19, 1974.

This matter is before the Commissioner on the pleadings, exhibits, a Motion to Dismiss by respondent and transcript of oral argument on the Motion conducted on October 17, 1975 at the State Department of Education, Trenton. The facts are as follows:

Petitioner was employed by the Board as a Title I teacher of preschool children from January 20, 1971 through June 30, 1973. No contract or promise of employment for the 1973-74 school year was issued by the Board until September 5, 1973, when petitioner was offered a contract effective retroactively to September 1, 1973, and forward to the date of January 19, 1974.

Petitioner refused to sign this contract but did in fact teach for the Board from September 1, 1973 until January 19, 1974. Petitioner first applied to the New Jersey State Board of Examiners for a New Jersey teaching certificate on June 18, 1974, and was issued a regular certificate on July 25, 1974 to serve as a nursery school teacher. (R-1, 2, 5)

Petitioner alleges that she was not given written notification by the Board prior to April 30, 1973, with respect to her employment status for the ensuing school year pursuant to *N.J.S.A.* 18A:27-10. The Board does not deny the allegation. The statute provides that:

> "On or before April 30 in each year, every *board of education* in the State *shall give* to each nontenure teaching staff member continuously employed by it since the preceding September 30 either
>
> > "a. A *written offer* of a contract for employment for the next succeeding year***, or
> >
> > "b. A *written notice* that such employment will not be offered."
> >
> > (*Emphasis supplied.*)

Petitioner grounds her claim to continued employment on *N.J.S.A.* 18A:27-11 which specifies that:

> "Should any board of education fail to give any nontenure teaching staff member either an offer of contract for employment for the next succeeding school year, or a notice that such employment will not be offered, all within the time and in the manner provided by this Act, then said board shall be deemed to have offered to that teaching staff member continued employment for the next succeeding school year***."

Petitioner contends, therefore, that an employment relationship without fixed term was established for the 1973-74 school year between her and the Board because of the Board's failure to act. She avers that the September 5 offer by the Board of a partial year's contract was an invalid act and that the Board's termination of her employment on January 19, 1974 was equally flawed.

Petitioner further lays claim to tenure by reason of the Board's alleged illegal termination of her employment two days before she would have gained tenure by reason of serving for a period in excess of three academic years within a four-year period pursuant to *N.J.S.A.* 18A:28-5(c).

Petitioner makes no claim that she possessed a New Jersey teaching certificate prior to July 25, 1974, or that she applied to the New Jersey State Board of Examiners for such a certificate before June 18, 1974. She avers that she made application for that certificate while *legally* (although not physically) in the employ of the Board in June 1974. (Tr. 26) She further argues that she was eligible to receive the certificate at the end of the summer school session in 1973 as evidenced by the verification statement of the State Board of Examiners.

(R-9) Petitioner contends that eligibility to receive a certificate is sufficient to qualify her services for tenure as long as she was regularly certified while still in the *legal* employ of the Board. Petitioner maintains that any dereliction in the procurement of the certificate was attributable to the Superintendent whose responsibility it was to make certain that the Board's teaching staff members were properly certificated pursuant to *N.J.A.C.* 6:11-3.5. (Tr. 36-40)

Finally, petitioner argues that the Board's termination of her employment was arbitrary and capricious within the context of *Arthur L. Page v. Board of Education of the City of Trenton, and Pasquale A. Maffei, Mercer County,* 1973 *S.L.D.* 704, decision on remand 1975 *S.L.D.* 644.

Conversely, the Board grounds its Motion to Dismiss, *inter alia,* on the following arguments and statutory interpretations:

1. Petitioner was neither certified nor eligible for regular certification prior to the date of her termination on January 19, 1974.

2. The Board was prohibited from continuing to employ petitioner by *N.J.S.A.* 18A:26-2 which specifies that:

> "No teaching staff member shall be employed in the public schools by any board of education unless he is the holder of a valid certificate to teach***."

3. The Board was compelled to terminate petitioner by *N.J.S.A.* 18A:27-2 which requires that:

> "Any contract or engagement of any teaching staff member, shall cease and determine whenever the employing board of education shall ascertain *** that such person is not *** the holder of an appropriate certificate required by this title for such employment.***"

4. Petitioner could not have acquired tenure by reason of *N.J.S.A.* 18A:28-4 which states that:

> "No teaching staff member shall acquire tenure *** who is not the holder of an appropriate certificate for such position***."

5. Petitioner failed to comply with the deadline mandate set forth in *N.J.S.A.* 18A:27-12 which provides that failure of a Board to give timely notice of employment or non-employment for an ensuing year shall trigger the requirement that a teaching staff member who desires employment:

> "***shall notify the board of education of such acceptance in writing, on or before June 1, in which event such employment shall continue as provided for herein. *In the absence of such notice of acceptance the provisions of this article shall no longer be applicable.*" (*Emphasis supplied.*)

In support of these contentions the Board cites *Mildred Givens v. Board of Education of the City of Newark, Essex County*, 1974 *S.L.D.* 906. Therein, the Commissioner determined that a ten-month period at the beginning of Givens' employment by the Newark Board of Education counted toward tenure although she did not receive a regular teaching certificate until the end of that ten-month period. Additionally, the Board cites, *inter alia, Jack Noorigian v. Board of Education of Jersey City, Hudson County,* 1972 *S.L.D.* 266, affirmed in part, reversed in part State Board of Education 1973 *S.L.D.* 777.

The Commissioner has carefully reviewed the evidence in the controverted matter and has balanced the arguments set forth by the parties. In similar disputes the Commissioner has on occasion determined that Title I teachers may gain tenure when the precise statutory requirements are met. *Ruth Nearier et al. v. Board of Education of the City of Passaic, Passaic County,* 1975 *S.L.D.* 604. It has also been determined that teachers who served part of their time without regular certificates may count that time toward tenure upon procurement of regular certification while still serving the same employing boards. *Joann K'Burg v. Board of Education of the Township of Egg Harbor, Atlantic County,* 1973 *S.L.D.* 636; *Givens, supra; Thomas Smith, Jr. v. Board of Education of the Township of Egg Harbor, Atlantic County,* 1974 *S.L.D.* 430 In similar manner the Commissioner has granted relief to nontenure teachers who were not given notice of their employment status by their employing boards pursuant to *N.J.S.A.* 18A:27-10 *et seq. Ronald Elliot Burgin v. Board of Education of the Borough of Avalon, Cape May County,* 1974 *S.L.D.* 396; *Thomas Aitken v. Board of Education of the Township of Manalapan, Monmouth County,* 1974 *S.L.D.* 207

In the instant dispute, petitioner asserts that she was entitled to employment for the entire 1973-74 school year by reason of the Board's failure to notify her in writing of her employment status prior to April 30, 1973, pursuant to *N.J.S.A.* 18A:27-10, 11. While it is clear that such notification should have been given by the Board, it is also clear that no evidence has been submitted that petitioner, pursuant to *N.J.S.A.* 18A:27-12, notified the Board in writing prior to June 1, 1973 of her acceptance of employment for the ensuing school year. Petitioner may not lay claim to employment rights by reason of the Board's failure to meet a statutory deadline when she herself similarly failed to meet a statutory prescription. The Commissioner so holds.

It is a well accepted principle of law that statutory language is to be given its ordinary meaning and that statutes are to be interpreted as a harmonious whole. *Abbott Dairies v. Armstrong*, 14 *N.J.* 319 (1954); *Hoffman v. Hock*, 8 *N.J.* 397 (1952) In this instance *N.J.S.A.* 18A:27-10, 11 and 12 were in fact enacted by the Legislature as *c.* 436, *Laws* of 1972. One statute may not properly be read, as petitioner seeks to read it, to the exclusion of another of equal import. Petitioner was not properly notified by the Board nor did she comply with the statutory requirement of *N.J.S.A.* 18A:27-12 to secure the employment to which she now lays claim.

Nevertheless, the Board employed her at the beginning of the next academic year on September 1, 1973. Petitioner refused to sign a contract for

less than a full academic year. In so refusing she mistakenly relied on her erroneous interpretation of *N.J.S.A.* 18A:27-10 *et seq.* The Board terminated petitioner on January 19, 1974, short of the statutory requirement for tenure. At that time, petitioner could not have acquired a tenure status because she possessed no valid teaching certificate as statutorily required by *N.J.S.A.* 18A:28-4. Nor could she have legally continued to teach without a valid certificate. *N.J.S.A.* 18A:27-2 The record is clear that petitioner did not even apply to the New Jersey State Board of Examiners for a teaching certificate until June 18, 1974. (R-10) This fact alone shows the instant matter to be clearly distinguishable from *Givens*, *supra*, wherein Givens applied for a teaching certificate prior to beginning to teach for the Newark Board, and received that certificate well in advance of the time she became eligible for tenure. This matter is likewise distinguishable from *Page*, *supra*, in that Page was at all times a fully certified teaching staff member. Petitioner's argument that the Superintendent was derelict in not compelling her to apply for certification is not a weighty one as a reason to grant the relief she seeks. The procuring of certification is the primary responsibility of a teacher. It is also the responsibility of the Superintendent to insure that all teaching staff members are either certified or apply in timely fashion for appropriate certificates. Such delay as exhibited herein embracing a period of years, contrary as it is to the statutes and rules of the State Board, is abhorrent to the Commissioner. Nevertheless, such inexcusable delay does not create for petitioner a valid claim to tenure.

Similarly, petitioner's charges that the Board's action which terminated her employment on January 19, 1974, was capricious is not supported by the record. The Board had given notice in September 1973, that she would be employed for a period of less than five months. This constitutes more than ample notice to negate a charge of capriciousness on the part of the Board.

Petitioner's claims to tenure are without merit by reason of her failure to meet the precise conditions set forth in the statutes. *Zimmerman v. Board of Education of Newark*, 38 *N.J.* 65 (1962), *cert. den.* 371 *U.S.* 956, 83 *S.Ct.* 508, 9 *L.Ed. 2d* 502 (1963); *Ahrensfield v. State Board of Education,* 126 *N.J.L.* 543 (*E. & A.* 1941) Her claims to continued employment pursuant to *N.J.S.A.* 18A:27-10 *et seq.* are similarly without merit. Accordingly, respondent's Motion is granted and the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

January 30, 1976

Robert Quay, individually, and
Haddon Township Education Association,

Petitioners,

v.

Board of Education of the Township of Haddon, Camden County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Hartman, Schlesinger, Schlosser & Faxon (Joel S. Selikoff, Esq., of Counsel)

For the Respondent, Leonard H. Savadove, Esq.

Petitioner Quay, a teacher employed by the Board of Education of the Township of Haddon, Camden County, hereinafter "Board," since September 1950, contests the determination of the Board to withhold his salary increment and adjustment increment for the academic year 1974-75. He alleges that the Board's action in this regard is arbitrary, capricious, and taken in bad faith denying him his constitutional right to procedural due process.

This matter is submitted to the Commissioner of Education for adjudication on exhibits, Briefs and affidavits.

The following pertinent facts are not in dispute and are set forth as follows:

1. Petitioner is a teacher with a tenured status who was initially employed by the Board in September 1950. (Petitioners' Brief, unp)

2. Based on petitioner's unsatisfactory teaching performance, the Board acted on March 19, 1970 to withhold petitioner's salary and adjustment increments for the 1970-71 academic year. The Board again acted on March 18, 1971 to withhold his salary and adjustment increments for the 1971-72 academic year. (Superintendent's Affidavit; Board's Brief, at p. 1)

3. Petitioner received partial salary and adjustment increments in March 1972 for the 1972-73 academic year. (Statement of Facts; Board's Brief, at p. 1)

4. Petitioner received partial salary and adjustment increments in March 1973 for the 1973-74 academic year. (Statement of Facts; Board's Brief, at p. 1)

5. On March 21, 1974, the Board acted to withhold petitioner's salary and adjustment increments for the 1974-75 academic year based on his allegedly unsatisfactory teaching performance. (Superintendent's Affidavit; Exhibit E)

6. On March 4, 1975, petitioner filed his Appeal with the Commissioner, contesting the action of the Board which set his salary at $12,300 for the 1974-75 academic year. (Petition of Appeal)

In the instant matter, petitioner does not challenge the actions of the Board which withheld all or part of his salary and adjustment increments for the 1970-71, 1971-72, 1972-73, and 1973-74 academic years. Rather, he asserts that the Board tried unsuccessfully to induce him to retire for reasons of alleged disability during the months of September, October and November 1973, and thereafter informed him in March 1974 that his 1974-75 salary and adjustment increments would be withheld (Exhibit E) for unsatisfactory teaching performance. (Statement of Facts; Petitioners' Brief, unp)

Petitioner admits being evaluated by his superiors on four occasions during the 1973-74 academic year; however, he asserts that none of these evaluations referred to the withholding of increments. The Superintendent's affidavit states that he met with petitioner on three occasions, September 17, October 10 and November 14, 1973, explained to him that his teaching performance was unsatisfactory and suggested that he should consider retiring. The affidavit states further that the President of the Haddon Township Education Association, hereinafter "Association," was present during each of these meetings and that during the first meeting on September 17, 1973, the high school principal was also in attendance. (Superintendent's Affidavit)

Petitioner admits the meeting on October 10, 1973 to discuss the possibility of applying for a disability retirement. He denies that he met with the Superintendent in September or November to discuss either his retirement or his teaching performance. (Petitioner's Affidavit)

The Commissioner observes that petitioner did not submit additional affidavits, for instance, from the President of the Association or other evidence corroborating the statements in his affidavit, or present other evidence that all three meetings did not take place as set forth in the Superintendent's affidavit. In this regard the Commissioner holds that the greater weight must be given to the Superintendent's affidavit; therefore, the Commissioner believes that the three meetings during the 1973-74 academic year occurred as set forth therein. (Superintendent's Affidavit)

Petitioner's legal argument is that he has been denied a property interest as defined in *Board of Regents v. Roth,* 408 *U.S.* 564 (1972), 33 *L.Ed. 2d* 548, 92 *S.Ct.* 2701 (1972). (Petitioners' Brief, unp) He asserts that he had a property interest regarding his salary by virtue of a salary policy adopted by the Board (Exhibit F, at p. 26) and pursuant to *N.J.S.A.* 18A:29-14 which reads as follows:

> "Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full

membership of the board of education. It shall be the duty of the board of education, within 10 days, to give written notice of such action, together with the reasons therefor, to the member concerned.***"

He argues, therefore, that absent a showing by the Board of insufficiency or other good cause to withhold his increments, he had a clear expectancy to receive his salary and adjustment increments for the 1974-75 academic year *Roth, supra* Petitioner concludes that if insufficiency or other good cause were indicated, then his rights to a procedural due process hearing have been violated and that he was entitled to (1) written notice of the grounds for the planned deprivation; (2) disclosure of the evidence supporting that deprivation; (3) the right to confront and cross-examine adverse witnesses; (4) an opportunity to be heard in person and to present supporting witnesses and documentary evidence (5) a neutral and detached hearing body; and (6) a written statement by the fact-finder as to the evidence relied upon. (Petitioners' Brief, unp)

The Board disagrees and asserts that the four previous years in which petitioner had his increments withheld in full or in part, together with the conferences referred to in the Superintendent's affidavit and the evaluations which were followed by conferences (Exhibits A, B, C, D), were collectively sufficient to inform petitioner that the Board was less than satisfied with his performance. The Board asserts further that petitioner was notified in writing pursuant to its policy and *N.J.S.A.* 18A:29-14 that his increments were being withheld. (R-1) The Board argues also that petitioner is guilty of laches by waiting one year, from March 22, 1974 to March 4, 1975, to press his claim before the Commissioner.

The Commissioner has considered all such arguments in the context of the stipulated facts of this matter and determines that:

1. Petitioner's delay of approximately one year from March 21, 1974 when the Board acted to withhold his salary increment, to March 5, 1975 when the instant Petition of Appeal was filed, may indeed be judged as an unreasonable one in the circumstances which does justify the invocation of the equitable defense of laches.

2. Even assuming, *arguendo*, that the defense of laches is not applicable there is ample evidence in the record to support the Board's action controverted herein as a reasonable exercise of discretion pursuant to the statutory authority. *N.J.S.A.* 18A:29-14

3. Petitioner's argument with respect to an alleged "property interest' in a salary increment is misplaced.

The Commissioner and the courts have long held that while there is no strict time period during which there must be an assertion of an alleged denial of rights, the assertion must be made promptly without unreasonable delay *Barbara Witchel v. Peter Cannici and Board of Education of the City of Passaic Passaic County,* 1967 *S.L.D.* 1, aff'd State Board of Education January 3, 1968 *Harenberg v. Board of Education of the City of Newark et al.*, 1960-61 *S.L.D*

142; *Dorothy L. Elowitch v. Bayonne Board of Education, Hudson County,* 1967 *S.L.D.* 78, aff'd State Board of Education 86; *Auciello v. Stauffer,* 58 *N.J. Super.* 522 (*App. Div.* 1959); *Marjon v. Altman,* 120 *N.J.L.* 16 (*Sup. Ct.* 1938) The delay of petitioner in the instant matter is, in the circumstances, an inexcusable one which acts as an estoppel against the assertion of the right. The Board had every reason to expect that petitioner had acquiesced to its action of March 22, 1974, and no reason to be forced to a defense of the action in March 1975. The Commissioner so holds.

The matter has proceeded to formal submission, however, and the Commissioner determines that the Board's controverted action is amply supported by the record and that the dispute should be decided on its merits.

Although the matter controverted herein does not relate to the academic years prior to 1974-75, the record discloses a pattern of withholding petitioner's increments for the four previous academic years which he never contested. Petitioner clearly understood through the continued withholding of his increments and his meetings with the Superintendent that the Board was not satisfied with his performance. (Superintendent's Affidavit)

The record discloses that four evaluations of petitioner's teaching performance during the 1973-74 academic year were offered in evidence in which petitioner was generally judged as "competent," although several comments were negative and several suggested areas for improvement were indicated on Exhibits B, C, and D. (Exhibits A, B, C, D) The record discloses further that petitioner would not write, or was reluctant to write, lesson plans for pupil instruction. On November 27, 1972, petitioner wrote the high school principal questioning the necessity of lesson plans as follows:

> "Mr. Deighan told me today that I am supposed to write lesson plans again. Please put this into writing and specify the person(s) making this decision and the reasons why and please return to me by Thursday.***" (Exhibit R-2)

The record discloses that this problem concerned with petitioner's submission of regular lesson plans was of continued concern to one of his supervisors who prepared a memo on September 13, 1973, which criticized petitioner for his failure to submit regular lesson plans. (Exhibit R-3)

The Commissioner has commented on matters such as these in prior decisions. In *Charles Coniglio v. Board of Education of the Township of Teaneck, Bergen County,* 1973 *S.L.D.* 449, the Commissioner quoted from the case of *Kopera v. West Orange Board of Education,* 1958-59 *S.L.D.* 96, aff'd State Board of Education 98, remanded to Commissioner 60 *N.J. Super.* 288 (*App. Div.* 1960), decision on remand 1960-61 *S.L.D.* 57, aff'd Superior Court (Appellate Division) 1961-62 *S.L.D.* 223.

In *Kopera, supra,* the Board had adopted a policy as part of its salary schedule which stated, *inter alia,* that:

> "***'All increases on all guides will be based on meritorious service. Favorable reports by the superintendent and those charged with supervisory responsibility, and approval by the Board of Education are a prerequisite to the granting of all increases in salary.'***" (60 *N.J. Super.*, at 291)

Judge Gaulkin, expressing the opinion of the Appellate Division, stated the following:

> "***'We hold that it is lawful and reasonable for West Orange to require 'favorable reports by superintendents and those charged with supervisory responsibility and approval by the Board of Education [as] a prerequisite to the granting of all increases in salary.'***" (*Id.*, at p. 294)

The Court in *Kopera, supra*, quoted the original decision of the Commissioner in that case, wherein he stated:

> "***A board of education is certainly within its statutory authority if it establishes satisfactory performance as a criterion for advancement in salary. Indeed, a board is given specific authority to deny a statutory increment under the minimum salary laws '***for inefficiency or other good cause.***' *N.J.S.A.* 18:13-13.7 [now *N.J.S.A.* 18A:29-12, 13 and 14] ***" (60 *N.J. Super.* at 295)

Similarly, in the matter *sub judice*, the Commissioner holds that it was reasonable for the Board to require "favorable reports" of petitioner's teaching performance and that the reports it did receive provide sufficient reason for the denial of a salary increment to petitioner on the grounds of "***inefficiency or other good cause.***" *Kopera, supra*; *N.J.S.A.* 18A:29-14

Petitioner's assertion that the Court's decision in *Roth, supra*, entitled him to the controverted salary increment as a constitutionally protected "property right" is improperly grounded. In *Roth* the Court said:

> "***Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.***" (92 *S. Ct.* at 2709)

The applicable "state law" herein (*N.J.S.A.* 18A:29-14) with relevance to petitioner's claim makes it clear that a salary increment must be earned and that it may be withheld.

Finally, the Commissioner finds nothing in the record to indicate that petitioner ever asked for, let alone was denied, an appearance before the Board at a time subsequent to the Board's action of March 22, 1974 to withhold his increment and, accordingly, the Commissioner finds no merit in the present

claim that petitioner was not afforded procedural due process. Indeed, the record supports an opposite conclusion; namely, that he had ample opportunity for an expression of view to his immediate superiors and that there was no other request. Further, the Commissioner finds as inappropriate the type of adversary hearing which petitioner now claims. (See *Kopera, supra.*)

The Petition is dismissed.

COMMISSIONER OF EDUCATION

February 6, 1976

In the Matter of the Election Inquiry in the School District of Edgewater Park, Burlington County.

COMMISSIONER OF EDUCATION

DECISION

This matter has been opened by a letter of Petition addressed to the Commissioner of Education dated February 6, 1976, from Barry S. Feldman, hereinafter "Petitioner," a candidate for a seat on the Board of Education of Edgewater Park, hereinafter "Board."

Petitioner alleges that the drawing for ballot position as prescribed in *N.J.S.A.* 18A:14-13 was held on January 30, 1976 by the Secretary of the Board and further alleges that such drawing was substantively incorrect as noted in his letter to the Commissioner:

> "***Although drawing for ballot position was done on Friday night, 1/30/76, by the Secretary of the Local School Board of Edgewater Park, N.J. 08010, Mrs. Clara Sheppard, the manner in which the 'five' names were drawn for the three seats on the full three year term is in *absolute* violation of the *above law and code.* Two *non-incumbents,* Mr. Ben Stephens and myself, were the only two other parties present at the drawing.***
>
> "With no further explanation as to the proper procedure to either of us, who I admit are novices at this, she (Mrs. Sheppard) proceeded to draw at 'lower then eye level', *in clear see through capsules* (with names rolled up in them), *from an open white envelope with the opening facing her and at less than arms length away*, the candidates names.***" (*Emphasis in text.*)

The Board Secretary, Mrs. Sheppard, has replied by letter dated February 13, 1976, addressed to the Commissioner:

"I was contacted today by Dr. Batezel, County Superintendent, regarding a letter to you on a violation of 18A:14-13 regarding the drawing for position on the ballot on January 30, 1976. The procedure as described in Mr. Feldman's letter is substantially correct in that the names were put in capsules and drawn from an envelope. I realize now that, although the names were folded inward and the capsules and slips were identical so that there was no capability nor intent to draw other than by chance, that the basic requirements of box, aperture, and cards 'of same size, substance and thickness' were not followed.***"

The Commissioner has previously considered election inquiries, 1972 *S.L.D.* 16 and 1973 *S.L.D.* 36, and finds direct applicability in the instant matter. The Commissioner said *In the Matter of the Election Inquiry in the School District of South Brunswick, Middlesex County,* 1973 *S.L.D.* 36:

"***The narrow question which is dispositive in this matter is whether the facts as set forth show compliance with the requirements of the applicable statute, *N.J.S.A.* 18A:14-13, which reads in pertinent part as follows:

'The position which the names of candidates shall have upon the annual school election shall be determined by the secretary of the board of education of the district by conducting a drawing in the following manner:

'a. The drawing of names shall take place at eight P.M. on the day following the last day for filing petitions for the annual school election at the regular meeting place of the board of education. In case the day fixed for the drawing of names falls on a Sunday, the drawing shall be held on the following day. The drawing shall be done by the secretary, or in the event of his sickness or disability or absence from the district, by a person designated by the president of the board of education. The person making the drawing shall make public announcement at the drawing of each name, the order in which the name is drawn and the term of office for which the drawing is made.

'b. A separate drawing shall be made for each full term and for each unexpired term, respectively. The names of the several candidates for whom petitions have been filed for each of the terms shall be written upon cards of the same size, substance and thickness. The cards shall be placed in a covered box with an aperture in the top large enough to admit a man's hand and to allow the cards to be drawn therefrom. The box shall be turned and shaken thoroughly to mix the cards and the cards shall be withdrawn one at a time.***'

"The Commissioner takes notice of his decision under date of January 26, 1972, which involved a drawing for ballot position in this same school district, *In the Matter of the Election Inquiry in the School District of South Brunswick, Middlesex County.* In that decision the Commissioner

cited the words of the Court in *Dimon v. Erhlich et al.*, 97 *N.J. Super.* 83 (*App. Div.* 1967), wherein the following pertinent statement appears at p. 88:

> '***The fact that two people rather than one were actually involved in the here questioned draw procedure is irrelevant. So far as the statutory language and intent are concerned, one person may perform the entire operation. The reliance of the statute for a fair draw is upon the identical physical character of the cards used and upon the thorough shaking and turning over of the box after the cards are placed in it; this, of course, under the implicit assumption that the official will not look into the box when drawing the card from it.***'***" (at p. 38)

Also, in *South Brunswick, supra,* the Commissioner issued a caveat to that Board and all other local boards of education to make certain that the exact requirements of *N.J.S.A.* 18A:14-13 are met, including the requirement for cards "***of the same size, substance and thickness***," which is intended to dispel any assumption that the drawer may be able to differentiate among the various names in the box by feeling each item with his hand.

The Commissioner finds and determines that the drawing for ballot position in the Edgewater Park School District on January 30, 1976, was conducted in an unlawful and improper manner, and is hereby declared a nullity.

Accordingly, the Commissioner orders that a new drawing for ballot position for the 1976 school election be conducted by the Secretary of the Edgewater Park Board of Education as soon as possible following prior written notification of such drawing to each of the five candidates.

COMMISSIONER OF EDUCATION

February 17, 1976

Board of Education of the Borough of North Arlington,

Petitioner,

v.

Mayor and Council of the Borough of North Arlington, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Glenn Taylor Leonard, Esq.

For the Respondent, Frank Piscatella, Esq.

Petitioner, the Board of Education of the Borough of North Arlington, hereinafter "Board," appeals from an action of the Mayor and Council of the Borough of North Arlington, hereinafter "Governing Body," taken pursuant to *N.J.S.A.* 18A:22-37 certifying to the Bergen County Board of Taxation a lesser amount of appropriations for school purposes for the 1975-76 school year than the amount proposed by the Board in its budget which was rejected by the voters.

Pursuant to the Governing Body's demand to present testimony in defense of the allegations set forth by the Board, a hearing was scheduled for December 11, 1975 at the office of the Bergen County Superintendent of Schools, Woodridge, by a hearing examiner appointed by the Commissioner of Education. The hearing examiner reports that contrary to its demand to elicit supporting testimony in defense of its position, the Governing Body, at the time of hearing, waived its asserted right and agreed to have the matter submitted directly to the Commissioner on the pleadings and supporting written documentation filed by the parties.

The matter is now before the Commissioner for adjudication.

At the annual school election conducted on March 11, 1975, the Board submitted to the electorate a proposal to raise $2,263,425 by local taxation for current expense of the school district for the 1975-76 school year. This item was rejected by the voters. Subsequently, the Board submitted its budget to the Governing Body for its determination of the amounts necessary for the operation of a thorough and efficient school system in the Borough of North Arlington in the 1975-76 school year, pursuant to the mandatory obligation imposed on the Governing Body by *N.J.S.A.* 18A:22-37.

After consultation with the Board, the Governing Body made its determination and certified to the Bergen County Board of Taxation an amount of $2,215,850 for current expense, or $47,575 less than the amount proposed by the Board.

The Board contends that the Governing Body's action was arbitrary, capricious and unreasonable and documents its need for the restoration of the reductions recommended by the Governing Body with written testimony. The Governing Body maintains that it acted properly and after due deliberation, and that the items reduced by its action are only those which are not necessary for a thorough and efficient system of public schools. The Commissioner observes that the audit report of the Board's budgetary accounts for 1974-75 shows that the unappropriated current expense balance as of June 30, 1975, was $23, 675 after it appropriated $80,000 to the 1975-76 current expense budget.

As part of its determination, the Governing Body suggested specific line items of the budget in which it believed economies could be effected as follows:

Account Number	Item	Board's Proposal	Governing Body's Proposal	Reduction
CURRENT EXPENSE:				
Administration				
J110F	Sal. Supt.	$ 28,820	$ 24,820	$ 4,000
J120B	Legal Fees	4,000	3,000	1,000
J130D	Oth. Exp. Sch. Elec.	900	500	400
J130F	Oth. Exp. Supt's. Off.	1,500	1,250	250
J130M	Oth. Exp. Prtg.	500	300	200
J130N	Misc. Adm.	5,000	3,600	1,400
Instruction				
J230C	A-V Mats.	10,500	8,000	2,500
J240	Tchng. Supls.	46,000	43,500	2,500
J250A	Misc. Supls. Instr.	6,010	4,250	1,760
J250B	Trav. Exp. Instr.	1,100	400	700
J250C	Misc. Exp. Instr.	3,965	2,100	1,865
Operation of Plant				
J610A	Sals. Cust. Servs.	14,000	6,000	8,000
J630	Heat	37,000	29,000	8,000
J640D	Telephone	10,000	8,500	1,500
J730	Purch. Equip.	40,500	29,500	11,000
J1112	Sals. Civic Actvs.	2,500	– 0 –	2,500
	TOTALS	$212,295	$164,720	$47,575

The Commissioner will discuss the major areas of administration, instruction, operation of plant, purchase of equipment, and civic activities set forth above and the total respective reductions imposed by the Governing Body.

J100 Administration	Board's Total Proposal	$40,720
	Governing Body's	33,470
	Reduction	$ 7,250

The Board asserts in its written documentation (P-1) that it requires the funds reduced in each of the J100 line items by the Governing Body. Specifically, the Board avers that its Superintendent who had retired on August 31, 1975, was receiving an annual salary of $28,820. It employed his successor at a salary of $27,500. The Commissioner finds that of the $4,000 reduction in the Superintendent's salary item the Board requires one-sixth of its former Superintendent's salary of $28,820 and five-sixths of its present Superintendent's salary of $27,500 or an approximate restoration of $3,000 of the $4,000 reduction.

The Governing Body argues in its written documentation (R-1) that the remaining recommended reductions in the area of administration still allow the Board sufficient moneys to operate with respect to legal expenses, election expenses and computer expenses as set forth in line item J130N, Miscellaneous Expense for Administration, and that those reductions are not arbitrary. Furthermore, the Governing Body avers that its reductions in the Superintendent's office expenses and the Board's printing expenses are so minimal that there would be no impact on the Board's efforts to provide a thorough and efficient educational program. (R-1, at p. 2)

The Board contends that its prior 1974-75 appropriation for legal expenses was over-expended and that its anticipated expenditure of $4,000 for 1975-76 is extremely modest. (P-1, at p. 1) It also argues that its proposed $900 expenditure for school election expenses reflects a $400 decrease from its 1974-75 appropriation. (P-1, at p. 2) The Board explains that between its costs for payroll computer service and computer accounting service, its estimated computer expenditure is $5,000 for 1975-76. The Board argues that the reduction of $200 from line item J130M (Other Expenses for Printing and Publishing) would preclude it from securing professional information from the New Jersey School Boards Association, the Department of Education, and booklets which offer legislative information. (P-1, at p. 3) Lastly, the Board avers that it requires the $250 reduction imposed by the Governing Body in line item J130F (Other Expenses for Superintendent's Office) to purchase stationery and rubber stamps for the new Superintendent. (P-1, at p. 2)

The Commissioner determines that the Board requires restoration of the Governing Body's reduction in its proposed legal expenses, school election expenses, printing and publishing expenses and computer expenses. The Commissioner further determines that the Board did not prove the necessity for restoration of the suggested reductions in other expenses for the Superintendent.

Accordingly, of the total reduction of $7,250 in the Board's administrative services, the Commissioner directs that $6,000 be restored and that a reduction of $1,250 be sustained.

J200 Instruction	Board's Total Proposal	$67,575
	Governing Body's Reduction	58,250
		$ 9,325

In the major area of instruction, the Governing Body reduced the Board's proposed expenditures in line items for elementary and high school audiovisual materials by $2,500; in elementary and high school teaching supplies by $2,500; in guidance office expense by $510; in elementary and high school office expense by $1,250; in dues to professional organizations the Board pays for selected employees by $360; in elementary and secondary assembly programs by $700; in travel expense for four employees by $700; and, miscellaneous expense for instruction by $805.

The Governing Body argues that its reduction in the Board's audiovisual line item still allows the Board the same appropriation of $8,000 it had for 1974-75. (R-1, at p. 2) The Governing Body explains that it reduced the Board's line item for teaching supplies by $2,500 for failure of the Board to document its need for those funds. (R-1, at p. 3) The Governing Body asserts that its reduction of $510 in the Board's guidance office expense is so minute that no effect would be felt on the guidance program. (R-1, at p. 3) The Governing Body determined that the amount of $2,250 for the Board's elementary and secondary school office expense is sufficient and that its reduction of $1,250 is reasonable. (R-1, at pp. 3-4) The Governing Body argues that the Board's policy of paying dues to professional organizations for selected employees should be reconsidered. Accordingly, it reduced the Board's proposed expenditure of $560 to $200. (R-1, at p. 4) The Governing Body maintains that the Board failed to substantiate its need for the $700 reduced from the school assembly line item. Consequently, of the $1,400 proposed by the Board for school assemblies, the Governing Body reduced that amount by $700. (R-1, at p. 4) The Governing Body asserts that travel expense for the Board's audiovisual aid coordinator should remain at $200, or the 1974-75 amount; for the Board's learning disabilities coordinator the Governing Body urges no travel allowance be provided because the Board expended no moneys in this manner during 1974-75 although it had appropriated $250; the travel allowance for the Board's distributive education coordinator should be $200, explains the Governing Body, because that is the amount expended by the Board during 1974-75; and, finally, the Governing Body urges that no travel allowance be granted the Board's commerce-industry education coordinator. (R-1, at pp. 4-5) The Governing Body asserts that the Board has sufficient money, $1,200, in its miscellaneous expense for instruction.

The Commissioner has reviewed the written documentation (P-1) of the Board with respect to the audiovisual line item and finds that the Board's proof of the need for the disputed $2,500 is not sufficient. (P-1, at p. 4) Also, the Commissioner notices that of the Board's proposed $46,000 expenditure for

teaching supplies, the Governing Body eliminated $2,500. The Board's argument that its "***per pupil allotment of $24.00***is certainly not high in comparison to other school districts***" (P-1, at p. 4) does not persuade the Commissioner that this recommended reduction should be restored. The Commissioner has reviewed the Board's arguments with respect to its need for the reductions imposed in guidance office expense, and elementary and secondary school office expense and finds that the thrust of its position is grounded upon increased paper costs, postage costs and inflation. (P-1, at p. 5) The commissioner observes that the proof necessary for the restoration of reductions recommended by the Governing Body is the necessity to operate its schools in a thorough and efficient manner. The Commissioner finds that with respect to the Board's guidance office expense and its elementary and secondary office expense the necessity for restoration has not been proven. The Commissioner has reviewed the Board's arguments with respect to the suggested reductions in its item for professional dues and assembly programs. (P-1, at p. 6) The Commissioner determines that the Board failed to establish the necessity for these disputed moneys.

The Board asserts that its proposed travel expense of $1100 is absolutely essential for intra-school and related travel by its audiovisual coordinator, learning disabilities specialist, distributive education coordinator, and its commerce-industry education coordinator. The Board asserts that a reduction of $700 in this line item would jeopardize the successful completion of their duties. (P-1, at pp. 7-8) The Commissioner finds that the Board has proven the necessity for these moneys and restores $700 to line item J250B.

The Board asserts the reduction of $805 in its proposed $2,005 budgeted for miscellaneous expense is necessary for such items as merit recognition awards for teaching staff members and pupils, student council leadership conferences for scheduling at its computer center and "***other items too numerous to mention.***" (P-1, at p. 8) The Commissioner determines that the appropriation of $1,200, which remains in this line item after the Governing Body's reduction of $805, is sufficient.

In summary, the Commissioner directs that $700 be restored to the Board for use in its line items for Instruction and that $8,625 of the Governing Body's recommended reduction be sustained.

J600 Operation of Plant	Board's Total Proposal	$61,000
	Governing Body's Reduction	43,500
		$17,500

The Governing Body recommended reductions in three line items consisting of $8,000 of $14,000 proposed by the Board for summer custodial work; $8,000 of $37,000 for heating, and $1,500 of the Board's proposal of $10,000 for telephone service.

The Governing Body asserts that the Board must devise new ways to accomplish the summer custodial work; that the Board ought to conserve

heating energy; and that it should conserve its telephone service. (R-1, at pp. 5-6)

The Board contends that its summer custodial workers fill in for regularly employed custodians during vacation periods and perform tasks such as painting, masonry work, and minor alterations and repairs. Furthermore, the Board argues that if this assistance of summer workers is not continued the result would be costlier repair bills. (P-1, at p. 9)

The Board maintains that it does conserve heating energy, but that its heating bill for 1974-75 was $36,133. The proposed appropriation for 1975-76 is $37,000, less than $900 over what it expended for 1974-75. (P-1, at pp. 9-10)

The Board asserts that its telephone costs were $12,000 for 1974-75 and that it appropriated only $10,000 for 1975-76. If the Governing Body's reduction of $1,500 in this line item is not restored, it would have $8,500 or $3,500 less than 1974-75 for telephone service. (P-1, at p. 10)

The Commissioner finds that in each of the line items for Operation of Plant the Board has proven the necessity for the controverted moneys. Accordingly, the Commissioner directs that $17,500 be restored to the Board for these purposes.

J730 Purchase of Equipment *Reduction $11,000*

The Governing Body recommended a reduction of $11,000, in an unspecified manner, from the following line items:

J730A	Replacement of Instructional Equipment
J730B	Replacement of Noninstructional Equipment
J730C	Purchase of New Instructional and Noninstructional Equipment

The Governing Body relies upon the decreased Board expenditure of $57,500 in this major area in 1974-75, compared to the $40,500 proposed by the Board for 1975-76 and concludes that if the Board can voluntarily reduce its proposed expenditures by that amount it can absorb another reduction of $11,000. (R-1, at pp. 7-8) The Commissioner points out that an unspecified area of reduction imposed upon a board of education is contrary to the New Jersey Supreme Court's mandate that the Governing Body specify recommended economies. *Board of Education of East Brunswick v. Township Council of East Brunswick,* 48 *N.J.* 94 (1966)

Consequently, the Board is placed in the position of attempting to prove the necessity for restoration of unspecified items. In this respect the Governing Body's suggested reduction is arbitrary. Consequently, the Commissioner directs that the $11,000 reduction recommended by the Governing Body be restored.

The Governing Body recommended elimination of the Board's total proposal in this line item, which is for janitorial services for the use of the school buildings by community groups. (P-1, at p. 11) The Governing Body avers that the Board should charge outside groups for the expenses they incur.

The Board's position is that the use of its schoolhouses by community groups, such as Boy and Girl Scouts, Pioneer Boys, Parent Teacher Association, and others, is part of its total responsibility to the community. The Commissioner determines that the Board has established the necessity for these moneys and directs that $2,500 be restored.

In summary, the Commissioner's determinations with respect to each of the specific line items reduced by the Governing Body are as follows:

TABLE II

Account Number	Item	Amount of Reduction	Amount Restored	Amount Not Restored
CURRENT EXPENSE:				
Administration				
J110F	Sal. Supt.	$ 4,000	$ 3,000	$1,000
J120B	Legal Fees	1,000	1,000	– 0 –
J130D	Oth. Exp. Sch. Elec.	400	400	– 0 –
J130F	Oth. Exp. Supt. Off.	250	– 0 –	250
J130M	Oth. Exp. Prtg.	200	200	– 0 –
J130N	Misc. Exp. Adm.	1,400	1,400	– 0 –
Instruction				
J230C	A-V Mats.	2,500	– 0 –	2,500
J240	Tchng. Supls.	2,500	– 0 –	2,500
J250A	Misc. Supls. Instr.	1,760	– 0 –	1,760
J250B	Trav. Exp. Instr.	700	700	– 0 –
J250C	Misc. Exp. Instr.	1,865	– 0 –	1,865
Operation of Plant				
J610A	Sals. Cust. Servs.	8,000	8,000	– 0 –
J630	Heating	8,000	8,000	– 0 –
J640D	Telephone	1,500	1,500	– 0 –
J730	Purch. Equip	11,000	11,000	– 0 –
J1112	Sals. Civic Actvs.	2,500	2,500	– 0 –
	TOTALS	$47,575	$37,700	$9,875

The Commissioner finds and determines that the certification of the appropriations necessary for school purposes for 1975-76 made by the Governing Body is insufficient by an amount of $37,700 for the maintenance of a thorough and efficient system of public schools in the district. The Commissioner directs, therefore, that the Bergen County Board of Taxation add to the certification of appropriations for school purposes made by the Governing Body the sum of $37,700, so that the total amount of the local tax levy for current expenses of the school district for the 1975-76 school year shall be $2,253,550.

COMMISSIONER OF EDUCATION

February 17, 1976

Helen P. Means,

Petitioner,

v.

Board of Education of the City of Newark, Essex County,

Respondent.

COMMISSIONER OF EDUCATION

CONSENT ORDER

1. It appearing that the parties having discussed the matter, and appraised all of the facts herein, and have annexed their written consent thereto, it is on this 18th day of February, 1976, directed that test heretofore taken by petitioner for the position of head guidance counsellor be graded on the basis of forty (40) possible points, ten for each of four examiners, and that the score of the representative of *any* bargaining group be eliminated from consideration therein.

2. That based upon the previous criteria, petitioner is adjudicated to have passed the examination and to have achieved eligibility as a head guidance counsellor as of June 5, 1975.

COMMISSIONER OF EDUCATION

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Rothbard, Harris & Oxfeld (Emil Oxfeld, Esq., of Counsel)

For the Respondent, Robert T. Pickett, Esq.

For the Intervenor, Liss and Meisenbacher (Raymond Meisenbacher, Esq., of Counsel)

The intervenor in this matter, the Newark Teachers Union, hereinafter "Union," seeks to have the Commissioner of Education vacate the Consent Order entered into between Helen Means and the Board of Education of the City of Newark, hereinafter "Board," dated February 18, 1976. Petitioner and the Board object to the intervenor's application to vacate the Consent Order. Oral argument was presented on May 18, 1976, at the State Department of Education, Trenton. In evidence are the pleadings, the Consent Order, an affidavit by an officer of the Union, the relevant portion of the agreement between the Union and the Board, hereinafter "Agreement," and the transcript of the oral argument.

The undisputed facts leading to the Consent Order are as follows: The Agreement contains a provision which establishes a committee of five educators to screen candidates who have applied for promotions in the matter herein controverted, a maximum score of fifty is possible, ten points allowable from each of the five educators. A score of forty is necessary to pass the screening, after which the applicant for a promotion is placed in a "pool" with other successful applicants. When vacancies occur in the system, positions are filled by the Board from the list of candidates in the pool. (Pleadings; Agreement, Exhibit A; Tr. 67-69)

It is clear from the language in the Agreement that petitioner met all the requirements for the position for which she applied since the Agreement states:

> "Candidates in order to be eligible for inclusion in the pool shall meet training, experience, and State certification requirements as established for each promotional position. *These requirements must be set prior to interview by the screening committee."* (*Emphasis supplied.*) (Agreement, Section 7, B(2))

Thereafter petitioner met the screening committee, composed of the following persons:

"a. Assistant Superintendent in Charge of Personnel or a Director on his staff.

"b. Assistant Superintendent from the appropriate school level.

"c. A Newark school administrator from the appropriate level.

"d. An educator from outside the Newark school system.

"e. A Newark school teacher from the appropriate school area selected by the Union."

(Agreement, Section 7, B (4))

After petitioner's screening, her scores were ten, ten, ten, eight, and zero, for a total of thirty-eight points given by the five educators. Petitioner thereafter filed her Petition of Appeal with the Commissioner which alleged that the score of zero was given her by the representative of the Union of which she is not a member, thus making it impossible for her to pass the screening. (Petition of Appeal) The Board asserts that it has the authority to review the recommendations of its promotion committee, which it did, and to subsequently decide that it made sense to amicably close the matter. (Tr. 30-31, 65) The Board then eliminated the score of *any* negotiating group and graded petitioner on the basis of forty possible points, ten for each of four examiners, and decided that petitioner had passed the screening test. She was placed in the pool. (See Consent Order.)

Intervenor does not deny any of the contentions as set forth herein. Intervenor alleges, however, that the Board is in violation of its Agreement; that a conflict of interest exists since petitioner is the wife of a Board member; that the action was instituted without enjoining the Union which is an indispensable part of the conflict; and that petitioner had not exhausted her administrative remedies as provided in the Agreement, in that she could have filed a grievance. (Intervenor's Notice of Motion)

The Commissioner cannot agree. Although an agreement between a board of education and the local negotiations agent must provide a grievance policy, such an agreement cannot deny a teaching staff member of the right to file a Petition of Appeal before the Commissioner when he/she believes that a controversy has arisen under the school laws of this State. (*N.J.S.A.* 18A:6-9; *N.J.A.C.* 6:24-1.1 *et seq.*) Neither is the Commissioner bound by the Agreement. Nor can the Commissioner find in the argument or the evidence any indication that there was a conflict of interest because of the marital status of petitioner and a Board member. On the other hand, the Commissioner finds in the instant matter a *prima facie* case of blatant discrimination against petitioner because she is not a member of the Union; or in the alternative, an arbitrary, capricious, and unreasonable score of zero by a committee member.

It is inconceivable, in the Commissioner's judgment, that five competent educators could give petitioner any kind of an equitable, objective, or subjective examination, and arrive at the aforementioned results; specifically, the zero given by the Union member.

Finally, the Union officer's affidavit does not deny the scores given petitioner, nor does the affidavit or the argument attempt to deny any of the allegations set forth in the Petition of Appeal.

Therefore, the Commissioner finds that there are no disputed facts in the instant matter and that the Board had good reason, after review of the screening committee recommendation, to settle this matter at the local level.

For these reasons, the Motion to vacate the Consent Order is denied.

COMMISSIONER OF EDUCATION

November 12, 1976
Pending before State Board of Education

Board of Education of the City of Plainfield,

Petitioner,

v.

City Council of the City of Plainfield, Union County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

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

For the Respondent, Crane, Beglin & Vastola (Edward W. Beglin, Jr., Esq., of Counsel)

Petitioner, the Board of Education of the City of Plainfield, hereinafter "Board," appeals an action of the City Council of the City of Plainfield, hereinafter "Council," certifying to the Union County Board of Taxation a lesser amount of appropriations for school purposes for the 1975-76 school year than the amount proposed by the Board in its budget. On December 8, 1975 at a hearing scheduled at the State Department of Education, Trenton, it was agreed by the parties and a hearing examiner appointed by the Commissioner of Education to limit the examination and cross-examination of documentary submissions to the filing of answering memoranda and to file exceptions to the

report of the hearing examiner pursuant to *N.J.A.C.* 6:24-1.16 within a period of three days after receipt thereof. The hearing examiner's report is as follows:

Plainfield is a city district classified for school purposes as Type I. Pursuant to law, in February 1975, the Board adopted and submitted its school budget for the 1975-76 school year to the Board of School Estimate. This budget proposed that, exclusive of Federal, State and other funds, the sum of $9,299,167 be raised by local taxation to operate the schools of the district for the 1975-76 school year. Thereafter, the Board of School Estimate on March 25, 1975, certified this precise sum to Council. Council determined, however, that the lesser sum of $8,559,833 was required for school purposes and certified that lesser amount to the Union County Board of Taxation on March 31, 1975.

The Board avers that this reduction of $739,334 would make available insufficient funds to provide a thorough and efficient system of education and prays the Commissioner to direct Council to certify the additional amount of $739,334 to the Union County Board of Taxation to be raised by local taxes for school purposes in 1975-76. Council denies that its proposed line item reductions totaling $739,334 threaten a viable educational program. Council further contends that the requirement by the Commissioner that it engage in a line by line reduction of the Board's budget

> "***introduces the governing body into the details of the educational process to a degree never intended or contemplated under ***Title 18A and goes beyond the intent of the Supreme Court decision in *East Brunswick Board of Education v. East Brunswick Township Council,* 48 *N.J.* 94 (1966).***" (Supplemental Answer of Respondent, at pp. 1-2)

The Supreme Court forthrightly stated in *East Brunswick, supra,* that:

> "***The governing body may, of course, seek to effect savings which will not impair the educational process. But its determinations must be independent ones properly related to educational considerations rather than voter reactions. In every step it must act conscientiously, reasonably and with full regard for the State's educational standards and its own obligation to fix a sum sufficient to provide a system of local schools which may fairly be considered thorough and efficient in view of the makeup of the community. *Where its action entails a significant aggregate reduction in the budget and a resulting appealable dispute with the local board of education, it should be accompanied by a detailed statement setting forth the governing body's underlying determinations and supporting reasons.* ***" *(Emphasis supplied.)* (at pp. 105-106)

The hearing examiner recommends that the Commissioner, within the context of this explicit directive of the Court, determine that it was indeed obligatory upon Council to delineate those items in the Board's budget in which it believed economies could be effected without undermining a thorough and efficient program of education.

The hearing examiner finds that Council, while registering the foregoing objection, did in fact meet its obligation pursuant to the Court's directive in *East Brunswick, supra,* by appending a listing of line item reductions in the Board's budget totaling $739,334 as shown in Chart I, *post*.

The Board registers strong protest that Council delayed for many months the delineation of its proposed economies in the line item budget. While it is apparent that Council was responsible for certain delay, it is also evident that *both parties* strived, unsuccessfully, for many months to effect an amicable settlement of the controverted matter, thus causing the major delay that has occurred.

The Board argues, additionally, that Council has failed to set forth adequately its rationale for those reductions it proposed in the disputed line items. (Petitioner's Memorandum of Law, at p. 3) The Board further charges that Council's action in the matter was arbitrary, capricious and unreasonable. (*Id.*, at pp. 3-4) In support of its contention that the Commissioner should restore the entire amount of Council's proposed reduction, the Board cites, *inter alia, East Brunswick, supra; Board of Education of the City of Passaic, Passaic County,* 1970 *S.L.D.* 367; and *Board of Education of the Borough of Union Beach v. Mayor and Council of the Borough of Union Beach, Monmouth County,* 1973 *S.L.D.* 231.

Council, conversely, argues that the Board has in all instances inadequately proven its need for restoration of any of the proposed reductions.

The hearing examiner has carefully considered these arguments of Council and the documentary submissions in evidence and recommends that the Commissioner determine that the record is sufficiently replete with submissions in reasonable conformity with requirements of law. Accordingly, the findings of fact and recommendations of the hearing examiner to the Commissioner are set forth *seriatim* for proposed reductions of major magnitude and in chart form for those of lesser amounts.

CHART I

Account Number	Item	Board's Proposal	Council's Proposal	Amount Reduced
CURRENT EXPENSE:				
J110B	Bd. Secy. Sals.	$ 26,000	$ 25,000	$ 1,000
J110F	Supt. Sals.	84,500	81,500	3,000
J110G	Curr. & Instr. Sals.	79,000	43,500	35,500
J110I	Bus. Off. Sals.	127,500	120,000	7,500

J110L	Pers. Sals.	102,000	63,500	38,500
J120B	Legal Fees	30,000	25,000	5,000
J120D	Negotiations Sals.	20,000	10,000	10,000
J130A	Bd. of Ed. Exps.	11,300	8,300	3,000
J130F, G, I, L, P	Off. Exps.	54,450	44,450	10,000
J211	Prins. Sals.	671,971	591,971	80,000
J212	Supvr. of Instr. Sals.	170,373	150,373	20,000
J213A	Teachers Sals.	6,527,644	6,512,644	15,000
J213B	Subs. Sals.	150,000	135,000	15,000
J213C	Co-Tchrs. Sals.	38,850	-0-	38,850
J214	Oth. Instr. Sals.	777,129	770,129	7,000
J215	Secys. Sals.	383,058	348,058	35,000
J220, 230 240, 250	Texts, Supls., Oth. Exps.	587,509	537,509	50,000
J410, 420	Health Servs.	184,350	176,350	8,000
J510, 520	Trans. Sals. & Exps.	521,204	506,204	15,000
J610A	Custs. Sals.	931,576	880,570	51,006
J620	Contr. Servs.	3,700	2,700	1,000
J630, 640	Heat and Utilities	376,000	373,000	3,000
J650	Supplies	46,800	41,800	5,000
J660C	Contr. Cleaning	2,000	1,000	1,000
J710	Maint. Sals.	150,450	147,450	3,000
J720A	Contr. Servs. Grds.	21,250	10,700	10,550
J720B	Contr. Servs. Bldgs.	213,879	74,429	139,450
J730	Repl. Equip.	153,771	118,771	35,000
J810, 820	Retire. Contr. & Ins.	683,744	673,046	10,698
J1010, 1020	Stud. Activs.	175,140	160,140	15,000
J1300, 1400, 1500, 1600	Adult Education	108,920	98,920	10,000
	SUBTOTALS	$13,314,068	$12,632,014	$682,054
CAPITAL OUTLAY:				
L1220, 1230	Remod. & Improve.	57,280	-0-	57,280
	TOTALS	$13,371,348	$12,632,014	$739,334

J110G Curriculum and Instruction, Salaries *Reduction $35,500*

Council proposed the elimination of the director of funded programs at a savings of $25,000 and the further elimination of one secretary from the office.

The Board admits that its FY 1975 application for $840,640 of Federal aid was rejected but asserts that this fact in no way obviates the necessity to employ a director of funded programs with supporting secretarial assistance in

order to secure approval of and to service programs funded by Federal aid. (Exhibit J)

It is recommended that the Commissioner determine that continuing efforts of the Board to secure Federal funding, which in FY 1974 totaled $1,500,000 in seventy separate categories, necessitates the continuance of the director's position. It is found, however, that the Board has failed to carry the burden of proof respecting its supporting secretarial personnel. Therefore, it is recommended that $25,000 be restored to this line item and that the reduction be sustained in the amount of $10,500.

J110L Personnel Office, Salaries *Reduction $38,500*

Council avers that the position of Assistant Superintendent, which was vacant during the latter part of 1974-75, as well as one secretarial position and provisions for overtime may be eliminated without loss of efficiency at savings of $25,000, $9,500 and $1,000 respectively.

The Board contends that these proposed staff reductions would seriously impair the district's ability to qualify for State aid and to comply with regulations of the State. In this regard the Board cites as reasons for its need for the controverted personnel the areas of pupil and staff records, accounting, record keeping and reporting to State agencies.

The hearing examiner has carefully considered the arguments of the litigants with respect to the need of the district for these personnel. It is clear, however, that the Board has for a substantial period, for reasons not revealed herein, allowed the position of Assistant Superintendent to remain unfilled. The Board has failed in its responsibility to sustain the burden of proof that this vacancy resulted in a less than thorough and efficient program of education in Plainfield in the 1974-75 school year. It is recommended, therefore, that the reduction be allowed to stand in the amount of $25,000 and that the amount of $13,500 be restored to this line item in order that there be no vacillation of continuing effort in those previously enumerated areas of pupil and staff record keeping and accounting. *Board of Education of the City of Plainfield v. City Council of the City of Plainfield, Board of School Estimates and County Board of Taxation, Union County,* 1974 *S.L.D.* 913

J211 Principals, Salaries *Reduction $80,000*

Council avers that one existing vice-principal at the high school and three proposed assistant elementary principalships be eliminated.

The Board states that its policy has been revised to require that any elementary school with an enrollment exceeding 500 pupils be assigned a vice-principal to assist, *inter alia,* with discipline, curriculum improvement, public and employee relations and attendance programs. It is further argued that certain other staff reductions have increased the work load of vice-principals at the high school. (See Exhibit M.)

The hearing examiner finds that enrollment at the high school has increased slightly in the 1975-76 school year. Absent a showing of decreasing duties of vice-principals at that school, it is recommended that the Commissioner determine that consistency in staffing requires that there be no reduction in this sector. It is further recommended that, in consideration of the Board's policy predicated on serious and thorough studies of the staffing needs of its elementary schools, the Commissioner determine that the Board has substantiated its need for three additional vice-principals at its elementary schools and may partially implement this policy by adding two additional vice-principals in the 1975-76 school year. In summary, it is recommended that the Commissioner restore $60,000 to this line item and sustain the reduction in the amount of $20,000.

J212 Supervisors of Instruction, Salaries *Reduction $20,000*

Council proposes that the position of coordinator of music which has been vacant since 1971, be allowed to remain vacant for the 1975-76 school year.

The Board states that demands from the public for improvement in the music program necessitate that it be filled.

The hearing examiner finds in the submissions of the Board no compelling data or studies that would require that this position be filled in view of the voters expressed desires for economy. It is recommended that the reduction be sustained in the full amount of $20,000.

J213C Co-Teachers, Salaries *Reduction $38,850*

Council seeks the total elimination of this program which is directed at improving reading in the first grade and has been in operation since 1964. (Exhibit O)

The Board asserts that this program, formerly operated in grades one through three, has been shown by research and evaluation studies within the district to be effective in the improvement of instruction.

It was said by the Commissioner in *Plainfield, supra:*

> "***While the constitutional requirement which imposes on local school districts the obligation to conduct 'thorough and efficient' programs of education is nowhere precisely defined, the Commissioner holds that it must be interpreted to mean that *as a minimum such programs are entitled to a continuing sustenance of support, one marked by constancy and not by vacillation of effort.****"*(Emphasis supplied.)* (at pp. 920-921)

Within the context of such explicit directive, it is recommended that $38,850 be restored to this line item in order that the Board's adjunct to its fundamental and vital programs of teaching young children to read be assured a sustenance of support.

J215 Secretaries, Salaries *Reduction $35,000*

Council proposes the elimination of certain secretaries in order to effect an aggregate savings of $35,000. The Board has proposed no additional secretarial or clerical positions and has provided for pay increases of eight percent.

It is found that the Board expended $326,210 in this line item in 1974-75 with some positions remaining vacant throughout that period. Increments provided for by the negotiated agreement require an additional $27,727, or a total of $353,938, to staff the offices at that level previously established by the Board. The Board has proposed an appropriation of $383,058. Accordingly, it is recommended that the reduction be sustained in the amount of $30,000 and that $5,000 be restored to this line item.

J220, 230, 240, 250 Texts, Supplies and Other Expenses *Reduction $50,000*

Council states that the Board's increase in appropriations of approximately $52,000 in these line items as compared to total appropriations for 1974-75 are excessive.

The Board argues that its proposed expenditures are reasonable and necessary. (Exhibits Q, R, S, T, U, V, W, X)

The hearing examiner finds that, with a single exception, the Board's proposed appropriations reflect only moderate increases such as may be attributable to inflation. However, the Board proposes to expend $51,363 for audiovisual materials in 1975-76 as compared to $29,050 in 1974-75. This increase of eighty percent amounting to $22,213 appears excessive. Therefore, it is recommended that it be limited to a fifteen percent increase, or $4,360. Accordingly, it is recommended that the reduction be sustained in the amount of $17,953 and that $32,047 be restored to this line item.

J610A Custodians, Salaries *Reduction $51,006*

Council desires to effect savings of $36,006 by elimination of the position of supervisor of buildings and grounds and his secretary. Council alleges that these are new positions. It further proposes that $15,000 may be saved without further staff reductions.

The Board states that a supervisor of buildings and grounds has been employed since 1929 and that its present supervisor is responsible for supervision of ninety-four employees caring for buildings and property valued at $35,000,000.

The Board's arguments for the necessity of employing a supervisor of buildings and grounds are cogent. *Plainfield, supra* Therefore, it is recommended that $35,006 be restored to this line item. Council's argument that $15,000 was unexpended from this line item in 1974-75 is found to be true in fact. Accordingly, absent a showing that additional personnel are required or that the

entire budgeted amount of $931,576 is required in this line item, it is recommended that the reduction be sustained in the amount of $16,000.

J720B Contracted Services, Building *Reduction $139,450*

Council avers that fiscal constraints on the district require that replacement of stage curtains, draperies, auditorium floors, wooden sashes, plumbing, auditorium seating and numerous other projects must be deferred until subsequent years.

The Board argues that in numerous instances these projects may not be postponed without endangering the safety of pupils, staff and public. The Board submits evidence of deteriorating conditions in certain of its older schools. (Picture Exhibits Nos. 2, 3, 4, 5, 6, 7, 9, 10, 11)

The hearing examiner finds convincing evidence that the replacement of sanitary fixtures, water piping, entrance doors, sashes, lighting fixtures, handrails and steps is essential to the health and safety of pupils, as well as the security of the Board's schools. It is recommended that $122,000 be restored to this line item which will enable the Board to accomplish the most urgent of these items as well as make a modest start at replacing unsightly and nonaesthetic draperies and stage curtains. It is further recommended that $17,450 of the reduction be sustained.

J730 Replacement of Equipment *Reduction $35,000*

Council contends that an expenditure of $118,771 is adequate for the Board's program.

The Board states that it has programmed a replacement of 2.5 percent of the $277 worth of furniture and equipment per pupil in the district. No lists of supportive data in the form of anticipated purchases were furnished by the Board.

It is observed that the Board expended $84,901 from this line item in 1974-75. The amount suggested by Council exceeds this expenditure by forty percent. Absent a showing by the Board of compelling need in this sector it is recommended that the Commissioner determine that the Board has failed in its burden of proof and that Council's reduction of $35,000 be sustained.

L1220, 1230 Capital Outlay for Sites and Building *Reduction $57,280*

Council avers that all proposed capital projects for improvements must be eliminated during the 1975-76 school year.

The Board proposes to expend $1,000 for architect fees and $16,670 on site improvements by paving play areas, parking lots and walkways. (Proposed School Budget, at p. 32A) It further proposes to expend $39,610 to improve buildings by replacing doors, window sashes, obsolete ventilators, ceilings, and by partitioning and renovating storage and instructional rooms. (*Id.* at p. 32A)

The hearing examiner has reviewed the written testimony and exhibits submitted as examples of the Board's needs to make the suggested capital improvements. (Exhibit Z-1, Picture Exhibits 10, 11) It is patently evident that the Board's appropriation is sufficient to accomplish only a small portion of that which it lists as necessary and desirable to accomplish in renovations of certain of its older buildings. It is further evident that failure to act on certain of these proposals in timely fashion will result in need for greater expenditures. While it is true that such capital expenditures could be incorporated into a bonding program, it is incontrovertible that the modest expenditure proposed by the Board represents the most economical approach to accomplishing the most pressing of these needs. Accordingly, it is recommended that $40,610 be restored to this line item to fund those projects for such *building renovations and restorations* as may be high on the Board's list of priorities.

The hearing examiner finds in the record insufficient evidence to conclude that $16,670 in site improvements may not be deferred until a bonding program is approved or until funds are otherwise available. It is recommended, therefore, that Council's reduction in the amount of $16,670 be sustained.

The hearing examiner sets forth the recommendations hereinbefore detailed, as follows:

CHART II

Account Number	Item	Amount of Reduction	Amount Restored	Amount Not Restored
CURRENT EXPENSE:				
J110G	Curr. & Instr. Sals.	$ 35,500	$ 25,000	$ 10,500
J110L	Pers. Sals.	38,500	13,500	25,000
J211	Prins. Sals.	80,000	60,000	20,000
J212	Supvrs. of Instr. Sals.	20,000	-0-	20,000
J213C	Co-Tchrs. Sals.	38,850	38,850	-0-
J215	Secys. Sals.	35,000	5,000	30,000
J220, 230 240, 250	Texts, Supls. & Oth. Exps.	50,000	32,047	17,953
J610A	Custs. Sals.	51,006	35,006	16,000
J720B	Contr. Servs. Bldgs.	139,450	122,000	17,450
J730	Repl. Equip.	35,000	-0-	35,000
	SUBTOTALS	$523,306	$331,403	$191,903
CAPITAL OUTLAY:				
L1220, 1230	Remod. & Improve.	$ 57,280	$ 40,610	$ 16,670

The hearing examiner has similarly considered the exhibits in evidence before him and sets forth the following recommendations with respect to the remaining reductions delineated by Council:

CHART III

Account Number	Item	Amount of Reduction	Amount Restored	Amount Not Restored
CURRENT EXPENSE:				
J110B	Bd. Secy. Sals.	$ 1,000	$ 750	$ 250
J110F	Supt. Sals.	3,000	500	2,500
J110I	Bus. Off Sals.	7,500	6,050	1,450
J120B	Legal Fees	5,000	1,000	4,000
J120D	Negotiations Sals.	10,000	5,000	5,000
J130A	Bd. of Ed. Exps.	3,000	2,250	750
J130F, G, I, L, P	Off. Exps.	10,000	9,000	1,000
J213A	Teachers Sals.	15,000	3,000	12,000
J213B	Subs. Sals.	15,000	15,000	-0-
J214	Oth. Instr. Sals.	7,000	7,000	-0-
J410, 420	Health Servs.	8,000	8,000	-0-
J510, 520	Trans. Sals. & Exps.	15,000	5,000	10,000
J620	Contr. Servs.	1,000	1,000	-0-
J630, 640	Heat and Utilities	3,000	3,000	-0-
J650	Supplies	5,000	2,800	2,200
J660C	Contr. Cleaning	1,000	-0-	1,000
J710	Maint. Sals.	3,000	3,000	-0-
J720A	Contr. Servs. Grds.	10,550	3,350	7,200
J810, 820	Retire. Contr. & Ins.	10,698	6,698	4,000
J1010, 1020	Stud. Activs.	15,000	5,000	10,000
J1300, 1400, 1500	Adult Education	10,000	5,000	5,000
	SUBTOTALS	$158,748	$ 92,398	$ 66,350
SUBTOTALS CHART II Curr. Exp.		523,306	331,403	191,903
TOTALS CURR. EXP.		$682,054	$423,801	$258,253
SUBTOTALS CHART II Cap. Out.		$ 57,280	$ 40,610	$ 16,670
TOTALS Curr. Exp. & Cap. Out.		$739,334	$464,411	$274,923

The hearing examiner finds that the 1974-75 audit reveals the unappropriated balance in the Board's current expense account as of July 1, 1975 to be $130,921, an amount approximating one percent of the Board's annual budget. It is recommended that no portion thereof be appropriated to the revenue section of the 1975-76 school budget.

In summary, the hearing examiner recommends to the Commissioner that he determine that the amounts of $423,801 for current expense and $40,610 for capital outlay must be restored to the Board's budget to insure a thorough and efficient educational program for the 1975-76 school year.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the pleadings, exhibits, and the entire record of the matter herein controverted including the hearing examiner report and the exceptions filed thereto by respondent pursuant to *N.J.A.C.* 6:24-1.16. The Commissioner will respond *seriatim, post,* concerning those four line items which Council has specifically enumerated in the exceptions.

A careful review of the record including the extensive documentation and arguments submitted by the respective parties convinces the Commissioner that there is no validity to Council's charge that the hearing examiner has dealt with Council's proposed economies in an inappropriate, summary manner. The summarization in chart form of certain recommendations of lesser magnitude has regularly been employed by both the Commissioner and those who serve him as hearing examiners in budget disputes in which there was delineation of a large number of line item reductions. As was said in *Board Education of the Township of Madison v. Mayor and Council of the Township of Madison, Middlesex County,* 1968 *S.L.D.* 139:

> "***There appears no necessity to deal *seriatim* with each of the areas in which Council recommended reduced expenditures. The problem is one of total revenues available to meet the demands of a school system***."
> (at p. 142)

In the instant matter, forty-eight separate line items were delineated upon which a determination must be made. While a careful consideration of all the pertinent documentary evidence must be afforded by both the hearing examiner and the Commissioner, narrative statements are not required for each line item. The Commissioner so holds.

Council's first exception, regarding line item J110G, is that the Board on January 20, 1976, transferred the director of funding to a middle school position. Although such may well be true, the Commissioner is aware that the Board's efforts to regain Federal funding and maintain programs made possible thereby continue unabated. He concludes that, absent evidence that the Board intends to abolish this position, it is essential that the budget provide for a replacement of the director.

In regard to Council's exception concerning the hearing examiner's recommendation for line item J110L, the Commissioner finds convincing evidence that sufficient essential work is performed by the secretary in question in the areas of pupil and staff record keeping and accounting to fully justify the continuance of this position.

Council states, with regard to line item J211, that the record is devoid of evidence that the Board's recently adopted policy to add a vice-principal to any elementary school in excess of 500 pupils was based on definitive studies establishing compelling need. The Commissioner does not agree. The written testimony of the Board substantiates that the Board did conduct serious studies of its needs and planned in accord with the 1974 recommendation of the Commissioner in *Plainfield*, *supra*. The Commissioner further finds the Board's staffing goals to be in accord with the recently adopted rule of the State Board set forth in *N.J.A.C.* 6:8-4.3(c) promulgated pursuant to the Public Schools Education Act of 1975.

Council's final exception states that the hearing examiner's finding and recommendation concerning line item J213 fails to consider that the Board's agents themselves had demonstrated that the co-teacher reading program had been unsuccessful. Council's exception does not comport with the record. The Board's analysis of this sector of its instructional program, as revealed by statewide and standardized testing, is that a significant deficiency exists in the mastery of reading at the early elementary level. In no way does the Commissioner assume this recognized deficiency to be attributable to a failure of the co-teacher program which was instituted to alleviate the deficiency. The Board's continuing effort to insure efficient development of essential reading skills at an early age is wholly consistent with *N.J.A.C.* 6:8-2.1(a)1, and entitled to a presumption of correctness.

The Commissioner accepts and holds for his own each recommendation of the hearing examiner. In consideration of all hereinbefore set forth, it is found and determined that the certification of appropriations necessary for 1975-76 made by Council is insufficient by the amount of $464,411 for a thorough and efficient system of public schools in the district. Accordingly, the Commissioner certifies to the Union County Board of Taxation the additional amount of $464,411 in appropriations for school purposes, so that the total amount of the local tax levy for current expenses of the school district shall be $8,983,634 and for capital outlay shall be $40,610 for the 1975-76 school year.

COMMISSIONER OF EDUCATION

February 18, 1976

Board of Education of the City of Asbury Park,

Petitioner,

v.

Board of School Estimate and Mayor and City Council of the City of Asbury Park, Monmouth County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Joseph N. Dempsey, Esq.

For the Respondents, Norman H. Mesnikoff, Esq.

Petitioner, the Board of Education of the City of Asbury Park, hereinafter "Board," appeals from an action of the Mayor and Council of the City of Asbury Park, hereinafter "Council," taken pursuant to *N.J.S.A.* 18A:22-37 certifying to the Monmouth County Board of Taxation a lesser amount of appropriations for school purposes for the 1975-76 school year than the amount proposed by the Board in its budget. The facts of the matter were adduced at a hearing conducted on November 3, 1975 at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner is as follows:

Asbury Park is a Type I school district having a Board of School Estimate. The Board adopted and submitted to the Board of School Estimate on February 24, 1975, a proposed budget for the 1975-76 school year in the total amount of $6,983,157 of which $3,200,344 was to be raised by local taxation. This proposed budget was then presented to the Mayor and City Council which at a meeting of the Council on Mary 12, 1975, reduced the amount of the budget to $2,800,344 which was certified to the Monmouth County Board of Taxation. The pertinent amounts in dispute are shown as follows:

	CURRENT EXPENSE
Board's Proposal	$3,200,344
Council's Proposal	2,800,344
Amount of Reduction	$ 400,000

The Board contends that Council's action was arbitrary, unreasonable, and capricious and documents its needs for the reductions recommended by Council with written testimony and a further oral exposition at the time of the hearing. Council maintains that it acted properly and after due deliberation, and that the items reduced by its action are only those which are not necessary for a thorough and efficient educational system. Council also documents its position

with written and oral testimony. As part of its determination, Council suggested specific accounts of the budget for a total of $415,762 in which it believed economies could be effected as follows: (See note below.)

Account Number	Item	Board's Proposal	Council's Proposal	Amount Reduced
CURRENT EXPENSE:				
J110B	Bd. Secy.'s Off.	$ 58,200	$ 41,600	$ 16,600
J110H	Supt.'s Off. Secy.	33,500	21,400	12,100
J110N	Data Proc. Assts.	39,615	22,624	16,991
J120M	Account. Fee	8,500	7,500	1,000
J130A	Bd. of Ed. Exps.	7,000	6,000	1,000
J130N	Adm. Res. Exps.	5,000	4,000	1,000
J211A	Vice.-Prin. H.S.	49,970	26,220	23,750
J211A	Vice-Prin. Mid. Sch.	25,080	-0-	25,080
J213	Tchrs. Bangs Ave.	502,865	480,865	22,000
J213	Tchrs., Bond St.	238,225	227,225	11,000
J213	Tchrs., Bradley	172,200	161,200	11,000
J213	Tchrs., H.S.	1,245,675	1,190,675	55,000
J213	Tchrs., Mid. Sch.	933,745	878,745	55,000
J214A	A-V Pers. Adm.	36,248	26,220	10,028
J214A	A-V Pers. Bangs	13,560	-0-	13,560
J214B	Guid. Pers. H.S.	156,160	139,210	16,950
J214B	Guid. Pers. Mid. Sch.	81,125	62,205	18,920
J215A	Prin. Off. Bangs	16,900	10,100	6,800
J215E	Guid. Off. Secy. H.S.	24,500	18,300	6,200
J216A	Oth. Instr. Sals. Bond	14,088	-0-	14,088
J216A	Oth. Instr. Sals. Bradley	4,294	-0-	4,294
J216A	Oth. Instr. Sals. H.S.	18,105	-0-	18,105
J216A	Oth. Instr. Sals. Mid. Sch.	12,166	-0-	12,166
J240A	Ind. Arts Equip.	14,800	10,800	4,000
J240A	Tchng. Supls. Mid. Sch.	26,600	19,600	7,000
J250C1	Comp. Servs. Elem.	19,000	-0-	19,000
J630	Fuel	67,000	85,000*	(18,000)*
J640B	Electricity	83,800	65,800	18,000
J640D	Tel./Tel.	36,900	27,920	8,980
J650B	Vehicle Supls.	5,200	4,650	550
J730A	A-V Equip. Repl.	10,953	7,353	3,600
	TOTALS	$3,960,974	$3,545,212	$415,762

*An addition by Council to the amount proposed by the Board.

Note: The itemized deductions total in excess of the $400,000 reduction actually certified by Council. However, the difference is a small one and all of the reductions will be scrutinized by the hearing examiner.

There appears no necessity to deal *seriatim* with each of the areas in which Council recommended reduced expenditures. As the Commissioner said in *Board of Education of the Township of Madison v. Mayor and Council of the Township of Madison, Middlesex County*, 1968 *S.L.D.* 139:

> "***The problem is one of total revenues available to meet the demands of a school system***. The Commissioner will indicate, however, the areas where he believes all or part of Council's reductions should be reinstated. It must be emphasized, however, that the Board is not bound to effect its economies in the indicated items but may adjust its expenditures in the exercise of its discretion as needs develop and circumstances alter.***"
>
> (at p. 142)

The hearing examiner will, however, examine some line items in narrative form and set forth his recommendations with respect to other line items in chart form.

J110B Board Secretary's Office *Reduction $16,600*

Council contends that the expenditures proposed by the Board in this line item would double the allocation for the office and that such an increase is unwarranted. The Board contends that an increased work load has required the transfer of two staff positions to his office and that the total expenditure has not in fact been increased for clerical services.

The hearing examiner has considered these arguments in the context of the total documentation and recommends a full restoration of this $16,600 reduction as necessary for a thorough and efficient operation in the office of the Board Secretary.

Amount of Reduction	–	$ 16,600
Amount Restored	–	16,600
Amount Not Restored	–	- 0 -

J110N Data Processing, Assistants *Reduction $16,991*

Council avers that the number of staff assistants involved in the data processing office may be reduced without harm to the district. The Board disputes the avowal at length but in the judgment of the hearing examiner has failed to provide sufficient reason for the restoration of the full amount of the reduction.

The hearing examiner recommends that a total of $8,723 be restored but that a reduction in the amount of $8,268 be sustained.

Amount of Reduction	–	$16,991
Amount Restored	–	8,723
Amount Not Restored	–	8,268

J211A Vice-Principal, High School *Reduction $23,750*

Council avers that in the 1969-70 school year there were two vice-principals in the high school at a time when 1,487 pupils were enrolled in the school and further states that in the 1975-76 school year there will be three vice-principals but that the enrollment has decreased to 1,401 pupils. The Board does not dispute such statistics but maintains that changing community mores and the need for strict disciplinary control policies require the services performed by the teaching staff member assigned to this position.

The hearing examiner has reviewed such argument and facts and concludes that there is a continuing necessity for this position. Accordingly, he recommends a full restoration of this reduction.

Amount of Reduction – $23,750
Amount Restored – 23,750
Amount Not Restored – - 0 -

J211A Vice-Principal, Middle School *Reduction $25,080*

Council avers that the position controverted herein is not necessary for a thorough and efficient school operation. The Board disputes the avowal and maintains the 1,056 pupil middle school requires the services of a vice-principal since strong and effective leadership is required to cope with problems caused by the restlessness of youth enrolled in these grade levels. The Board further avers that a staff in the middle school which numbers 105 members is further reason to provide the services of a vice-principal.

The hearing examiner has carefully considered such facts and arguments and finds them to be effective proof that the position controverted herein is required for a thorough and efficient operation of the middle school. Accordingly, he recommends full restoration.

Amount of Reduction – $25,080
Amount Restored – 25,080
Amount Not Restored – - 0 -

J213 Teachers, Bangs Avenue School *Reduction $22,000*

Council's reduction controverted herein is for two teachers in the Bangs Avenue School. Council avers that these positions may be eliminated without harm to the district or to the school. The Board avers that such positions are required to be added because of increased enrollment in kindergarten and the development of a new and major apartment complex.

The hearing examiner concludes from a review of the documentation, however, that the kindergarten enrollment increase is minimal (see P-8) and that the projected enrollment increase from the apartment complex is at this juncture speculative. Accordingly, the hearing examiner recommends that this reduction be sustained.

Amount of Reduction – $22,000
Amount Restored – - 0 -
Amount Not Restored – 22,000

J213 Teachers, High School *Reduction $55,000*

Council avers that a static enrollment provides no justification for an increase in high school staff and that a reduction of $55,000 in this line item is appropriate. The Board maintains that an increasing number of problems at the high school level provides justification for the increase of staff members in spite of enrollment stability. It further avers that such a reduction would cause damage to the academic program although no specific class size figures are set forth for regular academic classes or for pupils enrolled in supplemental instruction.

The hearing examiner has considered all such arguments and determines that an increase in staff at the high school level cannot be justified and, accordingly, he recommends that the reduction be sustained.

Amount of Reduction – $55,000
Amount Restored – - 0 -
Amount Not Restored – 55,000

J214B Guidance Personnel, High School *Reduction $16,950*

Council avers that there are eight guidance counselors assigned to the high school and that this number may be reduced without harm to the operation of the school. The Board states that three of the eight positions are filled by teaching staff members employed as career guidance counselors with funds from a federal grant and that one of the five remaining counselors performs duties as chairman of the department which necessitates a reduced pupil assignment load.

The hearing examiner has examined such arguments in the context of the facts of the counselor/pupil ratio and concludes that the Board's position herein is a reasonable one to maintain its program of guidance services as part of a thorough educational program. Accordingly, he recommends full restoration.

Amount of Reduction – $16,950
Amount Restored – 16,950
Amount Not Restored – - 0 -

J214B Guidance Personnel, Middle School *Reduction $18,920*

Council avers that the number of staff personnel assigned to guidance work in the middle school may be reduced without harm to the school or district. The Board avers that in reality there are only two counselors assigned to this large school and that a career guidance counselor now assigned to the school does not represent the creation of a new position.

The hearing examiner concludes from the testimony pertinent to this line item that there is no expansion of guidance services in the middle school but a continuation of program. He recommends full restoration of the reduction in this line item.

Amount of Reduction – $18,920
Amount Restored – 18,920
Amount Not Restored – - 0 -

J216A Other Instructional Salaries, High School *Reduction $18,105*

Council avers that four persons employed as teacher aides are not required and that salaries for the positions should be eliminated. The Board maintains that the positions are required to be maintained in the media center, health office, in-school suspension program and attendance office.

The hearing examiner has examined the documentation with respect to this line item and concludes that one of the four positions may be eliminated by an efficient scheduling procedure but that the other positions are necessary for a continuing program of education in the Asbury Park School District. Accordingly, the hearing examiner recommends a restoration of $13,811 to this line item.

Amount of Reduction – $18,105
Amount Restored – 13,811
Amount Not Restored – 4,294

J640B Electricity *Reduction $18,000*

The actual expenditure for electricity in the 1974-75 school year was $71,000 and the Board proposed to expend $83,800 in school year 1975-76. Thus, Council's proposal for an expenditure of $65,800 for 1975-76 represents a reduction from the amount actually required in the prior year. A ten percent rate increase is anticipated by the Board.

The hearing examiner has considered such facts and recommends that the budgeted amount for this line item be restored to a total of $72,800. Thus he recommends a restoration of $7,000 in the amount of reduction deemed appropriate by Council

Amount of Reduction – $18,000
Amount Restored – 7,000
Amount Not Restored – 11,000

These recommendations and other recommendations of the hearing examiner which are grounded in the record of this controversy are set forth in the following table:

Account Number	Item	Amount of Reduction	Amount Restored	Amount Not Restored
CURRENT EXPENSE:				
J110B	Bd. Secy.'s Off.	$ 16,600	$ 16,600	$ -0-
J110H	Supt.'s Off. Secy.	12,100	12,100	-0-
J110N	Data Proc. Assts.	16,991	8,723	8,268
J120M	Account. Fee	1,000	500	500
J130A	Bd. of Ed. Exps.	1,000	-0-	1,000
J130N	Adm. Res. Exps.	1,000	500	500
J211A	Vice-Prin. H.S.	23,750	23,750	-0-
J211A	Vice-Prin. Mid. Sch.	25,080	25,080	-0-
J213	Tchrs., Bangs Ave.	22,000	-0-	22,000
J213	Tchr., Bond St.	11,000	-0-	11,000
J213	Tchrs., Bradley	11,000	-0-	11,000
J213	Tchrs., H.S.	55,000	-0-	55,000
J213	Tchrs., Mid. Sch.	55,000	44,000	11,000
J214A	A-V Pers. Adm.	10,028	-0-	10,028
J214A	A-V Pers. Bangs Ave.	13,560	13,650	-0-
J214B	Guid. Pers. H.S.	16,950	16,950	-0-
J214B	Guid. Pers. Mid. Sch.	18,920	18,920	-0-
J215A	Prin. Off. Secy. Bangs	6,800	-0-	6,800
J215E	Guid. Off. Secy. H.S.	6,200	-0-	6,200
J216A	Oth. Instr. Sals. Bond	14,088	4,294	9,794
J216A	Oth. Instr. Sals. Bradley	4,294	-0-	4,294
J216A	Oth. Instr. Sals. H.S.	18,105	13,811	4,294
J216A	Oth. Instr. Sals. Mid. Sch.	12,166	7,872	4,294
J240A	Ind. Arts. Equip.	4,000	1,300	2,700
J240A	Tchng. Supls. Mid. Sch.	7,000	-0-	7,000
J250C1	Comp. Servs. Elem.	19,000	-0-	19,000
J630	Fuel	(18,000)*	-0-	-0-
J640B	Electricity	18,000	7,000	11,000
J640D	Tel./Tel.	8,980	5,900	3,080
J650B	Vehicle Supls.	550	450	100
J730A	A-V Equip. Repl.	3,600	3,600	-0-
	TOTALS	$415,762	$206,910	$208,852

*An addition by Council

In conclusion, the hearing examiner finds that it is necessary to restore $206,910 of the reductions deemed appropriate by Council in order that the Board may operate a thorough and efficient educational program in Asbury Park in the 1975-76 academic year.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and the exceptions thereto filed by the Board and Council. The Board particularly objects to the line item recommendations of the hearing examiner which are contained in chart form but unaccompanied by a narative explanation. Council takes exception to recommendations with respect to eight line items in the J200 account.

The Commissioner concurs, however, with the report of the hearing examiner and the recommendations contained therein. The problem presented by the Petition is one concerned with the total revenues available to the Board for the conduct of a program of education, in the context of Council's determinations. The recommendations of the hearing examiner are appropriate in the circumstances and need not be detailed at such length at the Board requests. *Township of Madison, supra* The Commissioner so holds.

Accordingly, the Commissioner directs the Monmouth County Board of Taxation to raise by local taxation an additional sum of $206,910 for the current expenses of the City of Asbury Park School District in the 1975-76 academic year.

COMMISSIONER OF EDUCATION

February 19, 1976

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, February 19, 1976

For the Petitioner-Cross Appellant, Joseph N. Dempsey, Esq.

For the Respondents-Appellants, Norman H. Mesnikoff, Esq.

This case involves an appeal by the Board of School Estimate and Mayor and City Council of the City of Asbury Park, Monmouth County, from the decision of the Commissioner restoring certain funds to the budget of the Board of Education of the City of Asbury Park (hereinafter Board) and a cross appeal by the Board for the restoration of certain other funds denied by the Commissioner. In reviewing the record, the State Board of Education found both merit and flaws in the arguments of both parties with respect to different specific items. For example, although we agreed with the Board in its contention that the budget in Account J213 was not based on any proposed increase in the number of high school teachers, we could not agree that this fact warranted the

restoration of $55,000 not restored by the Commissioner. Even after this reduction, the amount remaining in this account represents an 11.5% increase over the previous year and should provide adequately for salary increases for the existing staff. On balance, and with consideration of the fact that the Board is free to make cuts and use restored funds as it sees fit, the State Board of Education affirms the decision of the Commissioner to restore $206,910 of the $400,000 originally cut.

June 2, 1976

Board of Education of the City of South Amboy,

Petitioner,

v.

City Council of the City of South Amboy, Middlesex County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, George J. Otlowski, Jr., Esq.

For the Respondent, John J. Vail, Esq.

Petitioner, the Board of Education of the City of South Amboy, hereinafter "Board," appeals from an action of the Mayor and Council of the City of South Amboy, hereinafter "Council," taken pursuant to *N.J.S.A.* 18A:22-37 certifying to the Middlesex County Board of Taxation a lesser amount of appropriations for school purposes for the 1975-76 school year than the amount proposed by the Board in its budget which was rejected by the voters. The facts of the matter were adduced at a hearing conducted on July 17, 1975 at the State Department of Education before a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner is as follows:

At the annual school election held March 11, 1975 the Board submitted to the electorate a proposal to raise $1,516,133 by local taxation for current expense costs of the school district for 1975-76. This proposal was rejected by the voters and, subsequent to the rejection, the Board submitted its budget to Council for its determination of the amounts necessary for the operation of a thorough and efficient school system in the City of South Amboy during the 1975-76 school year, pursuant to the mandatory obligation imposed on Council by *N.J.S.A.* 18A:22-37.

After consultation with the Board, Council made its determination and certified to the Middlesex County Board of Taxation an amount for current expense costs which is $182,000 less than that originally proposed to the voters by the Board.

The Board asserts that Council's action was arbitrary, capricious, and unreasonable and documents its need for the funds it eliminated with written testimony and oral exposition at the time of the hearing. Council maintains that it acted properly and after due deliberation, and that the items it eliminated are those which are not necessary for a thorough and efficient educational system.

Prior to a discussion of the specific items controverted herein, the hearing examiner observes that Council, by letter (C-1) dated June 16, 1975, addressed to the hearing examiner, urged

> "***that you [the hearing examiner] disqualify yourself from hearing this matter, and that you advise the Commissioner *** that the Governing Body of the City of South Amboy demands that the Commissioner of Education appoint an impartial arbitrator through the American Arbitration Association to hear this dispute, in order that the city [Council] may not be prejudiced in the matter.***" (C-1)

Council grounds this request on what it considers to be

> "***an extremely prejudicial and detailed evaluation of the South Amboy school plant and curriculum [having] been conducted by [the Middlesex County Superintendent of Schools], at the direction of the Commissioner of Education, and in view of the fact that this report has been circulated throughout the Department of Education and received widespread publicity in both local and statewide newspapers***." (C-1)

The hearing examiner responded to Council's request by letter (C-2) dated June 23, 1975, and advised:

> "***Firstly, I [the hearing examiner] have no knowledge nor have I read nor been informed of the contents, conclusions, or recommendations which may or may not have been set forth in the Middlesex County Superintendent of School's report. Consequently, your application for disqualification of the hearing examiner on the grounds of that report is hereby denied.
>
> "Secondly, the Commissioner of Education has been directed by the New Jersey Supreme Court in *Board of Education of East Brunswick v. Township Council of East Brunswick,* 48 *N.J.* 94 to assert his jurisdiction in budget disputes such as the above referenced matter. Therefore, your request of the Commissioner to remand this matter to an arbitrator is denied.***"

Thereafter, the Board filed its written documentation in support of its need for the funds eliminated by Council. (R-6; R-7) Included therein were copies of an evaluation prepared on the Board's high school curricula and facilities by members of the Department of Education and submitted to the high school principal (R-6) and a report of the evaluation as submitted to the Commissioner. (R-7) Both reports (R-6; R-7) were submitted over the signature of the Middlesex County Superintendent of Schools.

In its opening statement on the day of hearing, Council renewed its application for disqualification of the hearing examiner and for the Commissioner to appoint a person "***not an employee of the Department of Education [to hear the matter] and render a final, binding, non-appealable decision.***" (Tr. 13) The hearing examiner, in response to Council's application, acknowledged that the evaluation reports (R-6; R-7) were now part of the record being submitted by the Board. (Tr. 10) However, the hearing examiner once again denied Council's application. (Tr. 20)

The Board is presently involved as party respondent in litigation before the Commissioner which results from the issuance, at the direction of the New Jersey State Board of Education, of a Show Cause Order against the Board with respect to pupil enrollment. However, in the hearing examiner's view, that matter is separate and apart from the matter, *sub judice,* which is limited to the proofs offered by the Board with respect to its alleged need for the funds in dispute. *East Brunswick, supra*

Finally, the Commissioner has been vested with the responsibility and authority by the Legislature, at *N.J.S.A.* 18A:4-23, to supervise "***all schools of the state receiving support or aid from state appropriations *** and he shall enforce all rules prescribed by the state board [of education]." Council argues, without proofs in support thereof, that the evaluations (R-6; R-7) are prejudicial and biased in favor of the Board with respect to the controversy herein. The hearing examiner does not agree. The evaluations are the work-product of subordinates of the Commissioner. The Commissioner may or may not accept, *in toto,* any or all recommendations, findings, or conclusions set forth therein. Likewise, the Commissioner may or may not accept the recommendations of the hearing examiner, which follow, with respect to the disputed funds herein. Council, however, desires to negate the existence of the evaluations solely on the grounds that it alleges the reports to be prejudicial and biased. Such an action would severely impair the legislative mandate set forth to the Commissioner by *N.J.S.A.* 18A:4-23. Furthermore, in controversies or disputes brought before him, the Commissioner must have all relevant facts before him to arrive at a just and judicious resolution. *N.J.S.A. 18A:6-9; East Brunswick, supra* Consequently, where appropriate, the hearing examiner will report those instances wherein the Board itself relies on the evaluation to substantiate its need for the specific funds in dispute.

As part of its determination to eliminate $182,000 from the Board's proposal for current expense costs, Council suggested specific accounts of the budget in which it believed economies could be effected as follows:

Account Number	Item	Board's Proposal	Council's Proposal	Amount Reduced
CURRENT EXPENSE:				
J110	Sals.-Admn.	$ 46,100	$ 45,000	$ 1,100
J120	Contr. Servs.-Admn.	23,400	14,400	9,000
J130	Othr. Exps.-Admn.	25,500	12,500	13,000
J220	Textbooks	21,050	16,050	5,000
J230	Sch. Lib./A-V Mats.	7,500	4,500	3,000
J240	Tchng. Supls.	38,000	33,000	5,000
J250	Othr. Exps.-Instr.	7,000	6,000	1,000
J310	Sals.-Attend. Servs.	2,200	1,600	600
J410	Sals.-Health Servs.	36,571	30,571	6,000
J520	Contr. Servs./Pub. Cars.	80,800	73,000	7,800
J610	Sals.-Oper. of Plant	28,500	23,200	5,300
J630	Heat-Bldgs.	20,000	19,000	1,000
J640	Utilities	16,200	15,400	800
J650	Supls.-Oper.	9,000	7,000	2,000
J720	Contr. Servs.-Maint. of Plt.	141,425	53,625	87,800
J810	Sch. Dist. Contrib.-Emp. Ret.	17,000	16,000	1,000
J820	Ins. & Judgments	73,000	48,000	25,000
J870	Tuition	182,000	176,000	6,000
J1010	Sals. Stud. Bdy Act.	12,500	11,500	1,000
J1020	Othr. Exps.-Stud. Bdy Act.	10,000	9,000	1,000
	TOTALS	$797,746	$615,346	$182,400

The hearing examiner has reviewed all of the documentation and will discuss the respective views of the parties in regard to all principal items. However, for discussion purposes, some line accounts listed, *ante,* have been consolidated, although the parties detailed a more specific breakdown. In particular, this reference includes those line item moneys in dispute which are less than $5,000 and include account numbers J110, J230, J250, J310, J630, J640, J650, J810, J1010, and J1020. The aggregate amount in dispute with respect to these accounts is $12,500. The range of reduction is from $600 to $3,000. If real economies are to be effected, it is the hearing examiner's view that the more principal amounts of money in dispute are the items deserving of greater attention. Consequently, the hearing examiner recommends that the funds recommended for reduction by Council in the specific line items set forth above, totaling $12,500, be restored.

As a preface to a discussion on the hearing examiner's specific findings and recommendations with respect to the principal items in dispute, it is noticed here that the Board's audit for 1974-75, which was filed during October 1975,

an unappropriated free balance of $29,197. The audit also shows that the Board appropriated $164,300 of its free balance to the 1975-76 budget. It is further observed that the Board operates a pre-kindergarten through twelfth grade program, with an enrollment of more than 1,000 pupils and it is noted that the entire school system is on half-sessions. Finally, the hearing examiner notices that the Board received a total amount of $249,168 in State aid compared to a total amount of $283,152 it anticipated, or $33,984 less than it had included in its original budget as proposed to the voters.

J120 Contracted Services *Reduction $9,000*

Council proposes a total reduction of $9,000 in this account, with a specific reduction of $5,000 for architect's fees and $4,000 for legal fees. With respect to architect's fees, the hearing examiner observes that the Board proposed a building referendum to the voters on July 8, 1975, which was defeated. (Tr. 57) Council argues that architect's fees with respect to construction or renovation ought to be secured from "***any referendum voted for by the voters***." (Council's Supporting Statement, at p. 2) The Board argues, however, that the $5,000 in dispute here is money owed the architect for work already done for it in terms of the referendum which has been defeated and for work the architect has been contracted to render with respect to renovations to the existing high school. (Tr. 26) (Board's Supporting Statement, at p. 1) The hearing examiner finds that the Board established its need for the $5,000 reduced by Council for architect's fees and recommends its restoration.

With respect to legal fees, it is observed that the Board had originally appropriated $10,000 for this specific line item. However, Council reduced that amount by $4,000. The Board argues that its legal expenses require the $4,000 for this account which has been reduced by Council. The Superintendent testified that the Board is presently engaged in ten arbitration cases, two of which are set down for hearing. Furthermore, the Superintendent testified that the Board and the local teachers' association bear one half the total cost of the arbitrator. (Tr. 35) Additionally, the Board cites other areas of litigation and situations which require legal counsel.

The hearing examiner finds that the Board has established its need for the funds for legal fees reduced by Council.

Accordingly, the hearing examiner recommends that the Commissioner restore the $9,000 to account J120.

J130 Other Expenses–Administration *Reduction $13,000*

Council proposed to reduce the Board's appropriation of $25,500 in this account by a total amount of $13,000. The then remaining balance of $12,500 would be less than it had appropriated for 1974-75. (Board's Supporting Reasons, at p. 29) In any event, Council's specific reductions are $2,300 from election expense, $600 from Board expense, $700 from Board Secretary

expense, $4,000 which the Board appropriated to support a Board newsletter, and $5,000 the Board desires to create a Board policy manual.

A review of the Board's testimony herein reflects that it does have need of the $2,300 for election expense, $600 for Board expense, and $700 for Board Secretary expense. However, the hearing examiner finds that the Board did not substantitate its need for $4,000 for its newsletter or $5,000 for a policy manual to carry out its responsibility to provide a thorough and efficient education for its pupils.

Consequently, the hearing examiner recommends that the Commissioner restore $3,600 of Council's reduction in account J130 and sustain the remainder of Council's reduction, or $9,400.

J220 Textbooks *Reduction $5,000*

The Board had appropriated $21,050 for this account. Council reduced the Board's amount by $5,000 on the grounds that it "***believed that the increase of this account by $1,050 [from the 1974-75 appropriated amount of $15,000] is sufficient.***" (Council's Answer, at p. 3) The hearing examiner observed that the Board has approximately 1,000 pupils enrolled in its schools, grades pre-kindergarten through twelfth grade. The original amount of $21,050 provides an approximate expenditure of $21 per pupil for textbooks. The approximate expenditure per pupil for textbooks in the context of Council's reduction would be $16 per pupil.

The Board argues that its requested total amount of $21,050 is essential in order to continue its improvement in its reading program which is reflected as being deficient by the Statewide testing program. Furthermore, the Board asserts that, consistent with the Department evaluation (R-6), it plans to replace textbooks considered to be archaic.

The hearing examiner finds that the Board established its need for the funds reduced by Council from its textbook account. Accordingly, the hearing examiner recommends that the Commissioner restore $5,000 to this account.

J240 Teaching Supplies *Reduction $5,000*

The Board had appropriated $38,000 for teaching supplies which Council reduced by $5,000 leaving a total appropriation of $33,000. The Board asserts that the total amount of $38,000 is necessary for consumable and nonconsumable supplies alike in its effort to provide a thorough and efficient school system. The Board states that its general supply bid order is $17,552, which does not include items such as test tubes, science materials, home economic supplies, industrial arts supplies, music or physical education supplies. Additionally, the Board avers, it must purchase reading, mathematics, science, and English workbooks for its pupils at both the elementary and secondary levels. Finally, the Board argues that it requires all the moneys it originally appropriated for teaching supplies to cover the cost of purchasing magazines and periodicals.

The hearing examiner finds that the Board documented its need for the $5,000 reduction imposed by Council in this account and, accordingly, recommends that the Commissioner restore this amount.

J410 Salaries–Health Services *Reduction $6,000*

The Board proposed an amount of $12,000 to cover the salary of a full-time social worker it wishes to employ as part of its Child Study Team. Council reduced the amount by $6,000, erroneously arguing that the salary of the social worker is paid through the Comprehensive Employment Training Act (CETA), a federal program. The Superintendent testified that the program does not fund the salary of the social worker. (Tr. 41)

Presently, the Board employs a social worker on a case-by-case basis. The Superintendent testified, however, that such an arrangement has resulted in a delay of from four to five months. (Tr. 75)

The hearing examiner finds that the Board has documented its need for the full-time services of a social worker and, accordingly, recommends the restoration of the $6,000 reduction made in this account by Council.

J520 Contracted Services–Public Carriers *Reduction $7,800*

From a total amount of $80,800 originally appropriated for this entire account, Council eliminated a total of $7,800. Council reasons that by virtue of the sluggish state of the economy, the Board could reduce expenditures in this total account by reducing contracted transportation services, field trips, and athletic transportation an aggregate amount of $7,800.

The hearing examiner has reviewed the Board's testimony with respect to its need for these moneys and finds that such testimony fails to establish such need for the operation of a thorough and efficient school. Accordingly, the hearing examiner recommends that the Commissioner sustain Council's reduction of $7,800 in this account.

J610 Salaries–Operation of Plant *Reduction $5,300*

The Board proposed a total amount of $28,500 while Council recommends a reduction of $5,300. Council asserts that even with its proposed reduction of $5,300 the Board would still have an $1,800 increase in the account over last year's appropriation. The Board asserts that without the $5,300 reduced by Council, it would be forced to eliminate overtime work summer help, emergency help, and would not have its custodial help assigned during evening functions. The hearing examiner finds that the Board has demonstrated its need for these funds and recommends that the $5,300 eliminated by Council be restored.

J720 Contracted Services–Maintenance of Plant *Reduction $87,800*

The Board proposed an amount of $141,425 for this account, from which Council eliminated $87,800. Council reasons that maintenance and repair should be accomplished over a period of years and, in light of the economy and the possibility that an addition may be built to one of the existing schools, the Board should wait to engage in costly repairs and maintenance. The Board argues that the total proposed amount of $141,425 is necessary for painting, replacement of windows, classroom remodeling which is being done on a year-to-year basis, lavatory remodeling, plumbing and heating repairs, roof repairs, fire detection systems, and other essential and critical repairs.

The hearing examiner notices that the evaluation completed by the Middlesex County Superintendent of Schools, upon which the Governing Body moved for disqualification of the hearing examiner, generally supports the need for the repairs and remodeling as outlined by the Board.

The hearing examiner finds that the Board has demonstrated its need for the moneys herein reduced by Council and recommends the restoration of $87,800 to this account.

J820 Insurance and Judgments *Reduction $25,000*

The Board appropriated $73,000 for this account, while Council eliminated $25,000 on the grounds that the reduction still leaves an increase in the account over last year. The hearing examiner has searched the record for the Board's testimony or documentary evidence underlying its need for the reduced moneys and finds the record void in this regard.

Consequently, the hearing examiner finds the Board failed to prove its need for the moneys reduced by Council and recommends that the $25,000 reduction be sustained.

J870 Tuition *Reduction $6,000*

The Board proposed an amount of $182,000 in this account for pupils who require special education classes not available in its own schools. It reasons that because of an additional ten new pupils this year who require special education classes, it requires the total amount of money it requested. Council reduced the Board's proposed amount by $6,000 on the grounds that the remaining amount of $176,000 is adequate.

The hearing examiner finds that the Board documented its need for the money eliminated by Council and recommends the restoration of $6,000.

In summary, the hearing examiner's recommendations with respect to the moneys in dispute are as follows:

Account Number	Item	Amount of Reduction	Amount Restored	Amount Not Restored
CURRENT EXPENSE:				
J110	Sals.-Admn.	$ 1,100	$ 1,100	$ -0-
J120	Contr. Servs.-Admn.	9,000	9,000	-0-
J130	Othr. Exps.-Admn.	13,000	3,600	9,400
J220	Textbooks	5,000	5,000	-0-
J230	Sch. Lib/A-V Mats.	3,000	3,000	-0-
J240	Tchng. Supls.	5,000	5,000	-0-
J250	Othr. Exps. - Instr.	1,000	1,000	-0-
J310	Sals. - Attend. Serv.	600	600	-0-
J410	Sals.-Health Serv.	6,000	6,000	-0-
J520	Contr. Serv./Pub. Cars.	7,800	-0-	7,800
J610	Sals.-Oper. of Plant	5,300	5,300	-0-
J630	Heat Bldgs.	1,000	1,000	-0-
J640	Utilities	800	800	-0-
J650	Supls. - Oper. of Plant	2,000	2,000	-0-
J720	Contr. Serv.-Maint. of Plt.	87,800	87,800	-0-
J810	Sch. Dist. Contrib.-Exp. Ret.	1,000	1,000	-0-
J820	Ins. & Judgment	25,000	-0-	25,000
J870	Tuition	6,000	6,000	-0-
J1010	Sals.-Stud. Body Act.	1,000	1,000	-0-
J1020	Othr. Exp.-Stud. Body Act	1,000	1,000	-0-
	TOTALS	$182,400	$140,200	$42,200

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record of the instant matter, including the report of the hearing examiner and the objections and exceptions filed thereto by Council.

Council makes objections and exceptions to the two prior rulings of the hearing examiner, by which its applications to have an independent arbitrator hear and determine the matter, were denied, as reported *ante*. Furthermore, the Commissioner notices that by letter dated January 14, 1976, Council urged the Commissioner to disqualify himself from ruling on the hearing examiner's findings and recommendations set forth in the report. Council argues that the Commissioner must appoint someone not associated with the Department of Education to adjudicate the matter. Council asserts that should this direct application to the Commissioner be denied and the Commissioner adjudicate the matter, the entire

reduction of $182,000 imposed upon the Board's 1975-76 school budget must be sustained.

The Commissioner observes that Council grounds its argument for disqualification of the hearing examiner and/or the Commissioner in the instant matter on what it alleges to be prejudicial evaluation reports (R-6; R-7), prepared by members of the State Department of Education with respect to the South Amboy school plant, facilities, and curricula and made part of the Commissioner's official records. The Commissioner notices that it is those reports which formed the basis upon which the State Board of Education issued its Show Cause Order against the Board with respect to its pupil enrollment.

Council argues that should the Commissioner assert and retain jurisdiction in this matter, he will have simultaneously assumed the roles of prosecutor (through his directed investigation), judge and jury.

The Commissioner will consider Council's continuing objection to the inclusion in the record of the evaluative reports (R-6; R-7) of the South Amboy school prepared by members of the State Department of Education.

The Commissioner is vested with the statutory authority to hear and determine controversies and disputes arising under the school laws. *N.J.S.A.* 18A:6-9 Furthermore, the Commissioner is charged with the responsibility of being the chief executive and administrative officer of the State Department of Education. *N.J.S.A.* 18A:4-22 The Commissioner is responsible for the supervision of all schools which receive support or aid from State appropriations and he has the authority and responsibility to enforce all rules prescribed by the State Board of Education. *N.J.S.A.* 18A:4-23 Additionally, the Commissioner shall, by direction or with the approval of the State Board, inquire into and ascertain the thoroughness and efficiency of operation of any public school in the State and he shall report his findings to the State Board. *N.J.S.A.* 18A:4-24 Finally, the Commissioner has the legislative authority to prescribe minimum courses of study with the approval of the State Board. *N.J.S.A.* 18A:4-25

Justice Jacobs, in writing the Court's opinion in *Board of Education of East Brunswick v. Township Council of East Brunswick,* 48 *N.J.* 94 (1966) addressed the scope of the Commissioner's reviewing power as it relates to controversies and disputes brought before him. Therein Justice Jacobs held:

> "***The Constitution contains a specific mandate for the State's maintenance and support of a thorough and efficient public school system. *Art.* VIII, *sec.* IV, *par.* 1. In fulfillment thereof, the Legislature has made provision for local school districts and State supervisory agencies. The local school districts have been broadly directed to provide 'suitable school facilities and accommodations' including proper school buildings and equipment and courses of studies. *R.S.* 18:11-1. And the State supervisory agencies have been vested with far reaching powers and duties designed to insure that the facilities and accommodations are being provided and that the constitutional mandate is being discharged. See, *e.g., R.S.* 18:2-1 *et seq.; R.S.* 18:3-1 *et seq.; R.S.* 18:10-45; *R.S.* 18:11-2; *R.S.* 18:11-12.

"Acting under its broad regulatory powers (*R.S.* 18:2-4), the State Board of Education has adopted rules governing schoolhouse construction which ***[set] forth mandatory minimum specifications as well as many supplemental recommendations. It is revised periodically and its minimum specifications are binding insofar as local school construction is concerned.***

"Beyond physical facilities, the State Board and the Commissioner have been appropriately vested with wide regulatory responsibilities bearing on the educational process. Illustrative is *R.S.* 18:3-17 which provides that, with the advice and consent of the State Board, the Commissioner shall 'Prescribe a minimum course of study for the public schools, and require boards of education to submit to him for approval or disapproval courses adopted by them, if and when in his opinion it is necessary or advisable so to do.' Action taken by the Commissioner pursuant to this provision would be binding on the local boards which, as they must when complying with the State Board's school construction regulations, would have to make suitable budgetary provision for any resulting increases in cost. Similarly, suitable budgetary provision would have to be made for any increased costs due to other statutory (*cf. L.* 1965, *c.* 936) or regulatory provisions such as minimum standards which may be prescribed with respect to individual classroom enrollments.***" (48 *N.J.* at 103-105)

Elsewhere in the same opinion, Justice Jacobs addressed the precise issue of the Commissioner's function with respect to budget disputes before him. Justice Jacobs wrote:

"***His [the Commissioner's] function is admittedly to sit as a reviewing body which, however, is charged with the *overriding responsibility of seeing to it that the mandate for a thorough and efficient system of free public schools is being carried out.****" (48 *N.J.* at 106) (*Emphasis supplied.*)

In reaffirming the principles articulated by the Court in *East Brunswick, supra,* in regard to the breadth of the Commissioner's powers under the State Constitution and the implementing legislation, Justice Jacobs, again writing for the Court in *Jenkins et al. v. Township of Morris School District et al.,* 58 *N.J.* 483 (1971) held that:

"***Our Constitution contains an explicit mandate for legislative 'maintenance and support of a thorough and efficient system of free public schools.' Art. 8, sec. 4, para. 1. In fulfillment of the mandate the Legislature has adopted comprehensive enactments which, *inter alia,* delegate the 'general supervision and control of public education' in the State to the State Board of Education in the Department of Education. *N.J.S.A.* 18A:4-10. As the chief executive and administrative officer of the Department, the State Commissioner of Education is vested with broad powers including the 'supervision of all schools of the state receiving support or aid from state appropriations' and the enforcement of 'all rules

prescribed by the state board.' *N.J.S.A.* 18A:4-23. The Commissioner is authorized to 'inquire into and ascertain the thoroughness and efficiency of operation of any of the schools of the public school system of the state' (*N.J.S.A.* 18A:4-24), is directed to instruct county superintendents and superintendents of schools as to 'the performance of their duties, the conduct of the schools and the construction and furnishing of schoolhouses' (*N.J.S.A.* 18A:4-29), and is empowered to hear and determine 'all controversies and disputes' arising under the school laws or under the rules of the State Board or the Commissioner. *N.J.S.A.* 18A:6-9.***"

(58 *N.J.* at 494)

While *Jenkins, supra,* dealt with the issue of school regionalization among several communities, the reaffirmance of the Commissioner's responsibility and authority as set forth in *East Brunswick, supra,* is applicable herein.

The State Board of Education, pursuant to its authority at *N.J.S.A.* 18A:4-15, has adopted rules for implementing and carrying out the school laws of this State. These rules are set forth at *N.J.A.C.,* Title 6. The rules adopted by the State Board in regard to schoolhouse construction set forth at *N.J.A.C.* 6:22-1.1 through 22-16.2 inclusive. The rules adopted by the State Board in regard to standards necessary to be met by local school districts to obtain secondary school approval are set forth at *N.J.A.C.* 6:27-1.3 Curriculum; *N.J.A.C.* 6:27-1.4 Graduation requirements; *N.J.A.C.* 6:27-1.5 Requirements to obtain credit for private music study; *N.J.A.C.* 6:27-1.6 Professional staff; *N.J.A.C.* 6:27-1.7 Teaching load; *N.J.A.C.* 6:27-1.8 Instructional equipment; *N.J.A.C.* 6:27-1.9 Clerical staff; *N.J.A.C.* 6:27-1.10 Pupil records; *N.J.A.C.* 6:27-1.11 School efficiency; and *N.J.A.C.* 6:27-1.12 Building and site.

Moreover, the Commissioner observes that *N.J.A.C.* 6:27-1.1 provides, in full, as follows:

"(a) A visit for evaluation of the school by an authorized representative of the Commissioner of Education shall be a prerequisite to approval by the State Board of Education.

"(b) In a district maintaining more than one high school, approval of each school shall be granted separately.

"(c) The maximum approval period of a high school shall be seven years. Conditional approval may be granted for a shorter period of time.

"(d) Approval of a high school by the State Board of Education shall constitute approval of the curriculum on the effective date of the action by the State Board. Subsequent additions of courses offered for diploma credit shall be reviewed and approved by the Director of Secondary Education.

"(e) Approval may be revoked if the school does not maintain the established standards or if the school fails to adhere to the program for which it has been approved."

It is this State Board of Education mandate, specifically *N.J.A.C.* 6:27-1.1(d) *ante,* that precipitated the evaluation reports (R-6; R-7) which were prepared by members of the State Department of Education at the direction of the Commissioner. The Board itself was seeking continued approval of its grade seven through twelve high school from the State Board of Education.

Consequently, because the reports (R-6; R-7) were prepared at the direction of the Commissioner, pursuant to his statutory responsibilities and consistent with State Board rules and regulations and the directions given him by the New Jersey Supreme Court in *East Brunswick, supra,* and *Jenkins, supra,* the Commissioner finds no basis upon which to grant Council's application to disregard their existence, or to hold that the reports, *prima facie,* prejudice the position of Council. Furthermore, the fact that the Board is a party respondent to a Show Cause Order issued by the State Board of Education with respect to certain alleged conditions in its high school, is not reason to conclude that Council's position in the instant matter has been tainted. When a board of education's proposed budget has been defeated by the voters and the board has submitted its defeated proposal to the governing body (*N.J.S.A.* 18A:22-37), the Court has determined in *East Brunswick, supra,* that:

> "******The governing body may, of course, seek to effect savings which will not impair the educational process. But its determinations must be independent ones properly related to educational considerations rather than voter reactions. In every step it must act conscientiously, reasonably and with full regard for the State's educational standards and its own obligations* to fix a sum sufficient to provide a system of local schools which may fairly be considered thorough and efficient in view of the makeup of the community.***" (*Emphasis supplied.*) (48 *N.J.* at 105-106)

In this light, the Commissioner must question Council's stated position in its filed objections to the hearing examiner's report urging that its reduction of $87,800 in line item J720 be sustained in order to "***teach the Board of Education to come to the Council in a position to negotiate rather than a position to appeal***." (Council's Objections, at p. 5) The Commissioner holds that the responsibility of the Board, as well as the responsibility of Council, is to fix a budget to support a thorough and efficient program of education for the pupils of the community.

Council takes exception (Council's Objections, at p. 3) to the hearing examiner's stated position that the instant matter is separate and apart from the litigation emerging from the Show Cause Order issued by the State Board. The Commissioner determines that the hearing examiner adopted the correct position inasmuch as he was not the hearing examiner assigned to the Show Cause Order proceedings. The Commissioner will, however, consider the totality of all relevant data before him in the instant adjudication.

For the reasons heretofore expressed, the Commissioner denies Council's application for an independent arbitrator to determine the matter since such an action would contravene *N.J.S.A.* 18A:6-9 and, additionally, denies Council's

application to ignore the evaluation reports (R-6; R-7) as part of this matter. Furthermore, the Commissioner finds no basis to conclude that Council's position has been unfairly prejudiced.

Council takes exception to the hearing examiner consolidating those line items in dispute which are less than $5,000 and his subsequent recommendation to restore the amount of $12,500 without setting forth a specific reason for that recommendation. The Commissioner has reviewed that portion of the hearing examiner's report and finds that his reason for consolidating the specific line items (J110, J230, J250, J310, J630, J640, J650, J810, J1010, and J1020) and recommending the restoration of $12,500 is that the record proves the necessity for restoration of such amounts in order to provide thorough and efficient educational services.

Council asserts that the hearing examiner should not have considered the amount of State aid received compared to the amount anticipated. Council argues that it is the prerogative of the Legislature to fix a lower amount of State aid to be received by the Board, and that the difference between what the Board anticipated and what it received is not relevant here. The Commissioner does not agree. The matter controverted herein addresses the total amount of money available to the Board to operate its schools during 1975-76 and shall be so considered. *Board of Education of the Township of Madison v. Mayor and Council of the Township of Madison, Middlesex County,* 1968 *S.L.D.* 139

The Commissioner has reviewed the remaining objections filed by Council and observes that they are based upon Council's perception of the probative value of the testimony adduced and documentary evidence received.

The Commissioner has reviewed the report of the hearing examiner in light of the total record and adopts as his own the findings and recommendations in the report.

The Commissioner finds and determines that the certification of the appropriations necessary for school purposes for 1975-76 made by Council is insufficient by an amount of $140,200 for the maintenance of a thorough and efficient system of public schools in the district. The Commissioner, therefore, certifies to the Middlesex County Board of Taxation the sum of $140,200 to be added to the certification of appropriations for school purposes made by Council, so that the total amount of the local tax levy for current expenses of the school district for the 1975-76 school year shall be $1,474,333.

COMMISSIONER OF EDUCATION

February 25, 1976

Iris Sachs,

Petitioner,

v.

Board of Education of the East Windsor Regional School District, Dr. John Hunt, Superintendent of Schools, and Mrs. Mary Lee Fitzgerald, Principal, Mercer County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Ruhlman and Butrym (Paul T. Koenig, Jr., Esq., of Counsel)

For the Respondents, Turp, Coates, Essl and Driggers (Henry G.P. Coates, Esq., of Counsel)

Petitioner is a nontenured teacher employed by the Board of Education of the East Windsor Regional School District, Mercer County, hereinafter "Board," who was terminated pursuant to the sixty days' notice clause in her contract Petitioner alleges that the notice of termination given her by the Superintendent of Schools is illegal. She alleges further that she was deprived of her constitutional right to a due process hearing under the First and Fourteenth Amendments to the United States Constitution prior to being denied a liberty and property right. Therefore, she demands a hearing before the Commissioner of Education to examine the reasons given for the termination of her contract Petitioner prays for reinstatement in her former position.

The Board filed a Motion to Dismiss with supporting Brief, affidavits, and exhibits. Petitioner thereafter filed a Brief in opposition to the Motion. The matter is therefore ripe for Summary Judgment by the Commissioner on the record before him.

The following facts are not in dispute:

1. Petitioner was employed initially from February 15, 1972 through June 30, 1972.

2. She thereafter received three consecutive contracts for the academic years 1972-73, 1973-74 and 1974-75. (Had the termination not been effected petitioner would have acquired a tenure status on February 15, 1975.)

3. Each contract contained a sixty day termination clause.

4. On November 20, 1974, petitioner was given a written notice of termination of her contract signed by the Superintendent which stated that her employment would terminate on January 19, 1975. (Exhibit C)

5. Exhibit C stated in part that the reason for termination was based on the principal's evaluation of petitioner's performance.

6. Petitioner was terminated by the Board at its meeting held on December 9, 1974, and a similar action was taken on January 13, 1975. (Petition of Appeal, at pp. 4-5; Board's Answer, at p. 3)

The record shows that written evaluations of petitioner's performance were made on September 25, 1974, October 21, 1974, and November 6, 1974. Petitioner contends that this observation actually occurred on November 1, not November 6, as shown in Exhibit B. The September evaluation was written by her principal and the October and November evaluations by other supervisors. (Exhibits A, B, G) Additionally, a memorandum from her principal to the Superintendent summarized petitioner's performance during the fall of 1974 and recommended her termination for four reasons, one of which was "unsatisfactory" performance for a third-year teacher. (Exhibit F) The Superintendent's affidavit stated in part that his decision was based on the principal's evaluation and reports.

Petitioner argues that she was illegally terminated on November 20, 1974 by letter from the Superintendent and that the Board, only, has the authority to terminate her employment. *N.J.S.A.* 18A:25-6 supports that contention and reads as follows:

> "The superintendent of schools may, with the approval of the president or presidents of the board or boards employing him, suspend any assistant superintendent, principal or teacher, and shall report such a suspension to the board or boards forthwith. The board or boards, each by a recorded roll call majority vote of its membership, shall take such action for the restoration or removal of such person as it shall deem proper, subject to the provisions of chapter 6 and chapter 28 of this title."

See also *Ronnie Abramson v. Board of Education of the Township of Colts Neck, Monmouth County*, 1975 *S.L.D.* 418, aff'd State Board of Education 424. Petitioner declares, therefore, that the action of the Board on January 13, 1975, which terminated her employment is the earliest date wherein the Board acted legally to terminate her.

Petitioner also challenges the validity of evaluations used by respondents to terminate her by reason of the fact that she was not permitted to question the Board as to the bases for its decision. She states also that her evaluations were not properly communicated to her by her supervisors.

The record discloses that the Board voted at a regular meeting held December 9, 1974 to terminate petitioner. (Exhibit H) Petitioner asserts that the

vote was four to two and that five votes were required to terminate her employment pursuant to *N.J.S.A.* 18A:25-6.

The Commissioner is not aware of any statute, State Board of Education rule or court decision which requires that the termination notice given a nontenure teacher must be approved by a majority vote of the full membership of the Board. Absent such statutory mandate, State Board of Education rule or court decision, the Commissioner holds that the Board's determination to terminate petitioner on December 9, 1974 by a plurality vote of the quorum was a proper and effective determination within its discretion. *Beckhusen et al. v. Board of Education of the City of Rahway et al.,* 1973 *S.L.D.* 167

In the judgment of the Commissioner, a roll call majority vote is only required for persons who will be awarded contracts of employment pursuant to *N.J.S.A.* 18A:27-1 which reads as follows:

> "No teaching staff member shall be appointed, except by a recorded roll call majority vote of the full membership of the board of education appointing him."

Therefore, absent an offer of renewal contracts, such contracts expire by their own terms on June 30, so long as the Board meets its statutory obligation of giving teaching staff members written notice on or before April 30. *N.J.S.A.* 18A:27-10 *et seq.*

In the instant matter the Commissioner finds that the Board terminated petitioner based on the Superintendent's recommendation and that the Board's determination was procedurally and statutorily proper. There is no showing of an arbitrary, unreasonable or capricious action by the Board.

The Board believed initially that its action was proper when it voted to terminate petitioner at its meeting on December 9, 1974. Thereafter, at petitioner's request she was given a written statement of reasons. (Exhibit E)

Petitioner clearly had a right to an appearance before the Board if she had requested such an appearance, after the Board had made its determination not to reemploy her. *Donaldson v. Board of Education of the City of North Wildwood, Cape May County,* 65 *N.J.* 236 (1974); *Barbara Hicks v. Board of Education of the Township of Pemberton, Burlington County,* 1975 *S.LD.* 332 The record is barren of any request by petitioner to appear before the Board to attempt to challenge her supervisors' evaluations and to dissuade the Board from terminating her contract.

When a teaching staff member alleges that a local board of education has refused reemployment for proscribed reasons (*i.e.* race, color, religion, etc.,) or in violation of constitutional rights such as free speech, or that the board was arbitrary and capricious or abused its discretion, and is able to provide adequately detailed specific instances of such allegations, then the teaching staff member may file a Petition of Appeal before the Commissioner which will result

in a full adversary proceeding. *Marilyn Winston et al. v. Board of Education of Borough of South Plainfield, Middlesex County,* 1972 *S.L.D.* 323, aff'd State Board of Education 327, reversed and remanded 125 *N.J. Super.* 131 *(App. Div.* 973), aff'd 64 *N.J.* 582 (1974), dismissed with prejudice by Commissioner of ducation November 1, 1974

In *Winston, supra,* the Court stated that:

> "***It may be acknowledged that the bare assertion or generalized allegations of infringement of a constitutional right does not create a claim of constitutional dimensions. *Cf. Trap Rock Industries, Inc. v. Kohl,* 63 *N.J.* 1(1973)***" (125 *N.J. Super.* at 144)

Nowhere does the record disclose a constitutional deprivation of petitioner's rights, nor is there any specific allegation of such a showing. Rather, petitioner bases this allegation on what she described as inadequate, improper or insufficient reasons for her termination. Further, she complains that she was not permitted to address her evaluations as to their adequacy and truthfulness.

In the judgment of the Commissioner, the record does not show that petitioner's termination was based on proscribed reasons, *ante,* nor has she shown that her due process rights have been violated.

In *Donaldson, supra,* the Court cited *George Ruch v. Board of Education of Greater Egg Harbor, Atlantic County,* 1968 *S.L.D.* 7, dismissed State Board of Education 11, aff'd New Jersey Superior Court, Appellate Division, 1969 *S.L.D.* 202 in support of an argument that "***the fears of tenure impairment and undue burden expressed by those who have thus far insisted on the withholding of reasons***" was an indication of how negligible such fears were. In *Ruch,* as in the matter herein, the Commissioner and the Court were concerned with a subjective judgment made by a local board of education. Likewise, reasons for non-retention had been afforded a nontenured teacher and an adversary hearing was requested to disprove their validity. The Commissioner, however, found no reason in *Ruch* to order an adversary hearing and said:

> "***The fact that respondent made available to petitioner the report of his supervisor which was adverse to petitioner's interest, does not open the door automatically to a plenary hearing on the validity of the 'reasons' for nonrenewal of employment. To hold that every employee of a school district, whose employment is not continued until he acquires tenure status, is automatically entitled to an adversary type hearing such as petitioner demands, would vitiate the discretionary authority of the board of education and would create insurmountable problems in the administration of the schools. It would also render meaningless the Teacher Tenure Act for the reason that the protections afforded thereby would be available to employees who had not yet qualified for such status.***
>
> "While petitioner has charged respondent with arbitrary, frivolous and discriminatory conduct with respect to his further employment, such a

bare allegation is insufficient to establish grounds for action. *U.S. Pipe and Foundry Company v. American Arbitration Association*, 67 *N.J. Super.* 384 (*App. Div.* 1961) Petitioner does not allege that race or religion or another kind of unlawful bias influenced respondent's failure to reappoint him. Nor does he claim that respondent was motivated by frivolous considerations. Petitioner's charge of unreasonable and arbitrary action rests on the unfavorable report of his superior. But examination of the report, which petitioner attached to his pleadings, reveals that it is nothing more than his supervisor's written evaluation of petitioner's classroom performance and teaching competence. Supervisory evaluations of classroom teachers are a matter of professional judgment and are necessarily highly subjective. There is no allegation that the supervisor's report was made in bad faith, the result of personal animosity or bias, or in other ways improper. What is plain is that the supervisor, in the normal course of her duties, rendered a report of her evaluation of petitioner's competence as a teacher to the administration, that a copy was furnished to petitioner for his knowledge, that the administration and the Board of Education considered the report and although it did not conduct an adversary type hearing such as petitioner demands, it did afford petitioner an opportunity to meet with the Board and express his point of view, and that as a result and with this information before it the Board simply chose not to reemploy petitioner. Under such circumstances the Commissioner finds no vestige of any unlawful, arbitrary or capricious motivation. The Commissioner cannot agree that because respondent made information underlying its decision not to place petitioner in a tenure status available to him, it bound itself to accord him a plenary hearing as a matter of right.***" (1968 *S.L.D.* at pp. 10-11)

The Court in *Donaldson* commented favorably on the Commissioner's decision in *Ruch* and said that the dismissal of the Petition by the Commissioner was grounded in an

> "***opinion by the Commissioner which set forth substantive and procedural principles which appear to have been well designed towards protecting the teacher's legitimate interests without impairing the board's discretionary authority and without unduly encumbering the administrative appellate process.***" (65 *N.J.* at 247)

(See also *Nicholas P. Karamessinis v. Board of Education of the City of Wildwood,* Docket No. A-1403-73, New Jersey Superior Court, Appellate Division, March 24, 1975.) The Commissioner's conclusion is grounded in just such "substantive and procedural principles." Petitioner was afforded reasons for her termination which in part at least were grounded in subjective judgment.

Having determined that petitioner was terminated properly on December 9, 1974, the Commissioner determines further that she is eligible for sixty days' salary from that date, but not to reinstatement. *Gladys M. Canfield v. Board of Education of the Borough of Pine Hill, Camden County*, 1966 *S.L.D.* 152,

affirmed State Board of Education April 5, 1967, affirmed 97 *N.J. Super.* 483 (*App. Div.* 1967), reversed 51 *N.J.* 400 (1968)

Except for this salary consideration, the Board's Motion is granted and the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

February 25, 1976

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, February 25, 1976

For the Petitioner-Appellant, Ruhlman & Butrym (Paul T. Koenig, Jr., Esq., of Counsel)

For the Respondents-Appellees, Turp, Coates, Essl & Driggers (Henry G. P. Coates, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

July 14, 1976
Pending Superior Court of New Jersey

In the Matter of the Application of the Phillipsburg Board of Education for the Termination of the Sending-Receiving Relationship with the Boards of Education of the Borough of Alpha, the Township of Greenwich, the Township of Lopatcong, the Township of Pohatcong and the Town of Bloomsbury.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Phillipsburg, Herr & Fisher (John H. Pursel, Esq., of Counsel)

For the Respondent, Alpha, Thomas J. Kelly, Jr., Esq.

For the Respondent, Greenwich, James A. Tirrell, Esq.

For the Respondent, Lopatcong, Wayne Dumont, Jr., Esq.

For the Respondent, Pohatcong, Howard W. Swick, Esq.

For the Respondent, Bloomsbury, Gebhardt & Kiefer (Richard Dieterly, Esq., of Counsel)

For the Intervenors, Curry and Kingfield, (John F. Kingfield, Esq., of Counsel)

The Board of Education of the Town of Phillipsburg, hereinafter "Phillipsburg Board," makes application to the Commissioner of Education pursuant to law (*N.J.S.A.* 18A:38-13) for a severance of the sending-receiving relationships heretofore existing between it and the Boards of Education of the Townships of Greenwich, Lopatcong, and Pohatcong. The Phillipsburg Board avers that its high school is overcrowded but that the pupil population of the facility would be reduced to an optimum figure if the application is granted. Respondents contest the application and maintain that there is no viable alternative placement for their pupils enrolled in grades nine through twelve at this juncture and that attempts to adopt a new regional alignment of districts have not been successful.

A hearing in this matter was conducted on February 21, and April 22, 1975 at the office of the Warren County Superintendent of Schools, Belvidere. The request of a Phillipsburg Area School Study Committee for participation as a party in the hearing was rejected at that time although the Committee subsequently filed a Brief. The report of the hearing examiner is as follows:

.The instant Petition of Appeal from the Phillipsburg Board for the severance of three of its sending districts is a refinement of an earlier request by the board for a review by the Commissioner of its entire relationship with a total of five sending districts. Such refinement was requested by the hearing examiner

at a conference of counsel held on December 13, 1974 although the Boards of Education of two other school districts, the Borough of Alpha and the Town of Bloomsbury, were required to be joined as parties to this controversy for purposes of comprehensive review of school district alignment for high school education in the Phillipsburg area. Thus, the instant report, while specifically concerned with an application by the Phillipsburg Board for the severance of three districts is, in reality, a report concerned with five sending districts and one receiving district. The necessity for this report is apparent from a review of certain basic facts which are not in dispute and from a review of the contentions of the parties.

The sending-receiving relationship between the Phillipsburg Board and each of its five sending districts for the education of high school pupils enrolled in grades nine through twelve is a long and amicable one which extends back to the years of the 19th Century. (Tr. I-5) During all of those years Phillipsburg High School has served as the only area facility for high school education, although the present building was not constructed until 1927. This schoolhouse received a major addition in 1958 and now has a functional capacity of approximately 1,200 pupils. (See P-1.)

In recent years Phillipsburg High School has accommodated in excess of 1,600 pupils and has been consistently overcrowded. Approximately fifty percent of the current total enrollment of approximately 1,620 pupils is comprised of pupils from Phillipsburg and the rest of the enrollment consists of pupils from the five sending districts. The Phillipsburg Superintendent of Schools now avers that, with growth factors added as the result of area immigration, the pupil population of Phillipsburg High School will exceed 2,000 pupils by 1980 and that pupils from Greenwich, Lopatcong, and Pohatcong, the three districts which the Phillipsburg Board requests to be severed, will increase from approximately 591 pupils to 723 during that time. (See P-1, at p. 6.) The Superintendent classifies a total pupil population of 2,000 pupils in Phillipsburg High School as "unmanageable" in the context of the present enrollment of 1,620 pupils which already necessitates the use of extraordinary scheduling devices (*i.e.,* gym classes of 110-130 pupils, large study halls employed as holding areas, etc. See Tr. I-38.) (See also P-4.)

Further testimony concerned with present conditions in Phillipsburg High School was given by the principal. (P-4) (Tr. I-70 *et seq.*) He testified:

***

"A. A nine period day must be maintained to accommodate the student elective program and a comprehensive educational program. As a result, this situation develops a free period schedule for students that is not desirable and does not add to the quality of education.

"B. Student drop-out and termination rate is 4.5% which indicates to me that the quality of education is hampered by inadequate facilities in an overcrowded school.

"C. There is no room to accommodate particular programs which would enhance quality education (ex: independent study, tutoring programs, remediation programs). If facilities were available, programs of this nature could help reduce the dropout rate.

***

"Presently, there are free periods for approximately 400 students per period over seven of the nine period school day.***

***

"The function of study hall or free time periods in our present situation is to serve as the holding areas for students not scheduled for classes."
(P-4 at p. 2)

"***The original (High School) building has been maintained but will need many renovations to meet the needs of a present modern educational facility. It is my opinion that the present building on the existing acreage has reached its potential school usage. To add to this building would be only the first aid to an existing ill." (P-4 at p. 3)

It is this present overcrowded condition and projection of future deterioration which has occasioned the instant Petition. If the three districts are severed, however, the Phillipsburg Board projects its pupil population for the Phillipsburg High School as remaining constant at between 1,000-1,250 pupils in the years 1976-80 (see P-1, at p. 8), since Alpha, Bloomsbury, and Phillipsburg have had, and are expected to have, relatively stable populations. As supporting data for its Petition of Appeal in this regard, the Phillipsburg Board lists the following population statistics:

	Population		
District	**1950**	**1960**	**1973**
Alpha	2,177	2,406	2,829
Bloomsbury	722	838	885
Greenwich*	1,217	1,397	1,482
Lopatcong*	1,737	2,703	3,144
Pohatcong*	2,540	3,543	3,924
Phillipsburg	18,919	18,502	17,849

*Districts requested to be severed (P-1)

Additionally, the Phillipsburg Board projects future population growth on the fact that Greenwich, Pohatcong, and Lopatcong have large undeveloped land areas which are closely situated to Interstate Highway 78. These land areas are:

District		Area
Greenwich		11.15 Square Miles
Lopatcong		7.45 Square Miles
Pohatcong		13.00 Square Miles
	TOTAL	31.60 Square Miles

as contrasted to:

Alpha		1.8 Square Miles
Bloomsbury		1.0 Square Mile
Phillipsburg		3.2 Square Miles
	TOTAL	6.0 Square Miles (P-1)

Phillipsburg further avers that its own land area is almost totally "built up" and that the land areas of Bloomsbury and Alpha are also substantially committed. In contrast, the Phillipsburg Board maintains that Greenwich, Lopatcong, and Pohatcong contain large tracts of land suitable for building and development.

In the context of present crowded conditions and of this possibility and/or probability of a general and pupil population increase in the years ahead, the Phillipsburg Board has considered the options available to it: an addition to its high school, various regionalization proposals, or the severance of the three sending districts named herein. It maintains, however, that its present 35-40 acre high school tract is insufficient for further expansion (Tr. I-6, 12) and that its own willingness to consider proposals for regionalization, or alternative arrangements, has been thwarted. The President of the Phillipsburg Board of Education testified that the Board "***even to this date has no objections to anything that can relieve our problems.***" (Tr. I-110) He testified further that the Phillipsburg Board has favored various regionalization proposals but that such proposals have been thwarted in each instance by one or more of the sending districts. (See Tr. I-108 *et seq.*) (Also see P-3.)

The Hunterdon County Superintendent of Schools testified that he had been a participant in regionalization studies in 1966 which involved all six districts but that such studies had never progressed to the point of submission for voter approval. (Tr. I-78-79) He testified further that the failure of such proposals led to a consideration of other alternatives which included various kinds of regional alignments or sending-receiving relationships but that agreement had not been secured. (Tr. I-79 *et seq.*)

The most recent regionalization proposal of the many proposed for consideration in the Phillipsburg area has been one involving Alpha, Greenwich, Lopatcong, and Pohatcong. This proposal, while similarly unsuccessful, had advanced at the time of the hearing to the point where the study group of representatives from the four districts had employed various consultants, surveyed proposed school sites, and selected a site of 108 acres for possible purchase. (Tr. I-164) At the second day of hearing, however, the Alpha Board presented a resolution, supported by testimony, that it had decided to withdraw from the four district regional study although it remained amenable to further consideration of a six district regional alignment. (Tr. II-16) It was the unanimous opinion of the witnesses for the remaining three districts, Greenwich, Lopatcong, and Pohatcong, that a regionalization of their districts without Alpha was not feasible. (Tr. I-121, 139, 171) (Note: It is the position of the Phillipsburg Board that a four district regional including Alpha would be detrimental to Phillipsburg since the enrollment of Phillipsburg High School would be too severely reduced.)

In accordance with the unanimous opinion of reference the three districts of Greenwich, Lopatcong, and Pohatcong oppose severance as sending districts to Phillipsburg and aver there is no suitable alternative placement for their high school pupils. (Tr. I-14, 16, 19) Their contentions in this latter regard were supported by testimony of the Acting Superintendent of Warren County Schools. (Tr. I-147 *et seq.*)

The positions of the five sending districts are outlined as follows:

Alpha (R-1) – The Alpha Board, through its administrative principal advances the view that there are only two alternatives to the proposed four district regional alignment which the Phillipsburg Board opposes and from which the Alpha Board now has withdrawn support. These alternatives are listed as:

1. a six district regional high school; (See Tr. II-16, 23.)

2. a continuation of the present sending-receiving relationships. (See Tr. II-22.)

Bloomsbury (R-2) – The Bloomsbury school district is the only one of the six districts as parties in the instant dispute which is in Hunterdon County. While the Bloomsbury Board has considered an alternative relationship with Hunterdon County high schools and has also considered the several regionalization studies which have not been finally approved for submission, it requests that it be permitted to remain as a sending district to Phillipsburg High School.

Greenwich (R-3) – The Greenwich Board projects an enrollment increase from 97 pupils enrolled in Phillipsburg High School in 1974 to a total of 150 expected to be enrolled in 1984. It avers there is no viable alternative to enrollment of Greenwich high school pupils in Phillipsburg except for construction of a new high school in a regional system. It further avers that under present conditions the Phillipsburg High School will become increasingly

overcrowded and "***resolves to expend all necessary efforts and energies to work toward organization of a new regional high school in order that its children might be provided with the best educational program we can offer." (Written testimony of the President of the Board. See also Tr. I-133 *et seq.*)

Lopatcong (R-4) – The Lopatcong Board avers that increased high school enrollments are evidence of the need for "***some kind of regionalization***". (Statement of the administrative principal, at p. 1. See also Tr. I-87 *et seq.*) The Board does not conclude, however, that a kindergarten-grade twelve regionalization is feasible at this juncture in the context of a prior three year study of such a proposal which resulted in failure. The Lopatcong Board lists an enrollment increase of pupils in grades kindergarten through twelve in the years 1965-74 as indicative of the kind of population growth which has created the instant problem. This data is that 650 pupils were enrolled in Lopatcong schools and in Phillipsburg High School in 1965 but that 855 were enrolled in 1974. This latter enrollment included 620 pupils in grades kindergarten through eight, and it is now estimated that this enrollment will increase to approximately 900 elementary pupils in those grade levels by 1977.

Pohatcong (R-5) – The Pohatcong Board has favored the four district regionalization proposal but avers that without Alpha the costs for the three districts would be prohibitive. The Board projects that its enrollment of high school pupils will increase from 230 in 1974 to 340 in 1984-85 and it resolves "***to expend all necessary efforts and energies to work toward the realization of a new regional high school in order that its children might be provided with the best educational program we can offer." (Written testimony of the President of the Pohatcong Board. See also Tr. II-25 *et seq.*)

Thus, in summary, the six districts in the Phillipsburg area which have enjoyed an amicable relationship for decades have a problem which is recognized by all of them. The Phillipsburg Board's answer to the problem, a severance of three districts, would apparently solve the problem for Phillipsburg but would provide no alternative educational placement for high school pupils of Greenwich, Lopatcong, and Pohatcong. There is no viable alternative alignment which, to this time, has met with the approval of all six districts. All attempts to solve the problem have met with failure.

In the argument of the Phillipsburg Board, the Board finds itself in "***an impossible position of not being able to survive with everybody***" and yet, conversely, requiring the maintenance of at least some of its sending-receiving relationships in order that the pupil population of Phillipsburg High School may be sustained at an optimum level. (Tr. I-7)

The problem, stated in another way, is that a small community, Phillipsburg, which has hosted thousands of high school pupils from neighboring communities for decades, finds its capacity to continue as a host increasingly in doubt. These communities with more than ten times the land area of Phillipsburg and with approximately half the pupils presently enrolled in

Phillipsburg High School present problems to the Phillipsburg Board for which the Board, acting alone, has no possible solution although it has been, and is, apparently ready to unite with its neighbors in the achievement of a joint approach. Its neighbors, while favoring various forms of regionalization, have not been able to formulate a plan of action to solve the problem which they, in fact, have caused in large part.

The hearing examiner has considered all the testimony and evidence recited, *ante,* and the arguments of the parties pertinent thereto and finds that:

1. The Phillipsburg High School is in an overcrowded condition now and the efficiency of its educational offering is seriously impaired.

2. Such overcrowded condition will continue to exist and the problems caused by it will intensify as pupil population in the large area surrounding Phillipsburg continues to increase.

3. These problems present immediate and future need for solutions which neither the Phillipsburg Board nor any combination of its sending districts acting alone can offer.

4. Solutions to such problems are most likely to be found in concerted action by all six districts formed together in a new alignment wherein each district assumes a share of the responsibility for a thorough and efficient program of high school education in the Phillipsburg area.

Specifically, with respect to the instant Petition of Appeal, the hearing examiner finds there is no possible alternative placement for any of the pupils of Greenwich, Lopatcong, or Pohatcong and thus no immediate solution to the problem posed by the facts recited, *ante.*

In this latter respect, then, the hearing examiner recommends rejection of Phillipsburg's request for severance of the Greenwich, Lopatcong, and Pohatcong school districts at this juncture. While the Phillipsburg Board has in fact provided "good and sufficient" reason for the severance which it requests, pursuant to the statutory test (*N.J.S.A.* 18A:38-13), a decision by the Commissioner to grant such request would be an exercise in futility. When faced with a similar problem on a previous occasion *In the Matter of the Application of the Upper Freehold Board of Education for the Termination of the Sending-Receiving Relationship with the Board of Education of the Township of Washington, Mercer County,* 1972 *S.L.D.* 627, the Commissioner said:

> "***A decision by the Commissioner to terminate the existing relationship between the Township Board and the Regional Board at this juncture might be purely academic; a delusion without practical effect. This is so because the pupils of Washington Township have an entitlement to a 'thorough and efficient' education; an entitlement which might mandate their placement in the regional district high school by the exigencies of the situation, even if the Commissioner were to formally agree that the

> Regional Board had sustained the burden of proof to which the Commissioner referred in the decision involving the Borough of Haworth***." (at p. 636)

In the referenced *Haworth* matter, *Board of Education of the Borough of Haworth v. Board of Education of the Borough of Dumont,* 1950-51 *S.L.D.* 42, the Commissioner stated he would approve a

> "***change of designation or reallocation of pupils only when he is satisfied that positive benefits will accrue***." (at p. 43)

In the instant matter a severance as requested by Phillipsburg would clearly be detrimental to the interests of the pupils of Greenwich, Lopatcong, and Pohatcong and at least at this juncture the request should not be recommended to be granted.

The hearing examiner also recommends, however, that the five sending districts be directed to intensify their efforts forthwith to constructively cooperate with Phillipsburg in an effort to solve what must be regarded as a joint problem shared by all six districts. He further recommends that such efforts be directed toward the rapid submission of a six district regionalization proposal to the Commissioner in order that solutions to present and future overcrowding problems of Phillipsburg High School may be found. While such a regional proposal has not met with approval in the past it is clearly indicated as the only viable proposal at the present juncture. A three district regional is not possible of achievement. A four district regional as discussed *ante* would, as the Phillipsburg Board correctly contends, reduce its high school pupil population to a level too low to be considered desirable. There is, on the other hand, the probability that districts which have cooperated informally for decades can, if aligned formally, solve the problems which now confront each of them and for which, individually or in segmented parts, they have no solution.

Finally, the hearing examiner advances the view that problems such as those in the matter herein must now be considered in the context of Chapter 212, Laws of 1975 which provides that all school districts in New Jersey are responsible for the provision of a more clearly defined "thorough and efficient" educational program and must establish goals in the exercise of this responsibility. The Statute provides in pertinent part:

> "Article II. Goals, Standards and Guidelines; Procedures of Evaluation; Enforcement
>
> 4. The goal of a thorough and efficient system of free public schools shall be to provide to all children in New Jersey, regardless of socioeconomic status or geographic location, the educational opportunity which will prepare them to function politically, economically and socially in a democratic society.

5. A thorough and efficient *system of free public schools* shall include the following major elements, which shall serve as guidelines for the achievement of the legislative goal and the implementation of this act:

a. Establishment of education goals at both the State and *local levels;*

b. *Encouragement of public involvement in the establishment of educational goals;*

c. Instruction intended to produce the attainment of reasonable levels of proficiency in the basic communications and computational skills;

d. A breadth of program offerings designed to develop the individual talents and abilities of pupils;

e. Programs and supportive services for all pupils especially those who are educationally disadvantaged or who have special educational needs;

f. Adequately equipped, sanitary and secure physical facilities and adequate materials and supplies;

g. Qualified instructional and other personnel;

h. *Efficient administrative procedures;*

i. An adequate State program of research and development; and

j. *Evaluation and monitoring programs at both the State and local levels. (Emphasis supplied.)*

14. The commissioner shall review the results of the evaluations conducted and reports submitted pursuant to sections 10 and 11 of this act. If the commissioner shall find that a school or a school district has failed to show sufficient progress toward the goals, guidelines, objectives and standards established in and pursuant to this act, he shall advise the local board of education of such determination, and shall direct that a remedial plan be prepared and submitted to him for approval. If the commissioner approves the plan, he shall assure its implementation in a timely and effective manner. If the commissioner finds that the remedial plan prepared by the local board of education is insufficient, he shall order the local board to show cause why the corrective actions provided in section 15 of this act should not be utilized. The hearing upon said order to show cause shall be conducted in the manner prescribed by subdivision B of article 2 of chapter 6 of Title 18A of the New Jersey Statutes.

15. If, after a plenary hearing, the commissioner determines that it is necessary to take corrective action, he shall have the power to order necessary budgetary changes within the school district, to order in-service training programs for teachers and other school personnel, or both. If he determines that such corrective actions are insufficient, he shall have the power to *recommend to the State board that it take appropriate action.* The State board, on determining that the school district is not providing a thorough and efficient education, notwithstanding any other provision of law to the contrary, shall have the power to issue an administrative order specifying a remedial plan to the local board of education, which plan may include budgetary changes or *other measures the State board determines to be appropriate.* Nothing herein shall limit the right of any party to appeal the administrative order to the Superior Court.

16. Should the local board of education fail or refuse to comply with an administrative order issued pursuant to section 15 of this act, the State board shall apply to the Superior Court by a proceeding in lieu of prerogative writ for an order directing the local school board to comply with such administrative order." *(Emphasis supplied.)*

Thus, the Statute is concerned with local school districts, their "goals" and achievements at "local levels." It is also concerned, however, with a "***thorough and efficient '*system*' of free public schools***" and with "State" goals and evaluation. In this broader concern or overview of the States "system" of education some questions may be posed with pertinence to the instant matter:

1. Are receiving districts, which provide high school education for area pupils, solely responsible for the conduct of a high school program in a "thorough and efficient" manner even when, as in the instant matter, sending districts provide approximately fifty percent of the pupils to be educated?

2. If receiving districts are so responsible and if physical conditions thwart the exercise of responsibility, where is the remedy to be found?

3. If receiving districts are not solely responsible, in the broader view of the State's "system" of free public schools, should local boards of education of sending districts be required to contribute to the solution of problems which they, in part at least, have caused?

The hearing examiner has considered such questions in the context of the new statutory mandate and concludes that the answers are obvious. Receiving districts heretofore responsible for the provision of high school educational programs for area pupils are no longer solely responsible if reasonable joint approaches to the remediation of overcrowded high school conditions are repeatedly spurned. In such instances the districts which contribute to the problem may also be expected to help solve it. A refusal in this regard would appear to trigger the requirement for an active role by the Commissioner and the

State Board of Education in the exercise of broad supervisory authority to mandate change.

In summary and in the context of these findings and conclusions of law the hearing examiner recommends that the six districts involved as parties in the instant matter be directed to develop forthwith a broad regionalization proposal, at least with respect to a program of education for grades nine through twelve, for the correction of clear and present impediments to a thorough and efficient educational program for high school pupils in the Phillipsburg area. He further recommends that such proposal be submitted on or before November 15, 1976 and that the Commissioner retain jurisdiction in this matter until the program has been reviewed and found to be adequate.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and the one reply thereto from the Lopatcong Board. This reply indicates general concurrence with the report.

The Commissioner also concurs with the report and commends all Boards here involved for their diligent efforts to arrive at a consensus of view with respect to a new regional alignment in the Phillipsburg area. It is evident from the facts of this litigation that such an alignment is clearly required for the welfare of school pupils and that a continuance of the status quo will produce a result detrimental to the area in general and to school pupils in particular. Regionalization is not a panacea for the declining effectiveness of programs of education. It does offer, however, real opportunities for progress and for the continuance of a viable program of education responsive to the wishes of a concerned citizenry. Such opportunities are clearly evident herein.

Accordingly, the Commissioner recommends that all Boards continue the efforts already begun in order that a new alignment for the advancement of education in the Phillipsburg area may be submitted in concrete form on or about the date of November 15, 1976.

COMMISSIONER OF EDUCATION

February 26, 1976

In the Matter of the Racial Imbalance Plan of the Roselle Board of Education, Union County.

COMMISSIONER OF EDUCATION

DECISION

For the Board of Education, John Cervase, Esq.

For the State Department of Education, George J. Kugler, Jr., Attorney General (Arthur Winkler, Deputy Attorney General)

This matter is before the Commissioner of Education as the result of an order of the Superior Court of New Jersey, Law Division, Mercer County, in the case of *Roselle Board of Education v. New Jersey State Commissioner of Education,* Docket No. L-3071-71-PW, November 29, 1971, wherein the Roselle Board of Education, hereinafter "Board," challenged the withholding of certain amounts of State aid from the school district by the Commissioner of Education as the result of the school district's failure to adopt and submit to the Commissioner an effective plan for the elimination of racial imbalance among the pupil enrollments of the several schools within the district. The Order of the Court directed, *inter alia,* that the Board be accorded a formal hearing on (a) the question whether the latest plan submitted by the Board to the Commissioner would reasonably alleviate racial imbalance in the school district in accordance with State policy and guidelines on racial imbalance, and (b) whether the aforesaid State policy and guidelines are reasonable. The Court also directed that the $52,000 State aid payment for May 1971, previously withheld by the Commissioner, remain withheld without prejudice to the Board to reapply for restoration of said moneys to the appropriate court following a formal hearing and determination by the Commissioner.

In accordance with the aforementioned order of the Court, the Commissioner issued an order directing a formal hearing on the matters specified by the Court.

Hearings in this case required a total of thirty-two days, beginning on January 10, 1972, and concluding September 13, 1973. A large number of documentary exhibits were received and marked in evidence. Subsequent to the hearing, Briefs were filed by the parties.

A recitation of the chronology of relevant facts is necessary for a clear understanding of this matter.

The State Board of Education adopted the following policy resolution on November 5, 1969 in regard to racial imbalance of pupil enrollments in the various public schools:

> "WHEREAS, there are certain school districts in the State of New Jersey maintaining racially imbalanced public schools; and

"WHEREAS, the maintenance of racially imbalanced schools by any school district is in violation of the law and public policy of the State of New Jersey; and

"WHEREAS, the State Board has determined that it is appropriate to deal with problems of racial imbalance without awaiting formal complaints by aggrieved citizens; now, therefore, be it

"RESOLVED, that the attached statement of policy reaffirm the position of the State Board of Education and be it further

"RESOLVED, that the Commissioner of Education in cooperation with local school districts undertake to determine in which school districts of the State of New Jersey racially imbalanced schools are maintained; and be it further

"RESOLVED, that the Commissioner of Education under the policy of the State Board undertake such steps as he shall deem necessary to correct such conditions of racial imbalance as may be found; and be it further

"RESOLVED, that the Commissioner shall, at reasonably frequent intervals, report his progress to the State Board of Education."

(Exhibit P-39B)

Attached to the resolution of November 5, 1969 (Exhibit P-39B) is a statement of policy (Exhibit P-38) which is supportive of the resolution. The statement of policy reads as follows:

"The New Jersey State Board of Education has long held that in a democratic society a fundamental precept of education is that each and every individual have an opportunity to develop the full potential of his capabilities, and that it is the responsibility of the State to insure that equality of opportunity is provided for every child regardless of his race, creed, color, place of residence, social or economic background.

"*Experience and research have demonstrated that:*

"The opportunity for children from a variety of backgrounds to work and learn together is essential for achieving the objectives of education.

"The racially imbalanced schools in this State deny this opportunity to large numbers of boys and girls – white and black alike, as well as children of other minority groups.

"Segregation of children on the basis of race is educationally harmful to all children.

> "Pupils in schools in which the population is predominantly Negro and of low socio-economic background show significantly diminished levels of achievement.

"A commitment to equal educational opportunity has been reaffirmed and mandated by the New Jersey Constitution of 1947 Article 1, paragraph 5 and the Judicial determinations of the Supreme Court of the United States (Brown v. Board of Education of Topeka, 347 U.S. 483, 98 L.Ed. 873 (1954)) and the Supreme Court of New Jersey (Booker v. Board of Education of Plainfield, 45 N.J. 161 (1965)).

"In suggesting that it is the duty of school officials and administrators to deal effectively with this problem, the New Jersey Supreme Court in the latter cited case stated:

> 'In a society such as ours, it is not enough that the 3R's are being taught properly for there are other vital considerations. The children must learn to respect and live with one another in multi-racial and multi-cultural communities and the earlier they do so the better. It is during their formative school years that firm foundations may be laid for good citizenship and broad participation in the mainstream of affairs. Recognizing this, leading educators stress the democratic and educational advantages of heterogeneous student populations, particularly when they are composed of a racial minority whose separation generates feelings of inferiority.' (See also 'Executive Order No. 21 Governor's Code of Fair Practices' Articles VIII, IX, June 24, 1965.)

"Local school districts must continually assess their own situations. Plans must be developed and actions taken which will eliminate racial imbalance before problems and pressures arise that cause community opinion to become polarized.

"A number of guidelines have been developed by the Office of Equal Educational Opportunity, New Jersey State Department of Education, and adopted by the State Board of Education to aid Administrative staffs and Boards of local school districts in planning and carrying out school desegregation. These should be carefully considered by all school districts in the development of school desegregation plans." (Exhibit P-38)

Guidelines for implementing the State policy were also adopted on November 5, 1969. (Exhibit P-39) Since these guidelines, as well as the State policy, are the target of attack by the Board in this matter, they are reproduced in entirety as follows:

"1. *A Statement of Educational Policy*

"Educational considerations are primary in eliminating school segregation. The elimination of racial imbalance is not to be sought as an

end in itself but because such imbalance stands as a deterrent and handicap to the improvement of education for all.

"Therefore, as a first step the local Board and its administrative staff, working together, should formulate a policy which states explicitly the educational considerations involved in their commitment to elimination of racially imbalanced schools.

"Excerpts from statements developed by Boards of Education:

"a. 'This Board acknowledges the social and moral basis of eliminating racial imbalance in our schools; and it recognizes that eliminating that imbalance must be achieved in a framework of educational progress. . .'

"b. '. . .The Education Committee is unanimous in its conclusion that the continued disparity of any ethnic group representation in a school different from that of its district composition leads to an eventual deprivation in 'quality' educational opportunity and achievement. . .'

"2. *The Desegregation Plans*

"Districts with segregated schools must do the following in developing plans:

"a. involve the community in its development and in plans for its implementation

"b. identify and consider alternative courses leading to solutions

"c. project the racial composition of each elementary and secondary school attendance area and the racial composition of its staff

"d. assess and draw on all resources – educational, financial and community – that can be brought to bear in the solution of the problem

"e. select location of proposed school building sites and utilize existing buildings so that each school will represent as nearly as possible a cross-section of the population of the entire district

"f. prepare a timetable indicating target dates for the completion of each phase, immediate and long-range

"g. reassess plans and projects annually.

"3. *Comprehensive Approach*

"Any effective educational system will include:

"a. involvement of the school staff

"b. opportunities for in-service training of Administrators, school board members, teachers and other school officials to meet the needs and problems arising from the implementation of desegregation plans; such training should be *a priori* and concurrent

"c. opportunities for students and parents to work with the staff in pooling creative ideas for the instructural program and student activities

"d. curriculum changes and introduction of teaching materials which provide for all children an understanding of the contributions of the Negro, Puerto Rican, and other minority groups in all subject areas

"e. a curriculum review committee to select relevant textbooks and other teaching materials

"f. encouragement and support to the end that all-white schools and all-Negro schools in local districts will provide opportunities for interracial and intercultural experiences. If pupil integration is not immediately possible, the staff should be integrated; if this is not immediately possible, resource people should be employed to provide these services.

"4. *Some Possible Courses of Action to Correct Racial Imbalance*

"a. pairing of schools

"b. grade level organization – bringing together into one school all of the district's students in a given grade

"c. altering school attendance zones

"d. transferring students from racially imbalanced schools to others which have available space

"e. establishment of "Educational Parks" or "Plazas"

"f. rearrangement of feeder patterns from elementary to Junior High School to Senior High School

"g. voluntary exchange of students between districts

> "h. attendance of students at a school other than their own for part of a day/week/or for special courses or activities
>
> "The staff of the Office of Equal Educational Opportunity, State Department of Education, will assist local districts in the development of a plan for their use." (P-39)

The school districts which were considered by the Department of Education as having the most severe problems of pupil racial imbalance were invited to a conference. (Tr. 23-36-20 to 22) The Roselle Board of Education was among those local boards which received a letter from the Department advising the school district to submit a plan for the correction of racial imbalance by February 1970. (Tr. 23-44-2 to 12 and 37-3 to 10)

At the conference of selected school districts held January 9, 1970 in Trenton, numerous questions were raised regarding the kinds of information to be included in each local school district's plan. In response to these questions, a "working definition" of the term racial imbalance was given to the various County Superintendents on January 21, 1970. (Tr. 23-37-11 to 38-7) The definition reads as follows:

> "Our working definition is that each district strive to establish school attendance areas that make possible, wherever feasible, a student body that represents a cross-section of the population of the entire district. If in the elementary grades, for example, the minority population is 25%, then each building and each class should try to reflect this percentage as is feasible." (Exhibit P-55)

The Department also transmitted to the County Superintendents and local superintendents a memorandum explaining the various elements which were to be included in plans submitted by local boards of education. (Exhibit P-56; Tr. 23-38-22 to 40-10) The memorandum of the Union County Superintendent of Schools (Exhibit P-55) was distributed to all school districts within that County and stated specifically that the districts of Elizabeth, Linden, Plainfield, Roselle, Scotch Plains-Fanwood, Summit and Westfield had immediate time limits for submission of a plan. The explanatory memorandum (Exhibit P-56) was attached to the Union County Superintendent's memorandum. (Exhibit P-55)

The Roselle Board does not deny having received these notices and memoranda. In fact, the Roselle Board had held discussions regarding the meaning and implementation of the State policy and guidelines. (Tr. 4-37-7 to 11 and 37-6 to 24; Tr. 5-119-20 to 120-18 and 125-1 to 126-25; Tr. 13-51-14 to 52-25) The memoranda from the Department and the County Superintendent and discussions between the Roselle Board and the Union County Superintendent of Schools pointed out the goal of having each school district create an enrollment plan, wherever feasible, that would provide a pupil enrollment in each school and classroom reflecting the ratio of minority pupils within the total school district. The testimony of a former member of the Roselle Board disclosed that the Union County Superintendent has advised the Board that a

ten percent variation above or below the total ratio for the district would be acceptable for individual schools or classes within the schools. (Tr. 20-90-4 to 91-8; Tr. 5-119-20 to 120-19) The minimum requirements outlined, *ante*, in the January 21, 1970 memorandum are self-explanatory. (Exhibit P-56)

Testimony of the Director of the Department's Office of Equal Educational Opportunity disclosed that the Roselle Superintendent had contacted her in February 1969 for assistance with a plan to correct racial balance within the school district. This was approximately ten months prior to the formal adoption of the State policy and guidelines. (Tr. 23-47-4 to 25) The Director described the considerable contact which took place between her office and the Board during 1969 and into the early months of 1970. (Tr. 23-48-3 to 52-3) The Director testified that the Board's plan, which was submitted February 2, 1970, hereinafter "Grade Level Plan," (Exhibit P-1) was completed earlier than that date, but her office requested that the Board hold up on the submission and implementation in order to complete all the components and make this a model plan for other school districts. (Tr. 23-50-20 to 52-3)

As was stated, the Roselle Board submitted the Grade Level Plan on February 2, 1970. (Exhibit P-1) By letter dated March 6, 1970 to the Superintendent, the Commissioner advised the Board that the Grade Level Plan was acceptable. The letter stated the Commissioner's understanding that the Plan would be fully implemented at the beginning of the 1970-71 school year. (Exhibit P-2)

The Director testified that the Grade Level Plan was acceptable for the reasons that (1) it was approved by the Board, (2) it was to be implemented for the 1970-71 school year, (3) the Plan provided for total integration of grades kindergarten through seventh, (4) the burden for balancing the pupil enrollment was distributed throughout the school district, (5) the Plan included needed educational program components, (6) transportation was to be provided for pupils in grades kindergarten through fourth who resided more than seven-tenths of a mile from school, and (7) the public and all teaching staff members had been informed regarding the plan. (Tr. 23-45-23 to 47-3; Tr. 24-3-25 to 5-2; Tr. 5-82-20 to 86-19)

Subsequent to the date that the Grade Level Plan (Exhibit P-1) was submitted to the Department, the annual school election held February 10, 1970 in the Roselle School District resulted in three new members acquiring seats on the Board.

By letter dated March 11, 1970, the Board advised the Commissioner that the Grade Level Plan (Exhibit P-1):

> "***does not meet the budgetary and financial needs of the citizens of Roselle. The 1970-71 budget was overwhelmingly defeated at the polls and a school budget reduction of $360,000 was effected on [March 9, 1970]. It is neither financially or otherwise practical to implement this plan to correct racial imbalance. Accordingly, other avenues of approach are

presently under study to include redistricting and construction of new facilities.***" (Tr. 24-8-4 to 14)

The Board notified the Commissioner by letter under date of March 25, 1970, signed by the Secretary (Exhibit P-3) that a special meeting had been held on March 24, 1970 at which the Board rescinded the Grade Level Plan. This letter also stated that the Board was in the process of finalizing alternate plans for submission to the Commissioner. (Tr. 24-9-5 to 10)

The Commissioner responded by letter dated April 9, 1970, addressed to the Board Secretary, acknowledging receipt of the Board's two letters of March 11 and 25, 1970. In order to make his position clear to the Board, the Commissioner stated, *inter alia,* the following:

"***There presently exists a condition of racial imbalance in the Roselle public schools which is amenable to correction. Such a condition constitutes an unlawful deprivation of equal educational opportunity under the laws of New Jersey. The Board of Education has submitted a plan for the elimination of the condition by the beginning of the 1970-71 school year, which has been approved by me. Once approved, that plan cannot be rescinded except by a reversal of the process. Such a reversal would require that the approval of this office be obtained as a prerequisite to such a withdrawal. No such approval has been sought or obtained and for that reason, the plan remains in effect until and unless approval is granted. Such approval will be granted only upon the submission of an acceptable alternate proposal. I suggest, therefore, that if the Board wishes to abandon or alter the present plan that it prepare and submit the proposal it wishes to substitute as soon as possible. It should also be made clear that whatever proposal is finally approved must be implemented at the onset of the 1970-71 school year. Any delay beyond that date will force this office to impose appropriate sanctions upon the school district until compliance is effected.

"If the above statement seems harsh, it is not intended to be. My purpose is solely to make the situation faced abundantly clear. As a constitutional officer, I am under a duty and have given my oath to uphold the laws of this State. The members of the Roselle Board of Education have also subscribed to the same oath and duty. The continued existence of conditions of racial imbalance such as exist in the Roselle schools is a clear violation of New Jersey law which calls for prompt correction by those who have been entrusted with such responsibilities. I urge you, therefore, to direct your best effort to implementation of the existing approved plan or, if it is desirable, an acceptable alternative." (Exhibit P-4)

The Board's response to the Commissioner's letter of April 9, 1970 (Exhibit P-4) was a letter dated April 17, 1970 with an enclosure entitled "Study of Desegregation Plan Alternatives," which describes five possible methods of changing the organization of the elementary schools. (Exhibit P-5)

These alternatives were obviously written by the Superintendent and Assistant Superintendent, whose names and titles appear upon the cover. The first page of this report describes its purpose in the following manner:

> "***The attached material gives a summary of the effects of the five alternative plans submitted to date [to the Board] and a brief critique of each plan.
>
> "If the board can now focus upon the most feasible alternative from among these tentative plans presented, and give us specific guidelines we can then develop a final acceptable plan.
>
> "If the problem of racial imbalance in the schools can be resolved, then we can turn our attention to educational program improvements, which represent a major part of the overall plan." (Exhibit P-5, p. 1 of Report)

The Director of the Office of Equal Educational Opportunity testified that these alternatives were reviewed and found not acceptable for the reason that it was unclear which, if any, alternative was to be adopted by the Board. The Board was advised to adopt one plan with full details and submit it to the Department. (Tr. 23-69-20 to 71-15; Tr. 24-10-1 to 11-24; Exhibit P-7)

The testimony of the Roselle Superintendent disclosed that the alternatives were more in the form of suggestions rather than firm plans. According to the Superintendent, none of the five alternatives (the sixth being to maintain the *status quo*) was adopted, because the Board could not agree that any were suitable alternatives. (Tr. 5-106-8 to 108-4)

The Board did send a proposed plan to the Commissioner, dated April 22, 1970, (Exhibit P-6) as an alternative to the Grade Level Plan. This plan, a two-page document, stated the balancing could be accomplished by redrawing the attendance area zones between the Harrison and Lincoln Schools, and between the Locust and Washington Schools.

The Superintendent, who had been Assistant Superintendent when the five alternative plans were submitted to the Commissioner, testified as follows regarding the possible achievement of racial balance by means of this plan:

> "***Redistricting [of school attendance zones] called for in the plan was extremely nondescript, it did not specify exactly where lines would be drawn but merely suggested that a redrawing of lines between the Lincoln School and the Harrison School and between the Washington School and the Locust School would correct the racial imbalance.***" (Tr. 5-116-7 to 14)

When the Superintendent was asked whether he could ascertain, from an analysis of the plan, what percentage of racial composition of the schools was intended to be achieved, he replied:

> "***The answer to that is no. I don't think anybody could, based on what's in this plan.***" (Tr. 5-119-4 to 12)

The inadequacies of the proposed plan (Exhibit P-6) were described in the testimony of the Director of the Office of Equal Educational Opportunity. Essentially, the proposed plan was devoid of any specific description of the method by which the plan's objective would be achieved, and when it would be implemented. (Tr. 23-75-8 to 25; Tr. 24-12-17 to 14-8)

The Board was advised by a letter dated May 19, 1970, addressed to the then-Superintendent by the Director of the O.E.E.O. that the plan submitted on April 22, 1970 (Exhibit P-6) was unacceptable because it did not meet the requirements for the submission of plans for review. The Board was advised that the Department expected a completed plan by May 29, 1970. (Exhibit P-8)

The Director and other Department officials conferred in Trenton on May 21, 1970 with a member of the Roselle Board, an Assemblyman and his assistant, and two other persons who were not Board members regarding the Board's problem. The Board member informed the participants that she had not seen the guidelines, was not familiar with the details of the problem and requested an extension of time for the Board to file a plan. At the conclusion of the conference the Board member was given nine copies, one for each member, of the guidelines, State policy statement, and transmittal requirements. (Tr. 23-76-91 to 78-4; Tr. 24-15-23 to 17-17)

On June 2, 1970, the Director, the Deputy Commissioner and an Assemblyman had a meeting in Roselle with the majority of the Board and the Superintendent. The State laws and policy regarding racial imbalance and related topics were discussed. (Tr. 23-78-9 to 79-2; Tr. 24-17-22 to 18-10)

The Commissioner directed a communication to the Roselle Board under date of June 18, 1970, setting forth his reasons for rejecting the April 22, 1970 plan (Exhibit P-6) and reminding the Board that the Grade Level Plan was the only acceptable plan which had been submitted. The Commissioner advised the Board that either that plan or an approved alternate would be required to be implemented at the beginning of the 1970-71 school year. (Exhibit P-9)

The Board acknowledged receipt of the Commissioner's June 18, 1970 letter (Exhibit P-9) by a communication dated July 8, 1970. (Exhibit P-10) The Board's letter stated that the Commissioner had rejected the Equal Educational Opportunity Plan. (Exhibit P-12) This was an incorrect statement. The Commissioner's letter dated June 18, 1970 (Exhibit P-9), specifically rejected the proposed plan which the Board had adopted on April 22, 1970 (Exhibit P-6), and not the Equal Educational Opportunity Plan. (Exhibit P-12) (Tr. 24-19-21 to 20-9) The Board's letter (Exhibit P-10) stated that the Equal Educational Opportunity Plan provided for the reassignment of pupils and quality education for each pupil. The Board compared the plan with the former Grade Level Plan by stating that the Grade Level Plan did not provide quality education for pupils. (Exhibit P-10)

The record does not make clear the exact date when the Board's Equal Educational Opportunity Plan was submitted to the Department. The document

itself (Exhibit P-12) is not dated and the testimony is not clear as to when this plan was received by the Department. (Tr. 23-79-4 to 15) It appears that the Equal Educational Opportunity Plan was probably submitted between June 18 and July 8, 1970. (Tr. 24-20-10 to 22)

The Commissioner directed a letter to the Board under date of July 17, 1970 (Exhibit P-11), in reply to the Board's letter of July 8, 1970 (Exhibit P-10), and stated that the substituted proposal to the previously approved Grade Level Plan "***was rejected because it falls far short of accomplishing the 'greatest dispersal possible' required by New Jersey Law.***" (Exhibit P-11) This letter was clearly in reference to the plan received on April 22, 1970, and not the Equal Educational Opportunity Plan.

A conference was held in the Department on September 2, 1970, which included the Deputy Commissioner, the Commissioner's administrative assistant, the Director of the O.E.E.O., the acting Superintendent and the then President of the Roselle Board. The subject of discussion was the Equal Educational Opportunity Plan, and the Department officials explained that the Board could take one of the alternatives suggested in this document, or a combination of several, and develop this into a plan which the Department could review. The Director characterized this conference as having an informational purpose. (Tr. 23-79-12 to 82-9; Tr. 24-25-6 to 28-6)

At its meeting held September 8, 1970, the State Board of Education received a status report from the Commissioner with respect to the correction of racial imbalance within local school districts. (Exhibit P-14) The State Board unanimously voted to approve the Commissioner's report, which included placing the Roselle School District in the category of noncompliance with the State policy and guidelines. The State Board's action also approved the utilization of the Commissioner's power under *N.J.S.A.* 18A:58-6 to withhold State aid from the Roselle School District. (Exhibit P-15)

The Commissioner notified the Roselle Board that it was in noncompliance and that the first State aid payment of October 1, 1970, would be withheld if an acceptable plan was not submitted by September 20, 1970. This notification was by telegram sent on September 8, 1970, followed by a letter from the Commissioner dated September 10, 1970 (Exhibit P-16), which advised the Board that a submitted plan should include the following:

"***a. Show the greatest pupil dispersal possible by grade and school in a plan to be implemented this semester.

"b. A tentative schedule for teacher inservice.

"c. Staff desegregation assignments and positions.

"d. Schedule for initiating curricular reforms.***" (Exhibit P-16)

The Roselle Board submitted a supplement (Exhibit P-12) dated September 18, 1970 to its Equal Educational Opportunity Program. The supplement #1 proposed to disperse elementary school pupils by a process of "selectively guided assignments" which would be determined after an analysis of data gathered at the opening of the schools. The proposal also contained sections in relation to staff desegregation assignments and curriculum reforms. (Exhibit P-13)

The school district was tentatively removed from the category of noncompliance and placed in the category of "Commissioner maintains jurisdiction pending staff visitation and evaluation," as the result of its submission of supplement #1 (Exhibit P-13) before the deadline of September 20, 1970. This was explained in a letter to the Board dated November 9, 1970 from the Director. (Exhibit P-17) The Roselle School District received its October 1970 State aid payment.

The Department subsequently reviewed supplement #1 (Exhibit P-13) and discovered deficiencies in this proposal. The testimony of the Director disclosed that listed curriculum improvements were not new, since many had been introduced in prior school years. Also, the plan and supplement did not provide information regarding the numbers, grade levels, and present locations of the pupils who were to be reassigned or the location of the reassignment. The number of pupil stations available for transfer was listed in the supplement. This proposal also failed to show the correction of racial imbalance which would result and was devoid of data regarding the time schedule for implementation. (Tr. 24-29-17 to 34-4)

Subsequently, on September 24 and at a later date, Department officials met with several of the Board's teaching staff members to discuss the Board's proposed inservice teacher training program, and to determine whether the school district could obtain federal funds under the Emergency School Assistance Program. (Tr. 24-34-5 to 35-7)

The Director testified that she communicated with the Acting Superintendent by letter dated November 18, 1970 to confirm her verbal agreement that the Department would provide financial assistance for the Board to engage the Dialogue System, an agency specializing in inservice teacher training programs, which was one of the components of the Roselle Board's proposal. (Tr. 24-36-21 to 37-9)

By letter dated December 9, 1970 to the Director, the Acting Superintendent advised the Department that supplement #1 to the Equal Educational Opportunity Plan (Exhibit P-13) had not been adopted by the Board. (Exhibit P-18)

The Director and two members of the staff of the Office of Equal Educational Opportunity attended a meeting on January 9, 1971 in Roselle with the Acting Superintendent and six members of the Roselle Board. This meeting, according to the Director, was devoted to more explanation by the Department

officials regarding the Board's responsibility to develop supplement #1 into a workable plan. The deficiencies of supplement #1 were explained to the Board. The Director testified that the Board did not verbally offer any one or a combination of several specific alternatives of their proposal as the plan which would be developed. The Director testified that the Board had not made a decision at that time regarding any specific pupil reassignments. (Tr. 24-37-20 to 39-14)

The Commissioner addressed a communication to the Roselle Board dated February 17, 1971 (Exhibit P-19), wherein he advised the Board that the plan had been analyzed and was not approved. The Commissioner found that the Board had not complied with his directive to develop a plan which could be implemented during the second semester of the 1970-71 school year. He found the Roselle Board in noncompliance, and in accordance with *N.J.S.A.* 18A:55-2, he stated he would notify the State Treasurer that, beginning with the May payment, State aid would be withheld until the school district had an approved plan in operation. (Exhibit P-19)

The Director testified that the Commissioner received a letter on February 25, 1971 from the then Board President which stated, *inter alia,* that:

> "***the Board requested a meeting with members of the [Department] staff to clarify the meaning of the letter and to assist us in developing a formula for implementation. We believe that once your approval has been given to the plan, we can move quickly to its implementation this semester.***" (Tr. 24-41-7 to 11)

On behalf of the Commissioner, the Director replied to the Roselle Board by letter dated March 8, 1971. (Exhibit P-20) This letter reviewed the background as to why the Equal Educational Opportunity Plan had been rejected and pointed out that supplement #1 was not a plan. The following seven deficiencies were listed:

"1. The formal approval of the Board of Education of the plan.

"2. The approval by the Board to follow up on the pupil assignments included in the supplement.

"3. A timetable for implementation. You were requested to develop a plan which was to be implemented during the Fall semester.

"4. Information relative to which students would be assigned to these spaces. At the meeting in January, this question was raised. At that time, it was indicated by you that no one had made a decision about which students would be assigned to the various buildings.

"5. The pupil ratio in each building after the assignments had been made.

"6. The shift in teacher assignment to accompany these changes.

"7. Information concerning curricular reforms at the elementary level as a result of desegregation efforts." (P-20)

The Board directed a letter to the Commissioner dated March 10, 1971 with an attached implementation schedule. (Exhibit P-21) This letter apparently crossed in the mails with the letter to the Board from the Director. This implementation schedule was limited solely to a voluntary pupil transfer program, with no precise determination by the Board of what degree of dispersal would result, and, more importantly, placed the burden for dispersal entirely upon the parents of the pupils, without a policy decision by the Board. (Tr. 24-44-2 to 45-2)

By letter dated April 30, 1971 (Exhibit P-22), the Commissioner notified the Roselle Board that the district was still in noncompliance and that, beginning May 1, 1971 State aid would be withheld. Thereafter, on or about May 1, 1971, the amount of $101,718 in State aid was withheld from the Roselle School District.

As a result of this State action, the Roselle Board advised the Commissioner that it would be short of funds in the amount of $52,000 by the close of the school year on June 30, 1971.

On May 6, 1971, the Board Secretary conferred with the Director in Trenton to clarify what action the Board would be required to take to have the withheld funds restored. (Tr. 25-3-17 to 21) Thereafter, by letter dated May 12, 1971 to the Director, the Board transmitted a resolution it had adopted at a meeting held May 11, 1971, which stated in essence that the Board was requesting a list of educational consultants from the Department, from which it would select one to assist with the development of a plan which would be submitted to the Department. (Tr. 25-4-14 to 5-17) The Director supplied such a list, and, in a letter dated June 3, 1971 (Exhibit P-23), advised the Board that the consultant would be financed by the Department. This letter enclosed the list of recommended educational consultants. (Exhibit P-23) The Board subsequently selected the National Education Program Associates, Edward A. Welling, Jr., Director, as the consultant. (Tr. 25-5-13 to 15)

In a further effort to have the withheld funds restored, the Board requested a meeting with Department officials, and such a meeting was held on June 3, 1971. Present at this meeting were the Board attorney, the Board Secretary, four members of the Board, the Assistant Commissioner of the Division of Controversies and Disputes, the Director of the O.E.E.O. and the Director of the Division of Business and Finance. (Tr. 25-6-8 to 15)

By letter dated June 10, 1971 to the Board attorney from the Assistant Commissioner (Exhibit P-25) the Board was clearly advised of the Department's

current position regarding the Board's status. This letter is of sufficient significance to reproduce in entirety. It reads as follows:

> "This will acknowledge receipt of your letter of June 4, 1971, in which you state your understanding of the discussion which occurred at a recent conference whose participants were Mrs. Nida Thomas, Dr. William Shine, Mr. Harold Bills, the Board Attorney and Secretary and four Board members of the Roselle Board of Education.
>
> "The purpose of the conference was to consider the options open to the Roselle Board which alleges that the Roselle District will be $52,000 short of funds at the close of the school year as a result of the action of the Commissioner of Education of withholding $100,000 in State aid payment because Roselle was in noncompliance with the State Mandate regarding correction of racial imbalance.
>
> "Mrs. Thomas informed us at this conference that for purposes of recovering the $52,000 in question, the Roselle Board of Education will be considered in partial compliance with the first step of developing a plan for the correction of racial imbalance when the Board takes the following courses of action:
>
> > "1. Adopts a resolution that it intends to correct racial imbalance in the Roselle School District.
> >
> > "2. Selects a consultant firm which will receive joint approval from the Roselle Board of Education and the New Jersey State Department of Education.
> >
> > "3. Submits correspondence and reports to the New Jersey State Department of Education, Office of Equal Educational Opportunity, which indicates a high level of activity in the aforementioned selection process.
> >
> > "4. Submits a schedule for the implementation of a plan for the elimination of racial imbalance. (This schedule does not have to be detailed, but should provide the Department with a clear understanding of the time limits contemplated by the Board.)
>
> "Please understand that the Commissioner retains jurisdiction in this matter and that the continuing effort of the Roselle Board of Education, pursuant to its own resolution (if one is adopted) and State requirements regarding racial imbalance, will be monitored. Subsequent decisions regarding withholding State aid pursuant to this matter will be based on the level of activity of the Roselle Board of Education as it works to correct racial imbalance at the Roselle School District." (P-25)

The Board informed the Department by letter dated June 22, 1971, that it had selected the firm of Dr. Edward A. Welling, National Education Program Associates (N.E.P.A.) as the educational consultant, at a fee not to exceed $5,000, payable by the Department. Also, the copy of the resolution adopted by the Board which confirmed its desire to comply with State law in order to insure the equality of educational opportunity was enclosed with the letter. This resolution stated, *inter alia*, that the Board would adopt a calendar to implement a mutually acceptable plan between the Department and the Board. (Exhibit P-26)

On or about June 25, 1971, Dr. Welling submitted a proposal to the Board containing an activity matrix, which specified that the N.E.P.A. would prepare and submit to the Board, for policy action, alternative school reorganization and desegregation plans, within sixty days following the receipt of a contract. (Exhibit P-28)

By letter dated July 2, 1971 (Exhibit P-29), the Superintendent advised the Director of the O.E.E.O. that the schedule contained in the N.E.P.A. proposal was submitted to the Department in compliance with item #4 of the Department's letter of June 10, 1971 (Exhibit P-25), requiring a timetable for implementation of a desegregation plan. (Tr. 25-9-17 to 10-11) The Director of the O.E.E.O. testified that this action by the Board did result in the Department restoring $52,000 of the previously withheld State aid. (Tr. 25-10-12 to 18)

N.E.P.A. submitted a final report to the Roselle Board on September 1, 1971. (Exhibit P-30) This report was compiled following a questionnaire survey distributed within the school district. Three alternative desegregation plans were proposed in the N.E.P.A. report, and each plan included educational components as well as proposals for correcting the racial imbalance of pupil enrollments in the elementary schools. The N.E.P.A. report traced the chronology of the Board's first efforts to correct racial imbalance beginning August 1963, which resulted in a proposal for a central intermediate school for grades four, five, and six. That proposal was never implemented. In 1967, a New York University study recommended a modified school plan for altering school attendance zones; an open enrollment plan for sending the pupils from the Lincoln Elementary School to all other elementary schools; a special ability school plan for homogeneous grouping of white and non-white pupils; a plan to make the Lincoln School a center for all pupils in selective grades; a proposal to convert the Lincoln School to an intermediate school for grades six and seven; and a final proposal to pair schools in close proximity. The report pointed out that the Board had adopted a desegregation plan in 1971, actually 1970, which had been approved by the Department, and, following the election of three new Board members, that plan had been rescinded. The report also pointed out that one half of the State aid previously withheld because of the school district's noncompliance, had been restored in July 1971 after the Board had both employed N.E.P.A. as a consultant and adopted a policy statement supporting the State's equal educational opportunity policy. (Exhibit P-30)

Two of the three proposals contained in the N.E.P.A. report involved the pairing of the Lincoln School with the Harrison School, and the pairing of the

Washington School with the Locust School. The results of such a reorganization would have been a racial balance of approximately thirty-five percent non-white pupils in each school. This would compare favorably to the percentage of minority pupils enrolled in the entire school district. The N.E.P.A. report also listed the alternative of a voluntary pupil transfer plan limited to the Wilday and Lincoln Schools. One obvious advantage of the two proposed pairing plans was that neither plan required the transportation of pupils by buses, since the proximity of the schools would permit the enrollment changes to take place with pupils walking from their homes to these schools. (Exhibit P-30)

Subsequent to the receipt of the report from N.E.P.A. (Exhibit P-30), which is referred to throughout the testimony as the "Welling Plan," the Roselle Board submitted a proposed plan to the Department entitled "Comprehensive Plan to Provide and Implement Equal Educational Opportunity Through Correction of Racial Imbalance for the Children of Roselle," hereinafter "Comprehensive Plan." (Exhibit P-31) This proposal was dated September 1971, and contained educational components which had been included in the N.E.P.A. proposal (Exhibit P-30), but differed significantly from that proposal. The Comprehensive Plan was limited to a statement, as opposed to a resolution such as was included regarding the educational components, that the Board would:

> "***c. authorize the free and voluntary transfer of any elementary [school] child to any elementary school in Roselle provided space exists maintaining a maximum class size [of] 28 pupils.***"
> (Exhibit P-31, Phase IV, at p.7)

The Board's proposal included a statement that it would adopt a plan for the construction of a new high school for grades nine through twelve and, by February 1, 1972, investigate the costs of remodeling the existing high school into a middle school for grades five through eight. (Exhibit P-31, Phase IV, at pp. 7-8)

The Board's Comprehensive Plan (Exhibit P-30) was reviewed by the Department's Office of Equal Educational Opportunity, and a letter dated October 7, 1971 to the Superintendent from the Director (Exhibit P-32) stated that:

> "***Since the plan does not offer a specific method for the correction of racial imbalance existing in the Roselle schools, it is not acceptable."
> (Exhibit P-32)

In response, the Roselle Board asked why the Comprehensive Plan was not acceptable. Accordingly, another communication was addressed to the Board by the Director dated October 15, 1971 (Exhibit P-33), which stated, *inter alia,* that:

> "***The plan submitted by the Roselle Board is unacceptable because its sole dependence on voluntary transfers does not guarantee positive

affirmative action to end racial segregation in the Roselle Schools. Minimum standards for the consideration of an acceptable plan would include:

"1. A Board decision indicating the number of children (Black and White) to be reassigned and to what schools they will be sent. Such reassignment should be of sufficient magnitude to demonstrably effect the elimination of racial imbalance in Roselle.

"2. Projected statistics showing the correction of racial imbalance as a result of pupil reassignments.

"3. A definite date when the plan is to go into effect.***"

(Exhibit P-33)

The Roselle Board submitted a modification of its Comprehensive Plan to the Department by letter dated November 10, 1971. (Exhibit P-34) The proposal contained therein was to transfer a sufficient number of non-white children from the Lincoln School to the Harrison School to increase the non-white percentage in the latter school to thirteen percent, provided space was available. Also, the Board proposed transferring a sufficient number of non-white children from the Locust School to the Washington School to increase the non-white percentage of the Washington School to thirteen percent.

The Department responded to this proposed modification by letter dated November 17, 1971 (Exhibit P-35), which raised the following questions:

***

"1. How many students will be reassigned from Lincoln to Washington School and to what grades?

"2. What will be the racial balance in Lincoln School after this reassignment?

"3. What will be the ethnic enrollment of Harrison School by class following the implementation of this plan?

"4. How many students will be reassigned from Locust to Washington School and to what grades?

"5. What will be the racial balance of Locust School after the pupil reassignment?

"6. What will be the ethnic enrollment of Washington School by class following the implementation of this plan?

"7. When will this plan become effective?

"If this is to be an interim plan, please describe the next steps towards complete racial balance and a timetable for implementation.

"May we have a schedule of the activities in curriculum improvements, initiated up to now? Identify groups participating." (Exhibit P-35)

The Roselle Board furnished answers to the above-listed questions by letter dated November 29, 1971. (Exhibit P-36) The results of the proposed transfer, according to the Board would be the following percentages of pupil enrollments:

Elementary School	Percentage White	Percentage Non-White
Lincoln	13.0	87.0
Locust	50.2	49.8

(Exhibit P-36)

The Board also indicated that the enrollment of the Washington School would be increased by twenty-seven non-white pupils, while the enrollment of the Harrison School would be increased by twenty-five non-white pupils. (Exhibit P-36) The next step, following this interim plan, would be the previously mentioned proposal to build a new high school and a conversion of the existing high school to a middle school. (Exhibit P-36)

By letter dated December 17, 1971 (Exhibit P-37), the Director notified the Board that the proposed modification, referred to in testimony as the "interim plan" was unacceptable as a plan to correct racial imbalance for the following reasons:

"***The reassignment of pupils is insufficient as it does not demonstrably effect the elimination of racial imbalance in the Roselle Schools.

"Voluntary transfers do not guarantee positive affirmative action to end racial segregation in the Roselle Schools.

"The burden of implementation does not fall equally on all students.***" (Exhibit P-37) (Tr. 25-21-3 to 25-19 and 37-8 to 38-14)

The testimony of the Director of the O.E.E.O. concerning the Board's proposed school building program was, in essence, that such a project was of necessity a long-range undertaking, while the Department's concern was that a plan was to have been implemented by September 1971. (Tr. 25-20 to 37-7) At the time of the hearing, the Board had engaged an architect and had submitted schematic plans for a proposed new high school to the Bureau of Facility Planning Services of the Department for approval. The educational specifications for such a schoolhouse were made part of the record in this matter. (Exhibit P-59) It is a matter of public information that the public referendum held

October 16, 1973 for the authorization of a bond issue for the building of a new high school within the Roselle School District was defeated by the voters. That proposal also included authorization for funds to be raised by means of a bond issue for the conversion of the existing high school to a middle school.

The Board subsequently instituted an action in the New Jersey Superior Court, Law Division, to compel the Department of Education to pay the withheld State aid moneys to the school district. A specific portion of the previously withheld State aid funds was paid to the district, and this matter was remanded to the Commissioner for hearing as was hereinbefore described.

The pupil enrollment statistics of the Roselle School District are significant as a basis for all of the events which had been herein described in chronological order.

The enrollment statistics for the five elementary schools in the Roselle School District were reported for September 30, 1971, as follows:

Elementary School	Percentage White	Percentage Non-White
Lincoln	13.2	86.8
Locust	48.4	51.6
Harrison	90.3	9.7
Washington	90.0	10.0
Wilday	60.8	39.2

(Exhibit P-42)

The same enrollments, by numbers of pupils rather than percentages, were reported as of September 30, 1971, as follows:

Elementary School	White	Non-White*
Lincoln	60	395
Locust	238	254
Harrison	445	48
Washington	406	45
Wilday	127	78

(Exhibit P-42)

*Excluding Spanish surnamed, American Indian, Oriental and other.

The enrollment statistics reported as of September 30, 1972, were requested by the hearing examiner and were received on October 26, 1972. (Exhibit P-61) This report is summarized by numbers of pupils as follows:

Elementary School	White	Non-White*
Lincoln	33	381
Locust	215	268
Harrison	401	53
Washington	389	50
Wilday	147	88

(Exhibit P-61)

*Excluding Spanish surnamed, American Indian, Oriental and other.

A comparison of the above statistics for September 30, 1972 with September 30, 1971 discloses that the Lincoln School, although declining in total enrollment, was becoming more racially imbalanced.

It was disclosed through the testimony of various witnesses that the percentage of population in the Borough of Roselle which is Negro, is approximately fifteen percent. The school enrollment of the district is approximately thirty-five percent Negro.

The Grade Level Plan (Exhibit P-1), which was initially adopted by the Roselle Board, but later rescinded, although it had been approved by the Department, proposed the following enrollment in the various elementary schools:

Enrollments–Grade Level Plan

Elementary School	Percentage White	Percentage Non-White
Lincoln	60.9	39.1
Locust	71.5	28.5
Harrison	62.1	37.9
Washington	67.6	32.4
Wilday	65.8	34.2

(Tr. 24-5-20 to 6-11)

The N.E.P.A. report (Exhibit P-30) included plans for pairing the Lincoln and Harrison Schools and the Washington and Locust Schools with the following proposed result:

Elementary School	Percentage White*	Percentage Non-White*
Lincoln	50	50
Locust	65	35
Harrison	50	50
Washington	65	35
Wilday	65	35

*Approximated (Exhibit P-30)

The Superintendent's testimony disclosed that the voluntary transfer plan was first utilized for the 1970-71 academic year, and during that year twenty-three requests for transfers were received, but space availability permitted only fourteen actual transfers. Of the fourteen pupils who were transferred, seven were white and seven were non-white. (Tr. 12-67-14 to 21)

For the 1971-72 academic year, a total of thirty parental requests for pupil transfers were received and each of these pupils was transferred. The pattern of transfers was as follows:

Elementary School	Left	Entered
Lincoln	23	0
Locust	4	8
Harrison	3	4
Washington	0	0
Wilday	0	18
TOTAL	30	30

(Exhibit P-30)

The Superintendent testified that the majority of transfers were out of the Lincoln School to the Wilday School. (Tr. 13-97-19 to 22) He also testified that of the thirty transferred pupils, sixteen were white and fourteen were non-white. (Tr. 13-97-17 to 19) At the opening of the 1971-72 academic year, the number of vacant pupil stations in each school was as follows:

Available Pupil Stations for Voluntary Transfer

Grade	Lincoln	Locust	Harrison	Washington	Wilday	Total
K	15	15	1	28	12	71
1	21	5	2	0	8	36
2	29	4	0	9	7	49
3	24	22	2	20	5	73
4	20	23	9	5	12	69
5	19	24	5	3	1	52
6	21	7	10	6	8	52
7	0	12	5	0	8	25
	149	112	34	71	61	427

(Exhibit P-51)

The Board's voluntary transfer plan, as operated for the 1970-71 and 1971-72 school years, and as proposed to the Department as a plan to correct racial imbalance, made no provision for the transportation of pupils who transferred to an elementary school district from their individual homes. Also, the Superintendent testified that there was no provision made by the Board for pupils to remain at any elementary school, with the exception of the Wilday School, during the lunch recess. Pupils could bring a bag lunch to the Wilday School and remain in the school during the lunch recess, under the supervision of teachers and two teacher aides. (Tr. 18-3-16 to 4-22) He also testified that the lack of provision for pupils to remain in the elementary school during the lunch recess could have a deterrent effect upon voluntary requests for transfers. (Tr. 17-120-12 to 23; Tr. 18-4-23 to 5-3; Tr. 18-17-22 to 18-12) In the Roselle School District the elementary schools were conducted on a two-session day, with pupils traveling home for the lunch recess, with the one exception noted, *ante*. (Tr. 18-10-4 to 14-7)

The Board did discuss the need for a program of lunchroom supervision, but, according to the Superintendent, the proposal was not considered important at that time. (Tr. 18-4-10 to 77) The Superintendent testified that there was an attitude of apathy by the Board to a lunchroom supervision plan for all schools. (Tr. 10-12 to 11-13) The former Board President, on the other hand, testified that the Board had considered an elaborate lunch plan for all the elementary schools when the voluntary transfer plan was submitted to the Department (Exhibit P-31), but it was discarded because of monetary considerations. (Tr. 20-118-5 to 19) By contrast, the Superintendent testified that the cost of a lunchroom supervision program would be "quite negligible." He stated that "it might even be zero." (Tr. 18-11-5 to 13) The former Board President testified that he was aware that the absence of a program for lunchroom supervision of pupils in the elementary schools would certainly be a factor in any parent's consideration of a voluntary transfer. (Tr. 20-118-20 to 119-6)

According to the Superintendent, another factor, in addition to the lack of in-school lunch supervision which resulted in only a relatively small number of transfers of minority pupils from the Lincoln School to other elementary schools, was that a feeling existed in the community that the voluntary transfer plan was not a serious plan, but a "***mere dodge to try to placate the State Department and give them something that really wasn't sincere.***" (Tr. 18-18-13 to 17) At any rate, an examination of the actual experience of the district with the voluntary transfer plan for the 1971-72 academic year discloses a negligible effect on the existing racial imbalance. (Exhibit P-50; Tr. 17-115-5 to 118-18) According to the Superintendent, the voluntary transfer plan alone would not solve the racial imbalance problem. He testified that this plan might make the problem worse. (Tr. 22-71-9 to 24)

The Board's suggested modification of the voluntary transfer plan (Exhibit P-34), by which it proposed to make certain transfers of minority pupils from the Lincoln School to the Harrison School, and of minority pupils from the Locust School to the Washington School, in order to create a thirteen percent minority enrollment in both Harrison and Washington Schools, would have increased the number of vacant pupil stations in the Lincoln and Locust Schools. At that time during November 1971, the Lincoln and Locust Schools clearly had the largest number of vacant pupil stations available for transfer. The Lincoln School had 149 and Locust School had 112, of the total of 424 available spaces among the five elementary schools. (Exhibit P-51) (Tr. 17-95-2 to 106-25) The Superintendent testified that the Board determined by this proposal to transfer only minority pupils out of the Lincoln and Locust Schools because the members believed that this was what the Director of the O.E.E.O. desired. (Tr. 17-107-2 to 9) He cited the letter from the Director dated December 17, 1971 (Exhibit P-37), which stated, *inter alia,* that the modification of the voluntary transfer phase of the Comprehensive Plan was not acceptable because:

> "***[t]he burden of implementation does not fall equally on all students***"

as the basis for the Board's belief that the Director desired only minority pupils to be transferred. (Tr. 17-108-14 to 109-11) This could not be so, because the above statement first appeared in the Director's letter of December 17, 1971 (Exhibit P-37), whereas the Board's letter suggesting the modification was dated November 10, 1971, and states that the Board's determination was made at a special meeting held October 29, 1971. (Exhibit P-34)

The Superintendent's further testimony indicates that he could not understand why the Board determined to transfer only minority pupils under its modified plan, and that he did not press an objection because the Board members would not listen to him. (Tr. 17-109-8 to 110-8) His exact testimony is as follows:

> ***
>
> Q. "As superintendent of schools you didn't feel it your duty to say anything?

A. "It was my duty but there was no point in carrying out that duty because nobody would listen. I spoke to them [the Board] in caucus and I had given up. I had washed my hands of the whole situation. I was disgusted that night because I felt the plan that was submitted was not a good plan.***" (Tr. 17-110-9 to 15)

At this juncture, the hearing examiner has reported the essential and relevant material facts with respect to the issue of whether the Board's Comprehensive Plan, dated September 15, 1971 (Exhibit P-31), together with the modifications dated November 10, 1971 (Exhibit P-34), reasonably alleviates pupil racial imbalance in the Roselle School District in accordance with State policy and guidelines. (See Order signed by Judge Kingfield, J.S.C., dated November 29, 1971, Exhibit P-41.)

The findings of fact clearly support a conclusion that the Roselle Board's Comprehensive Plan for voluntary pupil transfers, together with the proposed modification for a limited reassignment of pupils as hereinbefore described, fails in its entirety to reasonably alleviate pupil racial imbalance in the five elementary schools of the district. The record is devoid of any evidence that such a plan could successfully achieve the stated objective, and the record contains adequate proof that the results of the plan, which although never approved by the Department of Education was implemented during the 1970-71 and 1971-72 academic years, were totally without success in relieving pupil racial imbalance. In fact, such plan, as implemented by the Board, possesses the real potential to intensify the racial imbalance among the five elementary schools.

The Reasonableness of the State Policy and Guidelines

The Board's attack upon the State policy and guidelines for implementation of such policy was basically three-pronged. The Board maintained through the testimony of witnesses that "forced busing" and "forced movement of bodies" rather than neighborhood elementary schools are unreasonable in that such devices and actions are contrary to the will of the parents of pupils and other citizens, particularly in the Roselle School District. The second argument presented by the Roselle Board through several expert witnesses is that the basic concept upon which the State policy is based, *i.e.* that as a matter of educational policy pupil racial imbalance is unsound, is unproven at best and probably incorrect. The third argument set forth by the Board is that the State policy and guidelines have been unreasonably applied to the Roselle School District because State aid moneys have not been withheld from any other school district within the State as the result of the application of such policy regarding pupil racial imbalance.

These three arguments will be dealt with separately.

Three witnesses testified regarding the Board's determination to maintain the neighborhood school attendance zones. The former Board President Horhota, who left the Board in February 1972, at the expiration of his third, three-year term was one of the three witnesses. Board member Everett, who was elected to his first three-year term in February 1970, was the second witness, and Board member Murphy, who was elected to his first three-year term in February 1971, was the third witness.

The entire twentieth day of hearing in the matter was devoted to the testimony of Horhota. (See Tr. 20.) This witness testified that, when he stood for reelection in February 1969, one of the major points of his platform was the preservation of neighborhood schools without busing children to schools outside the neighborhood school attendance zones. (Tr. 20-6-16 to 25) He testified that he had held to this philosophy for his entire nine-year period as a Board member. (Tr. 29-7-3 to 12) Horhota testified that, prior to the February 1969 election, the Board had approved by a vote of eight to one, with his vote in opposition, to hold a public referendum for the construction of a middle school in the easterly end of the school district. One of the reasons he opposed this referendum was that pupils would have been transported by school buses to such a middle school, and this would have represented the inception of pupil transportation within the district. (Tr. 20-8-18 to 11-25) According to Horhota, he and two other incumbent Board members ran for reelection in February 1969 and the other two were not successful. (Tr. 29-13-2 to 12) He also testified that the candidates who were newly elected in February 1970 were opposed to "forced busing," as were the three newly elected members in February 1971. (Tr. 20-15-18 to 16-11.

Horhota testified that the Department was, in his judgment, trying to force the busing of school children upon the Board. He also testified that neither the Commissioner nor the Director of the O.E.E.O. would ever indicate to the Board what it was they wanted by way of a plan to end racial imbalance. (Tr. 20-18-13 to 24; Tr. 20-21-3 to 6; Tr. 20-31-5 to 12) He stated that the Board almost did not have time to submit an acceptable plan because the Department would set deadlines and let the time limits expire without informing the Roselle Board whether or not their plans were acceptable. (Tr. 29-19-3 to 12) He also testified that at no time did the Board receive a valid reason why its plans were not acceptable. (Tr. 20-21-14 to 16) This witness testified that most of the citizens of Roselle, regardless of race, were opposed to forced busing or forced transfers of children. (Tr. 29-27-4 to 22) He based this conclusion upon school election results. (Tr. 20-27-12 to 13) He further testified that the percentage required for pupil racial balance by the Department, within a range of ten percent above or ten percent below the existing school ratio, was mathematically impossible to achieve. (Tr. 29-32-23 to 34-4)

The witness testified that he was familiar with the State policy and guidelines and in his judgment they represented a central government dictating policy to a local board, which was "absolutely alien to the American system."

He stated that it would be difficult to comply with the State policy and guidelines and retain a democratic society. (Tr. 20-57-2 to 25) Horhota testified that, in regard to the total State policy and guidelines:

> "***essentially, it gets back to we [Board] can agree with most of this except forced busing or forced moving of children or moving of children only because they are a particular race.***" (Tr. 20-28-2 to 5)

The witness stated that the Department's requirement that the Board hire a consultant to help devise a plan and adopt a policy statement regarding racial imbalance, in order for the Board to receive $52,000 of the previously withheld State aid was "blackmail." (Tr. 20-68-14 to 25; Tr. 20-131-9 to 25) He testified that the Board rescinded the Grade Level Plan (Exhibit P-1) because it was not representative of what was desired by the people of Roselle and because it contained forced busing. (Tr. 20-85-7 to 86-5) The witness testified that singling out a particular race of children for reassignment is effectively saying that that race is inferior. He made clear that he is opposed to the busing of children for the sake of balancing races. (Tr. 20-94-18 to 95-11)

Board member Everett testified that he and two other candidates were elected to initial seats on the Board in February 1970, on a platform which opposed forced busing and the involuntary transfer or movement of school children. (Tr. 3-63-5 to 11) He further testified that three new Board members were elected in February 1971 on a similar platform. (Tr. 3-63-21 to 64-2) Everett testified that the Board determined not to adopt any one of the three alternatives recommended in the report prepared by the educational consultant, N.E.P.A. because

> "***they were unpalatable to the general public because of the intense pressure brought to bear on the Board by the people not wanting their children to be moved. So in view of this we [Board] decided to instead give our voluntary transfer plan to [the Commissioner]." (Tr.3-85-23 to 86-4)

It was the testimony of Board member Everett that the people who opposed any transfer plan included both white and non-white families. (Tr. 3-86-5 to 10) He further testified that he felt he had a mandate from the people to keep their children in the neighborhood schools. (Tr. 3-88-12 to 20; Tr. 4-74-23 to 24)

Board member Everett was questioned regarding his opinion of the State policy and guidelines and he replied as follows:

> "***I feel that they are both arbitrary and insulting.*** I say insulting because there are many people in the community, and the State seems to join them in agreeing on a tried but unproven theory that black children cannot learn among their peers, that is among other black children, they must have a salt and pepper mix in order to learn. When I say 'insulting,' I say I think it's insulting to black children because this is an unproven theory. And, I think that when you keep telling this to children at a tender

age, it's going to stay with them and as adults they're going to remember it and think they're inferior. This is my own theory and that's why I use the word 'insulting.'***" (Tr. 4-37-6 to 24)

When questioned whether he had ever examined the State policy and guidelines, Board member Everett replied:

"***I probably have, but some of them were so vague that I dismissed them as being utter nonsense. Not in all categories *** only the movement of bodies because I keep telling you that this is what the State wants, to move bodies. I don't think they're too interested in education, as far as Roselle is concerned.***" (Tr. 4-44-15 to 20)

The witness pointed out that he totally disagreed with the position of the State policy which states that racial imbalance stands as a handicap to the improvement of education for all children. (Tr. 4-47-15 to 21)

Board member Everett made clear during cross-examination that the existing pupil population of the five elementary schools was satisfactory to him. (Tr. 4-94-9 to 22) He stated his belief that white and non-white children should not be "pushed together by outside forces," but that if such children became friends by their own choice this would be a good thing. (Tr. 4-94-23 to 95-4) When questioned whether the facts of the school enrollments created racial balance, he replied, *inter alia*, that:

"***This racial balance is a bunch of garbage, as I see it.***" (Tr. 4-96-15)

He characterized the policy for requiring racial balance as an "untried theory" put forth by extremely liberal academicians. (Tr. 4-98-18 to 20) The witness stated his opinion that it was not necessary to change the status quo of the racial composition of the school district except on a voluntary basis. (Tr. 4-101-1 to 4)

Later in his testimony this witness stated that schools have the purpose, not limited to reading, writing and arithmetic, to teach children social mores and how to get along with one another. He further stated his belief that a child from an all white neighborhood could learn something from a child living in an all black neighborhood. (Tr. 6-70-18 to 71-2)

The witness also testified at some length regarding Roselle's Comprehensive Plan. (Exhibit P-31) He testified that the curriculum portions of the plan had not been implemented because the plan had not been approved by the Commissioner, but that the educational components of the plan would be implemented when the Commissioner gave his approval to the voluntary transfer plan. (Tr. 6-78-13 to 81-11)

Everett, who was President of the Board at the time of the hearing, also testified that his campaign literature reference to "sane neighborhood schools" meant:

> "***avoiding the insanity of sending anyone to a school other than their neighborhood school.***" (Tr. 6-102-7 to 15)

A large amount of testimony, both under direct and cross-examination, was given by Board member Everett in regard to his reasons why it would be hazardous for pupils to walk to school under the arrangements of the pairing of schools proposals submitted to the Board by the consultant, N.E.P.A. The hearing examiner finds no need to summarize this extensive testimony. It is sufficient to report that the testimony did not establish these alleged hazardous conditions as facts, and was not persuasive for a conclusion that the pairing of schools proposals were unreasonable because of excessive dangers and hazards to pupils. Nor was the testimony convincing that neighborhood schools are the only reasonable arrangement for pupils, because of hazards which would be encountered by pupils through walking to any school other than the one in the school attendance zone in which they reside. (Tr. 3-71-13 to 79-11; Tr. 4-49-17 to 51-3; Tr. 4-53-19 to 65-22; Tr. 6-15-12 to 28-18; Tr. 6-39-19 to 44-20; Tr. 7-36-17 to 38-17; Tr. 7-40-29 to 42-2; Tr. 9-21-7 to 29-2; Tr. 9-21-7 to 24-2; Tr. 15-38-24 to 41-15; Tr. 15-58-13 to 59-21; Tr. 15-65-13 to 67-12)

The third Board member to testify, Murphy, stated his conviction that the defeat of three incumbent Board members in February 1970 and the election of Everett and two other persons for whom he campaigned, came about because the three victors ran on a neighborhood school platform and opposed forced busing and the forced movement of children. (Tr. 9-10-16 to 21; Tr. 15)

He testified that the 1970 election changed the composition of the Board so that the majority opposed the forced transfer of children out of neighborhood schools, and, as a result, the Grade Level Plan was rescinded by formal action of the Board. (Tr. 9-59-5 to 21; Tr. 15-9-22 to 10-2; Tr. 15-13-20 to 24) Murphy testified that he and his two running mates in the February 1971 school election ran on a platform of not forceably moving children from one school to another, and the maintenance of strictly neighborhood schools. (Tr. 9-3-14-17 to 4-4; Tr. 15-3-10 to 12) He further testified that his campaign literature included reference to saving $350,000, the cost of busing children under the Grade Level Plan, but his later testimony clarified the fact that the $350,000 also included the cost of a cafeteria plan for each of the elementary schools. (Tr. 9-4-15 to 22; Tr. 15-38-8 to 17)

He testified that, as a candidate for election to the Board, he was aware of the Department's warning that the district might have its State aid withheld, but he did not think the Department should have the right to withhold State aid simply because children were not moved from neighborhood schools to other schools. (Tr. 9-5-14 to 6-2) According to this witness, his running mates also ran

on the same platform in spite of the threat of the loss of State aid. (Tr. 9-8-6 to 13) He made clear his position as follows:

"***I'm opposed to forced busing and opposed to forced integration.***"
(Tr. 9-17-14 to 15)

Board member Murphy testified that, following the February 1971 election, the majority of seven members opposed forceably transferring pupils or forceably integrating pupils. (Tr. 9-18-8 to 17; Tr. 15-14-9 to 15; Tr. 15-55-4 to 14) He acknowledged that the basic difference between the proposals submitted to the Board by the N.E.P.A. consultant and the voluntary transfer plan submitted by the Board to the Department was that the Board's proposal did not forceably move children from one school to another. (Tr. 9-24-6 to 10)

When asked his opinion why State aid had been withheld from the Roselle School District and from no other district, he testified as follows:

***.

A. "I believe Roselle was set up as the model town and when the people of the town did not go along with the plans [Grade Level Plan] then Roselle was going to be the example. Roselle has not been allowed to retain an all-white school, though other towns have been allowed to retain all-white schools and still retain their State aid. And, I have to draw the conclusion that Roselle was set up as the example for the State.

Q. "Do you feel that Roselle is being unfairly discriminated against?

A. "Yes, I do.***"

(Tr. 9-28-16 to 25)

Board member Murphy testified that he would support the three recommended alternative proposals submitted by the N.E.P.A. consultant, with the exception of the recommendation to forceably move children. (Tr. 9-47-18 to 21) He further testified that the sentiment of the citizens in the Lincoln School zone was concurrently against the forced movement of children. (Tr. 15-18-22 to 19-3) Although he testified that the Board had adopted all of the recommendations made by the N.E.P.A. consultant, with the exception of the forced transfer of pupils, he could not specify what the Board had accomplished to date in the implementation of the educational components. (Tr. 15-26-7 to 11; Tr. 15-27-6 to 28-11; Tr. 15-35-15 to 17) Board member Murphy testified further that his concept of quality education did not include racially balanced schools.

Board member Murphy was asked whether he would object to a plan of changing school attendance zones for the purpose of improving pupil racial balance, in a manner that would leave each child within walking distance of his school and he replied that he would not object. (Tr.15-66-18 to 67-2)

The testimony of the one former and two present members of the Board shows clearly that these individuals, in their official capacities, strongly opposed taking any formal Board action to change the racially imbalanced pupil enrollment patterns by any means other than permitting parents to voluntarily request a school transfer for their children. The explanation of the changes in the Board's position beginning with the February 1970 school election cast much light upon the reasons why the Department was unable, even after repeated consistent efforts, to make progress with the Roselle Board in the development of an effective plan to correct pupil racial imbalance in the district's elementary schools. The reason was that a majority of the Board, beginning in February 1970, was strongly opposed to taking any action which would either alter existing school attendance zones or transfer pupils, even without the necessity of pupil bus transportation, to elementary schools in other attendance zones. The adoption of the voluntary transfer plan, previously shown as having only negligible effects on the racial imbalance of the elementary schools, together with the proposed modifications for a limited reassignment of pupils, as previously described, was the maximum action which the Board's majority was willing to undertake to correct pupil racial imbalance.

It must be concluded that the testimony of these Board member witnesses, and the facts thereby disclosed, does not support a finding that the State policy and guidelines are unreasonable, or were unreasonably applied to the Roselle School District.

II

Several expert witnesses were presented by the Board for the purpose of attacking the reasonableness of the State policy and guidelines. Conversely, the Department presented an independent expert witness and the Director of its Office of Equal Educational Opportunity to support the underlying educational philosophy of the State policy and guidelines. Each of these witnesses testified at great length.

Dr. Louise Bates Ames, an eminent educational psychologist formerly associated with Yale Univeristy, is chief psychologist and co-director of the Gesell Institute of Child Development, and was called as a witness for the Roselle Board. Dr. Ames is the author of a publication entitled "Stop School Failure." Her opinion, in sum, is clearly opposed to the use of busing to achieve the purpose of integration of pupils in various public schools. (Tr. 5-15-10 to 20) She believes strongly that the utilization of busing results in a lack of attention to more vital problems negatively affecting the academic achievement of elementary school children. She testified that the moneys expended throughout the nation for busing to end segregation could better be utilized for the screening and diagnosis of intelligence levels, maturity levels, reading readiness, special learning handicaps, emotional problems, and the like. She testified that the individual child's special needs should determine the type of educational plan for each child in order to achieve the maximum growth and development of each child's potential, both academically and to become a successfully functioning adult member of our society. (Tr. 5-15-10 to 62-2; Tr. 5-38-7 to 13; Tr. 11-5-15 to 64-9)

Dr. Ames stated that in her opinion there is no relationship between integration of pupils in the schools and academic achievement (Tr. 5-48-8 to 25, the child's concept of his self-worth (Tr. 11-8-18 to 10-22), his attitude toward learning (Tr. 11-11-4 to 9; Tr. 11-17-13 to 16), or his ability to relate to individuals of other socioeconomic or ethnic groups when he reaches adulthood. (Tr. 11-25-25 to 27-9; Tr. 11-30-21 to 24) She stated that she disagreed with that position of the State policy and guidelines (Exhibit P-39) which holds that educational considerations are primary in elementary school segregation, because she believes the purpose of integration is social and not academic. (Tr. 11-22-20 to 23-20; Tr. 11-53-14 to 22) She also stated her disagreement with the policy statement that segregation of children on the basis of race is educationally harmful to all children. She testified that in her opinion it is not educationally harmful to a child to attend a segregated school. (Tr. 11-59-11 to 21) She further disagreed with the policy statement that there are academic and educational advantages of heterogeneous pupil populations because she does not accept the definition of educational advantages as including social factors. (Tr. 11-60-12 to 17)

Dr. Ames admitted that social scientists and educators who deal with human behavior are divided into "widely opposed camps" on issues of educational philosophy and policy such as are set forth in the State policy and guidelines (Exhibit P-39) and she represents one extreme point of view. (Tr. 11-61-7 to 14) She also testified that she is not opposed to the transfer of pupils from neighborhood schools to other schools if such transfer is voluntary on the part of parents. (Tr. 11-57-8 to 12) She believes that integration of school children would solve some social problems and is "a good idea," but as a matter of precedence she believes it is secondary to the main purpose of academically educating children. (Tr. 5-29-25 to 30-21)

Dr. Maxwell L. Rafferty, formerly the Superintendent of Public Instruction of the State of California for six years, and a nationally known school administrator and educator, testified on behalf of the Roselle Board. Dr. Rafferty testified that he was opposed to the forced transfer and busing of pupils for the purpose of racial integration on the grounds that it damaged the vital neighborhood school concept, aroused the anger of parents toward school authorities, increased pupil discipline problems, caused a loss of financial support for the public schools, caused resegregation, caused damage to the child moved from his familiar neighborhood surroundings, diminished vital parent-teacher and parent-school relationships and unnecessarily wasted excessive moneys for pupil bus transportation which should be expended for important educational needs. (Tr. 10-16-10 to 18-13; Tr. 10-31-2 to 32-13; Tr. 10-34-6 to 36-7) Dr. Rafferty testified that he saw no increase of educational opportunity resulting from the forced transfer of pupils to alleviate racial imbalance. In his view, pupils acquire poor attitudes toward learning and education from attending inferior schools which have inadequate teachers, instructional programs and facilities. He believes that the effectiveness of the teacher is the paramount factor for instilling in school children a desire to learn and a respect for education. (Tr. 10-26-8 to 20; Tr. 10-27-10 to 15; Tr. 10-76-8 to 13) He believes that a school district can achieve the maximum dispersal of minority pupils among the various schools by instituting a voluntary plan, which could

have many possible components. In his judgment, the maximum possible dispersal should be defined as the extent to which parents will avail themselves of the opportunity to voluntarily transfer their child to another school. He testified that in all the years of his experience as an educator, he has never seen any benefit, either educational or social, which resulted solely from the forced busing of pupils to achieve racial balance. He specifically stated that there is no relationship between the academic achievement of pupils and segregated schools. (Tr. 10-21-12 to 14; Tr. 10-34-9 to 15; Tr. 10-46-8 to 12; Tr. 10-50-8 to 17; Tr. 10-59-16 to 24) One of the main points of his testimony was that all schools should be equally supported financially and have equally good standards of education for the children. (Tr. 10-40-21 to 23) The entire transcript of the tenth day of hearing is devoted to a further exposition by Dr. Rafferty of these basic opinions. (Tr. 10)

Dr. Dan W. Dodson, the eminent educational sociologist from New York University testified as a expert witness for the Department. He viewed the components of the State policy and guidelines and testified that the educational policy statements contained therein are true. (Tr. 16-23-2 to 24-10; Tr. 16-29-22 to 31-14; Tr. 16-51-13 to 53-8) This witness testified that it is vital to integrate school children so that they will learn to cope with the reality of existence (Tr. 16-16-3 to 18-25) because the major discrimination is practiced by people of good will who lead personal lives of piety but who are segregated from the issues of reality. (Tr. 16-22-15 to 25) Dr. Dodson testified that the only means to improve the socialization of children is to bring them into interaction with one another in a wider world of different values and relationships. (Tr. 16-29-16 to 21)

In response to the question whether he agreed with a statement from the State policy that children must learn to respect and live with one another, the witness testified that he agrees and, further, he believes that isolation caused by public policy in regard to the assignment of children to schools by boards of education can cause feelings of inferiority. (Tr. 16-29-22 to 31-11)

In regard to the Roselle situation, Dr. Dodson testified that he believes racial balance of the pupil enrollments can be achieved without harm to the children. (Tr. 16-39-19 to 24) He testified that the voluntary transfer plan proposed by the Roselle Board is not a program for ending imbalance, because it merely gives parents the option to avail themselves of it. He pointed out that he doubted the success of a bond referendum designed to desegregate schools, because people do not vote affirmatively for such things. He observed that no civil rights act had been enacted by public referendum and stated that the rights of school children should not be put up for public option. (Tr. 16-40-5 to 41-9) He described in detail that a voluntary transfer plan is usually utilized by Negro parents who are searching for better educational opportunities fof their children and thus drains leadership from that portion of the community; it relieves the local board of its responsibility to formulate a public policy; and it provides an opportunity for white parents to transfer their children from schools in which they are in a minority. (Tr. 16-41-3 to 42-23) In Dr. Dodson's opinion, when voluntary transfer plans do not work or are unworkable, the rights of the

minority must be protected against the tyranny of the majority by a higher power, which must stand between the passions and prejudices of the local community and the educational opportunities offered to the children. (Tr. 16-44-4 to 12) He pointed out that in his experience he has never worked in a community where people expressed a desire for change. In his experience, however, it was rare that a restructuring of schools did not move forward with success once such a determination was made by the Board. (Tr. 16-45-15 to 23)

Dr. Dodson also expressed the opinion that the Board's modification of the Comprehensive Plan for transferring a limited number of non-white pupils, would not be a viable plan. (Tr. 16-50-14 to 24)

The witness testified that he would not make "vast claims" that children in a desegregated school situation show improvement in academic achievement over those in a segregated school, because the data, although somewhat indicating this, are relatively equivocal. (Tr. 16-75-4 to 10) Dr. Dodson testified that, when white and non-white children of equal ability, attending equal schools, are in a segregated situation, those non-white pupils who are segregated will not achieve anywhere near the degree the white children are achieving. He cited examples of these situations in New York City and Newark. (Tr. 16-78-17 to 79-9) He further testified that, even if he were ever to be convinced that pupil achievement in learning skills was not improved by desegregation, he believes that the citizenship goal of education requires that children learn to live together harmoniously within the schools. (Tr. 16-78-19 to 99-4) At the present time he testified the findings regarding pupil achievement are inconclusive. (Tr. 16-99-21 to 25) The witness also provided extensive testimony regarding the values of an integrated school plan. (Tr. 19-4-12 to 6-18) Dr. Dodson also testified that, in his judgment, the Commissioner is justified, as a last resort, in withholding State aid to the Roselle School District, or to many school districts, in order to secure compliance with the policy of the State. (Tr. 19-38-5 to 41-11) He pointed out that the decision as to where children attend public schools in each school district is a matter of setting public policy and is the responsibility of each local board of education. He testified that this determination sets the pattern of neighborhood living with which the board must then contend. (Tr. 19-44-20 to 25) Dr. Dodson further testified that if politicians, attempting to secure votes, do not agree with a public policy, it then is their prerogative to mobilize sufficient public opinion to change this policy. (Tr. 19-45-22 to 46-3)

Dr. Dodson testified that he believed it to be a supportable generalization that there is very little opposition from white families to either voluntary or forced transfer of children, so long as it is the non-white children who are moved. In his judgment, the opposition develops when the white children are also moved. (Tr. 19-76-20 to 77-6)

All of Dr. Dodson's judgments were extensively elaborated upon during cross-examination. (Tr. 19)

The hearing officer finds no basis in the presentation made by the Board to reach a conclusion that the philosophy of education upon which the State

policy is based is either unfounded or unsound. As the expert witnesses have pointed out, the data regarding the improvement of academic achievement (in educational skills, such as reading comprehension) resulting from integration of pupils, are equivocal. The basis of the State policy is not limited to this narrow, although salutary purpose, but is broadly based upon the goals of citizenship education, as described in the State policy, *ante,* and all the values encompassed within these broad goals. Accordingly, the hearing officer must conclude, and so recommend to the Commissioner, that the record does not contain sufficient evidence to sustain a finding that the State policy and guidelines are unreasonable.

III

The Board's third attack, based upon the assertion that the State policy and guidelines have been unreasonably applied to the Roselle School District because State aid has not been withheld from any other school district, was developed entirely by reliance upon the direct testimony of the Superintendent and cross-examination of the Director of the Office of Equal Educational Opportunity. The Director's testimony has been cited in a previous portion of this report.

The testimony of the Superintendent consumed seven full days of hearing (Tr. 8, 13, 14, 17, 18, 21 and 22) and one half or more of three additional days. (Tr. 5, 7, 12) A large portion of this testimony centered upon the existing status of eighty-seven school districts in regard to their respective degrees of compliance, or noncompliance, with the State policy and guidelines. The Superintendent received all materials in the files devoted to each of these districts in the Office of Equal Educational Opportunity and testified regarding his examination of each. Since the Department did not attempt to any great extent to refute such testimony by the Superintendent, the hearing officer accepts the testimony as factual. In the judgment of the hearing officer, it would be of little value to detail this extensive testimony. This testimony established, in sum, that of the eighty-eight districts originally identified as having racially imbalanced schools, no district other than Roselle had State aid withheld because of noncompliance. Also, the testimony clearly shows that some school districts are in advance of Roselle in having acceptable plans approved by the Department and, in fact, implemented; some districts are in the process of developing plans; and some have been unable because of unique circumstances (*i.e.* Newark) to develop a workable plan. The point is emphasized by Roselle that other districts which have not had plans approved by the Department have not had State aid withheld. This is factually true. The Commissioner and the State Board of Education are periodically advised of the current status of efforts to implement the State policy and guidelines, and such reports also disclose that all eighty-eight originally selected districts have not moved forward on a uniform basis either in the development or the implementation of an acceptable plan. For example, the report submitted to the State Board dated June 30, 1971 (Exhibit P-53) summarized the status by categories, showing thirty-two districts under the category "Voluntarily corrected situation before State Directed (approved as implemented)"; thirteen districts categorized as "Acceptable Plans Following

Directive"; twenty-one districts under the category of "Staged Implementation Plans: Tentative Approval (Commissioner maintaining jurisdiction)"; twenty-one districts in the category "Commissioner Maintains Jurisdiction Pending Staff Visitation and Evaluation"; and one district, Roselle, in the category of "Plans Not Acceptable: Districts in Noncompliance."

It is clear from the record that the progress of implementation is not uniform. The Department maintains, and Roselle strongly disagrees, that since Roselle was the first school district in New Jersey to have a plan approved for implementation, it is not unreasonable for the Department to determine that Roselle is in noncompliance, particularly considering the amount of effort by the Department to assist this school district in developing an acceptable, working plan.

Having examined all the evidence in this matter, including a review of the transcripts and evidence, in addition to hearing the testimony of all the witnesses, the hearing examiner must reach a finding that the State policy and guidelines have not been unreasonably applied to the Roselle School District, even though no other district has had State aid withheld for noncompliance. The Department, and particularly the Office of Equal Educational Opportunity, must move forward on eighty-eight separate fronts in its efforts to secure compliance with the State policy. Given this task, it would be unreasonable to conclude that uniformity of results could be achieved, insofar as time frames and time schedules are concerned. It is significant that the Roselle School District was far ahead of many, if not most, of the originally selected eighty-eight districts. From the record, a logical conclusion can be reached that the Roselle Board has been unusually recalcitrant in resisting compliance with the State policy.

IV

In summary, the hearing examiner finds that the facts and evidence in this case do not support a conclusion that (a) the State policy and guidelines are unreasonable, or (b) that the State policy and guidelines have been unreasonably applied to the Roselle School District. The hearing examiner also makes a positive finding and conclusion that the State policy and guidelines are based upon a sound, supportable educational philosophy.

The hearing examiner also observes that, as a matter of law, the State policy and guidelines for correcting pupil racial imbalance in the various public schools in this State are based upon prior decisions of the Commissioner, the State Board of Education, and the Courts. Accordingly, the State policy and guidelines possess a strong presumption of legal correctness, in addition to being sound educational policy. He leaves it to the Commissioner to comment upon the legal basis for this educational policy.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner in the instant matter, together with the objections thereto filed by the respondent Board in accordance with *N.J.A.C.* 6:24-1.16. The Commissioner has also reviewed the appropriate portions of this record which relate to the Board's objections to factual findings and conclusions made by the hearing examiner. The Board's objections will be dealt with in the course of this determination, *post.*

The relevant material facts of the matter are abundantly set forth in the report of the hearing examiner.

The first issue in this case concerns the question whether the Board's Comprehensive Plan, dated September 15, 1971 (Exhibit P-31), together with the modifications dated November 10, 1971 (Exhibit P-34), reasonably alleviates pupil racial imbalance in the Roselle School District in accordance with State policy and guidelines. The record clearly describes the chronology of events concerning the Department's effort to secure compliance by the Board with State policy. The Commissioner agrees with and adopts as his own the findings of fact of the hearing examiner and the conclusion set forth in the report as follows:

> "***The findings of fact clearly support a conclusion that the Roselle Board's Comprehensive Plan for voluntary pupil transfers, together with the proposed modification for a limited reassignment of pupils as hereinbefore described, fails in its entirety to reasonably alleviate pupil racial imbalance in the five elementary schools of the district. The record is devoid of any evidence that such a plan could successfully achieve the stated objective, and the record contains adequate proof that the results of the plan, which although never approved by the Department of Education was implemented during the 1970-71 and 1971-72 academic years, were totally without success in relieving pupil racial imbalance. In fact, such plan, as implemented by the Board, possesses the real potential to intensify the racial imbalance among the five elementary schools.***"

The Commissioner observes that the Board does not take exception to the fact-finding and conclusions in regard to this issue of the adequacy of the Board's latest plan to alleviate racial imbalance of pupil enrollments in the various elementary schools of the district.

The second issue in this case is concerned with the reasonableness of the State policy and guidelines. The Board has made a three-pronged attack upon this State policy, asserting that "forced busing" and "forced movement of bodies" rather than neighborhood elementary schools are unreasonable in that they are contrary to the will of the parents and other citizens residing in the Roselle School District. This allegation by the Board was the basis of extensive testimony by three Board members. The Board raises objections to the report of such testimony on the grounds that quotations recited in the report were either taken out of context or did not clearly show the intended meaning. A review of the pertinent portion of the fact-finding report, *ante,* and the appropriate references in the record discloses that there is no basis for such objection to be sustained.

In the judgment of the Commissioner the record, in regard to this part of the Board's case, adequately supports the conclusion that a majority of members of the Board was strongly opposed, beginning in February 1970, to adopting any plan for the alleviation of racial imbalance which would either alter existing school attendance zones or transfer pupils, even without the necessity of pupil bus transportation, to elementary schools in other attendance zones. Instead, the Board majority was only willing to adopt the voluntary transfer plan with proposed modifications for a limited reassignment of pupils. This plan, although never approved by the Department, was implemented for two academic years and failed to make any significant improvement in the racial imbalance of the district's elementary schools. The facts show that the voluntary transfer plan also possessed the real potential to intensify the racial imbalance among the five elementary schools.

It is clear that the Board majority based its position on the fact that various members constituting the majority conducted their election campaigns on platforms opposing the reassignment of pupils. The phrase "forced busing" appears repeatedly in the record of testimony by the three Board members. The Board majority apparently assumed that their respective elections constituted a mandate from the citizenry to oppose the State policy. The Commissioner holds that such arguments do not suffice to justify a failure on the part of members of a local board of education, in the Roselle School District or elsewhere, to perform their duties and comply with a policy of the State. The Commissioner adopts the findings and conclusions of the report, in regard to this part of the issue, as his own and determines that the Roselle Board erred in concluding that the State policy was unreasonable on such grounds. The Commissioner is constrained to state that many governmental policies, whether federal or state, would fail to be upheld if the criteria for the measure of reasonableness were solely popularity among the majority of the citizenry.

The Commissioner is constrained to comment at this juncture on that portion of testimony by the three Board members which repeatedly refers to "forced busing." The report of the hearing examiner clearly sets forth the finding that the Board majority, and these members in particular, consistently voiced opposition to "forced busing" to alleviate racial imbalance, even though solutions to the problem were readily available which did not require the transportation of pupils.

In this State the Commissioner has never ordered a local board of education to devise a plan to alleviate pupil racial imbalance with a mandatory provision for pupil transportation by school buses. Nor has the Commissioner ever devised and ordered a specific plan requiring pupil transportation. Instead, the Commissioner has consistently requested local boards of education to develop their own plans, in accordance with the State policy, for his review and approval. In several instances, the Commissioner has selected a plan among several proposed by a local board of education, when such board could not decide which of several plans would be most desirable and effective. Also, some local boards have submitted and received approval of plans which, in the board's judgment, required some pupil transportation in order to achieve the desired result of correcting racial imbalance in pupil enrollment.

The board also attacked the reasonableness of the State policy and guidelines on the grounds that a basic concept upon which the State policy is based, *i.e.*, that as a matter of educational policy pupil racial imbalance is unsound, is unproven at best and probably is incorrect. This argument has been the basis, either singly or in conjunction with other issues, for much of the previous litigation concerning pupil racial imbalance in the public schools, both before the Commissioner, the State Board of Education and the courts of this State.

The history of such litigation is long and has resulted in a considerable body of case law.

In *Shepard v. Board of Education of the City of Englewood,* 207 *F. Supp.* 341 *(D.C.N.J.* 1962) the plaintiffs attacked the Board's practice of assigning pupils to the public schools pursuant to a "neighborhood school policy" which, they alleged, resulted in racially segregated schools because the neighborhoods were segregated. The Court refused to entertain plaintiffs' cause of action because of a failure by plaintiffs to avail themselves of administrative remedies before the Commissioner and the State Board.

The Court pointed out that the State of New Jersey had for many years shown concern in matters of racial discrimination, and this would negate any apprehension that resort to the available State administrative remedies would be futile. The Court also pointed out that for many years, prior to the decision in *Brown v. Board of Education of Topeka,* 347 *U.S.* 483, 74 *S.Ct.* 686, 98 *L.Ed.* 873 (1954), the courts of New Jersey declared it to be unlawful for local boards of education, solely on the basis of race, to exclude children from any public school, or to refuse them admission to the school nearest their residence, or to require them to attend segregated schools. The Court cited *Pierce v. Union District,* 46 *N.J.L.* 76 (*Sup. Ct.* 1884), aff'd 47 *N.J.L.* 348 (*E.&A.* 1885); *Raison v. Board of Education,* 103 *N.J.L.* 547, 137 *A.* 847(*Sup. Ct.* 1927); *Patterson v. Board of Education,* 11 *N.J. Misc.* 179, 164 *A.* 892, aff'd 112 *N.J.L.* 99, 169 *A.* 690 (*E.&A.* 1934); and *Hedgepeth v. Board of Education,* 131 *N.J.L.* 153, 35 *A.2d* 622 (*Sup. Ct.* 1944). The Court also pointed out the New Jersey constitutional and statutory prohibitions of discrimination. (207 *F. Supp.* at 347) The Court observed that the Commissioner of Education had previously decided the case of *Walker v. Board of Education of the City of Englewood* (May 19, 1955), wherein the complaint charged the local Board with discrimination resulting from a change in school boundaries, and the Commissioner had ordered the Board to redraw the lines to eliminate the discrimination and also ordered the closing of a school used almost exclusively for Negro children. (207 *F.Supp.* at 347)

The Court in *Shepard, supra,* pointed out that a determination of the manner in which a neighborhood school policy operates in any particular school district requires the consideration and evaluation of a multitude of factors, and stated that:

> "***This Court feels that the Commissioner is especially well qualified, by reason of his knowledge and experience in the specialized field of

education, to make these factual determinations. There is no reason to assume that the Commissioner, in the performance of his duty, will not be guided by the applicable legal principles. Under all of the circumstances, the Commissioner should be given the opportunity, at least in the first instance, to pass upon the matters set forth in plaintiffs' complaint. Until such time as plaintiffs have exhausted the state administrative remedies***this Court should not entertain the action.***"

(207 *F.Supp.* at 348)

There followed a series of cases before the Commissioner, with subsequent appeals to the State Board and the courts of New Jersey. See: *Craig Fisher et al. v. Board of Education of the City of Orange, Essex County,* 1963 *S.L.D.* 123 (May 15, 1963); *Charles B. Booker et al. v. Board of Education of the City of Plainfield, Union County,* 1963 *S.L.D.* 136 (June 26, 1963), aff'd State Board of Education 1964 *S.L.D.* 167, aff'd 45 *N.J.* 161 (1965); *Deborah Spruill et al. v. Board of Education of the City of Englewood, Bergen County,* 1963 *S.L.D.* 141 (July 1, 1963), aff'd State Board of Education 147; *Dudley Morean III et al. v. Board of Education of the Town of Montclair, Essex County,* 1963 *S.L.D.* 154 (July 3, 1963), aff'd State Board of Education 160, aff'd 42 *N.J.* 237 (1964); *Clarence Alston et al. v. Board of Education of the Township of Union, Union County,* 1964 *S.L.D.* 54 (April 6, 1964), aff'd State Board of Education 60; *Joan Byers et al. v. Board of Education of the City of Bridgeton, Cumberland County,* 1966 *S.L.D.* 15 (January 24, 1966), aff'd State Board of Education 21; *Barry Elliott et al. v. Board of the Township of Neptune, Monmouth County,* 1966 *S.L.D.* 52 (May 2, 1966), aff'd State Board of Education 54, aff'd 94 *N.J. Super.* 400 (*App. Div. 1967*); *Patricia Rice et al. v. Board of Education of the Town of Montclair, Essex County,* 1967 *S.L.D.* 312 (November 8, 1967) and 1968 *S.L.D.* 192 (August 19, 1968), aff'd and remanded State Board of Education 1968 *S.L.D.* 199; *Michael Austin et al. v. Board of Education of the Township of Union, Union County,* 1970 *S.L.D.* 25 (January 21, 1970); *Clyde E. Christner et al. v. Board of Education of the City of Trenton et al., Mercer County,* 1970 *S.L.D.* 354 (November 14, 1970); *Beatrice M. Jenkins et al. v. Board of Education of the Township of Morris et al.,* 1970 *S.L.D.* 389 (November 30, 1970), aff'd 58 *N.J.* 483 (1971); *Board of Education of the City of Asbury Park v. Boards of Education of Shore Regional High School District, Borough of Deal and Borough of Interlaken, Monmouth County,* 1971 *S.L.D.* 221 (May 17, 1971), aff'd State Board of Education *S.L.D.* 228; *Deborah Jean Capen et al. v. Board of Education of the Town of Montclair, Essex County,* 1971 *S.L.D.* 301 (July 1, 1971) and 1971 *S.L.D.* 438 (September 8, 1971), aff'd State Board of Education 1972 *S.L.D.* 665; *Board of Education of the City of New Brunswick v. Board of Education of the Township of North Brunswick, Middlesex County,* 1973 *S.L.D.* 578 (November 30, 1973) and *Board of Education of the City of New Brunswick v. Board of Education of the Township of North Brunswick and the Board of Education of the Borough of Milltown,* 1974 *S.L.D.* 938, aff'd State Board of Education March 5, 1975; *Board of Education of the City of Plainfield v. Board of Education of the Borough of Dunellen et al.,* 1974 *S.L.D.* 9; *Eugene Vigna et al. v. Board of Education of the Township of Lakewood, Ocean County,* 1974 *S.L.D.* 929, aff'd State Board of Education 1975 *S.L.D.* 1162; *In re Application of the Board of Education of the*

Borough of Milltown to Terminate its Sending-Receiving Relationship with the Board of Education of the City of New Brunswick, Middlesex County, 1975 *S.L.D.* 445. See also: *Gertrude P. Fuller et al. v. Austin A. Volk et al.,* 230 *F.Supp.* 25 (*D.C.N.J.* 1964); *Vivian Spencer et al. v. George F. Kugler et al.,* 326 *F. Supp.* 1235 (D.C.N.J. 1971), aff'd 404 *U.S.* 1027, 92 *S.Ct.* 707, 30 *L.Ed.2d* 723; and *Frank Schults v. Board of Education of the Township of Teaneck,* 86 *N.J. Super.* 29 (*App. Div.* 1964), aff'd 45 *N.J.* 2(1965).

The Supreme Court of this State provided a comprehensive review of the litigation concerning pupil racial imbalance in the public schools and the applicable legal principles in *Charles B. Booker et al. v. Board of Education of the City of Plainfield,* 45 *N.J.* 161 (1965). The Court observed that the decisions of the Commissioner and the State Board in *Booker* had pointed out that racial imbalance of pupil enrollment was not to be equated with invidious segregation as condemned by both the Commissioner and State Board in *Volpe et al. v. Board of Education of the City of Englewood.* (See 45 *N.J.* 15 at 168.) The Court also took cognizance of the Commissioner's finding that the cause of the concentration of the Negro population in particular schools was to be found in patterns of housing resulting from a constellation of socioeconomic factors.

The Court stated the following:

> "***When in *Brown v. Board of Education of Topeka,* 347 *U.S.* 483, 74 *S.Ct.* 686, 98 *L.Ed.* 873 (1954), the Supreme Court struck down segregated schools, it recognized that they generate a feeling of racial inferiority and result in a denial of equal educational opportunities to the Negro children who must attend them. Although such feelings and denial may appear in intensified form when segregation represents official policy, they also appear when segregation in fact, though not official policy, results from long standing housing and economic discrimination and the rigid application of neighborhood school districting.***"
>
> (45 *N.J.* at 168)

The Court summarized the relationship of federal constitutional provisions in the following words:

> "***Whether or not the federal constitution compels action to eliminate or reduce *de facto* segregation in the public schools, it does not preclude such action by state school authorities in furtherance of state law and state educational policies. See *Morean v. Board of Education Town of Montclair,* 42 *N.J.* 237, 242-244 (1964); *Addabbo v. Donovan, supra,* 256 *N.Y.S.* 2d, at pp. 182-184; cf. *Schults v. Board of Education of Township of Teaneck,* 86 *N.J. Super.* 29 *(App. Div.* 1964), aff'd 45 *N.J.* 2 (1965).***"
>
> (45 *N.J.* at 170)

The Court then summarized the State's education policy regarding pupil racial imbalance by stating that:

> "In a society such as ours, it is not enough that the 3R's are being taught properly for there are other vital considerations. The children must learn to respect and live with one another in multi-racial and multi-cultural communities and the earlier they do so the better. It is during their formative school years that firm foundations may be laid for good citizenship and broad participation in the mainstream of affairs. Recognizing this, leading educators stress the democratic and educational advantages of heterogeneous student populations and point to the disadvantages of homogeneous student populations, particularly when they are composed of a racial minority whose separation generates feelings of inferiority. It may well be, as has been suggested, that when current attacks against housing and economic discriminations bear fruition, strict neighborhood school districting will present no problem. But in the meantime the states may not justly deprive the oncoming generation of the educational advantages which are its due, and indeed, as a nation, we cannot afford standing by. It is heartening to note that, without awaiting further Supreme Court pronouncements, some states, including our own, have taken significant legislative or administrative steps towards the elimination or reduction of *de facto* segregation. See Report of the United States Commission on Civil Rights 1963, pp. 55-62.***"
>
> (45 *N.J.* at 170-171)

In *Booker, supra,* the Court pointed out that the Commissioner had previously construed the scope of his authority and responsibility when reviewing local steps to alleviate racial imbalance in too restrictive a manner, and stated that when a local plan is presented to the Commissioner

> "***he must affirmatively determine whether the reasonably feasible steps towards desegregation are being taken in proper fulfillment of State policy; if not, he may remand the matter to the local board for further action or may prescribe a plan of his own***." (45*N.J.* at 178)

In the later case of *Jenkins et al. v. Board of Education of the Township of Morris, supra,* the New Jersey Supreme Court reviewed its earlier decision in *Booker, supra,* and reiterated its holding that the State's policy for alleviating pupil racial imbalance in the public schools is based upon constitutional and statutory provisions, as well as sound educational policy. 58 *N.J.* 483, 495-499 The Court stated in *Jenkins* that, if those policies and the views firmly expressed by the Court in *Booker* are to be at all meaningful, the Commissioner must have power to cross school district lines to avoid "segregation in fact," at least where there are no impracticalities and the concern is with a single community of interest without significant internal boundary separations. 58 *N.J.* at 501 As a result of the Court's determination in *Jenkins,* the Commissioner ordered the regionalization of the school districts of the Town of Morristown and the Township of Morris.

In the instant matter, the Board, through its expert witnesses, attacks the soundness of the State's education policy as a basis for requiring the correction of pupil racial imbalance. The Board does not attack the provisions of the State constitution, or statutory and case law which provide the legal foundation for the State's plan, as described in *Morean,* 42 *N.J.* at 242-243; *Booker,* 45 *N.J.* at 173-175; and *Jenkins,* 58 *N.J.* at 495-496, 504-507.

The Commissioner finds that the summary of expert testimony in the record adequately sets forth the positions of the witnesses. The Commissioner agrees with that portion of the testimony of Dr. Louise Bates Ames which states that more attention with adequate funding could and must be utilized for the screening and diagnosis of learning handicaps and physical and emotional problems, and for the implementation of corrective measures when deficiencies are discovered. The Commissioner is well aware that such psychological learning disabilities, together with a variety of physiological disorders, occur with greater frequency and in larger numbers among pupils from families who have been relegated by circumstances to the lowest socioeconomic status. The Commissioner does not agree, however, that there is no relationship between heterogeneous school population and the pupil's academic achievement, concept of self work, attitude toward learning, and the ability to relate to individuals of other ethnic or socioeconomic groups when he reaches adulthood. Dr. Ames excludes virtually all social factors from any consideration as an educational advantage, which is, in her own words, an extreme view. (Tr. 11-61-7 to 14)

The Commissioner is likewise not persuaded by the expert testimony of Dr. Max Rafferty, that there is no increase of educational opportunity as a result of measures to alleviate racial imbalance, and that there is no relationship between the academic achievement of pupils and segregated schools.

The Commissioner holds that the very necessity to offer equal educational opportunities to all school age children of every race, color, creed and national origin requires an affirmative policy to prevent isolation of ethnic groups and to alleviate racial imbalance in the public schools. This policy is founded upon the premise that a goal of the statewide educational system requires that children learn to respect and live harmoniously with one another in a multi-ethnic culture. This goal of citizenship education is presently set forth in the Department of Education's proposed rules and regulations for the implementation of *c.* 212, *L.* 1975 known as "An act providing for a thorough and efficient system of free public schools, etc." This goal is one of several which resulted from the participation of thousands of citizens in the State's twenty-one counties in the "Our Schools Project" which was sponsored by the Department. The project resulted in the adoption by the State Board of a resolution setting forth a number of statewide goals and objectives for the system of public schools. Historically, every set of promulgated goals and objectives, sometimes referred to as cardinal principles, of public education has included a broad citizenship goal deemed not only desirable but necessary for the perpetuation and very survival of our democratic society and our democratic republic. Such efforts and concomitant results have not been restricted to New Jersey; they have been nationwide, and they extend back to the very origins of the common

school, as the public schools were originally called. Long before this nation experienced large waves of immigration or even publicly recognized the derogation of the Negro in American society, the concept was firmly rooted that an educated man must be able to play a meaningful supportive role in the perpetuation of a government dedicated to the commonweal of the people.

Our modern era has seen many efforts made to promote equality and insure the basic civil rights of all citizens. Surely now more than ever before, the institution of the public schools, created by the people by means of the organic law and supported by the public purse, must strive to inculcate in all school age children the well known principles of citizenship embodied in a broad goal of humanitarian and civic education. The Commissioner is constrained to point out that the bridges between the races and ethnic groups are few and fragile and a strong commitment is required of all who comprise and support the institution of the public schools to bring all citizens of our nation together into a harmonious society dedicated to the elimination of bias, prejudice and discrimination. The ultimate goal at times appears to be unreachable and the task seems disproportionally difficult. But the perpetuation of a free and democratic society must transcend all obstacles, and the educational purpose is no less salutary because of the admitted difficulty of reaching the ideal goal.

The Commissioner concludes, for all of the foregoing reasons, that, although the measurable results of the State policy in regard to the improvement of academic achievement (in basic learning skills such as reading comprehension) resulting from the integration of pupils is equivocal, the broadly based goals of citizenship education, as described in the State policy, *ante,* and all of the values encompassed in these broad goals, constitute a reasonable educational policy, founded upon a sound educational philosophy.

The Commissioner will next consider the allegation by the Board that the State's policy and guidelines have been unreasonably applied to the Roselle School District, since no other district but Roselle has had State aid withheld by the Commissioner.

The factual circumstances concerning the eighty-eight original school districts identified as having imbalanced schools are summarized in the hearing examiner's report. The Board takes exception to the fact that the details of the progress of those districts, as presented through the Superintendent's testimony during seven full days and one-half or more of three additional days of hearing, were not set forth in the report. The Commissioner is satisfied that the summary of such testimony clearly shows an admitted lack of uniform progress by the various districts. The Commissioner adopts as his own the findings of the hearing examiner with respect to the reported status of the various affected school districts. The Commissioner is aware of the fact that these local districts are in varying stages of compliance, and he also recognizes that some districts are faced with more complex problems than others in attempting to develop and implement approved workable plans.

The Commissioner takes notice of the fact that the Roselle Board was the first in the State to develop an approved plan, and that the Department, which does have a limit upon its available staff, has expended a great deal of effort and time, almost disproportionately, upon the Roselle School District in an effort to secure a degree of compliance with State policy. Given the differences of conditions among the various districts, and realistically considering the Department's time schedules for meeting and consulting with various school boards and officials, it is illogical to conclude that uniform progress may be achieved by all school districts. It is significant to observe that, since the instant matter has been in the process of hearing and determination, another hearing has been initiated wherein a local board of education must show cause why it should not have its State aid withheld for failure to comply with the State policy and guidelines.

In conclusion, the Commissioner finds and determines that (a) the State policy and guidelines are reasonable and are based upon a sound, supportable educational philosophy, and (b) the State policy and guidelines have not been unfairly or unreasonably applied to the Roselle School District.

The Commissioner hereby directs the Roselle Board of Education to submit a plan, within sixty days of the date of this decision, for the assignment of pupils for the purpose of alleviating racial imbalance in its various public schools. Such plan shall include all of the educational components previously referred to in the record of this matter and shall include provision for implementation, following receipt of approval by the Commissioner, beginning the first day of the 1976-77 academic year in September 1976.

The Commissioner is constrained to remind this Board that the plan it adopts and submits for approval must meet the requirements of the State policy (Exhibit P-38) and guidelines (Exhibit P-39) which are hereinbefore set forth in their entirety. The record in this matter is replete with evidence of correspondence, communications and conferences which clearly shows that the Board has received adequate guidance, advice and technical assistance from the Department to enable it to exercise its discretion in promulgating an appropriate plan within the broad range of available possibilities and options.

The Commissioner will order the payment of $49,718 of previously withheld State aid from May 1971 upon satisfactory implementation of an approved plan. Should the Board fail to submit an appropriate plan as required by this decision, the Commissioner will order the implementation of his own plan beginning September 1976.

COMMISSIONER OF EDUCATION

February 27, 1976

COMMISSIONER OF EDUCATION

ORDER

WHEREAS on February 27, 1976, the Commissioner of Education directed the Roselle Board of Education:

> "***to submit a plan, within sixty days of the date of this decision, for the assignment of pupils for the purpose of alleviating racial imbalance in its various public schools. Such plan shall include all of the educational components previously referred to in the record of this matter and shall include provision for implementation, following receipt of approval by the Commissioner, beginning the first day of the 1976-77 academic year in September 1976.***" (1976 *S.L.D.* at p. 231); and

WHEREAS it was further ordered that should the Roselle Board of Education fail to submit an appropriate plan, the Commissioner of Education would direct the implementation of his own plan beginning September, 1976; and

WHEREAS the Roselle Board of Education has failed to submit any plan to the Commissioner of Education within the aforesaid time period; and

WHEREAS the Union County Superintendent of Schools attended the meeting of the Roselle Board of Education held May 17, 1976, and has advised the Commissioner that a Motion to submit Desegregation Plans A & B to the Commissioner was defeated by a four to four vote at that meeting; and

WHEREAS a team composed of members of the State Department of Education and the office of the County Superintendent of Schools has reviewed the planning efforts of members of the Roselle District and has considered the various plans to alleviate racial imbalance which were developed by district staff and which were presented to the Roselle Board of Education; and

WHEREAS the Commissioner of Education has fully considered these plans and their impact on the educational system of the Roselle School District; therefore

IT IS HEREBY ORDERED on this 21st day of May 1976 that:

1. The Roselle Board of Education implement "Plan A" (copy attached) for September, 1976.

2. The Roselle Board of Education take whatever steps shall be necessary to assure implementation of "Plan A" prior to the release of staff for summer vacation.

3. A monitoring task force composed of State Department of Education personnel is hereby assigned to the Roselle School District until June 24, 1976 to supervise and assist the efforts of the administrative staff in implementing "Plan A". The State Department task force will consult with the Roselle Superintendent's educational support team.

4. The Superintendent of Schools of the Roselle School District and all employees of such district shall cooperate in whatever way necessary to assure the full implementation of "Plan A."

5. The Superintendent of Schools of the Roselle District shall submit a finalized plan and status report to the Commissioner of Education by June 30, 1976.

6. The Commissioner shall retain jurisdiction until the Desegregation Plan is finalized and implemented in the Roselle School District.

COMMISSIONER OF EDUCATION

In the Matter of the Election Inquiry of the School District of the Township of Monroe, Gloucester County

COMMISSIONER OF EDUCATION

DECISION

The Board of Education of the Township of Monroe, hereinafter "Board," is scheduled to conduct its annual school election on March 9, 1976. Sid Simpson, hereinafter "complainant," a candidate for election to the Board, challenges the legality of nominating petitions filed by four candidates who also seek election to the Board.

Pursuant to complainant's letter request dated February 23, 1976, the Commissioner of Education directed his representative to conduct an inquiry into the matter on February 27, 1976 at the office of the Gloucester County Superintendent of Schools, Sewell. The report of the representative is as follows:

The undisputed facts of the matter are these. Candidates Steven R. Ball, Ronald H. Campbell, William J. Peacock, and Philip H. Price, each filed timely nominating petitions (C-1, C-2, C-3, C-4 respectively) with the Board Secretary in their quest for election to Board membership. Subsequent to that last day to file nominating petitions, the Board Secretary was informed that each of the four candidates, *ante,* failed to have his nominating petition (C-1, C-2, C-3, C-4) verified by "***the oath of one or more of the signers thereof***" as required by *N.J.S.A.* 18A:14-11. The Commissioner's representative observes

that each of the four nominating petitions controverted herein contains at least the minimum ten signatures of persons who endorse the candidacy of the respective nominees as required by *N.J.S.A.* 18A:14-9.

It is noticed that Candidate Ball filed his nominating petition (C-1) with the name of Ellen L. Ball as the person who, being duly sworn or affirmed according to the law on her oath, deposes and says:

> "***That the above petition is signed by each of the signers thereof in his own proper handwriting; that the said signers are, to the deponent's best knowledge and belief, legally qualified to vote at the ensuing election, and that said petition is prepared and filed in absolute good faith for the sole purpose of endorsing the candidate therein named in order to secure his election as a member of the board of education." (C-1)

Ellen L. Ball, however, is not one of the ten signatures as required by *N.J.S.A.* 18A:14-11 for the execution of verification of a nominating petition.

In similar fashion, Candidate Campbell filed his nominating petition (C-2) with the name of Anita L. Straub as the person who executed the verification of the petition. Anita L. Straub, however, is not one of the signatures to the petition.

Candidates Peacock and Price also filed their nominating petitions (C-3, C-4) verified by persons who were not signatories thereto.

The Board Secretary testified that after she informed each of the candidates of the error, she allowed them to make appropriate corrections to their nominating petition in her presence on the evening of the drawing for position on the election ballot. The Board Secretary also explained that the corrections were made in her office and that the filed nominating petitions never left her possession.

The Commissioner's representative observes with respect to Candidate Ball's nominating petition (C-1) the corrected verification was signed by Russell N. Ball. (C-1A) Candidates Campbell and Peacock corrected their nominating petitions (C-2; C-3), having one of the signatories thereto execute the verification (C-2A; C-3A) as required by *N.J.S.A.* 18A:14-11. Candidate Price did not make the necessary correction to his filed nominating petition. (C-4) Consequently, the Board Secretary determined, based on advice received from Board counsel, not to include his name on the election ballot.

It is these corrections to the filed nominating petitions, made after the last day for filing, that complainant alleges renders the petitions illegal and invalid. Thus, he seeks to have the names of Candidate Ball, Campbell and Peacock removed from the election ballot.

The Board Secretary testified that Candidates Ball, Campbell, and Peacock were allowed to correct their filed nominating petitions based on advice received

from Board counsel. The Board Secretary also explained that she was unaware of the provision of *N.J.S.A.* 18A:14-11 which requires the verification of nominating petitions to be executed by one of the signatories thereto.

The representative observes that while a three page instruction sheet (R-1) was distributed by the Board Secretary to those persons who requested nominating petitions, none of the instructions address the proper completion and filing of nominating petitions.

It is this set of circumstances upon which complainant alleges that the Board Secretary allowed violations of *N.J.S.A.* 18A:14-98 (False swearing; penalty) to occur. Complainant concludes, therefore, that the Board Secretary has demonstrated misconduct in office.

Complainant also alleges that during prior school elections, the Board Secretary acted beyond the scope of her authority by making determinations with respect to the validity of certain filed nominating petitions. In support of this allegation, complainant submitted a letter (P-1) dated February 7, 1975 which he had received from the Board Secretary with a legal opinion (P-1A) attached, by which complainant's name was excluded from the election ballot for the 1975 annual school election. It appears that complainant had filed a nominating petition for election to membership on the Board for the 1975 annual school election. It also appears that the nominating petition contained the minimum ten signatures endorsing complainant's candidacy. Counsel to the Board determined that one of the ten signatories was not qualified to sign complainant's nominating petition. (P-1A, at p. 2) Thus counsel to the Board concluded that the 1975 nominating petition filed by complainant did not contain the requisite ten signatures (*N.J.S.A.* 18A:14-9) and advised the Board Secretary that complainant's name must not appear on the election ballot. (P-1A, at p. 3) The Board Secretary followed this advice (P-1) and complainant's name did not appear on the 1975 election ballot.

Finally, the representative reports that the Board Secretary processed letters (C-5) from citizens of the Monroe School District which allegedly directed "challenges" to filed nominating petitions to her for resolution. Upon receipt thereof, the Board Secretary explained that she then informed the candidates of the alleged "challenge." (C-6) The representative concludes that the Board Secretary would then seek a legal opinion from Board counsel. If Board counsel determined that the filed nominating petition was invalid, the Board Secretary would then delete that candidate's name from the ballot as hereinbefore set forth.

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the report of his representative and the record herein. The Commissioner finds that the matter may be adjudicated upon the basis of complainant's letter of February 23, 1976 and the documentary evidence made part of the record.

The Commissioner has reviewed the specific nominating petitions (C-1, C-2, C-3, C-4) controverted herein and the subsequent corrections made thereto by Candidates Ball, Campbell, and Peacock. The statute of reference with respect to defective nominating petitions is *N.J.S.A.* 18A:14-12 which provides as follows:

> "When a nominating petition is found to be defective *excepting as to the number of signatures,* the secretary of the board shall forthwith notify the candidate of the defect and the date when the ballots will be printed and the candidate indorsing the petition may amend the same in form or substance, *but not to add signatures,* so as to remedy the defect at any time prior to said date." (*Emphasis in text.*)

The purpose of this statute is to eliminate technical imperfections which could otherwise invalidate a nominating petition to the detriment of a potential candidate and those citizens who support his candidacy.

It is clear to the Commissioner that the corrections made were and are proper pursuant to *N.J.S.A.* 18A:14-12. However, as the Commissioner stated in a prior decision in which he addressed a similar issue of corrections to nominating petitions, the Board Secretary should have returned the defective petitions to the candidates for correction. See *In the Matter of the Election Inquiry in the School District of the Borough of South River, Middlesex County,* 1974 *S.L.D.* 1040. Had the Board Secretary returned the petitions to the respective candidates for correction before the printing of the ballot and had the candidates not returned the corrected petitions before the date the ballots were to be printed, it would simply be a matter of failure to file a nominating petition. The Board Secretary would not be placed in the position of deciding whose name should be on the ballot.

The Commissioner observes that once a nominating petition is filed, the responsibility of the Board Secretary is to insure that the blanks on the form are filled in, that ten signatures of endorsement are recorded, that one of those ten signatures also verifies the petition, that the verification is notarized, and that the candidate signs the petition.

Any question with respect to the oath of the signatory who verifies the petition, or any question with respect to the qualifications of the signatures thereon are not within the authority of the Board Secretary to address. These are matters to be adjudicated only by a court of competent jurisdiction. See *T.W.D. v. Board of Education of the Town of Belleville, Essex County,* 1975 *S.L.D.* 26. While *T.W.D.* dealt with an affidavit pupil, the holding there is equally applicable here. When a person who verifies a nominating petition attests, through his/her oath, or certifies that he/she is qualified to indorse a nominee's candidacy, such oath or certification is subject to question only in a court of competent jurisdiction.

While the Commissioner does not condone the lack of adherence to the specific statutes with respect to the filing of nominating petitions herein, there is

no evidence that the Board Secretary or the candidates acted in bad faith. It has been held by the courts of this State that gross irregularities, when not amounting to fraud, do not vitiate an election. *State, ex rel. Love et al. v. Freeholders of Hudson County,* 35 *N.J.L.* 269 (*Sup. Ct.* 1871); *Stone et al. v. Wyckoff et al.,* 102 *N.J. Super.* 26 (*App. Div.* 1968)

In the Commissioner's judgment the facts established herein do not warrant the removal of the names of Candidates Ball, Campbell, or Peacock from the election ballot for the 1976 annual school election. A removal would deprive those persons of their right to be a candidate for public office and such an action would effectively negate the expressed desire of their respective signatories who endorsed their candidacy.

The Board Secretary is instructed to henceforth comply with the school election statutes as set forth in *N.J.S.A.* 18A:14-1 *et seq.* and is further instructed not to exercise authority not specifically granted her.

The Commissioner, having found no basis to intervene, hereby dismisses each and every complaint.

COMMISSIONER OF EDUCATION

March 5, 1976

Board of Education of the Township of Marlboro,

Petitioner,

v.

Mayor and Council of the Township of Marlboro, Monmouth County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, DeMaio and Yacker (Vincent C. DeMaio, Esq., of Counsel)

For the Respondent, Herbert B. Bierman, Esq.

Petitioner, the Board of Education of the Township of Marlboro, hereinafter "Board," appeals from an action of the Mayor and Council of the Township of Marlboro, hereinafter "Council," taken pursuant to *N.J.S.A.* 18A:22-37 certifying to the Monmouth County Board of Taxation a lesser amount of appropriations for school purposes for the 1975-76 school year than the amount proposed by the Board in its budget which was rejected by the

voters. The facts of the matter were adduced at a hearing conducted on December 9, 1975 at the office of the Monmouth County Superintendent of Schools, Freehold, before a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner is as follows:

At the annual school election held March 11, 1975, the Board submitted to the electorate proposals to raise $3,777,031 by local taxation for current expense and $8,000 for capital outlay costs of the school district. These items were rejected by the voters and, subsequent to the rejection, the Board submitted its budget to Council for its determination of the amounts necessary for the operation of a thorough and efficient school system in the Township of Marlboro in the 1975-76 school year, pursuant to the mandatory obligation imposed on Council by *N.J.S.A.* 18A:22-37.

After consultation with the Board, Council made its determinations and certified to the Monmouth County Board of Taxation an amount of $3,536,371 for current expense only. The pertinent amounts in dispute are shown as follows:

	Current Expense	**Capital Outlay**
Board's Proposal	$3,777,031	$8,000
Council's Proposal	3,536,371	–0–
Amount Reduced	$ 240,660	$8,000

The Board contends that Council's action was arbitrary, unreasonable, and capricious and documents its need for the restoration of the reductions recommended by Council with written testimony and a further oral exposition at the time of the hearing. Council maintains that it acted properly and after due deliberation, and that the items reduced by its action are only those which are not necessary for a thorough and efficient educational system. Council also documents its position with written and oral testimony. As part of its determination, Council suggested specific line items of the budget in which it believed economies could be effected as follows:

Account Number	**Item**	**Board's Proposal**	**Council's Proposal**	**Amount Reduced**
CURRENT EXPENSE:				
J130	Adm.-Oth. Exps.	$ 30,390	$ 27,190	$ 3,200
J213.1(a)	Teachers Sals.	2,088,200	2,046,000	42,200
J213.1(b)	Summer Program	5,560	–0–	5,560
J215 (a)	Secys. & Clerks	101,635	96,635	5,000
J215 (b)	Lib. Aides	22,225	12,225	10,000
J240	Teaching Supls.	150,000	130,000	20,000
J250	Instr.-Oth. Exps.	40,250	30,250	10,000
J510	Sals-Pupil Trans.	139,445	134,445	5,000

J535	New Vehicles	52,000	26,000	26,000
J550	Oper. & Maint.	46,075	42,075	4,000
J730	New/Add'l Equip.	30,213	21,213	9,000
J740	Upkeep of Grounds	23,700	15,000	8,700
	TOTALS	$2,729,693	$2,581,033	$148,660
CAPITAL OUTLAY:				
L1220	Sites	$ 5,000	$ –0–	$ 5,000
L1230	Buildings	3,000	–0–	3,000
	TOTALS	$ 8,000	$ –0–	$ 8,000

Additionally, Council suggested that the Board apply $92,000 surplus from its free appropriations current expense balance. This aggregate reduction in the Board's budget, therefore, is $248,660; $240,660 from current expenses and $8,000 from capital outlay.

There appears no necessity to deal *seriatim* with each of the areas in which Council recommended reduced expenditures. As the Commissioner said in *Board of Education of the Township of Madison v. Mayor and Council of the Township of Madison, Middlesex County,* 1968 *S.L.D.* 139:

> "***The problem is one of total revenues available to meet the demands of a school system***. The Commissioner will indicate, however, the areas where he believes all or part of Council's reductions should be reinstated. It must be emphasized, however, that the Board is not bound to effect its economies in the indicated items but may adjust its expenditures in the exercise of its discretion as needs develop and circumstances alter.***"
>
> (at p. 142)

The hearing examiner cannot conclude from the documents in evidence nor from the testimony adduced at the hearing that Council's reductions were arbitrary and capricious. Therefore, the budget will be examined as presented with the recommendations to the Commissioner, *post.*

J130 Administration, Other Expenses

The Board documents its need for these funds and states that they are part of contracted mileage payments for each of its four administrators. The record shows, however, that the amount of the Board's obligation is fifty dollars per month for each administrator for twelve months. Arithmetically this amounts to six hundred dollars each for a total of twenty-four hundred dollars.

The hearing examiner recommends, therefore, that $2,400 be restored to the budget and that a reduction of $800 be sustained.

J213.1(a) Teachers, Salaries

J213.1(b) Summer Program

The reduction of $42,200 deemed appropriate by Council in this line item is the largest of all such reductions and includes funds for the establishment of a summer enrichment program. The Board's budget for teachers has also included funds for ten new teaching positions attributable to an increase in pupil enrollments, two new special education teachers and teachers of speech and music.

In the context of this large staff expansion the instant reduction is a relatively small one and the hearing examiner finds no compelling evidence to justify a substitution of discretion for that exercised by Council.

J215(a) Secretaries and Clerks

J215(b) Library Aides

Although it would be desirable to hire additional personnel with funds from this line item as the Board suggests, the hearing examiner finds no convincing proof that such funds are required for the operation of a thorough and efficient program of education. It is therefore recommended that Council's reductions be sustained.

J240 Teaching Supplies

The proposed budget is this line item increased by $61,640, from $88,360 in 1974-75 to $150,000 in 1975-76. Council's reduction of $20,000 will still allow for an increase of $41,640.

The hearing examiner recommends that Council's reduction be sustained.

J250 Instruction, Other Expenses

The record does not support this line item proposal and the hearing examiner recommends that Council's reduction of $10,000 be sustained.

J510 Transportation Salaries

J535 New Vehicles

J550 Operation and Maintenance

The Board budgeted for four new buses but purchased only two for $24,626. The other two line items are for salaries of bus drivers and maintenance of the new vehicles.

The hearing examiner recommends on the basis of these facts that half the amount in line items J510 and J550 be restored and that the Board's proposal in line item J535 be reduced by half, or $26,000.

J730 New/Additional Equipment

The Board consents to a reduction in this line item. The hearing examiner recommends that Council's $9,000 reduction be sustained.

J740 Upkeep of Grounds

The Board stated its need for these funds to pave deteriorating driveways and lots in the district. Council does not assert that the paving is unnecessary; rather, Council suggests that the original contractor who paved the areas may be responsible.

The hearing examiner finds that a need for the funds herein exists and that the Board must determine when and if it will seek repairs or damages from the paving contractor; therefore, it is recommended that these funds be restored.

L1220 Sites

L1230 Buildings

The Board does not show adequate support for the need of the funds for sites; however, the L1230 line item is for the remodeling of lavatory facilities in one school and a master TV antenna in another.

The hearing examiner recommends that the funds for sites not be restored, but that the funds for buildings be restored to the budget.

A recapitulation of the amounts in dispute follows:

Account Number	Item	Amount of Reduction	Amount Restored	Amount Not Restored
CURRENT EXPENSE:				
J130	Adm.-Oth. Exps.	$ 3,200	$ 2,400	$ 800
J213.1(a)	Teachers Sals.	42,200	–0–	42,200
J213.1(b)	Summer Program	5,560	–0–	5,560
J215(a)	Secys. & Clerks	5,000	–0–	5,000
J215(b)	Lib. Aides	10,000	–0–	10,000
J240	Teaching Supls.	20,000	–0–	20,000
J250	Instr.-Oth. Exps.	10,000	–0–	10,000
J510	Sals.-Pupil Trans.	5,000	2,500	2,500
J535	New Vehicles	26,000	–0–	26,000
J550	Oper. & Maint.	4,000	2,000	2,000
J530	New/Add'l Equip.	9,000	–0–	9,000
J740	Upkeep of Grounds	8,700	8,700	–0–
TOTALS		$148,660	$15,600	$133,060

CAPITAL OUTLAY:				
L1220	Sites	$ 5,000	$ –0–	$ 5,000
L1230	Buildings	3,000	3,000	–0–
TOTALS		$ 8,000	$ 3,000	$ 5,000

Thus, in summary the hearing examiner finds that a total of $18,600 of Council's reduction is required to be restored for use by the Board as current expenses of the school district and for capital outlay costs. There remains the matter of Council's determination that other expenses of the Board totaling $92,000 may be funded from free appropriation balances.

The Board produced evidence at the hearing that its free appropriation balance was $179,052.65 on June 30, 1975, and accordingly, the reduction deemed appropriate by Council would reduce this sum to $87,052.65 if all of the expenses planned to be incurred from the total budget of the Board were incurred in fact.

The hearing examiner is not aware of any line items where contingency funds are expected to be required but nevertheless in the context of the total budget and the findings, *ante,* he concludes that the appropriation from balances is excessive and affords too narrow a margin for unforeseen expenses. Accordingly, he recommends that $30,000 of the total reduction be restored and that Council's determination be sustained in the amount of $62,000.

In summary, the hearing examiner recommends that the Commissioner direct the Monmouth County Board of Taxation to restore a total sum of $48,600 for use by the Board in the 1975-76 academic year but that in other respects the reductions deemed appropriate by Council which total $192,060 be sustained.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and notices that no exceptions pertinent thereto have been filed pursuant to *N.J.A.C.* 6:24-1.16. The Commissioner concurs with the report except for the listing of the total reduction as $192,060. In addition thereto, there was a reduction of $8,000 from capital outlay. Thus the total reduction recommended was in fact $200,060.

In all other respects the Commissioner adopts the report of the hearing examiner as his own and, therefore, directs the Monmouth County Board of Taxation to add an additional sum of $48,600 to the local tax levy of the Township of Marlboro for the current expenses and capital outlay costs of the school district in the 1975-76 academic year.

COMMISSIONER OF EDUCATION

March 10, 1976

In the Matter of the Tenure Hearing of Carolyn Ford, School District of the City of Linden, Union County.

COMMISSIONER OF EDUCATION

ORDER

For the Petitioner, Leo Kahn, Esq.

For the Respondent, Carolyn Ford, *Pro Se*

It appearing that the City of Linden Board of Education, hereinafter "Board," having considered tenure charges made against Carolyn Ford, hereinafter "respondent," by the Superintendent of Schools pursuant to *N.J.S.A.* 18A:6-10 *et seq.*; and,

It appearing that the Board determined by a majority vote of its membership on July 16, 1975 to suspend respondent without pay from her teaching duties and to certify said charges to the Commissioner of Education; and

It appearing that the Board unsuccessfully attempted on July 21, and 26, 1975 to serve a copy of said charges and certification upon respondent by certified mail prior to filing same with the Commissioner on July 22, 1975; and

It appearing that respondent was directed in writing to file a formal Answer to the Board's charges by a hearing officer appointed by the Commissioner on July 31, August 20, September 9, and December 26, 1975; and

It appearing that respondent failed to comply with the last directive of the hearing officer on December 26, 1975 to file a formal Answer to the Board's tenure charges against her by January 16, 1976, and that respondent was finally notified in writing by the hearing officer on January 28, 1976, that this matter was being referred to the Commissioner for determination; and

It appearing that the matter has not been moved before the Commissioner and, it further appearing that respondent has been given every opportunity to defend herself for more than six months; now therefore,

IT IS ORDERED on this *10*th day of March 1976 that Respondent Carolyn Ford is dismissed from her employment with the School District of the City of Linden, Union County, as of the date of her suspension by the Board of Education of the City of Linden.

COMMISSIONER OF EDUCATION

Board of Education of the City of Elizabeth,

Petitioner,

vs.

City Council of the City of Elizabeth, Union County,

Respondent.

COMMISSIONER OF EDUCATION

ORDER

STIPULATION AND WITHDRAWAL

For the Petitioner, Raymond D. O'Brien, Esq.

For the Respondent, John R. Weigel, Esq., Special Counsel

This matter having come before the Commissioner of Education in a petition of appeal; and the parties thereto having thereafter agreed to settle their difference; and said parties having on March 8, 1976, filed with the Commissioner of Education a Resolution duly approved authorizing their respective Counsel to Consent to this Order, setting forth that the Board of Education and the City Council of the City of Elizabeth having stipulated and agreed that there shall be raised by taxation the additional sum of $350,000.00 for the current expenses of the Board of Education of the City of Elizabeth, making a total of $19,224,446.67 for the school year 1975-1976; now therefore for good cause appearing,

IT IS ORDERED on this 15th day of March, 1976, that the Mayor and Council of the City of Elizabeth certify to the Union County Board of Taxation the additional sum of $350,000.00 to be raised by local taxation for the Board of Education of the City of Elizabeth for the school year 1975-1976. Said additional monies shall be raised in calendar year 1976 by the City Council of the City of Elizabeth and paid over to the Board of Education of the City of Elizabeth during the period between January 1, 1976 and June 30, 1976; and

IT IS FURTHER ORDERED, the Petition of Appeal and General Denial are hereby dismissed.

COMMISSIONER OF EDUCATION

March 15, 1976

Jo-Ann Krill and the Red Bank Borough Teachers Association,

Petitioners,

v.

Board of Education of the Borough of Red Bank, Monmouth County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Chamlin, Schottland & Rosen (Michael D. Schottland, Esq., of Counsel)

For the Respondent, Reussille, Cornwell, Mausner & Carotenuto (Martin M. Barger, Esq., of Counsel)

Petitioner is a teacher who was employed by the Board of Education of the Borough of Red Bank, hereinafter "Board," and was not reemployed for the 1974-75 academic year. She alleges that the Board failed to notify her pursuant to the appropriate statutes that she would not be reemployed. The Red Bank Teachers Association, hereinafter "Association," alleges that the Board violated certain specific provisions in its negotiated agreement with the Board, and thereby denied petitioner her contractual entitlement.

A hearing in this matter was conducted on January 23 and March 13, 1975 at the office of the Monmouth County Superintendent of Schools, Freehold, before a hearing examiner appointed by the Commissioner of Education. Several exhibits were admitted in evidence and Briefs were filed subsequent to the hearing. The report of the hearing examiner is as follows:

Petitioner was employed under contract by the Board for the 1973-74 academic year. (J-7) On April 11, 1974, she was notified by the Superintendent of Schools as follows:

> "By action of the Board of Education at its regular meeting on April 9, 1974, a contract will not be awarded to you for the 1974-75 school year.
>
> "May we thank you for your services during the past school year and wish you success in any new position you choose to accept.
>
> "If this office can be of any assistance to you, please feel free to call."
>
> (J-10)

By letter of May 13, 1974, petitioner requested a hearing before the Board (J-16) which was held on May 30, 1974, after which the Board notified her by letter dated June 24, 1974, as follows:

> "The Board of Education has requested that you be informed regarding its decision after your hearing on May 30, 1974. After careful consideration

and discussion, the Board has decided not to change its original decision of April 9, 1974 when a Resolution not offering you a contract was passed.

"In conformance with a decision on June 10, 1974 of the Supreme Court of New Jersey making it mandatory that a statement of reasons be given for terminating employment of non-tenure teachers, we are submitting the following:

"Your contract for the 1974-75 school year was not renewed upon the recommendation of your supervisors. The reasons presented were:

> 'Inability to control classroom behavior of students so that a conducive learning climate might prevail.'

"May we extend our appreciation for your year of service with us and hope you are successful in continuing your profession." (J-8)

Petitioner submitted in evidence several evaluations of her performance as a classroom teacher. One evaluation made by the Superintendent of Schools was quite positive and recommended her to any prospective employer "without reservation." (P-1) Other evaluations made by the vice-principal and the principal were more critical of her performance. Petitioner contended that she was told in her conferences with her supervisors that she was improving in her performance and that she was a good teacher. (Tr. II-5, 16) She admits, however, that there was a disagreement with the vice-principal concerning his evaluation of her performance on February 25, 1974 (J-5), in which he was quite critical. Petitioner also admits discussing that evaluation with her principal because of such disagreement. She testified that she was "crying" and "upset" and that she raised her voice during the meeting. (Tr. I-14)

Petitioner testified under direct examination that she cried once in front of her class because she was under the stress of a personal problem and because of other factors relating to her involvement in a testing program for the placement of pupils in the high school. On another occasion she said she did not cry in front of the class, but that she felt like crying because of problems she was having with one very difficult pupil, an eighth grade boy. She testified that she tried to find a teacher to cover for her so she "***could go downstairs *** and just let go.***" She testified further that a teacher did cover for her and told her to "compose" herself and then return to the classroom. (Tr. II-19-21)

The President of the Association argued that the Board's evaluation forms are intended for self-evaluation and professional improvement; therefore, they serve as a basis for the "***renewal and non-renewal of contracts***." He testified that petitioner's evaluations did not disclose that her performance was such that she should not be reemployed. (Tr. I-76-80)

The Superintendent testified that he observed petitioner teaching and that her performance was generally good for a new teacher. He said that he had

announced his visit to her classroom and that she had time to prepare for his observation. Nevertheless, his recommendation to the Board not to reemploy petitioner was based on the recommendations and evaluations made by the principal and the vice-principal who "***work with her on a day to day basis***." (Tr. I-21-24) Their recommendations were not favorable and he was advised by the principal not to recommend petitioner for reemployment.

The principal testified that he met with petitioner on March 11, 1974, discussed her evaluation of February 25, 1974, which was made by the vice-principal, and informed her that he would recommend that her contract not be renewed. (Tr. II-39) He said he explained to her that the reason for his recommendation was that she could not control her pupils, and that his presence was often necessary to restore order in the classroom. (Tr. II-40) He testified further that she cried in class in front of her pupils, and that he was concerned about her general emotional stability. In his continued testimony, the principal stated that petitioner's classroom control deteriorated to the degree that pupils began to "bait" petitioner and create situations. (Tr. II-45)

He testified also that the Superintendent asked him to put in writing his reasons for not recommending a renewal of her contract. (Tr. II-46-47) He testified finally that he had met with petitioner many times during the school year to discuss her continuing problems. (Tr. II-50-51)

In the hearing examiner's judgment, the principal's testimony alone, which is not refuted in its accuracy or forthrightness in any substantive manner, brings into sharp focus the essence of the matter, *sub judice.*

On the one hand, petitioner and the Association argued that the several classroom evaluations in evidence were insufficient to raise a recommendation that petitioner should not receive a new contract; therefore, the Board was in violation of its agreement with the Association. Conversely, the Board argued that petitioner's evaluations exhibited sufficient reason for her nonrenewal and, further, that the principal's recommendation not to reemploy her was grounded on reasons other than classroom performance. (Board's Memorandum of Law, at pp. 2-3)

The principal's memorandum to the Superintendent dated March 26, 1974, sets forth in explicit detail his reasons for not recommending that petitioner be reemployed. (R-2) In the hearing examiner's judgment, it is unnecessary to reproduce that document here; however, suffice it to say that the memorandum reviews petitioner's inadequacies as observed by the principal, states certain recommendations which were made to help her, and describes several steps which were taken by her supervisors to assist her.

Petitioner could not sustain the burden of showing that this document or the principal's testimony were false or inaccurate; nor could it be shown that the Board violated any of the statutory provisions regarding notification to petitioner that she would not be reemployed. Petitioner's assertion that the Board did not decide not to reemploy her prior to April 30, 1974, pursuant to

statute, is not supported by the facts. The Board reconsidered its earlier determination after granting petitioner's request for a hearing concerning the reasons that she would not be reemployed, and thereafter, she was notified on June 24, 1974, that it would not change its original decision not to reemploy her. (J-8) In the hearing examiner's judgment, such a hearing does not render the Board's earlier determination ineffective since, in most instances, all hearings (which are now required when requested) would occur after April 30 in each academic year. *Donaldson v. Board of Education of the City of North Wildwood, Cape May County,* 65 *N.J.* 236 (1974) Moreover, this matter preceded the *Donaldson* opinion; nevertheless, the Board provided the requested hearing and reasons. In *Nicholas P. Karamessinis v. Board of Education of the City of Wildwood, Cape May County,* 1973 *S.L.D.* 351, aff'd State Board of Education 360, aff'd Docket No. A-14037-73 New Jersey Superior Court, Appellate Division, March 24, 1975, the Court commented as follows:

> "***In our view the rule articulated by the Court in *Donaldson* was not intended to be retroactive but was for future application. In *Donaldson* the Court stated that, while many boards by collective agreements have already agreed to furnish reasons, 'those which have not will, under this opinion, hereafter be obliged to do so.' 65 *N.J.* at 248. At no point did the Court indicate that its ruling would be applied retroactively to those teachers who in years past had not been provided with reasons for their non-retention.
>
> "Nor do we perceive any special circumstances in the present case why the principle enunciated in *Donaldson* should be applied retroactively. Here a significant period of time has elapsed from the Board's action in terminating petitioner's active service. In any event, the Board in this case did inform the petitioner of its dissatisfaction with his performance.*** Thus, even if it were to be held that *Donaldson* should be applied retroactively, there was substantial compliance with that requirement.***"

The matter herein is similar. Petitioner was given reasons for her non-reemployment and the Board has exercised its discretionary authority not to reemploy her.

In *George A. Ruch v. Board of Education of the Greater Egg Harbor Regional High School District, Atlantic County,* 1968 *S.L.D.* 7, dismissed State Board of Education 11, aff'd New Jersey Superior Court (*App. Div.*) 1969 *S.L.D.* 202, it was held, *inter alia,* that:

> "***Respondent took no action with respect to petitioner's third contract nor was any called for. It simply fulfilled its obligations under the contract and took no action to continue the relationship. The Commissioner knows of no statute or rule which requires a board of education to take some formal action with regard to the non-renewal of a probationary contract which has expired. The employment of teachers who have not achieved tenure status in the district is a matter lying wholly within the

discretionary authority of the board. *N.J.S.* 18A:11-1c, 18A:16-1, 18A:27-4 See also *Zimmerman v. Board of Education of Newark,* 38 *N.J.* 65 (1962). Respondent was under no obligation to renew its agreement with petitioner, and in failing to take any action with respect to his reemployment it did no more than exercise the discretionary powers accorded it by statute.

"A board of education's discretionary authority is not unlimited, however, and it may not act in ways which are arbitrary, unreasonable, capricious or otherwise improper. *Cullum v. North Bergen Board of Education,* 15 *N.J.* 285 (1954)***." (at pp. 8-9)

In summary, the hearing examiner finds that the Board acted pursuant to its statutory and discretionary authority in determining that it would not reemploy petitioner for the 1974-75 academic year. There has been no showing that its actions were unreasonable, arbitrary, capricious, or improper. The hearing examiner recommends, therefore, that the Petition of Appeal be dismissed in its entirety.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has read the report of the hearing examiner and the exceptions filed thereto by petitioner pursuant to *N.J.A.C.* 6:24-1.16.

Petitioner advanced several objections which will be discussed by the Commissioner where appropriate in considering the report, findings, and recommendations of the hearing examiner.

A review of the record in this matter leads the Commissioner to the conclusion that each of the exceptions is without merit or basis in fact. Further, petitioner is attempting to place the Board in a position to prove its reasons. This contention is misplaced. The Legislature has determined that the termination of tenure teachers has the concomitant requirement that the board of education certifying the charges to the Commissioner sustain the burden of proof of those charges. *N.J.S.A.* 18A:28-5; *N.J.S.A.* 18A:6-10 *et seq; In re Fulcomer,* 93 *N.J. Super.* 404 (*App. Div.* 1967) There is no legislative requirement or court ruling that a board of education must successfully defend its reasons for the nonrenewal of a nontenured teacher's contract. The Court opinion in *Donaldson, supra,* is pertinent in this regard. In *Donaldson,* the Court stated that a board's determination not to grant tenure may be based on a teacher's classroom or professional performance, or other equally valid reasons. See also *Association of New Jersey State College Faculties v. Dunga,* 64 *N.J.* 338, 351-352 (1974); *cf. Cammarata v. Essex County Park Commission,* 26 *N.J.* 404, 412. (1958). The Court went on to suggest that an informal appearance before the board should ordinarily be granted. The Commissioner stated in *Barbara Hicks v. Board of Education of the Township of Pemberton, Burlington County,* 1975 *S.L.D.* 332 that the statement of reasons is essentially for the

benefit of the teaching staff member. See also *Donaldson* at 245. *Donaldson* also reviewed the Commissioner's decision in *Ruch v. Board of Education of the Greater Egg Harbor Regional High School District, supra,* in which the Court commented that the Commissioner established, therein, procedural principles which protect teachers' legitimate interests without impairing a board's discretionary authority. That part of the Court opinion in *Donaldson* which addressed *Ruch* is reproduced here in part as follows:

> "******The Commissioner first noted that the Board's discretionary authority was not unlimited and that its action could be set aside if it was 'arbitrary, unreasonable, capricious or otherwise improper.'* He then pointed out that the Board could not resort to 'statutorily proscribed discriminatory practices, *i.e.,* race, religion, color, etc., in hiring or dismissing staff' *nor could it adopt employment practices 'based on frivolous, capricious, or arbitrary considerations which have no relationship to the purpose to be served.'* 1968 *S.L.D.* at 10. *He held that, procedurally, the burden of sustaining the appeal was on the teacher and that the teacher's 'bare allegation' of arbitrariness was 'insufficient to establish grounds for action.' He declined to enter into a reevaluation of the teacher's classroom performance and teaching competence, pointing out that the matter involved the supervisor's professional judgment which was highly subjective and which was not charged to have been made in bad faith.**** Finding no affirmative showing of 'unlawful, arbitrary or capricious motivation' and finding no requirement for a plenary hearing before the Board, the Commissioner dismissed the petition; his action was sustained by the State Board of Education and further review was not pursued.***"
>
> (*Emphasis supplied.*) (65 *N.J.* at 247-248)

In the instant matter reasons were not required to be given by the Board because the actions of the Board in this matter preceded the *Donaldson* decision. Nevertheless, the Board gave petitioner "reasons" (J-8) which she now holds to be invalid.

Petitioner's attack of the Board's reasons is futile absent a showing that the reasons are improper, arbitrary, unreasonable or capricious. Petitioner has not sustained her burden of proof that such is the case. *Donaldson, supra*

The record adequately reflects that the principal was concerned about petitioner's emotional instability in the school and the fact that she could not control her pupils. (Tr. II-40, 45) Petitioner admitted that she cried once in front of her class; she admitted further that on another occasion she tried to find another teacher to cover her class so she "could go downstairs *** and just let go." (Tr. II-19-21) She testified that she cried after school in a meeting with the principal when discussing a vice-principal's evaluation which was critical of her performance and that she raised her voice during the meeting. (Tr. I-14)

In view of these admissions by petitioner, which support rather than undermine the testimony of the principal, the record adequately shows that the

subjective professional judgment of her principal is supported by the factual finding of the hearing examiner. The Commissioner concludes that the principal's testimony supports the reason for his recommendation to the Board that petitioner not be reemployed.

Nor does the Commissioner draw a distinction, as petitioner implies, between the Board's reason (J-8, *ante*) and the principal's testimony and the evidence. (Tr. II-40; R-2) There is also no showing that this matter has not been given a full and fair review by the hearing examiner in light of the testimony, the evidence and the prior opinions by the Commissioner and the Courts.

The Commissioner determines finally that it is not necessary nor would it be proper to examine the evaluations of the school administrators to ascertain whether or not they provide adequate reason for petitioner's nonrenewal. *Donaldson, supra; Sallie Gorny v. Board of Education of the City of Northfield et al.,* 1975 *S.L.D.* 669 Nor does the Commissioner find that the Board has violated any of petitioner's rights to procedural due process. *Ruch, supra*

In the instant matter there is no showing that the Board acted other than as provided by statute. The Board's notice of termination was given prior to the statutory deadline of April 30 as required by *N.J.S.A.* 18A:27-10. The Board was clothed with statutory authority to terminate petitioner's services and there is no showing that its action was taken for proscribed reasons.

The Commissioner has at various times reviewed such actions of local boards of education and in certain instances, finding that the protected rights of teaching personnel were violated, has set aside the actions of boards wherein they violated those protected rights of nontenured employees or otherwise abused their discretionary powers. *Elizabeth Rockenstein v. Board of Education of the Township of Jamesburg, Middlesex County,* 1974 *S.L.D.* 260 and 1975 *S.L.D.* 191, affirmed State Board of Education 199; *North Bergen Federal of Teachers, Local 1060 American Federation of Teachers, AFL-CIO and Beth Ann Prudente v. Board of Education of the Township of North Bergen, Hudson County,* 1975 *S.L.D.* 461 At other times the Commissioner has upheld the actions of boards of education when no abuse of discretion was found.

It was stated by the Commissioner in *John J. Kane v. Board of Education of the City of Hoboken, Hudson County,* 1975 *S.L.D.* 12:

> "***[T]he Commissioner will not substitute his judgment for that of a local board when it acts within the parameters of its authority. The Commissioner will, however, set aside an action taken by a board of education when it is affirmatively shown that the action was arbitrary, capricious, or unreasonable. See *Eric Beckhusen et al. v. Board of Education of the City of Rahway et al., Union County,* 1973 *S.L.D.* 167; *James Mosselle v. Board of Education of the City of Newark, Essex County,* 1973 *S.L.D.* 176; *Luther McLean v. Board of Education of the Borough of Glen Ridge et al., Essex County,* 1973 *S.L.D.* 217, affirmed State Board of Education March 6, 1974.***" (at p. 16)

See also *Sally Klig v. Board of Education of the Borough of Palisades Park, Bergen County*, 1975 *S.L.D.* 168.

The instant matter bears strong resemblance to *Ruch, supra,* in that petitioner takes exception to the validity of her supervisory evaluations. A review of the testimony given by the principal discloses his serious concern and dissatisfaction relative to petitioner's classroom and non-classroom performance.

The Board acted in full compliance with the spirit of the Court's decision in *Donaldson, supra.* This has long been the practice of numerous boards of education and will hereafter be required for all in New Jersey. *Donaldson, supra* Petitioner has established no cause for action on which relief can be granted. *Ocean Cape Hotel Corporation v. Masefield Corporation,* 63 *N.J. Super.* 369 (*App. Div.* 1960)

For the reasons previously stated, the report of the hearing examiner is affirmed by the Commissioner and the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

March 16, 1976

Board of Education of the Borough of South Plainfield,

Petitioner,

v.

Mayor and Council of the Borough of South Plainfield, Middlesex County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Wilentz, Goldman & Spitzer (Robert J. Cirafesi, Esq., of Counsel)

For the Respondent, Abrams, Dalto, Gran, Hendricks & Reina (Angelo H. Dalto, Esq., of Counsel)

Petitioner, the Board of Education of the Borough of South Plainfield, Middlesex County, hereinafter "Board," appeals from an action of the Mayor and Council of the Borough of South Plainfield, hereinafter "Council," taken pursuant to *N.J.S.A.* 18A:22-37 certifying to the Middlesex County Board of Taxation a lesser amount of appropriations for school purposes for the 1975-76 school year than the amount proposed by the Board in its budget which was rejected by the voters. The facts of the matter were adduced at a hearing

conducted on August 28, 1975 at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner of Education. Thereafter, the parties filed letter briefs in support of their respective positions. The report of the hearing examiner is as follows:

At the annual school election conducted on March 11, 1975, the Board submitted to the electorate a proposal to raise $6,746,864 by local taxation for current expense costs of the school district. This item was rejected by the voters and subsequently, the Board submitted its budget to Council for its determination of the amount necessary for the operation of a thorough and efficient school system in the Borough of South Plainfield in the 1975-76 school year, pursuant to the mandatory obligation imposed on Council by *N.J.S.A.* 18A:22-37.

After consultation with the Board, Council made its determination and certified to the Middlesex County Board of Taxation an amount of $6,566,764 for current expense, a reduction of $180,100 from the amount the Board had originally proposed to the voters.

The Board contends that Council's action was arbitrary, capricious and unreasonable and documents its need for the restoration of the reductions recommended by Council with written testimony and a further oral exposition at the time of hearing. Council maintains that it acted properly and after due deliberation, and that the items reduced by its action are only those which are not necessary for a thorough and efficient educational system. Council also documents its position with written and oral testimony.

The hearing examiner reports that the parties object to certain testimony allowed to be entered in the record by the hearing examiner.

Firstly, Council objects to the relevancy of testimony elicited by the Board with respect to a comparison of State aid the Board had anticipated during its budget preparation and the amount of State aid it actually received. (Tr. 13-18) The hearing examiner reasons that a proper and judicious determination of the instant matter demands that such information be considered by the Commissioner in the perspective of "***total revenues available to meet the demands of a school system.***" *Board of Education of the Township of Madison v. Mayor and Council of the Township of Madison, Middlesex County,* 1968 *S.L.D.* 139, 142 The Board was advised by the Department of Education that it might anticipate State aid in the amount of $1,027,000. That amount was reflected in the Board's original proposal (C-5) which was defeated by the voters. It is common knowledge that the Legislature approved a limited number of revenue producing measures which resulted in a lower amount of State aid available for distribution to each school district. Consequently, while the Board anticipated $1,027,000 in State aid for 1975-76, it actually received $889,239, or $137,761 less.

Secondly, each of the parties objected to an alleged failure of the other party to produce the actual authors of certain written testimony advanced in

support of the opposing positions. (Council's objections -- Tr. 51-54; Board's objections -- Tr. 69) Specifically, Council objects to the failure of the Board to present certain principals and teachers who filed reports which are made part of the Board's written documentation. (C-3) The Board objects to the failure of Council to present the Borough Clerk whose affidavit (C-4) is made part of Council's written documentation. The hearing examiner observes that the written documentation submitted by the parties represents their official positions in the instant matter. The Board had present for examination its Superintendent, Assistant Superintendent and Board Secretary, any one of whom could have been examined by Council in regard to its written documentation. Conversely, Council had the Mayor present who could have been examined on Council's official position as expressed in the Borough Clerk's affidavit. (C-4)

Next, the hearing examiner observes that the audit report of the Board's accounts for 1974-75 shows an unappropriated current expense balance of $667,889 as of June 30, 1975. The Board applied $400,000 of that amount to its 1975-76 budget leaving a net unappropriated current expense balance of $267,889.

Of the total $180,100 reduction imposed by Council, the Board, in its written documentation (C-3), had agreed to reductions in the amount of $50,327. The Board argues that it originally agreed to that amount of reduced expenditure upon its belief that it would actually receive the amount of State aid it originally anticipated. Since it received $137,761 less, it avers it can no longer accept the $50,327 reduction to which it originally agreed. (Tr. 6) The hearing examiner observes that the unappropriated current expense balance of $267,889 is $83,373 more than what was anticipated by the Board Secretary. (Tr. 32) Consequently, the hearing examiner concludes that the amount of $50,328 originally agreed to by the Board may be absorbed by the unappropriated current expense balance it had not anticipated. The reduction to be considered herein will therefore be $180,100, less the $50,328, or the amount of $129,772.

Finally, prior to a recitation of the specific economies recommended, the hearing examiner observes that Council certified $6,566,764 for current expense purposes. This amount is $180,100 less than the amount of $6,746,864 proposed by the Board. The specific reductions imposed by Council total $182,100. The actual reduction to be considered here is the amount of $180,100, less the $50,328.

The specific items recommended for reduction by Council are as follows: (C-2)

Account Number	Item	Council's Reduction	Reduction Agreed to By Board	Amount In Dispute
CURRENT EXPENSE:				
	Supplies[1]	$ 66,500	$ 6,566	$ 59,934
J213	Sals. Tchrs.	34,000	– 0 –	34,000
J250	Oth. Exp. – Instr.	6,000	– 0 –	6,000
J520	Contr. Servs.	1,600	1,600	– 0 –
J620	Oper. of Plnt.	10,000	2,712	7,288
J640	Utilities	12,000	– 0 –	12,000
J720	Maint. of Plnt.	42,000	29,450	12,550
	Anticipation of Rev.[2]	10,000	10,000	– 0 –
	TOTALS	$182,100[3]	$50,328	$131,772[4]

[1] Council recommends 84 specific reductions, ranging from a $100 reduction to a $10,000 reduction, in instructional and general supplies in each of the Board's seven schools and central administrative expense. The list is too lengthy to reproduce here. Accordingly, the total reduction shall be considered as a whole.

[2] Council demands that the Board anticipate $10,000 in revenue from its athletic contests. The Board agrees.

[3] Includes the excess reduction of $2,000.

[4] Includes the excess reduction of $2,000 not in dispute. The accurate figure is $129,772.

Instructional/General Supplies *Reduction $59,934*

The Board argues in its written documentation (C-3) that the amount in dispute is essential for it to operate its schools this year. Council argues (C-4) that its specific reductions were arrived at by comparing the same costs to last year, and after consideration of the Board's explanation for the proposed increase of the appropriation, it reduced the item by twenty percent. (C-4, at p. 3)

The hearing examiner has reviewed the written documentation (C-3) of the Board and finds that certain items requested such as band uniforms, awards, certain travel expense, new textbooks are desirable but may not be deemed essential for the conduct of a thorough and efficient school program. Consequently, taken as a whole the hearing examiner recommends that of the $59,934 reduction in these eighty-four specific program areas, the amount of $30,000 be restored to the Board and that a reduction of $29,934 be sustained.

Council reduced the proposed salary of a curriculum coordinator by $4,000, reduced the Board's proposed amount for substitute teachers by $10,000 and eliminated $20,000 which the Board planned to use to replace two teaching staff members who retired.

The Superintendent testified that the position of curriculum coordinator for kindergarten through grade six had been combined with the position of principal, but that such approach to curriculum development had not proved effective. Consequently, the Board determined to hire a curriculum coordinator for 1975-76 thereby taking that daily responsibility away from the principal. (Tr. 76-77) The hearing examiner observes that the $4,000 in dispute is the result of Council's assertion that the Board should employ a coordinator for $20,000 per annum instead of $24,000, as the Board proposed.

In the hearing examiner's view there is unanimity with respect to the need for the position. The disagreement is on the issue of salary which is wholly the responsibility of the Board. *N.J.S.A.* 18A:27-4; *N.J.S.A.* 18A:29-9 Consequently, the hearing examiner recommends that the $4,000 be restored.

Council reduced the Board's proposed appropriation of $60,000 for substitute teachers to $50,000 on the basis of comparative expenditures during prior years. (C-2; C-4) The hearing examiner observes from the Board's audit report for 1974-75 that it expended a total amount of $65,598 for substitute teachers. Its $60,000 appropriation for 1975-76 appears to be necessary for the Board to conduct its schools. Consequently, the hearing examiner recommends the restoration of $10,000.

Lastly, Council reduced this line item by $20,000 with respect to proposed salaries for replacement of two teachers who retired. Council argues that the total pupil enrollment has been declining but the total number of certificated personnel in the Board's employ has remained constant. The Superintendent testified that the enrollment decline between June 30, 1974, and that projected for June 30, 1975, is 326 pupils. (Tr. 55) The total number of certificated staff increased from 332.7 in the same period. (Tr. 55) The Superintendent explained that, notwithstanding the pupil enrollment decline, the teaching staff remained constant to continue the policy of the Board of a relatively low teacher-pupil ratio. (Tr. 56)

While the hearing examiner agrees with the philosophy of a low pupil-teacher ratio, he finds that in the matter herein the Board failed to establish the necessity for this $20,000 and recommends that this reduction be sustained.

In summary, the hearing examiner recommends that of the total reduction of $34,000 in this line item $14,000 be restored and the $20,000 reduction be sustained.

J250 Other Expenses,Instruction *Reduction $6,000*

The Board proposed $24,000 for in-service programs for its professional staff from which Council eliminated $4,000. The Board also proposed $8,000 for travel to conferences which Council reduced by $2,000. (C-2; C-4) The Board argues in its written documentation that the total sum for in-service programs is necessary to train its staff in the thorough and efficient requirements and that the reductions, if allowed to remain, would curtail its program. (C-3)

The hearing examiner finds the Board failed to establish its necessity for restoration of this reduction and recommends that the $6,000 reduction deemed appropriate by Council be sustained.

J620 Contracted Services, Operation of Plant *Reduction $7,288*

The Board, in its written documentation (C-3), estimates its actual cost for 1975-76 for janitorial services to be $92,888 and it appropriated $95,000. Council reduced the Board's appropriation by $7,288 and thereby limited the increase in this line item to 10.4 percent over the previous year's expenditure. (C-2)

The hearing examiner finds that the Board established the necessity for these moneys and recommends that the reduction of $7,288 be restored.

J640 Utilities *Reduction $12,000*

The Board proposed an amount of $45,000 for telephone expense, while Council reduced that amount by $12,000. Council asserts that its reduction reflects the amount of money that the Board will receive from Council for telephone service the Board provides the Borough. (C-2) The Board argues that it did anticipate the $12,000 it will receive from Council for telephone services rendered; however, it seeks the restoration of the reduction imposed upon it because of anticipated increased telephone costs. (C-3)

The hearing examiner finds that the Board has established the necessity for restoration of the reductions deemed appropriate by Council and recommends a restoration of $12,000 to this line item.

J720 Maintenance of Plant *Reduction $12,550*

Council's reduction in this line item is predicated upon its belief that the Board could secure a heating, ventilation and air conditioning maintenance agreement for a lesser amount. Also, Council determined that the Board should be able to complete the painting of hallways, lockers and rooms at a lower figure. (C-2)

The hearing examiner has reviewed the written documentation (C-3) of the Board with respect to this line item, including its preventive maintenance contract entered into with the Joyce Contracting Company and its documentation in regard to the estimate received for painting.

The hearing examiner finds that the Board has established the necessity for restoration of $12,550 in this line item.

In summary, the hearing examiner's recommendations with respect to the disputed items are as follows:

Account Number	Item	Amount in Dispute	Amount Restored	Amount Not Restored
CURRENT EXPENSE:				
	Supplies	$ 59,934	$30,000	$29,934
J213	Sals. Tchrs.	34,000	14,000	20,000
J250	Othr. Exp. Instr.	6,000	– 0 –	6,000
J520	Contr. Servs.	– 0 –	– 0 –	– 0 –
J620	Oper. of Plnt.	7,288	7,288	– 0 –
J640	Utilities	12,000	12,000	– 0 –
J720	Maint. of Plnt.	12,550	12,550	– 0 –
		$131,772		
	TOTALS	($129,772)	$75,838	$55,934

Accordingly, the hearing examiner recommends that of the actual $129,772 in dispute, $75,838 be restored to the Board.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and the exceptions thereto filed by Council. Such exceptions relate specifically to four line items and, the Commissioner determines, are valid with respect to that portion of line item J213 applicable to the salary of a curriculum coordinator. Council does not dispute the necessity for the position but reiterates a prior avowal that a delayed appointment to the position would result in a smaller expenditure than that proposed by the Board. The Commissioner concurs and determines that the $4,000 reduction deemed appropriate by Council for this position should be allowed to stand.

In all other respects the Commissioner concurs with the report of the hearing examiner.

Accordingly, the Commissioner directs the Middlesex County Board of Taxation to add the sum of $71,838 to the sum previously certified by Council for the support of a thorough and efficient system of education in the Borough of South Plainfield in the 1975-76 academic year.

COMMISSIONER OF EDUCATION

March 16, 1976

Board of Education of the Borough of Oradell,

Petitioner,

v.

Mayor and Council of the Borough of Oradell, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Michael J. Breslin, Jr., Esq.

For the Respondent, Major & Major (James A. Major, Esq., of Counsel)

Petitioner, the Board of Education of the Borough of Oradell, hereinafter "Board," appeals from an action of the Mayor and Council of the Borough of Oradell, hereinafter "Council," taken pursuant to *N.J.S.A.* 18A:22-37 certifying to the Bergen County Board of Taxation a lesser amount of appropriations for school purposes for the 1975-76 school year than the amount proposed by the Board in its budget which was rejected by the voters. The facts of the matter were adduced at a hearing conducted on October 15, 1975 at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner of Education. Thereafter, the parties filed letter memoranda of law in support of their respective positions. The report of the hearing examiner is as follows:

At the annual school election held March 11, 1975, the Board submitted proposals to the electorate to raise $1,068,852 by local taxation for current expense and $14,500 for capital outlay costs of the school district. These items were rejected by the voters and, subsequently, the Board submitted its budget to Council for its determination of the amounts necessary for the operation of a thorough and efficient school system in Oradell during the 1975-76 school year, pursuant to the mandatory obligation imposed on Council by *N.J.S.A.* 18A:22-37.

After consultation with the Board, Council made its determinations and certified to the Bergen County Board of Taxation an amount of $1,008,852 for current expense and $3,500 for capital outlay. The amounts in dispute are as follows:

	Current Expense	Capital Outlay
Board's Proposal	$1,068,852	$14,500
Council's Proposal	1,008,852	3,500
Amount Reduced	$ 60,000	$11,000

The Board contends that Council's action was arbitrary, capricious, and unreasonable and documents its need for restoration of the reductions recommended with written testimony and a further oral exposition at the time of hearing. Council in its Answer asserts that it acted properly and after due deliberation and that the items reduced by its action are only those which are not necessary for a thorough and efficient educational system. As part of its determination, Council suggested specific line items of the budget in which it believed economies could be effected as follows:

Account Number	Item	Board's Proposal	Council's Proposal	Reduction
CURRENT EXPENSE:				
J120B	Legal Fees	$ 4,000	$ 1,000	$ 3,000
J213	Sal., Tchrs.	759,130	712,130	47,000
*J610A	Sal., Cust. Servs.	43,500		
*J710B	Sal., Plnt. Maint.	15,000		
*J720A	Contr. Servs. Upkp. Grds.	650		
*J720B	Bldg. Repair Maint.	8,000		
*J720C	Equipment Repair	1,700		
*J740A	Oth. Exps. Upkp. Grds.	500		
*J740B	Bldg. Repair	3,100		
*J740C	Equip. Repair	500	**62,950	*10,000
	TOTALS	$836,080	$776,080	$60,000
CAPITAL OUTLAY:				
L1230C	Remodeling	$ 14,500	$ 3,500	$11,000

*Council, in its written answer, imposed a reduction of $10,000 spread among line items J610A through J740C, as grouped above.

**The total amount proposed by the Board in these line items is $72,950. Consequently, Council recommends an expenditure not to exceed $62,950.

The hearing examiner proposes to discuss the position of the respective parties in regard to each of Council's recommended economies as set forth above. Council's underlying reasons for its determinations to reduce specific expenditures are set forth in its Answer. (R-1)

J120B Legal Fees *Reduction $3,000*

Council urges a reduction of $3,000 from the Board's proposed estimated expenditure of $4,000 for legal fees. (R-1, at p. 2) The hearing examiner observes that while the Board has budgeted only $250 for legal fees for 1974-75, its actual expenditure was $2,927. (P-3, at p. 3, 8-9) The Board explains that it is presently involved in litigation with its Teachers Association, in addition to having a matter pending before the Appellate Division of Superior Court, as well as the matter *sub judice.*

The hearing examiner finds that the Board has realistically estimated its expenditures for legal fees at $4,000 for 1975-76. Thus, the hearing examiner finds that the Board established the necessity for the moneys reduced by Council in this line item and recommends restoration of $3,000.

J213 Salaries, Teachers *Reduction $47,000*

Prior to a discussion of the respective positions of the parties in regard to this reduction, the hearing examiner observes that in its written documentation (P-3, at p. 3) the Board asserts that its total proposal for this line item for 1975-76 is $766,830. In other written documentation, the Board asserts its total proposal for this line item is $759,130. (P-1, at p.2; P-2, at p. 1) Because the Board included the lower amount in its line item budget (P-1) and its explanation (P-2) of that budget, the hearing examiner concludes that the lower amount is correct.

Council, according to testimony adduced (Tr. 45-47), relies on a statement allegedly made by the President of the Board at a discussion between the parties subsequent to the defeat of the Board's proposed budget by the voters. The Board President was alleged to have stated that he was hopeful that the then pending salary negotiations between the Board and the Oradell Teachers Association could be settled at a two percent increase, plus increments, for 1975-76. The Board President also allegedly stated that a six percent increase was built into the J213 line item. Consequently, Council combined the salaries of the Board's classroom teachers, supplemental teachers, school librarian and school psychologist. The total amount approximated $800,000 from which Council extracted four percent, or $32,000. (Tr. 46) (R-1, at p. 2) The remaining $15,000 reduction in this line item, Council asserts, can be realized by a reduction of teaching staff members. (R-1, at p. 2)

The hearing examiner believes that the critical issue with respect to this portion of the $47,000 reduction in this line item cannot be anchored upon the Board's agreement to a two percent, as opposed to a six percent, increase in salaries. The difference between the two amounts, when compared to the total current expense budget of more than $1.2 million, is relatively small. A review of the Board's 1974-75 annual audit shows an unappropriated current expense balance on June 30, 1975 of $34,680 which is quite modest. In the context of total moneys available to the Board, the hearing examiner recommends that the $32,000 reduction by Council be restored.

In regard to Council's demand that the Board reduce its teaching staff, the Board President testified that it already has reduced nine and one-half teaching staff positions between 1972 and 1975. (Tr. 17) He asserts that the Board, in light of its enrollment, cannot make further staff reductions. The hearing examiner finds that the Board proved the necessity for the restoration of the $15,000 reduction recommended by Council.

In summary, the hearing examiner recommends that $47,000 in this line item be restored.

The hearing examiner proposes to address the remaining current expense reduction of $10,000 as recommended by Council to be spread over the eight line items, *ante*. The Board asserts that it requires $43,500 for janitorial staff salaries, as proposed in line item J610A, which staff it has employed for eleven years. While enrollment has decreased, the Board asserts that the buildings have not diminished in size and still require regular maintenance. (P-3, at p. 4) Council avers that because of decreasing enrollments, the Board should decrease its janitorial staff. (Tr. 49)

The Board asserts that the amount of $15,000 in line item J710B is necessary for the salary of its superintendent of buildings and grounds; $650 proposed in J720A is for tree spraying and painting of the flagpole; and the amount of $8,000 proposed in J720B is for resurfacing of chalkboards, inspection of the fire detection system, other repairs, and window washing. (P-3, at p. 4) The Board has proved the necessity for the $1,700 proposed in J720C for equipment repair, as well as the $500 in J740A for the minimal upkeep of grounds. (P-3, at pp. 5-6) The Board contends that the $3,100 in J740B is essential for the cost of materials for the repair of school buildings and that the amount of $500 in J740C is essential for supplies to repair equipment.

The hearing examiner finds that the Board has proved the necessity for its proposals in each of the eight referenced line items and recommends the restoration of $10,000.

L1230C Remodeling *Reduction $11,000*

The Board argues that it requires the total proposed amount of $14,500 to replace its intercom system at a cost of $11,000 and to replace corridor lighting at a cost of $3,500.

The hearing examiner, while acknowledging that an intercom system is desirable, finds that such a system is not essential for the operation of a school. Adequate corridor lighting, however, is obviously essential.

Accordingly, the hearing examiner recommends that the capital outlay reduction of $11,000 be sustained.

In summary, the hearing examiner's recommendations with respect to the recommended economies proposed by Council are as follows:

Account Number	Item	Amount of Reduction	Amount Restored	Amount Not Restored
CURRENT EXPENSE:				
J120B	Legal Fees	$ 3,000	$ 3,000	– 0 –
J213	Sal., Tchrs.	47,000	47,000	– 0 –
J610A	Sal., Cust. Servs.	–	–	–
J710B	Sal., Plnt. Maint.	–	–	–
J720A	Contr. Servs. Upkp. Grds.	–	–	–
J720B	Bldg. Repair	–	–	–
J720C	Equip. Repair	–	–	–
J740A	Oth. Exps. Upkp. Grds.	–	–	–
J740B	Bldg. Repair	–	–	–
J740C	Equip. Repair	*10,000	*10,000	– 0 –
	TOTALS	$60,000	$60,000	– 0 –
CAPITAL OUTLAY:				
L1230C	Remodeling	$11,000	– 0 –	$11,000

*$10,000 allocation refers to line items J610A through J740C

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and observes that no objections thereto have been filed by the parties. The Commissioner fully concurs with the report.

Accordingly, the Commissioner directs the Bergen County Board of Taxation to add the sum of $60,000 to the sum previously certified by Council for the support of a thorough and efficient school system in the Borough of Oradell in the 1975-76 academic year.

COMMISSIONER OF EDUCATION

March 16, 1976

William Orr and Harriet Orr,

Petitioners,

v.

Board of Education of Caldwell-West Caldwell, Essex County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Siegmar Silber, Esq.

For the Respondent, Stickel, Kain & Stickel (Harold M. Kain, Esq., of Counsel)

Petitioners, foster parents of C.R., aver that the Board of Education of the Borough of Caldwell-West Caldwell, hereinafter "Board," incorrectly classified C.R. during the 1972-73 academic year and that as a result of such classification and an inappropriate educational placement they were forced, in the interests of C.R., to provide an alternative educational program at their own expense in a private school during the 1973-74 academic year. They specifically request the Commissioner of Education to reimburse them for this expense totaling $10,350 and to consider the issuance of an order dissolving the West Essex Area School, Special Services, hereinafter "Cooperative," which, petitioners allege, improperly participated in an evaluation of the school facilities and program of which they now complain. The Board maintains that petitioners, as foster parents of C.R., have no legal standing to institute this proceeding before the Commissioner. Additionally, the Board advances five other defenses in support of its request that the Petition of Appeal be dismissed.

The Petition of Appeal in this matter was filed on May 16, 1975, and the Answer of the Board was forwarded to the Commissioner on June 20, 1975. Thereafter, a conference of counsel was held on July 29, 1975, and it was agreed that the first issue for determination was one concerned with the matter of petitioners' standing as foster parents to advance the Petition for adjudication by the Commissioner. Briefs pertinent to this issue were filed during the last week of September. Certain pertinent facts set forth in the pleadings and/or in the Briefs are not in dispute.

C.R. was born on October 28, 1966, and on June 20, 1967, was placed by the Bureau of Children's Services, hereinafter "State Agency," in the foster home of petitioners where she still resides. At the time of such placement and to the present day, however, C.R., a learning disabled child, was and is a legal ward of the State of New Jersey although for eight of these past nine years she has resided with petitioners as her foster parents. Petitioners do not contest such facts but raise, instead, a series of questions concerned with the "***rights, duties, and privileges of long-term care foster parents.***" (Brief of Petitioners, at p. 2) For discussion purposes these questions are set forth as follows:

> "When the State [Agency] cannot fulfill its obligations [to the child for whom it is legally responsible], does an implied contract arise whereby the foster parents become its agents?
>
> "When long-term care foster parents participate in the educational process do they become parent surrogates?
>
> "When long-term care foster parents provide care exceeding the minimal child-care program designed by the [State] Agency, are the said foster parents exceeding their apparent authority or is it their duty to provide care that is as comprehensive as possible?
>
> "When long-term care foster parents cannot obtain action from the [State] Agency to proceed against another State organization responsible for the education of all the children in the State, are the foster parents a sufficiently interested party to bring an action on behalf of the child?
>
> "Apart from the child's rights, where the long-term care foster parent has acted to remedy an educational situation, are they interested parties to a sufficient degree that an action can be maintained against the local Board of Education?" (at pp. 2-3)

Petitioners' answers to such questions, and in support of their avowal that they have standing to present the instant Petition of Appeal to the Commissioner, receive elaboration in the five-point presentation of their Brief. This presentation may be concisely summarized.

Petitioners' initial argument is that the State Agency has charged them with the responsibility for the day-to-day supervision of C.R. and that such responsibility, as a practical matter, could not be exercised by the State Agency. They aver that they have been conscientious in the exercise of such responsibility and have "thoroughly supported" the education of C.R. as "***any parent should.***" (Brief of Petitioners, at p. 6) As examples of such support petitioners cite their cooperation with school authorities, their provision for C.R. of non-educational activities, and the "special training" they have had with respect to the behavior pattern of learning disabled children. Accordingly, they argue that they are "parent surrogates" within the commonly accepted meaning of the term and in the context of *N.J.A.C.* 6:28-1.9(b) which provides:

> "The word 'parent' shall hereinafter include parents, guardians, and parent surrogates."

They further aver that until the instant Petition was filed their treatment by local school officials and by county and State divisions concerned with special education had not been different from that afforded parents.

Petitioners' second argument is that the State Agency holds the primary responsibility or "child-care contract" for the well-being of C.R. but that when placement was made in the foster home of petitioners some elements of that

responsibility were distributed. They aver that despite the contracting which surrounds the placement of a child in a foster home the child "***cannot be made the subject of a contract with the same force and effect as if he were a mere chattel*** " (Brief of Petitioners, at p. 8) In support of this view petitioners cite *Commonwealth ex rel. Children's Aid Society v. Gerd,* 362 *Pa.* 85, 92, 66 *A.* 2*d* 300, 304 (1949); *Commonwealth ex rel. Bankert v. Children's Services,* 224 *Pa. Super.* 556, 307 *A.* 2*d* 411 (1973); *Commonwealth ex rel. Berg v. Catholic Bureau,* 167 *Pa. Super.* 514, 76 *A.*2*d* 427 (1950), etc. Accordingly petitioners argue that when the State Agency allegedly failed to act responsibly with respect to the education of C.R., and when they allegedly did so act, the education contract became part of their contract with the State Agency and, in effect, they became subcontractors of the State in this respect.

Petitioners' third argument is that foster children must have an advocate for their entitlement to a thorough and efficient educational program as natural children do and that failure to afford such entitlement causes the existence of an invidious discrimination. They cite an opinion of the Attorney General of the Commonwealth of Pennsylvania in support of an avowal that an actual family relationship, and not a legal fictional one, confers standing on petitioners. This opinion cited by petitioners is set forth as follows:

> "We do not believe that rights growing out of the fundamental family relationship are less significant merely because the parent is a foster parent, rather than a natural parent. A foster parent or a foster child necessarily develops the same feelings of love and loyalty as a natural parent or child, and, indeed, departmental regulations state that a major goal of foster care is to provide 'experiences in family living which are essential to the [child's] constructive growth and development when their own parents are unable to provide this.' § 4302(a). Moreover, when the family relationship is at stake, the Supreme Court has looked to the reality of the emotional bonds, not to formalities. *Levy v. Louisiana,* 391 *U.S.* 68, 71-72 (1968)" (Brief of Petitioners, at p. 12)

Petitioners' last two points may be succinctly stated. They aver that they will be affected by the governmental action with respect to the instant Petition and thus have standing to challenge it. They also aver that the Board's past recognition of them acts now as an estoppel with respect to the Board's claim that they do not have standing to have their Petition considered on its merits before the Commissioner of Education.

The Board cites *N.J.S.A.* 30:4C-1 *et seq.* as authority for its avowal that the State Agency stands *in loco parentis* to C.R. and that a placement of her in a foster home does not, by virtue of that fact, "***grant the control of the child's destiny to the so called foster parent.***" (Board's Brief, at p. 4) Of particular importance in this regard the Board cites the definitions of the statute as follows:

> *N.J.S.A.* 30:4C-2
>
> (a) " 'Division of Youth and Family Services' successor to the 'Bureau of Childrens Services' means the State agency for the care, custody,

guardianship, maintenance and protection of children, as more specifically described by the provisions of this act, and succeeding the agency heretofore variously designated by the laws of this State as the State Board of Child Welfare or the State Board of Children's Guardians.

(c) "The term 'care' means cognizance of a child for the purpose of providing necessary welfare services, or maintenance, or both.

(e) "The term 'guardianship' means control over the person and property of a child as established by the order of a court of competent jurisdiction, and as more specifically defined by the provisions of this act. Guardianship by the Division of Youth and Family Services shall be treated as guardianship by the Commissioner of Institutions and Agencies, exercised on his behalf wholly by and in the name of the Division of Youth and Family Services, acting through the chief executive officer of the division or his authorized representative. Such exercise of guardianship by the division shall be at all times and in all respects subject to the supervision of the commissioner.

(f) "The term 'maintenance' means moneys expended by the Division of Youth and Family Services to procure board, lodging, clothing, medical, dental, and hospital care, or any other similar or specialized commodity or service furnished to, on behalf of, or for a child pursuant to the provisions of this act.

(h) "The term 'foster parent' means any person other than a natural or adoptive parent with whom a child in the care, custody or guardianship of the Division of Youth and Family Services is placed by said division, or with its approval, for temporary or long-term care, but shall not include any persons with whom a child is placed for the purpose of adoption.

(i) "The term 'foster home' means and includes private residences, group homes and institutions wherein any child in the care, custody or guardianship of the Division of Youth and Family Services may be placed by the said division, or with its approval, for temporary or long-term care, and shall include any private residence maintained by persons with whom any such child is placed for adoption.***"

Any other interpretation, the Board avers, would carry the meaning that children placed in foster homes would be subject to the control and guidance of two guardians, the State Agency and the foster parent or parents.

Further, the Board maintains that provisions contained in the rules of the State Board of Education, *N.J.A.C.* 6, indicate that when the State Agency is the guardian of a child, foster parents have no entitlement to be involved in the classification and placement process. In particular the Board cites *N.J.A.C.* 6:28-1.8(b) which provides that:

> "***The identification process may involve the judgment of teach medical and health professionals, school administrators, special servi personnel, parents and/or agencies concerned with the welfare of cl dren.***"

The Board further cites *N.J.A.C.* 6:28-2.2(b) which provides that the St Agency may under certain conditions "***assume the classification respor bility using its own child study team***." The Board also notes, however, tl such rules apply to requests for changes in classification or placement but devoid of reference to the principal relief request by petitioner, namely reimbursement for voluntarily incurred expense.

Finally in the Board's view petitioners are not true foster parents in wl the Board avers is the common law sense of the term and only the State Ager "***is the proper and only litigant that is entitled to institute a proceeding su as this." (Board's Brief, at p. 11)

The Commissioner has reviewed all such arguments and observes that th is no question that legal guardianship of C.R. has been, and is, vested in the St Agency. Petitioners, while not contesting this fact, advance an argument that t *de facto* relationship between them and C.R. is such that in principal respe they and not the State Agency stand *in loco parentis* to C.R. and thus that th do have standing to advance the instant Petition and its prayers for relief.

A Petition with both similarities and differences to the instant Petition w brought before the Commissioner in *St. Joseph's Village for Dependent Childr v. Board of Education of the Borough of Rockleigh, Bergen County,* 19 *S.L.D.* 301, and therein, as here, the Commissioner was required to examine alleged *in loco parentis* relationship which involved the entitlement of childr lodged in an institution, by a legally constituted charitable organization, tc free, public education. The Commissioner found that there was such entitlement in that instance and he grounded his opinion on the followi statement:

> "***Whether or not complete and permanent guardianship of each ch has been delegated to the operators of the Village or its parent agency by competent court, begs the question. Certainly the administrator and oth members of the Village staff stand *in loco parentis* to the childr committed to their care. There can be no doubt that an authorized leg relationship does exist for the time during which the institution h custody. Such relationship is sufficient, in the Commissioner's judgmer to come within the ambit of the [free education] statutes." (at p. 307

The Commissioner's determination in that matter was, however, one of limit scope, concerned with an entitlement to attend public school and not, as in tl matter herein with an avowal that foster parents who are not truly leg guardians have standing to advance a Petition which requests reimbursement f tuition costs they voluntarily incurred for the education of a child in a priva institution. Such costs should only be incurred, in the Commissioner's judgmer

with advance approval and at the request of the State Agency, the child's legal guardian. When, as herein, such request was not made or approval given, the Commissioner holds there is no legal standing to advance a Petition which requests a reimbursement of expenditures voluntarily incurred.

Thus, in summary, the Commissioner has held, and holds, that persons acting as foster parents have, by virtue of their *de facto* supervisory responsibility, an entitlement to enroll a foster child in a public school and to meet with school authorities on some of the routine matters which involve the child's welfare and well-being but that such entitlement is not without limit. He further holds that in matters which involve the child in a major departure from the routine (*i.e.* major hospitalization, placement in another home or institution, enrollment in a private rather than public school) it is the legal guardian alone who has clear authority to act on behalf of the child and that there is no other standing which may be recognized.

Accordingly absent a joinder by the State Agency to the instant Petition, the Petition is dismissed.

COMMISSIONER OF EDUCATION

March 19, 1976

Wall Township Education Association on behalf of Athan P. Anest, Harry W. Baldwin, John Carras, John R. Convery, Francis W. Groff, Dave Harris, Martin Herman, George Hooker, John M. Hanusek, Robert Livingston, William J. Meier, Powers McLean, Harry C. Madsen, Robert R. Smith, Leonard M. Sarr, Don Tober, Richard Van Duyn, Gerald J. Harry Whittley and George Williams,

Petitioners,

v.

Board of Education of the Township of Wall, Monmouth County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Morgan & Falvo (Peter S. Falvo, Jr., Esq., of Counsel)

For the Respondent, Mirne, Nowels, Tumen, Magee & Kirschner (William C. Nowels, Esq., of Counsel)

Petitioner, Wall Township Education Association *et al.*, hereinafter "Association," is an Association recognized by the Board of Education of the Township of Wall, hereinafter "Board." The Association requests relief from the

Board's policy of denying application of previously recognized military crec towards longevity credits. The Board denies that such entitlement exists.

This case is jointly submitted for Summary Judgment to the Commission of Education on the pleadings, stipulation of facts and Briefs. Such submissic emerged from a conference of counsel held in the office of the Assista Commissioner in charge of Controversies and Disputes on March 20, 1975 Trenton, New Jersey.

It is stipulated that the Board gives credit to a teacher initially entering i employ for the time spent in military service to a maximum of four years for a appropriate placement on its salary guide. When such teacher arrives at the t of the salary guide and, pursuant to the negotiated contract between tl Association and the Board, becomes eligible for a longevity increment, tl credits initially given for military service are not included for longevity credit.

The Association alleges that this action of the Board is in violation *N.J.S.A.* 18A:29-11, which provides:

> "Every member who, after July 1, 1940, has served or hereafter sh serve, in the active military or naval service of the United States or of tl state, including active service in the women's army corps, the womer reserve of the naval reserve, or any similar organization authorized by tl United States to serve with the army or navy, in time of war or a emergency, or for or during any period of training, or pursuant to or connection with the operation of any system of selective service, shall l entitled to receive equivalent years of employment credit for such servi as if he had been employed for the same period of time in some public owned and operated college, school or institution of learning in this or ar other state or territory of the United States, except that the period of su service shall not be credited toward more than four employment adjustment increments.
>
> "Nothing contained in this section shall be construed to reduce tl number of employment or adjustment increments to which any memb may be entitled under the terms of any law, or regulation, or action of ar employing board or officer, of this state, relating to leaves of absence."

The Association further alleges violation of the negotiated agreeme between the Board and the Association which provides in pertinent part:

> "***'ARTICLE XII. . .Salaries. . .C.
>
> . . .
>
> 'Longevity Increments: An additional $400 increment for teache entering their 15th and 18th years of teaching as a fully certified teache An additional $400 increment for teachers entering their 21st year teaching in Wall Township.'***" (Petitioners' Brief, at p.

The Association avers that the language of *N.J.S.A.* 18A:29-11 speaks mandatorily and an individual who has served in the armed forces

> "shall be entitled to receive equivalent years of employment credit for such service *as if he had been employed for the same period of time****." *(Emphasis added.)*

Further contention is made that the language of the statute in question is clear and unambiguous and that such fact is the reason which makes it applicable. The Association cites a number of cases in support of such contention. Specifically, it cites *Sperry and Hutchinson Co. v. Margetts,* 15 *N.J.* 203, 209 (1954); *Grogan v. DeSapio,* 11 *N.J.* 308, 322 (1953); *Hoffman v. Hock,* 8 *N.J.* 397, 409 (1952); *U.S. v. Chesbrough,* 176 *F.* 778 (*D.C.N.J.* 1910); *State v. Sperry & Hutchinson Co.,* 23 *N.J.* 38 (1956); *Duke Power Co. v. Patten,* 20 *N.J.* 42 (1955). Also, it cites *State v. Sperry & Hutchinson Co., supra,* at page 42, wherein the Court cited Justice Heher's reason of the law in *Caputo V. The Best Foods,* 17 *N.J.* 259, 264 (1955).

The Board agrees that the factual dispute between it and the Association centers around an interpretation of *N.J.S.A.* 18A:29-11. The Board, in its argument, states:

> "The sole question to be decided in this matter is whether the statute, *N.J.S.A.* 18A:29-11, requires the inclusion of the time spent in the military service by a teacher, as a credit for the purpose of securing increase in salary based on the longevity provisions of the contract between the Wall Township Education Association and the Board of Education of the Township of Wall.***" (Respondent's Brief, at p. 1)

The Board, in opposition to the inclusion of credit for military service for longevity credits, relies on a statement incorporated herein for reference:

> "***It is significant that the Legislature limited the credit for military service in its application to not more than four employment or adjustment increments. This indicates a legislative intent not to have it apply for the purpose of longevity. It is self-evident that the Legislature intended that it should apply to the basic salary guide only. A review of available decisions of the Commissioner of Education as well as the courts, reveals no case specifically interpreting the factual situation presented herein. Likewise, counsel for the petitioner[s] has not cited any case interpreting the state [statutes] insofar as longevity is concerned.***" (*Id.*, at p.2)

The Board also relies on the affirmative defenses set forth in its Answer.

The Commissioner has considered and carefully weighed the respective arguments of the parties in reference to the controverted inclusion of initially recognized years of military service towards longevity credits.

The Commissioner observes that the Board attaches significance to that part of the statute, *N.J.S.A.* 18A:29-11, which states that those who have served in the armed forces of the United States shall not be entitled by such fact to "more than four employment or adjustment increments." The Board interprets this phrase to apply strictly to employment increment or adjustment increments within the published salary scale but not to credits set forth as "longevity credits."

The Commissioner cannot agree. In *Louis Alfonsetti and Lakewood Education Association v. Board of Education of the Township of Lakewood, Ocean County,* 1975 *S.L.D.* 297, he stated:

> "***The matter is fundamentally one of statutory interpretation. The Courts have said that:
>
> > '***In every case involving the interpretation of a statute, it is the function of the court to ascertain the intention of the Legislature from the plain meaning of the statute and to apply it to the facts as it finds them, *Carley v. Liberty Hat Mfg. Co.*, 81 *N.J.L.* 502, 507 (*E. & A.* 1910). A clear and unambiguous statute is not open to construction or interpretation, and to do so in a case where not required is to do violence to the doctrine of the separation of powers. Such a statute is clear in its meaning and no one need look beyond the literal dictates of the words and phrases used for the true intent and purpose in its creation.***' *Watt v. Mayor and Council of Borough of Franklin,* 21 *N.J.* 274 (1956) (at p. 277)
> >
> > '***Where the wording of a statute is clear and explicit we are not permitted to indulge in any interpretation other than that called for by the express words set forth***.' *Duke Power Co. v. Patten,* 20 *N.J.* 42 (1955) (at p. 49)
>
> "The Commissioner finds the wording of *N.J.S.A.* 18A:29-11, *ante,* to be explicit, clear and unambiguous. The statute must be construed in accord with the express intentions of the Legislature. As was said by the Court:
>
> > '***The purpose of [statutory] construction is to bring the operation of a statute within the apparent intention of the Legislature.***' *Sperry & Hutchinson Co. v. Margetts,* 15 *N.J.* 203 (1954) (at p. 209)
> >
> > '***A statute should not be construed to permit its purpose to be defeated by evasion.***' *Grogan v. DeSapio,* 11 *N.J.* 308 (1953) (at p. 322)
> >
> > '***We are enjoined to interpret and enforce the legislative will as written, and not according to some unexpressed intention.***' *Hoffman v. Hock,* 8 *N.J.* 397 (1952) (at p. 409)***"
>
> (at pp. 299-300)

The Commissioner opines that the words used in the instant statute are determinative and that those who serve in the armed forces "***shall be entitled to receive equivalent years of employment credit for such service as if he had been employed for the same period of time in some***school***in this*** state.***" Such words are clear and the Commissioner holds that all teaching staff members who have served in the armed forces are entitled to count the years of such service in an identical manner to those who have earned years of credit for teaching.

Accordingly, the Commissioner determines that employment or longevity increments must be afforded similarly in the instant matter for years of service in the armed forces and for years of teaching. Therefore, the Commissioner directs the Board to afford service credits toward longevity increments to those who have performed the requisite service either as teaching staff members or in the armed forces, to a maximum of four years.

COMMISSIONER OF EDUCATION

March 24, 1976

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, March 24, 1976

For the Petitioners-Appellees, Morgan & Falvo (Peter S. Falvo, Jr., Esq., of Counsel)

For the Respondent-Appellant, Mirne, Nowels, Tumen, Magee & Kirschner (William C. Nowels, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

July 14, 1976

Pending before Superior Court of New Jersey

"M.T.C.,"

Petitione

v.

Board of Education of the Lower Camden County Regional High School District No. 1, Camden County,

Responden

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, D. Ellen Stimler, Attorney at Law

For the Respondent, Maressa, Daidone & Wade (John D. Wade, Esq., c Counsel)

Petitioner is an eighteen year old pupil enrolled in the twelfth grade i Lower Camden County Regional High School District No. 1, hereinafter "Hig School," who was suspended from school attendance on October 29, 1975 fc the possession of illegal articles on school grounds and subsequently expelle from school by action of the Lower Camden County Regional Board c Education, hereinafter "Board," on November 17, 1975 for the remainder of th 1975-76 school year. Petitioner alleges that his expulsion from schoc attendance is procedurally defective, excessively harsh and violative of his righ to a due process hearing before the Board. The Board denies the allegations se forth herein and avers that its expulsion action against petitioner is proper an legal in every respect.

By agreement of the parties, this matter is submitted for Summar Judgment by the Commissioner of Education on the pleadings, exhibits an Briefs filed in support of their respective positions.

Prior to the joining of the pleadings herein, petitioner moved before th New Jersey Superior Court, Chancery Division, Camden County, for interloc utory relief pending a determination on the merits by the Commissioner Petitioner was granted an Order to Show Cause against the Board signed by th Honorable Peter J. Devine, Jr., J.S.C., on November 21, 1975, temporarily reinstating petitioner in school. The return date of the Order was set fo December 2, 1975 at which time the parties appeared before Judge Devine Judge Devine decided informally to continue the interlocutory restraint o November 21, 1975, pending a report of counsel after a conference with Joseph F. Zach, Assistant Commissioner of Education, Division of Controversies anc Disputes, scheduled to be held on December 5, 1975. Meanwhile, petitioner filec his Petition of Appeal with the Commissioner of Education on December 1 1975. The pleadings were joined subsequent to the receipt of the Board's Answer on December 5, 1975 at the conference of counsel conducted by Assistant Commissioner Zach.

The essential facts with respect to the instant matter are not in dispute and are set forth as follows:

On the morning of October 29, 1975, while high school classes were in session, two female pupils in the eleventh grade were treated by the school nurse and determined to be in semiconscious condition. The school nurse contacted Mr. Robert Burns, hereinafter "Assistant Principal," and requested that an ambulance be called to take the pupils to the hospital for further treatment. At that time, one of the pupils allegedly identified petitioner as the person who supplied them with pills (barbiturates). (R-1) During this time, Officer Dukes of the Pine Hill Police Department arrived at the High School to investigate the incident. Petitioner was brought to the Assistant Principal's office where the police officer searched him, took possession of his car keys, and subsequently escorted him to the police station for further questioning. Petitioner's locker was also searched by the school authorities. (R-1)

Shortly thereafter, Mr. Larry Mauriello, hereinafter "teacher," assigned to duty in the High School parking area, observed two pupils, one of whom was petitioner's brother, trying to get into petitioner's locked car by use of a coat hanger. This incident was reported by the teacher to the Assistant Principal who then contacted the Pine Hill Chief of Police to suggest that a search of petitioner's car might be warranted. (R-1)

Officer Dukes returned to the High School and conducted a search of petitioner's car in the presence of the Assistant Principal and the teacher. The results of this search produced a quantity or "bag" of marijuana (R-1), which was alleged to be under 25 grams. (Petition of Appeal, at p. 2)

Petitioner was suspended from school on October 29, 1975 by the Assistant Principal and a letter to this effect was sent to petitioner's parents which reads in pertinent part as follows:

> "This is to inform you that your son has been suspended from school until a hearing before the Board of Education.***
>
> "The reason for this suspension is that *** [petitioner] had possession of illegal articles on school grounds.
>
> "You will be notified by the Superintendent Mr. Leonard A. Westman, of the time and place of the hearing.***" (R-5)

Petitioner's parents received a letter dated November 4, 1975 from Mr. Leonard Westman, hereinafter "Superintendent," informing them of the following:

> "In compliance with the Board of Education Discipline Policy, it is necessary that you appear before the Board of Education to discuss your son *** [petitioner's] discipline problems.

"The Board of Education will meet at 7:20 p.m. on Monday, November 10, 1975 and at that time a hearing will be held to determine *** [petitioner's] future educational program.

"The violation listed in Mr. Burn's letter to you will be the charge considered at the hearing. At the hearing you are entitled to be represented by counsel and also entitled to confront and cross examine any and all witnesses. If you so desire, a transcript of the hearing will be made available to you.

"During the period of time that your son is on suspension he should not visit any of the schools in the Lower Camden County Regional High School District at any time, for any reason, unless arrangements have been made through the office of the Assistant Principal. This includes the hours when school is in session as well as all other times, including weekends.

"If you have any questions concerning this matter or will be unable to attend the Board of Education meeting at the scheduled time, please contact me and advise me." (R-6)

Petitioner and his mother did attend his scheduled hearing on November 10, 1975. However, they chose not to be represented by counsel. Also present at that time were seven Board members, counsel for the Board and the Board Secretary, in addition to the Superintendent, Assistant Principal and the teacher. (R-4)

At the hearing the Assistant Principal testified to those undisputed facts hereinbefore set forth. He also explained for the benefit of those attending the hearing that it was standard procedure for the police to investigate incidents at the high school whenever an ambulance was requested. (R-4, at p. 1)

Thereafter, in response to an inquiry by the Board, petitioner's mother testified that her son had police charges pending against him in Juvenile Court for the possession of marijuana and the possession and sale of barbiturates in connection with the earlier incident occurring at the high school on the morning of October 29, 1975. However, petitioner categorically denied the latter charge at the hearing. (R-4, at p. 1)

During the hearing petitioner testified as follows to the questions raised by the Board's counsel with respect to the two pupils who attempted to forceably enter his car on October 29, 1975:

Counsel: "***[Petitioner], it was reported that some students were trying to get into your car.

Petitioner: "Yeh, the kids I brought to school that morning. They all knew it [marijuana] was in there [in petitioner's car] and they knew right where it was. So they were going to try to get it out of there.

Counsel: "Why?

Petitioner: "Well, because they seen the cop take me down to the police station and they, you know, figured . . . they seen them search my locker and they knew they were going to search my car.***" (R-4, at p. 2)

The Commissioner observes that strenuous objection was raised by petitioner's mother during the hearing on November 10, 1975, when the Board queried her son concerning his possession or use of drugs (pills) stemming from the alleged barbiturate incident of October 29, 1975 at the High School. In this regard, petitioner's mother made the following comment:

"***I would like to set the matter straight and have one charge or the other. I really don't see why this charge of drugs is brought into this matter. Marijuana, yes; but the drug charge, no.***" (R-4, at p. 3)

During the hearing of November 10, 1975, the teacher's testimony corroborated the earlier testimony of the Assistant Principal with respect to the incident that occurred in the parking area on October 29, 1975. However, the teacher went on to explain his reasons for becoming suspicious of the activities of the two pupils who were trying to gain entry to petitioner's car. His testimony in connection with the instant matter reads in pertinent part as follows:

"***[T]he reason I got very suspicious *** is that they [petitioner's brother and another pupil] tried to get into the car. They gave me – they were trying to get in to get the girl's gym suit.*** As they were walking back down the corridor by the gym area, your younger son [petitioner's brother] gave the girl's money back to her – that's when I got suspicious. Money exchanged hands between *** [petitioner's brother and the girl]. *** That's why I got suspicious and went down to see Mr. Burns [Assistand Principal].***" (R-4, at pp. 3-4)

The Commissioner is constrained to notice the above testimony reflects that a third pupil (female) accompanied petitioner's brother and another male pupil to petitioner's car on October 29, 1975. Further testimony in this regard was adduced by the Superintendent in response to petitioner's comments at the hearing:

Petitioner: "***I gave *** [pupil] a ride that morning [October 29, 1975]. Was she out there [in the parking area] too? She knew it [marijuana] was in the car.

Superintendent: "Yes, she was out there at the car.***" (R-4, at pp. 6-7)

Petitioner testified at the hearing that he bought the marijuana found in his car for himself although he did not plan to smoke it all himself. (R-4, at p. 4)

The transcript of the hearing reflects that petitioner was questioned at considerable length with respect to his use of marijuana and whether he sold or

provided marijuana to anyone else, especially persons younger than himself. While petitioner admitted that he did, on occasion, share marijuana with others, including younger persons, he denied selling marijuana to anyone. (R-4, at pp. 3-4)

Subsequent to petitioner's hearing before the Board, his parents received a letter dated November 12, 1975 from the Superintendent which reads as follows:

> "After reviewing all the information available as well as the testimony given at Monday night's hearing, the Board of Education decided that *** [petitioner] be expelled from school for the balance of this school year.
>
> "As outlined in my letter to you of November 4, during the period of expulsion *** [petitioner] should not visit any of the schools in the Lower Camden County Regional High School District at any time, for any reason, unless prior arrangements have been made through the Assistant Principal of the school.***" (R-7)

Thereafter, on November 17, 1975 at its regular meeting, the Board formally expelled petitioner from school attendance for the remainder of the 1975-76 school year. (R-8, at p. 35)

Petitioner argues in his Brief that he was denied a due process hearing by virtue of the fact that only the Board knew the specific nature of the charge against him prior to his hearing.

Petitioner grounds his argument on the fact that the written communications his parents received from the Assistant Principal and the Superintendent respectively (R-5; R-6, *ante*), prior to his hearing do not specifically indicate that he was being charged with the possession of marijuana on school property but, rather, that his suspension from school was for the "possession of illegal articles on school grounds.***" (R-5) Consequently, petitioner avers that he and his mother labored under the mistaken belief that the marijuana and barbituate incidents of October 29, 1975, would be heard by the Board on November 10, 1975. (Petitioner's Brief, at pp. 3, 5-6) Moreover, petitioner argues in his Brief that the Board did not limit the charge against him to the possession of marijuana on school property as set forth in the testimony of the Assistant Principal at the outset of his hearing. (R-4, at p. 1) Instead, petitioner asserts that the transcript of the hearing (R-4) reflects that the Board and its administrators proceeded to ask questions pertaining to the barbiturate incident, about alleged threats against another pupil, the use of drugs in school and other matters pertaining to his private habits and personal lifestyle. Consequently, petitioner alleges that a major portion of the testimony produced at his hearing was irrelevant and violated his right to a due process hearing by the Board. (Petitioner's Brief, at p. 6)

The Board rejects petitioner's arguments that a due process hearing was not afforded him, or that it had intended to consider any charge other than the "***possession of illegal articles [marijuana] on school grounds ***" (R-5) in arriving at its determination to expel petitioner from school.

In support of this contention, the Board relies on the Superintendent's letter (R-6) dated November 4, 1975 to petitioner's parents informing them of them of the Board's hearing on November 10, 1975. This letter states in pertinent part:

> "***The *violation* listed in Mr. Burn's letter to you will be the *charge* considered at the hearing.***" (*Emphasis supplied.*) (R-6)

Moreover, the Board avers that since the marijuana was the only controlled substance found in petitioner's possession there should have been no confusion with respect to the charge. (Board's Brief, at p. 2)

The Board avers that petitioner's argument with respect to the amount of irrelevant and prejudiced testimony produced at his hearing is without merit. In this regard, the Board relies on *J.W. v. Board of Education of the Town of Hammonton et al., Atlantic County,* 1975 *S.L.D.* 774 wherein the Commissioner said:

> "***In regard to the hearing itself, petitioners argue that the Board considered hearsay and irrelevant testimony which is not properly admissible. The Commissioner has reviewed the transcript *** of the hearing held June 2, 1975, and finds that while a certain amount of hearsay and irrelevant testimony was set forth, the fact remains that there was sufficient credible testimony and proper evidence to substantiate the Board's finding that J.W. did, in fact, commit the offense charged. The standard of proof in administrative hearings before the board of education or the Commissioner is not the same as that necessary in criminal proceedings. The quantum of proof here is whether the preponderance of believable evidence is sufficient to establish the truth of the charge; it is not to establish guilt beyong a reasonable doubt.***" (at p. 782)

The Commissioner has reviewed the transcript (R-4) of petitioner's hearing before the Board and the pertinent exhibits pertaining to the arguments of the parties as set forth above. The Commissioner finds that a certain amount of hearsay and irrelevant testimony was adduced at the hearing. However, in the Commissioner's judgment there was sufficient relevant testimony brought forth at petitioner's hearing to enable the Board to arrive at a determination with respect to the matter controverted herein. The Board is cautioned to instruct its administrators to communicate to parents of pupils who are suspended from school the specific nature of the suspension charges against them.

Additionally, petitioner argues in his Brief (at page 11) that although the Board formally voted to expel him from school at its regularly scheduled meeting of November 17, 1975, the fact remains that his parents were notified in writing on November 12, 1975 (R-7), by the Superintendent, of his expulsion from school. Consequently, petitioner alleges that the Board's action to expel him from school actually took place on November 10, 1975 at an informal meeting held after his hearing. Accordingly, petitioner argues that this sequence of events is contrary to the procedural rules to be followed by the Board as set forth by the Commissioner in *M.W. v. Board of Education of the Freehold Regional High School District, Monmouth County,* 1975 *S.L.D.* 134.

While the Board admits it reviewed the findings against petitioner in a closed session meeting subsequent to the hearing on November 10, 1975, it denies that any formal decision was reached at that time to expel petitioner from school. Rather, the Board maintains that additional time was required to carefully consider such findings. Consequently, petitioner was formally expelled by formal action taken by the Board at its regularly scheduled meeting on November 17, 1975. (R-8) (Board's Brief, at p. 6)

In the instant matter the Commissioner observes that the Board did, in fact, take formal action to expel petitioner from school on November 17, 1975 The minutes of the Board meeting on that date indicate that the Board retired to executive session during the meeting "***too discuss juvenile cases.***" Subsequent thereto, the regular meeting was reconvened, at which time the Board formally voted to expel petitioner from school. (R-8, at p. 35) While the Commissioner finds no fatal defect in this procedure to warrant a reversal of the Board's action on procedural grounds, he is constrained to comment upon the action taken by the Superintendent regarding the expulsion notice sent to petitioner's parents dated November 12, 1975. (R-7) In the Commissioner's judgment such action was premature and unwarranted coming prior to petitioner's formal expulsion by the Board on November 17, 1975. The power to expel a pupil from public school attendance is vested solely in a local board of education pursuant to the statutory prescription set forth in *N.J.S.A.* 18A:37-5.

Petitioner also asserts in his Brief that his expulsion from school by the Board was improperly severe for the infraction committed. In support of this assertion, petitioner relies on the guidance counselor's report dated November 6, 1975 (R-2) to indicate that his high school record reveals no prior suspensions or school detentions. Petitioner maintains that the incident of October 29, 1975, which admittedly involved bringing a small quantity of marijuana on school property, does not warrant his expulsion from school by the Board by virtue of the fact that the marijuana he is charged with having in his possession was locked in his car, and no attempt was made by him to bring the controlled substance into the school building, or to offer it to any pupils in school. It is held further by petitioner that neither the school administrators nor the Board took this fact into consideration at any time prior to his expulsion from school. Additionally, petitioner avers that his actions in this regard never really constituted a clear and present danger to the pupils attending the High School nor did it interfere with the orderly operation of the school. In this regard, petitioner relies on the following decisions of the Commissioner to support his claim for reinstatement to school. *J.D. and W.D. v. Hawthorne Board of Education, Passaic County,* 1975 *S.L.D.* 282; *M.W. v. Freehold Regional Board of Education, supra; J.W. v. Board of Education of the Town of Hammonton, supra* (Petitioner's Brief, at pp. 8-10)

The Board in its Brief also relies on *J.W. v. Hammonton, supra,* to justify its action with respect to petitioner's expulsion from school and cites, in pertinent part, the language of the Commissioner with respect to possession and use of illicit drugs on school property:

> "***The possession and use of illicit drugs by pupils in our public schools must be dealt with swiftly in order to prevent their introduction to other pupils particularly those of younger years.***" (at p. 781)

Moreover, the Board avers that it considered petitioner's testimony at the hearing (R-4, at p. 4) a continuing threat to its efforts to enforce its policy to prevent the introduction of illicit drugs to other pupils under its supervision. Thus, for this reason alone the Board contends that its action in expelling petitioner was justified. (Board's Brief, at p. 5)

The Commissioner has reviewed the respective arguments of the parties regarding the severity of the penalty of expulsion imposed upon petitioner and reaffirms his determination in *J.W. v. Hammonton, supra,* wherein he said:

> "***the possession or use by pupils in a schoolhouse *or on school grounds* of marijuana or any other controlled dangerous substance described in the law may not be condoned. It is the considered judgment of the Commissioner that to leave such conduct unpunished would only create a school atmosphere which would encourage younger pupils and more pupils to experiment with controlled dangerous substances. Local boards of education must deal with such problems in a manner which will discourage violations of the law.***" (at p. 783) (*Emphasis supplied.*)

In the Commissioner's judgment there can be no question that a local board of education has the authority to expel a pupil from school when its action is consistent with the applicable statutes. However, as the Commissioner pointed out in *John Scher v. Board of Education of West Orange, Essex County,* 1968 *S.L.D.* 92:

> "***Termination of a pupil's right to attend the public schools of a district is a drastic and desperate remedy which should be employed only when no other course is possible.***" (at p. 96)

It is the Commissioner's considered opinion that the Board's expulsion action against petitioner, in this instance, should have been tempered by consideration of the following facts:

1. The unlawful act committed by petitioner, although serious in nature, represents the only disciplinary infraction recorded on his record during his attendance at the high school. (R-2)

2. Prior to his expulsion from school for the balance of the 1975-76 school year, petitioner regularly attended the morning classes to which he was assigned in order to complete his academic course requirements in the vocational education curriculum during his senior year. (R-2)

3. Subsequent to attending morning vocational education classes at the high school, petitioner is employed and compensated as a laborer in Camden County five days a week during the afternoons when school is in session. (R-4, at p. 4)

4. According to the report (R-3) on petitioner's progress in his academic subjects, it would appear that petitioner has a reasonable chance to successfully complete his academic course work, and be graduated by the end of the 1975-76 school year, were it not for his explusion from school.

In the context of such facts the Commissioner is constrained in the instant matter to find and determine that the penalty imposed upon petitioner by the Board is excessively harsh. Therefore, the Commissioner hereby sets aside such action and directs the Board to provide petitioner with either a modified program of in-school instruction if such a program is feasible or, in the alternative, to provide petitioner with a suitable program of home instruction deemed appropriate by the Board so as to afford petitioner an opportunity to complete his academic course work by the end of the 1975-76 school year. The Board is directed further to supplement such program of instruction to the extent that petitioner is permitted to make up the assignments or tests missed during his period of expulsion from school.

Consequently, to this limited extent, petitioner's prayer for relief is granted. In all other respects the instant Petition of Appeal is denied.

Accordingly, the Petition is dismissed.

COMMISSIONER OF EDUCATION

March 24, 1976

Melvin Willett and Freehold Regional High School Education,

Petitioners,

v.

Board of Education of the Freehold Regional High School District, Monmouth County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Chamlin, Schottland & Rosen (Michael D. Schottland, Esq., of Counsel)

For the Respondent, Murray and Pachman (James P. Granello, Esq., of Counsel)

Petitioner Willett is a teacher and member of the petitioning Freehold Regional High School Education Association, hereinafter "Association," which

is the recognized bargaining agent for teachers employed by the Board of Education of the Freehold Regional High School District, hereinafter "Board." Petitioners appeal the Board's refusal to pay, from its current expense account, honoraria for chaperons of dances and other cocurricular activities held at times other than the regular school day.

The Board admits its refusal to pay honoraria to chaperons from its current expense account for certain student sponsored events but denies that its refusal is either improper, illegal, or contrary to its established policy. Rather, the Board holds that its policy requiring that they be paid by the sponsoring student organization is legal and entitled to a presumption of correctness.

A hearing to determine the relevant facts in dispute was conducted on June 5, 1975 at the offices of the Monmouth County Superintendent of Schools, Freehold, by a hearing examiner appointed by the Commissioner of Education. Briefs were filed subsequent to the hearing. The reports of the hearing examiner is as follows:

A procedural history of the controversy is in order. The Board and the Association entered into a negotiated agreement for the period from September 1972 through June 1974. Pursuant thereto, the question of honoraria for chaperons was submitted into binding arbitration. On December 28, 1972, the arbitrator ruled that chaperons were to be paid ten dollars per event. (P-1) When questioned as to the proper source from which such honoraria funds should come, the arbitrator denied that it was within his jurisdiction to make such determination. (P-2; R-1) The matter was litigated before the Monmouth County District Court, Docket No. 623-163, and the Court ordered on February 27, 1974, that the terms of the arbitration award requiring the "***Board of Education to pay $10.00 per teacher per event for co-curricular activities***" be enforced. (P-3)

Previously, on March 19, 1973, the Board had adopted a policy on the use of school facilities by student organizations providing, *inter alia,* that:

> "***Student organizations shall be permitted to use school facilities during non-school hours for such social, civic and recreational purposes as are generally acceptable to the standards of the community at large.
>
> "Prior to the use of said facilities the student organization or group desiring the use of the facility shall apply to the building principal who shall maintain the schedule for such use at such times and dates as are established by him. No consent for the use of school facilities shall be permitted by the building principal unless the applying group shall present its plan for security protection and chaperons sufficient in number to insure the orderly conduct of the proposed activity.
>
> "The school will make no charge for the use of the school facility by student organizations or groups and all of the expenses for the conduct of the activity, security, chaperons and clean-up thereafter shall be at the sole cost and expense of the using organization or group.***" (R-2)

Principals in the district were notified on March 22, 1974 by the assistant superintendent, *inter alia,* that:

> "***Chaperones will be paid via the Board of Education office *from funds in the student activity account of the sponsoring student organization.****" *(Emphasis in text.)* (P-4)

The Association protested that this source of funds for payments of chaperons was improper and petitioned the Monmouth County District Court to direct the Board to pay such honoraria from its current expense account. The Court, however, determined on July 24, 1974, that the source of funds for payment of the honoraria was not within the jurisdiction of the Court to direct. (P-5) Thereafter, on September 9, 1974, the within Petition of Appeal was filed before the Commissioner.

The Board has implemented its stated policy, *ante,* by delegating to its principals the authority to approve the use of school facilities during non-school hours by student organizations. The Board itself does not review or approve such building use. (R-3)

The Board makes no charge for building use by student organizations but, at present, budgets no money and pays no funds as honoraria for chaperons, at any such activities except athletic events. (R-3, at pp. 4-5; Tr. 37, 40, 43) The Board pays a yearly stipend to class and organization advisers. Although these advisers are required to attend events sponsored by their classes or organizations, they are not paid additionally for being present or chaperoning these events. (Tr. 40) It is the responsibility of the adviser or the sponsoring group to select and secure an adequate number of chaperons for each event. They are not in fact assigned by a principal or the Board. (Tr. 57; R-3)

A careful analysis of the testimony at the hearing and the documents in evidence leads the hearing examiner to conclude that the Board has precisely implemented its stated policy on the use of school facilities by student organizations as adopted on March 19, 1973. (R-2) Absent a showing of arbitrary or capricious application of its existing policy, the narrow issue remaining before the Commissioner is whether the Board's exercise of discretion in adopting and implementing this policy was legal and reasonable.

Petitioners assert that the Board may not legally require payment of teacher-chaperons from funds other than general revenue collected by the district. Petitioners ground this assertion on *Robinson v. Cahill,* 62 *N.J.* 473 (1973) in which the Court said:

> "***The Constitution's guarantee must be understood to embrace that educational opportunity which is needed in the contemporary setting to equip a child for his role as a competitor in the labor market.***"
>
> (at p. 515)

Petitioners argue that a free public education within the contemplation of the New Jersey Constitution and *Robinson, supra,* includes the payment of chaperons by the Board for its program of cocurricular activities and that such payment may not be arbitrarily required of pupil organizations. (Petitioners' Memorandum of Law, at pp. 2-3) In this regard petitioners cite *Clinton F. Smith et al. v. Board of Education of the Borough of Paramus et al., Bergen County,* 1968 *S.L.D.* 62. Therein it was determined by the Commissioner that the Board's educational program extended to and included cocurricular activities to which teachers were subject to *reasonable* assignment as chaperones of cocurricular activities. Similarly cited are *Board of education of the City of Long Branch v. Long Branch Education Association, Inc., Monmouth County,* 1974 *S.L.D.* 1189; *Jeffrey Pasko v. Board of Education of the Borough of Dunellen, Middlesex County,* 1962 *S.L.D.* 188; *Melvin C. Willett v. Board of Education of the Township of Colts Neck, Monmouth County,* 1966 *S.L.D.* 202; and *In the Matter of the Appeals of the Board of Education of the Black Horse Pike Regional School District and the Sterling Regional School District, Camden County,* 1973 *S.L.D.* 130.

Finally, petitioners argue that cocurricular activities are encompassed by the overall responsibility of the Board to provide a thorough and efficient education. They further assert that the services of teacher-chaperons, being beneficial to the decorum, discipline and educational value of such activities, must be provided by the Board from its general revenues rather than from pupil organizations. (Petitioners' Memorandum of Law, at p. 5)

Conversely, the Board argues that it is statutorily empowered to adopt a policy governing the use of its facilities after regular school hours by *N.J.S.A.* 18A:11-1 which provides that:

"The board shall –

"a. Adopt an official seal;

"b. Enforce the rules of the state board;

"c. Make, amend and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government and the transaction of its business and for the government and management of the public schools and public school property of the district and for the employment, regulation of conduct and discharge of its employees, subject, where applicable, to the provisions of Title 11, Civil Service, of the Revised Statutes[1]; and

"d. Perform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district."

[1] Section 11:1-1 *et seq.*

The Board does not dispute petitioners' contention that it should provide cocurricular activities as part of its educational program. It argues, however, that its management function requires that it regulate such activities. The Board asserts that it meets its obligation by the assignment of a paid teacher adviser to plan, guide, direct, evaluate and supervise these activities. (Brief on behalf of the Board, at p. 6) The Board states that this paid adviser in most instances provides sufficient supervision to insure proper conduct of an activity without additional chaperons.

The Board maintains that, for these activities which involve non-members of an organization or the general public, it is reasonable that the sponsoring pupil organization be required to pay the expenses of additional chaperons, security and clean-up personnel.

The Board argues that in reviewing such a matter, the Commissioner must be guided, *inter alia,* by *Boult and Harris v. Board of Education of Passaic,* 1939-49 *S.L.D.* 7, affirmed State Board of Education 15, 135 *N.J.L.* 329 (*Sup. Ct.* 1947), aff'd 136 *N.J.L.* 521 (*E.& A.* 1948) wherein it was held by the Commissioner that:

> "***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.***" (at p. 13)

The Board holds that, absent a finding of abuse of discretion, its policy determination should be upheld as legitimate exercise of its management prerogative pursuant to *N.J.S.A.* 18A:11-1 and *N.J.S.A.* 18A:20-34.

Finally, the Board avers that its exercise of discretion in adopting the controverted policy was reasonable. In support thereof, it states that numerous scheduled activities outside of regular school hours require no personnel to be present other than the paid adviser. The Board further points out that its policy does not, in fact, require that chaperons be teacher-chaperons but avers that any mature, responsible adults qualify to serve in that capacity. (Brief on behalf of Board, at p. 12)

The Board argues that, if additional expenses are incurred in those voluntary activities at which attendance is neither required nor in any way affects pupils' recorded grades, it is reasonable that those organizations which, by choice, sponsor such activities should assume responsibility for their expenses. In this regard, the Board cites *Willett v. Colts Neck, supra,* wherein it was stated by the Commissioner that:

"***It should be clearly understood that the Commissioner's determination herein that pupils cannot be required to bear the costs of school programs is limited to field trips and such other activities as are part of the regular classroom program of instruction or course of study. It does not extend to and is not applicable to such other school affairs as dances, concerts, dramatic productions, athletic events and the like, for which admission charges are ordinarily made. Such activities, while certainly part of the total school curriculum, are not part of the classroom teaching program. They occur after normal school hours and attendance at them is voluntary. A field trip is scheduled during normal school hours and attendance is not optional. It is the classroom made mobile. Such is not true in the case of those activities which although generally referred to as 'extra-curricular' are actually curricular but are 'extra-classroom.' The distinction made here is between procedures which, like field trips, use of the library, assembly programs, gymnasium-playground activities, etc., are an integral part of the classroom teaching-learning process, which occur during regular school hours and in which all pupils in a class automatically participate, as contrasted with other activities which are not directly related to the classroom program, which take place outside of the normal school day, and which pupils elect to attend. The expenses of these latter elective activities are often underwritten by charging participants or spectators a fee. The Commissioner finds no infirmity in such practice although he would prefer, as would most public school educators, that all such events could be made free.***" (at p. 206)

In further support of the reasonableness of its general policy, the Board maintains that it both safeguards the school plant and student participants and accommodates those activities which require additional chaperons without causing undue expense to the taxpayers. (Brief on behalf of Board, at p. 14)

In conclusion the Board concedes that if it were to *assign* chaperons it would be obligated to pay them. It maintains that, absent such assignment by the Board, its policy is reasonable and entitled to a presumption of correctness.

The hearing examiner, perceiving that the precise factual context herein presented has not previously been addressed by the Commissioner, leaves to the determination of the Commissioner the legality and reasonableness of the Board's stated policy as controverted herein.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has carefully reviewed the total record of this matter, including the arguments of law, and the hearing examiner's report to which, it is noted, no exceptions were filed by either party pursuant to the provisions of *N.J.A.C.* 6:24-1.16. The single narrow issue which requires determination is whether, within the factual context presented herein, the Board's policy requirement that certain teacher chaperons at cocurricular events be paid by sponsoring pupil organizations is a sound exercise in discretion.

The record is clear that the Board makes no charge to pupil organizatior or groups for use of its rooms and facilities, or for heat, light and equipmer utilized in cocurricular pupil sponsored events during non-school hours. Nc does the Board require that those pupil organizations underwrite the stipends c the teacher sponsors assigned to coordinate and supervise the activities, meetinç and special events which they initiate. The Board distinguishes between Boar sponsored events and events which are pupil sponsored and requires that only i the latter, chaperon fees be paid by the sponsoring pupil organization. (Verifie Answer, Third Separate Defense) (R-3) By contrast, the Board charges room us fees according to an established fee schedule to approved commercia community and civic users of its facilities. (R-4)

While it is true that the Board has delegated to building principals th authority to approve the use of its buildings for cocurricular use, this in no sens absolves the Board of its responsibility for such events. Nor does the fact tha the Board does not *directly* approve each and every event sever the sponsorin relationship of the Board to its pupil organizations. The Board is in all way responsible for such events. The Commissioner so holds.

The values of such cocurricular events as dances, dramas, athletic event: forensic activities, chess tournaments, and concerts have long been recognized b the Commissioner as they were in *Clinton F. Smith, supra.* It was clearl established therein that the duties of teachers and administrators may reasonabl encompass the supervision of such activities without additional compensation a long as the time required for these duties is reasonable and the assignment among faculty members are equitably distributed.

In the instant matter the Board had negotiated an agreement which bot the arbitrator and the Court have now determined requires the payment of $1 to each teacher who chaperons a cocurricular event. It remains only t determine whether the Board's established policy that they be paid by the pup organization is reasonable.

The Board's policy in regard to athletic events is to charge admission fee to pupils and adults who voluntarily choose to attend certain contests. From th proceeds of these contests, which the Board itself collects, it pays, at least i part, ticket takers, officials, security guards and other persons supervising th contests. (Tr. 44-45) Its coaching staff members, however, are paid stipend directly from budgeted Board funds, as are the sponsors of pupil organizations The proceeds from athletic contests are insufficient to defer the full costs o transportation, uniforms, medical care, insurance, coaches, officials and othe required supervisory personnel. (Tr. 45) Yet, the Board defers such costs as i may be utilizing those proceeds and thus reduces the burden of local taxation.

In similar fashion, the Board allows pupil organizations to collec admission fees from those eligible pupils and adults to voluntarily attend con certs, dances, dramas and other events. To the extent that the Board require that expenses for these approved activities be paid from the proceeds o admission fees or from sums generated in fund raising activities geared t

promoting such events, the Board's policy is both reasonable and consistent with the practice it maintains in the athletic sector. Accordingly, it is determined that the Board may reasonably assess costs of direct pupil supervision and control (other than the teacher-sponsor, *ante*) in proportionate amount to the realized revenue from an approved cocurricular activity. This determination is consistent with *N.J.S.A.* 18A:11-1 *et seq.* and *Willett v. Colt's Neck, supra.* However, this holding excludes any consideration of similar assessment for payment of routine maintenance, custodial or security personnel. It does not absolve the Board of its ultimate responsibility to compensate teachers or other assigned employees when the proceeds realized from an event are insufficient to compensate them.

It must be recognized that there are worthy events which, like certain athletic contests, either do not generate funds at all, or generate insufficient sums to defray the full amounts of expenses incurred. When these events are contemplated, a pupil organization may petition the Board in advance to absorb the cost of such event. (R-3, at p. 3) Thus, the Board's policy makes provision that such activities are not summarily relegated to oblivion. The Commissioner encourages the Board to look favorably upon those events which in the Board's judgment add to the scope and dimension of pupil opportunities which are not otherwise found in the curricular and cocurricular program.

This controversy has been long in litigation in three different forums and, in the interest of harmony, demands resolution. Accordingly, it is directed that the Board at the earliest possible time, acting in accordance with this enunciated determination, cause to be paid from such pupil organization funds as may still exist $10 to each chaperon who has served at an approved event wherein sufficient income from admission fees was generated to pay all expenses incurred, including the fees of assigned chaperons.

The Board is further directed to pay $10 per event from Board funds to each chaperon who has served at those events which generated insufficient funds to pay all expenses, including chaperons. The Board is also directed to pay $10 per event to each chaperon who served at approved events wherein sufficient funds were generated to pay all expenses including chaperons, but which funds no longer exist because of depletion thereof for other purposes.

In conclusion, the Board is directed to compensate or cause to be compensated in accord with the principles hereinbefore set forth those teachers who serve as chaperons at pupil sponsored events, the amount of $10 per event unless and until the matter of such compensation is altered by further negotiations. To this limited extent, the prayer of petitioners is granted. In all other respects the Petition is dismissed.

COMMISSIONER OF EDUCATION

March 24, 1976

Board of Education of the City of East Orange,

Petitioner,

v.

Mayor and Council of the City of East Orange, Essex County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Love and Randall (Melvin Randall, Esq., of Counsel)

For the Respondent, Julius Fielo, Esq.

At a regular meeting of the Board of Education of the City of East Orange, hereinafter "Board," on February 18, 1975, the Board adopted a resolution certifying to the Board of School Estimate and City Council of the City of East Orange, hereinafter "Council," that the sum of $12,274,187 was necessary to be raised by taxes for current expenses of the School District for the school year beginning July 1, 1975, and additional funds of $25,000 to be applied as follows:

Current Expenses	$12,274,187
Vocational Evening School	20,000
Evening School, Foreign-Born	5,000
	$12,299,187

As required by law *(N.J.S.A.* 18A:22-14 and 15), the Board submitted its budget to the Board of School Estimate which met on March 1, 1975, and voted to reduce the Board's proposed current expenses by $1,500,000, thereby setting $10,799,187 as the amount to be raised by local taxation. This amount was then certified to the governing body of the City of East Orange and was thereafter adopted within its budget. (Petition of Appeal)

The facts of the matter were adduced at a hearing conducted on November 24, 1975 at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner is as follows:

The Board states that Council acted arbitrarily, capriciously, and unreasonably in reducing the moneys to be raised for school purposes and avers that the sum appropriated will not provide sufficient funds for the operation of a thorough and efficient system of schools in the City of East Orange. The pertinent amounts in dispute are shown as follows:

	CURRENT EXPENSE
Board's Proposal	$12,299,187
Council's Certification	10,799,187
Amount Reduced	$ 1,500,000

Council maintains that it acted properly and that the items reduced by its action are only those which are not necessary for a thorough and efficient educational system.

The hearing examiner cannot conclude from the record that the action of Council in reducing the budget was arbitrary, capricious, or unreasonable. The record shows Council's concern for the total expenditure proposed by the Board and its later reduction of that budget after consultation with the Board of School Estimate. As part of its determination, Council suggested specific line items of the budget in which it believed economies could be effected as follows:

Account Number	Item	Board's Proposal	Council's Proposal	Amount Reduced
CURRENT EXPENSE:				
J110B	Sal., Bd. Secy.'s Off.	$ 209,000	$ 182,900	$ 26,100
J110F	Sal., Supt.'s Off.	123,300	123,090	210
J110H	Sal., Sch. Census	5,000	- 0 -	5,000
J110J	Sal., Bldgs. & Grds.	41,000	40,224	776
J110L	Sal., Pers. Off.	105,600	97,965	7,635
J110N	Sal., Adm. Off	62,543	59,109	3,434
J130L	Per. Off. Exps.	9,350	8,050	1,300
J130A	Bd. Mem. Exps.	15,185	12,131	3,054
J211A	Sal., Prins.	345,000	338,375	6,625
J211B	Sal., Ass't Prins.	230,100	222,335	7,765
J212	Sal., Supv. Instr.	234,620	205,378	29,242
J213A	Sal., Teachers	8,484,220	8,411,614	72,606
J213B	Sal., Spec. Ed. Tchrs.	495,000	474,590	20,410
J215A	Sal., Secys.	468,800	423,195	45,605
J215B	Sal., Supvrs. Secys.	20,880	18,270	2,610
J230A,B, C,E	Lib. Bks., Per., A-V Mats., Supls.	99,069	61,455	37,614
J240	Teaching Supls.	378,860	239,589	139,271
J310	Sal., Attend. Pers.	18,000	17,904	96
J320	Attend. Off. Exps.	3,000	325	2,675
J410C	Sal., Nurses	201,800	198,553	3,247
J510C	Field Trips	13,000	900	12,100
J610A, B,C	Sal., Custs.	979,000	945,980	33,020

J630	Heat	559,000	543,352	15,(
J640A	Water	14,490	13,551	(
J710	Sal., Maint.	251,000	242,875	8,
J720B	Bldg. Maint. Contr.	304,689	224,062	80,(
J730A	Instr. Equip. Repl.	72,750	- 0 -	72,'
J730C	New Equip.	122,500	70,125	52,:
J740C	Equip. Bd. Exp.	6,700	3,715	2,(
J810C	Pension Payments	16,770	12,417	4,:
J820C	Ins. Liability	45,000	41,100	3,(
J1030	Athl. Fund Exps.	135,000	110,600	24,:
J1116	Y-Swim. Program	12,078	- 0 -	12,(
J1119	Voc. Sch. Exps.	5,000	4,000	1,(
J1155	Summer Sch. Exps.	500	- 0 -	:
	TOTALS	$14,087,804	$13,347,729	$740,(

The Board submitted written documentation and work sheets supportir its stated need for the funds reduced by Council. Additional testimony w: adduced at the hearing.

There appears no necessity to deal *seriatim* with each of the areas in whic Council recommended reduced expenditures. As the Commissioner said in *Boar of Education of the Township of Madison v. Mayor and Council of the Tow ship of Madison, Middlesex County*, 1968, *S.L.D.* 139:

> "***The problem is one of total revenues available to meet the demanc of a school system***. The Commissioner will indicate, however, the are: where he believes all or part of Council's reductions should be reinstate(It must be emphasized, however, that the Board is not bound to effect i economies in the indicated items but may adjust its expenditures in tl exercise of its discretion as needs develop and circumstances alter.***"
>
> (at p. 14:

Certain categories of items are presented here to explain the point of vie of the litigants and the rationale underlying the hearing examiner's recommend tions, *post: J110B–Salaries, Board Secretary's Office; J110F–Salaries, Superi tendent's Office; J110J–Salaries, Buildings and Grounds; J215A–Salarie Secretaries; J1116–YMCA Swimming Program; J1119–Vocational School E: penses; J1155–Summer School Expenses*

Initially the Board conceded that it would accept Council's recommende reductions, in whole or in part, in each of these line items. (Tr. 29, 38, 77, 14:

The hearing examiner recommends that the Commissioner reduce tl Board's proposed budget by $86,269 which is the aggregate suggested reductic in these line items.

J110H Salaries, School Census

The Board's argument as to need for restoration of these funds is compelling. Council urged that the Board investigate and eliminate from the school district improperly enrolled affidavit pupils. *N.J.S.A.* 18A:38-1(b) (Exhibit R, at p. 3)

The hearing examiner recommends that these funds be restored for the purposes of the school census and the investigation of inordinate numbers of affidavit pupils which Council believes to be attending the public schools of the district.

J110L–Salaries, Personnel Office; J110N–Salaries, Administration; J130L–Personnel Office, Expenses; J211A–Salaries, Principals; J211B–Salaries, Assistant Principals; J212–Salaries, Instructional Supervisors; J410c–Salaries, Nurses

The Board did not adequately support its recommendation for full funding in these line items as set forth in its proposed budget. The hearing examiner recommends, therefore, that these reductions be sustained as set forth by Council in the aggregate of $59,248.

J130A Board Members, Expenses

The Board supports its need for these funds by stating that some of them are mandated by statute and that the remainder of the funds are required for important conferences.

The hearing examiner notices that the proposed expenditure is only nominally higher than the actual expenditure for the previous year. He recommends that $3,054 be restored to this line item. (Tr. 48-51; Exhibit R, at p. 6)

J213A,B Salaries, Teachers

The Board's records adequately support its need for restoration of these funds for contracted salaries. The Board also argues that anticipated enrollment increases and the creation of a new position demand these funds. The Board's records show that these line items may be underbudgeted in terms of last year's experience in utilizing substitute teachers. The hearing examiner recommends, therefore, that these funds be restored. (Tr. 52-77; Exhibit R, at pp. 7-8)

J215B–Salaries, Secretaries; J310–Salaries, Attendance Personnel; J710–Salaries, Maintenance

The Board records do not show that the amounts proposed by Council for these line item expenditures are so inadequate that the Board cannot meet its obligations. The hearing examiner recommends, therefore, that these recommended reductions be sustained.

J230A–Library Books; J230B–Periodicals; J230C–Audiovisual Materials; J230E–Library Supplies; J240–Teaching Supplies; J520C–Field Trips

The total amount of funds remaining in these line items after Council's reductions is approximately $18,000 less than that actually expended by the

Board in 1974-75. Although it would be desirable to provide full funding these line items as the Board proposes, the record cannot support a fi restoration.

The hearing examiner recommends that $18,000 be restored to line ite J240 so that the amount expended will not be less than last year's appropriati and that the remainder of Council's reductions be sustained. (Tr. 101-10 109-111; Exhibit R, at pp. 12-13)

J320 Attendance Office, Expenses

The Board's records show the necessity for these funds for the vi purpose of travel and home visits for Attendance and Pupil Personnel staff. T hearing examiner recommends full restoration in this line item. (Exhibit R, at 14)

J610A,B,C Salaries, Custodians

The record supports the Board's need for these funds for the cost contractual salaries. The Board's budget is grounded in its experience with ext help during the previous year. Salary increases will also demand greater fundi therefore, the hearing examiner recommends that these funds be restore (Exhibit B, at pp. 72-74)

J630 Heat

J640A Water

The Board bases its need for these moneys on the recommendation of fuel supplier and its experience last year. A new swimming pool will also requ additional expenditures for water. The hearing examiner finds that the necess for restoration of these items is adequately supported by the record a recommends full restoration. (Tr. 113 A, B; Exhibit B, at pp. 76-77)

J720B Building Maintenance, Contracted

The Board's records support the need for some required expenditures this line item but fail to show the necessity for its entire proposed expenditu

The hearing examiner recommends that some repairs be postponed a that Council's reduction be sustained. This line item will reflect the sa amount spent by the Board last year after Council's reduction. (Tr. 118-128)

J730A Instructional Equipment, Replacement

J730C New Equipment

The Board has adequately proved the necessity for new equipment in li item J730C and the hearing examiner recommends that the $52,375 reducti be restored. The proposal by the Board to replace old and worn equipme should be postponed as Council suggests. Accordingly, the hearing examir recommends that the reduction of $72,750 in line item J730A be allowed stand.

J740C Equipment, Board Expense

J810C Pension Payments

The Board did not prove that the funds provided in these line items were insufficient; therefore, the hearing examiner recommends that these reductions be sustained.

J820C Insurance, Liability

The record shows that the Board's insurance carrier would not continue coverage due to a poor experience rating. The new "high risk" insurance carrier demands a higher premium.

The hearing examiner recommends that these funds reduced by Council be restored to the budget. (Tr. 137-139)

J1030 Athletic Fund, Expenses

This program is desirable; however, the Board did not sustain its burden to show that it is necessary in order to operate a thorough and efficient system of schools. The hearing examiner recommends that Council's reduction be sustained.

In summary, the recommendations of the hearing examiner with respect to the total budget reductions are listed as follows:

Account Number	Item	Amount of Reduction	Amount Restored	Amount Not Restored
CURRENT EXPENSE:				
J110B	Sal., Bd. Secy.'s Off.	$ 26,100	$ - 0 -	$ 26,100
J110F	Sal., Supt.'s Off.	210	- 0 -	210
J110H	Sal., Sch. Census	5,000	5,000	- 0 -
J110J	Sal., Bldgs., Grds.	776	- 0 -	776
J110L	Sal., Pers. Off	7,635	- 0 -	7,635
J110N	Sal., Adm. Off.	3,434	- 0 -	3,434
J130L	Pers. Off. Exps.	1,300	- 0 -	1,300
J130A	Bd. Mem. Exps.	3,054	3,054	- 0 -
J211A	Sal., Prins.	6,625	- 0 -	6,625
J211B	Sal., Ass't Prins.	7,765	- 0 -	7,765
J212	Sal., Supvr. Instr.	29,242	- 0 -	29,242
J213A	Sal., Teachers	72,606	72,606	- 0 -
J213B	Sal., Spec. Ed. Tchrs.	20,410	20,410	- 0 -
J215A	Sal., Secys.	45,605	- 0 -	45,605
J215B	Sal., Supvrs. Secys.	2,610	- 0 -	2,610
J230A,B, C,E	Lib. Bks., Per., A-V Mats., Supls.	37,614	- 0 -	37,614
J240	Teaching Supls.	139,271	18,000	121,271
J310	Sal., Attend. Pers.	96	- 0 -	96
J320	Attend. Off. Exps.	2,675	2,675	- 0 -

J410C	Sal., Nurses	$ 3,247	$ -0-	$ 3,247
J520C	Field Trips	12,100	-0-	12,100
J610A B,C	Sal., Custs.	33,020	33,020	-0-
J630	Heat	15,648	15,648	-0-
J640A	Water	939	939	-0-
J710	Sal., Maint.	8,125	-0-	8,125
J720B	Bldg. Maint. Contr.	80,627	-0-	80,627
J730A	Instr. Equip. Repl.	72,750	-0-	72,750
J730C	New Equip.	52,375	52,375	-0-
J740C	Equip. Bd. Exps.	2,985	-0-	2,985
J810C	Pension Payments	4,353	-0-	4,353
J820C	Ins. Liability	3,900	3,900	-0-
J1030	Athl. Fund Exps.	24,400	-0-	24,400
J1116	Y-Swim. Program	12,078	-0-	12,078
J1110	Voc. Sch. Exps.	1,000	-0-	1,000
J1155	Summer Sch. Exps.	500	-0-	500
	TOTALS	$740,075	$227,627	$512,448

In addition to these recommended reductions, Council avers that the Board's free appropriations balance of $255,000 is excessive. The hearing examiner cannot agree. The Board's total budget is $19,500,000; therefore, its free appropriations balance approximates only one and three tenths of one percent of its total budget. The Commissioner has previously stated that sound business practice dictates that some contingency funds should be available to local boards of education. *Board of Education of Penns Grove-Upper Penns Neck Regional School District v. Mayor and Council of the Borough of Penns Grove and the Township Committee of the Township of Upper Penns Neck, Salem County*, 1971 *S.L.D.* 372, 374

It is recommended, therefore, that the free appropriations balance be allowed to stand and not be applied against the 1975-76 budget.

Although Council reduced the Board's budget by $1,500,000 in making its certification, its specific reductions amount to only $740,075. The hearing examiner recommends that the difference of $759,925 and the amount recommended to be restored of $227,627 be added to the Board's budget.

The hearing examiner recommends, therefore, that the total sum of $987,552 be restored to the Board's budget for the 1975-76 school year and that a reduction of $512,448 be sustained.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has read the report of the hearing examiner and the exceptions filed thereto by Council pursuant to *N.J.A.C.* 6:24-1.16.

The record shows that the Board has a current expense free appropriations balance in the amount of $255,000 which was recommended restored in its entirety by the hearing examiner because it represents a relatively small percentage of the total budget of $19,500,000. While the Commissioner has indeed stated that sound school business practice dictates that some contingency funds be available to local boards of education, in the instant matter he finds the Board's free appropriations balance excessive. The Commissioner commented further in *Penns Grove-Upper Penns Neck, supra,* as follows:

> "***The Commissioner is reluctant to set rigid parameters limiting the amount of surplus to a percentage of the school budget; however, he notes with concern the practice of many boards of education is establishing and maintaining surplus to protect against all unforeseen fiscal crises. This practice in an inflationary economy, which is also troubled by unemployment and heavy competition for public funds, can be counter-productive to the ideal of a healthy school budget fully-funded and supported by municipal officials.***" (at pp. 374-375)

Our economy is no less troubled today than it was in 1971. See also *Board of Education of the Borough of Middlesex v. Mayor and Council of the Borough of Middlesex, Middlesex County,* 1973 *S.L.D.* 648, 651. For this reason, the Commissioner will reduce by $100,000 the amount recommended for restoration by the hearing examiner, leaving the Board with a current expense free appropriations balance of $155,000. In all other respects the Commissioner adopts the report of the hearing examiner as his own. Accordingly, the Commissioner will restore to the budget $887,552 and sustain Council's reductions in the amount of $612,448.

Therefore, the Commissioner hereby certifies to the Essex County Board of Taxation the additional amount of $887,552 to be raised by public taxation for current expenses for the Board's use in providing a thorough and efficient system of public education in the City of East Orange during the 1975-76 school year.

COMMISSIONER OF EDUCATION

March 26, 1976

In the Matter of the Annual School Election Held in the School District of the Borough of Fieldsboro, Burlington County.

COMMISSIONER OF EDUCATION

DECISION

The announced results of the balloting for membership on the Board of Education for two full terms of three years each and one unexpired one-year term at the annual school election held on March 9, 1976 in the School District of the Borough of Fieldsboro, Burlington County, were as follows:

For Three-Year Terms:

	At Polls
James Harbour	40
Lawrence J. Blakeslee	35
Carol Prokop	35
Ethel Lett	30
Gloria O'Malley	3

For One-Year Unexpired Term:

Carolyn Lohrman	35
David A. Cook	31
Robert Marlin	29
Absentee Ballots	-0-
Number of names on poll list	83
Number of ballots counted	82
Number of ballots voided	1

Pursuant to a letter request dated March 12, 1976 from Ruth G. Blakeslee, Board Secretary, and at the directive of the Commissioner of Education, a recount of the ballots was conducted by an authorized representative of the Commissioner on March 16, 1976 in the office of the Burlington County Superintendent of Schools, Mount Holly.

The Commissioner's representative reports that the recount confirms the announced totals as set forth. There is an error on the printed ballot as confirmed by a letter from the Board Secretary (C-1) accepted into evidence for consideration by the Commissioner. The letter reads as follows:

> "The following is a true statement made to the best of my knowledge concerning the ballot used for the Fieldsboro Board of Education election held on March 9, 1976:

"The item in question concerns the unexpired one-year term [for] which three candidates were listed. The directions should have read vote for one candidate, however, the ballot did in fact read vote for two. Unfortunately, this error was not discovered until the day of the election so that correction was impossible. As near as can be determined, correct information was delivered to the printer. In proof reading the ballot the error was overlooked.

"On the advice of the County Superintendent of School's office the election was allowed to continue using the misprinted ballots." (C-1)

An examination of the ballots cast for the unexpired one-year term shows the following:

No votes cast	7 ballots
One vote cast	55 ballots
More than one vote cast	20 ballots
Total	82 ballots

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner finds and determines that James Harbour was duly elected to the Fieldsboro Board of Education for a full three-year term. Whereas an equipollent vote exists between Carol Prokop and Lawrence J. Blakeslee, there is a failure to elect and the Superintendent of Schools of Burlington County is herewith directed to appoint from the residents of the school district a citizen who holds the qualification for membership to a seat on the Fieldsboro Board of Education as prescribed in *N.J.S.A.* 18A:12-15.

The Commissioner takes note of the printing error on the ballot and finds and determines that because of this error the will of the public in filling the unexpired term cannot be clearly ascertained. Therefore, there is also a failure to elect and the Burlington County Superintendent of Schools shall appoint a qualified citizen to the Fieldsboro Board of Education for the unexpired one-year term.

The Commissioner is constrained to caution each board of education to be meticulous in the preparation of the printed ballot to insure that each voter who exercises his franchise can have his vote properly and expeditiously recorded in order that the will of the voting public can be clearly determined.

COMMISSIONER OF EDUCATION

March 26, 1976

Board of Education of the Borough of Totowa,

Petitioner

v.

Mayor and Council of the Borough of Totowa, Passaic County,

Respondent

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Jacob Green, Esq. (Allan P. Dzwilewski, Esq., of Counsel)

For the Respondent, Dobrin, Muscarella, Saunders & Bochet (Amos C Saunders, Esq., of Counsel)

Petitioner, the Board of Education of the Borough of Totowa, hereinafter "Board," appeals from an action of the Mayor and Council of the Borough of Totowa, hereinafter "Council," taken pursuant to *N.J.S.A.* 18A:22-37 certifying to the Passaic County Board of Taxation a lesser amount of appropriations for school purposes for the 1975-76 school year than the amount proposed by the Board in its budget which was rejected by the voters. The facts of the matter were adduced at a hearing conducted on October 27, 1975 at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner is as follows:

At the annual school election held March 11, 1975, the Board submitted to the electorate proposals to raise $1,478,789 by local taxation for current expense and $15,000 for capital outlay costs of the school district. These items were rejected by the voters, and the Board subsequently submitted its budget to Council for its determination of the amounts necessary for the operation of a thorough and efficient school system in the Borough of Totowa in the 1975-76 school year, pursuant to the mandatory obligation imposed on Council by *N.J.S.A.* 18A:22-37.

After consultation with the Board, Council made its determinations and certified to the Passaic County Board of Taxation an amount of $1,399,289 for current expenses and no moneys for capital outlay. The pertinent amounts in dispute are shown as follows:

	Current Expense	Capital Outlay
Board's Proposal	$1,478,789	$15,000
Council's Proposal	1,399,289	- 0 -
Amount Reduced	$ 79,500	15,000

The Board documents its need for restoration of the reductions recommended by Council with written testimony and a further oral exposition at the time of the hearing. Council maintains that it acted properly and after due deliberation, and that the items reduced by its action are only those which are not necessary for a thorough and efficient educational system. Council also supports its position with written and oral testimony. As part of its determination, Council suggested specific line items of the budget in which it believed economies could be effected as follows:

Account Number	Item	Board's Proposal	Council's Proposal	Amount Reduced
CURRENT EXPENSE:				
J100	Administration	$ 89,715	$ 84,715	$ 5,000
J211	Sals. Prins.	45,270	42,270	3,000
J213	Sals. Teachers	850,200	820,200	30,000
J213A-3	Sals. Sub. Tchrs.	31,500	26,500	5,000
J213.1	Sals. Spec. Tchrs.	96,710	91,710	5,000
J215,216	Sals. Secys.	52,635	49,935	2,700
J230	Libraries	12,750	6,750	6,000
J250A	Misc. Instr.	8,575	6,475	2,100
J500	Pupil Trans.	78,600	73,600	5,000
J610A	Sals. Plant Oper.	97,200	91,200	6,000
J720	Contr. Plant Maint.	13,500	10,300	3,200
J730A,B	Equip. Repl.	6,925	3,925	3,000
J740	Plant Maint.-Oth. Exps.	9,750	6,250	3,500
	TOTALS	$1,393,330	$1,313,830	$79,500
CAPITAL OUTLAY:				
L1220C	Site Improvement	$15,000	$ - 0 -	$15,000
	TOTALS	$15,000	$ - 0 -	$15,000

Council voiced a continued objection to the hearing examiner's ruling which limited its itemized reductions to the aggregate total amount it had actually specified. Council asserted that it listed reductions in the amount of $98,600 and that the Board had the burden to defend its budget, within that total recommended reduction, in the amount of $79,500. The hearing examiner ruled that the Board was only required to prove the necessity for restoration of itemized reductions totaling the actual aggregate total deducted by Council.

J100 Administration *Reduction $5,000*

The Board's expenditure in this series of line items for the 1974-75 school year was $71,701.71. Its proposed budget is $89,715, an increase of more than $18,000. The record and the Board's rationale cannot support such an increase. Council's reduction of $5,000 will still allow an increase of more than $13,000 in this series of line items.

The hearing examiner did not find any unusual anticipated expenses which could not be met within the amount proposed by Council; therefore, he recommends that this reduction be sustained.

J211 Salaries, Principals — *Reduction $3,000*

J213 Salaries, Teachers — *Reduction $30,000*

The Board's contractual obligations in this line item total $44,200 for principals, and it budgeted $45,270. The amount budgeted for teachers' salaries was $850,000, while its obligation for this item is $823,862.

The Board may adopt a salary policy pursuant to *N.J.S.A.* 18A:29-4.1 which reads as follows:

> "A board of education of any district may adopt a salary policy, including salary schedules for all full-time teaching staff members which shall not be less than those required by law. Such policy and schedules shall be binding upon the adopting board and upon all future boards in the same district for a period of two years from the effective date of such policy but shall not prohibit the payment of salaries higher than those required by such policies or schedules nor the subsequent adoption of policies or schedules providing for higher salaries, increments or adjustments. Every school budget adopted, certified or approved by the board, the voters of the district, the board of school estimate, the governing body of the municipality or municipalities, or the commissioner, as the case may be, shall contain such amounts as may be necessary to fully implement such policy and schedules for that budget year."

The Board's testimony regarding these line items was that the funds were necessary to meet its salary policy obligations.

The hearing examiner recommends that the amount of $1,980 be restored to line item J211, and $10,000 be restored to line item J213, so that the Board may meet the obligations of its salary policy. The hearing examiner finds that these line items with the recommended restoration of funds will be adequate to meet the Board's obligations. *N.J.S.A.* 18A:29-4.1

J213A-3 Salaries, Substitute Teachers — *Reduction $5,000*

Council's reduction in this line item will still allow the Board an increase in the amount of $13,000, which is more than the Board expended in 1974-75. (Tr. 75)

The hearing examiner recommends that Council's reduction of $5,000 be sustained.

J213.1 Salaries, Special Teachers *Reduction $5,000*

The rationale relied on in line items J211 and J213, *ante,* is not applicable here. These salaries are not the result of a negotiated salary policy. Furthermore, the Board's request for bedside and supplemental instruction salaries increased from the $2,118 actually spent in 1974-75 to the proposed $15,580 in 1975-76. Even Council's reduction of $5,000 will permit an increase of more than $8,000 in this line item.

The hearing examiner recommends, therefore, that Council's reduction of $5,000 be sustained.

J215, J216 Salaries, Secretaries *Reduction $2,700*

The record and the transcript disclose that the Board proposed an expenditure in these line items of $52,635; however, the actual expenditure for 1974-75 was $44,784. (Tr. 81-82) Council's reduction will permit an expenditure of more than $5,000 over the actual expenditure during the previous year. Furthermore, the Board was unable to sustain its burden of proof to show that more funds than Council provided were needed to meet its obligations.

The hearing examiner recommends, therefore, that the $2,700 reduction be sustained.

J230 Libraries, A-V Materials *Reduction $6,000*

The hearing examiner finds that the proposed expenditure by the Board is practically the same as its actual expenditure during the previous year. Furthermore, the board documents its need for these funds citing the demands of its media centers and the need to update its materials. Other needs cited were the replacement of software materials, enrollment in a school/television station program, and County audiovisual and library assessment.

The hearing examiner recommends that these funds in the amount of $6,000 be restored.

J250A Miscellaneous Instruction *Reduction $2,100*

Council's reduction in this line item will still allow an increase of $3,500 more than the actual expenditure during 1974-75. The Board did not give adequate supporting evidence for additional funds.

The hearing examiner recommends that the reduction of $2,100 be sustained.

J500 Pupil Transportation *Reduction $5,000*

The Board concedes to a $5,000 reduction in this line item.

J610A Salaries, Plant Operation *Reduction $6,000*

The Board's proposed budget in this line item is $97,200 against which it has already incurred contractual obligations and funds for part-time and over-time help amounting to $93,446.

The Board's rationale for the remainder of these funds is reasonable and based on unknown demands for service help during the balance of the school year.

The hearing examiner recommends that $6,000 be restored to this line item.

J720 Contracted Plant Maintenance *Reduction $3,200*

The Board's documentation and testimony adequately support its need for these funds. The amounts budgeted are slightly higher than those actually expended during the prior year. (Exhibit A; Tr. 107-118)

The hearing examiner recommends that these funds in the amount of $3,200 be restored.

J730A,B Replacement of Equipment *Reduction $3,000*

J740 Plant Maintenance, Other Expenses *Reduction $3,500*

These line items were reduced a total of $6,500 by Council. Although the Board stressed its need for both line item amounts and defended its needs with documentation and testimony, the hearing examiner finds that part of the proposed expenditure can be postponed for another year. He recommends, therefore, that $3,000 to replace equipment be postponed. The hearing examiner recommends, also, that $3,500 for line item J740 be restored.

L1220C Site Improvement *Reduction $15,000*

The testimony of the Board and the pictures offered in evidence demonstrated the urgent need for its proposed $15,000 to fix a deteriorating wall on the school grounds. (See Memorial School Exhibits/Pictures.)

The hearing examiner recommends that this $15,000 be restored.

The amounts discussed, *ante,* are recapitulated here as follows:

Account Number	Item	Amount of Reduction	Amount Restored	Amount Not Restored
CURRENT EXPENSE:				
J100	Administration	$ 5,000	$ - 0 -	$ 5,000
J211	Sals. Prins.	3,000	1,980	1,020
J213	Sals. Teachers	30,000	10,000	20,000
J213A-3	Sals. Sub. Tchrs.	5,000	- 0 -	5,000
J213.1	Sals. Spec. Tchrs.	5,000	- 0 -	5,000
J215, 216	Sals. Secys.	2,700	- 0 -	2,700
J230	Libraries	6,000	6,000	- 0 -
J250A	Misc. Instr.	2,100	- 0 -	2,100
J500	Pupil Trans.	5,000	- 0 -	5,000
J610A	Sals. Plant Oper.	6,000	6,000	- 0 -
J720	Contr. Plant Maint.	3,200	3,200	- 0 -
J730A,B	Equip. Repl.	3,000	- 0 -	3,000
J740	Plant Maint.-Oth. Exps.	3,500	3,500	- 0 -
	TOTALS	$79,500	$30,680	$48,820
CAPITAL OUTLAY:				
L1220C	Site Improvement	$15,000	$15,000	- 0 -
	TOTALS	$15,000	$15,000	- 0 -

The hearing examiner recommends, therefore, that the Commissioner restore $30,680 for current expenses and $15,000 for capital outlay to the budget for school purposes for the school year 1975-76.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and the exceptions filed thereto by the governing body pursuant to *N.J.A.C.* 6:24-1.16.

Council objects to the hearing examiner's ruling which limited discussion to the $79,500 by which it actually reduced the Board's budget. Council asserts that it pointed out areas wherein the budget could be reduced in current expenses in the amount of $98,000, and in capital outlay in the amount of $15,000. Therefore, Council demands consideration of the entire recommended reduction and states that the Board should be free to select, from those reduced areas, its own selection of line items which total $79,500 in current expenses and $15,000 in capital outlay. (Tr. 4-8, 11-12) The Commissioner cannot agree.

In *Board of Education of East Brunswick v. Township Council of East Brunswick,* 48 *N.J.* 94 (1966), the Court commented as follows:

> "***The governing body may, of course, seek to effect savings which will not impair the educational process. But its determinations must be independent ones properly related to educational considerations rather than voter reactions. In every step it must act conscientiously, reasonably and with full regard for the State's educational standards and its own obligation to fix a sum sufficient to provide a system of local schools which may fairly be considered thorough and efficient in view of the makeup of the community. Where its action entails a significant aggregate reduction in the budget and a resulting appealable dispute with the local board of education, *it should be accompanied by a detailed statement setting forth the governing body's underlying determinations and supporting reasons.* ***" (*Emphasis added.*) (at pp. 105-106)

Accordingly, the Commissioner has since determined that the sum of the reductions to be considered in budget disputes are those sums actually reduced by governing bodies and not greater sums from which boards of education should select what they believe are the relevant line items. See: *Board of Education of the City of Passaic v. Municipal Council of the City of Passaic, Passaic County,* 1972 *S.L.D.* 592, dismissed Docket No. M-1061-74 New Jersey Superior Court, Appellate Division; *Board of Education of the Matawan Regional School District v. Mayor and Council of the Borough of Matawan and Township Council of the Township of Matawan, Monmouth County,* 1973 *S.L.D.* 689; *Board of Education of the Borough of Middlesex v. Mayor and Council of the Borough of Middlesex, Middlesex County,* 1973 *S.L.D.* 648. In *Middlesex,* the Commissioner commented as follows:

> "***In the matter, *sub judice,* the Commissioner agrees with the hearing examiner that Council has failed to properly discharge its responsibility to set forth a detailed statement of its determination of budget reductions and supporting reasons therefor. Such procedural defeat is fatal to the judicatory process and the equitable resolution of such matters. Therefore, the Commissioner is constrained to adjure Council and all such municipal bodies to discharge their responsibility by setting forth such budgetary determinations promptly, faithfully, *and precisely in the amounts of their proposed reductions of board budgets.* Only under such circumstances may boards of education respond thereto in the prescribed manner before the Commissioner.***" *(Emphasis added.)* (at p. 650)

The Commissioner holds, therefore, that Council was properly limited to discussing only the suggested reductions totaling $79,500 in current expenses and $15,000 in capital outlay.

The testimony adduced at the hearing, however, clearly established that the Board did not demonstrate the need for an additional $20,000 in its transportation line item J500 (Tr. 94-102), a line item originally reduced by Council. The Commissioner determines that an additional reduction must be

considered appropriate. The clear facts adduced at the hearing cannot be set aside. The Commissioner so holds.

In all other respects the Commissioner adopts the report of the hearing examiner as his own. Accordingly, and for the reasons set forth herein, the Commissioner determines that additional sums of $10,680 for current expenses and $15,000 for capital outlay expenses must be added to the amounts previously certified by Council.

Therefore, the Commissioner hereby certifies to and directs the Passaic County Board of Taxation to raise the additional amounts of $10,680 for current expenses and $15,000 for capital outlay expenses of the School District of the Borough of Totowa for the 1975-76 school year.

COMMISSIONER OF EDUCATION

March 26, 1976

In the Matter of the Annual School Election Held in the School District of the Township of Weehawken, Hudson County.

COMMISSIONER OF EDUCATION

DECISION

The announced results of the balloting for members of the Board of Education of the School District of the Township of Weehawken for three terms of three years each at the annual school election held on March 9, 1976, were as follows:

	At Polls	Absentee	Total
Stanley D. Iacono	608	142	750
Edward O. Zensinger	505	123	628
John H. Charlesworth	526	77	603
Mark T. Aiello	477	117	594
John G. McGorty	485	53	538
Gloria M. Dally	405	77	482
Michael H. Tabat	341	55	396
Warren F. Wiltsie	201	9	210

(Exhibit D)

Pursuant to a Petition filed in Superior Court of New Jersey, Law Division, Hudson County, on March 12, 1976 by Candidate Mark T. Aiello, the Court ordered a recheck of the tabulations of both those votes shown on the voting

machines at the polls and those votes cast in the election as absentee ballots. The Court further ordered that neither Mark T. Aiello nor John H. Charlesworth, participate as members of the Board of Education of Weehawken until a determination is rendered based upon the aforesaid recheck of voting tabulations. (Exhibit A)

Thereupon, the Commissioner of Education directed that a recount of machine votes and absentee ballot votes be conducted by an authorized representative on March 17, 1976.

The recount of machine votes, conducted at the Hudson County voting machine warehouse, Jersey City, was limited to the votes cast for candidates and did not include those cast for the school budget. The recount of machine votes disclosed that the tally of votes cast was unchanged from the results announced by the election officials at the close of the polls on March 9, 1976, as listed above. (Exhibit B)

Thereafter, on March 17, 1976 at the offices of the Hudson County Board of Elections, Jersey City, an examination and recount of the absentee ballots was conducted. In recognition of the thrust of the Order of the Court, and with the consent of all persons present including attorneys representing Candidates Aiello and Charlesworth, the recount of absentee ballots was limited to the votes cast for Candidates Aiello and Charlesworth. The recount of absentee ballots disclosed that the tally of votes for Candidates Aiello and Charlesworth was unchanged from the results announced by the election officials as of the close of the election on March 9, 1976. (Exhibit C)

Accordingly, the Commissioner determines that, in addition to Stanley D. Iacono and Edward O. Zensinger whose election was not seriously challenged, John Charlesworth was elected to a seat on the Board as the result of having received 603 votes as compared to the lesser number of 594 votes cast for Mark T. Aiello at the election held on March 9, 1976.

The Commissioner, therefore, directs that John H. Charlesworth be sworn and seated as a member of the Board pursuant to *N.J.S.A.* 18A:12-2.1 at the next official meeting of the Weehawken Township Board of Education.

COMMISSIONER OF EDUCATION

March 31, 1976

Mildred Wexler,

Petitioner,

v.

Board of Education of the Borough of Hawthorne, Passaic County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Saul R. Alexander, Esq.

For the Respondent, Jeffer, Walter, Tierney, Dekorte, Hopkinson, & Vogel (Reginald F. Hopkinson, Esq., of Counsel)

Petitioner is a tenured teacher of French in the employ of the Board of Education of the Borough of Hawthorne, hereinafter "Board." She alleges that the Board's resolution of July 8, 1975, reducing her employment from full-time to half-time with corresponding reduction in salary, was an arbitrary act of bad faith which was procedurally defective and violative of her employment rights under the negotiated agreement and the statutes of New Jersey.

The Board denies that the reduction of petitioner's time of employment and salary was other than a sound exercise of discretion resulting from a marked decrease in enrollment in French classes within the Hawthorne High School.

The matter comes before the Commissioner of Education in the form of a Motion for Summary Judgment by petitioner, a Cross-Motion to Dismiss by the Respondent Board, Briefs of counsel, exhibits, and a transcript of the oral agreement conducted before a representative of the Commissioner on January 26, 1976 at the State Department of Education, Trenton. The known factual context giving rise to the dispute is as follows:

Petitioner is certified only in French by the New Jersey State Board of Examiners. On April 11, 1975, she was notified by the Superintendent in writing as follows:

> "Reappointment to your position as a member of the instructional staff of the Hawthorne School System for the 1975-76 school year was approved at the regular monthly meeting of the Board of Education held on Tuesday, April 8, 1975.
>
> "Salaries were not specified in the teacher appointment resolution adopted by the Board of Education inasmuch as salary negotiations are still in process.

"Your salary for the 1975-76 school year will be determined in accordance with the provisions of the agreement at the conclusion of Teacher - Board negotiations." (P-1)

Petitioner indicated that she intended to accept employment for the 1975-76 school year. (P-1) On July 8, 1975, however, the Board passed the following resolution:

"***WHEREAS, four years of instruction in French are presently offered in the curriculum of the Foreign Language Department of Hawthorne High School, and

"WHEREAS, the total number of students enrolled in the four levels of French instruction for the 1975-76 school year can readily be accommodated in three classes without adversely affecting the quality of education,

"NOW, THEREFORE, BE IT RESOLVED, that the position of French teacher in the Hawthorne Public School System henceforth be reduced from a full-time to a half-time position consisting of three instructional periods per day throughout the school year, effective September 1, 1975." (P-2)

Petitioner was notified by the Superintendent on July 9, 1975, that her salary, which in 1974-75 had been computed at $13,725 on step 13-A of the bachelor's degree scale (P-4), would be adjusted and computed for the 1975-76 school year on the basis of a half-time position. It is on this basis that she has since been paid by the Board.

Petitioner contends that the Board's resolution of July 8, 1975, merely diminished rather than abolished petitioner's full-time teaching position. She argues that this act was *ultra vires* and should be set aside because of failure to comply with *N.J.S.A.* 18A:28-9 which states:

"Nothing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of teaching staff members, employed in the district whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy, or because of reduction in the number of pupils***."

Petitioner argues further that both the Board's notice of employment for the ensuing year and her acceptance thereof (P-1) were predicated upon anticipation of full-time employment, there being no indication of intention to diminish her working hours. Petitioner argues that such offer and acceptance constitutes a binding contract requiring the Board to employ and compensate her on a full-time basis for the 1975-76 school year. (Tr. 9, 15) It is argued, additionally, that, absent a termination clause, the Board is obligated to compensate petitioner as a full-time employee for the entire period of the 1975-76 school year. (Memorandum of Petitioner, at p. 2)

Petitioner asserts that the Board knew, or should have known, of the reduction of enrollment in French classes at the time it adopted its 1975-76 budget. It is contended that notification as late as July 9, because it denied her opportunity to seek alternate employment, was untimely and can only be termed as frivolous, arbitrary, and capricious violation of the negotiated agreement which states, *inter alia,* that:

> "***Notification of employment to teachers including contract and salary status for the ensuing school year shall be offered no later than April 15th.***" (P-3)

Petitioner contends that the Board's action was a subterfuge constituting a unilateral change in terms of employment which could validly be effectuated only by negotiation and that the absence of such negotiation renders it null and void. (Tr. 17-18) *Board of Education of Englewood v. Englewood Teachers Association,* 64 *N.J.* 1 (1973) It is argued that to hold otherwise would, in effect, allow a board to defeat the intent of the tenure law by forcing the resignation of a tenured employee by reducing the hours of employment and the salary of that employee to an amount that is less than a living wage. (Tr. 19-21) In support of the foregoing arguments, petitioner cites, *inter alia, Sally Klig v. Board of Education of the Borough of Palisades Park, Bergen County,* 1975 *S.L.D.* 168; *Alfred W. Freeland v. Board of Education of Scotch Plains–Fanwood Regional School District, Union County*, 1972 *S.L.D.* 53, aff'd State Board of Education 58, aff'd New Jersey Superior Court, Appellate Division, 1973 *S.L.D.* 768; *Josephine De Simone v. Board of Education of the Borough of Fairview, Bergen County*, 1966 *S.L.D.* 43.

Petitioner seeks an order of the Commissioner declaring null and void the Board's resolution of July 8, 1975, and directing the Board to pay her the difference between the salary she actually received and that which she would otherwise have received as a full-time teacher.

Conversely, the Board avers that any provision of the negotiated agreement is superseded by the statutory authority of the Board and its obligation to its constituents to effect an efficient use of public funds by a reduction in force of its teaching staff pursuant to *N.J.S.A.* 18A:28-9. (Tr. 28) In this regard, the Board states that, in July 1975, when it was first made aware that enrollment in French had decreased to thirty-seven pupils for the ensuing year, it acted promptly to reduce the number of French classes and the instructional expenditures attendant thereupon. The Board argues that the statute of reference places no limitation as to the time when the Board has the right to effect a reduction in its teaching staff and that continued full-time employment of petitioner within the factual context would have been contrary to its duty to insure that public funds not be improperly dissipated. (Respondent's Memorandum of Law, at p. 4) In this regard, the Board states that its good faith efforts to utilize petitioner in any other teaching assignment were of no avail by reason of her lack of certification in any discipline other than French. (*Id.*, at p. 5)

The Board argues that

> "***whether a teacher is a tenured or a non-tenured employee, continued employment is always subject to a reduction because of the fact that sufficient students are not present to justify or warrant continued employment. The law could sanction no other arrangement. A public body could never justify continued employment of a teaching staff member if the pupil enrollment did not justify such employment.***"
>
> (*Id.*, at p. 6)

For these reasons, the Board submits that the Petition of Appeal should be dismissed and an Order entered in its favor.

The Commissioner has carefully considered and weighed the respective arguments of counsel within the context of the known facts relevant to the controversy. He observes that petitioner contends that, in the event her Motion for Summary Judgment is denied, the matter should go to a plenary hearing to determine whether the Board *may have acted in bad faith.* (Tr. 42) The Commissioner finds nothing within the record which is supportive of petitioner's contention that relevant facts exist other than those that are known and set forth in the sequential resume of events herein. Absent such a finding, the Commissioner proceeds to a determination of the controverted matter.

Petitioner, as a tenured employee, served without contract. She contends that the Superintendent's letter (P-1) notifying her of the Board's intention to employ her for the 1975-76 school year and her response that she intended to teach for the Board during that year created a contract requiring her to be employed under at least the same terms and conditions as prevailed during 1974-75. Such argument is defective. No communication between the Board and petitioner could alter the status which existed between the Board and petitioner as its tenured employee. Rather, the Superintendent's letter served only as a mutually agreeable communication whereby the Board and its tenured employee notified each other of their intentions for the ensuing school year. In no way did it superimpose a contract upon already existing mutual obligations under the Tenure Act or limit the applicability of *N.J.S.A.* 18A:28-9. The Board was not obligated to notify petitioner of its intent to continue to employ her. Nor was petitioner obligated to notify the Board of her intention to continue to teach in the district. (In this regard, see *De Simone, supra,* at pp. 46-47.) Only in the event that petitioner intended to relinquish her position was she required to give the Board sixty days' written notice of such intention. *N.J.S.A.* 18A:28-8

Petitioner avers that the Board's failure to formally abolish her full-time position of teacher of French is fatal and requires that she be paid for the entire 1975-76 school year as a full-time employee. Without question, the Board's resolution (P-2) did not forthrightly abolish the full-time position in French. It must, however, be determined whether the Board's action was so procedurally defective as to render it null and void.

It was said in *Robert T. Currie v. Board of Education of the School District of Keansburg, Monmouth County,* 1966 *S.L.D.* 193 that:

> "***The Commissioner looks rather to the clear intention of the Board than to the technical perfection of its language. Board of education members are laymen and where their intention is clear, they should not be limited by the legal niceties of language.***" (at p. 195)

Herein, the Commissioner finds no evidence that the Board's act was one of subterfuge or designed to compel a resignation as charged by petitioner. Rather, the resolution's clear and open phraseology reveals an intent on the Board's part to reduce its teaching staff by one half of one teacher in the field of French as a result of declining voluntary enrollment in that subject.

The Commissioner agrees that the Board, when confronted with the fact that three classes in French averaging thirteen pupils each would suffice, was obligated to reduce its teaching staff in that sector. The Commissioner, in recognition of the language of *N.J.S.A.* 18A:28-9, opines that the proper way to effectuate such a change would have been to abolish the full-time position and establish in its place the part-time position, to which petitioner was entitled by reason of her seniority rights. However, the Commissioner finds that the Board's resolution by its clear and unambiguous language reveals an intent which comports with the intent of the Legislature as set forth in *N.J.S.A.* 18A:28-9 *which places no limitation on the time when a board of education may effectuate a reduction in teaching staff for reasons of economy or other good cause*. Accordingly, the Commissioner holds that the Board's July 8, 1975 resolution is legal and valid.

Petitioner's argument that the negotiated agreement required that she be notified of her contract and salary status prior to April 15 cannot prevail. The Board's statutory authority under *N.J.S.A.* 18A:11-1 and *N.J.S.A.* 18A:28-9 may not be invalidated by any items in a negotiated agreement. Any violations of such agreement must be resolved under the terms of the agreement itself.

For a full treatment of this enunciated principle see *Margaret A. White v. Board of Education of the Borough of Collingswood, Camden County,* 1973 *S.L.D.* 261 and *Gladys S. Rawicz v. Board of Education of the Township of Piscataway, Middlesex County,* 1973 *S.L.D.* 305.

The Board's good faith is evidenced by the attempt of the Superintendent to determine whether petitioner's full-time employment could be continued by assignment in another field of certification. (R-1) However, absent alternate certification it was determined that petitioner could not be legally employed as a teacher in another discipline.

Absent a finding that the Board acted in violation of the statutes, or in an arbitrary, capricious manner, or was motivated by bad faith, the Commissioner, for the reasons hereinbefore set forth, determines that such procedural defect as is found in the resolution of July 8, 1975, is insufficient to render the Board's

action null and void. Accordingly, absent a showing of impropriety, the Board's action in entitled to a presumption of correctness. *Boult and Harris v. Board of Education of Passaic,* 1939-49 *S.L.D.* 7, 13, affirmed State Board of Education 15, affirmed 135 *N.J.L.* 329 (*Sup. Ct.* 1947), affirmed 136 *N.J.L.* 521 (*E. & A.* 1948) The arguments of the Board in support of the Motion to Dismiss must prevail. Petitioner is not entitled to the relief which she seeks. The Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

March 31, 1976

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, March 31, 1976

For the Petitioner-Appellant, Saul R. Alexander, Esq.

For the Respondent-Appellee, Jeffer, Walter, Tierney, DeKorte, Hopkinson & Vogel (Reginald F. Hopkinson, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

August 4, 1976

Board of Education of the City of Orange,

Petitioner,

v.

Board of Commissioners of the City of Orange, Essex County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Beck, Reichstein and Guidone (Phillip F. Guidone, Esq., of Counsel)

For the Respondent, Francis J. Dooley, Esq.

Petitioner, the Board of Education of the City of Orange, hereinafter "Board," appeals from an action of the Board of Commissioners of the City of Orange, hereinafter "Board of Commissioners," taken pursuant to *N.J.S.A.* 18A:22-37 certifying to the Essex County Board of Taxation a lesser amount of appropriations for school purposes for the 1975-76 school year than the amount proposed by the Board in its budget. The facts of the matter were adduced at a hearing conducted on December 23, 1975 at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner is as follows:

The City of Orange is organized as a type I school district. *N.J.S.A.* 18A:9-2 Accordingly, as mandated by statutory authority (*N.J.S.A.* 18A:22-7), the Board prepared its budget of proposed expenditures for the 1975-76 school year and delivered it to the Board of School Estimate for review and for subsequent certification to the Board of Commissioners.

This budget proposed that a total of $4,573,161 be raised in local taxation for the support of the Orange schools. Thereafter, the Board of School Estimate of the City of Orange, after notice and public hearing, determined that the sum of $4,573,161 be certified to the Board of Commissioners. The Board of Commissioners reduced this amount by $200,000 and certified the sum of $4,373,161 to the Essex County Board of Taxation. The Board appealed.

The pertinent amounts in dispute are shown as follows:

	Current Expense
Board's Proposal	$4,573,161
Board of Commissioner's Certification	$4,373,161
Amount of Reduction	$ 200,000

The Board avers that the Board of Commissioner's action was arbitrary, capricious and unreasonable and its requests a restoration by the Commissioner of the total reduction.

Counsel for the Board of Commissioners failed to file an Answer to the Petition of Appeal as required by *N.J.A.C.* 6:24-1.4. The principles with respect to such petitions are set forth by the Commissioner and the courts and are found in: *Board of Education of Township of East Brunswick v. Township Council of East Brunswick*, 48 *N.J.* 94 (1966); *Board of Education of the City of Elizabeth v. City Council of Elizabeth*, 55 *N.J.* 501 (1970); *Board of Education of Trenton v. City Council of Trenton, Mercer County*, 1967 *S.L.D.* 172; *Board of Education of Haledon v. Mayor and Council of Haledon, Passaic County*, 1970 *S.L.D.* 70, aff'd State Board of Education 75.

The most inclusive discussion of such principles is contained in the unanimous opinion of the New Jersey Supreme Court in *East Brunswick, supra,* which said:

> "***Where its [the governing body] action entails a significant aggregate reduction in the budget and a resulting appealable dispute with the local board of education, it should be accompanied by a detailed statement setting forth the governing bodies underlying determinations and supporting reasons.***" (48 *N.J.* at 105-106)

In *Board of Education of the City of Elizabeth v. City Council of the City of Elizabeth, supra,* the Supreme Court held that the requirements set forth in *East Brunswick, supra,* also hold for type I school districts when it said:

> "***The local and supervisory obligation must apply to type I as well as to all other types of districts and there is utterly no legislative indication to the contrary. Otherwise there can be no assurance that the constitutional mandate will be fulfilled in type I districts (which are primarily city school systems). The type I local governing body, when it is brought into the fund raising process, must perform its function under no less a standard than applies in any other case. What was said in *East Brunswick* in this connection equally applies.***" (at p. 506)

The Court in *Elizabeth, supra,* continues by citing the specific language in *East Brunswick, supra,* as follows:

> "***The governing body may, of course, seek to effect savings which will not impair the educational process. But its determinations must be independent ones properly related to educational considerations rather than voter reactions. In every step it must act conscientiously, reasonably and with full regard for the State's educational standards and its own obligation to fix a sum sufficient to provide a system of local schools which may fairly be considered thorough and efficient in view of the makeup of the community.***" (48 *N.J.* 105-106)

The record in this matter is replete with correspondence between the Division of Controversies and Disputes, Department of Education, and counsel for both parties. The Board filed its Petition of Appeal with the Commissioner on April 17, 1975. By letter of May 1, 1975, counsel for the Board of Commissioners requested information and data regarding the status of its employees; *i.e.*, names and addresses, job titles, rate of pay and annual pay, identification of the job title and its location in the budget, a separate list of all supervisory personnel and a description of their duties and responsibilities, and the names and addresses and job titles of all persons responsible to same and serving under their command. (Exhibit A)

On May 2, 1975, the Assistant Commissioner informed the Board of Commissioners that:

> "***As respondent you are required to file with this office***your Answer to the Petition***. This must include a list of specific recommended economies, by budgetary line items, including the dollar amounts and description of the proposed economies which, taken in the aggregate, total the gross amount of the reduction.***" (Exhibit B)

This correspondence (Exhibit B) continued with a letter which informed counsel for both parties of a pre-hearing conference scheduled for May 12, 1975 at the office of the Essex County Superintendent of Schools.

Counsel for respondent followed this letter with a letter of May 29, 1975, which canceled a subsequently arranged pre-hearing conference with the County Superintendent of Schools wherein it was stated that he had conferred with counsel for petitioner and, "***We agree that at this point, a conference would be of no value.***" (Exhibit C) The County Superintendent of Schools concurred with this position in a letter to the Assistant Commissioner dated June 2, 1975. (Exhibit D)

Cross-demands were propounded by both parties with respect to the instant matter. The Board demanded that an Answer be filed as required by *N.J.A.C.* 6:24-1.4. Counsel for respondent demanded more information from the Board for purposes of discovery. On July 1, 1975, the Assistant Commissioner informed counsel for respondent that his request for additional information was reasonable and should be granted by petitioner. (Exhibit L)

Subsequently, a letter dated November 6, 1975 from the Assistant Commissioner notified the Board of Commissioners as follows:

> "***By this letter I am ordering both counsel to confer as soon as possible in the Office of the Secretary of the Board of Education of the City of Orange at which time the Board Secretary shall make available a complete list of all personnel employed for the 1975-76 school year. If such conference does not immediately resolve the present conflict regarding discovery, I shall order both parties together with the Board Secretary and Superintendent of Schools to appear for a conference in this office at a

time and date to be set by me and to bring all documentary materials necessary to show the number of employees in all categories presently on the payroll of the Board.

"Please be advised that I am setting Tuesday, November 25, 1975 at 10:00 a.m. for a hearing in this matter***.

"We shall expect both parties to confer in order to complete discovery within 7 days from the date of this letter." (Exhibit H)

The Board advised the Assistant Commissioner and Board of Commissioners by letter of November 10, 1975, that:

"***With reference to your letter of November 6, 1975, upon receipt of same, I have advised Mr. Dooley's office that we have a list of the personnel available and to arrange the meeting as your have directed.

"I also wish to point out that the City has not filed its answer to the Petition which, of course, we must have in order to prepare our presentation of the matter and responsive material prior to the hearing date which you have scheduled.***" (Exhibit I)

The Assistant Commissioner followed this with a letter addressed to both parties dated November 13, 1975, wherein he stated:

"***Please complete your discovery as soon as possible in this matter. We will expect the Governing Body to file its Answer to the Petition setting forth the required information which has been described in previous correspondence and need not be repeated again.***" (Exhibit J)

On December 16, 1975, the Assistant Commissioner again addressed letters to both parties as follows:

"***Shortly after this Office sent a letter under date of November 13, 1975 to both parties, we were notified by telephone that the Governing Body's Answer in this matter would be filed almost immediately.

"We are now more than one month later and this Office has still not received a formal Answer from the Governing Body.***

"Accordingly, we are setting Tuesday, December 23, 1975 at 10 a.m. for a hearing in this matter. Under no circumstances will a postponement be granted for the reason that either party is not prepared to move forward." (Exhibit K)

Subsequently, the Board of Commissioners informed the Assistant Commissioner by letter dated December 17, 1975, that the City of Orange could not prepare its case due to the lack of information form the Board. On December 19, 1975, the Board of Commissioners informed the assigned hearing

officer by telephone that counsel would not be able to attend the hearing scheduled for December 23, 1975, due to personal reasons. The hearing officer then referred to the Assistant Commissioner's letter of December 16, 1975, which stated that no postponement would be granted and that the scheduled hearing would move forward with or without an appearance by the Board of Commissioners. The hearing officer reminded Counsel that as of the date of December 19, 1975, the Board of Commissioners had not filed its Answer to the Petition of Appeal as required by *N.J.A.C.* 6:24-1.4, nor had it followed the prescription found in *East Brunswick, supra,* by submitting a detailed statement of the Board of Commissioners' underlying determination and supporting reasons for reducing the Board's budget request. Counsel for the Board of Commissioners then stated that he would attempt to have the City comptroller represent the Board of Commissioners at the hearing.

On the same day and subsequent to the conversation with counsel for the Board of Commissioners, the hearing officer received a telephone call from the comptroller. The comptroller stated that his office had not received a copy of the Board's annual audit of the 1974-75 budget and, therefore, the Board of Commissioners could not be prepared for the hearing of December 23, 1975. The hearing officer informed the comptroller that a certified copy of the Board's audit was on file in the Office of the Assistant Commissioner, Division of Administration and Finance, Department of Education, and would be available at the time of the hearing. The hearing officer reminded the comptroller that it was not an unusual occurrence to conduct a plenary hearing on a budget dispute without the aid or benefit of a board's annual audit report.

The Superintendent of Schools, the business manager and counsel were present to represent the Board at the appointed time of the hearing. After approximately a one-half hour delay waiting for the arrival of the Board of Commissioners, a telephone call was placed to counsel for the Board of Commissioners. In direct conversation with counsel the hearing officer was again informed that respondent would not be represented at the hearing. The hearing officer reiterated the position of the Assistant Commissioner and informed counsel that the scheduled hearing would proceed with or without representation of the Board of Commissioners.

At the hearing the Board presented testimony in support of its need for the line item amounts contained in its original budget proposal. The Board of Commissioners absented itself from the hearing and, therefore, presented no testimony.

The record will show that the Board's 1974-75 budget appeal was held in abeyance pending the Commissioner's decision with respect to the Board's appeal of the 1975-76 budget. The record discloses that the Board of Commissioners reduced the Board's proposed 1974-75 school budget in the amount of $800,000. Subsequently, the Board of Commissioners restored and certified to the Essex County Board of Taxation an additional amount of $630,000 to the Board's 1974-75 school budget. The Board argues that the amount of $170,000 which represents the difference between the Board of

Commissioners' reduction of $800,000 and the subsequent restoration of $630,000 is of significance in the instant matter. (Tr. 18, 23-24, 52-56) Judicial notice of the 1974-75 budget appeal was noted for the record. (Tr. 55)

A close examination of the Board's documents presented into evidence discloses that it attempted to effectuate economies with respect to the 1975-76 school budget. A comparison of selected appropriations in the line item budgets of 1974-75 and 1975-76 reveals the following:

Account	1974-75	1975-76	Decrease
Administration			
J120 Legal Services	$ 5,000	$ 4,000	$ 1,000
J130 Supt.'s Off.			
Div. of C & I	3,500	2,000	1,500
Bd. of Ed. Off.	5,000	4,000	1,000
Tchr. Recruit	2,500	2,000	500
Instruction			
J212 Supervisors	75,058	62,512	12,546
J213 Teachers	3,532,729	3,416,324.60	116,404.40
J214 Other	324,653	289,023	35,630
J215 Secretaries	136,683	131,300	5,383
J230 Library A/V	79,870	54,870	25,000
J250 Other Instr.	89,399	79,199	10,200
J630 Operation of Plant	192,500	168,000	24,500
Maintenance of Plant			
J730 Repl. of Equip.	25,000	8,353	16,647
J730 Cap. Outlay Equip.	35,000	32,647	2,353
Fixed Charges			
J810 Board Retirement	5,916	3,178	2,738
J820 Insurance			
Fire Insurance	10,650	9,256	1,394
Auto & Gen. Liab.	8,700	7,875	825
Property	2,500	2,387	113
Burglary	380	- 0 -	380
J1123 Comm. Relations	5,000	4,000	1,000

Evening School

J4	Adult Education			
	Salaries	$ 8,100	$ 8,021	$ 79
	Supplies	1,250	850	400
J5	Reg. Eve. Sch.			
	Salaries	16,530	13,697	2,833
J6	Summer School			
	Supplies	600	300	300
J7	Voc. Eve. Sch.			
	Supplies	1,700	1,650	50
	Equipment	400	- 0 -	400
J8	Eve. Foreign-Born			
	Supplies	1,000	975	25

The record reveals that all of the remaining line items in the 1975-76 budget were increased or remained the same as in the 1974-75 budget. The Superintendent testified that significant increases occurred in programs mandated by the State of New Jersey. He testified that a major increase was projected in transportation and tuition for atypical pupils. Line item J520, Transportation of Atypical Pupils, was increased by $23,644, while J870 Tuition was projected to increase by the amount of $82,528. The Superintendent testified further that any additional placement of tuition pupils would result in a budget overrun in these line items. (Tr. 43)

The Superintendent testified that the Board had introduced a school lunch program into all of its elementary schools following the mandate of the State. This Food Service line item (J900) represented an increase of $24,557. He testified that due to the lack of past experience with this program he was concerned about the possible overrun in this line item of the budget. (Tr. 45)

The hearing examiner finds merit in the arguments and testimony of the Board with respect to its need for the funds budgeted. The Superintendent testified that although the school district was experiencing pupil growth (P-6; Tr. 35-40), the Board was effectuating economies in the reduction of staff personnel, primarily though attrition. (P-5; Tr. 35-42) He testified further that at the time of budget preparation no agreement had been reached with the negotiating units in the school district. The Board, therefore, projected salary increases of 3.5 percent in all categories for the 1975-76 budget. The Superintendent's testimony reveals that the actual negotiated settlements are as follows:

Teachers	5 percent	(P-3)
Administrators and Supervisors	7.5 percent	(Tr. 34-35)
Custodians and Maintenance	3.5 percent	(P-4)

Negotiations with the clerical/secretarial staff were not completed at the time of the hearing.

The business administrator testified that the school district absorbed a loss of approximately $60,000 in anticipated State aid. Further, the Commissioner's record discloses that the annual audit of the Board's books for 1974-75, ending June 30, 1975, disclosed a total unappropriated free balance of $72,818.69 in the current expense account.

In summary, and in the absence of the required Answer from the Board of Commissioners, the Commissioner's representative has determined that the Board's total request for tax funds to operate its schools in a thorough and efficient manner during the school year 1975-76 must be granted. Accordingly, he recommends that the sum of $200,000 be certified forthwith to the sum of $4,373,161 previously certified by the Board of Commissioners to the Essex County Board of Taxation so that the aggregate of such funds shall be $4,573,161.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has read the report of the hearing examiner and considered the exceptions filed by the Board of Commissioners. In the exceptions the correspondence between the parties and the State Department of Education is extensively reviewed and the Board of Commissioners asserts it was denied a hearing in the instant matter.

The Commissioner is constrained to observe that the Board of Commissioners failed to file its Answer to the Petition of Appeal as required by *N.J.A.C.* 6:24-1.4 and as directed by the Department on May 2, 1975. The Answer to the Budget Appeal must set forth in detail the Governing Body's underlying determinations and supporting reasons in its determination to reduce the Board's budget. This the Board of Commissioners failed to do.

The allegation that the Board of Commissioners was denied a hearing is without merit and therefore dismissed.

The hearing examiners's report is complete, thorough and well-reasoned; therefore, the Commissioner adopts that report as his own without exception. Accordingly, the Commissioner certifies to and directs the Essex County Board of Taxation to raise the additional amount of $200,000 for current expense for the 1975-76 school year to insure a thorough and efficient program of education.

COMMISSIONER OF EDUCATION

March 31, 1976

"M.D." and "R.D.,"

Petitioners,

v.

Board of Education of the City of Rahway, Union County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Ralph Neibart, Esq.

For the Respondent, Magner, Abraham, Orlando, Kahn & Pisansky (Leo Kahn, Esq., of Counsel)

Petitioners, parents of "I.D.," a fifteen-year-old handicapped pupil formerly enrolled in Rahway schools, aver that the educational program provided for I.D. in the years prior to 1973 was inappropriate to his needs and that the denial of an alternative program in that year provided justification for removal of I.D. from the Rahway program and his placement in a special private school. At this juncture petitioners request the Commissioner of Education to order the Rahway Board of Education, hereinafter "Board," to reimburse them for tuition costs in the 1973-74 and 1974-75 school years. The Board maintains that its educational program for I.D. was appropriate to his needs and pursuant to law and that the Petition should be dismissed.

A hearing in this matter was conducted by a hearing examiner appointed by the Commissioner on January 27, 1975, and continued on February 3 and March 25, 1975 at the offices of the Union County Superintendent of Schools, Westfield. Subsequent to the hearing, Briefs were filed by petitioners and the Board. The report of the hearing examiner is as follows:

I.D. was born on May 20, 1960, and attended public schools in Rahway during all of the period September 1965 to June 1973. Throughout that eight-year period he experienced difficulty with regular school work which resulted eventually in a series of diagnostic examinations by private physicians, engaged by petitioners and by the Board's Child Study Team. Ultimately I.D. was classified in September 1973 by the Child Study Team as perceptually impaired. (P-3) Excerpts from reports of these private physicians and the members of the Child Study Team during the period are required in order that the events and decisions of 1973—at issue herein—may be set in a proper perspective. They are recited as follows:

From a report of Dr. A. M. Chutorian of the Neurological Institute, New York, on November 4, 1969:

> "It is my impression that [I.D.] has some minimal organic cerebral dysfunction, which has been evident in the past due to his hyperactivity,

and continues to be evident in his learning disorder. *** In view of the absence of focal neurologic deficit or anything to suggest a paroxysmal disorder, I saw no need to suggest that specific laboratory studies be made. With appropriate educational help this youngster should make good gains***." (R-3)

From a report of the Board's psychologist, Samuel Sierles, dated February 22, 1972:

"***There is considerable retardation in reading. *** Perceptual inadequacies were seen. *** On the basis of intelligence, [I.D.] should be able to read at grade level but is considerably retarded. *** Perceptual-neurological difficulties may explain these deficits.***" (P-10)

From a report of the Board's psychiatrist, Dr. William E. Ganss, dated March 27, 1972:

"***[I.D.] tests at mid-average range of intelligence***. He is about 2 years behind in his reading, spelling and writing, although his arithmetic is at grade level. He reveals many perceptual problems which seem to be important in the reading disability, and also visual motor problems***." (R-4)

From a report of a psychiatric evaluation by Dr. Larry B. Silver, Rutgers Medical School, July 9, 1973:

"*** [I.D.] is frustrated and aware of his disabilities. *** [I]nformal data suggests that he is still 3-4 years below grade level academically and that he still has visual perceptual and written language disabilities.

"I am very concerned about [I.D.] going to a regular 7th grade class. There is no evidence to support the possibility that he can do the work. *** Ideally he should be in an intensive special educational program.***" (P-1)

From a report of Dr. Avrum L. Katcher, Director, Child Evaluation Center, Hunterdon Medical Center, dated September 10, 1973 to the Director of the Board's Child Study Team:

"***[I.D.] has made two years progress in six years time, in his ability to read isolated words on the Wide Range Achievement Test. *** His progress has been slow enough that I am forced to conclude that a radical re-adjustment of his program is required. I do not believe that continued supplemental teacher (sic) added to a regular classroom program will satisfy his educational needs.

"Instead I believe that he should be placed in a full time self contained program for children with multiple cognitive difficulties leading to a learning disability—in administrative terms a special class program designed for the perceptually impaired child.***

"While awaiting proper placement I have recommended to [I.D.'s] parents that they keep him out of school, because I believe it will only be damaging further to his self image to continue to struggle against odds which he cannot at any time overcome in a regular 7th grade program.***" (P-2)

From the classification report of the Child Study Team dated September 24, 1973:

"Psychological: [I.D.] has been tested several times by psychologists. His obtained verbal IQ's on the WISC have ranged from 87 to 94, Performance 94 to 107, and the full scale IQ's from 90 to 99. *** There also appears to be a perceptual deficit affecting his learning.

"Psychiatric: This 13 year old boy has been diagnosed as a case of minimal cerebral dysfunction syndrome. There are no *hard signs of neurological impairment*.***

"Classification: Perceptually Impaired.***" (*Emphasis supplied*.) (P-3)

Thus, in summary, I.D. is a boy of average or slightly below average intelligence who, by the summer and fall of 1973, had evidenced serious retardation with respect to the acquisition of learning skills. Although school officials had provided regular class placement for him with special tutorial help—in recognition of his perceptual impairment—the program had not been effective or commensurate with I.D.'s learning potential.

This latter fact, not seriously challenged by the Board herein, caused school officials in the summer of 1973 to agree with Dr. Katcher that a new program should be devised and they actively sought a placement for I.D. in classes for perceptually impaired pupils in nearby communities. According to the director of the Board's Child Study Team "***we weren't satisfied any more than they [petitioners] were satisfied***" with the progress of I.D. and so the director "***applied for perceptually impaired placement in Scotch Plains via telephone and Elizabeth via telephone, and written communications.***" (Tr. II-145) Such efforts were, however, not successful and the director was informed by State officials that private placement of pupils classified as perceptually impaired would not be approved. Accordingly, the director testified, the Child Study Team proposed, again, in 1973 to place I.D. in a regular school setting with supplemental help. (Tr. II-146) In the important respects this proposed placement was identical to the placement previously proven ineffective, and, in conformity with Dr. Katcher's recommendation, petitioners removed I.D. in September 1973 from the Rahway School System and placed him in the private Adams School in New York City. He has remained in this school, at petitioners' expense, to the present day.

The Adams School, according to the testimony of its executive director, is a nonprofit corporation, which is devoted, exclusively, to pupils "***diagnosed as being emotionally disturbed and/or neurologically impaired with learning

disabilities***" although many pupils are perceptually impaired as well. (Tr. I-70) The director testified that I.D. has become a "class leader," is in a program of "college preparatory" studies, and that he does very well socially and "works very, very hard." (Tr. I-73) The tuition paid by petitioners for I.D.'s educational program in the Adams School was $3,850 in school year 1973-74 and $4,200 in 1974-75 for a total of $8,050. The instant Petition requests the Commissioner to direct reimbursement in this amount plus transportation costs.

It is noted at this juncture that it is the Board's position that such tuition costs to a private school could not be authorized for perceptually impaired pupils but only for pupils classified as neurologically impaired. The Board grounds this argument in the rules of the State Board of Education (*N.J.A.C.* 6) which, unlike the statute *N.J.S.A.* 18A:46-8, separately categorizes perceptually impaired and neurologically impaired pupils. Further, the Board argues that State officials interpret the rules to mean that private school placement may not be authorized for perceptually impaired pupils and, thus, that petitioners' complaint herein, while against the Board, is also against the rules of the State Board of Education. The statute and rules of reference are cited as follows:

N.J.S.A. 18A:46-8

"Each handicapped child shall be identified, examined and classified according to procedures, prescribed by the commissioner and approved by the state board, under one of the following categories: mentally retarded, visually handicapped, auditorily handicapped, communication handicapped, *neurologically or perceptually impaired*, orthopedically handicapped, chronically ill, emotionally disturbed, socially maladjusted or multiply handicapped. (*Emphasis supplied.*)

N.J.A.C. 6:28-2.1

"Neurologically impaired.' – A child shall be classified as being neurologically impaired as a result of an examination which shows evidence of specific and definable central nervous system disorder. The procedure to determine such impairment shall be administered by a person qualified in the field of neurology. This disability shall be determined by the basic child study team to be related to impairment of the educational functions of the pupil.

"Perceptually impaired.'

"1. A child shall be considered to be perceptually impaired who exhibits a learning disability in one or more of the basic processes involved in the development of spoken or written language but which are not primarily due to sensory disorders, motor handicaps, mental retardation, emotional disturbance, or environmental disadvantage. The disabilities are manifested in the perceptual areas involved in listening, thinking, speaking, reading, writing, spelling, and the study of arithmetic.

"2. The determination of this classification shall rest with the basic child study team.

"3. Each child, so classified, shall have been evaluated in such a manner that an individual educational program related to the learning disability can be specified.

"4. For grouping such children in a special class program for the perceptually impaired, such program shall be described in writing and submitted for prior approval to the Bureau of Special Education and Pupil Personnel Services."

Thus, while the statute categorizes "neurologically or perceptually impaired pupils" as an entity, the rules make a distinct differentiation. Specifically, the rules require for a classification of neurologically impaired that the pupil examined show "***evidence of specific and definable central nervous system disorder." The director of the Board's Child Study Team testified that neurologically impaired pupils had always been categorized by his team separately from perceptually impaired pupils. (Tr. III-11)

Dr. Patricia Brady, a consultant from the Division of Curriculum and Instruction, State Department of Education, testified with respect to the classification categorizations which are in question here. Dr. Brady testified that despite the statute *N.J.S.A.* 18A:46-8 which establishes a category of "neurologically *or* perceptually impaired" pupils, it has been the practice of school districts to handle such pupils in two separate ways. (Tr. II-11) She testified further that, in her understanding of the State regulations, it "isn't possible" for a pupil without a "***specific and definable nervous system disorder***" (*N.J.S.A.* 18A:46-8)–interpreted to be a "hard" rather than a "soft" sign indicator–to be placed in a private school with tuition costs paid by a local board of education and with reimbursement by the State. (Tr. II-18) (See also Tr. II-27 *et seq.*)

Petitioners, in their Brief, aver that, if the policy of the State Department of Education is what Dr. Brady and the Board claim it to be, it is in violation of the New Jersey Constitution and of the pertinent statutes and regulations. They also aver that the law requires local school districts to provide each handicapped child resident therein an education appropriate to his/her needs, and establishes a single classification for pupils who are "neurologically *or* perceptually impaired." They further maintain that the absence of an appropriate local placement for handicapped pupils does not relieve a local board of education of responsibility and that, when necessary, such pupils may and should be placed in appropriate programs in adjoining states. In this latter regard petitioners cite *N.J.S.A.* 18A:46-13 which provides:

"***The absence or unavailability of a special class facility in any district shall not be construed as relieving a board of education of the responsibility for providing education for any child who qualifies under this chapter."

They also aver that:

> "Nothing in *** any *** statute authorizes the Department to deny tuition reimbursement for a child classified as neurologically or perceptually impaired.***" (Brief of Petitioners, at pp. 16-17)

(Note: In addition to statutes already cited, *ante*, petitioners cite *N.J.S.A.* 18A:46-14(g) which provides authorization to send handicapped pupils to nonsectarian schools in adjoining states, and *N.J.S.A.* 18A:46-21 which details the method for the establishment of tuition rates.)

Further, in advancing the view that the statute *N.J.S.A.* 18A:46-8 and other statutes mandate a single categorization for "neurologically or perceptually impaired" pupils and that such mandate may not be altered by administrative or agency rule, petitioners cite *Abelson's Inc. v. New Jersey State Board of Optometrists*, 5 *N.J.* 412 (1950); *Kamienski v. Board of Mortuary Science*, 80 *N.J. Super.* 366 (*App. Div.* 1963); and *Mercer Council #4, New Jersey Civil Service Association v. Alloway*, 119 *N.J. Super.* 94 (*App. Div.* 1972). In particular, petitioners cite *Hotel Suburban System v. Holderman,* 42 *N.J. Super.* 84 (*App. Div.* 1956) wherein the Court said:

> "***An administrator has the right and duty to construe the language of the statute if it is fairly susceptible of more than one interpretation. However, when the provisions of the statute are clear and unambiguous, he may not make rules and regulations amending, altering, enlarging or limiting the terms of the legislative enactment. Under the guise of rule-making, he may not exceed the authority given to him by the statute, the source of his power.***" (at pp. 90-91)

The Board avers that its actions controverted herein were procedurally proper and in accordance with the recommendations of its Child Study Team. It follows, in the Board's view, that when petitioners withdrew I.D. from enrollment in its school system and enrolled him in the private Adams School in 1973 they forfeited a claim against the Board. In support of this view, the Board cites *R.D.H. v. Board of Education of the Flemington-Raritan Regional School District, Hunterdon County,* 1975 *S.L.D.* 103; *K.K. v. Board of Education of Westfield, Union County,* 1971 *S.L.D.* 234; *Robinson v. Goodwin et al., Camden County,* 1975 *S.L.D.* 6; *"T.A." v. Edgewater Park, Burlington County,* 1973 *S.L.D.* 501. The Board further avers that it is not prepared to argue the validity of the rule *N.J.A.C.* 6:28-2.1 wherein perceptually impaired pupils are categorized separately from neurologically impaired pupils and afforded separate treatment–in the context of the statute *N.J.S.A.* 18A:46-8–wherein neurologically impaired or perceptually impaired pupils are categorized together. However, the Board maintains that if the Commissioner determines that the Administrative Code provision is inconsistent and improper such determination should be "***prospective only, as it applies to this case as well as all other cases.***" (Brief of the Board, at p. 11)

The hearing examiner has considered all such arguments in the context of the facts reported, *ante*. These facts in summary form are that:

1. I.D. is a boy of average or slightly below average intelligence whose academic progress in the years 1965-1973 was not commensurate with such intelligence.

2. In recognition of this fact and in cognizance of a number of authoritative reports, the Board did provide supplemental instruction for I.D. in addition to his regular school program during those years.

3. In effect, although a formal classification of I.D. as perceptually impaired was not set forth until September 24, 1973 (P-3), the Board provided a program for him for an extended period of time prior to that date which was in accordance with both the rules of the State Board of Education and the State Department of Education for perceptually impaired pupils.

4. Such program was not successful and in recognition of this fact the Board's Child Study Team attempted an alternative placement for I.D. in 1973 which, however, was not successful.

5. At that juncture, in September 1973, absent so-called "hard signs" of neurological impairment, the Board was not able to place I.D. in a class for neurologically impaired pupils and determined to place him again in a regular school program with supplemental instruction.

6. Petitioners, apprised of such determination, withdrew I.D. from the Rahway School System and placed him in the private Adams School in New York City. (Note: Petitioners evidently registered I.D. in the Adams School in late August 1973 (R-5) while continuing efforts in Rahway to have his program altered.) (See P-5.)

7. Such placement of a pupil classified as perceptually impaired would not qualify, even if sponsored by the Board, as a State-aided placement, whereas a pupil classified as neurologically impaired could be so placed with State reimbursement. (See P-4.)

In assessing such facts the hearing examiner finds no fault herein in the actions of the Board or of the school officials. I.D. was afforded consideration as a perceptually handicapped pupil and such consideration, although practically ineffective, was pursuant to rules of the State Board of Education and administrative interpretations of officials of the State Department of Education.

Such rules and interpretations are, however, clearly not consistent or in harmony with the clear and unambiguous prescription of the statute *N.J.S.A.* 18A:46-8 which categorizes "neurologically or perceptually impaired" pupils together for purposes of examination and classification and, as logic would dictate, for placement in an appropriate program. When, as herein, the practical result of neurological or perceptual impairment is a failure to achieve at a level

commensurate with learning potential, it cannot then be argued that so-called "hard" or "soft" signs must be scrutinized in order to distinguish the impairment or to fund tuition costs for neurologically impaired pupils while denying the same funding, and treatment, to those perceptually impaired. A contrary finding would ignore the practical result of the impairment—a failure to achieve. Form and procedure would replace substance. The statute's clear prescription would be set aside.

Accordingly, the hearing examiner recommends that the Commissioner, together with the Advisory Council (*N.J.S.A.* 18A:46-2) and the State Board of Education consider changes in the rule *N.J.A.C.* 6:28-2.1 in order that the classification and placement of "neurologically or perceptually impaired" pupils may be consistent with the statutory prescription. The hearing examiner further recommends, in the instant manner, that petitioners be reimbursed by the Board for tuition expenses incurred by them to obtain an appropriate educational program for I.D. in the years 1973-74 and 1974-75, if the Adams School, New York City, was an approved nonprofit school in those years and that reimbursement from State funds to the Board be subsequently authorized pursuant to law.

The hearing examiner finds no authority for the transportation costs requested by petitioners in this instance since the distance from the home of I.D. in Rahway to the Adams School is more than twenty miles and is outside the State of New Jersey. Accordingly, in this respect, the hearing examiner recommends that the request be denied.

Finally, the hearing examiner observes that the findings and recommendations herein are unique to this case and are not a departure from, but are consistent with, the principle that the authoritative classifications and placements of child study teams must be given effect, absent clear and convincing proof of arbitrary action or other fault. *R.D.H., supra; K.K., supra* In the instant matter the recognition of I.D.'s need for an alternate placement and program in September 1973 was as much a recognition by the Child Study Team as it was by petitioners. The fault herein is not attributable to the Team but to the rules on which its action was based.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and the exceptions and replies thereto filed by petitioners and the Board. Petitioners specifically contest the recommendation of the hearing examiner concerned with transportation costs and assert again, as in their Brief, that the Board's action of refusal to classify I.D. as "neurologically or perceptually" impaired was arbitrary and should also be set aside on such alternative grounds. The Board cites the present stringent financial climate as a practical reason to set aside the recommendations of the hearing examiner and argues that it "***should not be forced to pay a penalty for acting in good faith and in conjunction with the rules

nd regulations of the N.J.A.C. and its interpretation by the New Jersey Department of Education***." (Board's Exceptions, at p. 5) This latter rgument, the Board avers, is one it has set forth from the onset of the instant itigation, together with an avowal that as a result the Attorney General should e joined as a party to this action. The Board further avers that any ecommendation concerned with a change in the status and placement of erceptually handicapped pupils should be given prospective rather than etrospective application and that the recommendation, if followed, would be ontrary to prior decisions of the Commissioner. It cites in support of this vowal *R.D.H. v. Board of Education of the Flemington-Raritan Regional School District, supra; K.K. v. Board of Education of Westfield, supra,* aff'd State Board of Education 1973 *S.L.D.* 34, aff'd New Jersey Superior Court, Appellate Division, 1975 *S.L.D.* 1086 wherein the Commissioner has held that ocal boards of education are not responsible for tuition or other costs of ttendance in private schools for pupils voluntarily withdrawn by parents from ublic school enrollment. The Board also takes exception to certain of the indings of fact concerned with the Child Study Team's recommendation of an ppropriate placement for I.D. and also disputes the "conclusion" of the hearing examiner that I.D. progressed more quickly in a private school than he would ave in public school.

The Commissioner has considered all such exceptions and the total record f this case and determines that he concurs in part and differs in part with the eport of the hearing examiner. Of prime importance in this latter regard is the Commissioner's determination that the rule of the State Board (*N.J.A.C.* 6:28-2.1) is not faulty because it separately defines neurological and perceptual mpairment since such definitions are important for ultimate placement lecisions. The fault herein lies instead with the disparate treatment, based on the eparate definitions, which is afforded perceptually impaired pupils as compared vith that afforded those with neurological impairments. In each case the ractical result of learning impairment, whatever the cause, is present. The child s handicapped within the categorization of the statute as "neurologically or erceptually impaired." *N.J.S.A.* 18A:46-8 The placement benefits afforded upils so categorized may not continue to be different on the basis of separate lefinitions within the category. The Commissioner so holds although such olding is generally prospective in scope. This limitation is clearly appropriate ince the law to this time has been clearly set forth. *"K.K." v. Board of Education of the Town of Westfield, Union County,* 1971 *S.L.D.* 234, remanded State Board of Education 240, decision on remand 1973 *S.L.D.* 30, aff'd State Board of Education 34, aff'd Docket No. A-1125-73 New Jersey Superior Court, Appellate Division, February 13, 1975; *Parents on behalf of "G.S." v. Board of Education of the Borough of Rockaway, Morris County,* 1974 *S.L.D.* 637 As the Commissioner said in *K.K.*:

> "***While parents have a right to send their children to private schools, they do not have a right to require that public school districts pay the tuition costs involved.***" (at p. 240)

Nevertheless, and despite such clear dicta, the Commissioner determines hat some measure of equitable relief may properly be awarded petitioners on

the facts of this case without substantial harm to the Board and with the lega assessment against State funds. *N.J.S.A.* 18A:58-6 There was a recognition b the Board's Child Study Team that an alternative placement for I.D. was highl desirable, if not absolutely required, in 1973 although such placement was mad practically impossible by State Department rules. It may be assumed from th record that the Team would indeed have approved a placement such as tha secured by petitioners for I.D. in a private school if the rules with respect t State reimbursement had been different. Experience has shown the placement t be a beneficial one.

What measure of equitable relief is appropriate in the context of such facts?

The Commissioner determines that in the circumstances petitioners ar entitled to:

1. a reimbursement of fifty percent of the tuition charges which wer approvable by the State Department of Education for pupils in attendance at th Adams School, New York City, in the 1974-75 and 1975-76 academic years (th years subsequent to the filing of the instant Petition of Appeal in Septembe 1974);

2. a preliminary review by the Child Study Team of the options now made available by this decision for placement of I.D. during the 1976-7 academic year with full funding of tuition costs, if required to be incurred, a provided in law. *N.J.S.A.* 18A:58

Accordingly, the Commissioner directs the Board to provide such reimbursements to petitioners and thereafter to make application for reim bursement from State funds according to law. He further directs that the Boar make an early decision with respect to placement of I.D. in the 1976-7 academic year.

The Commissioner finds no authority for a reimbursement of trans portation costs to private schools outside the State and this plea of the Petitio is dismissed.

COMMISSIONER OF EDUCATION

March 31, 1976

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, March 31, 1976

For the Petitioners-Appellants, Ralph Neibart, Esq.

For the Respondent-Appellee, Magner, Abraham, Orlando, Kahn & Pisansky (Leo Kahn, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed to the extent hat there should be a review by the Child Study Team of the options for placement of "I.D." during the 1976-77 academic year with full funding of uition costs, if required to be incurred, as provided by law. *N.J.S.A.* 18A:58

In addition, the State Board of Education shall maintain jurisdiction as to he question of an appropriate financial remedy. This question is referred to the Attorney General's Office for advice on a proper financial remedy, given this inique situation in which a local board apparently acted in good faith, based ipon advice of the State Department of Education, which the Commissioner has uled was inconsistent with the law.

September 8, 1976

In the Matter of the Annual School Election Held in the School District of the Township of Pennsauken, Camden County.

COMMISSIONER OF EDUCATION

DECISION

The announced results of the balloting for three members of the Board of Education for full terms of three years each at the annual school election held on March 9, 1976 in the School District of the Township of Pennsauken, Camden County, were as follows, excluding a write-in candidate who received one vote.

	At Polls	Absentee	Total
Bernard Kirshtein	1669	22	1691
Theresa R. Brown	1162	6	1168
Barry J. Galasso	1070	9	1079
Seymour Gerber	1061	8	1069
James A. O'Donnell, Jr.	900	2	902
Edward C. Downs	892	7	899

Edward J. Brennan	767	3	770
Mark P. Campbell	685	7	692
Palma Scarfo	507	1	508
William M. Fallon	472	4	476

Pursuant to a letter request from Candidate Gerber dated March 12, 1976, the Commissioner of Education directed an authorized representative to conduct a recount of the ballots cast. The recount was conducted on March 19, 1976 at the voting machine warehouse in Camden County. The recount of the ballots cast on the voting machines disclosed that the tally of the ballots remained unchanged from the results announced by the election officials at the close of the polls on March 9, 1976 as listed above.

Candidate Gerber's request for a recount of the absentee ballots was denied by the Commissioner's representative.

The above ruling is grounded on the fact that the Commissioner has previously held that the canvass of absentee ballots does not rest within his jurisdictional authority. *In the Matter of the Recount of the Ballots Cast at the Annual School Election in the Borough of Little Ferry, County of Bergen,* 1960-61 *S.L.D.* 203

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the report of his representative and concurs with the findings herein. Accordingly, the Commissioner determines that Theresa R. Brown, Barry J. Galasso and Bernard Kirshtein were elected to full terms of three years each on the Board of Education of the Pennsauken School District.

COMMISSIONER OF EDUCATION

April 7, 1976

In the Matter of the Annual School Election Held in the School District of Union City, Hudson County.

COMMISSIONER OF EDUCATION

DECISION

The announced results of the balloting at the annual school election held on March 9, 1976 in the School District of Union City, Hudson County, for three members of the Board of Education for full terms of three years each and for the Board's proposed budgeted amounts to be raised by public taxation for current expenses and capital projects for the 1976-77 school year were as follows:

	At Polls	Absentee	Total
Frank Rieman	3047	841	3888
Paul Cavalli	2895	830	3725
Carl Mirasola	2567	811	3378
Eleanor Yaschak	1219	59	1278
Carol Denzler	949	50	999
Current Expense – YES	1544	759	2303
Current Expense – NO	1331	87	1418
Capital Outlay – YES	1304	751	2055
Capital Outlay – NO	1242	100	1342

(Exhibit C)

Pursuant to a Verified Complaint filed in Superior Court of New Jersey, Law Division, Hudson County, by Candidate Eleanor Yaschak, the Court ordered that a recheck be made of the tabulations of the votes cast on seventeen of the twenty-five voting machines used in the election. (Exhibit A)

Thereupon, the Commissioner of Education directed that a recount of the aforesaid seventeen machines be conducted by an authorized representative on March 17, 1976. The recount of votes on those machines conducted at the Hudson County voting machine warehouse, Jersey City, disclosed that the following votes were cast at the polls on the day of the election:

Frank Rieman	2013
Paul Cavalli	1917
Carl Mirasola	1685
Eleanor Yaschak	780
Carol Denzler	587
Current Expense – YES	1048
Current Expense – NO	816
Current Outlay – YES	885
Capital Outlay – NO	744

(Exhibit B)

A comparison of these totals of machine votes with the recorded totals of votes for each of the seventeen machines in question as certified to the County Superintendent of Schools and placed in the sealed packet of election results by the Secretary of the Board disclosed that the tally of votes cast for each candidate was in each and every instance precisely the same.

Accordingly, absent a finding of any error or discrepancy, the Commissioner determines that Frank Rieman, Paul Cavalli and Carl Mirasola were elected to full terms of three years each on the Board of Education of the Union City School District. The Commissioner further determines that the number of affirmative votes exceeded the number of negative votes on both the question of current expenses and the question of capital outlay. These budget proposals, therefore, were approved by the voters.

COMMISSIONER OF EDUCATION

April 14, 1976

"H.A.," an infant by his parents and natural guardians,

Petitioner,

v.

Board of Education of Warren Hills Regional School District, Warren County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Curry & Kingfield (John F. Kingfield, Esq., of Counsel)

For the Respondent, Schumann & Seybolt (Robert L. Schumann, Esq., of Counsel)

"H.A.," hereinafter petitioner, is a sixteen year old tenth grade pupil in Warren Hills Regional High School, hereinafter "high school," who was suspended and later expelled from school attendance for the remainder of the 1975-76 school year by the Warren Hills Regional Board of Education, hereinafter "Board," for his alleged participation with two other pupils, hereinafter "J.A." and "A.H.," in a telephoned bomb threat communicated to the high school on October 8, 1975 at approximately 11:15 a.m. Petitioner filed a Petition of Appeal accompanied by a Motion for Interim Relief in the instant matter on November 18, 1975 before the Commissioner of Education. Petitioner asserts therein that the Board's expulsion action against him is arbitrary,

capricious, unreasonable, violative of due process and contrary to the provisions of *N.J.S.A.* 18A:37-2. He prays that the Commissioner order his reinstatement to school or, in the alternative, that he be given home instruction by the Board pending a final determination of the instant matter.

Oral argument on the Motion was presented by counsel to a hearing examiner at the State Department of Education, Trenton, on December 19, 1975, and the transcript of the above proceedings together with the Board's Memorandum, petitioner's Reply Brief, exhibits and affidavit are herewith submitted to the Commissioner for his determination.

At this juncture the Commissioner finds that the following relevant facts giving rise to the instant matter are not in dispute:

On October 8, 1975 at approximately 11:15 a.m. a secretary at the high school received an anonymous telephone call from a male indicating that a bomb would explode in the school building at 12:00 noon. This incident was immediately reported to Dr. Raymond Pantuso whose position of employment by the Board is unidentified by the parties herein. The Commissioner concludes, however, that Dr. Pantuso is employed as an administrator at the high school.

Dr. Pantuso consulted with the Superintendent of Schools and then initiated the bomb threat safety procedure at the high school. Thereafter, the high school gymnasium was searched for a bomb and declared to be safe. All of the pupils were taken to that area while the remainder of the school building was searched. However, the results of this search failed to disclose the presence of a bomb on the school premises. (Board's Memorandum, at p. 1)

At approximately 2:00 p.m. on the same day a second anonymous telephoned bomb threat was received by another secretary at the high school from a male indicating that a bomb would explode in the school building at 2:30 p.m. The call was reported to Dr. Pantuso who, on this occasion, initiated the school fire alarm thereby causing the high school building to be evacuated. A search of the premises again failed to disclose the presence of a bomb. (Board's Memorandum, at p. 1)

An investigation into the aforementioned incidents was conducted by the school administration and members of the New Jersey State Police. At approximately 5:30 p.m. on the same day, a State Police officer reported to Dr. Pantuso that petitioner, J.A. and A.H. had confessed their participation in the bomb threat incident. Moreover, J.A. admitted making the telephone call at 11:15 a.m. to the high school office stating that a bomb would explode in the school at 12:00 noon. (Board's Memorandum, at pp. 1-2; Board's minutes of the hearing, Exhibit A) These pupils repeated their confessions to the school administration on October 9, 1975, and thereafter were suspended from school and their parents notified. (Board's Memorandum, at pp. 1-2; Exhibit A)

A hearing before the Board was scheduled for October 27, 1975, and the aforementioned pupils were given notice of the hearing on October 14, 1975.

(Board's Memorandum, at p. 2) The Commissioner observes that contained within the notice (P-1) given to petitioner, the Board advised him of his right to be represented by counsel, to cross-examine any witnesses against him and to call witnesses and produce evidence in his own behalf. Moreover, the notice set forth the charges against petitioner and informed him of the names of the proposed adverse witnesses who would testify at his hearing. (P-1)

The Commissioner has reviewed the certified copy of the Board's minutes of the hearing conducted on October 27, 1975 at 7:00 p.m. (Exhibit A) and observes that this record establishes that petitioner was in fact represented by counsel at the hearing. It is further observed that while the scope of the hearing included testimony related to the telephoned bomb threats received on October 8, 1975 at 11:15 a.m. and 2:00 p.m., the Board conceded at the hearing that petitioner was not involved in the latter incident. Additionally, the Commissioner observes from the minutes of the hearing that the parties were permitted to testify and ask questions with respect to the Board's charges against them. The Commissioner also observes that the record of the hearing reflects the fact that the Board was presented with conflicting testimony by the pupils with respect to the extent of petitioner's participation in the events related to the incident involving the 11:15 a.m. telephoned bomb threat. The conflicting testimony reveals that: 1) J.A. testified that petitioner "egged" him to make the telephone call and called him "chicken" when he failed to make the call earlier that morning; 2) J.A. and A.H. testified that petitioner gave J.A. the school office telephone number at the time he placed the telephone call; 3) J.A. testified that petitioner also gave him the dime to make the telephone call to the high school office.

Finally, the Commissioner observes that at the conclusion of the hearing the Board deliberated and thereafter determined by majority vote to expel petitioner, J.A. and A.H. for the remainder of the 1975-76 school year. (Exhibit A) Petitioner's parents received notice to this effect on October 28, 1975. (P-2)

Petitioner argues in his Reply Brief that the factual findings and determinations of the Board were against the weight of evidence produced at the hearing and, furthermore, that the Board stretched the testimony to all possible lengths to substantiate its findings against him. In support of this position, petitioner avers that, notwithstanding the fact that J.A. made the telephoned bomb threat to the high school at 11:15 a.m. on October 8, 1975, the Board elected to believe certain testimony in this regard, adduced by J.A. and A.H. at the time of the hearing, which was contrary to that of his own.

The Commissioner observes that, by way of an affidavit (P-3) attached to his Notice of Motion for Interim Relief and through oral argument, petitioner denies that his participation in the alleged bomb threat on the morning of October 8, 1975, was any greater than indicated by his testimony at the time of his hearing. (P-3; Tr. 5-6)

Moreover, petitioner contends that the Board's minutes of the hearing strongly suggest that J.A.'s telephone call was instigated by a pupil other than

himself named at the hearing by A.H. It was alleged that this pupil who was not required to be at the hearing offered J.A. ten dollars to make such a telephone call. In this regard, petitioner maintains that the Board's contention that he instigated J.A. to make the bomb threat, as set forth in its Memorandum in Opposition to Petition of Appeal and Motion for Interim Relief, is not based upon a fair and reasonable analysis of the evidence. (Petitioner's Reply Brief, at pp. 4-5)

Petitioner argues further that his statement at the hearing to the effect that he had no prior disciplinary record at the high school and was anxious to return to school was refuted by a high school administrator, but the minutes failed to reflect what these infractions were. Petitioner asserts that testimony not included in the minutes of the hearing indicated that his past disciplinary problems were not serious and occurred infrequently. However, petitioner asserts that the Board by its action attempted to infer that the reverse was true. (Reply Brief, at pp. 5-6)

In support of his argument to indicate that the Board's action in the instant matter is arbitrary, capricious, unreasonable and excessive, petitioner relies on *John Scher v. Board of Education of the Borough of West Orange, Essex County,* 1968 *S.L.D.* 92, wherein the Commissioner determined in part that the

> "[t]ermination of a pupil's right to attend the public schools of a district is a drastic and desperate remedy which should be employed only when no other course is possible.***" (at p. 96)

Petitioner avers that the record is barren of any evidence to indicate that the Board's decision to expel him was tempered beforehand by the advice of competent professionals as set forth in *Scher.* Petitioner contends that the Board's failure to avail itself of such advice and consultation prior to his expulsion, especially in view of his prior disciplinary record, is sufficient to reflect that it adopted a negative approach to his problem in total disregard of his right to continue school. (Reply Brief, at pp. 7-8)

With respect to the Board's alleged failure to comply with the provisions set forth in *N.J.S.A.* 18A:37-2, petitioner maintains that the Board acted without statutory authority when it expelled him from school by virtue of the fact that his action did not constitute any of the following: willful disobedience; open defiance of any teacher or person having authority over him; cutting, defacing or otherwise injuring school property; a continuing danger to the well-being of other pupils; a physical assault upon another pupil, teacher or school employee; or an attempt to cause substantial damage to school property. (Reply Brief, at p. 9)

Finally, petitioner argues that the notice of hearing (P-1) given to him by the Board violated due process and deprived him of a fair hearing by virtue of the fact that the Board failed to indicate that J.A. and A.H. would attend the hearing and possibly testify against him. In this regard, petitioner relies on the

Court decision rendered in *Dixon v. Alabama State Board of Education*, 294 *F. 2d* 150 (5 Cir. 1961) and *R.R. v. Board of Education of Shore Regional High School*, 109 *N.J. Super.* 337 (*Chan. Div.* 1970) to support his claim. Petitioner argues further that the Board introduced testimony at his hearing with respect to the second bomb threat incident in which the Board conceded that he was not involved but inferred that at least one or both of the other participants may have been involved. This testimony, petitioner avers, was used against him by the Board in arriving at a single expulsion determination affecting all three pupils at the conclusion of the hearing. Such prejudice as exhibited by the Board in consolidating the incidents, petitioner maintains, is sufficient to constitute a serious procedural error in the action taken against him. Petitioner relies on *State v. Baker*, 90 *N.J. Super.* 488 (*App. Div.* 1966) in support of his argument. (Reply Brief, at pp. 11-12)

The Commissioner has carefully reviewed the contentions of the parties as set forth in the record herein and cannot agree with the position advanced by petitioner that evidence against him considered by the Board was insufficient to warrant his expulsion. The Commissioner holds that the standard of proof in administrative hearings before a board of education or the Commissioner is not the same as that necessary in criminal proceedings. The quantum of proof here is whether the preponderance of believable evidence is sufficient to establish the truth beyond a reasonable doubt. *Victor W. DeBellis v. Board of Education of the City of Orange, Essex County*, 1960-61 *S.L.D.* 148

Additionally, the Commissioner finds that petitioner's position with respect to the Board's expulsion action against him in the context of *N.J.S.A.* 18A:37-2 is without merit. The Commissioner finds that the fundamental fact herein is that the Board and its administrators were faced with an incident of the highest magnitude on October 8, 1975, wherein an inherent danger to the safety and well-being of the pupils under its jurisdiction was threatened. At the time of the incident the school administration was left with no other alternative but to consider the telephoned bomb threat a potentially dangerous occurrence of incalculable dimension with respect to the imminent peril of injury, destruction and loss of life which might result if, indeed, a bomb were present in the building. In the Commissioner's judgment actions of pupils who perpetrate such incidents, notwithstanding the fact that the incident itself is subsequently found to be false, cannot go unpunished. A board of education has the authority and the responsibility pursuant to the aforementioned statute to deal swiftly and effectively with pupils who wittingly or unwittingly jeopardize the safety and well-being of a pupil population and school staff. All pupils are accountable for their actions to school authorities and the authority for the school administration to require such accountability of pupils is clearly set forth at *N.J.S.A.* 18A:25-2 which reads as follows:

> "A teacher or other person in authority over such pupil shall hold every pupil accountable for disorderly conduct in school and during recess and on the playgrounds of the school and on the way to and from school."

The Commissioner is not swayed by petitioner's argument with respect to the failure of the Board to provide him with a separate hearing in connection

with the bomb threat incident in which he participated with J.A. and A.H. on the morning of October 8, 1975. Moreover, the Commissioner finds that the Board properly exercised its discretionary authority pursuant to *N.J.S.A.* 18A:11-1 when it combined the hearings of petitioner, J.A. and A.H., especially in view of the fact that the aforementioned pupils admittedly participated in the bomb threat. The Commissioner finds that while the hearing included testimony relevant to the second bomb threat occurring in the afternoon of the same day and allegedly involving the action of J.A. and A.H., but not petitioner, there was nothing fatally defective in its action.

With respect to petitioner's position that he was not previously notified that J.A. and A.H. would testify against him at the hearing, the Commissioner finds that the Board was in no way responsible for the adverse testimony adduced from these pupils. Therefore, it is the Commissioner's judgment that the testimony of these pupils resulted from their own perceptions of the events surrounding the morning bomb threat incident. The Commissioner finds that the Board did indeed notify petitioner of the proposed adverse witnesses to be present at his hearing. It did not commit a procedural error in considering the testimony of J.A. and A.H. which conflicted with petitioner's version of the incident in determining the penalty to be meted out against these pupils.

Finally, the Commissioner observes that petitioner complains that the Board's expulsion action against him was not grounded on the competent advice and recommendations of its professional staff, considered to be essential by the Commissioner in *Scher, supra,* before the Board determined that the drastic and desperate remedy of expulsion from school be imposed upon him.

In the instant matter, the Commissioner is constrained to observe that the nature of the Board's expulsion action against petitioner does not constitute his permanent expulsion from school, but rather the Board has by its action effectively excluded him from school for the remainder of the 1975-76 school year for the infraction committed. In this regard, petitioner has failed to substantiate that the Board was required to adhere to the Commissioner's ruling in *Scher, supra,* prior to arriving at a determination to expel him from school for the period of time controverted herein. Having found no legal reason to impose another judgment in this matter, the Commissioner is constrained to remind the Board as he did in *Scher* that "***while such an act [of expulsion] may resolve an immediate problem for the school, it may likewise create a host of others***." (1968 *S.L.D.,* at p. 97) Not the least of these problems are those created for both petitioner and the community at large if his educational program is discontinued for the period of time set forth herein without some alternative method of insuring his educational future in school. To obviate this ultimate result, the Commissioner finds and determines that petitioner's exclusion from school for a period of approximately five months is sufficient to impress upon him the seriousness of his actions and that to deny him an education for the remainder of the school year will accomplish no useful purpose.

Accordingly, the Commissioner directs the Board of Education of the Warren Hills Regional School District to provide an offer of an alternate form of

education to petitioner, either in a modified program of daily in-school instruction or home instruction. In this respect the Commissioner will retain jurisdiction in this matter and will expect within a ten-day period following issuance of this decision to be apprised of the Board's determination.

For the reasons stated, the Motion for Interim Relief is denied except that the alternative form of education is granted in connection with the instant Petition.

Accordingly, the Commissioner finds and determines that no further relief can be accorded petitioner in this regard. Consequently the Petition is dismissed.

COMMISSIONER OF EDUCATION

April 14, 1976

In the Matter of the Annual School Election Held in the Township of Pittsgrove, Salem County.

COMMISSIONER OF EDUCATION

DECISION

The announced results of the balloting for three members of the Board of Education for full terms of three years each at the annual school election held in the School District of the Township of Pittsgrove, Salem County, on March 9, 1976, were as follows:

	At Polls	Absentee	Total
Frank T. Reaves	494	9	503
Everett H. Walker	471	9	480
Patricia Ann Junghans	454	7	461
Fred Laning	455	6	461
Everett W. Schaper	443	10	453
Donald J. Reed	438	7	445

Number of names on poll list	948
Number of ballots counted	941
Number of ballots voided	7

Pursuant to a letter of request dated March 17, 1976 from Candidate Fred Laning, the Commissioner of Education directed an authorized representative to conduct a recount of the ballots cast for the equipollent positions three and four and for position number five of the announced results of the election for members of the Board of Education. The recount was conducted at the office of the Salem County Superintendent of Schools, Woodstown, on March 25, 1976.

The Commissioner's representative reports that at the conclusion of the recount the tally of uncontested ballots, with five ballots left for the Commissioner's determination, stood as follows:

	Total
Fred Laning	454
Patricia Ann Junghans	443
Everett W. Schaper	441

There being no necessity to determine the five referred ballots, since in any case they could not alter the results, they were left undetermined.

The Commissioner finds and determines that Frank F. Reaves, Everett H. Walker and Fred Laning were elected on March 9, 1976 to seats on the Township of Pittsgrove Board of Education for full terms of three years each.

COMMISSIONER OF EDUCATION

April 14, 1976

In the Matter of the Tenure Hearing of Genevieve Rinaldi, School District of the City of Orange, Essex County.

COMMISSIONER OF EDUCATION

ORDER

For the Complainant Board, Beck, Reichstein & Guidone (Philip F. Guidone, Esq., of Counsel)

For the Respondent, Rothbard, Harris & Oxfold (Sanford Oxfeld, Esq., of Counsel)

This matter having been opened before the Commissioner of Education (Eric G. Errickson, Assistant Director, Division of Controversies and Disputes) on May 14, 1974, by Philip Guidone, Esq., attorney for the complainant Board of Education of the School District of the City of Orange, hereinafter "Board"; and,

The Board having certified charges pursuant to *N.J.S.A.* 18A:6-10 *et seq.* against respondent, a tenured teacher in the Board's employ, and the Board having suspended respondent without pay, effective May 1, 1974; and,

The matter having proceeded through two days of hearing on April 15, 1975 and May 27, 1975, with further hearing to be scheduled pursuant to the granting of petitioner's Motion for a continuation of the hearing, which Motion was procedurally granted, conditional upon petitioner moving in the New Jersey Superior Court to compel the appearance of certain witnesses who had failed to respond to subpoenas issued by the Commissioner; and,

It having been moved with supporting argument by Sanford Oxfeld, Esq., attorney for respondent, May 27, 1975, that the Commissioner require the Board to compensate respondent beginning with the 121st day of her suspension, pursuant to *N.J.S.A.* 18A:6-14; no argument opposing the Motion having been offered by counsel for the Board; and

The Board having failed to compensate petitioner from the 121st day of her suspension pursuant to *N.J.S.A.* 18A:6-14, which failure is contrary to the laws of the State of New Jersey; now, therefore

IT IS ORDERED that the Board compensate respondent forthwith in the full amount of her salary, less mitigation in the amount of her earnings, if any, beginning with the 121st day of her suspension and continuing until the receipt of this order. Thereafter, the Board is directed to continue to pay respondent her full salary, less mitigation, if any, at regular payroll intervals, until there is a determination in the matter. Such payments beyond the date of this order shall

exclude that period of time, if any, which may be occasioned by the granting of any delay at respondent's own request, pursuant to *N.J.S.A.* 18A:6-14.

Entered this 24th day of June 1975.

COMMISSIONER OF EDUCATION

In the Matter of the Tenure Hearing of Genevieve Rinaldi, School District of the City of Orange, Essex County.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Beck, Reichstein & Guidone (Phillip F. Guidone, Esq., of Counsel)

For the Respondent, Rothbard, Harris & Oxfeld (Emil Oxfeld, Esq., of Counsel)

Respondent is a tenured elementary school teacher who for twenty-six years has been employed by the Board of Education of the City of Orange, hereinafter "Board." The Board, pursuant to *N.J.S.A.* 18A:6-10 *et seq.*, by a majority vote of its full membership, on April 24, 1974, suspended respondent without pay and certified eleven charges of conduct unbecoming a teacher which the Board avers would be sufficient, if true in fact, to warrant dismissal or reduction in salary. Respondent denies any improper action on her part.

A hearing in this matter was conducted on April 15, 1975 at the office of the Morris County Superintendent of Schools, Morris Plains, by a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner is as follows:

A number of witnesses who had originally preferred certain of the charges herein before the Board and who were called by the Board to testify with respect to these charges, failed to appear at the hearing. Thereupon, a second day of hearing was scheduled and the absent witnesses were subpoenaed. (Tr. I-111) Some, but not all, of the subpoenaed witnesses appeared and testified on May 27, 1975. Thereupon, counsel for the Board moved to continue the hearing at a later date. Their testimony was deemed essential by the hearing examiner to a final determination and, accordingly, the Motion was granted by him on condition that the Board attorney move before the Court pursuant to *N.J.S.A.* 18A:6-21 to compel the reluctant witnesses to appear. (Tr. II-76-83) An order dated July 9, 1975, was issued by the Essex County Court compelling these witnesses to appear and was honored by these witnesses at the third and final day of hearing on August 28, 1975.

Respondent moved on the second day of hearing for an order of the Commissioner to compel the Board to pay her salary beginning with the 121st day following her suspension without pay. An order granting this Motion was entered by the Commissioner on June 24, 1975, pursuant to *N.J.S.A.* 18A:6-14 and subsequently the Board complied with the statutory prescription.

Herewith are set forth, *seriatim,* the charges certified by the Board, a resume of the important testimony pertinent thereto, and the recommendations of the hearing examiner to the Commissioner. It should be noted that neither the Board nor the parents of those children who were in respondent's first grade classes in the 1973-74 school year and who ostensibly were involved in or witnessed the events hereinafter described, chose to compel these pupils, because of their tender age, to testify at the hearing.

CHARGE NO. 1

It is charged that respondent, while eating lunch with a fellow teacher on February 8, 1974 at a public diner, was overheard by two teachers from a neighboring school district to speak in a loud and abusive manner derogating and demeaning the children assigned to her class. It is further charged that these alleged remarks, being brought to the attention of parents and the PTA of the Park Avenue School in which respondent teaches, caused aroused feelings, accusations, confrontations, and a threatened boycott or closing of the school.

The two teachers from the neighboring school district testified that respondent, sitting adjacent to them in the diner, spoke during the period of about thirty minutes in a loud and abusive manner about the children and administration of the Board's Park Avenue School. (Tr. II-37-38, 57) They testified that respondent's remarks contained both racial slurs and invectives and would best be characterized as a monologue rather than a conversation with her luncheon partner. (Tr. II-38, 44) They described it as a disgraceful public display attracting the attention of numerous other diners (Tr. II-36, 59) and testified that they felt that such utterances were totally inappropriate and professionally indefensible in a public place. (Tr. II-42, 46, 53, 59) Their indignation culminated in a letter dated February 11, 1974, addressed to the principal of the Park Avenue School. (P-1) This letter complained that respondent had loudly described children in her class, *inter alia,* as unteachable, inferior, unqualified and stupid. The letter expressed concern that pupils not be subjected to "***intimidation, anxiety, tension and fear***." (P-1) Additional concern was expressed that there appeared to be overt disrespect and hatred for black co-workers or administrators. (P-1)

A resume of the events which ensued is in order. Copies of this letter had also been sent to the Mayor of the City of Orange, the President of the Board, the NAACP and the Board's Director of Personnel. (P-1) The contents of this letter became known to parents, some of whom met with the principal early in the day on February 14 and threatened to boycott and withhold attendance of their children from the Park Avenue School unless action was taken against respondent. (Tr. I-118)

The Superintendent later met on February 14 with respondent and the principal to discuss the allegations contained in the aforementioned letter. (Tr. I-82) Because of what he felt to be certain admitted improprieties by respondent in speaking in public about a particular child, the Superintendent suspended respondent for the single day of Friday, February 15. (Tr. I-85) This penalty, however, was deemed insufficient by numerous aroused parents. (Tr. I-124) One hundred fifty citizens met at the Park Avenue School with the Superintendent and the principal to express their continued concerns on February 27, 1974. (Tr. I-66, 88) The Superintendent testified that a boycott then in progress against the Park Avenue School had slowed down and threatened to disrupt the entire educational process. (Tr. I-96) At the meeting on February 27 the Superintendent advised the concerned parents to reduce to writing their concerns which, when completed, were brought to the Board and formed a basis for the charges herein. (Tr. I-103-104) The Board thereafter suspended respondent without pay and certified the eleven charges on April 24, 1974.

Respondent's friend and fellow teacher with whom she lunched on February 8, 1974, testified that she did not recall that respondent in the diner had referred to her pupils as animals, as stupid, or otherwise uttered invectives or racial slurs. (Tr. I-86-98) She testified that, while respondent was clearly upset on that occasion and could be heard by others in the immediate vicinity of the diner booth in which they were sitting, respondent did not speak continuously in such manner or at any time berate the administration of the school. (Tr. I-94, 99)

Respondent herself testified that she was upset on that occasion because she had come to believe that she had been assigned a greater number of children with serious reading problems than those assigned to any other first grade teacher. (Tr. III-70) She denies the use of invective, or racial slurs, or that she verbally attacked the administration. (Tr. III-71-73) However, she admits lamenting those problems she was having with a pupil, A.W., and complaining bitterly about the composition of her class which was grouped by reading ability. (Tr. III-73) She testified that, when questioned by the principal, she had admitted to him that she had spoken in a complaining manner in the diner. (Tr. III-77)

The hearing examiner has studied and weighed the extensive testimony concerning Charge No. 1 and finds that respondent was emotionally upset and displeased on February 8, 1974 at what she believed to be an inequitable assignment of pupils to her classes. (Tr. III-86-89) The preponderance of believable evidence supports the conclusion that she freely gave vent to her frustration in a loud and complaining manner, easily heard in the immediate vicinity of her booth in the diner. It is further found that she spoke of her particular complaints about one pupil, A.W., whom, although he was an advanced reader, she believed to have been improperly placed in her class. (Tr. I-85; Tr. III-90) There is no evidence that her luncheon partner engaged in expressing similar concerns on that occasion. Rather, it appears that she passively allowed her friend to effect an emotional release. There is no evidence herein to form a conclusion that such outbursts had occurred on previous occasions.

It is further found that, as charged, respondent's behavior in the aforementioned diner incident set in motion a series of events which threatened and, in fact, hampered for a time the efficient and orderly operation of the Park Avenue School. The attention of the public engendered by the aforementioned letter brought into focus certain other incidents, or supposed incidents, relating to respondent which form the basis of the ten remaining charges.

In summary, the hearing examiner finds that Charge No. 1 is proven to be substantially true in fact with the exception that there is insufficient evidence to conclude that respondent used invective or racial slurs or made personal attack upon the administration of her school.

The hearing examiner leaves to the Commissioner to determine whether these findings are sufficient to characterize respondent's behavior with respect to Charge No. 1 as conduct unbecoming a teacher.

CHARGE NO. 2

It is charged that respondent on two occasions during February 1974 tied a pupil, A.W., to a chair.

Respondent admits that on a single occasion she tied A.W. in his seat on a day when he was particularly overactive. (Tr. III-63) However, she stated that this was done with a piece of soft yarn from a crafts project in such a loose manner that he was not strictly restrained nor denied the use of his hands. She testified that A.W. was a hyperactive pupil (Tr. III-64) and an exceptionally bright child who was reading at the first grade level (traditional orthography) but improperly placed in her ITA (Initial Teaching Alphabet) first grade reading class. (Tr. III-65)

An aide, present in respondent's room when this alleged incident occurred, testified that she had similarly observed A.W. to be a hyperactive, intelligent child. (Tr. III-50) She testified further that on a certain day in February when A.W. was particularly active, respondent tied the yarn

> "***loosely around the chair and in front of him. Then she went back to the reading group and as soon as she was there, all he would do is lift the string up and slide out of it and go and do something or poke somebody and then he would scoot right back before she had a chance to see him and slide right back under it, by lifting it up the same way he got out.***"
> (Tr. III-52)

A.W.'s mother testified that he reported to her on two occasions that he had been tied in the chair. She stated that on one occasion he had marks on his wrist. (Tr. III-23-25) She testified that the matter was reported to the school authorities on February 27, 1974 at the meeting of citizens previously mentioned. (Tr. III-41)

The hearing examiner has considered the testimony, and in recognition of the corroborative testimony of the teacher's aide, finds that a single incident

occurred in substantially the manner recited by respondent, but that A.W.'s hands were not tied nor his wrists marked by restraints. While the hearing examiner can find no valid reason for tying a pupil in any manner in a chair, he recommends that the Commissioner treat this as a matter for mild censure in the context of these facts. However, Charge No. 2 is found to be true in fact in this limited extent.

CHARGE NO. 3

It is charged that respondent struck one of her pupils on the head for requesting permission to go to the rest rooms without having first raised his hand.

The parent of the pupil who was allegedly struck with a ruler testified that early in 1974 her son reported the incident, but that absent marks or scars, she made no protest at the time. (Tr. II-10) She further testified that she did not recall whether her son had stated how hard he was hit. (Tr. II-8) She stated that she had no complaints with respect to respondent's conduct of her class or the teaching of her child. (Tr. II-12) Respondent denies Charge No. 3. (Tr. III-59)

Absent a more conclusive showing, the hearing examiner determines that there is insufficient evidence to conclude that this charge is true in fact. It is recommended, therefore, that the Commissioner dismiss Charge No. 3.

CHARGE NO. 4

It is alleged that respondent in November 1973 threw milk in the face of a pupil, B.Y.

The mother of B.Y., who worked as an aide at the school, testified that her son came home at lunch time "***with milk all over his face.***" (Tr. I-10) She stated that she questioned respondent about the matter and was told that respondent "plopped" the carton down on the desk before the child, accidentally causing it to splash on his face. She testified that she gave respondent the benefit of the doubt and lodged no complaint with respondent or with the school authorities then or later, until February 1974. (Tr. I-22)

Respondent testified that the incident occurred, and that milk did accidentally splash on B.Y.'s face. (Tr. III-62)

The hearing examiner has weighed the testimony and concludes that, absent eyewitness testimony of persons other than respondent, there is insufficient evidence herein, to prove that respondent threw milk in B.Y.'s face. It is recommended, therefore, that the Commissioner dismiss Charge No. 4.

CHARGE NO. 5

It is charged that respondent called S.W., a pupil in her class, an animal and told her that she belonged in a zoo. It is further charged that respondent

told S.W. that she (the daughter of a white mother in an interracial marriage) should have a white father.

The parent of this child testified that her daughter had on more than one occasion related to her that respondent had yelled at the class, called them stupid, said that they were animals and that they belonged in a zoo. (Tr. II-24) She stated that her daughter reported in February that respondent had said that she should have a white father. She further testified that she had never spoken to respondent or to school authorities about these matters until February 14. (Tr. II-25) She related that she had attended parent-teacher conferences but had not discussed these matters in conversations with respondent. (Tr. II-27) She testified that she was satisfied that her daughter was well instructed by respondent and was very happy at school. (Tr. II-32)

Respondent denies that she ever called her pupils animals or that she told the child she should have a white father. (Tr. III-61)

However, when questioned further by the hearing examiner, respondent said that *as a daily occurrence* she began her class by saying to her pupils:

> "***How many people are going to be smart and how many people are going to be stupid? *** They knew what I meant. *** It was part of my style.***" (Tr. III-84)

When asked whether she used words such as stupid, dumb, or animals, respondent stated:

> "***Yes, I said to [R] one time, come on, are you a dog or an animal[?] People walk on two legs and not on the floor.***" (Tr. III-85)

The teacher's aide who assisted respondent testified that she had never heard respondent call a pupil an animal (Tr. III-56) but that on occasion she had heard respondent say to her pupils:

> "***[Y]ou don't want to be stupid, who wants to be stupid, raise their hands [sic] and nobody's hand would go up and then she would say, who wants to be smart, do you want to be smart, and learn, and all the kids would put their hands up and say, we don't want to be stupid, we want to learn. That would be the only time I heard her say stupid.***" (Tr. III-55)

The hearing examiner has considered the testimony with respect to Charge No. 5 and finds insufficient evidence to conclude that respondent told S.W. that she should have a white father, or that she called S.W. or any other pupil an animal, stupid or dumb. It is found, however, that respondent used such "color" words with indiscriminate frequency in such fashion as to make her susceptible and vulnerable to such allegations when stress and emotional crises arose. The hearing examiner leaves to the Commissioner to comment upon the appropriateness of such manner and pattern of speaking.

The hearing examiner recommends that the Commissioner determine that Charge No. 5 has not been proven to be true in fact and should be dismissed.

CHARGES NOS. 6 AND 7

The Board produced no testimony or documentary evidence in proof of these charges and withdrew the charges on the third day of hearing. (Tr. II-73; Tr. III-44)

CHARGE NO. 8

This charge is that respondent called E.H. and other pupils in her class stupid.

The mother of E.H. testified that her son had related to her that respondent had called him and other pupils in the class stupid. (Tr. III-19) She stated, however, that she never had gone to respondent or to the school principal to complain about this or to assure herself that it was true, but registered the complaint only in February with the other charges, *sub judice.* (Tr. III-13)

The hearing examiner finds that no useful purpose would be served by a reiteration of previously reported testimony with respect to Charge No. 5 concerned with respondent's admitted use of such words as "stupid" within the scope of her "style" of teaching. Consequently, absent further findings, it is recommended that the Commissioner dismiss Charge No. 8 for the same reasons set forth in Charge No. 5.

CHARGE NO. 9

The Board called no witnesses nor produced any documentary evidence in support of Charge No. 9 and withdrew this charge on August 28, 1975. (Tr. III-46)

CHARGE NO. 10

It is alleged that respondent on numerous occasions called R.B. and others in the class stupid, dumb, and animals.

R.B.'s mother testified that her daughter had told her that on several occasions respondent had said these words and that her daughter, being sensitive, was upset by them. She testified that she had neither lodged a complaint nor brought the matter up at scheduled parent-teacher conferences with respondent. She stated that the single time she did go to the school to look into the matter was on February 14 when several other parents went to the school coincidentally to lodge complaints. (Tr. II-16-17) She testified that in the beginning of the school year respondent and her daughter were good friends but that her daughter became upset because respondent yelled a great deal in the classroom. (Tr. II-21)

Respondent denies the substance of this charge and states that she did not scream or yell an inordinate amount of the time in the classroom. (Tr. III-58)

The hearing examiner has considered the testimony of this parent within the context of similar charges set forth herein. It is noted that R.B.'s mother received her total information with respect to this charge from a young child whom she and the Board chose not to allow to give eyewitness testimony. Such testimony from the parent alone is found to be insufficient evidence to prove that this charge is true in fact. Accordingly, it is recommended that Charge No. 10 be dismissed.

CHARGE NO. 11

No witness was called to testify nor was documentary evidence entered relative to this charge. The Board withdrew Charge No. 11 on the final day of hearing. (Tr. III-46)

In summary the hearing examiner has found insufficient evidence to prove that Charges Nos. 3, 4, 5, 8, and 10 are true in fact and recommends that they be dismissed by the Commissioner. Charges Nos. 6, 7, 9 and 11 were withdrawn by the Board. Charges Nos. 1 and 2 were found to be substantially true in fact and are left for a determination of the Commissioner concerned with whether or not respondent's utterances at the public diner and her "tying of A.W. loosely in his chair" on a single occasion constitute conduct unbecoming a teacher.

In the event that the Commissioner should so determine, the hearing examiner recommends that any penalty be assessed in full consideration of respondent's many years of satisfactory service as a teacher in the City of Orange. Her principal testified that, although respondent typically kept to a limited circle of friends on staff (Tr. I-73), no animosity existed between himself and respondent. He further stated that she willingly followed suggestions that he made. He characterized respondent as a very capable person who planned well and worked hard at her job. He stated that a sampling of first grade pupils in ITA reading programs in the district as a whole revealed that her pupils had achieved at a higher level than any other similar group. (Tr. I-57)

It should also be noted that the very persons who brought Charges Nos. 2 through 11 and testified at the hearing spoke with commendation, in nearly every instance, of respondent's teaching ability and her general relationship to their individual children.

It is similarly noted by the hearing examiner that respondent testified at the hearing and without exception spoke in the respectful manner of a mature educator of those pupils who are subjects of the instant charges. (Tr. III-61-96) In recognition thereof, the hearing examiner recommends that respondent be restored to her teaching position and that a penalty, if deemed appropriate by the Commissioner, be limited to censure and/or a reduction of salary. *N.J.S.A.* 18A:6-10 *et seq.*

This concludes the report of the hearing examiner.

* * * *

The Commissioner has carefully reviewed the entire record of this matter ıd it is noted that neither party chose to file exceptions pursuant to the rovisions of *N.J.A.C.* 6:24-1.16. The Commissioner accepts the findings of fact ɔt forth in the report of the hearing examiner and holds them for his own.

It is observed that the majority of the charges preferred by parents and ɔrtified by the Board against respondent are supported only by the testimony f parents who had not been eyewitnesses to the events of which their children ɔmplained, and who had not sought to ascertain in timely fashion the accuracy f those complaints. Nor did they, or the Board, choose to require that their ıildren, because of their tender age, testify before the hearing examiner. It is ɔo significant that the charges herein did not initially originate or result from bservation and evaluative procedures used by the principal or other agents of ıe Board.

The Commissioner, in *William J. Moore, as guardian of Desiree Moore v. oard of Education of the City of Vineland et al., Cumberland County,* 1975 *L.D.* 290 wherein similar conclusions of parents had been reached, stated that:

> "***[I]f a teacher's effectiveness were to be judged by parents primarily on the basis of reports made to them by their children, teachers would be subject to secondhand evaluations which could be based solely on personality, frivolous and fanciful concerns, or other considerations having no educational basis.***" (at p. 296)

See also *In the Matter of the Tenure Hearing of Anthony Polito, School ıistrict of the Township of Livingston, Essex County,* 1974 *S.L.D.* 662.

Charges Nos. 6, 7, 9 and 11 have been withdrawn and merit no further ɔnsideration.Charges Nos. 3 and 4 are herewith dismissed for lack of proof of / ıe accuracy of that which is alleged therein. Charges Nos. 5, 8 and 10 are kewise dismissed for the reason that the proofs offered fail to substantiate the ıarges that respondent exhibited unbecoming conduct.

The Commissioner hastens, however, to caution respondent and all other ɜachers in the public schools that the use of such "color words" as "dumb," ɜtupid," and "animals," even though not directed at a single pupil or group of ıpils, exposes the user and his employing board of education to the perils of ıisinterpretation. Consequently, their use in such manner as employed by ɜspondent, *ante,* even though well-intentioned, should be avoided in the ıterests of the harmonious relationship of teachers, pupils and parents so ɜsential to an effective and orderly educational process. As was said *In the latter of the Tenure Hearing of Jacque L. Sammons, School District of Black 'orse Pike Regional, Camden County,* 1972 *S.L.D.* 302:

> "***[T]eachers *** are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children

> with the hope that this trust will result in the maximum educationa growth and development of each individual child. This heavy duty require a degree of self-restraint and controlled behavior rarely requisite to othe types of employment. As one of the most dominant and influential force in the lives of the children, who are compelled to attend the publi schools, the teacher is an enormous force for improving the publi weal.***" (at p. 321

Similarly, it was said *In the Matter of the Tenure Hearing of Ernest Tordo School District of the Township of Jackson, Ocean County,* 1974 *S.L.D.* 9 that:

> "***Teachers are public employees who hold positions demanding publi trust, and in such positions they teach, inform, and mold habits anc attitudes, and influence the opinions of their pupils. Pupils learn therefore, not only what they are taught by the teacher, but what they see, hear, experience, and learn about the teacher.***" (at pp. 98-99

There remains for consideration Charges Nos. 1 and 2, wherein the findings of fact are indicative that charges are true. The Commissioner car conceive no justifiable reason for the binding, albeit loosely, of a pupil in a seat However, an analysis of the testimony of the respondent, corroborated by thai of her teacher's aide, caused the Commissioner to conclude that respondent's restriction of A.W., while improperly conceived, was limited in nature and in nc way prompted by unrestrained anger, ill will or malice. Nevertheless, respondent is herewith censured for this action which is contrary to both the safety of the pupil in the event of an emergency and to the building of the positive self-image so essential to the development of a sound personality.

With respect to the remaining Charge No. 1, the Commissioner determines that respondent's manner of speaking in the public diner while on her lunch hour was in large part responsible for the unfortunate disruption to the orderly educative processes in the Park Avenue School. Respondent was, on that occasion, distraught at what she believed to be an inequitable assignment of pupils with limited reading capacity to her class. In *Elizabeth H. Rogers v. Board of Education of the Northern Burlington Regional School District et al., Burlington County,* 1974 *S.L.D.* 1298, it was determined that:

> "***There is no legal right for a teaching staff member to be assigned specific numbers of high or low ability pupils. A past practice in this regard does not constitute a rule. Assuming *arguendo* that there is such a rule, there can be no holding by the Commissioner that the rule must be inflexible.***" (at p. 1306)

In any event, respondent became emotional and indiscreetly gave vent to her frustration in a public place, even to the extent that she verbally complained of the actions of a particular pupil. This display of her dissatisfaction was unprofessional. The Commissioner so holds. It is clearly distinguishable from that which was exhibited by the Superintendent *In the Matter of the Tenure*

Hearing of Peter J. Romanoli, School District of the Township of Willingboro, Burlington County, 1975 *S.L.D.* 352 in that Romanoli gave vent to his ire directly and privately to the Board member who was the object of his wrath. Therein, it was held that teachers or superintendents are not:

> "***divested of such rights when in the role of private citizens they engage in essentially private, personal conversation–albeit other than that used in polite exchange–at midnight in a school parking lot. This determination is limited to the specific factual circumstances in this case. It does not negate numerous prior decisions of the Commissioner and the courts that private conduct may, in other circumstances, properly be the subject of a charge before the Commissioner.***" (at p. 357)

In the matter herein controverted, respondent was indiscreet. Rather than expressing her displeasure in a professional manner to her supervisors or to the Board, she displayed it in a public place. The end result was at least a temporary public loss of confidence in her as a teacher and in the school in which she taught. Such result is, of course, contrary to the constitutional mandate of a thorough and efficient education.

Respondent's indiscretion, however, must be viewed within the context of her commendable teaching service for the Board which extends over a period of twenty-six years. Without question, respondent's suspension of service has itself been a painful ordeal. See *In the Matter of the Tenure Hearing of William H. Kittell, School District of the Borough of Little Silver, Monmouth County,* 1972 *S.L.D.* 535, 542. The Commissioner determines that dismissal of respondent would be an unduly harsh penalty which is not warranted in this instance. Accordingly, it is determined that her penalty shall be limited to the forfeiture of one month's salary.

Hence, the Board is directed to reinstate respondent forthwith to her tenured position and to provide her with any emoluments and salary which she otherwise would have received, less one month of her salary and any other earnings which she may have had in mitigation.

COMMISSIONER OF EDUCATION

April 14, 1976

Howard J. Whidden, Jr.,

Petitioner

v.

Board of Education of the City of Paterson, Passaic County,

Respondent

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Pendleton & Latzer (Roy R. Claps, Esq., of Counsel)

For the Respondent, Robert P. Swartz, Esq.

Petitioner, a former member of the United States Marine Corps for three years, was employed for four and one-half years by the Board of Education of the City of Paterson, hereinafter "Board," at the first level of the salary schedule for those possessing a bachelor's degree. He now claims recognition for his three years of military experience and compensation totaling $4,590, plus interest attorney's fees and costs. The Board denies this claim and grounds such denial in the defense of laches. The Board further avers that petitioner entered into a contract of employment voluntarily and therefore waived any claim for additional compensation for military service.

This matter is submitted by the parties for Summary Judgment by the Commissioner of Education on the pleadings, a stipulation of facts and Briefs Such submission emerged from a conference of counsel held in the office of the Assistant Commissioner of Education in charge of Controversies and Disputes on October 6, 1975 in Trenton, New Jersey.

The relevant facts are not in dispute and are recited as follows:

Petitioner served as a member of the Marine Corps and received his discharge on January 15, 1970 after three years of active duty. Thereafter he was employed by the Board as a teacher in the social studies department of Kennedy High School. His work there began on January 1, 1971, and he was continuously employed from that time forward until June 30, 1975. On that date he resigned and took a position in another school system.

Petitioner was placed at the time of his initial employment by the Board at the first level of the salary scale applicable to teaching staff members in possession of a bachelor's degree. Thus he was not compensated for any of the years of his military service at the time of initial employment and no recognition of such service was afforded him in subsequent years through the 1974-75 academic year. In June 1975 he became aware of the possibility that he might be entitled to salary credit for his military service and he filed a claim with the Board. Such claim was filed on June 17, 1975 in the following amounts:

January 1, 1971 – June 30, 1971 3 steps x $300 x 6/10 yr. =	$ 540.00
September 1, 1971 – June 30, 1972 3 steps x $300 x 10/10 yr. =	900.00
September 1, 1972 – June 30, 1973 3 steps x $300 x 10/10 yr. =	900.00
September 1, 1973 – June 30, 1974 3 steps x $300 x 10/10 yr. =	900.00
September 1, 1974 – June 30, 1975 3 steps x $450 x 10/10 yr. =	$1,350.00
	$4,590.00

The Board denies the claim and maintains that petitioner's delay of approximately four and one-half years in advancing a salary claim for military service is an unreasonable delay and is barred by laches. The Board further avers that *N.J.S.A.* 18A:29-9 clearly indicates that an initial salary agreement need not include credit for military service. The statute recited in its entirety provides that:

> "Whenever a person shall hereafter accept office, position or employment as a member in any school district of the state, his initial place on the salary schedule shall be at such point as may be agreed upon by the member and the employing board of education."

Petitioner argues that *N.J.S.A.* 18A:29-11 is applicable in the instant matter. This statute recited in pertinent part provides that:

> "Every member who, after July 1, 1940, has served or hereafter shall serve, in the active military or naval service of the United States *** shall be entitled to receive equivalent years of employment credit for such service as if he had been employed for the same period of time in some publicly owned and operated college, school or institution of learning in this or in any other state or territory of the United States, except that the period of such service shall not be credited toward more than four employment or adjustment increments.***"

Thus, an adjudication of the instant dispute rests for determination primarily on an interpretation of two statutes. It rests also on a consideration of the facts in the context of the Board's assertion that petitioner should be barred at this juncture by the equitable defense of laches and by certain prior decisions of the Commissioner, the State Board of Education and the courts. At the conference of Counsel the issue was set forth as follows:

> The question for decision is whether 18A:29-11 in the context of 18A:29-9 mandates that all military service be credited at the time of hire.

In petitioner's view the benefits of *N.J.S.A.* 18A:29-11 are mandatory a the time of employment and may not be waived by either the employee or th employer. He avers that the statute is clear, explicit and unambiguous and accordingly, that it is not open to construction or interpretation. In support o this avowal he cites a number of court decisions. *Sperry and Hutchinson Co. v Margetts,* 15 *N.J.* 203 (1954); *Hoffman v. Hock,* 8 *N.J.* 397 (1952); *In r Information Resources Corp.*, 126 *N.J. Super.* 42 (*App. Div.* 1973); *Watt v Mayor and Council of Borough of Franklin,* 21 *N.J.* 274 (1956); *Duke Powe Co. v. Patten,* 20 *N.J.* 42 (1955) Petitioner further avers that the statutor phrase "***shall be entitled to receive equivalent years of employmen credit***" acts as a bar to discretionary salary placement or to placemen subject to an agreement between employee and employer. He asserts that he di not waive his rights either intentionally or voluntarily and that he is not guilty o laches since the claim for wages is analogous to a civil action in court and i "***cognizable as a suit at law, rather than one in equity***" (Petitioner' Brief, at p. 9) and thus subject only to the six year statute of limitation. He als maintains that, if equitable principles are held to be applicable herein, he acte quickly to assert his claim as soon as he had knowledge of the law in June 1975 and that no equitable precepts have been violated. In support of his assertio that he is not guilty of laches in the circumstances, he cites *Clark v. Judge,* 8 *N.J. Super.* 35 (*Chan. Div.* 1964), aff'd 44 *N.J.* 550 (1965); *Citizens Casualt Co. of New York v. Zambrano Trucking Co.,* 141 *N.J. Eq.* 310 (1948); *Allstat Insurance Co. v. Howard Savings Institution,* 127 *N.J. Super.* 479 (*Chan. Div* 1974).

The Board maintains that petitioner's delay of four and one-half year (January 1, 1971-June 1975) in filing his claim was an unreasonable delay prejudicial to the Board, and that, therefore, the claim should be barred by th equitable doctrine of laches. In support of this view the Board cites *Dorothy Elowitch v. Bayonne Board of Education of the Township of Wayne, Passai County,* 1967 *S.L.D.* 78; *E. Gordon Johnson v. Board of Education of th Township of Wayne et al., Passaic County,* 1966 *S.L.D.* 180; *Gloria Ulozas v Board of Education of the Matawan Regional School District, Monmouth County,* 1975 *S.L.D.* 598, aff'd State Board of Education 604. Further, th Board argues that if it is determined that petitioner was entitled to credit at th time of employment and thereafter for military service "***then by hi inaction, petitioner never gave the Respondent Board an opportunity to valu his continued employment in light of his mandated salary.***" (Board's Brief at pp. 2-3) The Board also asserts that while the Commissioner has held in *Louis Alfonsetti et al. v. Board of Education of the Township of Lakewood, Ocean County,* 1975 *S.L.D.* 297 that benefits for military service must be applie equally, he has not been called upon to decide whether local boards of educatio "***could not uniformly negotiate with persons in view of *N.J.S.A.* 18A:29-9.***" (Board's Brief, at p. 4)

The Commissioner has considered all such arguments and the stipulate facts of this case and determines that:

1. Petitioner is not barred by the equitable defense of laches from advancing the instant claim.

2. The statutes *N.J.S.A.* 18A:29-9 and 11 must be read *in pari materia* in order to avoid an anomalous result.

3. Such a reading indicates petitioner and the Board could have and did properly make an agreement that petitioner's initial salary as an employee of the Board was to be that payable to the holder of a bachelor's degree on the first step of the salary scale (*N.J.S.A.* 18A:29-9) and that thereafter petitioner had an "entitlement" to an "adjustment increment" not less than that provided by law ($150) (*N.J.S.A.* 18A-29-6) until the full three years of his military service had been recognized.

The determination that petitioner is not barred by laches from advancing the instant claim, despite a delay of four and one-half years, is grounded in the nature of the claim and in a judgment that the Board has not been prejudiced. This is not a case wherein a decision in favor of petitioner will result in the payment of two salaries for one position by the Board as the result of petitioner's delay. (See *William Gleason v. Board of Education of the City of Bayonne,* 1938 *S.L.D.* 138.) It is case in which it is alleged that a statutory entitlement to placement on or movement within an adopted salary schedule was ignored. As the Commissioner said in *Edna Aeschbach v. Board of Education of the Town of Secaucus, Hudson County*, 1938 *S.L.D.* 598, 604 (1934):

> "***'I do not understand that *mere delay* in bringing a suit will deprive a party of his remedy, unless such neglect has so prejudiced the other party by loss of testimony or means of proof or changed relations that it would be unjust to now permit him to exercise his right.' *Tyman vs. Warren,* 53 *N.J. Eq.* 313***"(*Emphasis in text.*)

Further,

> "***'If, however, upon the other hand, it clearly appears that lapse of time has not in fact changed the conditions and relative positions of the parties, and that they are not materially impaired, and there are peculiar circumstances entitled to consideration as excusing the delay, the Court will not deny the appropriate relief, although a strict and unqualified application of the rule of limitations would seem to require it. Every case is governed chiefly by its own circumstances.' *Wilson vs. Wilson,* 41 *Or.* 459. Quoted in 4 Pomeroy's Equity Jurisprudence, page 3423.***"

Accordingly, the Commissioner determines that the request of petitioner may be examined on its merits.

The Commissioner holds, with respect to the merits of petitioner's request, that the initial employment of a teaching staff member with military service credit may be at an "agreed upon" salary (*N.J.S.A.* 18A:29-9) which must thereafter be adjusted each year until all military service to a maximum of four years is credited on the applicable salary scale of the local board of education. This determination is founded in the clear expression of *N.J.S.A.* 18A:29-11

which defines the entitlement of those with service in the military not only in terms of "employment" increments but also in terms of "adjustment" increments. Thus the statute clearly embraces the principle that at the time of initial employment a teaching staff member who has served in the military services may be employed with something other than a full entitlement for service credit.

There remains the question of the amount of the entitlement to an "adjustment" increment each year until such time as the full entitlement has been granted. In this regard, the Commissioner holds that the "adjustment increment" cannot be less than the definition of *N.J.S.A.* 18A:29-6 wherein an adjustment increment is defined as

> "***an increase of $150.00 granted annually as long as shall be necessary to bring a member *** to his place on the salary schedule according to years of employment***"

or less than the increments of a local board of education salary policy.

Finally, the Commissioner holds that the determinations set forth, *ante*, are in conformity and not in conflict with prior decisions of the Commissioner in *Dominick F. Colangelo v. Board of Education of the City of Camden, Camden County,* 1956-1957 *S.L.D.* 62 and *Alfonsetti, supra.* In the earlier case, as herein, petitioner requested an adjustment increment for military service credit and the request was granted by the Commissioner. In the latter case the decision involved a set of circumstances wherein petitioner had been afforded disparate treatment to that given other teaching staff members similarly situated. There is no such claim herein and the adjudication rests entirely on the mandate of statutory interpretation.

Accordingly, the Commissioner directs the Board to compensate petitioner with an adjustment increment of $150 for each of the years of his employment by the Board, subsequent to the initial year, so that the total amount of adjustment shall be $600.

COMMISSIONER OF EDUCATION

April 14, 1976
Pending Superior Court of New Jersey

**In the Matter of the Tenure Hearing of Alex Smollok,
Passaic County Technical and Vocational Board, Passaic County.**

**COMMISSIONER OF EDUCATION
ORDER**

For the Complainant Board, Raymond Shenekji, Esq.

For the Respondent, Miles Feinstein, Esq.

Written charges of improper conduct were preferred on December 18, 1974 against Alex Smollok, a tenured employee and Board Secretary-Business Manager of the Passaic County Technical and Vocational School, by the School's Board of Education, hereinafter "Board." A copy of the charges was then forwarded to the Commissioner of Education pursuant to the mandate of the Tenure Employees Hearing Law. *N.J.S.A.* 18A:6-10 *et seq.*

Such charges arose from ten counts of bribery lodged against respondent by the State Grand Jury, as well as a Verified Complaint in Lieu of Prerogative Writ filed by the Attorney General of New Jersey. The charges before the Commissioner were, however, held in abeyance by the Commissioner pending determination of the criminal and civil actions in the Superior Court, Law Division, Essex County, and an Answer to the charges was not required to be filed by respondent.

On January 23, 1976, respondent was tried on such charges by a jury of his peers and was found guilty of nine counts of bribery. The Court imposed a sentence of one to three years in the New Jersey State Prison and a fine of $9,000.

A certified copy of the indictment No. S.G.J. 2 Term of 1974 and Judgment Sheet in re *State of New Jersey v. Alex Smollok* for bribery have now been obtained and incorporated as a part of the total record before the Commissioner.

The Commissioner determines that such record warrants respondent's dismissal from his tenured post and, therefore,

IT IS ORDERED on this 21st day of April 1976 that Alex Smollok is hereby dismissed as a tenured Board Secretary-Business Manager of the Passaic County Vocational School retroactive to the date of his suspension by the Board on December 18, 1974.

COMMISSIONER OF EDUCATION

Peter Baldanza,

Petitioner,

v.

Board of Education of Tinton Falls and Board of Education of the Monmouth Regional High School District, Monmouth County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Edelstein & Edelstein (Benjamin Edelstein, Esq., of Counsel)

For the Respondents, Reussille, Cornwell, Mausner & Carotenuto (Martin M. Barger, Esq., of Counsel)

Petitioner is the father of infant children attending the schools of the Tinton Falls Board of Education and the Board of Education of the Monmouth Regional High School District in the Township of New Shrewsbury, hereinafter "Boards," who alleges that the Boards have acted arbitrarily, capriciously and in violation of his statutory rights and in violation of the Constitutions of the State of New Jersey and the United States in refusing to have the school bus pick his children up in front of their residence. Petitioner avers that his children now walk along a dangerous route to a bus stop for the purpose of being transported to their respective schools by the Boards.

Separate Petitions of Appeal were filed on behalf of petitioner's children attending the Tinton Falls schools and one child who attends the Monmouth Regional High School. They were subsequently consolidated since the issues in each are precisely the same. The litigants agreed to submit Briefs in this matter at a conference before the Commissioner on October 9, 1975; however, they later acknowledged by letters dated December 16 and 18, 1975, that the matter could be decided by the Commissioner on the pleadings and the information gleaned at the conference. This matter is ripe, therefore, for Summary Judgment by the Commissioner. It is stipulated that all of petitioner's children are entitled to transportation by mandate of the State Board rule, *N.J.A.C.* 6:21-1.3, and that the distance from the pupils' residence to the bus stop is 500 feet. It is also stipulated that there are no sidewalks in the area in question and that petitioner's children had previously been served by a school bus which stopped in front of their residence. The Boards later changed the location of the bus stop which required the children to walk to an intersection 500 feet distant from their residence. In petitioner's judgment this intersection is extremely dangerous.

The Commissioner is constrained to point out at this juncture that there is no evidence or proof offered by petitioner to support his charges of arbitrary or capricious action by the Boards; nor is there any offer by petitioner to show that

the Boards' action has in fact violated any of his constitutional rights. Petitioner rests on the allegations in his Petitions of Appeal and the understandings between the litigants and the Commissioner at the conference, *ante.*

Local boards have the statutory authority pursuant to *N.J.S.A.* 18A:11-1 to make rules and regulations for government of their schools. The statute reads as follows:

"The board shall –

"a. Adopt an official seal;

"b. Enforce the rules of the state board;

"c. Make, amend and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government and the transaction of its business and for the government and management of the public schools and public school property and the district and for the employment, regulation of conduct and discharge of its employees, subject, where applicable, to the provisions of Title 11, Civil Service, of the Revised Statutes[1]; and

"d. Perform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district."

[1] Section 11:1-1 *et seq.*

In the matter controverted herein, the Commissioner finds no evidence that the Boards' change in the location of a bus stop which affected petitioner's children is arbitrary, capricious, or unreasonable. Nor does the Commissioner find that petitioner has been treated unfairly, inequitably, or denied any of his constitutional rights. See *West Morris Regional Board of Education et al. v. Sills et al.*, 58 *N.J.* 464 (1971).

The Commissioner holds that the Boards acted within their statutory and discretionary authority pursuant to *N.J.S.A.* 18A:11-1, 39-1 and *N.J.A.C.* 6:21-1.3 and that such actions pose no reason for intervention by the Commissioner. This principle was enunciated in *Boult and Harris v. Passaic,* 1939-49 *S.L.D.* 7, affirmed State Board of Education 15, 135 *N.J.L.* 329 (*Sup. Ct.* 1947), aff'd 136 *N.J.L.* 521 (*E. & A.* 1948) as follows:

"***[I]t 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.***" (at p. 13)

In *Howard Schrenk et al. v. Board of Education of the Village of Ridgewood, Bergen County,* 1960-61 *S.L.D.* 185, the Commissioner said:

> "***In the Commissioner's judgment, a board of education may, in good faith, evaluate conditions in various areas of the school district with regard to conditions warranting transportation. It may then make reasonable classifications for furnishing transportation, taking into account differences in the degree of traffic and other conditions existing in the various sections of the district. Such differences need not be great in classification, but no classification may be unreasonable, arbitrary or capricious. *Guill, et al. v. Mayor and Council of City of Hoboken,* 21 *N.J.* 574 (1956); *Pierro v. Baxendale*, 20 *N.J.* 17 (1955); *DeMonaco v. Renton,* 18 *N.J.* 352 (1955); *Borough of Lincoln Park v. Cullari,* 15 *N.J. Super.* 210 (*App. Div.* 1951).***" (at p. 188)

See also: *James P. Beggans, Jr. et al. v. Board of Education of the Town of West Orange, Essex County*, 1974 *S.L.D.* 829, aff'd State Board of Education 1975 *S.L.D.* 1071, affirmed New Jersey Superior Court, Appellate Division, 1071.

Finding no evidence or proof that the Boards have acted in bad faith or outside their statutory or discretionary authority, the Commissioner determines that petitioner's demand for relief and return to the previous bus stop designation in front of his residence cannot be supported in the context of the record before him.

For the reasons detailed herein, the Petitions of Appeal are hereby dismissed.

COMMISSIONER OF EDUCATION

April 27, 1976

Valerie Mina, previously known as Valerie Montecalvo,

Petitioner,

v.

Board of Education of the City of Hoboken, Hudson County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Parsonnet, Parsonnet & Duggan (Thomas L. Parsonnet, Esq., of Counsel)

For the Respondent, Robert W. Taylor, Esq.

Petitioner, a teaching staff member who has acquired a tenure status in the employ of the Board of Education of the City of Hoboken, Hudson County, hereinafter "Board," alleges that her salary has been improperly established by the Board since February 1973 to the present time. Petitioner also complains that the Board, in addition to improperly establishing her salary for that period of time, simultaneously began to illegally withhold moneys from that allegedly improper salary. The Board denies that it improperly established petitioner's salary as of February 1973, and avers that its action of withholding certain moneys from her salary was proper and legal. The Board seeks to have the petition dismissed.

A hearing was conducted in the matter on May 6, 1975 at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner of Education. Thereafter, the Board filed supplemental information at the request of the hearing examiner. The report of the hearing examiner is as follows:

Prior to the hearing the board filed a Motion to Dismiss, with supporting Brief, and petitioner filed an opposing Brief. Upon receipt of the Motion to Dismiss and the respective Briefs of the parties, the hearing examiner determined that, absent a joint stipulation of fact, the record was insufficiently developed for the Commissioner to rule on the Motion. Accordingly, the hearing examiner ruled that a hearing was necessary to determine the facts.

Petitioner began her employment with the Board on September 1, 1970, and was assigned to teach English in the eighth grade at the A.J. Demarest Junior High School. The record discloses that immediately thereafter the Board experienced budgetary problems which resulted in a reduction of staff in the area of special education. Petitioner testified that in February 1971, she was instructed by the Superintendent of Schools to thenceforth report to the Daniel L. Kealey School where she was assigned to teach an educable class. (Tr. 17, 74)

On Februrary 9, 1971, the Board adopted a resolution to transfer petitioner that assignment effective February 15, 1971. (C-7)

At this juncture, the hearing examiner observes that petitioner possesses Secondary School Teacher of English certificate (J-1) which, since March 197 has been held by the Department of Education to be valid for the teaching reading. *N.J.A.C.* 6:11-6.2, 8.3 Furthermore, the hearing examiner h determined from the Commissioner's own records that petitioner was eligible f a provisional certificate for the teaching of special education during Novemb 1971.

In any case, petitioner testified that when she assumed her new duties t teach an educable class on February 15, 1971, her biweekly paycheck increase consistent with the provisions of the then existing agreement (C-5) between th Board and the Association. That agreement provided that teachers who we assigned to special education would receive $300 additional yearl compensation. Petitioner testified that while she knew her paycheck increase she could not be specific as to the amount because her assignment to speci education began during the middle of the year. (Tr. 30-31)

While the hearing examiner is convinced that petitioner's salary wa increased for the period February 15 through June 30, 1971, it is observed tha the Board itself did not authorize such increase. Petitioner's 1970-71 cor tractual agreement (C-1), which sets forth a salary of $7,400, was not amende in any way by the Board.

In the following academic year, 1971-72, petitioner continued in he assignment in special education. (Tr. 32) Her contractual salary (C-2) set fort an amount of $8,900. That amount appears to have been determined by takin the amount set forth at the second step of the Board's then existing salary guid (C-5), or $8,600, and adding thereto the $300 additional compensation whic was then being granted to teachers assigned to special education. (Tr. 31)

However, by letter (R-1) dated October 12, 1971 to the Superintendent o Schools, petitioner requested a reassignment to teach English at either the junio or senior high school. Consistent with her request, the Superintendent, by lette (C-9) dated December 1, 1971, recommended to the Board her reassignment. O December 14, 1971, the Board transferred petitioner to the A.J. Demares Junior High School. By letter (C-8) dated December 15, 1971, the Boar Secretary notified petitioner of her transfer by the Board.

The hearing examiner observes that the transfer resolution simply assign petitioner to the A.J. Demarest Junior High School with no specific grade leve or department. The hearing examiner also observes that the Board took n action with respect to petitioner's 1971-72 contractual salary amount of $8,900 She continued to receive that amount until June 30, 1972.

Petitioner testified that upon her transfer, as of December 14, 1971, sh was assigned by the Superintendent as a teacher of reading. (Tr. 23) Petitione

described her duties in this assignment as a teacher of "remedial reading." (Tr. 23) Petitioner testified that pupils were referred to her by their classroom teachers or by guidance counselors. Petitioner explained that she tested pupils, diagnosed reading problems, determined reading skills deficiencies, and constructed a corrective reading program. Thereafter, petitioner post-tested the pupils and, if sufficient progress were made, she reassigned them to their regular classrooms. (Tr. 23) In support of her position that she is a teacher of "remedial reading," petitioner points to her 1974-75 schedule of classes (P-1) given her by a vice-principal. That schedule assigns her to five periods of remedial reading.

The hearing examiner observes that the position to which petitioner had been assigned on December 14, 1971, is the same position she is assigned to at the present time. (Tr. 80) It is the salary for this assignment which petitioner questions in the matter herein and it is her contention that it was improperly established and has been incorrectly maintained.

When petitioner was reassigned to the A.J. Demarest Junior High School on December 14, 1971, as a teacher of reading, the then existing agreement (C-5) provided that those who served as reading specialists were to receive $300 additional compensation to their base salary. Petitioner argues that when she was transferred, she was performing the duties which demanded the $300 additional compensation as a reading specialist. (Tr. 84) (Petitioner's Brief, at page 1)

Petitioner continued in her assignment for the 1972-73 academic year. Her contractual salary set forth an amount of $9,300. (C-3) However, according to the salary guide (C-5) then in effect, the third step indicated a salary of $9,000 was applicable.

During the course of academic year 1972-73, specifically during January 1973, petitioner testified that she was informed by the Board's payroll clerk that she was receiving salary compensation to which she was not entitled. (Tr. 33-34) Petitioner was further informed that her contractual salary of $9,300 would be reduced to $9,000 for the remainder of the 1972-73 academic year, and from that $9,000 salary there would be deducted an amount equivalent to an alleged excess compensation which she had received since her transfer on December 14, 1971. (Tr. 34-35)

The Board contends that since it transferred petitioner back to the A.J. Demarest Junior High School, she had no claim to the additional $300 additional compensation for the remainder of the 1971-72 academic year. Nor, the Board argues, did petitioner have a claim for the additional $300 for that part of the 1972-73 academic year during which she received it since she is not a reading specialist as contemplated by the agreement. Consequently, the Board asserts that she received additional compensation between December 14, 1971, and February 1, 1973 through error. Accordingly, the Board avers it had the responsibility to recoup those moneys erroneously distributed to petitioner and to adjust her salary for the period between February 1, 1973, and June 30, 1973.

The hearing examiner observes that there is no dispute between the parties with respect to additional compensation awarded petitioner during the time she served as a teacher of special education. However, petitioner claims that not only did the Board illegally reduce her salary on February 1, 1973 by the amount of $300, but also that her then 1972-73 contractual agreement of $9,300 should more properly have provided $9,400. This is so, petitioner argues, because the amount of additional compensation for a reading specialist as set forth in the new 1972-73 and 1973-74 salary agreement (C-6; C-6A) provided for additional compensation of $400 for reading specialists, a $100 increase over the prior year's compensation. Since petitioner served in the same capacity for 1973-74, 1974-75, and presumably 1975-76, it is her contention that her salary in each of those years should have been at least $400 more than she received by virtue of what she alleges to be her assignment as reading specialist.

The hearing examiner observes that petitioner's contractual salary (C-4) for 1973-74 provided for the payment of a salary of $10,500, which is consistent with the amount set forth at the fourth step of the then existing Board's salary policy. (C-6) The hearing examiner concludes that for the 1974-75 and 1975-76 academic years petitioner's salary has been properly established by the terms of the Board's salary guides, excluding additional compensation.

Finally, petitioner seeks to recover the following sums:

1. That amount of repayment which the Board withheld from her paycheck as of February 1, 1973. It is agreed that the Board withheld the amount of $350.10 to recover what it alleges was the amount erroneously paid petitioner during the period December 14, 1971 through January 31, 1973. (Tr. 39)

2. The amount by which her existing 1972-73 contractual salary of $9,300 was reduced between February 1, 1973, and June 30, 1975. That amount cannot be ascertained from the record herein.

3. The extra $100 she avers is due her for the 1972-73 academic year by virtue of the increase in the additional compensation afforded reading specialists in the 1972-73, and 1973-74 academic years as contrasted to the 1971-72 academic year. (C-6; C-6A)

4. The additional compensation of $400 as a reading specialist which should have been afforded her for the academic years 1973-74, 1974-75, and 1975-76.

Permission was granted petitioner at the time of hearing to amend her prayer for relief to extend to June 1975. (Tr. 40) The hearing examiner observes that if the relief requested were to be granted until June 1975, and if petitioner is similarly emplyed for 1975-76 the relief would also be applicable to the present year.

The Assistant Superintendent, on behalf of the Board, testified that the additional compensation of $300/400 set forth for reading specialists in the agreements, C-5, C-6, and C-6A, applies only to those teachers who specialize in reading and who are assigned to the Board's Title I, Elementary and Secondary Education Act program. (Tr. 61) Furthermore, the eligibility of teachers for a placement in this program depends upon certification. (Tr. 61) The Assistant Superintendent also testified that no teaching staff member, except those employed in the Title I program as reading specialists, receive extra compensation for the teaching of reading. (Tr. 67, 69) However, the Assistant Superintendent conceded that nothing in the agreements, C-5, C-6, and C-6A, refers to an eligibility for additional compensation being dependent upon an assignment as reading specialist to the Title I program. (Tr. 70)

The Assistant Superintendent describes petitioner's teaching position to be that of a teacher of eighth grade reading. (Tr. 57) He testified that her morning schedule (R-3) calls for her, along with two other reading teachers, neither of whom receives extra compensation, to work with all eighth grade pupils in the area of reading. Her afternoon assignment involves working with individual pupils referred to her by homeroom teachers. (Tr. 58)

In its Brief in support of its Motion to Dismiss, the Board argues that the Commissioner lacks jurisdiction herein because the dispute emerges not from Title 18A, Education Law, but from the then existing agreements, and that the Commissioner has no authority to hear disputes arising out of a differing interpretation of agreements and cites *Board of Education of East Brunswick Township v. Township Council of East Brunswick,* 48 *N.J.* 94 (1966). The hearing examiner does not agree.

Local boards of education derive their authority to appoint teaching staff members from *N.J.S.A.* 18A:27-1. Boards of education are authorized to make their own rules for the employment of teachers, including rules for the terms and tenure of employment, promotion and dismissal, salaries, and method of payment from *N.J.S.A.* 18A:27-4. Furthermore, boards of education are authorized to transfer teaching staff members by *N.J.S.A.* 18A:25-1, and boards of education may not employ persons as teaching staff members who are not the holders of proper certificates. *N.J.S.A.* 18A:26-2 The authority to issue proper certificates is vested in the State Board of Examiners, *N.J.S.A.* 18A:6-38, and the rules of this Board are set forth in the New Jersey Administrative Code, Title 6. The dispute herein demands an adjudication concerned with whether or not petitioner was and is employed as a reading specialist. Clearly, then, this matter is one which arises under the school law and the Commissioner does have the authority and responsibility to hear and determine all such controversies and disputes. *N.J.S.A.* 18A:6-9

Finally, the Board, in support of its Motion to Dismiss, asserts that petitioner failed to exhaust her administrative remedies at the local level before appealing to the Commissioner. The Board argues that petitioner failed to follow the grievance procedure set forth in the agreement for each of the years in dispute herein where the final remedy is binding arbitration. The Board cites

Shepard v. Board of Education of the City of Englewood, 207 *F.Supp.* 34 (1962) (*D.C.N.J.*).

The record discloses that petitioner did file a grievance with the Superintendent of Schools (Tr. 50) which was denied by letter (R-2) dated February 26, 1973. Although that fact by itself is not dispositive of whether petitioner should have proceeded to binding arbitration, the hearing examiner believes that if the matter is properly before the Commissioner as a matter of school law then binding arbitration was not a necessary prerequisite to the instant litigation.

Consequently, the hearing examiner recommends that the Board's Motion to Dismiss be denied.

In the hearing examiner's judgment, the following questions need to be addressed and require a finding of fact:

1. Has petitioner been employed by the Board as a reading specialist since December 14, 1971?

2. If so, does petitioner have a valid claim for additional compensation?

3. Was petitioner's contractual salary (C-3) of $9,300 illegally reduced on February 1, 1973?

4. Are the deductions made from petitioner's salary between February 1, 1973, and June 30, 1973, legal and proper?

The issues will be addressed in the order presented.

While *N.J.A.C.* 6:11-12.20 sets forth specific requirements for the acquisition of a reading specialist certificate by new applicants after July 1, 1975, the hearing examiner observes that prior to that date the only specific certification required was that of an elementary teacher. Consequently, a factual determination as to whether petitioner was employed as a reading specialist or simply a reading teacher must be made on the record herein.

A review of petitioner's testimony, read *in pari materia* with the Assistant Superintendent's testimony with respect to petitioner's responsibilities, leads the hearing examiner to conclude that petitioner was a teacher of reading assigned to the eighth grade. The hearing examiner finds no convincing testimony that petitioner was, *de facto,* a reading specialist. Having made that finding, it is also the finding of the hearing examiner that petitioner has no claim to additional compensation for the academic years 1973-74, 1974-75, or 1975-76. Nor does petitioner have a claim for an extra $100 for the 1972-73 year by virtue of such increase for reading specialists.

The Board admits, with respect to whether or not petitioner's contracted salary of $9,300 (C-3) had been illegally reduced after February 1, 1973, that a reduction had in fact been made as correction for error in the period subsequent

to December 14, 1971. However, the hearing examiner observes that the Board itself never acted to correct such error. Instead, the Board now relies on the determination of either its Assistant Superintendent or its payroll clerk, neither of whom has the authority to reduce salaries of teaching staff members. Even assuming, *arguendo,* that the Board itself acted to reduce petitioner's contractual salary because of its error, such an action would be set aside for the error was not of petitioner's making. Consequently, the hearing examiner finds that the Board did illegally reduce petitioner's salary.

The hearing examiner further finds that the Board's deductions from petitioner's salary subsequent to February 1, 1973, were in violation of the explicit terms of her contract. If the Board, upon petitioner's transfer on December 14, 1971, had chosen to reduce petitioner's salary commensurate with a change in her responsibilities, such reduction would clearly have been a proper one within the authority of the Board. The Board did not, however, exercise such authority to alter petitioner's salary for the balance of academic year 1971-72 and it chose to renew her salary at the higher level for 1972-73.

Accordingly, the hearing examiner recommends that:

1. The Board be directed to reimburse petitioner in the amount of $350.10, the sum total of reductions in her salary which were intended to compensate for alleged over-payments in the period subsequent to December 14, 1971.

2. The Board be directed to compensate petitioner for that part of her contractual salary of $9,300 that it improperly withheld from her subsequent to February 1, 1973. It is also recommended that the parties submit a consent Order stipulating the amount of money due petitioner in this respect.

3. Other prayers for relief by petitioner be denied.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record in the instant matter, including the report of the hearing examiner and the objections and exceptions filed thereto by the Board. It is noticed that petitioner filed no response to the hearing examiner's report.

The Commissioner observes that the Board objects to the alleged failure of the hearing examiner to address the affirmative defense of laches in his report. (Board's Objections, at p. 1) It is also observed that the Board presses its claim that the Commissioner lacks jurisdiction in the matter and cites *Board of Education of the Township of East Brunswick v. Township Council of East Brunswick,* 48 *N.J.* 94 (1966). (Board's Objections, at p. 2) The Commissioner also notices that the Board argues that, regardless of the Commissioner's

determination with respect to whether he has jurisdiction, petitioner still failed to exhaust remedies available to her. Consequently, the matter, in this context is not properly before the Commissioner. (Board's Objections, at p. 2) And finally, the Commissioner observes that if the recommended relief were granted petitioner, the Board would be paying petitioner for services not rendered.

The Commissioner notices with respect to the Board's affirmative defense of laches that the hearing examiner set forth the relevant actions undertaken by petitioner to press her claim before the Board. Specifically, the hearing examiner reported that petitioner was informed during Janurary 1973 by a payroll clerk that her contractual salary of $9,300 was to be reduced. The hearing examiner also reported that petitioner resisted this action by filing a grievance with the Superintendent. Her claims were denied and petitioner was so informed by letter dated February 26, 1973. Thereafter, petitioner filed her instant Petition of Appeal before the Commissioner.

The Commissioner determines that petitioner's actions between the date on which the payroll clerk informed her of the intention to reduce her contractual salary and the date on which petitioner filed her Petition before the Commissioner for relief were timely and not taken in a manner injurious to the Board. The Commissioner opines that the principal element in applying the doctrine of laches as an equitable defense is the factor of resulting prejudice to the defendant. *Albert DeRenzo v. Board of Education of the City of Passaic, Passaic County,* 1973 *S.L.D.* 236; *Auciello v. Stauffer,* 58 *N.J. Super.* 522 (*App. Div.* 1959) Additionally, the Commissioner observes that the Board has neither offered nor submitted any proofs to substantiate that it was prejudiced by an alleged delay by petitioner. *Dorothy L. Elowitch v. Bayonne Board of Education, Hudson County,* 1967 *S.L.D.* 78, affirmed State Board of Education 86

Accordingly, the Commissioner finds and determines that the Board's affirmative defense of laches against the action herein is without merit and is hereby set aside.

The Commissioner has reviewed the Court's opinion in *East Brunswick, supra,* in regard to the Board's allegation that the Commissioner lacks jurisdiction in the matter.

Justice Jacobs, in delivering the opinion for the Court, held, *inter alia*:

> "***While there have been instances where the courts have entertained controversies under the school laws without prior exhaustion of the available administrative remedies, those instances have been isolated and exceptional ones where, unlike here, no administrative expertise was thought to be involved.***" [cites omitted] (48 *N.J.* at 103)

The Commissioner opines that his educational and administrative expertise is necessary in the instant matter to determine whether petitioner was a teacher of reading, as asserted by the Board, or a reading specialist, as petitioner asserts.

This determination must be grounded upon petitioner's day-to-day assigned responsibilities in conjunction with applicable rules and regulations of the State Board of Education as set forth in the New Jersey Administrative Code, Title 6. For these reasons, the Commissioner finds and determines that the instant matter is within his jurisdiction as a controversy arising under school law. *N.J.S.A.* 18A:6-9 Consequently, because the matter is properly before the Commissioner, there was no need for petitioner to exercise any options for relief before the Board at the time when her salary was reduced.

The Board argues that if the recommended relief is granted petitioner, it would be paying her for services not rendered. The Commissioner opines that the issue with respect to this argument is not whether the Board would be paying petitioner for services not rendered but rather, whether or not the Board improperly and illegally reduced petitioner's salary between February 1, 1973 and June 30, 1973 to recover moneys it allegedly overpaid her between December 14, 1971 and sometime in January 1973.

The Commissioner finds that the record establishes that, upon petitioner's transfer on February 15, 1971 to teach special education, her salary was simultaneously increased consistent with the terms of the then existing salary policy of the Board with respect to teachers of special education. Although the record herein does not establish that formal action of the Board was taken to increase petitioner's salary because of her responsibilities, this was not the fault of petitioner. The fact remains that petitioner did receive an increase consistent with the salary policy of the Board.

Next, the record establishes that petitioner began the 1971-72 academic year in the assignment of teacher of special education. The face amount of petitioner's 1971-72 contract (C-2) sets forth an annual salary of $8,900. On December 14, 1971, petitioner was reassigned, at her request, to the A.J. Demarest Junior High School. There, petitioner was assigned as a teacher of reading at the eighth grade level. It is noticed that petitioner's salary remained at $8,900 for the balance of 1971-72.

Petitioner's contractual salary for 1972-73 (C-3) set forth an annual salary of $9,300 which she received until January 1973. It is observed that petitioner began the school year 1972-73 as a teacher of eighth grade reading and continues in that capacity today.

The Commissioner finds and determines that had the Board desired to reduce petitioner's 1971-72 salary of $8,900 as of December 14, 1971, because of an assignment to different duties, it clearly could have done so by formal action. Likewise, the Board could have established petitioner's salary for 1972-73 at $9,000 if it so desired. The Board could also have taken formal action during January 1973 to reduce petitioner's salary of $9,300 to $9,000 because of the different responsibility to which she was assigned. However, the Board's failure to take formal action with respect to petitioner's salary, for the period of time controverted herein, does not serve as an authority for an agent of the Board to act unilaterally for the Board. Therefore, the withholding of

moneys from petitioner's salary during the period February 1, 1973 to June 30, 1973, in addition to the action reducing petitioner's contractual salary of $9,300 to $9,000 as of February 1, 1973, is clearly illegal and is hereby set aside.

Finally, the Commissioner adopts as his own the findings of the hearing examiner that petitioner failed to prove that she is, in fact, employed as a reading specialist consistent with the policy of the Board or in the context of existing State Board of Education rules and regulations.

Accordingly, the Commissioner of Education hereby directs the Board of Education of the City of Hoboken, Hudson County, to forward to Valerie Mina the amount of $350.10 at the next regularly scheduled pay period which amount represents improper withholdings from her salary between February 1, 1973 and June 30, 1973. Additionally, the parties are directed to submit a consent order, by June 1, 1976, setting forth the amount of money due petitioner as the result of the illegal reduction of her 1972-73 contractual salary from $9,300 to $9,000 between February 1, 1973 and June 30, 1973.

Petitioner's remaining prayers for relief are denied.

COMMISSIONER OF EDUCATION

April 27, 1976

Township Committee of the Township of Oxford, Warren County,

Petitioner,

v.

Board of Education of the Township of Oxford,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Howard A. McGinn, Esq.

For the Respondent, Schumann & Seybolt (Robert L. Schumann, Esq., of Counsel)

This matter is before the Commissioner of Education in the form of a Petition for Rehearing filed by the Township Committee of the Township of Oxford, hereinafter "Committee," with respect to the judgment of the Commissioner entered in *Board of Education of the Township of Oxford v.*

Township Committee of the Township of Oxford, Warren County, 1975 *S.L.D.* 536. The Committee asserts that the annual audit of the Board's financial accounts for 1974-75, not previously available to the Commissioner, establishes new evidence in regard to the total moneys available to the Board from its unappropriated current expense balances. The Board of Education of the Township of Oxford, hereinafter "Board," opposes the Committee's Petition for Rehearing and, on its own behalf, filed a Motion to Dismiss.

The matter is now before the Commissioner for determination on the record, including the Committee's Brief in opposition to the Board's Motion to Dismiss.

At the annual school election held on March 11, 1975, the Board submitted to the electorate a proposal to raise $377,231 by local taxation for current expense costs of the school district. This item was rejected by the voters and, subsequent to the rejection, the Board submitted its budget to the Committee for its determination of the amount necessary for the operation of a thorough and efficient school system in Oxford Township during the 1975-76 school year, pursuant to the mandatory obligation imposed upon the Committee by *N.J.S.A.* 18A:22-37.

The Committee determined to reduce the Board's current expense proposal in the amount of $31,000. This reduction was appealed to the Commissioner by the Board. The Commissioner determined to restore the $31,000 reduction imposed by the Committee. (See *Board of Education of the Township of Oxford, supra,* at p. 338.)

The Committee grounds its Petition for Rehearing on the audit report, filed on September 16, 1975, which established that the Board's unappropriated current expense balance as of June 30, 1975, was $74,725, from which $18,000 had been applied to the Board's 1975-76 school budget. The Board began the 1975-76 academic year with a net unappropriated current expense balance of $56,725. The Committee relies on the audit report to establish that the Board expended $191,918 for teachers' salaries as opposed to the $230,000 it had appropriated for this item for the 1974-75 year.

The Committee argues that because the 1974-75 audit report was not before the Commissioner for his consideration on the Board's original appeal, that matter must now be reopened for the Committee to introduce the audit report in support of its original reduction of $31,000.

The Commissioner does not agree. The audit report does establish that the Board began 1975-76 with an unexpended current expense balance of $56,725, after applying $18,000 to its current school budget. It is also established that the Board had appropriated $230,000 in the J213 Salaries of Teachers line item from which it expended $191,918 during 1974-75. The difference between what the Board originally appropriated compared to what it expended, however, is reported as part of its $56,725 unappropriated current expense balance.

Thus, the single issue herein is whether such facts warrant a differen decision or a rehearing. The Commissioner determines that they do not. The fre balance available to the Board is one of reasonable proportions for use i contingencies. It may be appropriated by the Board to defray future expense. I is not unusual to find such changes in unappropriated balances since at the tim of budget case submissions the annual audit of local boards of education i usually not available.

Accordingly, the Committee's Petition for Rehearing is denied and th Board's Motion to Dismiss the Petition is granted.

COMMISSIONER OF EDUCATIO

April 29, 1976

Patricia Bitzer,

Petitioner,

v.

Board of Education of the Town of Boonton, Morris County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Saul R. Alexander, Esq.

For the Respondent, Ruvoldt & Ruvoldt (Harold J. Ruvoldt, Jr., Esq., of Counsel)

Petitioner is a teacher who was employed by the Board of Education of the Town of Boonton, hereinafter "Board," for three consecutive academic years and was not reemployed for a fourth. Petitioner demands reinstatement in her position and any other relief to which she is entitled on the grounds that the Board's action concerning her non-reemployment was procedurally and statutorily defective.

A hearing in this matter was conducted in the office of the Somerset County Superintendent of Schools on March 12, 1975 before a hearing examiner appointed by the Commissioner of Education. At the hearing several exhibits were accepted as evidence. After the hearing counsel agreed to, then later waived, the scheduled filing of Briefs. The report of the hearing examiner follows:

The essential material facts are not in dispute. The narrow issue to be decided was framed at the conference of counsel held in the office of the Morris County Superintendent of Schools on December 2, 1974. It reads as follows:

> "Was proper and timely notice of nonrenewal of contract given to petitioner pursuant to *N.J.S.A.* 18A:27-10 *et seq.*?"

Those pertinent statutes read as follows:

N.J.S.A. 18A:27-10

> "On or before April 30 in each year, every board of education in this State shall give to each nontenure teaching staff member continuously employed by it since the preceding September 30 either
>
> > "a. A written offer of a contract for employment for the next succeeding year providing for at least the same terms and conditions of employment but with such increases in salary as may be required by law or policies of the board of education, or
> >
> > "b. A *written notice* that such employment will not be offered." (*Emphasis added.*)

N.J.S.A. 18A:27-11

> "Should any board of education fail to give any nontenure teaching staff member either an offer of contract for employment for the next succeeding year or *a notice that such employment will not be offered*, all within the time and in the manner provided by this act, then said board of education shall be deemed to have offered to that teaching staff member continued employment for the next succeeding school year upon the same terms and conditions but with such increases in salary as may be required by law or policies of the board of education." (*Emphasis added.*)

N.J.S.A. 18A:27-12

> "If the teaching staff member desires to accept such employment *he shall notify the board of education of such acceptance, in writing,* on or before June 1, in which event such employment shall continue as provided for herein. In the absence of such notice of acceptance the provisions of this article shall no longer be applicable." (*Emphasis added.*)

The record reveals that petitioner was evaluated by her principal and the Superintendent of Schools and that they were not satisfied with her performance. The Superintendent testified that he told the Board in January that he was sending warning notices to petitioner and others who might not be recommended for reemployment and thereafter sent petitioner the following memorandum on January 28, 1974: (Tr. 70)

"Our contract with the Boonton Education Association prescribes tha non-tenured teachers shall be given an indication of their status for the 1974-75 term by January 31.

"Your principal has advised me that there remains some doubt in his mind concerning a recommendation for another contract for you. Please understand that *a final decision has not been reached*, and that *we have until April 1st to make a recommendation.*

"I would urge you to work closely with your principal to identify those areas in which you are in need of improvement." (R-6)
(*Emphasis added.*)

Thereafter, he notified petitioner again on March 29, 1974, as follows:

"A review of your work and classroom visitations by your principal and me have led us to the conclusion that *we do not intend to recommend you for a contract in Boonton in 1974-75.*

"Letters such as this are very difficult to compose, and yet we feel the decision is in the best interests of the school district. Both your principal and I are aware of your strengths and weaknesses, and we do not wish to imply that our judgment concerning your success in Boonton precludes your obtaining another position.

"We want to take this opportunity to thank you for your efforts in behalf of the children of the school district and to wish you well in the future." (R-7) (*Emphasis added.*)

At a public meeting of the Board on April 22, 1974, the Board determined not to offer petitioner a contract for the coming school year. (P-2) However, no written notice of this action was afforded petitioner prior to April 30, 1974. (See testimony of Superintendent, *post.*) Petitioner thereafter notified the Board by letter dated May 14, 1974, as follows:

"This letter signifies my acceptance of employment for the school year 1974-75. This notification is in compliance with both the negotiated agreement and the statute pertaining to teacher notification of acceptance.

"The above acceptance should in no way be interpreted as being a relinquishing of my rights to pursue appropriate compensation for the services to be rendered in 1974-75." (P-3)

Petitioner's contention is that the Board has never given her a written notice pursuant to *N.J.S.A.* 18A:27-10; therefore, she accepted employment pursuant to *N.J.S.A.* 18A:27-11 and 12.

The Superintendent testified that he met with petitioner (and her department chairman) on March 15, 1974 to explain to her that her work was

unsatisfactory and tried to get her to resign, rather than have her reemployment status presented publicly to be acted upon by the Board. He testified that petitioner replied that "[s]he would rather be fired than resign.***" (Tr. 64) He testified further that he explained to her that the Board had never rejected his recommendations concerning the employment of personnel. (Tr. 65) The Superintendent testified also that the Board decided in an executive session meeting on March 18 or 25, 1974, not to reemploy petitioner, and he thereafter sent her the controverted notice. (R-7, *ante*) The Superintendent testified, finally, that neither he nor the principal, nor any other school district administrator or Board member, ever sent a written notice to petitioner on or before April 30, stating that the Board had taken an action which would terminate her employment. (Tr. 84-85) The record shows that such a notice was sent to petitioner on May 16, 1974.

Thus the narrow legal issue to be determined centers on the Superintendent's memoranda to petitioner (R-6; R-7), the Board's public action in which it determined not to reemploy her (P-2), and the statutory requirements of *N.J.S.A.* 18A:27-10, 11 and 12. Suffice it to say that the school administrators were not satisfied with petitioner's performance and she was so informed verbally and in writing. (R-6; R-7; Tr. 37-43) Nevertheless, the hearing examiner finds that she was not notified in writing on or before April 30, 1974, that the Board had determined not to reemploy her and that such failure of notice was contrary to the statutory prescription. *N.J.S.A.* 18A:27-10 See *Thomas Aitken v. Board of Education of the Township of Manalapan, Monmouth County,* 1974 *S.L.D.* 207; *Ronald Elliott Burgin v. Board of Education of the Borough of Avalon, Cape May County,* 1974 *S.L.D.* 396.

On the other hand, petitioner did accept employment for the 1974-75 academic year (*N.J.S.A.* 18A:27-12) by notifying the Board "in writing on or before June 1"; therefore, the hearing examiner finds that a contract of employment did exist between petitioner and the Board for the 1974-75 academic year. *N.J.S.A.* 18A:27-10, 11 and 12

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and the exceptions thereto filed by respective counsel. The Board takes particular exception to the finding that the Superintendent's letter of March 29, 1974 (R-7) was not the final "written notice" required by law. *N.J.S.A.* 18A:27-10 The Commissioner concurs, however, with the report of the hearing examiner.

Such concurrence is grounded in the explicit statutory prescription that if a local board of education determines that the contract of a nontenure teacher will not be renewed in a succeeding year it shall, on or before April 30, give a "*** written notice that such employment will not be offered." The mandate is clear. It is not satisfied by a letter from the Superintendent, otherwise timely, which states *inter alia* "*** we do not intend to recommend you." (R-7) The Commissioner so holds.

Accordingly, the Commissioner determines that petitioner was entitled to a contract for the 1974-75 academic year "*** upon the same terms and conditions but with such increases in salary as may be required by law or policies of the board of education." *N.J.S.A.* 18A:27-11 Such entitlement is conditioned only by a termination clause, if any, contained in her employment contract. *Sarah Armstrong v. Board of Education of the Township of East Brunswick, Middlesex County,* 1975 *S.L.D.* 112, aff'd in part/reversed in regard to salary entitlements, State Board of Education 117.

If petitioner's individual employment contract for the 1973-74 academic year contained a provision for notice of termination, which would have been effectuated by the Board's written notice of termination dated May 16, 1974, (R-8) then she is entitled to receive salary for the number of days stated in such termination clause, beginning September 1, 1974. See *Armstrong, supra; Patricia Fallon v. Board of Education of the Township of Mount Laurel, Burlington County,* 1975 *S.L.D.* 156; decided by the Commissioner on remand for salary entitlement consideration, January 30, 1976. If petitioner's 1973-74 employment contract contained no provision for notice of termination, then she is entitled to receive her entire 1973-74 salary "***but with such increases as may be required by law or policies of the board of education," (*N.J.S.A.* 18A:27-11) less mitigation of any other salary earnings during the 1974-75 academic year.

The State Board in *Armstrong* cited the New Jersey Supreme Court decision in *Canfield v. Board of Education of Pine Hill Borough,* 51 *N.J.* 400 (1968)[1966 *S.L.D.* 152, aff'd State Board of Education April 5, 1967, aff'd 97 *N.J. Super.* 483 (*App. Div.* 1967)] which established the law regarding the termination of contracts under their cancellation clauses. The Court adopted the dissenting opinion of the Honorable Edward Gaulkin, J.S.C., as follows:

> "***If the contract contained no cancellation clause, and the board elected not to permit the teacher to teach beyond the date of notice of dismissal, it seems to me the teacher would, at most, be entitled to his salary for the full term of the contract, but not to tenure. If I am correct in this, I see no reason why the result should be different when the contract contains a cancellation clause *but the board's notice of dismissal is not given in accordance with the cancellation clause. Suppose here the board had simply discharged plaintiff and not even offered her the 60 days' pay? It seems to me that she would then be entitled to the 60 days' day, under section 11, or, at most, damages for the breach of the contract, but not to tenure.****"(*Emphasis added.*) (97 *N.J. Super.* at 492)

For these reasons, petitioner is not entitled to reinstatement and except for salary consideration the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

April 29, 1976

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, April 29, 1976

For the Petitioner-Appellant, Saul R. Alexander, Esq.

For the Respondent-Appellee, Rowe, McMahon, McKeon & Curtin (Thomas R. Curtin, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

August 4, 1976
Dismissed Superior Court of New Jersey May 24, 1977

Board of Education of the Borough of Maywood,

Petitioner,

v.

Mayor and Council of the Borough of Maywood, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Parisi, Evers & Greenfield (Irving C. Evers, Esq., of Counsel)

For the Respondent, Mazer & Lesemann (Leo B. Mazer, Esq., of Counsel)

Petitioner, the Board of Education of the Borough of Maywood, hereinafter "Board," appeals from an action of the Mayor and Council of the Borough of Maywood, hereinafter "Council," taken pursuant to *N.J.S.A.* 18A:22-37 certifying to the Bergen County Board of Taxation a lesser amount of appropriations for school purposes for the 1975-76 school year than the amount proposed by the Board in its budget which was rejected by the voters. The facts of the matter were adduced at a hearing conducted on November 6, 1975 at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner is as follows:

At the annual school election held March 11, 1975, the Board submitted to the electorate proposals to raise $2,708,800 by local taxation for current expense and $56,375 for capital outlay costs of the school district. These items were rejected by the voters, and the Board subsequently submitted its budget to Council for its determination of the amounts necessary for the operation of a thorough and efficient school system in the Borough of Maywood in the 1975-76 school year, pursuant to the mandatory obligation imposed on Council by *N.J.S.A.* 18A:22-37.

After consultation with the Board, Council made its determinations and certified to the Bergen County Board of Taxation an amount of $2,580,650 for current expense and $25,375 for capital outlay. The pertinent amounts in dispute are shown as follows:

	Current Expense	Capital Outlay
Board's Proposal	$2,708,800	$56,375
Council's Proposal	$2,580,650	$25,375
Amount Reduced	$ 128,150	$31,000

The Board contends that Council's action was arbitrary, unreasonable, and capricious and documents its need for restoration of the reductions recommended by Council with written testimony and a further oral exposition at the time of the hearing. Council maintains that it acted properly and after due deliberation and that the items reduced by its action are only those which are not necessary for a thorough and efficient educational system. Council also supports its position with written and oral testimony. As part of its determination, Council suggested specific line items of the budget in which it believed economies could be effected as follows:

Account Number	Item	Board's Proposal	Council's Proposal	Amount Reduced
CURRENT EXPENSE:				
J130A	Bd. Members' Exps.	$ 5,000	$ 4,000	$ 1,000
J130F	Supt.'s Exps.	4,000	2,000	2,000
J130M	Newsletter	400	- 0 -	400
J211	Sal. Prin. (New)	20,000	- 0 -	20,000
J213	Sals. Instr.	2,000	- 0 -	2,000
J230C	A-V Mats.	7,030	6,000	1,030
J250B	Travel Exp.	2,300	1,800	500
J250C	Instr.-Misc. Exp.	18,000	16,000	2,000
J520C	Field Trips	11,850	11,000	850
J720B	Bldg. Repairs	133,450	39,450	94,000
J720C	Equip. Repair	5,200	4,200	1,000
J730A	Instr. Equip. Repl.	7,765	6,000	1,765

J730B	Noninstr. Equip. Repl.	2,965	2,500	465
J730C	Equip. New	6,140	5,000	1,140
	TOTALS	$226,100	$97,950	$128,150
CAPITAL OUTLAY:				
L1230A	Prof. Fees	$ 10,000	$ 2,500	$ 7,500
L1230C	Bldg. Remod.	56,400	32,900	23,500
	TOTALS	$ 66,400	35,400	31,000

There appears no necessity to deal *seriatim* with each of the areas in which Council recommended reduced expenditures. As the Commissioner said in *Board of Education of the Township of Madison v. Mayor and Council of the Township of Madison, Middlesex County,* 1968 *S.L.D.* 139:

> "***The problem is one of total revenues available to meet the demands of a school system***. The Commissioner will indicate, however, the areas where he believes all or part of Council's reductions should be reinstated. It must be emphasized, however, that the Board is not bound to effect its economies in the indicated items but may adjust its expenditures in the exercise of its discretion as needs develop and circumstances alter.***"
>
> (at p. 142)

The hearing examiner finds that this budget can be analyzed in three distinct sections. The current expense category will be discussed in two sections: line item J720B (reduction $94,000) and the balance of the current expense account. The third section will be an examination of the capital outlay account.

J720B Contracted Services, Building Repairs

An examination of this line item reveals that the Board has proposed in its budget the sum of $133,450 to replace the roof of the Memorial School. An architectural firm hired by the Board examined the roof and determined that it should be replaced because of its poor condition and the fact that it is a flat roof twenty years old. Exhibit B, which contains the architect's recommendation and photographs, gives graphic proof of the poor condition of the roof. The photographs show water standing in small pools, fungus growths, disintegrated gravel stop lap sheets, cracks, and related damage caused by weathering.

Council recommended repairing rather than replacing this roof and had its own expert, who had examined the roof, testify at the hearing. The expert testimony by Council's witness was that the roof could be repaired; however, he conceded that "repair is not the answer" and that eventually the roof would have to be replaced. The hearing examiner finds from the testimony and evidence that the roof must be replaced.

The Board and Council proceeded to discuss the cost of replacing this roof. The Board conceded that it never obtained a professional cost estimate

from a roofing contractor. Council's expert, who testified at the hearing estimated that the replacement cost of the roof, using the materials he described would be approximately $56,000.

The hearing examiner reiterates that the proofs are sufficient to show that the roof must be replaced and, further, the testimony indicates that the cost for this replacement will approximate $56,000. Regarding the time which has elapsed since the Board constructed this budget in the fall and winter of 1974-75 and the continuing inflationary trends in our economy, the hearing examiner recommends that the Commissioner restore $60,000 to the budget to replace the roof on the Memorial School.

In examining the balance of the current expense account, the hearing examiner finds that the Board's proposals are, in the aggregate, about the same or only slightly higher than the amounts actually expended during the previous year. In each instance the testimony and the evidence are sufficient to warrant restoration of moneys needed to operate a thorough and efficient system of public schools.

Therefore, the hearing examiner recommends that the Commissioner restore funds in the following line items:

J130A	Board Members' Expenses
J130F	Superintendent's Expenses
J211	Principal's Salary
J213	Salaries, Instruction
J520C	Field Trips
J702C	Equipment Repair

On the other hand, the hearing examiner finds that the remainder of the reductions effected by Council are not so severe that the Board will be unable to conduct a thorough and efficient system of public schools. Although Board documents and testimony support its reasons for restoration of these moneys, the reductions are nominal in some line items and still allow for increases in others.

The hearing examiner recommends, therefore, that Council's reductions be sustained in the following line items:

J130M	Newsletter Publication
J230C	A-V Materials
J250B	Travel Expenses
J250C	Miscellaneous Expenses, Instruction
J730A	Instructional Equipment, Replacement
J730B	Noninstructional Equipment, Replacement
J730C	New Equipment

The third section consists of an examination of the Board's proposed capital needs. The Board defends its need for these funds if the building repairs it has identified are affirmed as necessary expenditures by the Commissioner.

The hearing examiner's recommendation to replace the roof (J720B), if affirmed by the Commissioner, will necessitate that funds be spent for architectural drawings and specifications. (L1230A) Likewise, the Board's evidence and testimony attest to the need for improving the school plant and sites.

The hearing examiner recommends, however, that these two line items be considered together and that two-thirds, or $20,000, be restored to the budget for this 1975-76 school year and the balance be proposed as an expenditure for the subsequent year. This amount is suggested for the reason that a substantial portion of the capital funds will be spent for professional fees, if affirmed by the Commissioner. Therefore, the balance of the moneys will approximate equal expenditures in the 1975-76 school year and in the 1976-77 school year.

These line items are recapitulated as follows:

Account Number	Item	Amount of Reduction	Amount Restored	Amount Not Restored
CURRENT EXPENSE:				
J130A	Bd. Members' Exps.	$ 1,000	$ 1,000	$ - 0 -
J130F	Supt.'s Exps.	2,000	2,000	- 0 -
J130M	Newsletter	400	- 0 -	400
J211	Sal. Prin. (New)	20,000	20,000	- 0 -
J213	Sals. Instr.	2,000	2,000	- 0 -
J230C	A-V Mats.	1,030	- 0 -	1,030
J250B	Travel Exp.	500	- 0 -	500
J250C	Instr.-Misc. Exp.	2,000	- 0 -	2,000
J520C	Field Trips	850	850	- 0 -
J720B	Bldg. Repairs	94,000	60,000	34,000
J720C	Equip. Repair	1,000	1,000	- 0 -
J730A	Instr. Equip. Repl.	1,765	- 0 -	1,765
J730B	Noninstr. Equip. Repl.	465	- 0 -	465
J730C	Equip. New	1,140	- 0 -	1,140
	TOTALS	$128,150	$86,850	$41,300
CAPITAL OUTLAY:				
L1230A, L1230C	Prof. Fees - Bldg. Remodeling	$ 31,000	$20,000	$11,000

The hearing examiner recommends, therefore, that the Commissioner restore $86,850 in current expenses and $20,000 in capital outlay for school purposes for the 1975-76 school year.

This concludes the report of hearing examiner.

* * * *

The Commissioner has read the report of the hearing examiner and the exceptions filed thereto by Council pursuant to *N.J.A.C.* 6:24-1.16.

Council's objection in general is that the hearing examiner made nc findings of fact on the proofs offered by either party in this controversy. The Commissioner cannot agree.

Regarding line item J720B, Building Repairs, the hearing examiner made a specific finding that the evidence offered proved that the roof of the Memorial School should be replaced. The Commissioner adopts this finding as his own however, he agrees with Council that the hearing examiner had insufficient reason to add $4,000 to the estimated cost of the roof replacement which was $56,000. Therefore, the Commissioner will adopt the recommendation of the hearing examiner only to the extent of reinstating $56,000 to the budget for the roof replacement.

The record shows that the hearing examiner did not give specific reasons for either restoring moneys for each line item, or sustaining Council's reductions; nor is such a detailed individual line item review required.

As the Commissioner said in *Board of Education of the Township of Madison v. Mayor and Council of the Township of Madison, Middlesex County,* 1968 *S.L.D.* 139:

> "***The problem is one of total revenues available to meet the demands of a school system***. The Commissioner will indicate, however, the areas where he believes all or part of Council's reductions should be reinstated. It must be emphasized, however, that the Board is not bound to effect its economies in the indicated items but may adjust its expenditures in the exercise of its discretion as needs develop and circumstances alter.***"
> (at p. 142)

Further, the hearing examiner found that the Board's proposed expenditures in the balance of the line items for which he recommended the restoration of moneys, *ante*, was not excessively above that which was spent by the Board in the previous school year. The Commissioner stated in *Board of Education of the City of Plainfield v. City Council of the City of Plainfield et al., Union County,* 1974 *S.L.D.* 913 that:

> "***While the constitutional requirement which imposes on local school districts the obligation to conduct 'thorough and efficient' programs of education is nowhere precisely defined, the Commissioner holds that it must be interpreted to mean that as a minimum *such programs are entitled to a continuing sustenance of support, one marked by constancy and not by vacillation* of effort.***" (*Emphasis supplied.*) (at pp. 920-921)

"Thorough and efficient" has now been defined (*N.J.A.C.* 6:8-1.1 *et seq.*) and the Commissioner's holding that school programs are entitled to a continuing

sustenance of support is as valid now as it was then; therefore, the Commissioner will adopt the findings and recommendations of the hearing examiner regarding the balance of the current expense line items.

There remains the capital outlay account and Council's objections thereto. Council's statement that the hearing examiner raised professional fees to $20,000 cannot be supported by the record which shows that in addition to the proposed architectural fees and drawings, the Board had embarked on a continuing program to update and repair its school buildings. The record is unclear in that there appears to be duplication of architects' fees in line item J720B and L1230 A, C; therefore, the Commissioner will further reduce the capital outlay line items (L1230 A, C) by $5,000 and reinstate only $15,000 of the $20,000 which was recommended to be restored by the hearing examiner.

The Commissioner is constrained also, to review the record regarding the Board's free appropriations balances as of July 1, 1975, which were, in the aggregate, $91,624.65. The Board has since been notified by the State Department of Education that it will receive $53,445 less in state aid, which reduction will certainly leave its reserve funds dangerously low. Other encumbrances, to wit: the completion of the salary policy with the teachers' association with greater benefits for the teachers and higher tuition payments than anticipated have further reduced this balance.

For these reasons and those findings and recommendations accepted and adopted from the hearing examiner's report, the Commissioner will restore $82,850 for current expenses and $15,000 for capital outlay expenses for the 1975-76 school year.

Therefore, the Commissioner certifies to the Bergen County Board of Taxation the additional amounts of $82,850 for current expenses and $15,000 for capital outlay expenses to be raised by public taxation so that the Board may provide a thorough and efficient system of public schools in Maywood during the 1975-76 school year.

COMMISSIONER OF EDUCATION

April 29, 1976

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, April 29, 1976

For the Petitioner-Appellee, Parisi, Evers & Greenfield (Irving C. Evers, Esq., of Counsel)

For the Respondent-Appellant, Mazer & Lesemann (William F. Rupp, Esq., of Counsel)

The appeal is dismissed on the ground of mootness.

Mr. David Brandt dissented in this matter.

March 2, 1977

Kathleen Mullelly,

Petitioner,

v.

Board of Education of the Township of Maple Shade, Burlington County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Hartman, Schlesinger, Schlosser & Faxon (Joel S. Selikoff, Esq., of Counsel)

For the Respondent, Yocum and Yocum (Howard R. Yocum, Esq., of Counsel)

Petitioner, a physical education teacher in the employ of the Board of Education of the Township of Maple Shade, hereinafter "Board," from September 1972 through June 1974, alleges that the Board improperly refused to provide her with either a statement of reasons for nonrenewal of her teaching contract or a requested hearing.

The Board contends that it has complied with statutory requirements to notify petitioner of her nonrenewal and has additionally afforded written statements of reasons for its decision not to reemploy her for the 1974-75 academic year.

The matter is jointly submitted to the Commissioner of Education for Summary Judgment in the form of the pleadings, exhibits and Briefs of counsel. The facts are these:

On March 27, 1974, the Superintendent notified petitioner in writing that the Board had voted not to offer her employment for the ensuing school year. (J-1) Thereupon, petitioner, in timely fashion, requested by letter "***a hearing concerning [her] employment status for the 1974-75 school year.***" (J-2) On April 23, 1974, the Board denied petitioner's request for a hearing. (J-3) Thereafter, by letter to the Board dated June 14, 1974, petitioner stated that, pursuant to the recently announced decision of the New Jersey Supreme Court in *Donaldson v. Board of Education of North Wildwood,* 65 *N.J.* 236 (1974), she was "***requesting that a statement of reasons be provided *** with respect to the non-renewal of *** [her] teaching contract for the 1974-75 school year.***" (J-4)

The Board responded to petitioner's request for a statement of reasons by citing the June 10, 1974 opinion of the Court in *Donaldson*, *supra*, as follows:

> "***Many boards by collective contracts *** have already agreed to furnish reasons and *those which have not will, under this opinion, hereafter be obligated to do so.****" (*Emphasis supplied.*) (at p. 248)

The Board further advised petitioner that its decision was based on the numerous quarterly evaluations, classroom observation reports, conference reports, and the unanimous recommendation of its administrative and supervisory personnel that petitioner not be reemployed. (J-5; J-6) More specifically, the Board stated that it had concluded that:

> "1) The pattern of classroom performance was no better than average and, in some respects, was below average.
>
> "2) There was continuing indication of Miss Mullelly's failure to establish a cooperative working relationship with staff and supervisors which had, and could continue to have, an adverse effect upon the program." (J-6)

Petitioner argues that the factual context recited above is inadequate to satisfy the elemental fairness requirement of *Donaldson, supra,* that a tenured teacher be supplied with a statement of reasons which will "***disclose correctible deficiencies and be of service in guiding *** future conduct***." (65 *N.J.* at 245) In this regard, petitioner maintains that the Board's mere citing of the existence of numerous records of observations, evaluations and conferences falls far short of a definitive statement *by the Board itself* as envisioned by the Court in *Donaldson.* Petitioner avers that, were a board allowed to merely call attention to existence of such written documents of its agents in lieu of a definitive statement of its own, it would unreasonably leave a tenured teacher to his or her own devices to discern which of numerous reasons found in such documents were so serious and important as to cause the Board to refuse an offer of reemployment. (Petitioner's Brief, at pp. 3-7)

Petitioner further contends that the two reasons given by the Board (J-6 *ante*) are so nonspecific, vague, ambiguous, and nebulous as to similarly "***leave it to Petitioner to determine what the Board, in its collectiv judgment, meant.***" (Petitioner's Brief, at p. 5)

Finally, petitioner argues that she was entitled to a statement of reason because her request for such a statement was pending before the Board when th Supreme Court issued its opinion on June 10, 1974 in *Donaldson, supra.* In thi respect she avers that her request for a hearing before the Board in March 197 can only be interpreted as a valid request to determine the reasons for th Board's decision. (Petitioner's Brief, at p. 8)

Petitioner prays the Commissioner to issue an order requiring the Board t both give a statement of its reasons for her nonrenewal and afford her a hearin for the purpose of refuting those reasons. (Petitioner's Brief, at p. 9) In suppor of the foregoing arguments, petitioner also cites *Virginia Bennette et al. v. Boar of Education of the Township of Hopewell, Cumberland County,* 1975 *S.L.L* 746 and *Barbara Hicks v. Board of Education of the Township of Pemberton Burlington County,* 1975 *S.L.D.* 332.

Conversely, the Respondent Board holds that it has provided petitione with reasons for her nonrenewal with an appropriate degree of specificity a contrasted to *Donaldson, supra,* wherein Donaldson had been unable to obtai *any pertinent disclosure.* (65 *N.J.* at 238) (Respondent's Brief, at pp. 3-4) Th Board avers that its disclosure to petitioner reveals correctible deficiencies i regard to her relationships with pupils and staff. (Respondent's Brief, at pp. 5-8 The Board further maintains that the two reasons given in J-6, *ante*, ar sufficiently detailed in the documentary reports of classroom observations evaluations, and conferences (J-7-43) to be meaningful to petitioner (Respondent's Brief, at pp. 8-11)

The Board also argues that, absent statutory violations, abridgement c petitioner's constitutional rights, or so much as an allegation that it ha arbitrarily, capriciously, or unreasonably abused its discretionary powers, th Commissioner should not substitute his discretion for that of the Board. *Eri Beckhusen et al. v. Board of Education of the City of Rahway et al., Union County,* 1973 *S.L.D.* 176; *Phebe Baker v. Board of Education of the Lenap Regional High School District et al.,* 1975 *S.L.D.* 471; *Donaldson, supra; Salli Gorny v. Board of Education of the City of Northfield et al., Atlantic County* 1975 *S.L.D.* 669 (Respondent's Brief, at pp. 10-13)

The Board disputes petitioner's claim of entitlement to a hearing an maintains that *Hicks, supra,* decided on May 6, 1975, was *prospective only in it application* wherein the Commissioner detailed orderly, sequential procedures t implement the requirements of *Donaldson, supra,* that a statement of reasor and an informal appearance be afforded when requested. In this regard, th Board asserts that petitioner was given ample opportunity to rebut the criticism directed against her as evidenced by J-7, 11, 19, 32, 40, 41, 42, 43. Finally, th Board asserts that petitioner attended respondent's regular meeting accompanie by persons who spoke on her behalf on March 26, 1974 in an attempt t dissuade the Board, thus rendering any further appearance unnecessary.

For these reasons the Board contends that petitioner's prayer for relief should be denied.

The Commissioner has thoroughly reviewed the numerous exhibits in evidence and has carefully considered and weighed the arguments of the litigants. It is noted that respondent has voluntarily provided petitioner with what it purports to be a proper statement of reasons for non-reemployment. (Respondent's Brief, at p. 14) Petitioner, in her letter of March 27, 1974 (J-2), did not request a statement of reasons, but only a hearing before the Board. However, in *Donaldson, supra,* the Court stated that "***a timely request for informal appearance before the board should ordinarily be granted even though no formal hearing is undertaken.***" (*Emphasis added.*) (65 *N.J.* at 246) The commissioner finds no reason to believe that the Court considered the elemental fairness provided by an informal appearance to be of lesser importance than the statement of reasons itself. Nor does the Commissioner make such a distinction. *Hicks, supra*

In *Hicks, supra,* a request for reasons and a conference with the Board had been made prior to issuance of the opinion in *Donaldson, supra.* This triggered the requirement that reasons be given, to be followed by a timely informal appearance before the Board. Similarly, herein, petitioner's pending request for a hearing (dated March 16, 1974) triggered the requirement on June 10, 1974 (when *Donaldson* was rendered), that she be afforded an informal appearance by the Board. Petitioner was never scheduled for such an appearance, nor does her attendance at a regularly scheduled meeting of the Board absolve the Board of responsibility to afford her a private informal appearance pursuant to *Hicks.*

It must further be determined whether the Board has complied with *Donaldson, supra,* and *Hicks, supra,* by providing an informative statement of reasons for nonrenewal of her contract as a prerequisite to an informal appearance. *Hicks* In this regard, the Commissioner determines that the two reasons given by the Board through its Superintendent (J-6, *ante*), referenced as they are by numerous listings of documentary reports of conferences, classroom observations, and evaluations (J-8 through J-39), are sufficiently detailed and understandable to meet the requirements of *Donaldson* and *Hicks.*

In *Gorny, supra,* the Commissioner warned boards of education against overly charitable evaluations which fail to enlighten the beginning teacher of deficiencies in teaching performance. No such deficiencies of the evaluative process appear herein. Comments of supervisors are numerous, candid, and frank. They are in certain cases complimentary of petitioner's performance. (J-15, 23, 26, 30, 36, 39) In others they are strongly critical. (J-7, 27, 37) In yet others they are an intermixture of the two. (J-8, 9, 10, 11, 13, 15, 18, 22, 24, 28, 29, 31, 37, 38) In all cases they are understandable and obviously aimed at the improvement of instruction and the implementation of the stated policy of the district. It is further evident that serious consideration was given by the Board's agents to rebuttal when it was offered by petitioner. (J-7, 11, 25)

Within such a factual context, the Board's statement of reasons for nonrenewal meets the prescription set forth in *Donaldson, supra,* and *Hicks, supra.* The Commissioner so holds.

Accordingly, the relief petitioner seeks in the form of a directive to the Board to issue a further statement of reasons is denied.

The Board may not substitute the documents of its supervisors or its Superintendent (J-6) in lieu of an informal appearance by petitioner before the Board wherein she may seek to dissuade the Board from its action. Petitioner's request for an appearance was timely and it must now be granted in timely fashion. The Commissioner directs that the Board afford petitioner such an informal appearance as is detailed in *Hicks, supra,* no later than thirty days from the date affixed hereto. To this limited extent, the prayer of petitioner is granted.

COMMISSIONER OF EDUCATION

April 29, 1976

In the Matter of the Tenure Hearing of Jeanette Finkbiner, School District of the Borough of Audubon, Camden County.

COMMISSIONER OF EDUCATION

DECISION

For the Complainant Board, J. Robert McGroarty, Esq., of Counsel

For the Respondent, Hartman, Schlesinger, Schlosser and Faxon (Joel S. Selikoff, Esq., of Counsel)

Charges of insubordination, conduct unbecoming, and incapacity were certified to the Commissioner of Education on September 27, 1974 by the Board of Education of the Borough of Audubon, Camden County, hereinafter "Board," against Jeanette W. Finkbiner, hereinafter "respondent," a teaching staff member with a tenure status in its employ. Respondent denies the charges set forth and, by way of counterclaim, alleges that she has been subjected to discriminatory and illegal harassment by the Board. Respondent seeks dismissal of the charges against her and an order by which the Board would be directed to cease the alleged illegal harassment. The Board denies respondent's allegations and, in its own right, seeks her dismissal from her tenured employment.

Eight days of hearings were conducted commencing on January 6, 1975, and concluding on October 21, 1975 at the offices of the State Department of Education in Pennsauken and in Trenton by a hearing examiner appointed by the Commissioner. Subsequent thereto the parties filed memoranda in support of their respective positions. The report of the hearing examiner is as follows:

Respondent has been employed by the Board for seven years (Tr. I-29) and assigned to teach tenth and twelfth grade English. (Tr. I-46) Respondent was

uspended from her teaching duties without pay effective September 26, 1974, /hen the Board certified charges to the Commissioner. Pursuant to the rovisions of *N.J.S.A.* 18A:6-14 the Board resumed regular salary payments to espondent on January 23, 1975. (See *In the Matter of the Tenure Hearing of eanette W. Finkbiner, School District of the Borough of Audubon, Camden ounty*, decision on Motion, April 18, 1975.)

The Board certified three charges against respondent, filed by the high chool principal, hereinafter "principal," as follows:

CHARGE NO. ONE

"JEANETTE W. FINKBINER has by concerted, deliberate and insubordinate tatics (sic) refused to execute her duties as cafeteria supervisor in the 5th period of the school day. *** [Here follows a lengthy recitation of respondent's activities on a daily basis between August 21, 1974 and September 17, 1974.]"

CHARGE NO. TWO

"Respondent has contended that she is physically incapable of performing as required by the job description [for cafeteria duty] and impedes a determination of the validity of that claim and a determination as to whether the school system is capable of compensating without adverse effect, thusly respondent is incapable of performing the full days (sic) work for which she is paid. *** [The specifications of this charge are the same as for Charge No. One.]"

CHARGE NO. THREE

"Respondent in the Spring of 1974 comported herself in an unbecoming manner and unprofessional manner. *** [Three paragraphs of specifications follow.]"

Charges Nos. One and Two emanate from the same essential allegation that espondent refused to perform her assigned cafeteria duty responsibility in a anner acceptable to the principal.

The principal testified that seventy-two teaching staff members were ssigned to the high school with approximately 1,300 pupils enrolled in grades even through twelve. (Tr. I-11, 121) The school day, extending from 8 a.m. to :12 p.m., was divided into eight periods. Each teacher was assigned five daily eriods, although some teachers were assigned six periods. Those teachers ssigned five periods, one of whom was respondent, used the remaining three eriods for either lunch time, a conference period in regard to pupil assistance, r class planning. During the remaining period teachers carried out an assigned uty such as study hall, hall duty, office suspension or cafeteria duty, ereinafter "non-teaching duties." (Tr. I-11-12) Cafeteria duty, the issue herein, equired the assigned teacher to supervise pupils in the school cafeteria. (Tr. 12; P-4)

The principal testified that he was assisted by two vice-principals. One vice-principal, hereinafter "first vice-principal," was assigned the supervision of the high school guidance department, curriculum and the preparation of teachers' schedules and class assignments with the approval of the principal. The first vice-principal has subsequently accepted employment with another board of education. (Tr. III-15) The other vice-principal, hereinafter "second vice-principal," was in charge of pupil activities and discipline and was also responsible for the supervision of teachers in their non-teaching duty assignments. (Tr. I-39)

The first vice-principal began the preparation of the 1974-75 master schedules (P-7; P-7A) of teacher assignments during the late spring of 1973-74 academic year. (Tr. III-22) The first task in this endeavor was to assign each teacher five or six classes so that the teaching schedule was known and, once this was accomplished, the non-teaching duties were assigned according to teacher availability.

During the summer of 1974 it became apparent that respondent had the fifth period unassigned. Consequently, the first vice-principal recommended to the principal, who approved, that respondent be assigned daily cafeteria duty during the fifth period. (Tr. I-35; Tr. III-19) A male teacher, not a party to the dispute, was also assigned daily cafeteria duty during the fifth period. (Tr. I-24) The first vice-principal explained that because of the number of pupils involved in the cafeteria and the resulting difficulties encountered in past years, it was decided that two teachers, one of each sex, would be assigned cafeteria duty. (Tr. III-18)

Respondent testified that she learned of her assigned cafeteria duty during late August 1974 when she was in the school on other business and attempted to discuss the matter with either the principal or the first vice-principal, neither of whom was in school that day. (Tr. V-77) Consequently, respondent left a written message for the first vice-principal which states, in pertinent part:

> "***I noticed [on the schedules] I have 5th period lunch duty. Was this an oversight? I believe if you will check the sheet [teacher scheduling requests for 1974-75 (P-8)] I filled out in the spring, you will find that cafeteria duty was the only thing I made a special note about – not as a preference but for medical reasons. Would you consider switching me to another duty like study hall, C-2 [suspension], hall duty? My request is for this year since I was hospitalized this summer and [I] am still under specific care.***" (P-9)

The hearing examiner observes, with respect to the cited medical reasons, that respondent testified she was hospitalized between May 2 and May 6, 1974. (Tr. V-64) Respondent further testified that at the conclusion of this hospitalization she knew from her gynecologist that she was scheduled to have surgery during the 1974 summer. The gynecologist, called as a witness for the Board, testified that he had performed the operation on June 20, 1974 to realign the internal organs of respondent's pelvic structure through the insertion of a pessary, or splint, which was to remain in place for three months. (Tr. V-7-13)

Respondent was to be examined periodically for three months following the operation to determine whether it was successful. Finally, the gynecologist testified that on July 2, 1974, he determined that the pessary was to remain intact until late September or early October. (Tr. V-37-38)

The first vice-principal testified that he devised the teacher scheduling request form (P-8) to assist him in the preparation of the master schedules. (Tr. III-21; P-7; P-7A) He further explained that the forms for the teachers' schedule requests for 1974-75 were distributed in late May 1974, and by that time teachers had already been informed of their teaching assignments for 1974-75 by their respective department chairpersons. (Tr. III-21, 28) It is observed that the request forms also enabled teachers to specify those non-teaching duties which they would, or would not, prefer. Furthermore, it is observed that the principal testified the master schedules for 1974-75 were not finally completed until August 1974. (Tr. I-32)

Respondent testified that she completed the form on May 20, 1974 (P-8), and specifically requested not to be assigned cafeteria duty because of medical reasons. Respondent testified that she had been assigned cafeteria duty during 1971-72 and knew the demands of that duty. Respondent testified that the teacher assigned cafeteria duty had to break up food fights between pupils, do much bending to pick up food, occasionally break up physical confrontations between pupils and, generally, use much physical activity to maintain order. (Tr. V-69-71) Consequently, respondent explained that while she had requested not to be assigned cafeteria duty, she was willing to perform non-teaching duties such as library supervisor, hall duty, suspension room, or study hall suspension. Respondent testified that in her judgment the other non-teaching duties were not as physically demanding as cafeteria duty. (Tr. V-64-75)

The first vice-principal testified that not only were the 1974-75 teacher schedule request forms (P-8) distributed late to the teachers, but they were also distributed during an anxious period of negotiations between the Board and the Audubon Education Association, hereinafter "Association." (Tr. III-22) It is observed that respondent was a member of the Association's negotiating team, as well as being the Association's faculty representative for 1974-75. (Tr. V-50)

The first vice-principal testified that when teachers returned the schedule request forms (P-8) to him, he reviewed them in a cursory fashion and determined that they were not completed in good faith (Tr. III-22) or, in his words, he determined that the completed forms "were bogus." (Tr. III-131) Consequently, the first vice-principal testified that he ignored the schedule request forms in general (Tr. III-23) and with respect to respondent's schedule request for 1974-75 determined it to be bogus. The first vice-principal explained that respondent listed courses she would like to teach, in order of preference, as Honors English II, Physical Education, Sewing and Business English. He ignored the form because respondent stated that she possessed certification only as a teacher of English. (Tr. III-22) Respondent testified that she would have liked to teach physical education and sewing in an emergency if the situation arose. (Tr. VI-141-142) Respondent testified that she had been asked by the former Superintendent to assist the regular physical education teacher during the 1971-72 academic year, even though she was not properly certified. (Tr. VI-137)

The first vice-principal testified that on the next day, probably August 28 1974, he discovered the message (P-9) addressed to him by respondent. (Tr III-25) He further explained that respondent telephoned him, probably on August 29, 1974, with respect to her cafeteria duty assignment. The first vice-principal testified that he told respondent her request for a schedule change had to be discussed with the principal. Consequently, respondent testified, the first vice-principal switched the telephone call to the principal's office. (Tr V-89)

The principal testified that respondent then requested to be relieved of her cafeteria duty assignment because of her recent operation which respondent did not explain in detail, nor did he pursue. (Tr. I-42) The principal testified he informed respondent that no schedule change would be made unless a note from her physician was submitted stating she was not physically capable of performing the assigned cafeteria duty and, further, that the mere submission of such a note would not guarantee she would be relieved of the duty. Rather, he explained, respondent was informed that the submission of such a note would only grant consideration of her request. (Tr. I-41)

Respondent's version of this telephone conversation with the principal differs slightly to the extent that she testified that the principal denied her request for a schedule change out-of-hand and that it was she who asked him whether a note from her gynecologist would support her request. Respondent testified that the principal replied she could submit the note and it would be considered but no promises would be made. (Tr. V-80)

Respondent testified that she secured a note (P-1) from her gynecologist and attempted to deliver it personally to the principal or the second vice-principal on the morning of the first day of school, September 4, 1974 However, when she reported to school at 7:45 a.m., she was informed by a secretary that neither principal arrived at school until 8:30 a.m. Consequently respondent left the note with the secretary. (Tr. V-85) The note states in full:

"September 3, 1974

"To Whom It May Concern,

"Ms. Jeanette Finkbiner is under our medical care. We recommend that she not undertake Cafeteria Supervision for the 1974-75 school year.

"Sincerely,

_____"

[Signed: W.W. Bare, M.D.] (P-1)

Respondent testified that after she left the note with the secretary and began to walk towards her classroom, she met the first vice-principal and informed him of the note. Respondent testified that the first vice-principal simply said, "Well, thank you very much." (Tr. V-86) The first vice-principal testified that the note was received at 8 a.m. and that respondent requested a meeting as soon as possible. (Tr III-86)

Respondent testified that thereafter she had no communication from the principal or either one of the two vice-principals with respect to the physician's note (P-1) or with respect to her cafeteria duty assignment. (Tr. V-86) Respondent testified that when the fifth period began she went to the first vice-principal's office to determine whether she was relieved of cafeteria duty. Respondent testified that the first vice-principal explained that the decision was not his to make; rather, the decision had to be made by the principal. Respondent also testified that the first vice-principal informed her that the principal was going to contact her physician to verify the note. (Tr. V-87) Respondent testified that the first vice-principal did not direct her to go to cafeteria duty. (Tr. V-86)

Respondent testified that she then went to the principal's office to determine whether she was relieved of cafeteria duty and she was informed that the principal was unable to see her and was advised to make an appointment for later in the day. Respondent testified that she attempted to get an appointment for the sixth period, her regularly scheduled lunch period (P-7A), but the principal was still unavailable. Finally, respondent testified that she made an appointment to see him at 3 p.m. that day. (Tr. V-87-88)

Respondent testified that by this time the sixth period had begun, and she went to have her lunch. (Tr. V-89) During her lunch period, respondent was informed that the principal wanted to see her in his office. The principal wanted to know why she was not on cafeteria duty during the fifth period. The principal then informed her, according to respondent's testimony, that he had telephoned her physician in regard to the medical note (P-1) and was advised that the problem should be handled by him, the principal. (Tr. V-91) Respondent testified that the principal had not spoken with her attending physician but with another doctor associated with the same medical service who had no knowledge of her medical problem. Respondent testified the principal then informed her he was "writing up insubordination charges" against her and directed her to be in his office at 3 p.m. that day to sign them. (Tr. I-172; Tr. V-91)

The principal testified that his secretary did not inform him of respondent's medical note (P-1) until after he personally discovered that respondent was not on cafeteria duty during the fifth period. (Tr. I-42) The principal explained that the purpose of the scheduled 3 p.m. meeting with respondent, which was also attended by a witness from the Association at the principal's direction (Tr. I-146), was to allow respondent to review and sign a memorandum (R-1) he planned to submit to the Superintendent. (Tr. I-174) Respondent testified that she reviewed the prepared memorandum during the 3 p.m. meeting with the principal but did not sign the document because she was not certain of the provisions set forth in the Agreement with respect to a teaching staff member signing any document. (Tr. V-96)

The principal's memorandum (R-1) dated September 4, 1974, sets forth the chronology of events. The principal concluded the memorandum by stating:

> "1. I recommend that no change be made in Miss Finkbiner's 5th period Cafeteria supervision duty assignment for the 1974-75 school year.

"2. I recommend that, since Miss Finkbiner did not report to her 5t period Cafeteria supervision duty assignment on September 4 and furthe that she had not previously received permission to be excused from thi assignment, disciplinary action be undertaken against Miss Finkbiner fo insubordination." (R-1

The principal also prepared a memorandum (R-11) to file which state that respondent refused to sign the memorandum. (R-1)

The Superintendent testified that he first became aware of respondent' request for a schedule change when he received the principal's memorandum o September 4, 1974. (Tr. IV-4; R-1) The Superintendent further testified that th principal's recommendation that respondent be charged with insubordinatio was perhaps hasty and due to the excitement and pressures of the first day c school. (Tr. IV-5) He explained that he talked with respondent during th morning of September 5, 1974, and suggested to her that he would telephon her gynecologist. In the meantime, he advised respondent to report for cafeteri duty until the matter was resolved. The Superintendent testified that he di telephone Dr. Bare and explained to him the requirements of cafeteria duty. Dr Bare informed him that he would recommend, based on that explanation, tha respondent refrain from cafeteria duty for a period of from six to twelve weeks (Tr. IV-6) This estimate is contrary to the earlier medical note (P-1) in which i was recommended that cafeteria duty not be assigned respondent for th 1974-75 school year. The physician testified that the earlier estimate of th entire year was based on a conversation he originally had with respondent i regard to the requirements of cafeteria duty. (Tr. V-4-5) In any event, th Superintendent testified that when he informed respondent of the six to twelv week estimate he received from Dr. Bare she was surprised. The Superintenden further testified that Dr. Bare fully explained respondent's medical problem t him and that he understood that explanation. (Tr. IV-7)

The Superintendent testified that Dr. Bare agreed to submit a letter i which the six to twelve week estimate would be confirmed. The Superintenden testified that he informed respondent that as soon as that letter was received, a adjustment would be made in her schedule. (Tr. IV-8)

Respondent testified that she, too, had explained her medical problems t the Superintendent on September 5, 1974 (Tr. V-98), and that she reported t cafeteria duty for the fifth period on that day. In fact, it is clear that responden reported to cafeteria duty every day, except September 4, 1974, up to the tim of her suspension. (Tr. VI-64)

The principal testified that when he visited the cafeteria during the fift period on September 5 to determine whether respondent was present (Tr. I-48 he found her in the cafeteria; however, the principal testified, she was seated The principal testified that he informed respondent she was expected t circulate around the cafeteria and that she replied she had difficulty standin and moving around because of her operation. (Tr. I-48-50) The principal the informed the Superintendent that although respondent was on cafeteria duty she was seated and not walking around as he expected her to do. (Tr. I-50)

Consequently, the Superintendent met with respondent again on September 5, 1974 to discuss the matter further. Respondent testified that the Superintendent gave her a copy of the job description (P-4) for cafeteria duty. (Tr. V-101) It is also observed that respondent testified that the Superintendent informed her on September 5, 1974, that she was deliberately assigned cafeteria duty for 1974-75 because of her request not to be so assigned. (Tr. VI-140) It is observed that the Superintendent testified he did give respondent a copy of the job description but he recalled the date as being September 9, 1974, and not September 5. (Tr. IV-10) The job description is set forth in a memorandum dated September 5, 1974 from the Superintendent to the respondent as follows:

"CAFETERIA DUTY

"A. Broad Definition

"1. The cafeteria duty teacher will supervise and carry out all duties that may be required by the principal.

***

"As per our conversation of this morning, I expect you to fulfill your obligations of Cafeteria Supervision until further notice." (P-4)

The hearing examiner observes that while the job description for cafeteria duty sets forth the obligations of teachers assigned thereto, there is no stated requirement that those responsibilities be met by continuous walking.

The principal testified that the standard operating procedure for teachers on cafeteria duty is to move around the entire cafeteria and the annex area, a small section attached to the main cafeteria. Furthermore, the principal testified that cafeteria duty also required supervision of the boys' and girls' lavatories, as well as quieting noisy groups of pupils. (Tr. I-19-20) The first vice-principal testified that while the cafeteria duty job description (P-4) does not specify that the teacher must walk around, it does state that the teacher is to "***supervise and carry out all duties *** required by the principal.***" To him, this implied that respondent was supposed to walk around the cafeteria because that was what the principal instructed her to do. (Tr. III-41)

The principal testified that the Superintendent instructed him on September 5, 1974 to begin observing respondent in the performance of her cafeteria duty assignment which he and the first vice-principal did on September 6, 1974. He testified that he once again instructed respondent to walk around the cafeteria which, in his judgment, she was not doing. (Tr. I-51) The first vice-principal testified that he also directed respondent to walk around the cafeteria. Respondent replied that she could not do so because of her medical problem. (Tr. III-29-30) The first vice-principal also testified that respondent informed him at this time that a representative from the New Jersey Education Association, hereinafer "N.J.E.A.," would contact him in regard to her cafeteria duty performannce and the demand for constant walking. (Tr. III-30) The first

vice-principal reported this conversation to the principal who, in turn, included it in a report (R-10) which he submitted to the Superintendent.

The two-page typewritten report (R-10) submitted to the Superintendent by the principal on September 6, 1974, stated that, for the most part, respondent was seated during cafeteria duty at the time the principal observed her. The principal stated that he was in the cafeteria for twenty-nine minutes. The principal did state, however, that respondent stood on three different occasions: the first time she was on her feet for twelve seconds; the second time for twenty seconds; and the third time for eleven seconds. (R-10, at p. 2) When asked how he measured the time that respondent was on her feet, the principal testified that he guessed or approximated the seconds. (Tr. II-62)

The principal concluded his report to the Superintendent by stating:

> "***It is my feeling that Miss Finkbiner, even though you explained the duty to her, [the first vice-principal] explained the duty to her, and I explained the duty to her, did not perform the duty in an acceptable manner. I feel that, since I personally explained to her in detail exactly what was to be done, Miss Finkbiner in not performing the duty as I indicated was insubordinate. Therefore, I am recommending that some disciplinary action be taken against her for not performing her 5th period Cafeteria supervision duty assignment in a satisfactory manner." (R-10)

A systematic program of observation of respondent's performance in the cafeteria began, followed by almost daily meetings between and among respondent, the principal, and the Superintendent. Furthermore, respondent's teaching performance was formally evaluated on two successive days as a direct outgrowth of her performance in the cafeteria.

On September 9, 1974, the first vice-principal observed respondent in the cafeteria. He submitted a report to the principal which states, in pertinent part:

> ***
>
> "11:35 [The first vice-principal] arrived in the cafeteria.
>
> "11:36 Bell rang ending period 4.
>
> "11:51 Miss Finkbiner arrived - walked to cafeteria annex entrance (near water fountain), sat down, got up and got a drink and then sat down.
>
> "11:56 Stood up (in place) for 1 minute.
>
> "11:57 Sat down.
>
> "11:59 Up for 20 seconds (in place).
>
> "12:05 Up for 10 seconds (in place).

"12:12 Up for 15 seconds (walked to windows and back).

"12:24 Up for 15 seconds (in place).

"12:25 Bell rings and Miss Finkbiner walked to counter to get her lunch.

***

"In view of the fact that you, [the principal], [the Superintendent] and myself explained the cafeteria supervisor duties to her previously, and she isn't carrying them out properly, she is insubordinate. Therefore, I would recommend some type of disciplinary action to be taken." (R-5)

The first vice-principal testified that on the basis of his observations of respondent's cafeteria performance on September 5 and 9, respectively, he, too, recommended that she be charged with insubordination. (Tr. III-43)

The principal, subsequent to the receipt of the first vice-principal's report (R-5), instructed respondent by memorandum (P-10) to report to his office at 3 p.m. that day to discuss her cafeteria duty performance. The principal testified that he instructed respondent to walk around the cafeteria and to refrain from sitting. The principal testified that respondent replied that because of her medical problem it was her judgment, based on the medical note (P-1) she had submitted on the first day of school, she should refrain from constant walking and should, in fact, remain seated. (Tr. I-56)

Respondent's cafeteria performance must have been reported to the Superintendent because he submitted the following memorandum to respondent on September 9, 1974:

"It has come to my attention that you are not carrying out the instructions of the Principal according to the Job Description for Cafeteria Duty. In my judgment this responsibility of supervising the children is best done by continually moving about the cafeteria during your assigned period." (P-2)

The principal testified that he met with respondent again on September 10, 1974 with respect to her cafeteria duty performance. While the record is void of evidence or testimony that respondent was observed on September 10, 1974 while on cafeteria duty , the testimony of both the principal (Tr. I-57) and of respondent (Tr. VI-26) is clear that a meeting occurred that day. The principal testified that:

"***the meeting[s] that we began to have *** took on somewhat the same appearance ***. I would go over the observation [and] provide copies. Occasionally she [respondent] would bring *** someone from the [Association] *** as a witness, and we would go over the same thing, that she was not performing the duties as I instructed. I said we wanted you to move around, and she said that she was not physically able to move around. And that in her interest, she would remain seated.***" (Tr. I-57)

Respondent testified that it was the principal who directed a representative of N.J.E.A. to be present at the meeting. Respondent also testified that the principal directed her again to sign a letter in which he alleged insubordination against her. (Tr. VI-25-26)

Respondent testified that, subsequent to the meeting with the principal, she met with the Superintendent and informed him she was now willing to sign the earlier memorandum (R-1) of the principal dated September 4, 1974. Respondent testified that the Superintendent refused to allow her to sign it. (Tr. VI-28)

The principal testified that respondent was observed in the cafeteria and was formally evaluated in her classroom on September 11, 1974 by the first vice-principal. (Tr. I-58) The first vice-principal testified that he formally evaluated respondent's teaching performance at the principal's direction. (Tr. III-45) The principal testified that the formal evaluation of respondent's teaching performance was done at the direction of the Superintendent. (Tr. I-66)

Subsequent to the observation of respondent's performance in the cafeteria and the submission of the formal evaluation report (R-3) by the first vice-principal on September 11, 1974, the principal met with respondent. (Tr. I-58) The principal testified he informed respondent that the classroom observations were to determine her ability to function in the classroom in view of her medical problem. (Tr. I-66) The hearing examiner observes that the formal evaluation (R-3) of respondent by the first vice-principal was, in all respects, positive and reflected a highly competent teacher. The first vice-principal saw fit to include on the evaluation the statements that "***Miss Finkbiner walked back and forth [around] the front of the room throughout the period. Occasionally, she moved up and down the aisles.***" (R-3, at p. 2) Furthermore, the first vice-principal stated on the evaluation that:

> "***The purpose of this observation at this time is to determine your ability to conduct your classroom in an educationally sound manner in light of your *alleged* medical problem." (*Emphasis supplied.*)
>
> (R-3, at p. 2)

The Superintendent testified that as of September 11, 1974, he had not received the letter from Dr. Bare with respect to his recommendation that respondent not perform cafeteria duty for six to twelve weeks. (Tr. IV-10) Consequently, the Superintendent wrote to Dr. Bare on September 11, 1974, requesting that he send the letter by September 17, 1974. (P-5) The record is clear that the Superintendent never requested respondent to expedite the letter from her physician. (Tr. IV-9) Furthermore, the Superintendent testified that by this time he had reported the entire incident to the Board and that the Board desired another opinion in regard to respondent's medical problems.

The hearing examiner observes that the principal testified he had questioned the veracity of what he perceived to be conflicting statements by Dr. Bare. (Tr. I-83) The first vice-principal also testified he questioned the validity of the medical note. (Tr. III-121; P-1) Initially, the principal explained, he received

a medical note (P-1) which stated that Doctor Bare recommended respondent refrain from cafeteria duty for the 1974-75 school year. Then, according to the Superintendent's telephone conversation on September 5, 1974, Dr. Bare recommended that respondent refrain from cafeteria duty for a period of from six to twelve weeks. (Tr. I-83; Tr. II-76) It is also observed that the principal testified that on one of the occasions he observed respondent in the performance of her cafeteria duty he "***happened to have a Board member with [him] ***" probably on September 12, 1974. (Tr. II-81) While not a primary issue herein, the hearing examiner believes that the Board requested its second medical opinion based upon the position obviously adopted by the principal that the credibility of the statements of respondent's physician were suspect.

The Superintendent testified that he met with respondent on September 11, 1974, regarding the Board's request for another opinion. The conversation between respondent and the Superintendent is recorded in a memorandum to file as follows:

> "Mr. Held: The Board would like to have another opinion by a Board appointed doctor on Miss Finkbiner's health.
>
> "Miss Finkbiner: Does it have to be a Board appointed doctor?
>
> "Mr. Held: Right now, yes.
>
> "Miss Finkbiner: At my expense, no. I do not know, but I will be very willing to consider it. The earliest I can let you know is tomorrow morning [September 12, 1974].
>
> "Mr. Held: Get back to me." (R-9)

Respondent testified that the Superintendent offered no explanation with respect to the verbal request of the Board to secure another medical opinion. (Tr. VI-33)

The Superintendent testified that the next morning, September 12, 1974, he sent a pupil messenger to respondent during her preparation period to inform her he wanted to see her in regard to the second medical opinion. (Tr. IV-11-12; C-2) The subsequent events, as recorded in a memorandum to file prepared by the Superintendent, are as follows:

> "Miss Finkbiner had been instructed on Wednesday, September 11th at a meeting witnessed by Miss Mary Provine, that she was to provide an answer to the question of having a Board appointed physician examine her. She was to provide this information during first period Thursday morning.
>
> "During the first period class I sent a verbal message to tell Miss Finkbiner that I wanted to see her right away. She has first period free so there was no reason why she could not meet with me at that time.

> "Miss Finkbiner told the messenger she would not come to my office until she received a written request to do so. My written request was delivered. This request was answered by a note from Miss Finkbiner stating she could not meet with me at that time because she was 'preparing for class'. I immediately went to the library where she was typing and personally requested that she meet with me in my office immediately. Miss Finkbiner then asked permission to bring along another person to the meeting as a 'witness'. I agreed to this request and returned to my office to wait for Miss Finkbiner and 'witness'.
>
> "Apparently Miss Finkbiner could not find anyone available to accompany her to my office because she never did return. Finally, I went back to the library to see her and at her request, and because of the time factor we agreed to meet in my office at the end of the school day (2:52 pm)."
>
> (P-3)

The Superintendent testified that when he personally visited respondent in the library where she was typing "***emotions [between him and respondent] were running a little high.***" (Tr. IV-12)

Respondent testified that it was the Superintendent's secretary who first informed her during her preparation period that the Superintendent wanted to see her. (Tr. VI-33-34) Respondent testified that the typing she was doing was necessary for her classes. Thus, she asked the secretary if she could meet with the Superintendent at a later time. After the secretary relayed the message, the Superintendent appeared or sent a note (C-1) to the library stating he wanted to see respondent immediately. Respondent testified that she explained that the work she was doing was necessary for class. Respondent also testified she did not agree to decide whether to secure a second medical opinion by the first period of the day. The Superintendent then agreed to meet with her after school. (Tr. VI-34)

The meeting between the Superintendent and respondent did occur after school on September 12, 1974 with an N.J.E.A. representative present at her request. (Tr. VI-34) The Superintendent testified respondent stated that before she decided whether to comply with the Board's request for a second medical opinion, she wanted the reasons for such a request in writing. (Tr. IV-12) Respondent testified that when she made this request the Superintendent offered no explanation with respect to the reasons for the Board's request for a second opinion. (Tr. VI-36) There is no evidence in the record that the Board ever reduced its request to writing. The Superintendent testified that respondent never refused to secure another opinion; she simply wanted the request in writing. (Tr. IV-38) The Superintendent did report her request to the Board. (Tr. IV-13)

The hearing examiner observes that, in additon to respondent's meeting with the Superintendent on September 12, 1974, respondent was also formally evaluated in her classroom teaching performance by the second vice-principal. The formal evaluation (R-4) submitted to the principal establishes that respondent is an effective teacher. The report, quite similar to the evaluation report (R-3) of the first vice-principal, states, *inter alia*:

"***

"Miss Finkbiner moves around the room well to check on all students.***"

And,

"***The purpose of this observation at this time is to determine your ability to conduct your classroom in an educationally sound manner in light of your *alleged* medical problem.***" (*Emphasis added*.)
(R-4, at p. 2)

The record herein is unclear with respect to whether the principal met with respondent on September 12, 1974 to discuss either her cafeteria duty performance or her classroom evaluation. (Tr. II-81; R-4)

The first vice-principal observed respondent's cafeteria duty performance on September 13, 1974, and prepared the following report to the principal reproduced here in pertinent part:

***

"11:44 - I arrived in the cafeteria and Miss Finkbiner was not present.

"11:58 - Miss Finkbiner arrived. Her late arrival was acceptable as she was meeting with Mr. Held [the Superintendent]. Miss Finkbiner came into the cafeteria and walked directly to the water fountain, cafeteria annex area and sat down.

"12:05 - Got up, walked to a group of students at a table in the direction of the cafeteria line. She spoke to them and returned to her seat (25 seconds).

"12:10 - Stood up and walked in the direction of the cafeteria line, spoke to a few students and walked back past her chair to the window area and talked to other students and then returned to her seat and sat down (50 seconds).

"12:20 - I left the cafeteria and Miss Finkbiner was still seated.

"The performance described above is not satisfactory. Her duties as cafeteria supervisor have been explained to her several times and she is not carrying them out properly. This is insubordination.

***

"I am recommending some type of disciplinary action be taken against Miss Finkbiner." (R-6)

The principal also testified that since September 4, 1974, the first vice-principal had been recommending to him that no schedule change be made for respondent and he agreed with that recommendation because of the lack of credible medical information. (Tr. I-69-70)

Respondent testified that a meeting with the principal occurred September 13, 1974. However, her testimony is that the principal gave her the ultimatum of simply signing the observation (R-6) of the first vice-principal with respect to her cafeteria duty performance or waiving her "right" to do so. (Tr. VI-39) Respondent testified that no discussion occurred in regard to the contents of the report. (R-6)

While the testimony of the Superintendent does not establish that he met with respondent on September 13, 1974, respondent's testimony does establish the occurrence of such a meeting. Respondent testified that on September 13, 1974, she meet informally with the Superintendent who told her he had not received her medical information from Dr. Bare which he had been expecting (Tr. VI-38), and that this was the first knowledge she had that the Superintendent was expecting any written documentation or statement from her physician. Respondent further testified that she never gave, nor was she ever requested to give, permission to any school administrator to contact her physician with respect to her medical history or present medical problem. (Tr. VI-37, 89-90)

The hearing examiner observes that subsequent to the time respondent learned on September 13, 1974, that the Superintendent was expecting information from her physician, she telephoned the physician's office and instructed employees there not to release information with respect to her medical status without her permission. (Tr. VI-98) Respondent testified that her intent was not to stop the Superintendent from receiving the letter from Dr. Bare that he had been expecting. (Tr. VI-105-106) Rather, respondent testified that she issued the instructions to her physician's office in order to protect her doctor from a possible civil suit later on. (Tr. VI-98) It is observed that the initiation of a civil suit against her doctor for releasing her medical status would find its genesis in respondent herself. Respondent also testified that she took no action to facilitate the Superintendent's receipt of the expected letter from her doctor because she and the Association had, by this time, determined to resolve the matter through the grievance procedure. (Tr. VI-106) Furthermore, respondent testified she never informed the Superintendent that she had instructed her physician not to release information to anyone with respect to her medical status. (Tr. VI-108)

The first vice-principal observed respondent in the performance of her cafeteria duty on September 16 and September 18, 1974. On both occasions, the first vice-principal prepared and submitted reports (R-7; R-8) to the principal. The first vice-principal reported that on September 16, 1974, respondent's performance was not satisfactory; that when he arrived in the cafeteria respondent was seated; that six minutes later respondent was on her feet for seventy seconds to reprimand several pupils; that nine minutes later respondent was on her feet for ten seconds to talk with several pupils at a table.

he first vice-principal concluded this report (R-7) by recommending that espondent be charged with insubordination.

Respondent testified she met with the principal on September 16, 1974 to stablish whether she would be allowed to discuss the contents of the reports of er cafeteria duty which were to be submitted to him. Respondent testified that ne principal replied no discussion would be allowed. (Tr. VI-41-42)

The first vice-principal prepared and submitted a memorandum (R-8) to ne principal of his observation of respondent's performance while on cafeteria uty on September 18, 1974 in which he reported that respondent's erformance was not satisfactory; that when he arrived at the cafeteria espondent was seated; that two minutes thereafter respondent stood for ten econds talking with pupils at a table; that eight minutes thereafter respondent tood for fifty-five seconds talking with pupil monitors; that one minute hereafter respondent stood for forty seconds when she walked to the cafeteria nnex; that ten minutes thereafter respondent stood for ten seconds; and that /hen he left the cafeteria respondent was seated. The first vice-principal oncluded his report (R-8) by recommending that respondent be charged with nsubordination.

The hearing examiner observes that the first vice-principal testified he alked with the principal on September 17, 1974, the day before the first ice-principal submitted his report, *ante.* (R-8) The first vice-principal testified hat the principal told him

> "***the situation is going probably to a point of no return, and he's [the principal] beginning to prepare the filing of the [tenure] charges against Miss Finkbiner. He did say *** if the information that we requested from the Doctor had come in *** the matter would be dropped.***"
>
> (Tr. III-56)

On cross-examination, however, the first vice-principal denied that the rincipal stated the situation had reached the point of no return in regard to the iling of tenure charges. (Tr. III-109) The hearing examiner finds credibility in he first vice-principal's testimony that the principal informed him on September 7, 1974, that the situation had reached the point of no return for the reason hat the first vice-principal had testified that as far back as September 6, 1974, he principal was considering her suspension. (Tr. III-34)

The principal testified that he met with respondent on September 18, 974, and informed her he was waiting for a clarification from Dr. Bare with espect to the length of time she had to avoid constant standing. (Tr. I-70-71) Respondent testified that the only thing that occurred at her meeting with the rincipal on September 18 was that he told her to sign three reports in regard to ier cafeteria duty performance. Respondent testified that the reports were dated eptember 16, 17, and 18. The hearing examiner observes that the reports (R-7; R-8) for September 16 and 18 are in evidence. (Tr. VI-41-42) The principal estified that respondent was not observed after September 18, 1974. (Tr. I-70)

The Superintendent testified that in the meantime he and the principal had met with the Board to determine whether or not formal tenure charges should be certified against respondent to the Commissioner. (Tr. IV-21) The Board instructed the Superintendent to meet with respondent one more time in regard to its earlier verbal request for a second medical opinion and the receipt of the anticipated letter from Dr. Bare. (Tr. IV-14) Consequently, a meeting was held on September 19, 1974, attended by the Superintendent, the principal, respondent and an N.J.E.A. representative. A three-page memorandum (P-11) to file was prepared with respect to the statements made by the parties. This document affirmed that the Superintendent informed respondent that her cafeteria duty performance was not satisfactory and that her alleged medical problem had not been supported by her own physician. Obviously the Superintendent determined that respondent's physician's failure to submit the letter with respect to his six to twelve week estimate, *ante*, constituted a failure to support respondent's claim of a medical problem. It is apparent that the Superintendent placed no value on his telephone conversation with Dr. Bare on September 5, 1974 at his, the Superintendent's, initiation.

The memorandum (P-11) also states that respondent was admonished for not demonstrating willingness to be examined by another physician. The memorandum then states that the Superintendent advised respondent, *inter alia*, that:

> "***we [the administrators] get a medical opinion clarifying the status of your health and an agreement [from respondent] to an examination by a physician of the Board's choice. We must have this opinion in and something in writing [from respondent] that you will have a physician of the Board's choice examine you to see the extent of your alleged medical disability.***" (P-11)

Thereafter, the Superintendent instructed respondent to accede to his requests by September 23, 1974 at 3 p.m. or the tenure charges heretofore discussed and subsequently prepared would be certified against her.

The hearing examiner observes that while respondent's request to have the Board's reasons in writing with respect to a second medical opinion was not honored, the Superintendent directed respondent to agree, in writing, to secure a second opinion from a physician to be selected by the Board.

The memorandum (P-11) further states that the Superintendent alleged that respondent's behavior from September 4, 1974 and thereafter with respect to cafeteria duty reflected "***a basic immaturity, a desire for sensationalism, and an interest in being part of a controversy.***" (P-11, at p. 2)

The memorandum (P-11) states that the Superintendent also advised respondent that if charges were certified against her as a result of the cafeteria duty situation, he would also include as a charge an incident which had occurred during the spring of 1974. The hearing examiner observes that that incident constitutes the allegations set forth in Charge No. Three, *sub judice*, and shall be discussed later.

Finally, the memorandum (P-11) of September 19, 1974, states that the uperintendent directed respondent to return to his office the next day, eptember 20, 1974, in order to sign the memorandum he prepared. An ddendum to the memorandum states that respondent failed to appear at the uperintendent's office on September 20, 1974. Rather, a field representative, ereinafter "representative," from N.J.E.A. did appear at the Superintendent's ffice in her behalf. The Superintendent states in the addendum that the epresentative informed him that a grievance (R-14) had been filed with the rincipal on behalf of respondent that day and that respondent would enceforth not meet with the Superintendent regarding the cafeteria duty ituation unless the representative was present. (P-11, at p. 3)

The representative testified that respondent had been advising him of the aily occurrences with respect to her performance on cafeteria duty and the ctions of the Superintendent, the principal, and the vice-principals since eptember 4, 1974. (Tr. VII-72) The representative testified, however, that the irst time he had talked with the Superintendent in regard to the situation was n September 20, 1974. (Tr. VII-103) The representative testified that his fforts in the entire matter were to resolve the situation through compromise. Tr. VII-89) The representative testifies that he had advised the Superintendent hat respondent would not meet with the Superintendent, without his presence, n respect to the cafeteria duty, based on an earlier holding of the Commissioner n *Gregory Cordano v. Board of Education of the City of Weehawken, Hudson County,* 1974 *S.L.D.* 316. (Tr. VII-76)

Respondent testified that she had attempted to contact her physician on eptember 20, 1974 to secure the desired letter for the Superintendent. lowever, her physician was not available until the following Tuesday. (Tr. /I-49) Respondent also testified that she did not meet with the Superintendent n September 23 at 3 p.m. as directed because of the advice she received from he representative. (Tr. VI-52)

The representative testified that the Superintendent advised him on eptember 20, 1974 to contact the Board attorney for purposes of resolving the natter. (Tr. VII-90) The representative testified that he contacted the Board's ounsel on September 23, 1974, and a settlement conference ensued. (Tr. /II-95) The representative testified that he believed the Board attorney was to ave met with the Board that evening, September 23, with respect to possible ettlement. (Tr. VII-97) The representative testified that it was this set of ircumstances with the possibility of settlement that led him to conclude and to o advise respondent that the September 23rd 3 p.m. deadline should be held in beyance. (Tr. VII-99)

The representative testified that the next communication came from the Superintendent on September 25, 1974, advising him that the Board had taken formal action to certify the charges, *sub judice*, against respondent on September 24, 1974. (Tr. VII-97)

The principal testified that throughout the entire proceedings the other non-teaching duties which respondent was willing to accept were as physically

demanding as cafeteria duty. (Tr. I-21-22, 32) However, the principal also testified that the area to be covered on cafeteria duty was much larger than the area with respect to any other non-teaching duty. (Tr. I-154) The hearing examiner concludes, on the basis of the principal's testimony, that cafeteria duty, according to the principal's expectations, is more physically demanding than any other non-teaching duty hereinbefore discussed. (Tr. I-151-161)

Respondent testified that subsequent to her appointment to the Association's negotiating team for 1974-75, the second vice-principal had threatened her with tenure charges for insignificant violations of school policy. Specifically, respondent had been one minute late for hall duty; she had not stood completely in the hall during a class change; and she had failed, on one occasion, to sign out. (Tr. V-52-56) Respondent also testified that during February 1974, she had elected to be absent from school on Lincoln's Birthday, a recognized legal holiday. Respondent testified that the principal had informed her he was going to prevent her from being paid. However, the principal had thereafter rescinded that statement because she was paid for the day. (Tr. V-54-62)

Respondent testified that while on cafeteria duty she positioned herself in a strategic location, seated where she could see the exits to the cafeteria, and that she had two pupil monitors next to her. Respondent testified that if she noticed a pupil problem she would stand and correct the situation. (Tr. VI-56) The hearing examiner observes that the testimony of the principal, the first vice-principal, and the Superintendent does not, in any way, establish that respondent's failure to continuously walk around the cafeteria resulted in discipline problems during her supervisory assignment.

Respondent testified that she was neither informed of the pending evaluations (R-3; R-4) of her teaching performance, nor was she informed that she was being observed in the cafeteria. (Tr. VI-36) Respondent testified that she was not allowed to review the reports (R-1; R-5; R-6; R-7; R-8) prior to the meetings with the principal, contrary to the provisions of the Agreement. (Tr. I-39-59; C-3)

It is within this context that the Board alleges the conduct of respondent to be insubordinate and further alleges that her performance on cafeteria duty establishes that she is incapable of performing that duty as required. Consequently, the Board seeks respondent's dismissal from its employ.

Respondent, to the contrary and through her counterclaim filed against the Board, alleges that the Board has subjected her to improper and harassing tactics with respect to the whole of the matter herein. Respondent seeks dismissal of the tenure charges against her, reinstatement to her teaching position with all emoluments due her, and an order which directs the Board and its agents to cease the alleged improper and harassing tactics it has employed against her.

The hearing examiner finds that the tenure charges, *sub judice*, are the result of an effort by the Board's administrative team to establish what it

perceived to be its total authority over its teaching staff. The first vice-principal had no reason to disregard respondent's completed schedule request form (P-8) which he himself distributed. Respondent had stated on that form that she would prefer not being assigned cafeteria duty because of medical reasons but would accept other nonteaching duties. It may be supposed here that had respondent not in fact completed the form, another charge of insubordination would have been submitted to the Board.

The principal set the stage on September 4, 1974 for subsequent events when he informed respondent that he was charging her with insubordination because of her failure to be on cafeteria duty that one day. The intensity with which the principal carried out that threat is established by his memorandum (R-1) to the Superintendent. Furthermore, the fact that respondent had submitted a medical note (P-1) to the principal's office at 8 a.m. on September 4, 1974 with respect to respondent's medical problem, *vis-a-vis* her assignment to cafeteria duty, vitiates the principal's testimony that he was not aware of the note's existence. If, in fact, he was not aware of it, he should have been by any standard of administrative rule.

Finally, if the principal chose to question the veracity of the contents of respondent's medical note (P-1), the hearing examiner believes that the principal should have informed respondent of that concern prior to contacting her physician. Furthermore, it appears to the hearing examiner that the principal should have requested respondent's permission to contact her private physician for additional information in regard to her health.

Subsequent to September 4, 1974, there were a series of meetings, evaluations, and observations. In the hearing examiner's view, these meetings, observations, and evaluations were intended solely to compile a dossier upon respondent to establish the administrative charges against her.

The hearing examiner does not take issue with administrative authority or responsibility to manage its assigned schools. The hearing examiner cannot, however, agree with administrative regulations and directives which are patently arbitrary.

The hearing examiner finds that the Board failed to substantiate its allegations against respondent as set forth in Charges Nos. One and Two.

The hearing examiner did not require an affirmative defense to be entered on Charge No. Three because the Board offered hearsay testimony with respect to its total proofs. (Tr. VII-70-71) Consequently, respondent would have been denied the opportunity for cross-examination on the merits of the specific charge.

The hearing examiner recommends that the charges certified by the Board against respondent be dismissed.

The hearing examiner observes that respondent's counterclaim or request for a cease or desist order against the Board, with respect to alleged harassment,

would be essentially granted by dismissal of the charges. However, in any event, the hearing examiner finds no basis for such a precise order.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner as set forth above and notices that neither party filed exceptions thereto. The Commissioner agrees with and adopts as his own the findings of fact and recommendations as set forth therein.

Accordingly, the Commissioner hereby directs Jeanette W. Finkbiner be reinstated to her position as a teaching staff member in the employ of the Audubon Borough Board of Education effective immediately. The Board is also directed to compensate Jeanette W. Finkbiner all monies and emoluments, less mitigation, which have been withheld from her from the date of her suspension.

COMMISSIONER OF EDUCATION

April 29, 1976

Kenneth Dougherty,

Petitioner,

v.

Board of Education of the Township of Hamilton, Mercer County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Hartman, Schlesinger, Schlosser & Faxon (Joel S. Selikoff, Esq., of Counsel)

For the Respondent, Henry F. Gill, Esq.

Petitioner, a teacher formerly employed by the Board of Education of the Township of Hamilton, Mercer County, hereinafter "Board," was not reemployed by the Board for the academic year 1974-75. He alleges that the Board's determination not to reemploy him is arbitrary, capricious, and made in bad faith; therefore he prays for reinstatement and all requisite back pay.

This matter is submitted for adjudication by the Commissioner of Education on the pleadings, separate stipulations of fact, and Briefs.

There is no disagreement about the following factual presentment.

Petitioner was employed by the Board as a science teacher for two academic years (September 1, 1972 to June 30, 1973 and September 1, 1973 to June 30 1974) and was not reemployed for the 1974-75 academic year. Pursuant to *N.J.S.A.* 18A:27-10 and *N.J.S.A.* 18A:27-11, petitioner was notified by the Superintendent of Schools on April 18, 1974, that he would not be reemployed for the coming academic year. (Exhibits A, B) The pertinent statutes regarding the issue in dispute read as follows:

N.J.S.A. 18A:27-10

"On or before April 30 in each year, every board of education in this State shall give to each nontenure teaching staff member continuously employed by it since the preceding September 30 either

"a. A written offer of a contract for employment for the next succeeding year providing for at least the same terms and conditions of employment but with such increases in salary as may be required by law or policies of the board of education, or

"b. A written notice that such employment will not be offered."

N.J.S.A. 18A:27-11

"Should any board of education fail to give to any nontenure teaching staff member either an offer of contract for employment for the next succeeding year or a notice that such employment will not be offered, all within the time and in the manner provided by this act, then said board of education shall be deemed to have offered to that teaching staff member continued employment for the next succeeding school year upon the same terms and conditions but with such increases in salary as may be required by law or policies of the board of education."

The record shows that a teacher on leave of absence was scheduled to return for the 1974-75 academic year and that a vacancy for that teacher had to be created. The expertise of the returning tenured teacher and that of petitioner is in the field of chemistry. The secondary principals in the district were asked to submit a list of all nontenured teachers in the field of science, which lists were examined by the Board's Director of Secondary Education. His recommendation was that petitioner not be reemployed.

There is no dispute between the litigants at this juncture, and the Board does not attack petitioner's classroom or extra-classroom performance while in its employ. In fact, at a grievance hearing on July 22, 1974, which followed petitioner's notice of non-reappointment, the Director of Personnel testified that "***if a position were available, at this time, [petitioner] or any other candidates that have filed for any position in our District, we would select from them." (Exhibit C, at pp. 41-42) He testified also that there was nothing in

petitioner's record that would preclude his reappointment and that if there were a vacancy petitioner would be reemployed. (Exhibit C, at pp. 42-43)

Petitioner contends that there were vacancies for teaching positions which were filled by the Board between April 30, 1974 and September 1, 1974 in fields in which he was certified to teach. (Petitioner's Brief, at p. 4) Therefore, it is this filling of a position by the Board, while maintaining that no position was available, which petitioner brands as arbitrary and made in bad faith.

The record shows also that no vacancy existed for which petitioner was certified to teach on April 30, 1974. The Board asserts that a science vacancy was filled on July 17, 1974, prior to petitioner's grievance hearing which was filed on May 15, 1974 and held on July 22, 1974. The Board asserts also that this grievance which was filed on behalf of petitioner and three other teachers stipulated in the relief sought as follows:

> "***'We are not seeking re-employment. We request that relief shall be compensation of the salary differential loss for the school year of 1974-75.'***" (Board's Brief, at p. 2)

The Board avers that petitioner never made an application for employment for the 1974-75 school year after this statement was made and that he was not seeking reemployment, although he was aware that vacancies in the field of science had occurred when teachers in the system notified the Board after June 30, 1974, that they would not return for the 1974-75 academic year.

The Commissioner finds that petitioner was given proper and timely statutory notice that he would not be reemployed. (Petitioner's Brief, at p. 1; Board's Brief, at p. 2) He asked for an official statement at the grievance hearing as to why he would not be reemployed and he was told by the Board President and the Director of Personnel that there was no vacancy at that time (Exhibit C, at p. 8) and that a teacher was returning from educational leave or maternity leave and a vacancy had to be created for her. (Exhibit C, at pp. 8-9, 41)

The record shows also that at least one other vacancy occurred in petitioner's teaching field after his notice of non-reemployment, but the Board elected to employ another candidate. (Board's Brief, at p. 3) There is no showing by petitioner that he applied for another teaching position in the district. In any event, the Board had no obligation to offer a position to petitioner.

The fact is that at the time the notice of non-reemployment was given petitioner, there was no vacancy for which he was certified. The Board thereafter met its statutory and contractual obligations to petitioner and those obligations terminated for both parties on June 30, 1974.

The change brought about by the enactment of Chapter 436 of the Laws of 1971 (now *N.J.S.A.* 18A:27-10, 11 and 12), effective September 1, 1972, was set forth in *Patricia Bolger et al. v. Board of Education of the Township of Ridgefield Park, Bergen County*, 1975 *S.L.D.* 93, affirmed State Board of Education 98, aff'd Docket No. A-3214-74 New Jersey Superior Court, Appellate Division, April 21, 1976:

"***Prior to the enactment of *N.J.S.A.* 18A:27-10 *et seq.*, employment contracts of nontenured teachers expired automatically by their own terms on June 30 of each academic year, since an affirmative action to reemploy such teachers was then required of each local board of education. *N.J.S.A.* 18A:27-1 reads as follows:

> 'No teaching staff member shall be appointed, except by a recorded roll call majority vote of the full membership of the board of education appointing him.'

"The enactment of *N.J.S.A.* 18A:27-10 in 1971 significantly modified the law as set forth in *George H. Ruch v. Board of Education of the Greater Egg Harbor Regional High School District, Atlantic County*, 1968 *S.L.D.* 7, dismissed State Board of Education, 1968 *S.L.D.* 11; aff'd Superior Court (*App. Div.*) 1969 *S.L.D.* 202, in which it was held, *inter alia*, that:

> '***Respondent took no action with respect to petitioner's third contract nor was any called for. It simply fulfilled its obligations under the contract and took no action to continue the relationship. The Commissioner knows of no statute or rule which requires a board of education to take some formal action with regard to the nonrenewal of a probationary contract which has expired. The employment of teachers who have not achieved tenure status in the district is a matter lying wholly within the discretionary authority of the board. *N.J.S.A.* 18A:11-1c, 18A:16-1, 18A:27-4 See also *Zimmerman v. Board of Education of Newark*, 38 *N.J.* 65 (1962). Respondent was under no obligation to renew its agreement with petitioner, and in failing to take any action with respect to his reemployment it did no more than exercise the discretionary powers accorded it by statute.
>
> 'A board of education's discretionary authority is not unlimited, however, and it may not act in ways which are arbitrary, unreasonable, capricious or otherwise improper. *Cullum v. North Bergen Board of Education*, 15 *N.J.* 285 (1954)***.' (at pp. 8-9)

"The enactment of *N.J.S.A.* 18A:27-10 *et seq.* changed this body of law in that the statutes now provide for automatic renewal of nontenure teacher contracts where notice in writing is not given on or before April 30.

"The primary purpose of these statutes is to provide teachers with timely notice when they are not going to be reemployed so that they may seek employment elsewhere. When local boards of education waited until the months of May or June, or later, to notify teaching staff members that they would not be reemployed, this late action created a hardship for those employees. The new statutes remedied that situation by providing for notice by April 30 of each academic year, sixty days prior to the expiration of standard teacher contracts on June 30***." (at pp. 94-95)

The Commissioner determines from the record as set forth herein t there is no relief to which petitioner is entitled. The Board has met obligations to petitioner and his allegation that the Board's action was arbitı and not made in good faith is not supported by the evidence.

For all of the above reasons the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATI

April 29,1976

Board of Education of the East Windsor Regional School District,

Petitior

v.

Common Council of the Borough of Hightstown and Council of the Township of East Windsor, Mercer County,

Respondei

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Turp, Coates, Essl and Driggers (Henry G. P. Coat Esq., of Counsel)

For the Respondents, Mason, Griffin and Pierson (Kester R. Pierson, Es of Counsel); Warren, Goldman and Berman (Ronald Berman, Esq., of Couns

Petitioner, the Board of Education of the East Windsor Regional Sch District, hereinafter "Board," appeals from an action of the Common Council the Borough of Hightstown and the Council of the Township of East Winds hereinafter "Councils," taken pursuant to *N.J.S.A.* 18A:22-37 certifying to t Mercer County Board of Taxation a lesser amount of appropriations for sch purposes for the 1975-76 school year than the amount proposed by the Board its budget which was rejected by the voters. The facts of the matter w adduced at a hearing conducted on September 12, 1975 and November 26, 19 at the State Department of Education, Trenton, before a hearing examii appointed by the Commissioner of Education. The report of the hear examiner is as follows:

At the annual school election held March 4, 1975, the Board submitted the electorate proposals to raise $7,143,719 by local taxation for curr expense and capital outlay costs of the school district. These items were reject by the voters, and, subsequent to the rejection, the Board submitted its bud to the Councils for their determination of the amounts necessary for t

ration of a thorough and efficient school system in the East Windsor gional High School District in the 1975-76 school year, pursuant to the ndatory obligation imposed on the Councils by *N.J.S.A.* 18A:22-37.

After consultation with the Board, the Councils made their determinations l certified to the Mercer County Board of Taxation the amounts of 378,658 for current expense and $27,675 for capital outlay. The pertinent ounts in dispute are shown as follows:

	Current Expense	Capital Outlay
Board's Proposal	$7,116,044	$27,675
Councils' Proposal	$6,378,658	$27,675
Amount Reduced	$ 737,386*	$ –0–

ote that this amount of reduction is $170 less than line item reductions of 37,556 detailed by the Councils, *post*.

The Board contends that the Councils' action was unreasonable and cuments its need for the reductions recommended by the Councils with itten testimony and a further oral exposition at the time of the hearing. The uncils maintain that they acted properly and after due deliberation, and that e items reduced by their action are only those which are not necessary for a orough and efficient educational system. The Councils also document their sition with written and oral testimony. As part of their determination, the uncils suggested specific programs of the budget in which they believed onomies could be effected as follows:

CHART I

ogram umber	Item	Board's Proposal	Councils' Proposal	Amount Reduced
urrent Expense:				
aff Reductions – Salaries and Fringe Benefits:				
4	Bldg. Adm.	$ 427,457	$ 414,457	$ 13,000
6	Ass't. Bus. Mgr.	16,767	–0–	16,767
6	Keypunch Oper.	5,136	136	5,000
9	Lang. Arts.	1,442,012	1,285,514	156,498
11	Foreign Lang.	155,830	147,480	8,350
13	Home Economics	58,624	50,274	8,350
14	Indust. Tech.	129,018	120,668	8,350
15	Instruc. Serv. Ctr.	147,636	129,200	18,436
18	Mathematics	667,748	596,263	71,485
19	Med. Health	76,053	70,796	5,257

23	Science	548,972	498,866	50,
24	Social Studies	534,130	490,705	43,(
25	Spec. Ed./Spec. Servs.	333,045	327,788	5,:
27	Trans.	124,054	120,424	3,(
29	Comm. & Summer Sch.	214,740	164,740	50,(
	SUBTOTALS	$4,881,222	$4,417,311	$463,9

Program Number	Item	Board's Proposal	Councils' Proposal	Amou Redu
Expenses Other Than Salary:				
1	Art	$ 11,020	$ 10,419	$ (
3	Arch. Fees	24,000	–0–	24,(
3	Legal Fees	9,000	6,600	2,(
3	Bd. Expense	8,742	3,240	5,5
3	Prtg. & Pub.	5,000	3,000	2,(
5	Bus. Ed.	13,375	10,474	2,9
7	Dir. Spec. Proj.	6,700	4,000	2,7
7	Prog. Analy. Trav.	2,700	1,300	1,(
7	Keyman Travel	1,000	–0–	1,(
7	Centr. Adm. – Test.	30,000	–0–	30,(
8	Heat, Elec., Tel.	321,023	221,393	99,(
9	Lang. Arts	81,960	74,250	7,7
13	Home Economics	8,716	6,114	2,(
14	Indust. Tech.	22,292	19,595	2,(
15	Instruc. Serv. Ctr.	57,568	52,497	5,(
17	Maintenance	100,250	91,850	8,(
21	Phys. Ed. & Health	80,180	65,881	14,2
23	Science	51,711	49,060	2,(
24	Social Studies	32,674	26,015	6,(
28	Land & Bldg. Rental	19,635	5,000	14,(
29	Comm. & Summer Sch.	69,384	51,938	17,(
32	School Supls.	130,164	110,823	19,3
	SUBTOTALS	$1,087,094	$ 813,449	$273,6
	TOTALS	$5,968,316	$5,230,760	$737,5

The hearing examiner has considered these proposed reductions within t context of the evidence adduced at the hearing and the written testimony a exhibits submitted by the parties and sets forth the following recommendatic in narrative form concerning certain of the major reductions as follows:

Program 6 Assistant Business Manager, Salary *Reduction $16,7*

The Councils propose to eliminate the recently established position assistant business manager as an austerity measure.

The Board asserts that the establishment of this position was recommended a consultant study as part of a comprehensive analysis of its administrative ffing. (Exhibit G, at pp. 10-12)

The extensive duties set forth in the job description of this position lude, *inter alia*, payroll, withholdings, bidding, legal advertising, cifications, billing, election procedures, purchasing, cost flow analysis, paration for audit, financial reporting, and the keeping of Board minutes. ., at p. 12) This listing of duties is extensive and supports the conclusion that ull-time position is warranted and essential. Therefore, it is recommended that full amount of $16,767 be restored to this program line item.

grams 9, 11, 13, 14, 15, 18, 23, 24, 25 Instructional Salaries
Reduction $370,257

The Councils aver that enrollments have not risen as predicted and that nomies may be effected in staffing without imperiling a viable educational gram. (Exhibit M)

The Board asserts that its pupil enrollment has increased and that sus- ning its educational program requires that the entire amount of this reduction restored in the interests of a thorough and efficient educational program. chibits A through G)

Extensive written testimony, as well as the testimony adduced at the two s of hearing, supports the conclusion that the following salient facts must be nsidered in determining the validity of these proposed reductions in tructional salaries, which reductions are here treated as a single entity *in pari teria.*

The Board employs as instructional staff members, *inter alia*, in addition classroom teachers, staff support units (SSU's) in the form of numerous chers' aides and teachers' assistants. (Tr. I-28) (Exhibit C, at p. 66) The ails of the explicit formula controlling the number of SSU's need not be set th herein.

The Board projected a full time equivalent pupil enrollment in September 75 of 5,425. Staffing needs reflected in the 1975-76 budget were predicated on this projected enrollment. The September 30, 1975 enrollment was in fact 25. (Exhibit A) Accordingly, the Board's staffing requirement for both class- om teachers and SSU's is correspondingly lower than that for which provision s made in the 1975-76 budget. The Superintendent testified at the hearing at the number of instructional staff members not required as a result of this ver-than-anticipated enrollment could result in a saving of $179,379, while at same time maintaining the previously established pupil-teacher ratios. He ther testified that a reduction of $57,054 could similarly be sustained in the quired expenditures for SSU's for a total decrease of $236,433. (Tr. II-52) e also Exhibit G, at pp. 14-24.)

The hearing examiner finds that the reduction of $236,433 may be fected without adverse impact upon the Board's previously established and

reasonable ratios of pupils to instructional staff. He finds, however, that further reductions may properly be made. It was said in *Board of Educatior the City of Plainfield v. City Council of the City of Plainfield et al., Un County,* 1974 *S.L.D.* 913 that:

> "***While the constitutional requirement which imposes on local sch districts the obligation to conduct 'thorough and efficient' programs education is nowhere precisely defined, the Commissioner holds tha must be interpreted to mean that *as a minimum such programs are enti to a continuing sustenance of support, one marked by constancy and by vacillation of effort.****" (*Emphasis supplied.*) (at pp. 920-9

Accordingly, it is recommended that the reduction be sustained to extent of $236,433 and that $133,824 be restored to this program line item.

Program 29 Community and Summer School Salaries *Reduction $50,*

The Superintendent testified that the Board, when faced with Councils' proposed reductions, markedly reduced its summer school offeri which reduced the Board's proposed expenditures for that purpose by $70,C (Tr. II-63) Since the time period during which summer school is conducted passed, there can be no justification for restoration of the $50,000 reductior is, therefore, recommended that the entire reduction of $50,000 be sustained

Program 3 Architects, Fees *Reduction $24,*

The Board has for five years appropriated annually an amount architect fees in an effort to minimize the appropriations required to be rai by bond referenda for building and sites development in this growing sch district. The Board states that its costs for architects' services are thus minimi by this pay-as-you-go basis. (Exhibit G, at p. 62)

The Board appropriated $14,000 for architect fees in its 1974-75 budg During this period it expended for this purpose $39,928. (Exhibit O)

The record is replete with evidence that the Board is required to prov additional facilities and renovate others for an expanding school population. T hearing examiner finds that the Board's policy of paying architect fees from annual budget is in the best interests of the district in that interest does accrue to increase the cost of these essential services. Accordingly, it recommended that the amount of $24,000 be restored to this program line ite

Program 7 Central Administration Testing *Reduction $30,*

The Councils aver that the entire appropriated amount may be deletec the interests of economy without threat to a viable, thorough and effici educational program.

The Board states that although it has budgeted $30,000 to this progr line item for the last three years, the appropriated amount has been reducec $15,000 in each of the 1973-74 and the 1974-75 school years subsequent to defeat of those budgets.

The Board states that pursuant to "thorough and efficient" requirements its l has been to develop "***criterion referenced tests to monitor achievement the district goals.***" (Exhibit G, at p. 63) In 1974-75 the Board expended ,209 of local funds and $8,000 of Title V funds for this purpose. (*Id.*, at p. Exhibit O; Exhibit P, at p. 5)

The Board's arguments are compelling within the context of the stitutional mandate and the contemporary emphasis of the Legislature, the te Board of Education and the Department of Education on thorough and cient requirements. Therefore, it is recommended that the Board's continuing gram of developing criterion referenced tests be funded to the extent of ',000 for the 1975-76 school year and that the Councils' reduction be tained in the amount of $13,000.

gram 8 Heat, Electricity, Telephone *Reduction $99,630*

The Board expended $326,269 in this essential sector of its budget during 1974-75 school year. (Exhibit O) In consideration of the announced reases in telephone rates and the costs for electricity and fuel since the Board pared its 1975-76 budget, it is found that the Board's appropriation of !1,023 in this sector is inadequate to maintain telephone communications, l to heat and light its buildings. (Exhibits G, p. 68 and O) No reduction is nd appropriate and it is recommended that $99,630 be restored to this gram line item.

gram 29 Community and Summer School Expenses *Reduction $17,446*

It is found that the Board expended $46,985 for expenses other than uries in its Community School and Summer School in the 1974-75 school year. hibit O) The Councils have agreed to an appropriation of $69,384, an ount 47.6 percent greater than the Board's 1974-75 expenditure for such enses. Since this is so, and in further consideration of the fact that the Board stically curtailed its summer school offerings during the summer of 1975, e, it is recommended that the total amount of the reduction of $17,446 be tained.

gram 32 School Supplies *Reduction $19,341*

The Councils argue that economies may be effected without detriment to program of education by curtailing expenditures for district-wide school plies to the extent of $19,341.

The Board cites the inflationary costs of supplies as one principal reason its proposed 18.3 percent increase in expenditures for school supplies. It ther states that increased pupil enrollment compels an increase in available plies.

The actual September 1975 increase in full time equivalent pupil ollment as compared to September 1974 was 258 pupils. (Exhibit A) This

represents an increase of 5.19 percent in enrollment. This increase, coupled w the inflationary costs of numerous supply items, requires that increased funds made available to maintain a constancy of educational opportunity for e enrolled pupil. *Plainfield, supra* It is evident that the number of pupils enro has not met the Board's expectation. Therefore, it is reasonable that there l modest reduction in the Board's projected appropriation for school supplies. (II-69)

In consideration of the facts set forth above and the further evidence testimony within the record, it is the hearing examiner's recommendation t $14,341 be restored to this program line item and that $5,000 of the reduct be sustained. (Tr. II-68; Exhibits G, at pp. 57-59 and O)

The hearing examiner has similarly examined the record before him sets forth in Chart II, *post*, the recommendations heretofore delineated with further recommendations concerning the remaining contested program line it of lesser magnitude. There appears no necessity to deal *seriatim* with each of remaining areas of recommended reduced expenditures. As the Commissic said in *Board of Education of the Township of Madison v. Mayor and Counci the Township of Madison, Middlesex County,* 1968 *S.L.D.* 139:

> "***The problem is one of total revenues available to meet the dema of a school system***. The Commissioner will indicate, however, the a where he believes all or part of Council's reductions should be reinsta It must be emphasized, however, that the Board is not bound to effec economies in the indicated items but may adjust its expenditures in exercise of its discretion as needs develop and circumstances alter.***" (at 1

CHART II

Program Number	Item	Amount of Production	Amount Restored	Amount Restore
Current Expense:				
Staff Reductions – Salaries and Fringe Benefits:				
4	Bldg. Adm.	$ 13,000	$ –0–	$ 13,000
6	Ass't. Business Mgr.	16,767	16,767	–0–
6	Keypunch Operator	5,000	5,000	–0–
9,11,13,14,15,18, 23,24,25,	Instruc. Sals.	370,257	133,824	236,43
19	Medical Health	5,257	–0–	5,25
27	Transportation	3,630	3,630	–0–
29	Comm. & Summer Sch.	50,000	–0–	50,000
	SUBTOTALS	$463,911	$159,221	$304,69

xpenses Other Than Salary:

1	Art	$ 601	$ 201	$ 400
3	Arch. Fees	24,000	24,000	–0– *
3	Legal Fees	2,400	1,500	900
3	Bd. Expense	5,502	5,502	–0–
3	Prtg. & Pub.	2,000	1,000	1,000
5	Bus. Ed.	2,901	1,000	1,901
7	Dir. Spec. Proj.	2,700	2,700	–0–
7	Prog. Analy. Trav.	1,400	–0–	1,400
7	Keyman Travel	1,000	1,000	–0–
7	Centr. Adm.-Test.	30,000	17,000	13,000*
8	Heat, Elec., Tel.	99,630	99,630	–0– *
9	Language Arts	7,710	2,710	5,000
13	Home Economics	2,602	1,600	1,002
14	Indust. Tech.	2,697	1,700	997
15	Instruc. Serv. Ctr.	5,071	–0–	5,071
17	Maintenance	8,400	8,400	–0–
21	Phys. Ed. & Health	14,299	4,299	10,000
23	Science	2,651	2,651	–0–
24	Social Studies	6,659	2,700	3,959
28	Land & Bldg. Rental	14,635	14,635	–0–
29	Comm. & Summer Sch.	17,446	–0–	17,446*
32	School Supplies	19,341	14,341	5,000*
	SUBTOTALS	$273,645	$206,569	$ 67,076
	TOTALS	$737,556	$365,790	$371,766

*See analysis detailed, *ante*.
**Conceded by Board (Tr. II-78)

Additionally, it is found that the Board's unappropriated balance in its current expense account at the time of the hearing approximated only $18,000. (Tr. I-22; Exhibit L, at p. 15) Accordingly, no substantial funds are available to appropriate to the Board's revenue section of the current expense budget.

In summary, it is recommended that the Commissioner determine that it is necessary to restore $365,790 for the current expenses of the Board for the 1975-76 school year.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record of the herein controverted matter including the oral and written testimony, the exhibits in evidence, the findings and recommendations set forth in the report of the hearing examiner, and the exceptions thereto filed by the parties pursuant to *N.J.A.C.* 6:24-1.16.

The Board argues that the hearing examiner's recommendation to susta the Councils' reduction of $13,000 in the Program 4, Building Administratic item is inconsistent with his reliance elsewhere in the report upon *Plainfiel supra*, which emphasizes that school support should be marked by constanc rather than vacillation of effort. The Commissioner finds no such inconsistenc In 1974-75 the Board expended $357,838 for building administration. (Exhib O) Deducting the $13,000 proposed by the Councils from the $427,4 appropriated by the Board in this item for 1975-76 allows for expenditures 15 percent greater than those in the 1974-75 school year. Such provision is co sistent with that which was stated in *Plainfield*. The reduction is sustained.

The Board takes further exception to the hearing examine recommendation that a $50,000 reduction in Program 29, Community ar Summer School Salaries be sustained. The Commissioner concurs with tl hearing examiner's recommendation on the basis that the period when summ school could be conducted during the 1975-76 school year has passed. Tl Board, in fact, reduced its planned expenditures for summer school by a amount of $70,000. (Tr. II-36) It must logically be concluded that such summ school offerings as were eliminated cannot be logistically provided during tl remainder of the school year. Accordingly, the reduction will stand.

The Councils take exception to the hearing examiner's recommendation t restore $133,824 of a proposed reduction of $370,257 for instructional salarie In this regard the Councils contend that the Board "***may well have bee overstaffed even pursuant to its own complex and complicated ratio of teache and SSU's to pupils***." (Councils' Exceptions, at p. 3) The Commission finds nothing within the record to support the Councils' speculation in th regard. The recommendation of the hearing examiner shall stand.

The Councils take further exception to the hearing examiner's finding th the Board's provision for architectural fees on a pay-as-you-go basis, as oppose to incorporation of such charges in a bonding referendum, is in the best interes of the School District. The Councils clearly have the right to recommend th such charges be included with a referendum proposal. The Board, however, not bound by such a recommendation. Absent a clear showing of bad faith c abuse of discretion, the Board's incorporation of such charges in limite amounts into its annual budget is entitled to a presumption of correctness. *Bou and Harris v. Board of Education of Passaic*, 1939-49 *S.L.D.* 7, 13, affirme State Board of Education 15, 135 *N.J.L.* 329 (*Sup. Ct.* 1947), affirmed 13 *N.J.L.* 521 (*E. & A.* 1948)

The Commissioner finds no merit whatsoever in the Councils' objection t the ruling of the hearing examiner that items other than those delineated by th Councils within the time period prescribed by the Legislature were not subjec to scrutiny at the hearing. The Commissioner is aware that the time wa shortened by the Legislature for such determination in 1975. The ruling of th hearing examiner is consistent with existing law. In this regard see *Board c Education of East Brunswick et al. v. Township Council of East Brunswick*, 4 *N.J.* 94 (1966) and *Board of Education of the Township of Wayne v. Municipa Council of the Township of Wayne, Passaic County*, 1975 *S.L.D.* 793.

The Commissioner has examined and weighed the respective arguments of he Board and the Councils in respect to each of the economies proposed by the Councils. In each instance it is determined that the recommendation set forth by he hearing examiner comports with the factual data revealed in the record. Accordingly, the Commissioner determines that certification of appropriations or current expense purposes is insufficient by the amount of $365,790 to naintain a thorough and efficient system of public schools in the District. Consistent with this determination, the Commissioner certifies, in addition to he prior certification of appropriations for current expenses made by the Coun- ils to the Mercer County Board of Taxation, the additional sum of $365,790, so hat the total tax levy for current expenses of the School District for the 975-76 school year shall be $6,744,448.

COMMISSIONER OF EDUCATION

April 29,1976

In the Matter of the Annual School Election Held in the School District of the Town of Westfield, Union County.

COMMISSIONER OF EDUCATION

DECISION

A letter of complaint (C-1A) dated March 16, 1976, was filed pursuant to *N.J.S.A.* 18A:14-63.12 by ten qualified voters, hereinafter "complainants," of he School District of the Town of Westfield in regard to the annual school election conducted on March 9, 1976. Complainants allege that the campaign committee coordinator for one of the elected candidates distributed an election lyer (C-1) containing false information which may have affected the results of he election.

An authorized representative conducted an inquiry at the direction of the Commissioner of Education on March 31, 1976 at the office of the Union County Superintendent of Schools, Westfield. The report of the representative is as follows:

The flyer (C-1) which complainants allege sets forth false information was listributed to new residents in the Town of Westfield by the campaign coordinator for a successful candidate to membership on the Board of Education of the Town of Westfield, hereinafter "Board." The flyer reads, in pertinent part:

"Dear New Resident,

"Welcome to Westfield! If you are a citizen you are eligible to vote in the annual Board of Education Election, Tuesday, March 9th. *You may vote*

even if you have not registered, by signing a residency affidavit at th polls.***" (*Emphasis in text.*) (C-

The campaign coordinator for the successful candidate testified that sh prepared and distributed approximately ninety-five of the flyers to residen who had recently moved to the Town of Westfield. The campaign coordinat explained that the Union County Board of Realtors supplied her with a list c persons who had recently purchased homes in Westfield.

The campaign coordinator testified that she prepared the contents of th flyer (C-1) and that, at the time, she believed the information set forth an recited above was accurate. She explained that she has since learned th information was inaccurate.

The representative observes that the combined statement of result (C- establishes that there were four polling districts for this election. Four electic officers, one from each polling district, testified with respect to those perso who executed affidavits in claiming their right to vote because their duplica permanent registration forms could not be located. *N.J.S.A.* 18A:14-52

Election officer Doris Schaub testified that three persons appeared befo her and attempted to claim their right to vote through the execution c affidavits. Election officer Schaub testified that the three persons were nc granted the right to vote because of their failure to meet the residenc requirements.

Election officer Eleanor Coogan testified that she recalled four or fiv persons executing affidavits in claiming their right to vote. Election offic Coogan explained that each of the four or five persons met the qualifications t vote and consequently were granted the right to do so. No one of these four c five persons had his specific affidavit challenged by complainants herein.

Election officer Barbara Knelling testified that no voter appeared befo her to claim his right to vote through the execution of an affidavit.

Election officer Margaret MacPherson testified that she recalled thre persons who appeared before her to claim their right to vote through th execution of affidavits. Election officer MacPherson testified that she recalled a least two of the three affiants being granted their right to vote. She is not certai whether the third affiant was granted the right to vote based on his execute affidavit.

During the inquiry complainants were allowed to review each affidav executed by persons who claimed their right to vote during the electio Complainants produced two affidavits (C-3; C-4) executed by a husband an wife, the contents of which do not comport with the records of the Unio County Board of Elections. According to a letter (C-8) dated March 29, 197 from the Chief Clerk of the Union County Board of Elections the husband an wife who executed the affidavits (C-3; C-4) registered to vote on February 1(1976, twenty-nine days before the date of the election. Affidavits aver in eac

ıstance that she/he "***was permanently registered *** in the Town of /estfield at least thirty days prior to such election.***" (C-3; C-4)

Finally, the representative reports that the combined statement of result C-2) establishes that the margin between the successful candidate who received ıe least number of votes and the highest vote received by a losing candidate is ıore than 630 votes.

This concludes the report of the representative.

* * * *

The Commissioner has reviewed the report of his representative set forth bove and the record in the instant matter.

The Commissioner observes with respect to the flyer (C-1) distributed by ıe campaign coordinator that the information contained therein is erroneous. A erson may not vote in a school election who is not properly registered to vote. he Commissioner cautions all persons who assist candidates for board ıembership to exercise great care in the preparation and distribution of election ıaterials. Had the flyer generated ninety-five persons seeking the vote who were ot properly registered, the election process could have been chaotic.

In the instant matter two persons were obviously allowed to vote who had ot been registered the requisite amount of time. The fact that the affiants (C-3; -4) were registered for twenty-nine days, instead of thirty days as they attested, oes not make the irregularity any less serious. In future elections, election fficers must insure that persons who desire to execute affidavits with respect to ıeir qualifications, when their duplicate permanent registration cards cannot be ›cated, understand the contents of the affidavits. This may be accomplished by ıe election officers reading the contents of the affidavit to the potential affiant nd/or telephoning the Commissioner of Registration to verify that the potential ffiant has registered.

While the Commissioner cannot condone the irregularity of the misleading :atement in the flyer (C-1) or persons who vote who are not properly registered, e finds nothing in the record before him which would lead to a conclusion that ıe circumstances of the cited irregularities resulted in the will of the voters eing thwarted.

Accordingly, the Commissioner hereby finds and determines that the :sults of the election conducted by the Town of Westfield Board of Education n March 9, 1976, will stand as announced.

COMMISSIONER OF EDUCATION

.pril 29, 1976

In the Matter of the Annual School Election Held in the School District of the Township of Hillside, Union County.

COMMISSIONER OF EDUCATION

DECISION

The announced results of the balloting for three members of the Board Education of the Township of Hillside, hereinafter "Board," for full terms three years each at the annual school election held March 9, 1976, were follows:

	At Polls	Absentee	Total
Jerry Kaplan	679	21	700
Edward J. Capasso	721	5	726
Anthony Panarese	784	5	789
James E. Clark	516	7	523
Julie Ann Moffat	703	18	721
Sandra Tasch	779	21	800

Pursuant to a letter request dated March 21, 1976 from Candidate Moff a recount of the votes cast was conducted by an authorized representative of t Commissioner of Education at the office of the Union County Superintende of Schools, Westfield, on March 31, 1976.

The Commissioner's representative reports that at the conclusion of t recount the total votes for each candidate as set forth above was affirmed.

The Commissioner's representative also reports that automatic voti machines were used in this election. At the conclusion of the balloting in each the respective polling districts, the total votes cast for each of the respecti candidates and/or public question, proposal, or referendum are recorded master sheets for posterity. The automatic voting machines are then cleared zero. Consequently, recounts on these kinds of voting machines are possible t ascertaining that the total vote for each candidate has been read properly fro the master sheet. The master sheets, subsequent to the election, are forwarded the County Superintendent of Schools in a sealed package by the Boa Secretary. *N.J.S.A.* 18A:14-62

During the recount, herein, it was discovered that the election officers one of the polling places had not signed the master sheet in the space provide prior to submitting it to the Board Secretary. *N.J.S.A.* 18A:14-61.

This concludes the report of the representative.

* * * *

The Commissioner has reviewed the report of his representative set forth ɔove.

The Commissioner is constrained to observe that defeated candidates to embership on local boards of education may request a recount of the votes ıst pursuant to *N.J.S.A.* 18A:14-63.2. It is also observed that defeated ındidates may request an inquiry into alleged irregularities with respect to the ɔnduct of the election pursuant to *N.J.S.A.* 18A:14-63.12. In the instant atter, Candidate Moffat requested a recount of the votes cast at the election. here is no allegation of irregularity in regard to the conduct of the election.

While it is clear from the representative's report that at the time of the count it was discovered that the election officers at one polling place failed to ɜn the master sheets in the space provided, such discovery does not constitute *ʻima facie* reason to conduct an inquiry. The Commissioner so holds.

The Commissioner finds and determines that Edward J. Capasso, Anthony ınarese, and Sandra Tasch were elected to membership for full terms of three ɜars each on the Board of Education of the Township of Hillside.

COMMISSIONER OF EDUCATION

pril 29, 1976

In the Matter of the Inquiry into the Annual School Election Held in the School District of the Township of Hillside, Union County.

COMMISSIONER OF EDUCATION

DECISION

The announced results of the balloting for three members of the Board of ducation of the Township of Hillside, hereinafter "Board," for full terms of ıree years each at the annual school election held March 9, 1976, were as ɔllows:

	At Polls	Absentee	Total
Jerry Kaplan	679	21	700
Edward J. Capasso	721	5	726
Anthony Panarese	784	5	789
James E. Clark	516	7	523
Julie Ann Moffat	703	18	721
Sandra Tasch	779	21	800

Pursuant to a prior letter request dated March 21, 1976 from Candida Moffat a recount of the votes cast was conducted by an authorize representative of the Commissioner of Education at the office of the Unic County Superintendent of Schools, Westfield, on March 31, 1976. On that san date a second request for an investigation of certain alleged irregularities w proffered by Candidate Moffat.

The Commissioner's representative reported as a result of the recount th automatic voting machines were used in this election and that these machin recorded the results of the balloting on master sheets which confirmed tl tabular totals of the votes cast as indicated on the voting machine counters the conclusion of the school election. Subsequent to the election, these mast sheets were forwarded in a sealed envelope to the County Superintendent Schools by the Board Secretary. *N.J.S.A.* 18A:14-62

At the time of the recount the Commissioner's representative found th the election officers in one of the polling places did not sign one of the mast sheets which was subsequently forwarded to the Board Secretary and then ser to the office of the County Superintendent.

The Commissioner ultimately determined that while it was true, in fac that one of the master sheets recording the votes cast at one of the polling plac had not been signed by the school election official, such discovery did not vitiat the results of the school election. Accordingly, the results pertaining to th election of three candidates to the Board for terms of three years each w affirmed as originally announced. *In the Matter of the Annual School Electio Held in the Township of Hillside, Union County*, 1976 *S.L.D.* 428

The circumstances which give rise to the instant inquiry resulted from th second letter directed to the Commissioner dated March 31, 1976 by Candidat Moffat, hereinafter "complainant," setting forth the following allegations:

> "***The recount was conducted on Wednesday March 31, 1976 with th following results:
>
> "(1) Tally sheets [of] the Hurden Looker School [election] results wer not signed. This is in violation of statute 18A:14-57.
>
> "(2) The secretary of the Hillside Board of Education failed to check th validity of above mentioned tally sheets and initiate correctiv action. This is a violation of statute 18A:14-61.
>
> "(3) Voting machine counters for machines used in the Hillside Board o Education election were reset before the recount was taken ir violation of statutes 18A:14-63.1 and 18A:14-63.4. As a result th number of ballots issued could not be checked against the number o votes registered on each machine. This was especially critical to th results at Hurden Looker School where many voters were unable tc

vote for approximately two hours as a result of machine failures. Voters who had signed the registry log and received ballots to vote left without voting.

"(4) The voting machine located at Hurden Looker School was allowed to operate with its back compartment open in violation of New Jersey Statutes for Board of Education elections.

"(5) An unauthorized person was allowed to attempt to repair above mentioned machine in violation of New Jersey Statutes for board of education elections. This individual had a personal interest [in] the outcome of the election.***"

An inquiry with respect to such allegations was conducted by an uthorized representative of the Commissioner on April 20, 1976 at the office of ıe Union County Superintendent of Schools, Westfield.

The Commissioner's representative, at the time of the inquiry, determined ıat he would entertain testimony and accept documents pertaining only to ıose portions of complainant's allegations which would not be reviewed and ecided by the Commissioner in the pending report of the ballot recount. These ɜmaining allegations of complainant are as follows:

"(3) ***[M]any voters [at the Hurden Looker School polling place] were unable to vote for approximately two hours as a result of machine failures. Voters who had signed the registry log [poll list] and received ballots to vote left without voting.

"(4) The voting machine located at the Hurden Looker School was allowed to operate with its back compartment open in violation of New Jersey Statutes for Board of Education elections.

"(5) An unauthorized person was allowed to attempt to repair above mentioned machine in violation of New Jersey Statutes for Board of Education elections. This individual had a personal interest [in] the outcome of the election.***"

Complainant's testimony reveals that such allegations were not based on ersonal observation, but were set forth as a matter of understanding through ɜlephone calls and conversations with persons who attempted to cast their allots at the Hurden Looker School on the day of the school election. 'omplainant further relies on the two voter affidavits (C-1; C-2) submitted in vidence, as well as the testimony of two other witnesses, in support of her pecific allegations set forth in Charges Nos. 3, 4 and 5, *ante*.

The Commissioner's representative finds that this testimony and ocumentary evidence reveal that a series of incidents occurred at the Hurden ,ooker School polling place on the day of the school election which were ıitially triggered by the inability of the school election workers to place the sole

voting machine in operation at the time the polls were opened at 2:00 p.m. T record shows that on March 9, 1976, the date of the annual school electi school election officials at the Hurden Looker School were unable to unlock t sole voting machine located at the polling place. (Tr. 22, 27) Shortly thereaft the Judge of Election contacted the Board Secretary and the Union Cour Board of Elections to request technical assistance. (Tr. 17-18) Meanwh another school election official reviewed the instructions for unlocking t voting machine with a Board member who was assigned to the polling place a as a result, was able to unlock the machine. (Tr. 27-28) After approximat eleven people had cast their ballots on the machine (Tr. 14), the school electi official noticed the top panel of the machine was unlocked or opened. S interrupted the balloting and unsuccessfully attempted to lock this back pan The Board member assigned to the polling place also tried to lock the panel. (28) Finally, the school election official concluded that the panel on the voti machine could not be locked because the automatic counter was open. She th locked the automatic counter, and as a result the back panel also locked. T action taken by the school election official also locked the voting machine that it could not be operated. (Tr. 28)

The Union County Board of Elections was notified and subsequently se repair technicians to the polling place to reopen the voting machine. Up arrival at the Hurden Looker polling place, the repair technicians were unable unlock the machine without first returning to the machine warehouse Elizabeth to obtain the proper key to the machine. Consequent approximately one and one-half hours had elapsed before the machine was ma operative again by the repair technicians. (Tr. 18, 29) Thereafter the machi continued to operate without interruption.

During the time the voting machine was inoperative some voters who we waiting in line to cast their ballots, as well as those who had signed the poll li left the polling place. In this regard, the Commissioner's representative observ that the testimony fails to establish the number of voters who were not able return to the polling place to cast their ballots when the voting machine becan operative.

In any event it appears from the testimony adduced at the inquiry th after the voting machine was locked by the school election official approximately 2:15 p.m., it was not put back into operation until 3:45 p.m. (T 14, 35)

Additionally, complainant testified that the inclement weather conditio prevailing on the day of election prevented some voters from returning to t polls to cast their ballots after the voting machine was made operative. T Commissioner's representative finds that there is insufficient testimony specifically support this contention.

Complainant further asserts that when the school election official locke the automatic counter on the voting machine she caused the results of the fir eleven ballots to be cancelled from the voting machine. The Commissioner

representative finds that this assertion is without merit in view of the fact that all of the ballots cast on the voting machine were recorded on a master sheet.

The Commissioner's representative directed a written communication to the Superintendent of Elections to confirm this finding and received the following reply on May 13, 1976:

> "In reply to your letter dated May 7, 1976, we received a call from the Hurden Looker School, Hillside, N.J. that Machine No. 113748 was not operating.
>
> "When the Voting Machine Technician arrived he found that the machine operator had turned the No. 2 key down which locks the machine from further voting. He reset the after election latch so the machine would work.
>
> "This in no way would clear any votes on the machine prior to the time it was locked by one of the election workers." (C-3)

Finally, the Commissioner's representative observes that complainant was unable to support her allegation with respect to an unauthorized "***person [having] a personal interest in the outcome of the election.***" (Tr. 10) The only testimony adduced at the inquiry in this regard was that which she read in a newspaper article.

In summary, the Commissioner's representative finds that the voting machine at the Hurden Looker polling place could not be operated on two occasions by the school election officials on March 9, 1976. This resulted in a voting delay of approximately one hour and thirty minutes. Such delay caused some voters to leave the polling place; however, the testimony does not sufficiently establish how many voters were unable to return to the polls at a later time. It is further found that the school election officials did attempt to place the voting machine in operation with the assistance of one or more members of the Board who were present at the polling place, contrary to the instructions given to them by the Board Secretary. Additionally, the Commissioner's representative finds that the eleven ballots cast on the voting machine before it was locked were included in the final tally of votes cast at the Hurden Looker polling place.

Finally, the Commissioner's representative finds that the testimony fails to establish that one of the unauthorized persons (a Board member), who assisted the school election officials, had a personal interest in the outcome of the election.

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the report of his representative in the instant matter.

The Commissioner finds it unfortunate that the combination c circumstances herein was such as to generate an allegation that, had conditior been otherwise, the outcome of the election would have been different. Th evidence does not support such an allegation. The Commissioner is deepl concerned that in many school elections only a small percentage of the qualifie voters cast their ballots on matters vitally affecting the welfare of the pupils o this State. To that extent no voter should be discouraged from exercising his/he franchise. The Commissioner finds no evidence that persons who wished t exercise their right to vote were in fact denied this opportunity. It is wel established that an election will be given effect and will not be set aside unless i is clearly shown that the will of the people was thwarted, was not fairl expressed or could not be properly determined. *Love v. Board of Chose Freeholders,* 35 *N.J.L.* 269 (*Sup. Ct.* 1871); *Petition of Clee,* 119 *N.J.L.* 31((*Sup. Ct.* 1938); *Application of Wene*, 26 *N.J. Super.* 363 (*Law Div.* 1953), aff 13 *N.J.* 185 (1953); *In the Matter of the Annual School Election Held in th School District of the Borough of Carteret, Middlesex County*, 1972 *S.L.D.* 16

While the Commissioner can appreciate the sense of urgency experience by the school election officials in trying to effect repairs to the voting machin in question, he cannot condone the manner in which assistance was provided tc them by unauthorized persons.

In this regard the Commissioner directs the Board to instruct the schoo election officials to be guided by the statutory provisions of *N.J.S.A.* 19:48-7 which supplement the public school election laws in *N.J.S.A.* 18A:14-1 *et seq.* The provisions of this statute read as follows:

> "If any voting machine being used in any election district shall, during the time the polls are open, become damaged so as to render it inoperative in whole or in part, the election officers shall immediately give notice thereof to the county board of elections or the superintendent of elections or the municipal clerk, as the case may be, having custody of voting machines, and such county board of elections or such superintendent of elections or such municipal clerk, as the case may be, shall cause any person or persons employed or appointed pursuant to section 19:48-6 of this Title to substitute a machine in perfect mechanical order for the damaged machine. At the close of the polls the records of both machines shall be taken and the votes shown on their counters shall be added together in ascertaining and determining the results of the election. Unofficial ballots made as nearly as possible in the form of the official ballot may be used, received by the election officers and placed by them in a ballot box in such case to be provided as now required by law, and counted with the votes registered on the voting machines. The result shall be declared the same as though there had been no accident to the voting machine. The ballots thus voted shall be preserved and returned as herein directed with a certificate or statement setting forth how and why the same were voted.***"

Additionally, the Commissioner determines that in instances where there is only one voting machine stationed in a polling place during a school election, it is imperative for a local board of education to be prepared to implement an alternative method in order to facilitate the voting process if that voting machine malfunctions. Accordingly, in future school elections the Commissioner strongly urges local boards of education to consider having on hand either paper ballots printed in advance or a spare voting machine stationed at the polling place for just such emergency.

Having found no sufficient basis to vitiate the school election in the instant matter, the Commissioner adopts the findings of his representative and determines that the outcome of the annual school election held in the Township of Hillside on March 9, 1976, stands as previously reported.

COMMISSIONER OF EDUCATION

November 12, 1976

In the Matter of the Annual School Election Held in the School District of the Township of Mount Laurel, Burlington County.

COMMISSIONER OF EDUCATION

DECISION

The announced results of balloting for three members of the Board of Education for full terms of three years each at the annual school election held in Mount Laurel Township, Burlington County, on March 9, 1976, except for six write-in candidates who received one vote each, were as follows:

	At Polls	Absentee	Total
Christine B. Scoble	198	–0–	198
Robert J. Hughes	203	–0–	203
Alvin F. LeBreton	178	–0–	178
Harry J. Wilson	181	–0–	181

Pursuant to a letter request dated March 11, 1976 from ten registered voters of the school district, a recount of the ballots cast for Candidates Alvin F. LeBreton and Harry J. Wilson was conducted by an authorized representative of the Commissioner of Education at the office of the Burlington County Superintendent of Schools in Mount Holly on March 25, 1976.

At the conclusion of the recount the uncontested tally for the two candidates in question stood:

	At Polls	Absentee	Total
Alvin F. Lebreton	174	—0—	174
Harry J. Wilson	181	—0—	181

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the report of his representative and find and determines that Christine B. Scoble, Robert J. Hughes and Harry J. Wilsoı were elected for full terms of three years each on the Board of Education of th Mount Laurel Township School District.

COMMISSIONER OF EDUCATIOI

April 29, 1976

In the Matter of the Annual School Election Held in the School District of the Township of Evesham, Burlington County.

COMMISSIONER OF EDUCATION

DECISION

The announced results of the balloting for three members of the Board o Education for full terms of three years each at the annual school election hel on March 9, 1976 in the School District of the Township of Evesham Burlington County, were as follows, excluding four write-in candidates wh received one vote each:

	At Polls	Absentee	Total
William Anderson	218	—0—	218
Charles Allbee	369	1	370
William Evans	330	1	331
Charles Shusterman	397	—0—	397
Robert Weishoff	122	—0—	122
William Cossaboon	366	1	367
Carmen Carosella	320	—0—	320
Helen Rinier	396	—0—	396

Pursuant to a letter request from Candidate Cossaboon dated March 12, 1976, the Commissioner of Education appointed an authorized representative to conduct a recount of the ballots cast for Candidates Allbee and Cossaboon. The

ecount was conducted at the office of the Burlington County Superintendent of Schools on March 25, 1976.

At the conclusion of the recount of the uncontested ballots, with two ballots referred for determination pursuant to a challenge by Candidate Allbee, he tally was as follows:

	At Polls	Absentee	Total
Charles Allbee	369	1	370
William Cossaboon	367	1	368

The two ballots not counted (C-1; C-2) contained diagonal lines within the squares to the left of Candidate Allbee's name and in the squares to the left of the names of two other candidates. Candidate Cossaboon did not receive a vote cast on either of the two ballots in question.

There being no necessity to determine the two referred ballots since in any case they could not alter the result they are left undetermined.

The Commissioner finds and determines that Charles Allbee, Charles Shusterman and Helen Rinier were duly elected by the voters on March 9, 1976 to seats on the Evesham Township Board of Education for terms of three years each.

COMMISSIONER OF EDUCATION

April 29, 1976

In the Matter of the Annual School Election Held in the School District of the Township of Bedminster, Somerset County.

COMMISSIONER OF EDUCATION

DECISION

The announced results of the balloting for candidates for membership o the Board of Education for three full terms of three years each at the annu school election held March 9, 1976 in the School District of the Township c Bedminster, Somerset County, were as follows:

	At Polls	Absentee	Total
Antonette Hess	365	19	384
Ralph DeVito	364	19	383
John C. Barbery	325	18	343
John G. Christian	214	8	222
Jean M. Noe	182	7	189
Davilynn B. Hellwig	141	8	149
James P. Wadley	117	2	119

[One write-in ballot was cast for one other person.]

Pursuant to a letter request dated March 19, 1976 from ten registerec voters in Bedminster Township School District, hereinafter "complainants," ar authorized representative of the Commissioner of Education conducted a recount of the ballots cast and held an inquiry into the conduct of this electior at the Somerset County voting machine warehouse on March 30, 1976. The report of the representative is as follows:

The recount affirmed the total votes received by the respective candidates as set forth above.

Nine persons, whose duplicate permanent registration forms apparently could not be located in the signature copy register at the time they claimed their right to vote, executed affidavits which attested to their legal qualifications to vote. A review of the affidavits establishes that eight of the nine affiants attested to their age and residency qualifications to vote, on a form prescribed by the Commissioner, pursuant to *N.J.S.A.* 18A:14-44. The ninth affidavit, executed by William C. Bixby and not in the form prescribed by the Commissioner, attests to the following:

"I, William C. Bixby, Deerhaven Road, Bedminster, New Jersey, did register at the Municipal building in Bedminster with Frank Robinson, ADM Clerk, on February 12, 1976 and I still reside at the same address.

[signed]
William Bixby

"[signed]
"Irva G. Ten Eyck
"Bd. of Elections"

(C-1)

It appears that voter Bixby, based on the contents of his affidavit, was granted the right to cast his ballot.

The representative observes that while complainants assert that several unidentified persons executed possibly illegal affidavits, complainants offered no documentary evidence to support such allegation. However, it is observed that one of the complainants asserts that her parents were allowed to vote at the election even though they had registered to vote on that day. The one affidavit (C-1) discovered by the representative which appears *prima facie* to fail in setting forth affiant's proper qualification to vote has already been hereinbefore addressed.

The judge of elections explained that when duplicate registration forms cannot be located for voters and such voters execute affidavits of eligibility, those affidavits are accepted as presented as the basis for granting such voters the right to cast their ballots. The judge of elections, however, did not explain how William C. Bixby was granted the right to vote. A representative from the Somerset County Board of Elections explained that it was a simple matter for the election workers to determine the validity of affidavits executed during elections. She said that this was accomplished through a telephone call to the Commissioner of Registration who then checked to establish whether the person claiming the right to vote was, in fact, registered.

This concludes the report of the representative.

* * * *

The Commissioner has reviewed the report of his representative as set forth above.

The Commissioner observes that the qualifications for persons to vote in school elections are set forth in *N.J.S.A.* 18A:14-44. The statute of reference, subsequent to its most recent legislative amendment by *L.* 1965, *c.* 108, § 1, has been amended by certain New Jersey constitutional amendments adopted by the legally qualified voters of this State on November 5, 1974. Specifically, Article II, paragraph 3(a) of the New Jersey Constitution now reads, in pertinent part:

> "Every citizen of the United States, of the age of 18 years, who shall hav been a resident of this State and of the county in which he claims his vot 30 days, next before the election, shall be entitled to vote for all officer that now are or hereafter may be elected by the people***."

Consequently, while *N.J.S.A.* 18A:14-44 requires a person to be twenty one years of age, a resident of the State six months, a resident of the county i which he claims his vote thirty days prior to the election, and registered in a election district included within the school district, the supreme law of the Stat is the Constitution. All statutory laws to be valid must conform to th Constitution. *Byrnes v. Boulevard Commissioners*, 16 *N.J. Misc.* 141, 14 (*Hudson County Cir.*, 1938), affirmed 121 *N.J.L.* 497 (*E.&A.* 1938) A Stat statute is unconstitutional and invalid if it is in conflict with the Constitution o the State. *Duffcon Concrete Products v. Borough of Cresskill*, 137 *N.J.L.* 81, 8 (*Sup. Ct.* 1948), reversed on other grounds 1 *N.J.* 509 (1949)

The Commissioner notices that *N.J.S.A.* 19:4-1 provides, in pertinent part

> "***[E]very person possessing the qualifications required by Article II paragraph 3, of the Constitution of the State of New Jersey***and being duly registered***shall have the right of suffrage and shall be entitled to vote***."

Thus, it is clear that any citizen, eighteen years of age, who has been a resident of the State of New Jersey and the county in which he or she claims his right to vote and is registered for a period of thirty days before a school election, may exercise his or her franchise and vote in that election.

The Commissioner observes with respect to the affidavit (C-1) executed by William C. Bixby that that document fails to establish affiant's qualifications to vote. It is obvious that affiant Bixby was not registered to vote during all of the requisite period of thirty days. The Commissioner, however, is convinced that affiant Bixby committed no intentional error in casting his ballot and there is no showing herein that the affidavit was executed in bad faith.

However, the Commissioner is concerned that the judge of elections granted affiant Bixby the right to vote based on his affidavit (C-1) when it is clear that he was not properly qualified to vote. The Commissioner cautions each election worker to henceforth explain the contents of the prescribed affidavit to persons claiming their right to vote when duplicate permanent registration may not be found prior to the execution of the affidavit. If this is done, there can be no question as to whether the individual affiants know to what they attest. Also, should the contents of an executed affidavit be questioned by the election officers, a telephone call to the County Commissioner of Registration will erase any doubt which might otherwise exist.

Finally, the Commissioner notices that the remaining eight affidavits which were executed during this election have not been seriously challenged by complainants.

While the Commissioner cannot condone irregularities which occur during an annual school election, he finds nothing in the record before him which would lead to a conclusion that the circumstances of the irregularity resulted in the will of the voters being thwarted. All qualified citizens possess the right to participate fully in the electoral process, but not one has the right to act in a manner contrary to the letter and intent of statutory prescription.

However, it is well established that an election will be given effect and will not be set aside unless it is shown that the will of the people was thwarted, was not fairly expressed, or could not properly be determined. *Love v. Board of Chosen Freeholders,* 35 *N.J.L.* 269 (*Sup. Ct.* 1871); *Petition of Clee,* 119 *N.J.L.* 310 (*Sup. Ct.* 1938); *Application of Wene,* 26 *N.J. Super.* 363 (*Law Div.* 1953), aff'd 13 *N.J.* 185 (1953) There has been no such showing herein.

Accordingly, the Commissioner finds and determines that John C. Barbery, Antonette Hess, and Ralph De Vito have been elected to membership on the Board of Education of the Township of Bedminster for full terms of three years each.

COMMISSIONER OF EDUCATION

April 29, 1976

In the Matter of the Annual School Election Held in the School District of the Borough of Hopatcong, Sussex County.

COMMISSIONER OF EDUCATION

DECISION

The announced results of the balloting for candidates for three seats for full terms of three years each on the Board of Education of the Borough of Hopatcong, Sussex County, were as follows:

	At Polls	Absentee	Total
Frances Francomacaro	385	6	391
F. Edward DeMott	260	4	264
Robert C. Avery	259	3	262
Thaddeus M. Wilhelm	255	4	259

Pursuant to a letter request from Candidate Wilhelm, a recount of th ballots cast for the candidates was conducted by an authorized representativ appointed by the Commissioner of Education on April 2, 1976 at the office o the Sussex County Superintendent of Schools. The report of the representativ is as follows:

At the conclusion of the recount, with six ballots reserved for deter mination, the tally stood as follows:

	At Polls	Absentee	Total
Frances Francomacaro	386	6	392
Robert C. Avery	264	3	267
F. Edward DeMott	258	4	262
Thaddeus M. Wilhelm	255	4	259

The six ballots (C-1, C-2, C-3, C-4, C-5, and C-6) referred to the Commissioner are as follows:

Ballot C-1—During the conduct of the recount, this ballot was discovered among the ballot coupons which were being counted to compare the number of ballots executed with the number of signatories to the poll list. The ballot is, in all respects, properly executed pursuant to *N.J.S.A.* 18A:14-35 and registers one vote for Candidate Wilhelm and one vote for Candidate Francomacaro. The representative recommends that this ballot and the votes registered thereon be added to the tallies of the respective candidates selected by the voter.

Ballot C-2—This ballot has properly registered voting marks in the squares to the left of the selected candidates' names. However, the coupon which is to be removed when the voter has executed the ballot is still attached thereto. Consequently, this ballot may be identified with the voter and, therefore, may not be counted.

Ballot C-3—The voter who executed this ballot failed to follow the instructions set forth on the ballot itself, which comport with the provisions of *N.J.S.A.* 18A:14-35. The instructions provide in pertinent part:

> "***To vote for any person whose name appears on this ballot make a cross (x) or plus (+) or check (✓) *** in the space or square at the left of the name of such person.***"

In this instance the voter registered the selection by writing the word "YES" in the square to the left of two candidates' names. Consequently, proper voting marks do not appear on this ballot and it may not be counted. *In the Matter of the Annual School Election Held in the Township of Medford, Burlington County,* 1967 *S.L.D.* 50; *N.J.S.A.* 19:16-3(a)

Ballots C-4 and C-6—Neither of these ballots has any marks in the squares to the left of any candidates' names. The representative observes that one ballot

(C-4) does contain a check (✓) mark to the right of a selected candidate's name. It has been consistently held by the Commissioner in numerous election decisions that a ballot cannot be counted when the statutory requirement, that a cross (x), plus (+) or check (✓) mark must be made in the square to the left of a candidate's name, has not been met. See *N.J.S.A.* 18A:14-55 and 18A:14-37. See also *In the Matter of the Annual School Election Held in the School District of the Township of Voorhees, Camden County,* 1971 *S.L.D.* 65.

Ballot C-5—Voters were instructed to vote for three of the four candidates whose names were printed on the ballots for full terms of three years each. The voter on this ballot registered proper marks for all four of the candidates whose names appeared on the ballot. Consequently, it is impossible to determine which of the three candidates the voter intended to select. See *N.J.S.A.* 19:16-3(a); 16-4.

In summary the Commissioner's representative recommends that of the six ballots referred for determination, only those votes registered on ballot C-1, *ante*, be counted.

Finally, the representative reports that the Statement of Result (C-7) for Polling District No. One as completed by the election officials contains an obvious error. The election officials report that 264 persons signed the poll list, 267 ballots were counted, and three ballots were voided. The report should state that 267 persons signed the poll list, 264 ballots were counted, and three ballots were voided.

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the report of his representative and adopts as his own the findings set forth with respect to the six ballots referred for determination.

Accordingly, adding the one vote each for Candidates Wilhelm and Francomacaro, the final tally is as follows:

	At Polls	**Absentee**	**Total**
Frances Francomacaro	387	6	393
Robert C. Avery	264	3	267
F. Edward DeMott	258	4	262
Thaddeus M. Wilhelm	256	4	260

The Commissioner cautions election officials to use extreme care in completing Statements of Results to avoid even the appearance of an error in the tallying of votes cast, poll list signatories, and ballots voided.

The Commissioner finds and determines that F. Edward DeMott, Frances Francomacaro, and Robert C. Avery have been elected to full terms of three years each on the Board of Education of the Borough of Hopatcong, Sussex County.

COMMISSIONER OF EDUCATION

April 29, 1976

In the Matter of the Annual School Election Held in the School District of the Township of Hamilton, Mercer County.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Ronald B. Turner, *Pro Se*; Carl Moldovan, *Pro Se*

For the Respondent, Henry F. Gill, Esq.

The annual school election in Hamilton Township, Mercer County, was conducted on March 11, 1975, and thereafter, on March 14, 1975, two of the candidates for seats on the Hamilton Township Board of Education, hereinafter "Board," filed a complaint with the office of the Mercer County Prosecutor alleging certain irregularities by school officials prior to the election. Such allegations were referred by the Prosecutor on May 9, 1975 to the Division of Controversies and Disputes, State Department of Education, as a controversy under the school law, Title 18A, Education, within the jurisdiction of the Commissioner of Education. Thereafter, on June 3, 1975, a hearing examiner appointed by the Commissioner conducted a hearing of inquiry with respect to the allegations at the State Department of Education, Trenton. Subsequently, the Board filed a Memorandum of Law on August 15, 1975, and the candidates replied on September 19, 1975. The report of the hearing examiner is as follows:

The instant complaint with respect to election irregularities was initially filed by Ronald B. Turner and John E. Pierson III, candidates for seats on the Board, and by Carl Moldovan, an incumbent member of the Board, hereinafter "petitioners." They allege that funds, personnel employed by the Board and school supplies were used prior to the annual school election in Hamilton Township in an effort to secure the defeat of Candidates Turner and Pierson and in support of the Board's proposed budget for the 1975-76 academic year. More specifically they aver that pupils were used to distribute partisan election literature contrary to law (*N.J.S.A.* 18A:42-4) and that such literature was illegally printed and distributed and was not identified properly pursuant to the statutory mandate of *N.J.S.A.* 18A:14-97 and *N.J.S.A.* 18A:14-97.2.

These statutes of reference are recited in their entirety as follows:

N.J.S.A. 18A:42-4

"No literature which in any manner and in any part thereof *promotes, favors or opposes* the candidacy of any candidate for election at any annual school election, or the adoption of any bond issue, proposal, or any public question submitted at any general, municipal or school election shall be given to any public school pupil in any public school building or on the grounds thereof for the purpose of having such pupil take the same to his home or distribute it to any person outside of said building or grounds, nor shall any pupil be requested or directed by any official or employee of the public schools to engage in any activity which tends to promote, favor or oppose any such candidacy, bond issue, proposal, or public question. The board of education of each school district shall prescribe necessary rules to carry out the purposes of this section."
(*Emphasis supplied.*)

N.J.S.A. 18A:14-97

"No person shall print, copy, publish, exhibit, distribute or pay for printing, copying, publishing, exhibiting or distribution or cause to be distributed in any manner or by any means, any circular, handbill, card, pamphlet, statement, advertisement or other *printed matter having reference to any election* or to any candidate or to the adoption or rejection of any public question at any annual or special school election unless such circular, handbill, card, pamphlet, statement, advertisement or other printed matter shall bear upon its face a statement of the name and address of the person or persons causing the same to be printed, copied or published or of the name and address of the person or persons by whom the cost of the printing, copying, or publishing thereof has been or is to be defrayed and of the name and address of the person or persons by whom the same is printed, copied or published." (*Emphasis supplied.*)

N.J.S.A. 18A:14-97.2

"In event that any such circular, handbill, card, pamphlet, statement, advertisement or other printed matter of the nature referred to in section 18A:14-97 is to be printed, copied, published, exhibited, or distributed or the cost thereof is to be defrayed by an association, organization or committee, the name and address of the association, organization or committee may be used in compliance with the provisions of this article if there is used therewith the name of at least one person by whose authority, acting for such association, organization or committee, such action is taken."

In support of their allegations that there was violation of the clear prescription of these statutes, petitioners offer a total of six documents marked

in evidence as exhibits at the hearing of inquiry and limited testimony. Tl documents are summarized and excerpted as follows:

P-1 This exhibit contains the heading "Hamilton Township Board c Education" and the printed name and title of "Fred A. Sigafoo President, Hamilton Township Board of Education" at the bottom of th page. It is addressed "To the Citizens of Hamilton Township." Include within the text of the exhibit are statements with respect to the cost c education per child, the number of school administrators compared wit other school districts, the expenses of educational trips by administrator etc. Such statements are prefaced by the sentence

> "As President of the Hamilton Township Board of Education believe that the people of Hamilton Township deserve to know th whole truth about our schools, not just the selective interpretatio voiced by some."

P-2 This document is a letter to all "Parents" from the "Coordinato Hamilton Township Parent-Teacher Association." It contains the state ment, "Please vote!!!" and avers that the Association has engaged in campaign "***to deliver the accurate facts to as many voters as possible." Other statements within the text of the letter would appear to be a defense of the school budget as a reasonable one in the context of th facts of inflation, cost of education per pupil, etc.

P-3 This exhibit is a recital of alleged facts with respect to school distric size and cost of education per pupil. It also contains a listing of seven line items of the budget over which it is alleged the Board exercises "little o no control" and sets forth what appears to be favorable comparison of the Board's budget proposal with the facts of inflation, with staffing ratios and with maintenance, transportation, program and supply allocations. The document does not contain the name of a person or persons o organization who caused it to be printed, published or distributed.

P-4 This exhibit contains the heading "Lalor School PTA" and contains cost comparison information and other allegedly factual material similar to that in documents P-1-3 described, *ante*. The document does not contain the name of

> "***at least one person by whose authority acting for such association *** such action is taken."
>
> (*N.J.S.A.* 18A:14-97.2)

P-5 This exhibit is a letter from the Hamilton Township PTA Committee to all parents. It is concerned with per pupil costs and contains the statement that the Superintendent of Schools had provided information "***which clearly illustrated that costs per student for the proposed 1974-75 School Budget in the Hamilton Township School District are the most efficient and economical for all school districts in the County ***." It urges parents to "go out and vote."

P-6 This exhibit is a pictorial representation of cost per pupil expenditures.

Petitioners testified that they had campaigned against adoption of the Board's budget and that the documents summarized, *ante*, were designed to be a subtle, partisan contradiction of their views. (Tr. 15, 17) They testified further that it was their "belief" that the documents were prepared at public expense and distributed by pupils (see Tr. 13, 16, 26) although they offered no specific proof in this regard. Petitioners do not contend that the alleged "facts" set forth in the exhibits are false but they categorize them as incomplete and misleading. (Tr. 18-19) They admit that the exhibits contain no advisement to "vote yes" but only the admonition to "vote." (Tr. 22) There is no allegation by petitioners that the Board *per se* authorized the preparation or distribution of any of the documents but an allegation that administrative and other employees were, in part at least, responsible. (Tr. 24, 31)

The Board does not deny that supplies necessary for the preparation of the documents P-1-6 were furnished from supplies purchased for school use from public funds (see Tr. 36), but it avers there is no prohibition in law against the presentation of facts pertinent to public questions by local boards of education. In support of this avowal, the Board cites *Halligan v. Board of Education of the Borough of Rutherford, Bergen County,* 1959-60 *S.L.D.* 198 and *Citizens to Protect Public Funds v. Board of Education, Parsippany-Troy Hills,* 13 *N.J.* 172 (1953). Further, the Board avers that the documents in question do not promote, favor or oppose a public question and that there is no adequate proof in the record to substantiate an allegation that pupils were given the literature to which petitioners object for the purpose of distribution. The Board requested dismissal of the Petition.

The hearing examiner has examined the total record in the instant matter and finds that there is insufficient evidence to support a finding that any of the exhibits, P-1-6, were given to pupils for distribution to citizens of Hamilton Township. Testimony by petitioners that they "believe" pupils were given the documents by one or more teachers in one or more schools does not constitute proof that such distribution took place. There is no other evidence to establish the allegation as true in fact in contravention of the statutory prescription against distribution of literature by pupils on an election question which "promotes, favors or opposes" candidacies or proposals. *N.J.S.A.* 18A:42-4 In the context of this finding concerned with the allegation of distribution by pupils there is no necessity for a finding with respect to whether or not the controverted exhibits do in fact promote, favor or oppose questions or candidates.

Since the exhibits were certainly distributed in some manner, however, there remains the question of propriety in the context of the statutes *N.J.S.A.* 18A:14-97 and 97.2 and in this regard the hearing examiner finds the documents generally defective. All documents are in "reference" to the annual school election but none of them bears "upon its face ***the name and address of the person or persons by whom the same is printed, copied or published." *N.J.S.A.*

18A:14-97 Additionally, Exhibits P-3, 4 and 6 bear no notation at all containin "***a statement of the name and address of the person or persons causing th same to be printed, copied or published***." *N.J.S.A.* 18A:14-97 Accordingly the defect is clear. The "distribution" of such documents – by whatever mean – was contrary to law. The hearing examiner so finds.

It is of note, however, that despite the controverted exhibits, or perhap because of them, the budget question with which the documents were concerne was defeated by the electorate. There is no request by petitioners for th Commissioner to vitiate the election.

The hearing examiner presents these findings to the Commissioner fo consideration.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner an the exceptions thereto filed by petitioners. Such exceptions contest the findin that there is insufficient evidence to conclude that the documents P-1 through 6 were sent home with school pupils. They also request the Commissioner t "***find in their favor in regards to violations of each of the appropriat statutes***" and to direct the Hamilton Township Board to develop rules t prevent repetition of all the violations they have alleged. (Exceptions to th Report of the Hearing Examiner, at pp. 2-3)

The Commissioner concurs with the report of the hearing examiner and again cautions all boards of education that anything less than strict compliance with statutory mandates should not be tolerated. As the Commissioner said *In the Matter of the Recount of Ballots Cast at the Annual School Election in the Borough of Fort Lee, Bergen County*, 1959-60 *S.L.D.* 120:

> "***Boards of Education have a responsibility to see that school elections are conducted in strict compliance with the statute[s]. Informal, loose procedures and the ignoring of statutory provisions have no place and cannot be condoned in the holding of any school election.***"
>
> (at pp. 120-121)

In the instant matter, there is evidence of "loose procedures" and of less than strict compliance with statutory mandates. Such defects, even when standing alone, do provide reason for censure and for caution, not only with respect to the statutes concerned with identification of those who circulate election materials but also with respect to the total statutory prescription. The election process in a democracy is one which should be zealously guarded from abuse. The Commissioner so holds.

Accordingly, the Commissioner directs the Board to review its own policies pertinent to elections to insure that such policies conform strictly to the statutory prescription in order that abuse may be avoided.

COMMISSIONER OF EDUCATION

April 29, 1976

In the Matter of the Annual School Election Held in the Township of Deptford, Gloucester County.

COMMISSIONER OF EDUCATION

DECISION

The announced results of the balloting for three members of the Board of Education for full terms of three years each at the annual school election held in the School District of the Township of Deptford, Gloucester County, on March 9, 1976, were as follows:

	At Polls	Absentee	Total
Frank Scambia	362	-0-	362
Albert H. Brown, Jr.	337	-0-	337
Richard Green	264	-0-	264
William F. Burke, Sr.	250	-0-	250
Stanley K. Solen	218	-0-	218
Norman Parks	178	-0-	178
Charles H. Platt, Jr.	164	-0-	164

Number of names on poll list	736
Number of ballots counted	735
Number of ballots voided	23

Included in the announced results but omitted from the results as set forth above are five write-in candidates, each of whom received one vote.

Pursuant to a letter request dated March 15, 1976 from Candidate William F. Burke, Sr., the Commissioner of Education directed an authorized representative to conduct a recount of the ballots cast for Candidates Burke and Green. The recount was conducted at the office of the Gloucester County Superintendent of Schools, Sewell, New Jersey, on March 24, 1976.

The Commissioner's representative reports that at the conclusion of th recount the tally of uncontested ballots, with thirty-nine ballots left for th Commissioner's determination, stood as follows:

	Total
Richard Green	236
William F. Burke, Sr.	235

The following is a description of the balloting system used in the annua school election held on March 9, 1976 in the Township of Deptford. This systen is based on a modified paper ballot which when properly dimensioned anc inserted into the Datavote machine is snugly enclosed. Such insertion triggers a device which releases a paper punch mounted on a guide which then may bc moved up or down to correspond to the voter's wishes. When depressed, thi punch makes a small rectangular hole in the selected space and thus registers thc choice of the voter.

During the election certain difficulties were encountered in the proper functioning of this system as explained in Heck's affidavit:

> "I, John W. Heck, am employed as the Secretary of the Board of thc Deptford Township Board of Education.
>
> "On the evening of March 9, 1976 I was overseeing the conduct of thc school elections for the Township of Deptford and was faced with thc following problems.
>
> "The Data Vote machines which are authorized voting machines in thc County of Gloucester were used as a means of voting by the electorate. I had problems in all districts with the machines, however, while I was at the 4th District polling place exchanging machines a problem developed in the 1st District polling place. I was requested by the judge in the 1st District to allow the voters to use a pencil to indicate their choice and try and obtain hand punches for the voter use.
>
> "I contacted Mrs. Patricia Tucci of the Gloucester County Board of Elections and presented the problem to her, who in turn notified two election board commissioners of the problem. I was then notified that the decision was mine to make if I wished to count these ballots so marked. I stated to Mrs. Tucci that I would instruct the judges to count the ballots if a definite, clear choice of intent could be determined.
>
> "To the best of my knowledge this decision was carried out in all six polling places when the ballots were counted." (E-1)

The difficulties encountered with this particular voting device are explained in letters addressed to the Secretary of the Deptford Township Board

of Education from the Gloucester County Clerk and the Commissioner of Registration of the Gloucester County Board of Elections. (E-2; E-3) These difficulties are attributed to the use of improperly dimensioned paper stock on which the ballots were imprinted.

It was agreed by the parties present at the recount that the thirty-nine contested ballots would be referred to the Commissioner for consideration. The Commissioner's representative has separated and classified them as exhibits for consideration in narrative form by the Commissioner. The Commissioner's representative has also set forth his recommendations as follows:

Exhibit A - 14 Ballots (C-1 through C-14)

These ballots were not punched by the device on the Datavote machine which makes a small rectangular perforation. Rather, a punch device leaving a large circular perforation was used. In each case the resulting opening is clearly centered in a designated space. Accordingly, the recommendation herein is that these ballots be counted.

Summary of Recommendation:

	Add to Tally
Richard Green	8
William F. Burke, Sr.	8

Exhibit B – 11 Ballots (C-15 through C-25)

These ballots are marked like those in Exhibit A except that the perforations are smaller in size. The Commissioner's representative recommends that these ballots be included in the tally for the reason previously stated with respect to Exhibit A, *ante.*

Summary of Recommendation:

	Add to Tally
Richard Green	6
William F. Burke, Sr.	6

Exhibit C -- 6 Ballots (C-26 through C-31)

These ballots, with one minor difference, are similar to those in Exhibit A. However, the perforations within the designated spaces are physically contiguous such that they overlap with no separating strip of paper. In each case the major area of the circle lies substantially within the designated space and the Commissioner's representative recommends that these ballots be included in the tally.

Summary of Recommendation:

	Add to Tally
Richard Green	5
William F. Burke, Sr.	1

Exhibit D – 1 Ballot (C-32)

It is apparent that the designated space has been center-punched by th point of a pencil in such manner that the ballot has been pierced and als emblazoned by graphite marks indicating a twisting motion used by the voter i selecting his choice. The intent of the voter is, however, clearly in evidence an it is recommended that this ballot be added to the tally.

Summary of Recommendation:

	Add to Tally
Richard Green	1
William F. Burke, Sr.	-0-

Exhibit E – 1 Ballot (C-33)

This ballot is distinguished by a large rectangular opening evenly centere within the designated space. For the reason described in Exhibit D, *ante,* it is th recommendation of the Commissioner's representative that this ballot b included in the tally.

Summary of Recommendation:

	Add to Tally
Richard Green	1
William F. Burke, Sr.	-0-

Exhibit F – 2 Ballots (C-34 and C-35)

Although each ballot is perforated by the punch of the Datavote machin the openings are so located off-center as to make the intent of the vote impossible to determine. Accordingly, the Commissioner's representative recon mends that these ballots be adjudged invalid.

Summary of Recommendation:

	Add to Tally
Richard Green	-0-
William F. Burke, Sr.	-0-

Exhibit G – 1 Ballot (C-36)

This ballot has not been perforated in any manner; however, there is a precise check adjacent to a designated space. The intent of the voter is clear and therefore it is recommended that this ballot be included in the tally.

Summary of Recommendation:

	Add to Tally
Richard Green	-0-
William F. Burke, Sr.	1

Exhibit H – 1 Ballot (C-37)

The designated space has been marked with an X in blue ink and also center-punched, possibly by the same pen. The intent of the voter is clearly in evidence and it is recommended that this ballot be added to the tally.

Summary of Recommendation:

	Add to Tally
Richard Green	1
William F. Burke, Sr.	1

Exhibit I – 1 Ballot (C-38)

This ballot is distinguished by having precise pencil checks adjacent to the designated space and, additionally, two of the spaces have been emblazoned with a pencil mark. For the reason stated in Exhibit G, *ante,* this ballot should be included in the tally.

Summary of Recommendation:

	Add to Tally
Richard Green	1
William F. Burke, Sr.	1

Exhibit J – 1 Ballot (C-39)

A large circular hole perforates the ballot but is off-center to the degree that the ballot is adjudged invalid.

Summary of Recommendation:

	Add to Tally
Richard Green	-0-
William F. Burke, Sr.	-0-

Thus a summary of uncontested votes and the recommendation of the Commissioner's representative is set forth as follows:

	Green	**Burke**
Ballots Recounted and Uncontested	236	235
Recounted Ballots: Add to Tally		
Exhibit A	8	8
Exhibit B	6	6
Exhibit C	5	1
Exhibit D	1	-0-
Exhibit E	1	-0-
Exhibit F	-0-	-0-
Exhibit G	-0-	1
Exhibit H	1	1
Exhibit I	1	1
Exhibit J	-0-	-0-
TOTALS	259	253

This concludes the report of the Commissioner's representative concerning the results of this election. However, the Commissioner's representative also finds varying forms of ballot designations resulting from difficulties encountered with the machines used in this election and leaves judgment in this matter to the Commissioner.

* * * *

The Commissioner has reviewed the report of his representative in the instant matter and concurs with the recommendations expressed therein. Accordingly, the Commissioner finds and determines that the announced results of the annual school election held in the School District of the Township of Deptford, Gloucester County, on March 9, 1976, are affirmed with Frank Scambia, Albert H. Brown, Jr., and Richard Green elected to serve full terms of three years each.

However, the Commissioner is constrained to comment on the varying forms of ballot designations described in C-1 through C-39. The difficulties, as cited in letters E-2 and E-3, were attributable to the use of improperly dimensioned paper stock on which the ballots were imprinted. Accordingly, the Commissioner issues a caveat to each board of education selecting this mechanical voting device to be explicitly determinate in the use of properly dimensioned paper stock. In the instant matter there were imperfections and such imperfections in any election are always to be deplored. However, the Commissioner concurs with the subsequent measures taken to insure that each voter might exercise his franchise and have his vote recorded. It is well established that elections are to be given effect whenever possible and are not to be set aside unless it can be shown that the irregularities were of such a nature that the will of the people was thwarted, not properly expressed or could not be fairly determined.

The Commissioner stated *In the Matter of the Annual School Election Held in the Borough of Totowa, Passaic County*, 1965 *S.L.D.* 62:

> "***It is well established that irregularities which are not shown to affect the results of an election will not vitiate the election. The following is quoted from 15 *Cyc.* 372, in a decision of the Commissioner in the case of *Mundy v. Board of Education of the Borough of Metuchen,* 1938 Edition of School Law Decisions, at page 194:
>
> > 'Where an election appears to have been fairly and honestly conducted, it will not be invalidated by mere irregularities which are not shown to have affected the result, for in the absence of fraud the courts are disposed to give effect to elections when possible. And it has been held that gross irregularities when not amounting to fraud do not vitiate an election.' *In the Matter of the Recount of the Annual School Election in Ocean Township,* 1949-50 *S.L.D.* 53, 55
>
> "See also *Love v. Freeholders of Hudson County*, 35 *N.J.L.* 269 (*Sup. Ct.* 1871).***" (at p. 65)

There is no such showing here and, accordingly, the will of the electorate must be given effect.

COMMISSIONER OF EDUCATION

April 29, 1976

In the Matter of the Annual School Election Held in the School District of the Borough of Carteret, Middlesex County.

COMMISSIONER OF EDUCATION

DECISION

A letter complaint (C-2) dated March 10, 1976, was filed by Louis Mangieri, hereinafter "complainant," a defeated candidate to membership on t Board of Education of the Borough of Carteret, hereinafter "Board," allegi irregularities in the form of distribution of certain election materials prior to t annual school election conducted on March 9, 1976.

An authorized representative conducted an inquiry at the direction of t Commissioner of Education on April 2, 1976 at the office of the Middles County Superintendent of Schools. The report of the representative is follows:

The Board moved to dismiss the matter based on the failure complainant and/or the State Department of Education to properly serve it wi a copy of the complaint (C-2) until the day of the inquiry. The Board argu that such failure violates the New Jersey Administrative Procedure A *N.J.S.A.* 52:14B-1 *et seq.* and stands in specific violation of *N.J.A.C.* 6:24-1 which requires proof of service upon respondent. The Commissioner's re resentative recommends that the Board's Motion to Dismiss be denied f several reasons. Firstly, the letter of complaint (C-2) is directed against perso who were candidates for Board membership. Therefore, the Board, as an entit does not have standing in the matter to move for dismissal because the Board not a named respondent. Secondly, *N.J.A.C.* 6:24-4.1 which sets forth the ru for requesting a recount and/or inquiry with respect to school elections suspen the requirements attendant to the formal filing of a petition of appeal and t serving of a copy upon the respondent.

Complainant asserts that prior to election day he witnessed a Boa member distributing election endorsement cards (C-1) which violate t provisions of *N.J.S.A.* 18A:14-97 and 14-97.2. The election cards which measu approximately three inches by five and one-half inches endorse the candidacy three persons who were elected to the Board. The legend on the election ca with respect to payment for the cost of printing states:

> "Paid for and distributed by the Better Schools Association, P.O. Box 27 Carteret, New Jersey. Printed by Hoffman Printing Corp." (C-1

Complainant asserts that the failure of at least one member of the Be ter Schools Association to have his name on the card violates the provisio of *N.J.S.A.* 18A:14-97.2. Furthermore, complainant alleges that the Bett Schools Association is really a defunct organization which only comes to li during Board elections.

The representative observes that *N.J.S.A.* 18A:14-97 requires, *inter alia:*

> "No person shall print, copy, publish, exhibit, distribute***in any manner or by any means, any circular, handbill, card***having reference to any election or to any candidate***at any annual or special school election unless such circular, handbill, card***shall bear upon its face a statement of the name and address of the person or persons causing the same to be printed***."

N.J.S.A. 18A:14-97.2 similarly provides, *inter alia:*

> "In the event that any such circular, handbill, card***referred to in section 18A:14-97 is to be printed***or distributed or the cost thereof is to be defrayed by an association***the name and address of the association***may be used in compliance with the provisions of this article *if there is used therewith the name of at least one person by whose authority, acting for such association***such action is taken."*
>
> *(Emphasis supplied.)*

The Board member who complainant asserts distributed the cards (C-1) was present during the inquiry. The Commissioner's representative finds that it is clear the Board member did distribute the cards; however, the Board member, offered no testimony as to why one person's name, acting upon the authority of the Better Schools Association, does not appear on the card.

Another Board member who was also present testified that the Better Schools Association has been in existence for a number of years. Its function, he explained, is to work closely with the board and the school staff to strive for better public schools in the Borough of Carteret.

It is observed at this juncture that no one identified as a member of the Better Schools Association testified at the inquiry, nor did complainant seek, by way of subpoena or otherwise, to have anyone from the Better Schools Association testify. Complainant asserts, to the contrary, that 1) he had insufficient time to secure legal counsel and 2) he could not secure any witnesses from the Better Schools Association because he does not know who belongs.

The representative observes that the letter complaint (C-2) is dated March 10, 1976, and the inquiry was held on April 2, 1976. It appears that complainant had sufficient time to secure the services of legal counsel had he desired. It also appears that had complainant desired to call a member of the Better Schools Association or, in the alternative, had he wished to establish that the Better Schools Association does not, in fact, exist he could have subpoenaed the printer whose firm printed the cards.

The representative observes that the endorsement card (C-1) controverted herein does stand in violation of *N.J.S.A.* 18A:14-97.2 inasmuch as a person's name, acting on behalf of the Association, does not appear on the face of the card. There is no proof that the distribution of the cards thwarted the will of the electorate in casting their votes.

Complainant next alleges that a flyer (C-4) endorsing the candidacy of t same three candidates as set forth on the card (C-1) was improperly inserted ir newspaper delivered in the Borough of Carteret by newspaper carrie Complainant asserts that the insertion of the flyer violates a policy of t newspaper publishing company and is therefore improper.

The representative observes that the flyer comports with the provisions *N.J.S.A.* 18A:14-97 by setting forth the name of the person who caused it to printed and who defrayed the cost of printing. The representative observes th the Commissioner will hear and determine controversies and disputes arisi under school law, *N.J.S.A.* 18A:6-9. There is no allegation by complainant th the flyer has violated any school election law. Consequently, the representati recommends that complainant's allegation in regard to the flyer be dismissed.

A third allegation with respect to absentee ballots has been withdrawn b complainant. This concludes the report of the representative.

* * * *

The Commissioner has reviewed the report of his representative and th record herein and adopts as his own the recommendation that the complai with respect to the flyer (C-4) be dismissed. The narrow issue to be determine is whether by the failure of any individual, acting on behalf of the Bett Schools Association, to have his name affixed to the election endorsement car (C-1) distributed by the Board member is sufficient cause to set aside the scho election. While the issue *per se* is narrow, the Commissioner is constrained t remain cognizant of the often recited principle that school elections must b given effect whenever possible, despite irregularities, so that the will of th people, freely expressed, may be clearly indicated. *In the Matter of the Scho Election of the Hopatcong School District, Sussex County,* 1973 *S.L.D.* 11 Only when the deviations from authorized procedure are so gross as to produc illegal votes which would not have been cast or to defeat legal votes which woul have been counted so as to have made it impossible to determine the will of th people will the election be set aside. *In the Matter of the Annual School Electio Held in the Township of Fredon, Sussex County,* 1970 *S.L.D.* 131

The Commissioner observes that complainant did not demonstrate that th distribution of the controverted cards (C-1) produced illegal votes, or renderec otherwise legal votes illegal, or thwarted the will of the voters. Th Commissioner cautions all persons who become involved in school elections tha their actions must be consistent with statutory prescription.

The Commissioner also finds that the distribution of the cards (C-1) herei is not as significantly flagrant of the statute as was found *In the Matter of th Special School Election Held in the Borough of Point Pleasant Beach, Ocea County,* 1973 *S.L.D.* 697. There, the situation was sufficiently violative of th law to warrant the entire matter being referred to the Ocean County Prosecuto for investigation of possible criminal intent.

The Commissioner having found no basis to intervene with respect to the onduct or results of the annual school election conducted by the Board of ducation of the Borough of Carteret hereby dismisses the instant complaints.

COMMISSIONER OF EDUCATION

pril 29, 1976

In the Matter of the Annual School Election Held in the School District of the Township of Cherry Hill, Camden County.

COMMISSIONER OF EDUCATION

DECISION

The announced results of the balloting at the annual school election held Aarch 9, 1976 in the School District of the Township of Cherry Hill, Camden County, for three members of the Board of Education for full terms of three ears each were as follows:

	At Polls	Absentee	Total
James G. Marino	1664	7	1671
C. Edmund Rhoad	1637	5	1642
Sylvia Misbin	1511	25	1536
Jerry Krader	1508	13	1521
Sy Kantrowitz	1361	5	1366
William Capehart	863	1	864
Merle Spellman	703	4	707

Pursuant to a letter request dated March 17, 1976 from Candidate Jerry Krader, the Commissioner of Education directed an authorized representative to conduct a recheck of the totals on the voting machines used in this election. The recheck, confined to Candidates Krader and Misbin, was made at the voting machine warehouse of the Camden County Board of Elections, Parkaid Building, 35 North 5th Street, Camden, on April 2, 1976.

The Commissioner's representative reported a change in the announced results for Candidate Krader in that the last voting machine inspected, which was located in the Sharp School, 16-B, Number 30998, was improperly read as recording 110 votes. The correct reading was 119 which added nine votes to Candidate Krader's total vote. This error was apparently made because the digit 9 in the total registered vote of 119 was not completely visible in the machine's window. Only the top closed half of the digit could be seen clearly; therefore, the total was read as 110 instead of 119.

Nevertheless, the addition of nine votes to Candidate Krader's total d not change the result of the election.

The Commissioner finds and determines, therefore, that James G. Marin C. Edmund Rhoad and Sylvia Misbin were elected to full terms of three yea each on the Township of Cherry Hill Board of Education by the voters at th annual school election held on March 9, 1976.

COMMISSIONER OF EDUCATIO

April 29, 1976

In the Matter of the Annual School Election Held in the School District of East Amwell, Hunterdon County.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, *Pro Se*

For the Respondent, Richard Koerner, Esq.

Petitioners are two defeated candidates in the School District of Eas Amwell, Hunterdon County, who allege five separate counts of irregularities i the conduct of the annual school election held on March 9, 1976. An inquir into the school election procedures was conducted on March 30, 1976 at th office of the Hunterdon County Superintendent of Schools, Flemington, by hearing examiner appointed by the Commissioner of Education. The report o the hearing examiner follows with respect to each of the counts.

Count No. 1

> "In that the public hearing and final board passage of the East Amwel School Budget took place on the evening of March 1, 1976, and th election took place on March 9, 1976, therefore the budget was no publicly posted for the period of ten days as required by state law. (Titl 18A: 14-19). Thus the East Amwell Board of Education violated the law.'

The evidence in this regard is clear and uncontradicted.

The budget was posted on February 27, 1976 in an attempt to meet the requirements of *N.J.S.A.* 18A:14-19 and *N.J.S.A.* 18A:22-10; 22-13, which require that the adopted budget be printed in a newspaper and posted ten days prior to the election. However, this was not the official budget because it was not presented in public for adoption until March 1, 1976. The Board Secretary

ıted that the Board was unable to meet the requirements of the "Sunshine ıw," which requires prior notice of public meetings, and the aforementioned ıtutory requirement; therefore, the officially adopted budget was not printed any newspaper until March 4, 1976, five days prior to the election.

The record shows that the budget as originally posted by the Board was opted without change; therefore, the same budget was later printed in the cal newspaper as the officially adopted budget. (Exhibits A, B)

The Board clearly did not meet the letter of the law in that the officially opted budget was not posted, nor was it printed in any newspaper at least ten ys prior to the annual school election as required by the statutes.

Count No. 2

"The location of challengers in such a position within the election site so as to infer that they were election officials, enough so that the majority of voters stopped at their location believing them to be part of the registration confirmation processs."

The proofs in this regard are limited to petitioners' objections to the cation of the table at which the challengers sat which was at the end of the gistration table in the polling site.

There was no showing that any statute was violated or that any voter was ndered or unable to cast his vote; therefore, the hearing examiner recommends at Count No. 2 be dismissed.

Count No. 3

"The ejection of Mr. Pursell, a candidate, from the election site on charges that he was engaged in electioneering, whereas Messers [sic] Arthur Kern and Anthony Robbi, also candidates, were permitted to remain in the election site even though they were engaging in activities that could be interpreted as electioneering. Secondly, Mr. Pursell was not advised of his right as a candidate to be present in the election site."

The statutes provide that each candidate may act as a challenger. *N.J.S.A.* 3A:14-15 However, there is no requirement that any election official has the sponsibility to so notify the candidates. There was no proof offered by :titioners that the candidates named in Count No. 2 were electioneering. There as testimony that at least one candidate may have been loitering at the polling ace in that he was seated there for the last twenty minutes awaiting the close the polls. Petitioner Pursell denies that he was electioneering at the time when e judges asked him to move from the entrance to the polling place. evertheless, he admits loitering there a short time, while denying any illegal tion.

The hearing examiner recommends that Count No. 3 be dismissed.

Count No. 4

"The failure of the School Board to provide or insure safe acess [sic] all voters to the polling place. We feel that the board had the responsibi to take the necessary steps to have township roads made passable. Fail to do so until after the polls closed prevented numerous voters fr exercising their vote."

Petitioners contend that a rather severe snowstorm made it practica impossible for many voters to get to the polls and the Board had, at the v least, a moral responsibility to notify Township officials to plow all roads for safety and convenience of access of the voters.

The hearing examiner finds no requirement in the statutes that obliga the Board to provide convenience of access to the polling place. Plowing snov a function of the municipal governing body. The hearing examiner recommer that Count No. 4 be dismissed.

Count No. 5

"The reading of a statement prejudicial to our candidacy by Mr. Wilfi Harrison, board member, during an official and public meeting of t board immediately prior to the election, over the objections of the boa president. His statement, inferring improprieties on our part, was made if it expressed the feeling of the whole board, and was an attempt to i properly influence the outcome of the election."

A board of education president regulates the conduct of public meetin Although the testimony indicates that the Board President in the instant mat stated that he did not think it a good idea to read the statement, now consider prejudicial by petitioners, the evidence cannot support the claim that objected or attempted to prevent its being read.

That statement which was later printed in the local newspaper states part that the remarks "***are my [Wilfred Harrison] own and do n necessarily represent the opinions of the board.*** I also regret that the opini of three candidates calling for defeat of the budget received headlines while t view of the school board, who have been wrestling with this situation f months, received only brief mention.***" (Exhibit C)

The hearing examiner cannot find in Count No. 5 any substance to t allegation that the candidacy of petitioners was adversely influenced by the remarks. It is to be expected that the majority of a board favors the adopti and approval of the budget it submits to the voters. In this regard, the boa should speak in favor of such adoption. In *Peter P. Lucca v. Lower Camd County Regional High School District #1, Camden County,* 1968 *S.L.D.* 16 the Commissioner commented as follows:

"***A board of education not only has the right, but it also has the du to disclose fully and fairly all relevant facts to the voters in its endeavor

inform and to secure approval of its proposals. *Cf. Citizens to Protect Public Funds and Dudley Kimball v. Board of Education of the Township of Parsippany-Troy Hills,* 13 *N.J.* 172 (1953).***" (at p. 168)

The hearing examiner recommends, therefore, that Count No. 5 be ismissed.

* * * *

The Commissioner has reviewed the report of the hearing examiner and he record in the instant matter and finds that the proofs regarding the llegations set forth in Counts Nos. 2, 3, 4, and 5, are insufficient to establish ny irregularities that interfered with the conduct of the election. Therefore, hey are hereby dismissed.

The hearing examiner correctly reported a violation of *N.J.S.A.* 18A:14-19 1 that the officially adopted Board budget was not posted or printed in a ıewspaper at least ten days prior to the annual school election. However, the :ommissioner cannot find in the evidence adduced herein that the will of the oters was suppressed or could not be fairly determined. It is purely speculative o propose that if none of the alleged irregularities had occurred, or that the ›rinting of the budget had been timely, that the results of the election would ıave been different. *In the Matter of the Annual School Election in the School Jistrict of Voorhees Township, Camden County,* 1968 *S.L.D.* 70 See also *Application of Wene,* 26 *N.J. Super.* 363 (*Law Div.* 1953); *Sharrock v. Keansburg,* 15 *N.J. Super.* 11 (*App. Div.* 1951); *Love v. Freeholders,* 35 *N.J.L.* 169 (*Sup. Ct.* 1871); *In the Matter of the Annual School Election in the Township of Jefferson, Morris County,* 1960-61 *S.L.D.* 181.

The Commissioner directs the Board Secretary, however, to carefully .dhere to the letter of the law in the future with respect to the posting and ›rinting of the officially adopted budget in the newspaper.

The Commissioner finds and determines that any irregularities attendant ıpon the annual school election held in the School District of the Township of East Amwell, Hunterdon County, as set forth herein, do not constitute sufficient grounds to set aside the election; therefore, the results will stand as announced.

COMMISSIONER OF EDUCATION

April 29, 1976

In the Matter of the Annual School Election Held in the School District of the City of Hoboken, Hudson County.

COMMISSIONER OF EDUCATION

DECISION

The announced results of the balloting for three members of the Board of Education for full terms of three years each at the annual school election held on March 9, 1976 in the School District of the City of Hoboken, Hudson County, excluding those candidates who received fewer than seven hundred votes from a total of 18,019 ballots cast, were as follows:

	At Polls	Absentee	Total
John R. Raslowsky	1457	156	1613
Leo F. Mclaughlin	1216	152	1368
Aurelio Lugo, Jr.	1036	96	1132
Charles Roberts	1018	70	1088
Leonard A. Luizzi	844	97	941
Richard F. England, Jr.	871	47	918
Clayton Anderson	777	69	846

Pursuant to a Verified Complaint filed in Superior Court of New Jersey Law Division, Hudson County, by Candidate Charles Roberts, naming as respondent Candidate Aurelio Lugo, the Court ordered that a recheck be made of the tabulations of both the votes cast on the voting machines at the polls and those votes cast in the election as absentee ballots. (Exhibit A)

Thereupon, the Commissioner of Education directed that a recount of machine votes and absentee ballot votes be conducted by an authorized representative on March 17, 1976. The recount of machine votes conducted at the Hudson County voting machine warehouse, Jersey City, was limited by common agreement of all persons persent, including Candidate Roberts, to a recount of those votes cast for Candidates Lugo and Roberts. The recount of machine votes disclosed that the tally of votes cast for Candidates Lugo and Roberts was unchanged from the results announced by the election officials at the close of the polls on March 9, 1976, as listed above. (Exhibit B)

Thereafter, on March 17, 1976 at the office of the Hudson County Board of Elections, Jersey City, an examination and recount was conducted of the absentee ballots on which votes were recorded for Candidates Lugo and Roberts. The recount of absentee ballots disclosed that the tally of votes for Candidates Lugo and Roberts was unchanged from the results announced by the election officials as of the close of the election on March 9, 1976. (Exhibit C)

Accordingly, the Commissioner determines that, in addition to John R. Raslowsky and Leo F. McLaughlin, whose election to the Board was unchallenged, Aurelio Lugo was elected to a three-year term on the Board of Education of the City of Hoboken School District.

COMMISSIONER OF EDUCATION

April 29, 1976

In the Matter of the Application of the Board of Education of the Borough of Avon-by-the-Sea for the Termination of the Sending-Receiving Relationship with the School District of Asbury Park, Monmouth County.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Peter Shebell, Esq.

For the Respondent, Joseph N. Dempsey, Esq.

Petitioner, the Board of Education of the Borough of Avon-by-the-Sea, hereinafter "Avon Board," avers that the present and expected future per pupil tuition costs assessed by the Board of Education of the City of Asbury Park, hereinafter "Asbury Park Board," are higher than those presently calculated as applicable in the neighboring Neptune High School and that such fact constitutes sufficient reason for a severance of its sending-receiving relationship with Asbury Park. It requests the Commissioner of Education to grant such severance or, in the alternative, to reimburse the Avon Board for the additional expense. The Asbury Park Board contests the application of the Avon Board and maintains that the present relationship must be continued in order that a racially integrated and balanced pupil population may continue to be maintained in Asbury Park High School.

The original resolution of the Avon Board which petitioned the Commissioner to sever its sending-receiving relationship with Asbury Park was approved by the Avon Board on November 14, 1974, and the Asbury Park Board resolved to oppose the application in December 1974. Subsequently, on February 11, 1975, a conference of counsel was conducted at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

At the conference of counsel it was agreed that the instant controversy would be submitted on a Stipulation of Facts, the pleadings and Briefs.

Subsequently, however, it was determined that a hearing was also requir and it was held on October 9, 1975 at the office of the Monmouth Coun Superintendent of Schools, Freehold. Thus, the record of this hearing is also pa of the total case submission.

At the hearing, the hearing examiner requested the Avon Board to revi and update its resolution of 1974 in terms of the 1976-77 academic year. Such revised resolution was adopted by the Avon Board on October 9, 1975, and set forth in its entirety as follows:

> "WHEREAS, the tuition cost per student attending Asbury Park Hi School for the current 1975-76 school year has been determined by th Asbury Park Board of Education to be $2,200.00 (1976-77 tuition rat are not available at this date from the Asbury Park Board), and
>
> "WHEREAS, the Avon Board of Education is required by legislative act send 37.5% of its public high school students to Asbury Park High Schoo and
>
> "WHEREAS, the tuition cost per student attending Neptune High Scho for the current 1975-76 school year has been determined by the Neptu Board of Education to be $1,500.00 for the Senior High School ar $1,350.00 for the Junior High School (1976-77 tuition rates are no available at this date from the Neptune Board), and
>
> "WHEREAS, the Avon Board of Education is concerned with th uncertainty of State Aid in the future through possible reapportionmen by the Legislature to benefit other districts including Asbury Park, and
>
> "WHEREAS, if the entire twenty-five students comprising the 1976-7 freshman class from Avon-by-the-Sea attended Asbury Park High Schoo the cost (based on 1975-76 tuition rates) would be $55,000.00, a compared with the same number attending Neptune Junior High School a a cost (based on 1975-76 tuition rates) of $33,750.00, the Avon Board o Education hereby determines that a "Thorough and Efficient" educatio could be given said twenty-five students at a savings of $21,250.00 to th taxpayers of the Borough of Avon-by-the-Sea, if all freshman students b permitted to attend Neptune Junior High School for the 1976-77 schoo year.
>
> "Therefore be it
>
> "RESOLVED that the Avon-by-the-Sea Board of Education hereb petitions Commissioner Burke and the State of New Jersey, Department o Education, to permit all freshman and as many other high school student as possible, to attend Neptune High School commencing with the 1976-7 school year and for all years thereafter, in the interest of "Thorough an "Efficient" education for all students and taxpayers in the Borough o Avon-by-the-Sea, New Jersey, or in the alternative, the State of Ne

Jersey reimburse the Borough of Avon-by-the-Sea, New Jersey, for the additional cost of sending public high school students to Asbury Park High School.

"ADOPTED: October 9, 1975.

"RESOLUTION NOTATION: Above Resolution has been adopted by the Avon Board of Education solely to update initial Resolution on this matter, originally adopted on November 14, 1974."

Note: The legislative act of reference is *N.J.S.A.* 18A:38-12 which mandated a ratio of 37.5 percent of public school pupils from Avon to continue in attendance at Asbury Park High School. In October 1975, however, there were only eighteen Avon pupils in attendance in public secondary schools, nine in Asbury Park and nine in Neptune Junior High School. Eighteen pupils were in attendance in that month in private schools.)

Thus, the primary, and only, reason advanced by the Avon Board in support of its request is a financial one. There is no contention that the Asbury Park Board is not providing an adequate educational program for the pupils of Avon or that the Asbury Park High School is overcrowded. There is no argument that ease of access or convenience serves as a reason for the action. Indeed, at the hearing, counsel for the Avon Board stated that educational reasons or reasons other than financial were not to be advanced, and he indicated that the Petition of Appeal was solely motivated by what the Avon Board regards as the imposition, by State policy, of a cost burden which Avon should not be required to bear. (See Tr. 10.)

The State policy of reference is one which for decades has been directed toward the maintenance of a racially integrated system of free public schools and, in the case of Asbury Park, has resulted in extensive litigation involved with, or to foster, racial balance. (See *Board of Education of the City of Asbury Park v. Boards of Education of the Shore Regional High School District, Borough of Deal and Borough of Interlaken, Monmouth County*, 1971 *S.L.D.* 221; *Board of Education of the Borough of South Belmar v. Board of Education of the City of Asbury Park and Board of Education of the Borough of Manasquan*, 1969 *S.L.D.* 156; *Board of Education of the City of Asbury Park v. Board of Education of the Borough of Belmar and Board of Education of the Borough of Manasquan, Monmouth County*, 1967 *S.L.D.* 275; *Board of Education of the Borough of Bradley Beach v. Board of Education of the City of Asbury Park, Monmouth County,* 1959-60 *S.L.D.* 159.) The Asbury Park Board avers that this policy is involved in the instant matter and that a grant of the request for severance would result in a significant alteration of racial percentages in contravention of prior decisions of the Commissioner. It further avers that the resolution of the Avon Board contains no firm commitment by the Neptune Board to act as the receiving district for Avon pupils and, thus, that the application is incomplete. (See Tr. 14.) In support of this avowal, the Asbury Park Board cites *In the Matter of the Application of the Board of Education of the Upper Freehold Regional District, Monmouth County, for the Termination*

of the Sending-Receiving Relationship with Washington Township, Merc County, 1975 *S.L.D.* 856. At the hearing the Asbury Park Board moved f dismissal of the Petition on the grounds that the total record failed to prese reason for action by the Commissioner.

The hearing examiner has considered this total record and sets forth tl following data as being of prime significance in the context of the limit application of the Avon Board, and the opposition thereto by the Asbury Pa Board.

Tuition Cost Estimates

The Avon Board has submitted three cost projections derived fror estimated tuition costs for the 1975-76 academic year in the Asbury Park an Neptune school districts. (P-2; P-3) Such projections are based on tuition cost for 84 pupils if tuition for pupils in attendance in 1975-76 is estimated at th rate of $2,200 per pupil attending Asbury Park High School and $1,500 for th Neptune High School. A tuition rate of $1,350 is used as the base rate for ninth grade attendance in the Neptune Junior High School. According to the Avo Board in its document P-1:

"***If the present ratio is continued the cost to the taxpayers of Avo will be as follows:

52 students at Asbury Park High School	@ $2,200 = $114,40(
10 Students at Neptune Junior High School	@ $1,350 = $13,50(
22 students at Neptune High School	@ $1,500 = $33,00(
TOTAL COST	$160,90(

"If all students were to attend the Neptune Township schools the cost t the taxpayers of Avon would be as follows:

26 students at Neptune Junior High School	@ $1,350 = $35,10(
58 students at Neptune Senior High School	@ $1,500 = $87,00(
TOTAL COST	$122,10(

"The difference between the above equals $38,800.

"If all first year students intending to go to public school went to Neptune Junior High School and those in Neptune High School and Asbury Park High School were permitted to complete their schooling therein the costs to the Avon taxpayers would be:

26 students at Neptune Junior High School	@$1,350 = $35,100
22 students at Neptune Senior High School	@ $1,500 = $33,000

36 students at Asbury Park High School	@ $2,200 = $79,200
TOTAL COST	$147,300

"If all students were required to attend Asbury Park High School the cost to the Avon taxpayers would be:

84 students at Asbury Park High School	@ $2,200 = $184,800***" (P-1)

The Avon Board further projects (on the basis of a calculation that each $2,511 in the school budget raises the tax rate one cent), a 15-1/2 cent approximate reduction in the local tax rate as the result of the diminution of the total tax assessment by $38,000. (See second example, *ante.*)

The Asbury Park Board does not dispute the accuracy of such calculations but advances the following argument with respect to them.

"***The Stipulation as submitted by [petitioner] fails to include any reference to Asbury Park's contention that any action of the Commissioner must be withheld if it would tend to cause segregation of the Asbury Park school system. That issue cannot be ignored in the Stipulation of Fact, nor does his Stipulation contain the statement that the quality of education in both schools is equal.

"Clearly, Asbury Park intends to balance the financial effect to show that the type of education is needed for its students and that the economic advantage to Avon is far outweighed by the educational disadvantage to surviving students should segregation result.***"

(Letter of the Asbury Park Board dated June 9, 1975 in reply to P-1.)

Ethnic Summary

Asbury Park High School
September 30, 1974

District	White	Black	Other	Total
Asbury Park	188	518	48	754
Allenhurst	25	-	-	25
Avon	40	-	1	41
Belmar	74	37	2	113
Bradley Beach	167	3	14	184
Deal	83	-	1	84
Interlaken	36	-	-	36
South Belmar	7	32	-	39
TOTALS	620	590	66	1,276

PERCENTAGE OF TOTAL	48.59	46.24	6.17	100 (R-4)

NOTE: If the 40 pupils from Avon had attended schools other than Asbury Park High School in 1974, the percentages would have approximated

White	46.9
Black	47.7
Other	5.4

District Enrollment Comparison
1964-1973

	Pupils 1964	**Pupils 1973**	**Pupils Change**
Asbury Park	685	810	+ 125
Allenhurst	16	25	+ 9
Avon	52	46	- 6
Belmar	64	111	+ 47
Bradley Beach	201	199	- 2
Deal	128	84	- 44
Interlaken	66	35	- 31
South Belmar	3	32	+ 29
TOTALS	1,215	1,342	+ 127 (R-4)

The Asbury Park Board avers that:

"***Non-resident enrollments since 1964 have not fluctuated sufficiently to warrant inclusion of a growth factor in projecting non-resident enrollment over the near future.

"Resident enrollments have fluctuated over this same span ranging from a low of 658 in 1966 to a high of 845 in 1969. Average enrollment during the past six (6) years indicates a fairly stable Asbury Park High School population of approximately 800 resident students.

"Thus in projecting enrollments through 1982 substantial growth is not anticipated." (R-4)

The Asbury Park Board also approximates a tuition loss of $92,400 if all Avon pupils attend high school in schools other than the Asbury Park High School.

Such facts comprise the principal reasons for the instant controversy and serve as the basis for the arguments of the parties.

The Avon Board avers that the Commissioner has the authority pursuant to *N.J.S.A.* 18A:38-13 to terminate sending-receiving relationships upon the presentation of "good and sufficient reason" and further avers that it has presented such reason; namely, financial advantage to the taxpayers of Avon. It also avers that the impact of severance in the instant matter would not appreciably alter the racial composition of the Asbury Park High School and thus that the facts herein are little different from the decision of the Commissioner in *Morris Regional School District v. Board of Education of Harding Township*, 1974 *S.L.D.* 457, aff'd State Board of Education 487, aff'd Docket No. A-905-74 New Jersey Superior Court, Appellate Division, May 28, 1975 (1975 *S.L.D.* 1107), wherein a severance was allowed to go forward. The Avon Board further maintains that:

> "***If, as a matter of State policy, the Commissioner should deny Avon's present application, then he should require the State to pay for the difference in sending Avon's students to Asbury Park as compared to Neptune. If the funds are not available for such a purpose, then the sending-receiving relationship should be terminated for the said constitutional reasons, until such time as the State, through the Legislature or otherwise, makes such aid available to rectify the situation. Fundamental fairness to the citizens of Avon requires no less." (Petitioner's Brief, at p. 9)

(Note: The referenced "constitutional reason" is one grounded in an argument that it is not "efficient" for taxpayers of Avon to pay more for education in Asbury Park than would be required for a new sending-receiving relationship with Neptune Township.)

The Asbury Park Board maintains that it has consistently complied with recommendations of the State Department of Education and the State Board of Education with respect to the maintenance of an appropriate educational program for a multi-racial pupil population and for handicapped pupils. It further maintains that the expense of such a program must be borne by all sending districts and that a decision in the instant matter in favor of the Avon Board "***would necessarily apply to the other sending districts and the Asbury Park system would by order of the Commissioner become a segregated school system.***" (Brief of the Asbury Park Board, at p. 6)

The hearing examiner has considered all such arguments in the context of the factual stipulations set forth, *ante,* and finds no basis for a recommendation to grant the application of the Avon Board. Indeed, if such request were granted, on the basis of a tuition cost differential, the stability of relationships of benefit to thousands of New Jersey pupils over decades of experience would be seriously endangered for what might well be illusory gain. There is no guarantee that costs

in one high school will retain a constant relationship to costs of another scho or schools. Indeed, presently envisioned funding formulas and/or the decisio of local boards may well produce significant changes in such costs borne by loc taxation. In any event it would appear that any argument grounded solely (cost factors as a connotation of "efficient" is one which is based on shifti sand.

Finally, the hearing examiner finds the citation of *Morris Regional, supr* to be inappropriate to the factual setting of the instant matter. There, the proo attested to a seriously overcrowded high school and an alternative placement f pupils of the sending district which was clearly advantageous. Such proofs a lacking herein.

Accordingly, the hearing examiner recommends rejection of the app cation contained in this Petition of Appeal. This concludes the report of tl hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner ar the exceptions thereto filed by the Avon Board. Such exceptions are reiteration of the view that cost factors in a tuition paying sending-receivi relationship are legitimate reasons for severance, particularly when there is "minimal social impact." (Exceptions of the Avon Board) The Avon Board al reiterates other views as previously set forth in its Brief.

The Commissioner concurs, however, with the report of the heari examiner for the reasons expressed therein. Accordingly, the Petition dismissed.

COMMISSIONER OF EDUCATIO

April 29, 1976

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, April 29, 1976

For the Petitioner-Appellant, Peter Shebell, Jr., Esq.

For the Respondent-Appellee, McOmber & McOmber (Richard L McOmber, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

September 8, 1976

Pending before Superior Court of New Jersey

Nicholas P. Karamessinis,

Petitioner,

v.

Board of Education of the City of Wildwood, Cape May County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Guston & Reiss (Arthur D. Reiss, Esq., of Counsel)

For the Respondent, Edwin W. Bradway, Esq.

Petitioner Karamessinis, previously employed as Superintendent of Schools by the Board of Education of the City of Wildwood, hereinafter "Board," appeals to the Commissioner of Education to reopen a prior controversy, the determination of which was made on June 27, 1973, and reported in *Nicholas P. Karamessinis v. Board of Education of the City of Wildwood, Cape May County,* 1973 *S.L.D.* 351, aff'd State Board of Education 360, aff'd Docket No. A-1403-73, New Jersey Superior Court, Apellate Division, March 24, 1975.

The controverted matter comes again before the Commissioner in the form of a Petition to Reopen Based on Newly Discovered Evidence, a Motion for Summary Judgment with supporting Brief by the Board, and petitioner's Brief in opposition thereto. The known facts and arguments of law upon which *Karamessinis, supra,* was grounded are fully set forth in 1973 *S.L.D.* 351 as affirmed and need not be reiterated herein. To this contextual portrayal must be added those events which have since occurred and which are herein considered *in pari materia* with that previously reported in *Karamessinis.*

On February 9, 1974, petitioner filed a Notice of Appeal with the Appellate Division of the Superior Court. Thereafter, during that same month, petitioner moved to remand the matter to the Commissioner for a hearing based on newly discovered evidence. That evidence offered by petitioner to the Court

consisted of an affidavit dated December 28, 1974 by Dr. Leon Mazzotta, who had been a member of the Board at the time of petitioner's notice of termination in September 1972. Therein, Dr. Mazzotta stated, *inter alia*, that:

***

"3. On April 12, 1972 at a duly constituted public meeting, the members of the Board of Education of the City of Wildwood voted to extend the contract of Superintendent of Schools Nicholas Karamessinis for the period September 1, 1972 through August 31, 1973.

"4. In May, 1972, a contract was executed by the City of Wildwood Board of Education and Nicholas Karamessinis which contract embodied the conditions of employment for Nicholas Karamessinis for the period September 1, 1972 through August 31, 1973.

"5. On or about August 25, 1972, a private caucus was held at the home of Mrs. Hilda Gordon, 3007 Atlantic Avenue, Wildwood, New Jersey. The caucus was attended by Elaine Billiris, Mrs. Hilda Gordon, Gloria Breslin, Augusta Sladek, Leon Fulginiti and myself. The above group constituted a majority of the Board of Education of the City of Wildwood and represented one faction of the Board of Education. Board members Charles Kuski, Bernard Switzer and Raymond Harris, Board President, did not attend said meeting nor were they invited because of known policy differences.

"6. At this meeting the decision was made to terminate the services of Nicholas Karamessinis as Superintendent of Schools. It was further determined who would initiate the motion to terminate Karamessinis' services at the time of the public meeting.

***

"8. On September 6, 1972, at a special meeting of the Wildwood Board of Education, the services of Mr. Karamessinis as Superintendent of Schools were terminated in the manner as had been predetermined at the August, 1972 meeting in the home of Hilda Gordon.

"Karamessinis' termination was accomplished by vote of the Board members in attendance at the August, 1972 meeting without further discussion as had been agreed and predetermined at the August, 1972 meeting.

"The motion to terminate the services of Nicholas Karamessinis was introduced by Elaine Billiris and seconded by Gloria Breslin, all in accordance with the decision which had been predetermined at the August, 1972 meeting." (Exhibit 1)

Although this affidavit is not now in evidence before the Commissioner, he must consider it to be factual, for purposes of a determination of the Motion. In any event, the Apellate Court denied petitioner's Motion to remand the matter to the Commissioner for a hearing and affirmed the determination of the State Board of Education.

Thereupon, petitioner filed suit against the Board in the Chancery Division of the Superior Court of New Jersey listing four counts, each of which sought compensatory damages. The second count, it was agreed by petitioner and the Court, arose under school law and required that petitioner exhaust administrative remedies by appealing to the Commissioner pursuant to his jurisdiction to hear and determine controversies arising under the school laws. *N.J.S.A.* 18A:6-9; *N.J.S.A.* 18A:10-6 It was the Court's determination that:

> "***Each of the other counts basically revolve around the legality of the termination of his employment. Therefore, the validity of the termination of his contract is a matter which should be first litigated before the Commissioner of Education, if there is any merit to his claim of 'newly discovered evidence.' Accordingly, unless and until he has made application to the Commissioner of Education to reopen his case on the ground of newly discovered evidence, he has not exhausted his administrative remedy. Plaintiff's complaint will therefore be dismissed." (Docket No. C-3940-74, Superior Court of New Jersey, Chancery Division, October 21, 1975, at pp. 2-3, unpubl)

The Board, in support of its Motion for Summary Judgment, argues that the Commissioner in his decision dated June 27, 1973, had determined that the Board's decision to terminate petitioner was legally made at a special meeting, properly called for and conducted on September 6, 1972, at which meeting petitioner was both relieved of his duties as Superintendent and noticed that his contract would not be renewed at the time of its expiration on August 31, 1973. (Respondent's Brief in Support of Summary Motion, at p. 3) The Board asserts that the matter of alleged conduct of official business at a private meeting was thoroughly treated by the Commissioner in his 1973 determination. It is further argued that the Appellate Division's refusal to remand the matter to the Commissioner for further hearing provides compelling reason for the Commissioner to reject petitioner's argument that Dr. Mazzotta's affidavit provides valid reason to reopen the matter. (*Id.*, at p.3)

In this regard the Board contends that all issues raised by the Commissioner, the State Board and the Court have been rendered *res judicata* and "***that at some point in time which is reasonable the right to try and retry issues be terminated.***" (*Id.*, at p. 4) Finally, the Board contends that the Petition fails to state a claim upon which relief can be granted. For these reasons the Board urges that the Commissioner dismiss the instant Petition.

Petitioner holds, conversely, that the Chancery Division opinion, which followed the Appellate Division affirmance, directs that petitioner proceed in precisely the manner in which he has proceeded to reopen the matter before the Commissioner. Petitioner contends that the Commissioner's decision of June 27,

1973, based as it was on a motion for summary judgment, was without benefi of a plenary hearing to discover the facts regarding the matter of pre determination, now advanced as being of even greater relative significance as the result of newly discovered evidence.

Petitioner seeks a determination from the Commissioner that the actior taken by the then Board on September 6, 1972, terminating his employment was invalid by reason of that action having been illegally predetermined at a private caucus meeting on August 25, 1972. Petitioner seeks the further determination that he was legally employed from September 1, 1972 to August 31, 1973, as a result of both the alleged invalid terminating action, and the failure of the Board to notify him in writing by March 15, 1973, as required by his 1972-73 contract, *post.*

Finally, petitioner seeks an order of the Commissioner directing that he be reinstated to the position of Superintendent with all salary and benefits to which he would otherwise have been entitled in that position from September 1, 1973 to the date of reinstatement, less any earnings in mitigation.

The Commissioner takes note that, although petitioner's services were terminated on September 6, 1972, he was paid his salary for the entire period of the then existing contract from September 1, 1972 through August 31, 1973. Petitioner contends that the Board's decision to terminate him was improperly made on August 25, 1972 by a faction of the Board at a private caucus held without the knowledge or participation of the remaining members of the Board. He further asserts that a predetermination was made by that faction to terminate his services and to refuse to reemploy him for the ensuing school year. He alleges that that predetermination was then illegally presented as a *fait accompli* and acted upon. Petitioner avers that this act was so tainted as to be fatally defective and contends that it should be declared null, void, and of no effect. He further contends that such an act, being of no effect, was insufficient to notice him that he would not be remployed for the 1973-74 school year as required by the termination clause in his 1972-73 contract which stated:

> "***This contract may be terminated by mutual agreement of the parties, or by written notice of termination by either party to the other no later than March 31, 1973, termination to be August 30, 1973.
>
> "Lack of such notice shall automatically extend this contract for a like period.***" (1973 *S.L.D.* 351)

Petitioner relies upon a contractual provision which, in absence of an action of the succeeding Board, provides for an automatic extension of his contract for a one year period. In *Frederick J. Procopio, Jr. v. Board of Education of the City of Wildwood, Cape May County,* 1975 *S.L.D.* 805 it was once again reaffirmed that a board of education may not bind the hands of a successor board by entering into a multi-year contractual agreement with a superintendent of schools except *when a vacancy exists in that position.* In this regard the Commissioner in *Procopio* quoted with favor *Edwin Holroyd et al. v.*

Board of Education of Audubon et al., Camden County, 1971 *S.L.D.* 214 wherein it was said concerning the Audubon Board's entering into a second multi-year contract with its Superintendent that:

> "***The basic and fundamental question is whether the Board could legally take such an action at all – an action that discarded an important clause of a continuing contract and removed from the discretion of a succeeding Board a power that it ought to have. The Commissioner holds that the Board of Education in office in January 1970 had no such power and that its action with regard to the contract, sub judice, was an unlawful usurpation of power and ultra vires.***" (Emphasis supplied.)
>
> (at pp. 219-220)

Similarly quoted in *Procopio, supra,* was *Henry S. Cummings v. Board of Education of Pompton Lakes et al., Passaic County,* 1966 *S.L.D.* 155 wherein it was said of the Pompton Lake Board's offer to its Superintendent of a second multi-year contract that:

> "***There was no vacancy* to be filled in June 1965, and the Board then in power had no authority to reach forward beyond its own official life and into the term of its successor to make a decision not due until then. *Bownes v. Meehan,* 45 *N.J.L.* 189 (*Sup. Ct.* 1883); *Fitch v. Smith,* 57 *N.J.L.* 526 (*Sup. Ct.* 1895); *Dickinson v. Jersey City et al.,* 68 *N.J.L.* 99 (*Sup. Ct.* 1902)***" (Emphasis supplied.) (at p. 158)

Also quoted with favor in *Procopio, supra,* was that which was stated by the Commissioner in *Edward M. Kiamie v. Board of Education of the Township of Cranford,* 1974 *S.L.D.* 218 that:

> "***[L]ocal boards of education may utilize the provisions of *N.J.S.A.* 18A:17-5 and proffer a multiple-year contract to a new superintendent, only when there is a vacancy in that position, and at no other time.***[A] local board of education is a noncontinuous body whose authority is limited to its own official life and those actions can bind its successors only in those ways and to the extent expressly provided by statute. *Skladzien v. Bayonne Board of Education,* 12 *N.J. Misc.* 603 (*Sup. Ct.* 1934), affirmed 115 *N.J.L.* 203 (*E.&A.* 1935); *Evans v. Gloucester City Board of Education,* 13 *N.J. Misc.* 506 (*Sup. Ct.* 1935), affirmed 116 *N.J.L.* 448 (*E.&A.* 1936)***" (at p. 223-224)

In the matter herein controverted the Board and petitioner in 1972 entered into a contract, the terms of which required that the successor Board either notify petitioner of termination by March 31, 1973, or be bound to a continuing contract for a period of one year. The Commissioner determines that such a provision automatically extending a contract in the event of failure of a successor board to act by a designated calendar date is *ultra vires,* void, and of no binding effect upon the successor board. Petitioner's reliance thereon is misplaced. A successor board, within such a factual context, is not bound by omission of such notice, any more than it would be bound by the forthright (but illegal) offer to a superintendent of a second multi-year contract, as in *Procopio, supra; Kiamie, supra; Cummings, supra; and Holroyd, supra.*

Petitioner was paid in full according to the provisions of his 1972-73 contract which expired by its own terms. Absent a valid claim of entitlement to a successor contract, the Board was under no obligation to issue such a contract. Nor did it do so. That petitioner was without right to continued employment within such a contextual pattern was rendered *stare decisis* in *Karamessinis, supra,* at pp. 357-359, and requires no further exposition herein. Petitioner has no entitlement to continued employment or the emoluments pertaining thereto from August 31, 1973 forward. The Commissioner so holds.

The Commissioner is not unmindful of the serious nature of the charges made by petitioner. Both the Commissioner and the courts have acted at times to make whole those who have been injured by the abuse of discretion of a board such as is alleged by petitioner to have occurred herein. In this regard see *George I Thomas v. Board of Education of the Township of Morris, Morris County,* 1963 *S.L.D.* 106, aff'd State Board of Education 1964 *S.L.D.* 188, aff'd 89 *N.J. Super.* 327 (*App. Div.* 1965), aff'd 46 *N.J.* 581 (1966); *Gladys M. Canfield v. Board of Education of the Borough of Pine Hill, Camden County,* 1966 *S.L.D.* 152, aff'd State Board of Education 154, aff'd 97 *N.J. Super.* 483 (*App. Div.* 1967), reversed 51 *N.J.* 400 (1968); *Grogan v. DeSapio,* 11 *N.J.* 308 (1953); *Cullum v. Board of Education of Township of North Bergen,* 15 *N.J.* 285 (1954).

The Commissioner is duly concerned that, pursuant to statute, no board of education make important official decisions in a forum from which one or more of its members has been arbitrarily excluded. *Peter Contardo v. Board of Education of the City of Trenton, Mercer County,* 1974 *S.L.D.* 650 The function of local boards of education is of such paramount importance in developing and implementing programs of education to serve the youth of our State and nation that they must be ever guided by the principle that "***it is of the very essence that justice avoid even the appearance of injustice***." *James v. State of New Jersey,* 56 *N.J. Super.* 213, 218 (*App. Div.* 1959); *Hoek v. Board of Education of Asbury Park,* 75 *N.J. Super.* 182, 189 (*App. Div.* 1962) A reading of the statutes and case law can lead only to the conclusion that official acts of boards of education must not be reduced to a sham by the predetermined actions of factional segments of boards without full, frank, and open discussion and full knowledge of all *bona fide* members. *Cullum, supra*

The previous observations are made, of course, without prejudice to the Board whose acts have not come under the scrutiny of an evidentiary hearing.

Assuming, *arguendo,* for purposes of the Motion that all of the allegations made by petitioner are factual and that the newly discovered evidence in the form of Dr. Mazzotta's affidavit was found to be true in fact at a plenary hearing, there is, nevertheless, no relief which may properly be afforded by the Commissioner. Petitioner has no valid claim to tenure; there is no showing that his constitutional rights were violated and he has no continuing contractual right to employment after August 31, 1973. Nor is the Commissioner empowered to award damages should such be merited. *Raymond Winter v. Board of Education of the Township of North Bergen, Hudson County,* 1975 *S.L.D.* 236 Such relief, if warranted, must be considered by a court of competent jurisdiction.

Accordingly, the Petition to Reopen is dismissed for failure to state a claim upon which relief may properly be granted.

COMMISSIONER OF EDUCATION

April 29, 1976

In the Matter of the Application of the Board of Education of the East Windsor Regional School District for the Termination of the Sending-Receiving Relationship with the School Districts of the Borough of Roosevelt, Monmouth County, and the Township of Cranbury, Middlesex County.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Turp, Coates, Essl & Driggers (Henry G.P. Coates, Esq., of Counsel)

For the Respondent Borough of Roosevelt, Bard, Bogatz & Shore (Harold Bogatz, Esq., of Counsel)

For the Respondent Township of Cranbury, Golden, Shore & Paley (Philip H. Shore, Esq., of Counsel)

Petitioner, the Board of Education of the East Windsor Regional School District, hereinafter "East Windsor Board," requests the Commissioner of Education to sever the sending-receiving relationships for the education of high school pupils, grades nine through twelve, between it and the Boards of Education of the Borough of Roosevelt and the Township of Cranbury, hereinafter "Roosevelt Board" and "Cranbury Board." Such request is grounded in a series of enrollment projections developed by the East Windsor Board. The Roosevelt Board and the Cranbury Board oppose the request and aver that the East Windsor Board has not provided good and sufficient reason for the severance.

A hearing in this matter was conducted by a hearing examiner appointed by the Commissioner on October 14, 1975, December 5, 1975, and on January 7, 1976 at the State Department of Education, Trenton. The report of the hearing examiner is as follows:

The East Windsor Board and the Roosevelt and Cranbury Boards have been associated in a sending-receiving relationship for decades and at the present time are completing a ten year contractual agreement which was initially effective September 1, 1966. Additionally, the East Windsor Regional School District has served as the receiving district for pupils of Monroe Township,

Monmouth County, although at the present juncture this relationship is beir phased out.

The East Windsor Regional District has, however, experienced a buildir and population expansion in recent years, and it is this expansion, translate into high school pupil population projections, which has triggered the instar application. The application is not grounded in present crowded conditions ; the high school level but in anticipated enrollments in future years.

It is this latter fact which principally caused the Roosevelt and Cranbur Boards to move, at the completion of the presentation of evidence by the Ea: Windsor Board at the hearing, for a dismissal of the application. They als averred that the application was otherwise faulty by reason of the fact that was originally filed with the Commissioner as a resolution of the East Windsc Board and not as a formal Petition of Appeal pursuant to rules of the Stat Board of Education. *N.J.A.C.* 6

The hearing examiner considered the Motion for Dismissal a substantiv one when it was advanced at the hearing, since there appeared to be no evidenc of present harm to the East Windsor Board. Accordingly, he recessed the hearin without requiring a defense except that which is already contained in th pleadings and submissions of the parties prior to hearing.

The basis for the East Windsor Board's application and the response thereto by the Roosevelt and Cranbury Boards will now be examined.

The East Windsor Regional School District is a small one of approximatel sixteen square miles. In recent years a large housing development, the Twi Rivers Planned Development complex, and smaller developments, have dra matically increased the general population of the District. Such increase has bee paralleled by increases in school enrollments, particularly at the elementar school level, and, as a result, new schools and/or additions have been built. A the time of hearing (Fall 1975) the enrollment of these schools approximatec 5,200 pupils, an increase of approximately 1,200 pupils in a five year perioc from September 1970. (P-12a) This enrollment and school building capacity i: shown as follows:

Enrollment
East Windsor Regional Schools

School	Grade Level	Present Enrollment	Building Capacity
Melvin H. Kreps	K-8	1,511	1,750
Hightstown Inter.	6-8	582	640
Walter C. Black	K-2	656	775
Perry L. Drew	K-5	657	600
Ethel McKnight	K-5	575	600
Subtotals		3,981	4,365

High School	1,245	1,446*
Grand Totals	5,226	5,811

(See P-22.)

*The noted functional capacity of the High School by standards of the State Department of Education is 1,397 pupils. (PR-1)

Additionally, a building program is presently in progress at the Perry L. Drew School to increase the capacity of that building by 300 pupils. (P-1)

Enrollment of pupils from the Twin Rivers project alone includes 1,448 pupils in grades kindergarten through eight and 208 in the High School. The enrollment of pupils in the High School from Cranbury and Roosevelt is listed by the East Windsor Board as follows:

Grade	Cranbury*	Roosevelt*
9	32	19
10	32	12
11	27	8
12	36	8
	127	47

(*P-4–applicable April 22, 1975)

Enrollment of pupils in Cranbury and Roosevelt in grades kindergarten through eight include 332 in Cranbury and 132 in Roosevelt. (P-3)

On the basis of such data, the East Windsor Board projects an ever increasing enrollment in its High School and grounds such projection in a number of statistical calculations. These calculations, grouped and summarized, are listed as follows:

East Windsor Regional District
Projected High School Enrollment

	1976-77	1977-78	1978-79	1979-80
Straight Line Method (Includes all 3 districts) (P-14)	1,434	1,532	1,649	1,757
Per Cent Survival Technique (Includes all 3 districts) (P-13)	1,464	1,598	1,781	1,900

Straight Line Method (East Windsor only) (P-15)	1,219	1,314	1,434	1,568
With State Persistence Factors (Includes all 3 districts) (P-16a)	1,394	1,509	1,658	1,773

(Note: Rated functional capacity 1,397) (PR-1)

At the time of hearing there were 1,245 pupils enrolled in the Hig School.

Such pupil population facts and projections were the principal topic fo testimony and cross-examination at the hearing and comprise the principa reason for the Motion to Dismiss the Petition. There were, however, other fact of importance adduced at the hearing and in the documentation.

A representative of the State Department of Education, Division o Building Services, testified at the hearing that he had visited the High Schoo prior to the compilation of the functional capacity study. (PR-1) At that time h found no evidence of overcrowding. (Tr. II-37)

The Acting County Superintendent testified that there were two hig schools in the general area which would have the space and facilities t accommodate additional pupils. She testified that the Spotswood High School, new facility, has not only the "***room, but the need for additional students i order to function effectively next year***." (Tr. II-78) Further, she testifie that the Jamesburg High School has recently experienced a declining enrollmen and could accommodate additional pupils. (Tr. II-78)

The Roosevelt Board avers in written documentation (R(R)-1) that it has investigated alternative sending-receiving relationships with nearby districts but has found none willing to enter a relationship. It presents the following projection of enrollment of pupils in the high school:

1976-77	–	74 pupils	
1977-78	–	76 pupils	
1978-79	–	73 pupils	
1979-80	–	65 pupils	
1980-81	–	60 pupils	
1981-82	–	61 pupils	
1982-83	–	61 pupils	(R(R)-1)

The Roosevelt Board further avers that "[a]verage growth in the last twenty-five years has been no more than two houses per year***" and that no increase in general population is projected. (R(R)-1) It indicates that its relationship with the East Windsor Board and Hightstown High School has been "constructive and salutary" and requests that it be continued. (R(R)-1)

The Cranbury Board avers that its pupil population, grades kindergarten hrough eight, has steadily declined during the period 1969-75 from a total of 414 to 276, and that the impact of pupils from Cranbury or Hightstown High School "has been and will continue to be minor." (R(C)-2) It projects that the percentage of Cranbury pupils in Hightstown High School will decline from approximately ten percent to five percent by 1983. (See R(C)-2, at p. 4.) (See also (R(C)-3.) It further avers that a loss of approximately $225,000 in tuition revenues by the East Windsor Board would be of significance to East Windsor and, in effect, it questions the rationale which prompted the instant application. The Cranbury Board requests that the East Windsor Board be directed to continue the present relationship with Cranbury.

The hearing examiner has reviewed such facts and arguments and sets forth the following findings and conclusions:

1. Overcrowded conditions cannot, at this point, be advanced as reason to justify an immediate termination of the sending-receiving relationships between the East Windsor Board and the Boards of Roosevelt and Cranbury.

2. Overcrowding is unlikely to be present in the 1976-77 academic year. (Note: Even the maximum projection of 1,464 pupils would appear to be manageable in a building with a functional capacity of 1,397 pupils.)

3. Pupil population projections do appear to indicate that beginning in 1977 and continuing forward from that date the Hightstown High School will be increasingly overcrowded.

This latter statement is tentative and conjectural since there is wide variance in the statistical projections and since such projections in recent years have, for a variety of reasons, often proved to be unreliable. Accordingly, the hearing examiner finds the proofs inadequate to support a finding at this time that there is "good and sufficient reason,"—the statutory test (*N.J.S.A.* 18A:38-13)—for the severance requested by the East Windsor Board.

The hearing examiner does recommend, however, that the Cranbury Board, in particular, be permitted to proceed in an expeditious manner to explore alternative arrangements which the Acting County Superintendent testified are possible and, in fact, have already been explored to some extent. (Tr. II-86) The hearing examiner further recommends that the Commissioner retain jurisdiction in this matter until January 1, 1977 in order that present pupil projections may be assessed against actual September 1976 enrollment and to allow sufficient time for the formulation of a voluntary alternative arrangement.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner to which no exceptions have been filed. The Commissioner concurs with the report and with the recommendations contained therein.

Accordingly, the Commissioner retains jurisdiction in this matter to the date of January 1, 1977 at which time new data with respect to pupil enrollmen may be assessed. In the interim, the Cranbury Board is free to pursue possible alternatives and to submit a recommended alternative sending-receiving relationship to the Commissioner for review and consideration.

COMMISSIONER OF EDUCATION

April 29, 1976

Board of Trustees of the East Brunswick Public Library,

Petitioner,

v.

Board of Trustees of the New Brunswick Public Library, Middlesex County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Miller and Lookhoff (Robert S. Miller, Esq., of Counsel)

For the Respondent, Gilbert L. Nelson, Esq., and Joseph E. Sadofski, Esq.

The Board of Trustees of the East Brunswick Library, hereinafter "petitioner," charges that the conditional designation by the New Jersey State Board of Education of the New Brunswick Public Library as the Area Library for South Middlesex County was unjustified, prejudicial and otherwise improper. Petitioner prays that the aforesaid conditional designation of the New Brunswick Public Library be reconsidered and that the East Brunswick Public Library, by reason of its location, facilities and services, be designated as the Area Library for South Middlesex County.

The Board of Trustees of the New Brunswick Public Library, hereinafter "respondent," avers that the conditional designation of the New Brunswick Public Library as Area Library was a sound exercise in discretion, non-prejudicial, or otherwise tainted and is entitled to a presumption of correctness.

A hearing was conducted on March 1 and 2, 1976 at the offices of the Somerset County Superintendent of Schools, Somerville, by a hearing examiner appointed by the Commissioner of Education. The undisputed facts surrounding the controversy are as follows:

From 1968 through 1972 the New Brunswick Public Library was esignated as a developmental library with special funding which enabled it to nprove its reference materials. (Tr. I-117; Tr. II-57) Thereafter, on October 29, 974, the Director of the New Jersey State Library forwarded to the ommissioner a unanimous resolution of the Advisory Council of the State ibrary recommending the tentative designation of the New Brunswick Public ibrary as Area Library to serve the fifteen municipalities of South Middlesex ounty which have a population in excess of 250,000. The State Board ibsequently made such a tentative designation, *conditional upon the initiation f construction of an addition to the library on or before January 1, 1976 of at ast 20,000 square feet with appropriate facilities to perform Area Library unctions and services.* Attendant upon an ultimate unconditional designation as rea Library is a base grant of $35,000 and a further appropriation of twenty ents per area resident which aggregate amount approximates $85,000. (C-1; Tr. I-10)

The Director of the State Library advised the Commissioner that the otential for performance of Area Library services were exhibited by two braries in South Middlesex County. He characterized the libraries as follows:

> "***the New Brunswick Public Library, an older, well established library which had long been hampered by both budgetary and space restrictions; and the East Brunswick Township Public Library, a new, dynamic library which, in a short space of time, achieved the funding, staff and leadership to be a serious contender for designation as an Area Library. Both agencies have building plans which will eventuate in facilities adequate to meet criteria established for Area Library designation: both agencies have formally applied for such designation.***" (C-1, at p. 2)

The Director further advised the Commissioner that the choice between ie two had been made by the Advisory Council after consideration of both a irvey of library facilities in the area and statistical data of the two contenders evealing information on library collections, staff, existing and proposed building nd parking facilities, access, programs, and performance. (C-1, at pp. 2-3) The irector also advised the Commissioner on October 29, 1974, that:

> "***Two additional considerations were given considerable weight by the Advisory Council:
>
> > "1. The posture which the Advisory Council should take relative to a choice between an economically depressed inner city environment and a relatively affluent, dynamic suburban environment;
> >
> > "2. The proximity of the Rutgers University Library as one of the four Research Library Centers designated in the State Library Aid Act, and the possibility for clarification of roles as well as mutually supportive programs.***" (C-1, at p. 3)

The Director of the State Library stated that the choice between the two ontending libraries was a difficult one since the statistical basis of each library

was similar and met the standards for Area Library designation. He furth stated that the decision was based, *inter alia*, upon the fact that at that time tl New Brunswick Library had a superior library collection and vastly larg circulation, was more easily accessible, was the Middlesex County seat and w situated in an economically depressed municipality which would be aided in general rehabilitation by being the site of an Area Library. (C-1, at pp. 3-4)

Since the conditional designation in 1974 by the State Board of the Ne Brunswick Public Library as the Area Library, architectural plans have be developed by respondent for an addition to the present building of appro imately 20,000 square feet at a cost of approximately $81,000. (Tr. I-11 However, as of the date of the hearing, the New Brunswick City Council had n voted affirmatively to proceed with a bonding and construction program. (T II-20) Since 1974, petitioner has constructed a 32,500 square foot mode library in East Brunswick Township with 200 free, off-street parking facilitie This program is scheduled for completion in April 1976. (Tr. I-14)

Petitioner argues that the Advisory Council's decision to give considerab weight to the existence of an alleged depressed, inner-city environment as a ba for its recommendation was contrary to the laws and Constitution of New Jers and an abuse of both the Advisory Council's powers and the discretion of tl State Board. (Tr. I-7) Petitioner alleges that the East Brunswick Public Library the logical designee in terms of traditional and accepted standards for tl designation of an Area Library by reason of its more central locatio professional staff, modern building and parking facilities, collection of boo and materials, cooperative inter-library borrowing programs, municipal financi support, circulation, convenient location, and developed plans for providi Area Library services. (Tr. I-5, 8; Tr. II-79-83) For these reasons and the fa that respondent has failed to meet the conditional requirement of beginni construction of a 20,000 square foot addition by January 1, 1976, petition urges that the prior decision to designate the New Brunswick Public Library b set aside and that the East Brunswick Public Library be designated instead as tl Area Library for South Middlesex County.

Conversely, respondent contends that the designation of the Ne Brunswick Public Library was well reasoned and justifiable, and that tl consideration by the Advisory Committee of economic disparity between Ne Brunswick and East Brunswick was justifiable and free from taint. Respondei argues further that, while it has not met the conditional deadline to beg construction by January 1, 1976, it has made good faith progress by expendir $81,000 to finalize construction plans. Additionally, respondent contends that has, in effect, operated a reference library in a facility that is easily accessible b automobile or by bus, enjoys a location near County office buildings an parking garages which enables it to serve both its resident population and working day influx of 125,000 persons. (Tr. II-27)

Respondent further argues that the New Brunswick Public Library's larg library collection, outreach centers serving minority populations, long history c operations, planned facility of 39,000 square feet, operational bookmobi program, designation as a United States Government select depository, record c

inter-library cooperative loan programs, and proximity to the Rutgers University Library support a conclusion that it should be designated as the Area Library for South Middlesex County. For these reasons respondent prays that the Petition of Appeal herein be denied. (Tr. I-9-10; Tr. II-83-85)

The hearing examiner has carefully studied the entire record, including the pleadings, the exhibits in evidence, transcripts of two days of hearing and the respective arguments of counsel and makes the following findings of fact:

1. Respondent has expended $81,000 since 1974 for test borings, architect's fees and consultant fees in preparation for an anticipated building program designed to provide a total of 39,000 square feet of library floor space, including a new addition of 20,000 square feet as specified in the State Board's conditional designation. Respondent, at the time of the hearing, had exceeded by ten weeks the date of January 1, 1976, specified by the agreement as the deadline by which construction was to begin. (Tr. II-20, 54-55) During this same period petitioner erected a new 32,500 square foot library. (Tr. I-14)

2. Respondent has developed a cooperative inter-library loan program with certain libraries in South Middlesex County, operates two state-funded outreach centers serving minorities on a bilingual basis, and a bookmobile program within New Brunswick, and further is a select depository for the United States Government. (Tr. I-20, 111-112, 115-116; 125; Tr. II-20, 34-37, 49, 57) Petitioner has similarly developed an effective inter-library loan service through efforts of its cooperative, aggressive, service-minded professional staff which has capacities in such diverse areas as cable television and graphics. (Tr. I-16-17, 28, 34, 37)

3. Respondent has not developed well-formulated plans for the operation of its library as an Area Library, but states that it has plans to add two professional staff members to its existing professional staff of seven. (Tr. I-119; Tr. II-41, 48-51) By contrast, petitioner has well-formulated plans for expansion of its present pick-up and delivery service and reciprocal borrowing privileges, as well as staff expansion and utilization, which it would employ were the East Brunswick Public Library to become the Area Library designee. (Tr. I-16-17, 28, 34, 37)

4. The New Brunswick Public Library is so situated that certain library users may reach it by walking or by public transportation. Petitioner's facility offers no such access by foot or by present public transportation routes. However, it is apparent that the great majority of library users from South Middlesex County would approach *either* library by automobile, in which event parking facilities are of importance. Respondent's facility is so situated that users would not have available free, off-street parking, but it is within five blocks of two parking garages with 900 spaces and limited on-street metered parking. Petitioner, by contrast, offers 200 off-street, free parking spaces. Either library is conveniently accessible by major roads from all constituent municipalities, but the location of the East Brunswick Public Library is more geographically centralized within South Middlesex County. (Tr. I-47, 83, 118, 126; Tr. II-24-25; P-3; R-1)

5. Respondent budgeted $212,066 of municipal funds for 1976. By contrast petitioner budgeted $400,000 of municipal funds for 1976 exclusive of debt service of $93,000 and municipal services estimated at a value of $40,000 (Tr. I-71, 80)

The hearing examiner herewith sets forth in chart form the remaining relevant findings of fact:

Item	New Brunswick	East Brunswick
Circulation (P-4)		
1970	163,843	179,842
1971	173,762	205,802
1972	166,315	209,075
1973	160,783	206,203
1974	146,035	209,237
1975	145,930	244,474
Hardcover Books Added (P-5)		
1970	5,382	5,028
1971	4,063	7,292
1972	4,369	7,159
1973	4,020	6,775
1974	5,467	9,375
1975	4,203	11,445
Hardcover Book Collection (1975)	98,000	75,000
F.T.E. Professional Staff (1976)	7	8 1/2
Materials loaned (1975)	248	395
Cardholders	10,000	26,000
Library Hours/Week	68	72
Bookmobile	Yes	No
Records Circulated (1975)	16,814	16,687
Pictures Circulated (1975)	532	1,424
Films Circulated (1975)	3,548	1,888
Periodicals	449	447

It should be further noted by the Commissioner that, since the conclusion of the hearing, the following letter dated March 19, 1976, was received by the Bureau Head of the State Library from the Director of the New Brunswick Library reporting an action in March 1976 by the municipal governing body of the City of New Brunswick as follows:

"As you know the library expansion bond issue was defeated by a vote of 3-2. Although four of the councilmen expressed sympathy for the project or a lesser version, the future prospects are vague and not very substantive. I will now proceed under the assumption that New Brunswick has lost its area designation; consequently necessitating a reorienting of our library.***" (Exhibit A)

The Bureau Head of the State Library responded to this letter on April 1, 976, as follows:

"Thank you for your letter of March 19 advising the State Library that the library expansion bond issue was defeated at a recent meeting of the New Brunswick City Council. I assume from your comment that your library is relinquishing its claim to designation as an area library for Southern Middlesex County." (Exhibit B)

t should be recognized, however, that the New Brunswick Public Library has ot by reason of the above communication relinquished its claim of entitlement f designation as Area Library for South Middlesex County. (Exhibit C)

In conclusion, and in full consideration of the findings of fact hereinbefore et forth, the hearing examiner makes the following recommendations to the ommissioner:

1. It is recommended that the Commissioner determine petitioner has ailed to prove that the conditional designation by the State Board of the New runswick Public Library as the Area Library for South Middlesex County was nproper, unjustified, prejudicial or otherwise tainted.

2. It is recommended that the Commissioner determine it was proper that he Advisory Council gave considerable weight to the alleged economic disparity etween the communities of New Brunswick and East Brunswick in selecting an rea Library designee.

3. It is further recommended that the Commissioner determine the failure f respondent to initiate construction of an additional 20,000 feet of floor space n or before January 1, 1976, renders the specific terms of the State Board's onditional approval of the New Brunswick Library as the Area Library for outh Middlesex County null, void and of no effect.

4. Finally, absent action by New Brunswick City Council to approve a uilding addition to the New Brunswick Public Library, and in recognition that he East Brunswick Public Library has provided facilities and program which the dvisory Council recognizes as meeting the requirements for Area Library esignation in South Middlesex County (C-1, at p. 3), it is recommended that he Commissioner, upon the further concurrence of the Advisory Council, ecommend to the State Board of Education that the East Brunswick Public ibrary be designated as the Area Library for South Middlesex County.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has carefully reviewed the record of the controverte matter including the transcripts of hearing, the exhibits in evidence, the repo of the hearing examiner and the exceptions thereto filed by counsel pursuant t *N.J.A.C.* 6:24-1.16.

Petitioner takes exception to the hearing examiner's recommendation tha the Commissioner determine that the 1974 conditional designation by the Stat Board of the New Brunswick Public Library was proper, unprejudiced and fre from taint. The Commissioner has carefully searched the record and finds n evidence on which to base a conclusion that the aforementioned condition designation was defective by reason of failure to give due consideration t appropriate guidelines for the establishment of an Area Library.

When such a determination is made, the Advisory Council, the Com missioner and the State Board must carefully weigh the multifarious facet exhibited by potential Area Library designees. These include, *inter alia*, boo collections, audiovisual collections, periodicals, staff, financial bases, buildin facilities, accessibility and program services. It is also proper that consideratio be given to economic, ethnic and social aspects of the communities unde consideration. A search of the record fails to reveal facts sufficient to support conclusion that the 1974 conditional designation of the New Brunswick Publi Library resulted from failure to regard and balance these and other importan considerations. Rather, it is concluded that the expertise and administrativ review capacity of the Advisory Council, the Commissioner and the State Boar were properly exercised. The Commissioner so holds.

Respondent's exceptions emphasize the quantitative features of th inter-library loan service and the minority and bilingual programs. Responden requests that additional time be given for the erection of an addition to the Ne Brunswick Public Library. The Commissioner is not unmindful of the qualit and effectiveness of these programs, but is of the opinion that further delay i the designation of an Area Library for South Middlesex County is not in the be interests of the populace in that area. The Commissioner finds no validity to tha portion of respondent's exceptions which makes claim to a more favo re location for the New Brunswick Public Library. The record supports conclusion that either of the libraries considered by the Advisory Council i equally desirable in terms of geographic location and equally accessible to th residents of the area. That exception wherein respondent makes claim to a large collection of hardcover books cannot be denied. However, the more substantia financial basis provided by the municipality of East Brunswick is fast narrowin that gap and has provided an excellent modern collection in the East Brunswic Public Library.

The New Brunswick Public Library, unfortunately, has been unsuccessfu in complying with the conditional aspects of its designation, namely to initiat by January 1, 1976, the construction of a library addition of at least 20,00 square feet with appropriate facilities. Respondent has not only failed to mee the time deadline for the beginning of such construction, but as of this writin four months later, is unable to present other than a negative vote by th municipal governing body on a proposal to initiate such construction.

The minutes of the Advisory Council of the Division of the State Library, dated April 8, 1976, reveal that that body has again reviewed the known facts relating to the Area Library designation for South Middlesex County. These minutes state that:

> "***The Advisory Council again reviewed the question of designation of an Area Library for south Middlesex County: the provisional designation of the New Brunswick Free Public Library; the appeal of the East Brunswick Public Library to the Commissioner of Education; the failure of the New Brunswick City Council to pass a bonding issue for expansion of the library facility; and the approaching report of the Division of Controversies and Disputes to the Commissioner of Education relative to the hearing on the matter. It was the consensus of the Council that the East Brunswick Public Library was eligible for designation and that it would be a disservice to the citizens of south Middlesex County to continue to be deprived of the benefits of the state grant for area library services.
>
> "Acknowledging the time factor in placing its recommendation before the State Board of Education so that designation could be made and the grant awarded before the end of the fiscal year, it voted to confirm its selection of the East Brunswick Library as its recommended designee pending the outcome of the hearing and the Commissioner's decision. The Advisory Council empowered Mr. Palmer to draft a resolution in its behalf recommending the designation of the East Brunswick Public Library, to be placed before the State Board of Education at its next meeting, May 5, 1976, provisional upon the findings of the hearing that the New Brunswick Public Library had not met the conditions imposed by the State Board in its resolution of November 6, 1974, and therefore is ineligible for designation.***" (Exhibit D)

The Commissioner, finding the recommendations of the Advisory Council to be consistent with those of the hearing examiner, concurs with the stated recommendations. Accordingly, the Commissioner urges that the State Board of Education declare the 1974 conditional designation of the New Brunswick Public Library as the Area Library for South Middlesex County to be null, void and of no continuing effect because of failure to comply with the conditional aspect of the designation. It is further urged that the State Board of Education, acting upon the recommendation of the Advisory Council and the Commissioner, designate the East Brunswick Public Library as the Area Library for South Middlesex County.

The Commissioner recommends further that, in the event the State Board finds favor with the above recommendation, action thereon not be taken until any appeal from this decision has been acted upon by the State Board. Thereby, the appeal process will not inadvertently be prejudiced by prior action of the State Board.

COMMISSIONER OF EDUCATION

April 30, 1976

David Hochman,

Petitioner,

v.

Board of Education of the City of Newark, Stanley Taylor, Superintendent of Schools, Theresa David, Assistant Superintendent of Schools, and James Vasselli, Principal, Broadway Junior High School, Essex County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, David Hochman, *Pro Se*

For the Respondents, Barry A. Aisenstock, Esq.

Petitioner, a nontenure teaching staff member in the employ of the Board of Education of the City of Newark, hereinafter "Board," was discharged from his employment by action of the Board which was effective on December 25, 1974. He avers that such discharge was contrary to accepted principles of fairness and due process of law and requests an immediate reinstatement by the Commissioner of Education. The Board maintains that its actions were legally correct and that petitioner's discharge was properly grounded in good cause.

The matter is submitted directly to the Commissioner for Summary Judgment on the pleadings, Briefs and the transcribed record of an appearance granted petitioner by the Board on March 13 and 19, 1975. The Commissioner has reviewed this total record.

Petitioner was first employed by the Board in September 1973 as a teacher and continued in such employment to November 25, 1974. On that date, however, he was suspended by an administrative action of the Superintendent of Schools and on December 5, 1974, petitioner was informed that his employment would be terminated on December 25, 1974 because of "unsatisfactory performance." Subsequently, he was afforded the opportunity to appear before the Board in March 1975 and on April 30, 1975, the Board, by majority vote approved the following resolution:

> "WHEREAS the Superintendent of Schools recommended the termination of David Hochman effective December 25, 1974; and
>
> "WHEREAS a hearing has been conducted before this board of education at which time Mr. Hochman was given an opportunity to cross-examine all witnesses against him and present evidence in his behalf; and
>
> "WHEREAS the board of education has carefully considered all evidence presented to it;

"NOW THEREFORE, Be it

"RESOLVED by THE BOARD OF EDUCATION OF NEWARK IN THE COUNTY OF ESSEX that it affirms the administrative action of the Superintendent of Schools in suspending David Hochman through a communication sent by the Assistant Superintendent in charge of Personnel effective November 25, 1974; and be it further

"RESOLVED that Mr. Hochman be paid full salary through December 25, 1974 in accordance with board rules and regulation and the laws of New Jersey; and be it further

"RESOLVED that Mr. Hochman be terminated effective December 25, 1974; and be it further

"RESOLVED that the Superintendent advise Mr. Hochman that the Board's action is based on Mr. Hochman's insubordination by willful and open violation of board rules and the laws of this state after notice to discontinue such conduct."

The question before the Commissioner is one concerned with a review of the Board's action, a review of the "good cause" which prompted it and the proofs pertinent thereto. In assessing such proofs it has long been held that the Commissioner will not substitute his discretion for the discretion of the local board of education charged with original jurisdiction if there is evidence to support it. As the State Board of Education said in *J.S. Weekley v. Board of Education of the Township of Teaneck*, 1938 *S.L.D.* 390 (1929), aff'd State Board of Education 396:

> "***The second contention of appellant, that he was dismissed from his position of teacher without good cause, and in violation of his contract of employment, we also find to be without merit. The determination of this contention involved a question of fact. Much testimony was submitted by the Board of Education, tending to establish the omission of appellant to observe the rules promulgated by the principal, and his inability to maintain proper discipline in his classes, and dissatisfaction by the board with his services; this evidence was opposed by that appellant and his witnesses. Where the trial court has considered evidence offered by the parties, has had the benefit of observing the witnesses while testifying, and it has reached a conclusion of fact, an appellate body will not disturb such finding where there is any evidence to support it. *Faux v. Willett*, 69 *N.J.L.*, page 52***" (at p. 398)

While the State Board was concerned in *Weekley* with a decision of the Commissioner, the principles set forth therein are equally applicable in the instant matter. There, as here, was ample opportunity to observe witnesses, consider evidence and reach conclusions of fact. This evidence and the conclusions set forth by the Board in its resolution recited, *ante*, may now be examined.

The Commissioner has examined them and concludes that the appearance afforded petitioner by the Board was a fair procedure which gave him every opportunity for rebuttal. Five witnesses testified with respect to petitioner's teaching performance and alleged insubordination. Petitioner himself testified at length on March 19, 1975.

The record of this testimony is, in the determination of the Commissioner, ample support for the ultimate action taken by the Board. School administrators testified that petitioner had:

1. Exercised poor disciplinary control over pupils in his classes; (Tr. I-30-32, 53, 83)

2. Submitted lesson plans which were insufficiently detailed and late; (Tr. I-8, 18)

3. On one occasion sprayed a pupil with the contents of a spray can; (Tr. I-8, 37)

4. Sent an inordinate number of discipline referrals to school administrators (25 in May 1974, 84 during the period from September 1973 to November 1974); (Tr. I-11, 75)

5. On one occasion pulled a girl's hair; (Tr. I-36, 39)

6. On at least one occasion locked the door to his room and on another occasion refused, even when directed by a supervisor, to let pupils enter; (Tr. I-102, 106, 110, 118)

7. Sent letters home to parents which announced a disciplinary policy he deemed appropriate and continued to send such letters even when admonished to discontinue the practice; (Tr. I-40-41, 45-46, 61, 71)

8. On one occasion refused to teach. (Tr. I-14, 119)

Further, school administrators testified that petitioner had been told repeatedly of his errors and that improvement was needed. (Tr. I-28-30) They also testified that conferences with him failed to effect change. (Tr. I-29)

Petitioner testified with respect to all such allegations and either denied that they were true in fact or offered explanation for his conduct. (Tr. II-2-87) His testimony was, in general terms, an indictment of the school disciplinary situation as a whole and of the conditions under which he was required to teach. (See Tr. II-6-7.) He also avers that his dismissal was occasioned by his exercise of free speech in complaining about school conditions to school officials and to others outside the school environment and that, in any event, the Board's stated reasons for his dismissal were not the true reasons. He also avers that the hearing afforded him was too long delayed.

The Board maintains that the procedure was conducted as expeditiously as possible and that, of the three adjournments which preceded it, one was

requested by petitioner. It further maintains that petitioner asserts his own entitlement to due process of law in the name of free speech but that he denied it to his pupils in the pronouncement of his discipline practice.

All such arguments have been considered by the Commissioner and he finds that there were ample reasons for the Board's ultimate action to exercise a thirty day notice clause in petitioner's contract of employment. The Board's procedure of March 1975 afforded petitioner a full measure of due process which exceeded the requirements of law for written reasons and an informal appearance before the Board. See *Barbara Hicks v. Board of Education of the Township of Pemberton, Burlington County,* 1975 *S.L.D.* 332.

The Commissioner finds and determines that petitioner has failed to carry the necessary burden of proof that the Board's action terminating his employment was for improper and/or proscribed reasons or was performed in an improper manner. Accordingly, the Petition is dismissed.

COMMISSIONER OF EDUCATION

May 3, 1976

Arthur Jones *et al.*,

Petitioners,

v.

Board of Education of the Borough of Leonia, Bergen County,

Respondent,

and,

Alan Alda *et al.*, **Intervenors.**

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Ruhlman & Butrym (Edward Butrym, Esq., of Counsel)

For the Respondent, Parisi, Evers & Greenfield (Irving Evers, Esq., of Counsel)

For the Intervenors, Paul Tractenberg, Esq.

The Petition of Appeal, herein, was filed on May 16, 1973 by twelve residents of Leonia and the Leonia Education Association, hereinafter "petitioners." They allege that the Board of Education of the Borough of Leonia, hereinafter "Board," employs as teachers in its Leonia Alternative High School,

hereinafter "Alternative School," persons who are not properly certificated by the New Jersey State Board of Examiners. They further allege that this and other practices of the school are in violation of *N.J.S.A.* 18A:26-2, *N.J.A.C.* 6:11-3.1 *et seq.* and *N.J.A.C.* 6:20-1.3(g). Petitioners pray that the Commissioner direct the Board to cease using persons not properly certificated as teachers in its schools.

The Board denies any impropriety or illegal conduct and maintains that the Alternative School has been operated with the approval of the County Superintendent of Schools and the State Department of Education.

A Motion to Intervene as parties respondent was filed on September 27, 1973 by twenty-eight persons including residents of Leonia, pupils, parents of pupils who are enrolled in the Alternative School, and persons engaged in the instructional program of that school. Oral argument on the Motion to Intervene was conducted on December 20, 1973 at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner of Education. Petitioners opposed the Motion to Intervene but the Board neither resisted the Motion nor offered argument thereon. Following the filing of Briefs, the Commissioner rendered a decision dated March 14, 1974, denying intervention on the grounds that the Board by statutory mandate was required to represent for educational purposes both those who sought to intervene and all other persons resident in the Borough of Leonia.

The matter of intervention was appealed on April 9, 1974 to the State Board of Education, which body reversed the Commissioner's decision on June 26, 1974. Thereafter, the aforementioned twenty-eight persons, hereinafter "intervenors," were named as parties respondent and were represented by counsel at all of the ensuing proceedings. A hearing was conducted by the hearing examiner at the office of the Bergen County Superintendent of Schools, Wood-Ridge, on June 27, 1975, and at the Anna C. Scott School, Leonia, on July 9, 1975. Briefs were filed subsequent to the hearing. The report of the hearing examiner is as follows:

On August 31, 1972, the Board determined to establish an alternative high school and on September 29, 1972, submitted a request to the State Department of Education for its approval. (C-1) Thereafter, on October 27, 1972, approval was granted by the Division of Curriculum and Instruction provided that the Alternative School met certain enumerated requirements of both *N.J.S.A.* 18A:26-6 *et seq.* and the regulations of the New Jersey State Board of Education as set forth in *N.J.A.C.* 6:11-3.1 *et seq.* (C-2)

The Alternative School was visited and evaluated at various times by representatives of the Division of Curriculum and Instruction and has been modified in various ways throughout its existence over a period in excess of three years to the present date. Initially it was staffed by two certificated core teachers who, with the assistance of numerous community resource persons, provided instruction to pupils who voluntarily enrolled as participants in the Alternative School. (C-2) Thereafter, the Board increased to four the number of

core teachers assigned to this school. (C-6) It was agreed by counsel that testimony at the hearing would be limited to the facts which pertain to the 1974-75 operation of the Alternative School. Facts relative to that year of operation are as follows:

Four core teachers were employed with certification in their respective fields of English and French, social studies, science, and mathematics. These teachers conducted classes in their respective fields for an enrollment of approximately eighty pupils in grades nine through twelve. They instructed their classes in the "Little House," a facility approved by the County Superintendent of Schools and located approximately six blocks from the Leonia High School. (Tr. II-115) In addition to these classes the four core teachers directed, for credit or enrichment, independent study projects, seminars, mini-courses and arts and crafts instruction throughout the year. (Tr. I-45-48, 50-62; Tr. II-11, 16)

One core teacher served as head teacher and performed certain administrative duties as a liaison between the Leonia High School administration and the Alternative School. (Tr. I-40)

The core teachers were also responsible for preparing and approving each nine weeks a syllabus of class offerings, seminars, project proposals, lists of community resource persons and their areas of expertise. These syllabi presented to the pupils a brief resume of each quarter's offerings by either core teachers or resource persons. (P-1-4)

Community resource persons, all of whom served without pay, were themselves responsible for writing synopses of those courses within their sphere of expertise which they proposed to present to pupils. These were then reviewed by the core teachers who, as a group, were authorized to accept, reject or modify the proposals, at their discretion, upon consultation with the community resource persons. (Tr. I-63-64, 88) Core teachers likewise assisted the community resource persons, *in some instances,* by providing available materials and resources and by advising on course content and methodology. (Tr. I-90) When the quarterly offerings were approved by the core teachers, they scheduled the pupils and the class meetings variously at the Little House, Leonia High School, Town Meeting Room, a local church, a park or the home of a community resource person. (Tr. I-96)

Courses offered in the syllabi for the 1974-75 school year as proposed and presented by community resource persons included but were not limited to the following:

1. Psychology
2. Tolkien
3. Journalism I, II
4. Psychoanalysis
5. Race and Racism
6. Needlecrafts
7. Blues
8. Satire
9. Hatha Yoga
10. Science Fiction

11. Photography
12. Educational Philosophy
13. Play Writing
14. Conversational French
15. Paper Castle Making
16. Vocabulary Building
17. Learning to Learn
18. High School Geometry
19. Beginning Acting
20. Writers Workshop
21. The Plantagenet Dynasty
22. Contemporary Teenage Problems
23. Biomedical Revolution
24. Dream Baby (A Play)
25. Chronology of American Humor
26. Cellular Biology and the Brain
27. Basic Geology and Mineral Resources
28. The Law–Is It An Alternative
29. Elementary Hebrew I, II
30. Introduction to Archaeology
31. Physical Anthropology
32. Ecology, Evolution and the Human Environment

It is the participation of the community resource persons in these and other offerings that is at the heart of the controverted matter. The hearing examiner has examined thoroughly the testimony of witnesses at the hearing and the large volume of documentary evidence and finds the following to be true with respect to the participation of community resource persons during the 1974-75 school year:

1. They composed and submitted personal data and course descriptions to the core teachers for approval. (Tr. II-62; R-13)

2. They prepared lessons and were in full charge of methods and materials used in instruction. (Tr. I-90)

3. They reported pupil attendance at the end of each quarter as regular, fairly regular or poor. (R-5)

4. They made assignments and evaluated the performance of pupils and submitted both a narrative evaluation and letter grade or pass-fail grade for each pupil at the end of each course. (Tr. I-87; R-5-8)

5. They did not submit to the core teachers or other Board employees for their approval such things as lesson plans, pupil assignments or projects. (Tr. I-98; Tr. II-39)

6. They were in complete charge of instruction for those classes assigned to them, which classes ranged in size from two to twenty pupils. (Tr. II-20, 37)

7. With rare exception, they were not certificated as teachers by the New Jersey Board of Examiners.

8. They conducted, during regular school hours or during evenings or on weekends, courses for which pupils were assigned academic credit. (Tr. I-114)

9. They conducted courses, seminars and workshops ranging from three weeks to one full year in length at the locations previously set forth. (Tr. I-79; P-5)

10. They were persons whose talents and expertise ranged over a wide sector of human endeavors.

11. They were persons with strong motivation to enrich the educational offerings of the Board by selflessly sharing their expertise with those youth who elected to avail themselves thereof.

An analysis of the responsibilities of the core teachers, counselors, supervisors, and administrators and their relationship to the courses taught by community resource persons is succinctly set forth as follows:

1. Core teachers were assigned the responsibility to observe community resource persons' classes when such classes were within the scope of their own certification. On occasion they did so. Such classroom visitations seldom exceeded two in any nine week period. In numerous instances no such observation was made. (Tr. I-82; Tr. II-37) In at least one instance a core teacher was unable to recollect either the number of pupils assigned to a class within his field of expertise or the name of the community resource person who taught the class. (Tr. I-132) No written reports were made of such observations. (Tr. I-84)

2. Core teachers were assigned the responsibility of reviewing and signing the pupil evaluation form prepared by the community resource persons. They were authorized to adjust a grade which they felt inappropriate. There is evidence that they reviewed and signed these forms designating whether academic credit should be awarded. (R-5-8; Tr. I-66)

3. Core teachers did not review lesson plans, research papers, assignments or daily or periodic course coverage with community resource persons. (Tr. I-92)

4. Core teachers on occasion met with community resource persons regarding the content and progress of a course. However, no such meeting was held with respect to many courses. (Tr. I-93, 133, 135)

5. Core teachers did not engage directly in the instruction of pupils assigned to community resource persons. (Tr. II-27)

6. Counselors at the Leonia High School provided substantially identical services to pupils participating in the Alternative School as they did to other pupils. (Tr. II-63-69) No pupil was assigned to the Alternative School on other than a voluntary basis. (Tr. II-80)

7. The principal was charged with the same responsibilities for the Alternative School as for the Leonia High School. However, he observed and evaluated the core teachers but never observed nor evaluated community resource persons. (Tr. II-97, 102)

8. The principal reviewed proposed courses and approved course outlines for the Leonia High School but neither received nor approved courses formulated by either the core teachers or the community resource persons in the Alternative School. (Tr. II-100, 114)

9. Department chairmen, as part of their assignment, were responsible for the observation and evaluation of community resource persons but did not fulfill the responsibility. (Tr. I-124; Tr. II-106)

10. Department chairmen formulated courses of study at the Leonia High School but did not participate in such formulation for courses taught at the Alternative School. (Tr. II-99)

11. The Superintendent recommended prospective teachers to the Board for hiring at the Leonia High School and as core teachers for the Alternative School. However, he did not engage in any phase of the selection process for the community resource persons of the Alternative School. (Tr. II-123) Nor was he aware of criteria utilized for their selection. (Tr. II-126)

12. The Superintendent visited one class taught by a community resource person. (Tr. II-129) He maintained no files containing evaluations of community resource persons as he did of persons who taught in Leonia High school. (Tr. II-132)

A brief summary of the factual context which relates to pupil participants in the Alternative School is in order:

Pupils participated in the Alternative School only on a voluntary basis. They received all of their instruction from Alternative School courses or received part of it in the Leonia High School. (Tr. I-116) Alternative School pupils received instruction in health and physical education at the Leonia High School from a certified health and physical education instructor. (Tr. I-117; Tr. II-96) They were free to choose to take any number of courses at the Leonia High School. They were also free to take courses from either the certified core teachers or community resource persons. (Tr. I-118; Tr. II-93) They had access to guidance counseling at the Leonia High School. (Tr. I-125) They had similar access to the library, typing classes, and other special facilities of the Leonia High School. (Tr. II-119, 121) In fact, they were considered as enrolled pupils of the Leonia High School of which the Alternative School was an extension.

Pupils at the Alternative School were encouraged to assume responsibilities for supplies, clean-up, community relations, communication, secretarial duties, evaluations, social affairs, finance and other duties on a "contract" basis. (P-2, Tr. II-88) The testimony of pupils indicated that they did so willingly. (Tr. II-87) Pupils served on an administrative council and reported their attendance on an honor system basis. (Tr. II-88, 103)

One pupil testified that, whereas she had had to be placed on home instruction because of her inability to cope with the pressures she experienced in the larger high school, she found that the quieter atmosphere of the Alternative School enabled her to progress both scholastically and socially. (Tr. II-83-92)

Another pupil, a National Merit Scholarship finalist, testified that he found in the smaller Alternative School an empathy among participants which met his needs. He testified that he found no significant difference in the quality of instruction provided by the community resource persons as compared to that provided by the core teachers. (Tr. II-95)

Pupils from the Alternative School exhibited varying aspirations and some of them were accepted into the most prestigious colleges and universities of the United States. (Tr. II-164; R-1; R-2)

One community resource person, a professor of anthropology at Barnard College, who has served on numerous committees for both the Alternative School and Leonia High School, testified that his experience as an instructor in the Alternative School has caused him to be "***amazed at the mature, intelligent response of the children.***" (Tr. II-168) He stated that he looked upon the Alternative School not as a challenge to, but as a single adjunct of, the total educational program of the Board in which he is equally interested. (Tr. II-165-177) He testified further that, if he were required to be certified to teach, his time schedule would not permit him to take courses to qualify as a secondary school teacher, even if certification in the field of anthropology were possible. (Tr. II-172)

The principal of Leonia High School testified that he was "***very pleased with the performance of the community resource people [and] the expansion of the program that they have brought to Leonia.***" (Tr. II-111) A member of the Board testified similarly that she believed the Alternative School made possible, without prohibitive expense, a broad, flexible program in keeping with the Board's philosophy. (Tr. II-151-152) The Superintendent testified that he finds the Alternative School to be a viable program and that, while present plans call for the housing of the Alternative School in the yet to be completed new Leonia High School, he envisions an even greater use of outside resource persons, institutions and agencies. (Tr. II-135, 137)

Petitioners, however, allege that the Board utilizes community resource persons to perform all the important functions of teachers in contravention of statute and the rules of the State Board of Education. Petitioners further charge that community resource persons are not subject to the benefits of supervision as are others who teach for the Board. (Petitioners' Brief, at pp. 3-5) Petitioners do not malign or derogate those who volunteer their services, but maintain that those who write course descriptions, choose topics and projects, lecture, test, lead discussions, make assignments and evaluate pupils, by whatever name they are called, are in fact teaching staff members. (Petitioners' Brief, at p. 6)

Petitioners recognize that community resource persons are not paid by the Board. Nevertheless, they argue that, inasmuch as the Board utilizes their

services, they are "employed" as teachers without complying with the certification requirements of the State. (Petitioners' Brief, at pp. 8-9) Petitioners argue that the certification procedures of the State are sufficiently flexible to allow for the certification of eminently qualified persons without the taking of unnecessary courses. (Petitioners' Brief, at p. 12) Petitioners further charge that to leave the determination of fitness to teach in the Alternative School to the head core teacher who has less than five years of teaching experience is insupportable.

Finally, petitioners charge that the Board has violated the terms and conditions of the initial approval and the subsequent annual approvals of the Alternative School.

Conversely, the Board argues that the Alternative School is being properly and beneficially operated in accordance with the approval of the State Department of Education. The Board contends that a viable challenging program is offered and that, absent a showing of inadequate instruction to pupils, it must be determined that it complies with the constitutional requirements of a thorough and efficient education. (Brief on Behalf of Respondent Board, at p. 12)

The Board argues that statutory and State Board regulations refer to situations where persons are hired to teach for compensation and that community resource volunteers are not in fact "employed" by the Board. The Board argues that community resource persons have never been treated as teaching staff members and that to interpret the statutes referring to employed persons as including volunteers would "***twist and distort the clear intention of the Legislature.***" (*Id.*, at p. 15)

The Board does not deny that community resource persons teach but asserts that they educate in the truest sense. It is argued, therefore, that the community should not be denied their services by reason of their nonpossession of teaching certificates. The Board further asserts that to require that highly qualified professional persons take courses to qualify for teaching certificates would be an absurdity. (*Id.*, at pp. 16, 18)

The Board avers that, while the education laws provide for compulsory education, they do not require that it be obtained in a school setting, but allow for equivalent instruction elsewhere than at school. In this regard, *State v. Massa,* 95 *N.J. Super.* 382 (*Law Div.* 1967) is cited. The Board argues that, if such instruction as countenanced by the Court in *Massa* may be provided by parents and/or professional persons elsewhere than at school, pupils in the Alternative School should not be deprived of such benefits as an enrichment to their education *within the school program.*

Intervenors, in turn, argue that intrusion by the Commissioner would be contrary to the discretionary rights of the Board. *N.J.S.A.* 18A:11-1; *Boult and Harris v. Board of Education of Passaic,* 135 *N.J.L.* 329 (*Sup. Ct.* 1947), 136 *N.J.L.* 521 (*E.&A.* 1948) Intervenors contend that the discretion of the Board extends to innovative and experimental programs such as the Alternative School. (Brief on Behalf of Intervenors, at pp. 9-11)

Intervenors hold that the statutes do not require that all instruction be given by certified teachers. In this regard they argue that noncertificated persons in cooperative work-study and field study programs and in the armed services render instruction for which credit is given toward graduation requirements. (*Id.*, at pp. 16-17) Intervenors aver that statutes requiring certification have no reasonable application to the part-time unpaid volunteers who have no professional aspirations, may not be clothed with tenure, are not paid, and serve without benefit of contracts. (*Id.*, at pp. 25-26) Intervenors do not contend that such persons should serve without supervision, but hold that if adequate supervision has been lacking, the remedy is to provide it when, and only when, appropriate. (*Id.* at p. 26)

Intervenors argue that statutes must be construed to comport with constitutional requirements for a thorough and efficient system of free public schools. They maintain that this requires that pupils who, for whatever reason, cannot benefit from a conventional program be provided such programs as are offered at the Alternative School. (*Id.*, at p. 30)

Finally, intervenors assert that a determination that all community resource persons must be regularly certified (meeting course work and practice teaching requirements) would in all likelihood be a decision which would effectively terminate the services of the community resource persons in the Alternative School. They pray the Commissioner, therefore, to dismiss the within Petition of Appeal. Finally, intervenors recommend, should the Commissioner determine that certification of community resource persons is requisite, that guidelines be promulgated defining more precisely the application of *N.J.A.C.* 6:11-3.14 which provides that:

> "Certification to teach in a school having an experimental curriculum not covered by these certification regulations may be granted by the Commissioner of Education."

The hearing examiner has carefully considered and weighed the evidence herein concerning the participation of community resource persons and makes the following findings of fact:

Community resource persons do not possess New Jersey teaching certificates. They teach in the Alternative School with much less supervision of course content, materials, teaching methodology and techniques, and evaluative processes than is afforded to those who are certificated core teachers or teachers at the Leonia High School. The hearing examiner recommends that the Commissioner determine that the community resource persons as utilized by the Board are teaching staff members within the contemplation of *N.J.S.A.* 18A:26-2 which provides that:

> "No teaching staff member shall be employed in the public schools by any board of education unless he is the holder of a valid certificate to teach***."

A teaching staff member is defined in *N.J.A.C.* 6:11-3.4 as:

> "***a member of the professional staff of any district *** holding office, *position* or employment of such character that the qualifications, for such office, position or employment, require him to hold a valid and effective standard, provisional or emergency certificate, appropriate to his office, position, or employment, issued by the State Board of Examiners***." (*Emphasis supplied.*)

The hearing examiner finds that a community resource person holds a position which entails fully as great a responsibility in the process of the instruction of pupils as that borne by any other teaching staff member. *N.J.A.C.* 6:11-3.5(c) requires that a county superintendent of schools notify the Commissioner immediately "***when he learns of a professional staff member holding a position in violation of the State certification laws and regulations." Similarly, *N.J.S.A.* 18A:27-2 provides that:

> "Any contract or engagement of any teaching staff member, shall cease and determine whenever the employing board of education shall ascertain *** in any *** manner, that such person is not, or has ceased to be, the holder of an appropriate certificate required by this title for such employment***."

The Board argues that it has operated the Alternative School as approved by the State Department of Education. The hearing examiner finds, however, that in certain important aspects its operation has been contrary to the directives of the State Department of Education.

The original letter of approval dated October 27, 1972, emphasized that "***all instruction shall be under the direct supervision and direction of a properly certified teacher.***" This approval further listed in detail the statutes and State Board rules with which the Board was required to comply. (C-2) On December 18, 1972, and again on June 14, 1973, the then Superintendent was advised to apply to the County Superintendent for certification of the community resource persons as aides. (C-4; C-6) However, on June 27, 1973, the County Superintendent refused to certify them as aides on the basis that he believed they should apply for certification *to teach in an experimental program* pursuant to *N.J.A.C.* 6:11-3:14. The Superintendent appealed this ruling of the County Superintendent (C-10), but the appeal was rejected on August 14, 1973 by the Director of Secondary Education who stated, *inter alia,* that:

> "***In its stead, it is suggested that all students in the Alternative School Program be assigned to core teachers for courses. Core teachers would be free to use community resource persons in their classroom if they saw fit to do so. If resource persons are used, the core teacher would be responsible for their supervision as well as for the evaluation of students.***" (C-11)

Thereafter on July 30, 1973, the then acting Superintendent submitted an alternate proposal which stated, "***community resource people will be under

the immediate and direct supervision of the core teachers plus high school supervisory personnel.***" (C-14) On August 30, 1973, the Superintendent wrote that community resource persons would not be viewed as fully certificated personnel and would in no way be used to supplant regularly certificated personnel. (C-15)

On the basis of this and other representations, the Director of Secondary Education, on September 5, 1973, granted approval for the Alternative School for the 1973-74 school year. Therein he stated, *inter alia:*

> "*** Let me add one point *** which I think ought to be clearly understood. *** All students in the alternative school will be assigned to core teachers for classes; none will be assigned to the resource staff.***" (C-15)

A clear reading of this explicit directive, within the context of the previously established facts, supports the conclusion that, although the Board has complied in numerous aspects with requirements set forth in the approval of the Director of Secondary Education, it has failed to comply with the directive that pupils not be assigned to classes taught by community resource persons without certification. Nor has the Board to date sought to have its community resource persons certified either by the Commissioner under *N.J.A.C.* 6:11-3.14 as teachers in an experimental program, or by the State Board of Examiners pursuant to *N.J.A.C.* 6:11-3.31 by reason of unusual backgrounds of education and experience deemed to be the equivalent of, or superior to, the regular requirements.

It is further evident that, although the Board has complied with numerous requirements contingent upon approval of the Alternative School, it has not provided eight observations of each community resource person each nine week cycle as specified by the Director of Secondary Education in his approval for the 1974-75 school year. (C-16)

In summary, the hearing examiner recommends that the Commissioner determine that the Board operates its Alternative School in contravention of the certification requirements for teaching staff members set forth in the statutes and the rules of the State Board, as well as certain specified terms of approval of the Director of Secondary Education.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has carefully reviewed the pleadings, the exhibits in evidence, the Briefs, the interlocutory opinion of the State Board of Education, the testimony of the two days of hearing, the hearing examiner report and the exceptions filed thereto by the Board and intervenors pursuant to *N.J.A.C.* 6:24-1.16.

Intervenors and the Board take exception to the finding of the hearing examiner that the Alternative High School has been operated in contravention of certain specified terms of approval set forth by the Director of Secondary Education. In this regard, intervenors argue that the Board was under no restriction from the Director during 1974-75 that precluded the assignment of pupils to classes taught by community resource persons. (Intervenors' Exceptions, at pp. 1-2) The Commissioner does not agree. This condition of approval of the Alternative High School dated October 27, 1972, continued thereafter to be in effect even as in similar fashion the approval of a traditional high school which is periodically reviewable pursuant to *N.J.A.C.* 6:8-6.1 *et seq.*, continues in effect subject to both the terms of the original approval and any required modifications found necessary thereafter. In fact, this condition of approval was reemphasized on September 5, 1973. (C-15, *ante*)

The Board and intervenors take further exception to the recommendation of the hearing examiner that the Commissioner determine that community resource persons are teaching staff members within the contemplation of *N.J.S.A.* 18A:26-2 and *N.J.A.C.* 6:11-3.4. Intervenors argue that a community resource person does not hold a position with responsibilities as great as that of a regular teaching staff member. In support thereof, the Board points out that they are not engaged in instruction regularly, but teach only a limited time each week, and are under constraints whereby the grades they assign to pupils may be adjusted by the core teachers. (*Id.*, at pp. 4-5)

The Commissioner agrees that community resource persons as utilized by the Board do not, in the aggregate, have totally commensurate responsibilities to those of regularly employed teachers under contract. Such a distinction is largely one of semantics as it applies to pupils who receive instruction in a course given for credit taught only by the resource person using techniques, methods, materials, and course content of his own devising. The record is clear that supervision of these courses is infrequent, and less frequent than what the Superintendent had agreed to provide. (C-16)

The Commissioner has carefully considered the remaining exceptions but finds no necessity to treat each one, *seriatim;* nor does he find in the record any evidence that convinces him of error in the findings of fact set forth in the hearing examiner report.

The Commissioner is not unmindful of the great effort that has been expended by community resource persons who, possessing recognizable knowledge and expertise, have unselfishly shared their talents and enthusiasm with the youth of Leonia. This they have done gratuitously, their only recompense being that intangible, satisfying recognition imparted by a pupil to one who teaches, which is perhaps the ultimate reward to one who gives of himself in the educational process.

Yet, it must be recognized that not all scholars are naturally endowed with the ability to impart their knowledge and expertise as successful teachers. As was said in *Sallie Gorny v. Board of Education of the City of Northfield et al.,* 1975 *S.L.D.* 669:

> "***Although adequate scholarship of teachers is without question a vital component for competent and effective instruction, it is not the sole factor. Brilliant scholars have been known to be poor teachers. Teaching is an art, not a science. The successful teacher is one who is not only a competent scholar, but possesses a keen desire to teach, and acquires through training and experience a great variety of methods, skills, understanding of the learning process, and effective means of motivation. The teaching process is complex. Indeed, whole libraries are devoted to the subject. It is not unusual then to find that beginning teachers, even those who are excellent scholars, experience much difficulty in achieving effectiveness during their first several years in the classroom setting. Some never are able to reach a satisfactory level of competence, and others only after much trial and error and a long period of experience. For these reasons systems of supervision and evaluation evolved as a means of improving the performance of teachers and, most importantly, to provide the best possible instructional program for the children entrusted to the care of the public schools.***" (at p. 681)

Such supervision and evaluation has not been provided by the Board in the Alternative High School. The record is replete with evidence that department supervisors have not regularly observed nor evaluated lessons taught by community resource persons. Nor have they aided in the formulation of courses taught by resource persons. Similarly, no such course formulation, evaluations or observations have been undertaken by the principal. In but a single instance was a classroom observation made by the Superintendent. The Commissioner does not approve of the failure to utilize the supervisory and evaluative expertise of those specialists employed by the Board for these purposes. This omission is not in the best interests of the pupils of the Alternative High School.

The concept of a visiting lecturer who is not necessarily a certificated teacher gratuitously bringing to the classroom a dimension that cannot be provided by a teaching staff member is not new. It has been successfully used in both the traditional and alternative schools of our State for many decades. There is need in our programs of education for such added dimension. In this instance, the Leonia Board has evolved a program wherein community resource persons have in certain instances replaced, rather than supplemented, the teaching expertise of the certificated instructor. Such is violative of *N.J.S.A.* 18A:26-2 and *N.J.A.C.* 6:11-3.4. A harmonious reading of the statutes and the rules of the State Board supports the conclusion that a person who assumes the *full responsibility* for instructing a class of pupils for a designated course of study for credit must be the holder of a teaching certificate from the State Board of Examiners. The Commissioner so holds.

The Commissioner takes notice that the Legislature, in its wisdom, recently enacted *c.* 132, *L.* 1975, effective July 1, 1975, which is intended to strengthen the supervisory process and thus improve the instruction of pupils in the public schools. This law requires that each nontenured teacher be "***observed and evaluated at least three times during each school year***" to be followed by appropriate conferences, all of which are designed to improve professional competence. Although it is apparent that this law does not address

itself to such a factual context as that described herein, the Commissioner perceives that it is the will of the Legislature that such a requirement extend to the supervision of those who teach in the Alternative High School as well.

The Commissioner directs that the Board take immediate steps to revise the operational plan of the Alternative High School to insure the following:

1. Certificated teachers shall be in charge of the instruction of all courses offered for credit at the Alternative High School with community resource persons serving as supplemental resource persons for specific periods of time.

2. Administrative and supervisory personnel shall provide the same thorough supervisory and evaluative services for all courses at the Alternative High School as they provide at the Leonia High School.

The Commissioner is aware that such revision as ordered above may extend the Board's budgetary requirement for professional personnel assigned to the Alternative High School. It will, however, relieve the community resource persons of the full weight of responsibility for course development, instructional activities, grading, and evaluation, which the Commissioner perceives is too broad and great a responsibility to be reasonably borne by volunteers. The above directives are not designed for rigid conformity to established rules. Nor should they be interpreted as a design to stifle that which has many aspects of a successful innovative alternative program. They will, nevertheless, serve to bring the Board's alternative program into harmony with the statutes and the rules of the State Board and insure the quality of instruction in all courses offered for credit. Such result is in the best interests of the pupils of the Leonia schools.

The Commissioner also directs the Director of Secondary Education, Office of School Approvals and County Services, to confer at an early date with the Board's Administrators concerning the implementation of the aforementioned directives and coordination of such approaches as independent study programs whereby the expertise of uncertified community resource persons may continue to be utilized in a flexible manner under the supervision of certificated instructors and administrative and supervisory staff members.

To the extent hereinbefore set forth, the prayers of petitioners are granted.

COMMISSIONER OF EDUCATION

May 4, 1976

Pending before State Board of Education

George Gamvas,

Petitioner,

v.

Board of Education of the Township of Lakewood, Ocean County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Joseph N. Dempsey, Esq.

For the Respondent, Rothstein, Mandell & Strohm (Edward M. Rothstein, Esq., of Counsel)

Petitioner, a tenured teaching staff member in the employ of the Board of Education of the Township of Lakewood, hereinafter "Board," avers that he was transferred in 1972 from his position as principal to a position he believed and was told was comparable but that subsequently he received a salary less than that which would have been payable to him as principal. He maintains that such salary was inappropriate and requests the payment of an additional sum of $6,183 in retroactive compensation. The Board avers that petitioner was transferred in 1972 with his consent and that there was no violation of his tenured entitlement to compensation. It further avers that petitioner's present salary is in accord with an existing agreement between the local administrators' association and the Board.

A hearing in this matter was conducted on March 12 and June 5, 1975 by a hearing examiner appointed by the Commissioner of Education at the office of the Ocean County Superintendent of Schools, Toms River. Subsequently each counsel filed a Memorandum of Law. The report of the hearing examiner is as follows:

Petitioner has been a teaching staff member in the employ of the Board for seventeen years as a teacher, assistant principal and principal. His service in this latter position encompassed six years as principal of a junior high school prior to 1969 and three years as a high school principal subsequent thereto. In June 1972, however, petitioner met with the Superintendent of Schools in conference and he was told that he would be transferred to a position which petitioner understood was to be "comparable" to his position as principal. The new position had the title of Director of Occupational Education and petitioner agreed to the transfer at the conference with the Superintendent. On June 26, 1972, the Board made petitioner's appointment to the new position official and he has continued his service in the position to the present day.

In the interim, however, a controversy has developed between petitioner and the Board which is grounded in what petitioner alleges is an alteration in the status given to his new position by the Board. Specifically, he avers that his

salary for the three-year period has been set at a lower level than that established for the high school principal and that such a salary is improper in the context of a transfer to a "comparable" position. The differences in salary afforded to petitioner and to the high school principal during the three-year period are itemized as follows:

Year	Salary of Petitioner	Salary of High School Principal	Difference
1972-73	$21,622	$21,970	$ 308
1973-74	$23,250	$26,000	$2,750
1974-75	$23,625	$26,750	$3,125
			$6,183

Thus, petitioner's claim herein is for a total sum of $6,183. The basis for the claim must now be examined.

The principal fact in this regard, upon which petitioner relies, is that at the time of his transfer in 1972 he was told by the Superintendent that his new position would be "comparable" to his former one. (Tr. I-10 *et seq.*) Petitioner testified:

> "***In terms of benefits, I was told the salary would be comparable; identical to the high school principal.***" (Tr. I-11a)

In fact, the salary set for the position of principal and the position held by petitioner were initially set at the same amount in 1972. Thereafter, petitioner was awarded a 5.5% increment as a "Director" retroactive to the beginning of the 1972-73 year while the high school principal was given a 7% increment. Subsequently, a negotiated agreement executed between the Board and school administrators in March 1972 (PR-1) established a salary level for petitioner, as a "Director," which was lower than that of principal. Petitioner protested both the differential contained in the percentage increase in 1972-73 and the differential in the negotiated agreement.

He addressed a letter to the Board on July 31, 1973 (P-1) which referenced a vacancy in the position of high school principal and, in effect, emphasized his tenured status. He also questioned the lack of "comparability in salary." (Tr. I-27)

There followed, on September 26, 1973, a letter from the Superintendent of Schools to petitioner which is cited in its entirety as follows:

> "In accord with your wishes and my judgment, I recommended to the Lakewood Board of Education, in their conference meeting of September 17, 1973, a salary adjustment in the amount of 7% of your 1971-72 salary as opposed to the actual adjustment of 5.5% and that adjustment to be added to your 1972-73 salary.

> "In addition, I reported to the Board that for 1973-74, you will be reporting directly to the Superintendent of Schools. I indicated that although the position has been established as a position comparable to that of the High School Principal, I felt it was in the best interests of good human relations to have you report to the Assistant Superintendent for the first year in that assignment.
>
> "I believe that the 1973-74 year arrangement will give us an opportunity to expand the results of the Occupational Education Program to the level that we both would like to see it at." (P-2)

Despite the recommendation, however, the Board never did adjust petitioner's salary for the 1972-73 school year to an amount equivalent to the seven percent increment which was awarded to the high school principal.

The referenced negotiated agreement (PR-1) of March 1974 followed and counsel for petitioner addressed a letter to counsel for the Board which said, *inter alia*, that the Board had

> "***conspired with the Superintendent of Schools to fraudulently attract [petitioner] to another position, inducing him with the representation that it would be equivalent to the high school principal's role, that he would be responsible only to the Superintendent of Schools and that his pay would always be the same as that of a high school principal.***"
>
> (PR-2)

The letter further stated:

> "***We take the point of view that a salary equivalent to that of the high school principal is his as a matter of right and cannot be manipulated away from him by the Board by signing an agreement with the bargaining unit in a different amount.***" (PR-2)

This letter was the subject of a reply dated May 7, 1974 (PR-3) which indicated that the matter would be referred to the Board but subsequent Board action has not contained an accession to petitioner's claims and requests.

There was other testimony at the hearing concerned with petitioner's claims that he accepted a transfer in 1972 on the basis of assurances that the transfer was to a comparable position. The Superintendent of Schools testified that he regarded the responsibilities of Principal and Director of Occupational Education as "generally comparable." (Tr. II-6) He also testified:

> "***I recall indicating that this reassignment would in no way hurt him, and although I can't recall the exact language my intention was to be sure that Mr. Gamvas did not suffer a reduction in salary because of the reassignment. And I believe that I did indicate to Mr. Gamvas that I would recommend that to the Board ***that the Board should be sure that [the] salary for Mr. Gamvas was not reduced nor reduced from the level that he would receive if, in fact, he were the High School Principal for the next year.***" (Tr. II-6-7) (See also Tr. II-16.)

The Superintendent testified that no additional assurances had been offered petitioner with respect to salary subsequent to the 1972-73 school year (Tr. II-8), but on cross-examination he stated that he had not indicated that salary comparability would be limited to that one year. (Tr. II-19)

The President of the Board testified that it was the point of view of the Board that the position to which petitioner was transferred was "comparable" to his position as principal. (Tr. I-71) (See also Tr. I-5)

The Board moved at the hearing of March 12, 1975 to dismiss the Petition of Appeal and its arguments at that time are in essence repeated in its Memorandum of Law. The Board grounds its move for dismissal on two or three principal facts and arguments. It avers that as a matter of law the Petition should be dismissed since petitioner has not suffered a reduction in salary and was transferred to a position of comparable responsibility. Further, the Board maintains that even with the fact of an admittance "***that [petitioner] was probably talked into taking this position, and was given some promises to the effect that his salary would be comparable to that of the high school principal***" such facts would not be a binding commitment of the Board. (Tr. I-77) (Note: The Board does not admit such fact but postulates it, *arguendo*.) Additionally, the Board avers that petitioner is guilty of laches since he accepted the job of Director, received the compensation for it which included the increase of 5.5%, and at the time when the position was again vacant he advanced "***no complaint at that time that the Board had no right to transfer him***." (Tr. I-78) Further, the Board maintains that petitioner "***submitted himself to the jurisdiction of the Lakewood Education Association***" and thus that the negotiated agreement (PR-1) wherein petitioner is listed as a Director is binding with respect to petitioner's status. (See Tr. I-79.)

Petitioner avers that in spite of an initial agreement that his transfer was to a comparable position there has not been comparability since his compensation has been less than that awarded the principal. He further avers that the Board cannot "negotiate away" an agreement concerned with the tenure entitlement of a teaching staff member and maintains it would be "manifestly unfair" to do so. (Petitioner's Memorandum, at p. 3)

The hearing examiner has reviewed all such arguments, testimony and other evidence and concludes that a decision herein must be predicated in the first instance on an examination of the conditions under which petitioner accepted transfer to a "comparable" position in 1972 and on a delineation of the meaning of the term "comparable." The facts requisite to the decision are not in basic dispute and for purposes of clarity are set forth as follows:

1. Petitioner was in 1972 a tenured school principal who could not be removed from such position except as provided in law. *N.J.S.A.* 18A:6-10 *et seq*.

2. He was subject, however, to transfer to a comparable position (*N.J.S.A.* 18A:25-1) and in apparent recognition of this fact and in the context of assurances from the Board's chief administrative officer given with knowledge of the Board (Tr. I-71), he accepted the transfer.

3. The position to which petitioner was transferred was not, in fact, in all respects treated by the Board as one comparable with the one petitioner formerly occupied.

4. The question is whether it must be comparable or whether something less than complete comparability is acceptable as a matter of law.

Other questions of pertinence were formulated at the time of the conference of counsel prior to the hearing as follows:

"***(a) With respect to petitioner's salary:

"1. Was there a binding oral understanding in 1973, an understanding substantiated by the facts of subsequent action by the Board, to the effect that petitioner's salary was thereafter to be equated with that of the high school principal.

"2. If there was, were future boards bound by it?

"3. If there was and if the future boards are not bound does petitioner have residual rights to the position of high school principal or to some other similar position.

"(b) If there was an understanding as recited, *ante*, could such an agreement be terminated by the action of the bargaining representative acting on petitioner's behalf.***"

The hearing examiner finds no substance in the Board's argument that a transfer to a position with comparable responsibility may be made with propriety simply because there is no "reduction" in salary and in spite of the fact that others similarly categorized are afforded dissimilar salary treatment. Such an argument is fallacious on its face, in the context of what petitioner was clearly led to believe with respect to his position transfer and in the context of the Board's own negotiated agreement. (PR-1) This agreement represents an equation of responsibility with salary entitlement and while petitioner received a new title in 1972 his tenure entitlement, in the event his new position was not comparable with his former one, was clearly that of principal. Deceit, whether intentional or inadvertent, cannot be held to alter that fact, and it can hardly be held either that the privilege of tenure conferred on an individual by statute *N.J.S.A.* 18A:28-5 may be bargained away by collective negotiations.

Accordingly, the hearing examiner finds that petitioner has held and now holds an entitlement to a position in the employ of the Board as principal or in a comparable position and has been and is entitled to all the emoluments in the comparable position which are afforded to principals.

Stated more directly with respect to the listed issues, *ante*, the hearing examiner finds that there was an oral agreement in 1972 upon which petitioner was entitled to rely and that future boards were bound by it if petitioner was to

be continued in his new position of Director and that a failure in this regard should and must trigger rights of seniority set forth by the State Board of Education in categories of employment. *N.J.A.C.* 6

The hearing examiner finds no merit in a claim that petitioner's complaint must be set aside at this juncture because he was tardy in advancing it. The facts cited, *ante*, are proof to the contrary, and the hearing examiner recommends that the Commissioner grant petitioner's prayers for relief.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and the exceptions, objections and replies thereto filed by the Board and petitioner. The Board avers that the hearing examiner drew incorrect inferences from the facts before him. Petitioner supports the totality of the report.

The Commissioner concurs with the report of the hearing examiner and rejects an argument that the salary awarded to petitioner during the years 1972-73 through 1974-75 was not a reduction in salary of the kind clearly prohibited by the Tenure Law (*N.J.S.A.* 18A:28) absent the preferment of charges and a determination by the Commissioner that such reduction was warranted. As long as the position of principal in which petitioner held tenure exists, his claim to it, or to a directly comparable position, may not be set aside. The Commissioner so holds.

Such holding is one founded on long precedent and particularly on two decisions of the Commissioner and the Court. *Mabel M. Cassidy v. Board of Education of Jersey City,* 1938 *S.L.D.* 368 (1930), affirmed State Board of Education 372 (1930); *Emma A. MacNeal v. Board of Education of Ocean City*, 1938 *S.L.D.* 374 (1926), affirmed State Board of Education 377 (1927), affirmed New Jersey Supreme Court 377 (1928) Both decisions involved the legality and propriety of transfers of tenured personnel and both were concerned with compensation as one element of comparability. In each decision it was held that a transfer to a position with a lesser salary expectation was not a transfer to a comparable position and was thus *ultra vires* in the context of the tenure laws. In *MacNeal* the Commissioner said:

> "***Had appellant been allowed to continue in her position as grade principal her salary, according to the $100 yearly increase designated for such position by the Board, *would have reached for the year 1926-27* the sum of $2,000, while the salary awarded her on the transfer to a teaching position was fixed at $1,900. Appellant hence suffered an actual decrease in compensation.***" (*Emphasis supplied.*) (at p. 376)

In *Cassidy,* with a different set of facts, but also with an analogy to the matter, *sub judice,* the dicta was similar:

"***As long as the school exists and the *salary schedule* for it continues to be above that of the regular type of school, a teacher cannot be transferred from it at a reduction in salary.***" (*Emphasis supplied.*) (at p. 371)

The analogy is clear herein; namely, if a position continues to exist the tenured holder thereof may not be transferred to a position with lesser expectancy. The Commissioner so holds.

Accordingly, the Commissioner directs the Board of Education of the Township of Lakewood to compensate petitioner for the difference in compensation between his position and the position from which he was transferred retroactive to the date when the disparity commenced and to continue the comparability in the future.

COMMISSIONER OF EDUCATION

May 4, 1976

Lawrence Parachini,

Petitioner,

v.

Board of Education of the City of Union City and Robert Menendez, Hudson County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Sydney I. Turtz, Esq.

For the Respondent, Scipio L. Africano, Esq.

Petitioner, the former Secretary of the Board of Education of the City of Union City, hereinafter "Board," alleges that the Board's action taken April 8, 1974, dismissing petitioner from his position as Secretary effective as of that date was illegal, improper and based upon proscribed reasons.

The Board denies the allegation and asserts that its admitted action was in all respects legal and proper.

At a conference of counsel in this matter, three issues were framed for determination by the Commissioner of Education. One issue is concerned with

the question whether or not petitioner's dismissal was improper by virtue of being for proscribed reasons. It was mutually agreed by the parties that this issue would be held in abeyance pending a determination of the two issues which are essentially questions of law. Accordingly, facts were stipulated and Briefs were submitted by the parties on the legal questions which will be considered, *post.*

An understanding of the issues requires a brief exposition of the relevant material facts which are not in dispute.

The minutes of the Board's regular meeting held December 20, 1972 (Exhibit P-4), disclose that petitioner was appointed acting Secretary of the Board effective December 26, 1972, with his salary payable in twenty-four semimonthly installments. This appointment was effectuated by three affirmative votes, no dissenting votes and two abstentions, with all five Board members present. The minutes of the Board's regular meeting held February 21, 1973 (Exhibit P-6) contain a resolution whereby petitioner was appointed Secretary of the Board effective January 1, 1973 at a salary to be paid in equal semimonthly installments. This resolution was adopted by three affirmative votes, with no dissenting votes and one abstention. Since the minutes also show that no members were absent, it must be concluded that there was one vacancy on the five-member Board at that time. There is no evidence that any subsequent resolution was adopted by the Board regarding petitioner's appointment as Secretary.

On or about November 6, 1973, a referendum was held in the Union City School District, by which the voters elected to change the school district from a Type I district with an appointed Board to a Type II district with an elected Board. This referendum also increased the Board membership from five to nine members. At the annual school election held February 13, 1974, the election of four additional members effectuated this change from a five to nine-member Board.

At a special meeting of the Board held April 8, 1974, the Board adopted the following resolution:

> "RESOLVED that the services of Lawrence Parachini as Secretary of the Board of Education of the City of Union City in the County of Hudson, State of New Jersey, be and they are hereby terminated effective as of April 8, 1974." (Exhibit P-8)

A mailgram was sent to petitioner on the same date, April 8, 1974, signed by the Board President, advising him of the termination of his services effective that date. (Exhibit P-9)

No reasons for such action were conveyed to petitioner by the Board, nor were any reasons stipulated to the Commissioner in the record of the instant matter at this juncture.

Petitioner's first argument is that the Board's action taken February 21, 1973, appointing him Secretary of the Board effective January 1, 1973, was

legal and proper in accordance with *N.J.S.A.* 18A:17-5, which provides as follows:

> "Each secretary shall be appointed by the board, by a recorded roll call majority vote of its full membership, for a term to expire not later than June 30 of the calendar year next succeeding that in which the board shall have been organized, but he shall continue to serve after the expiration of his term until his successor is appointed and qualified.***"

The Board's position is that petitioner was not appointed as Secretary for any term of office which, the Board maintains, is required by *N.J.S.A.* 18A:17-5. The Board argues that at best petitioner served at the pleasure of the Board and was subject to dismissal at any time. The Board also relies upon *N.J.S.A.* 18A:16-1 in support of its position. This statute is quoted in its entirety as follows:

> "Each board of education, subject to the provisions of this title and of any other law, shall employ and may dismiss a secretary or a school business administrator to act as secretary and may employ and dismiss a superintendent of schools, a custodian of school moneys, when and as provided by section 18A:13-14 or 18A:17-31, and such principals, teachers, janitors and other officers and employees, as it shall determine, and fix and alter their compensation and the length of their term of employment."

It is clear that the above-cited statute requires each local board of education to employ a secretary.

The Board also asserts that it must fix a term of office when it appoints a secretary, because each local board is a corporate body whose authority is limited.

The Board acknowledges that at the time of employment of petitioner no formal contract was issued.

Petitioner avers that the Board's formal action did not require inclusion of a specific term because the statute *N.J.S.A.* 18A:17-5 provides that the term shall expire "***not later than June 30 of the calendar year next succeeding that in which the board shall have been organized***."

The Commissioner has examined and carefully considered the stipulated facts, Briefs and respective arguments directed to the controverted dismissal of petitioner, and finds that the matter is fundamentally one of statutory interpretation. The courts have said that:

> "***In every case involving the application of a statute, it is the function of the court to ascertain the intention of the Legislature from the plain meaning of the statute and to apply it to the facts as it finds them. *Carley v. Liberty Hat Mfg. Co.*, 81 *N.J.L.* 502, 507 (*E. & A.* 1910). A clear and unambiguous statute is not open to construction or interpretation, and to do so in a case where not required is to do violence to the doctrine of the

separation of powers. Such a statute is clear in its meaning and no one need look beyond the literal dictates of the words and phrases used for the true intent and purpose in its creation.*** *Watt v. Mayor and Council of the Borough of Franklin,* 21 *N.J.* 277 (1956)

"***Where the wording of a statute is clear and explicit we are not permitted to indulge in any interpretation other than that called for by the express words set forth***." *Duke Power Co. v. Patten,* 20 *N.J.* 42, 49 (1959)

It is clear that a board of education must appoint a secretary as provided by *N.J.S.A.* 18A:16-1. It is also clear that the appointment by a board of its secretary is prescribed by *N.J.S.A.* 18A:17-5. Accordingly, petitioner's appointment was for a term which was to end not later than June 30 following the Board's reorganization.

On April 8, 1974, the Board, by resolution, terminated petitioner from his position as Secretary to the Board. (Exhibit P-8) A mailgram (Exhibit P-9) was sent to petitioner notifying him of the action of the Board.

The Commissioner observes that the removal of the secretary of a board of education is provided for by *N.J.S.A.* 18A:17-1, which reads as follows:

"No secretary, assistant secretary, school business administrator or business manager of a board of education of any school district shall, during the term for which he was appointed, be dismissed or reduced in compensation except for neglect, misbehavior or other offense unless it is otherwise provided in his contract of employment.

There is no evidence entered into the record by the Board that petitioner was accused of neglect, misbehavior or any other offense. To the contrary, the record shows that the first indication received by petitioner of his termination of office was the mailgram (Exhibit P-9) dated April 8, 1974, and signed by John J. Powers, President.

The Commissioner finds that, absent an individual contractual provision for notice of termination and any showing by the Board of neglect, misbehavior or other offenses on the part of petitioner, the action of the Board summarily dismissing him on April 8, 1974, was contrary to law.

Petitioner's plea to the Commissioner that the person appointed to the position of Secretary to the Board at the April 8, 1974 meeting be directed to vacate the position, has no merit. The Board had no legal requirement to re-appoint petitioner, who had not acquired a tenure status in accordance with the provisions of *N.J.S.A.* 18A:17-2, for the succeeding 1974-75 school year. The Commissioner observes that petitioner's term of office as Secretary would have expired on June 30, 1974. *N.J.S.A.* 18A:17-5

The Commissioner finds, and so holds, that petitioner is entitled to receive all salary and emoluments due him from April 8, 1974 to June 30, 1974,

mitigated by such amounts earned by petitioner in substitute employment, if any, during such time period, and hereby directs the Board to make such restitution to petitioner at its next regularly scheduled meeting. In all other respects, the Petition is dismissed.

COMMISSIONER OF EDUCATION

May 5, 1976

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, May 5, 1976

For the Petitioner-Appellee, Sydney I. Turtz, Esq.

For the Respondent-Appellant, Scipio L. Africano, Esq.

The Application for Stay is denied. The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

July 14, 1976
Pending before Superior Court of New Jersey

R. Thomas Jannarone, Jr.,
Milton Cernansky, Michael Del Pozzo,
Charles R. Winders, and David W. Egbert,

Petitioners,

v.

Board of Education of the City of Asbury Park and
Thelma Gaddis Wisner, Jeanette Dunst, Ralph White,
Peter J. Spagnulo and Ralph P. Perone, Monmouth County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION ON MOTION FOR INTERIM RELIEF

Petitioners, five teaching staff members in the employ of the Asbury Park Board of Education, hereinafter "Board," allege that they have tenure in the Asbury Park School District and that an action of the Board on December 13, 1975 to abolish their positions was taken in bad faith. They further allege that the action was procedurally illegal and constitutes a suspension with pay without the preferment of charges as required by the statutory authority. *N.J.S.A.* 18A:6-10 *et seq.* They request immediate interim relief by the Commissioner of Education in the form of reinstatement.

The Board denies any illegality or impropriety in its actions and requests the Commissioner to dismiss the Petition of Appeal as premature or at least to "***stay further proceedings in the matter until the actions of the Board are final with respect to the petitioners and the issues can fairly be drawn." (Board's Answer, at p. 17) The Board also moves for the appointment of a hearing examiner independent of the Division of Controversies and Disputes on the grounds that the Assistant Commissioner in charge of the Division may be subject to call as a witness at the time of a plenary hearing.

An oral argument with respect to petitioners' Motion for Interim Relief and the Board's Motion for an independent hearing examiner was held at the State Department of Education, Trenton, on January 21, 1976 before the Deputy Assistant Commissioner of the Division of Controversies and Disputes. At the oral argument the Federated Boards of Education was joined with the Board in support of the Motion for an independent hearing examiner at the time of plenary hearing, but did not request participation with respect to petitioners' Motion for Interim Relief.

The Petition of Appeal and certain attached documentary evidence not in dispute, the Board's Answer to the Petition of Appeal and the record of the oral argument have been presented directly to the Commissioner for decision on the Motion for Interim Relief. The Commissioner has examined all of this total record and finds it adequate for decision on such Motion. Certain principal facts are not in dispute and are recited as follows:

Each of the five petitioners has been employed as a teaching staff member in a professional capacity by the Board for a period longer than that required for the accrual of a tenured status:

1. Petitioner Jannarone was first appointed by the Board as a principal in 1967 and served continuously as a teaching staff member until July 1975 when his service as Superintendent of Schools was purportedly terminated by the Board and he was transferred to another position. (Note: Such termination is the subject of separate litigation before the Commissioner.)

2. Petitioner Cernansky was first appointed as a teaching staff member by the Board in 1963, and has served continuously in that position and as chairman of the special education department, or as Director of Special Education since that time.

3. Petitioner Del Pozzo was first appointed by the Board as a teacher in 1960, and has served continuously since that time as teacher, guidance counselor, chairman of the guidance department, or as Director of Pupil Personnel Services.

4. Petitioner Winders was first appointed by the Board as a teacher in 1956, and has served continuously since that time as teacher, director of instructional materials services or as City Coordinator of Instructional Materials.

5. Petitioner Egbert was first appointed by the Board as a teacher in 1961, and has served continuously since that time as teacher, director of instructional materials or as federal aid coordinator.

Such service, the Commissioner holds, has clearly earned for each of the petitioners a tenured status as teaching staff members in the Asbury Park School District although a holding with respect to the specific position title of the separate tenured entitlements, the subject of challenge by the Board, is reserved. The decision of the Commissioner in *Michael Keane v. Board of Education of the Flemington-Raritan Regional School District, Hunterdon County,* 1970 *S.L.D.* 162 and the statutory authority of *N.J.S.A.* 18A:28-5 are ample support for such determination.

The statute of reference provides:

> "The services of *all teaching staff members* including all teachers, principals, assistant principals, vice principals, superintendents, assistant superintendents, and all school nurses including school nurse supervisors, head school nurses, chief school nurses, school nurse coordinators, and any other nurse performing school nursing services and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, *serving in any school district* or under any board of education, excepting those who are not the holders of proper certificates in full force and effect, *shall be under tenure* during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the

manner prescribed by subarticle B of article 2 of chapter 6 of this title, *** after employment in such district or by such board for:***

(b) three consecutive academic years, together with employment at the beginning of the next succeeding academic year***."

(Emphasis supplied.)

The decision in *Keane, supra,* held that even though a tenured entitlement to a specific position was in doubt the total service of teaching staff members was required to be counted for tenure purposes at least toward the "general category of teacher." (at p. 164) It was further held in *Keane* that once such tenure had been acquired by a teaching staff member the Board could not set it aside by a dismissal of the staff member, absent a statement of charges and hearing pursuant to the Tenure Employees Hearing Act. (*N.J.S.A.* 18A:6-10 *et seq.*) (at p. 165)

The determination herein is similar; namely that the Board cannot suspend any of the tenured petitioners from active employment either with or without pay except as provided in law. The applicable statutes are *N.J.S.A.* 18A:6-10 *et seq.* which in summary provide that no tenured teaching staff member may be dismissed or reduced in compensation except for cause and then only in the prescribed manner clearly set forth therein. They also provide that prior to such dismissal or reduction there shall be an initial preferment and service of written charges (*N.J.S.A.* 18A:6-11) and that such charges may then be followed by a suspension of "***the person against whom such charge is made, *with or without pay,* pending final determination of the same***." (*N.J.S.A.* 18A:6-14) *(Emphasis supplied.)*

The Board's action of December 13, 1975, which serves as the basis for the instant dispute may now be examined in the context of the facts set forth, *ante,* which are not in dispute, the Commissioner's holding that all five petitioners have tenure at least in the Asbury Park School District, and the statutory mandate summarized *ante.*

On December 13, 1975, the Board met in special meeting and unanimously approved the following resolution:

"WHEREAS, the Board of Education of Asbury Park in the County of Monmouth wishes to provide a more efficient and cost-effective system for the delivery of instructional programs to the pupils in the school district; and

"WHEREAS, the Commissioner of Education and the County Superintendent of Schools have recognized this need; and

"WHEREAS, the Honorable Mayor of the City of Asbury Park has expressed concern relating to the cost-effective operation of the school district, which is his right and privilege, and

"WHEREAS, certain recommendations pertinent to these issues have been made to the Board of Education by recognized consultants and authorities,

"NOW THEREFORE, Be it

RESOLVED that to implement a more cost-effective delivery of instruction the following positions are hereby eliminated:

Assistant to the High School Principal
Director of Special Education
Director of Pupil Personnel Services
Director of Instrumental Materials
Federal Aid Coordinator

and be it further

"RESOLVED that the personnel now occupying such positions are to be, or may be, assigned to appropriate positions commensurate with their qualifications, tenure and certification, fully in compliance with the applicable sections of the New Jersey Administrative Code and being accorded all rights and entitlements provided thereunder. Any terminations necessitated by this reorganization will be accomplished in accordance with the applicable statutory provisions and Administrative Code of New Jersey,

and be it further

"RESOLVED that, where needed, the office of the Secretary in cooperation with the Superintendent of Schools (Chief Administrative Officer) shall create new position codes and titles as is necessary and deemed to be required by the rules,

and be it further

"RESOLVED that, the Superintendent of Schools (Chief Administrative Officer) shall present to the Board at its next regularly scheduled public meeting, a recommendation for position titles, position codes and new salary schedules (Guides) applicable to those personnel affected hereunder;

and be it further

"RESOLVED that the Superintendent of Schools (Chief Administrative Officer) shall immediately commence the implementation of the provisions contained herein, without delay, and shall report to the Board at its next regularly scheduled meeting on the progress,

and be it further

"RESOLVED that this resolution take effect immediately." **(P-1)**

Thereafter, on December 15, 1975, the President of the Board addressed the following letter to each of the five petitioners:

> "I am forwarding to you a copy of the resolution passed at a special meeting of the Board of Education on December 13, 1975.
>
> "You are hereby requested to remove yourself and your personal effects from the school system until notified to return by the Acting Superintendent of Schools.
>
> "This should be done by the close of schools on December 15, 1975.
>
> "All keys and other property of the Board of Education must be turned in to the Board Secretary as of the date stated.
>
> "In the event that it should appear that you have no right to a parallel or lesser position under the regulations or statutes, this is to further advise you that your employment is terminated as of February 20, 1976." (P-2)

It is noted here that neither the resolution (P-1) nor the letter (P-2) make mention of, or authorize, a suspension of petitioners "with pay" although it is agreed by the parties that since December 15, 1975, and to the time of the oral argument on January 21 petitioners had performed no duties for the Board but had been continued on the payroll of the Board.

The Board avers that

> "***[it] knows of no standards of proper school administration which have been adopted by the State Department of Education in its regulations or by the Commissioner or by the Courts which require that when positions are abolished any different notices should be given other than the notices given in this case.***" (Board's Answer, at p. 11)

The Board further avers that its action was taken in good faith, that it cannot be truly assessed since a final administrative chart has not been completed and that, in any event there has as yet been no impact of consequence on petitioners.

Petitioners do not agree. They maintain the Board's action against them was punitive, taken in bad faith and was contrary to both the spirit and letter of the law. Specifically, petitioners cite *Arthur L. Page v. Board of Education of the City of Trenton and Pasquale A. Maffei, Mercer County,* 1973 *S.L.D.* 704 in support of their position.

The Commissioner concurs with petitioners' position. He finds the Board's action of December 13, 1975, and the subsequent letter (P-2) which, although not authorized by the resolution, directed petitioners to remove themselves and their possessions from the school premises to be *ultra vires* and of no effect. Petitioners are clearly tenured employees of the Board. As such they are not subject to suspension, even with pay, except in the manner prescribed in the statutes. While their positions may be abolished in good faith, the abolishment

controverted herein is one which was precipitous and, for whatever motive, an improper exercise of discretion by the Board. The Commissioner so holds.

Further, on the basis of the Board's resolution which states, *inter alia,* that the action was prompted by "cost" considerations, the Commissioner holds that the action was not taken in good faith, since as in *Page, supra,* there was no cost factor known to the Board at the time of its controverted action with respect to petitioners that was not known when their salaries were established for the year. Their expectation of employment is required to be realized. As the Commissioner said in *Page:*

***

> "1. The authority of a local board of education to abolish positions of employment is statutory.
>
> "2. Such authority is not absolute, however, and may not, on all occasions and under all circumstances, be exercised in an arbitrary manner in complete disregard of those rights to timely notice with respect to future employment which are afforded to non-tenured teachers by specific statutory authority; and, the Commissioner holds, to tenured employees by indirection.
>
> "In the instant matter, the facts may be assessed in the context of those conclusions and within the parameters of law.
>
> "The Commissioner has so assessed them and determines that the action of the Board herein controverted cannot be sustained on the basis of budgetary considerations (R-1), since in June 1973, the Board knew of its budgetary limitations and, despite this knowledge, in effect gave sanction to petitioner's position for another year and employed him for it at a salary commensurate with the tasks imposed. Thus, the later action of the Board in August 1973, to abolish the position, was patently frivolous, since the stated reason for the abolishment (R-1), if valid in fact, was as valid in June as it was in August.
>
> "It follows, then, that the Commissioner determines that the action taken herein by the Board was not in 'good faith.' Additionally, however, the Commissioner holds that even a contrary opinion in this specific regard would not obviate the harm caused by the precipitate and untimely notice which petitioner received that his position would be abolished. In the circumstances, the Commissioner holds he was entitled to a more considerate treatment (the Board could expect no less than a sixty-day notice if petitioner had resigned (*N.J.S.A.* 18A:28-8); and, therefore, should be made whole at this juncture on these grounds alone.***"
>
> (at p. 709)

See also *Deborah Shaner v. Board of Education of Gloucester City*, 1938 *S.L.D.* 542 (1932), aff'd State Board of Education 1938 *S.L.D.* 545 (1933), wherein the Commissioner said:

"***It is entirely within the discretion of a board of education whether a high school principal should have any administrative assistants. The efficiency of the high school without an assistant principal is not an issue in this case. Less efficiency at reduced cost is permissible in situations of this kind. It may be necessary to reduce the cost of school government in many districts and boards of education should be permitted to reorganize their school systems to secure more economical administration; *but good faith should be evident in all such instances.**** (*Emphasis supplied.*) (at p. 543)

Accordingly, for the reasons set forth and particularly for the reason that the Commissioner finds no statutory authority for a suspension of tenured employees with pay without the preferment of charges against them, the Commissioner directs the Board to restore petitioners forthwith, or within one week of receipt of this decision, to their former positions of employment or to positions appropriate to their tenured entitlement pursuant to seniority rules of the State Board of Education. *N.J.A.C.* 6

A decision with respect to the need for plenary hearing in this matter is reserved. The Commissioner retains jurisdiction.

COMMISSIONER OF EDUCATION

February 3, 1976

R. Thomas Jannarone, Jr.,

Petitioner,

v.

Board of Education of the City of Asbury Park, Thelma Gaddis Wisner, Jeannette Dunst, Dr. Peter J. Spagnuolo, Ralph W. White and Dr. Ralph A. Perone, Monmouth County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Zager, Fuchs, Leckstein & Kauff (Abraham J. Zager, Esq., of Counsel)

For the Respondent, Joseph N. Dempsey, Esq. and Morgan, Melhuish, Monaghan, McCoid & Spielvogel (John Scott Donington, Esq., of Counsel)

Petitioner, Superintendent of Schools in the employ of the Asbury Park Board of Education, hereinafter "Board," until July 16, 1975, avers he had accrued tenure in such position and that the Board could not, as it resolved to

do on the evening of that day, remove him from it except in the manner set forth in law. *N.J.S.A.* 18A:6-10 *et seq.* He requests a restoration to the position and a restraint against the Board from any interference in the discharge of his duties. He further requests an award of counsel fees and costs and the imposition of certain punitive damages against the Board as a corporate entity and against its individual members. The Board denies that petitioner had accrued a tenured status in its employ and by affidavit of one Board member, avers that its controverted action of July 16, 1975, was a reassignment "***to a position in which he has tenure.***" (Affidavit of Peter J. Spagnuolo, at p. 6) (Note: No formal Answer to this Petition has been filed although the Board's position with respect to it is set forth in affidavits submitted at the time of oral argument on a Motion for Interim Relief.) (Tr. I)

A hearing in this matter with respect to a Motion for relief *pendente lite* brought by petitioner was conducted on July 29, 1975 at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner of Education. At this hearing, however, the hearing examiner determined that such relief was inappropriate and that a hearing on the merits of petitioner's complaint was required. (Tr. on Motion-45) Subsequently a hearing was conducted by the hearing examiner on September 17, 1975, and continued on September 23, October 29, November 5 and 6, and December 17, 1975 at the office of the Monmouth County Superintendent of Schools, Freehold. The report of the hearing examiner is as follows:

Petitioner was first employed as a teaching staff member by the Board in 1967. His initial appointment for the 1967-68 academic year was that of vice-principal although one month later he was assigned to a principal's position. He served in this latter position until July 1, 1969. On that date he began service as Federal Aid Coordinator and, thereafter, on September 1, 1970, he assumed new responsibility as Administrative Assistant to the Superintendent of Schools. (Tr. IV-117) Petitioner continued in this position of Administrative Assistant to the Superintendent (Dr. Donald J. Smith) until June 20, 1973. On that date the Board met in regular session and received the following letter from Dr. Smith:

> "As you know, I have been offered a position with the American Dependent Schools in Germany. Because of the many educational and cultural experiences such a position will provide my entire family, I have decided to accept the position.
>
> "Rather than resign as Superintendent, I request that the Board of Education consider granting me a one year leave of absence to begin October 1, 1973. If a leave is granted, I will certainly notify the Board as early in 1974 as possible concerning my future status.
>
> "During the past three years I have worked closely with the Board in what has been considered by many to be one of the most challenging periods in the history of the Asbury Park School District. I appreciate the support and the direction the Board has provided me during my years as Superintendent. Thank you all for the many personal and professional courtesies you have extended to me." (P-21, at p.27)

Subsequently, during that same meeting, the Board took the following actions of pertinence to the instant adjudication:

> *"Appointment Superintendent, 1973-74*
>
> "It was moved by Mr. White and seconded by Mrs. Dunst:
>
> 'That the Board of Education renew the contract of Dr. Donald J. Smith, Superintendent of Schools, for the year beginning July 1, 1973 and ending June 30, 1974 at the rate of $30,000.00 per annum.'
>
> "Upon roll call the motion was unanimously carried.
>
> *"Leave of Absence – Dr. Smith*
>
> "It was moved by Mr. White and seconded by Mrs. Dunst:
>
> 'That the Board of Education grant Dr. Donald J. Smith, a one year leave of absence without pay beginning October 1, 1973.'
>
> "Upon roll call the motion was unanimously carried.
>
> *"Appointment – Acting Superintendent:*
>
> "It was moved by Mrs. Dunst and seconded by Mrs. Gaddis:
>
> 'That the Board of Education appoint Mr. R. Thomas Jannarone as Acting Superintendent of Schools beginning October 1, 1973 and ending June 30, 1974 and that Mr. Jannarone be authorized to act in the capacity of superintendent prior to that date during the absence of the Superintendent.'***" (P-21, at p. 28)

It is noted here that Dr. Smith's actual physical leave from an active duty status as an employee of the Board began on July 24, 1973, since on that date he left the United States for his post of duty in Germany. From that date forward to the date of July 16, 1975, a period eight days less than two calendar years, it is agreed that petitioner performed all the duties of the position Superintendent of Schools, albeit in an "acting" capacity, until Dr. Smith formally resigned in May 1974. Subsequent thereto on July 1, 1974, petitioner received formal appointment as Superintendent. (Tr. IV-118)

On July 16, 1975, however, the Board resolved to terminate petitioner's employment as Superintendent and reassigned him to a vice-principal's position. The instant Petition of Appeal was subsequently filed.

It is petitioner's contention that the Board's action to terminate his employment as Superintendent was *ultra vires* since, he avers, he held tenure in the district as Superintendent and could not be summarily removed. He cites in particular *N.J.S.A.* 18A:28-6 in support of his avowal. The statute is recited in its entirety as follows:

"Any such teaching staff member under tenure or eligible to obtain tenure under this chapter, who is transferred or promoted with his consent to another position covered by this chapter on or after July 1, 1962, shall not obtain tenure in the new position until after:

"(a) the expiration of a period of employment of two consecutive calendar years in the new position unless a shorter period is fixed by the employing board for such purpose; or

"(b) employment for two academic years in the new position together with employment in the new position at the beginning of the next succeeding academic year; or

"(c) employment in the new position within a period of any three consecutive academic years, for the equivalent of more than two academic years; provided that the period of employment in such new position shall be included in determining the tenure and seniority rights in the former position held by such teaching staff member, and in the event the employment in such new position is terminated before tenure is obtained therein, if he then has tenure in the district or under said board of education, such teaching staff member shall be returned to his former position at the salary which he would have received had the transfer or promotion not occurred together with any increase to which he would have been entitled during the period of such transfer or promotion."

Further, petitioner avers that during all of the period June 21, 1973 to July 16, 1975, he performed all of the duties of Superintendent and that such service is in excess of that required by the statutory prescription of "two calendar years" for the accrual of tenure in a "new" position. At the hearing on Motion of July 29, 1975, the hearing examiner assessed such contentions and facts and determined that the prime requisite for an ultimate determination of petitioner's status was a plenary hearing concerned with the duties actually performed by petitioner during the period June 21, 1973 to July 24, 1973. Thus, the hearing was principally concerned with this period.

It was agreed at the conference of counsel held on July 29, 1975, that the principal issues for determination are as follows:

1. Does petitioner's service in the position of Acting Superintendent of Schools entitle him to the status of a tenured teaching staff member in the employ of the Board?

2. May the service of June 21 to July 24, 1973 be counted towards such accrual?

3. May the service forward from that latter date also be added?

The latter question is clearly a matter of law in the context of petitioner's performance of the duties of the office. The primary question which requires both findings of fact and conclusions of law is concerned with the period June 21 to July 24, 1973, and it is this period which will now be examined.

A principal witness at the hearing, Dr. Donald Smith, returned from Germany to the United States and testified on September 23, 1975. (Tr. II) His testimony was, in general terms, a recital of duties performed by him as Superintendent prior to June 20, 1973, and subsequent thereto until he left the United States on July 24, 1973.

He testified that he had discussed his pending overseas assignment and resignation as an employee of the Board with Board members during the first two weeks of June 1973 (Tr. II-24), although at that time the specific date of his departure was unknown. (Tr. II-43) Nevertheless he said he thought he would be leaving for Europe "around the middle of July." (Tr. II-43) Dr. Smith testified that he had prepared the agenda for the meeting of the Board on June 20, 1973 (Tr. II-25), and from that time forward had been in his office on "a day to day basis" until June 29. (Tr. II-106) He also testified that subsequent to that latter date he had been "in and about" the schools and his office although he "***took off three days at various times for packing and one-half day on another occasion for necessary preparation***" and "***also took off several or part of other days for attention to personal business***". (Tr. II-105) Dr. Smith testified that he viewed the total period June 21 to July 24, 1973, as a "transition" period during which he maintained his authority as Superintendent while at the same time he turned over increasing responsibility to petitioner. (Tr. II-33, 40, 90, 101)

His testimony with respect to this period is excerpted in pertinent part as follows:

> "***I was still the Superintendent of Schools and was to provide the best transition for Mr. Jannarone***." (Tr. II-31)

> "***[I]n effect then the key decisions were made by Mr. Jannarone and key recommendations were made by Mr. Jannarone.***" (Tr. II-40)

Dr. Smith also testified that he had reviewed and approved the agenda formulated by petitioner prior to the meeting of the Board on July 18, 1973 (Tr. II-26, 40), and was, in fact, present for the meeting. (See also Tr. II-45, 89, 111, 114, 120.) He testified that he had not discussed items with the Board at the meeting, although such testimony was later amended to state that he had made one "remark" concerned with an insurance contract. (Tr. II-49,99)

Dr. Smith further testified that the transistion period petitioner had:

1. processed applications for employment, interviewed prospective employees and made recommendations for employment; (Tr. II-29-31)

2. carried on duties of the Superintendent while he (Smith) was out of the district; (Tr. II-44)

3. prepared and presented the agenda to the Board at the meeting of July 18, 1973. (Tr. II-45)

Cross-examination elicited testimony from Dr. Smith that some items marked for action at the July 18, 1973 meeting had been the result of work performed by him, and he expressed this further view of his role during the transition period:

> "***I saw myself as a resource person to him in his dealings with the district.***" (Tr. II-101)

He also testified:

> "***I would say that the material that he [Jannarone]] required to function as Superintendent of Schools were probably in his hands by the first of July.***" (Tr. II-103)

Petitioner testified that in 1973 he held the school administrator's certificate required for service as a superintendent of schools (Tr. IV-118; P-22), and that during the period June 21 to July 24, 1973, he "***performed the duties as the chief school administrator in the district***." (Tr. IV-118) His testimony was, in general, a recital of duties he had performed during that period and he said:

> "***There was no question in my mind that I had full authority and responsibility***." (Tr. IV-120)

Petitioner testified that such responsibility began on June 21, 1973, when Dr. Smith had begun referral to him of a series of documents needing attention and continued throughout the period to July 18, 1973. (Tr. IV-129) (See P-21, 25.) He testified that he had:

1. approved vacation schedules; (Tr. IV-125)

2. made recommendations to the Board for position appointments; (Tr. IV-127)

3. processed applications for positions; (Tr. V-15-16)

4. attended the Board's caucus meeting in July 1973 but that Dr. Smith was not present; (Tr. IV-137)

5. prepared and presented the agenda for the Board meeting of July 18, 1973. (Tr. IV-133; Tr. V-17)

He further testified that such assumption of responsibility for "day to day" operation of the school system had been taken "with the full knowledge and understanding of the Board of Education." (Tr. V-36) Such testimony he indicated was grounded in the Board's "two part resolution of June 20th." (Tr. V-36, 39; P-21) Petitioner did testify on cross-examination that Dr. Smith had signed in July 1973 the Annual Report of Educational Statistics and the Enrollment Statistics reports (R-1; R-2) pertinent to the 1972-73 academic year. (Tr. V-28-29)

Other testimony at the hearing was elicited from school administrators and members of the Board who were serving on the Board in 1973.

The then President of the Board testified that subsequent to the June 20, 1973 meeting of the Board he discussed school affairs with petitioner and not Dr. Smith. (Tr. IV-8) He said that petitioner had been vested with authority to perform the duties of Superintendent during the period June 21 to July 18, 1973, although Dr. Smith still held the title. (Tr. IV-15) On cross-examination the following testimony was elicited:

***

Q. "[I]t was your understanding, that after June 20, 1973 Don Smith was essentially on vacation, is that right?

A. "That is correct, to the best of my knowledge.

Q. "And that Tom Jannarone was essentially taking his place?

A. "Yes, sir.***" (Tr. IV-18-19)

School officials testified that during the period June 21 to July 18, 1973, they had referred matters of school business to petitioner and talked with him about them. (See Tr. IV-17-18, 19, 35, 39, 63, 65, 76.) The private secretary to the Superintendent testified that petitioner's role had changed by July 1, 1973. (Tr. IV-65) She said:

> "Mr. Jannarone***by that time, had taken over the day to day routine work and was acting in the capacity of acting Superintendent. Dr. Smith had begun to take a back seat and refer matters to Mr. Jannarone. Dr. Smith was occupied with not only leaving the office, but leaving the country as well, and most of the time on the days that he was in the office, his days were taken up more or less with***taking care of personal matters in preparation for leaving the country." (Tr. IV-67-68)

The Board Secretary testified that petitioner had been paid as Administrative Assistant to the Superintendent during the period June 21 to July 18, 1973 (Tr. IV-95), while Dr. Smith's salary remained that of the Superintendent. (Tr. IV-92) He further testified that petitioner had on July 18, 1973, occupied the seat usually used by the Superintendent in Board meetings and had presented the agenda. (Tr. IV-78, 105, 107) He also testified that Dr. Smith had spoken on

the insurance matter of reference, *ante,* at the July 18 meeting and that he, as Board Secretary, had considered that Dr. Smith had spoken as Superintendent. (Tr. IV-101)

At the conclusion of petitioner's presentation of evidence on November 6, 1975, the hearing examiner indicated the nature of the defense which was required of the Board. (Tr. V-52 *et seq.*) He said that in his judgment the evidence was a *prima facie* showing that petitioner did in fact perform substantially all of the duties of Superintendent in the period of June 21 to July 18, 1973, while at the same time the person with the title, Dr. Smith, was still on the scene, in his office on occasion, and present at the Board meeting of July 18, 1973. (Tr. V-53) The hearing examiner also said that this view of the evidence was a stronger one with respect to the period July 1 to 18, 1973. (Tr. V-54) Thus, the defense by the Board was specifically addressed to such view.

Seven witnesses were called by the Board to testify at the hearing of December 17, 1975. (Tr. VI) Testimony was elicited from an elementary supervisor, principal, secretary, two members of the Board, a teacher and the Board Secretary.

One Board member, Mrs. Wisner, testified that it was her understanding that in the period June 21 to July 18, 1973, Dr. Smith continued as Superintendent since she understood only one person could be paid for the work of the office (Tr. VI-60), and that petitioner had been supervised or directed in his work by Dr. Smith. (Tr. VI-60, 64) She testified that petitioner had presented agenda items to the Board at the Board's caucus meeting in July 1973. (Tr. VI-77) She also testified that such presentation and/or other work assignments might have been expected to be performed by petitioner during the time of a vacation for Dr. Smith. (Tr. VI-80)

A second Board member testified that it was his understanding that petitioner would continue as an assistant to Dr. Smith during the period June 21 to July 18, 1973. He characterized the period as one of "apprenticeship" for petitioner (Tr. VI-83) and testified that Dr. Smith had continued to perform duties as Superintendent. (Tr. VI-92) On cross-examination he testified that his knowledge with respect to the performance of "duties" was not based on visits to the school offices or schools but on a statement Dr. Smith had made to him directly. (Tr. VI-93)

A middle school principal testified he considered Dr. Smith to be Superintendent during the period June 21 to July 18, 1973 (Tr. VI-17), but that he was told by Dr. Smith in July 1973 to discuss a staff appointment with petitioner. (Tr. VI-20) He further testified that he was to discuss "day to day" operation of his school with petitioner. (Tr. VI-21)

Other witnesses for the Board also testified that they had regarded Dr. Smith as Superintendent during the period June 21 to July 18, 1973 (Tr. VI-25) and/or addressed correspondence or copies of correspondence to him as Superintendent during that time. (Tr. VI-10, 17) (See also R-15-20.) A secretary testified that Dr. Smith had signed the educational reports R-1 and R-2 in her

presence on June 30 and July 10, 1973. (Tr. VI-34, 36) A teacher who served as vice-president of the local teachers association testified she had presented Dr. Smith with an engraved gift in his office during the month of July 1973. (Tr. VI-50)

Such witnesses for the Board and witnesses for petitioner authenticated a total of forty-seven exhibits in evidence. These exhibits are, in effect, a reflection of the testimony reported, *ante.* Petitioner's exhibits indicate that petitioner had received a number of document referrals from Dr. Smith subsequent to the June 20, 1973 meeting of the Board and had otherwise performed duties as Superintendent or had been regarded as Superintendent by employees of the school district. The Board's exhibits indicate that Dr. Smith had also performed some of such duties and had been regarded by other employees as the person continuing to hold the office. The Board Secretary and others had continued to send copies of correspondence to Dr. Smith subsequent to June 20, 1973. (R-12, 17, 18, 19, 20) Dr. Smith had in fact performed follow-up duties subsequent to the Board meeting of June 20, 1973. (R-9, 10, 11, 16)

This concludes a summary recital of the testimony and evidence at the hearing. Subsequent thereto counsel filed Briefs.

Petitioner avers that the facts elicited at the hearing are clear evidence that during the period June 20 to July 18, 1973, and thereafter, petitioner performed all the duties of the office of Superintendent and had accrued a tenured right to the position pursuant to the statutory prescription. *N.J.S.A.* 18A:28-6 He advances three arguments in support of such avowal. These arguments are that: (1) tenure accrues when the statutory period of service has been completed; (2) the criteria for decision is concerned with the duties performed rather than the assigned title of the position; and (3) the presence of Dr. Smith during the period June 20 to July 18, 1973 "***does not render that period of time ineligible in tolling the petitioner's tenure in the position of Superintendent of Schools." (Petitioner's Brief, at p. 15) In support of such arguments petitioner cites a number of decisions of the Commissioner and the courts. *Cornelius T. McGlynn v. Board of Education of the Township of Lumberton, Burlington County,* 1972 *S.L.D.* 28, 33; *Alfred W. Freeland v. Board of Education of Scotch Plains-Fanwood Regional School District, Union County,* 1972 *S.L.D.* 53, aff'd State Board of Education 58, aff'd New Jersey Superior Court 1975 *S.L.D.* 768; *Robert F.X. Van Wagner v. Board of Education of the Borough of Roselle, Union County,* 1973 *S.L.D.* 488; *Ann A. Quinlan v. Board of Education of the Township of North Bergen, Hudson County*, 1959-60 *S.L.D.* 113; *Juanita Zielenski v. Board of Education of the Town of Guttenberg, Hudson County,* 1970 *S.L.D.* 202, reversed State Board of Education 1971 *S.L.D.* 664, aff'd New Jersey Superior Court 1972 *S.L.D.* 692; *Weehawken Education Association and John J. Corbett v. Board of Education of the Town of Weekhawken, Hudson County,* 1975 *S.L.D.* 505, aff'd State Board of Education 512

The Board, on the other hand, avers that Dr. Smith was in fact the Superintendent during the period June 20 to July 18, 1973, and "did function in that position up until his departure on July 24, 1973." (Board's Brief, at p. 3)

Further, the Board argues that the position of Superintendent is a unique one which may be filled by only one person at a time and that such person must be appointed to serve in the position with the knowledge and at the direction of the Board. In support of its position the Board cites: *Rall v. Board of Education of the City of Bayonne,* 104 *N.J. Super.* 236, (*App. Div.* 1969), 54 *N.J.* 372; *Van Wagner v. Roselle, supra;* and *Herbert Buehler v. Board of Education of the Township of Ocean, Monmouth County,* 1970 *S.L.D.* 436, aff'd State Board of Education 1972 *S.L.D.* 660; aff'd New Jersey Superior Court 1972 *S.L.D.* 664. In a Reply Brief the Board also avers that, despite petitioner's service of approximately eight years as principal and administrative assistant in the employ of the Board, he did not have tenure in the Asbury Park district since "***at no time did he serve continuously at one job for a three year period." (Board's Supplement to Trial Brief, at p. 1)

The hearing examiner finds this latter contention incompatible with the clear evidence. From 1967 forward through 1975 petitioner served as a teaching staff member in the employ of the Board in a series of responsible administrative positions, contradictory to the Board's own avowal at the time of hearing on the Motion. (Affidavit of Peter J. Spagnuolo, at p. 6) Further, the contention clearly ignores principles set forth in *Michael J. Keane v. Board of Education of the Flemington-Raritan Regional School District, Hunterdon County,* 1970 *S.L.D.* 162 wherein the Commissioner held that tenure in a school district may accrue even though tenure in a specific position may be lacking. Accordingly, the instant matter requires a finding of fact concerned with petitioner's employment status in the period June 21, 1973 to July 24, 1973.

The hearing examiner has reviewed the evidence concerned with this period and sets forth the following findings of fact and conclusions of law.

The date of June 20, 1973 stands herein as the date of administrative change in the Asbury Park School District. Prior to that date, and at the meeting held that evening, Dr. Smith performed all the duties of Superintendent and was the chief executive officer of the school district. On the evening of June 20, 1973, however, the Board took significant action. It:

1. renewed the contract of Dr. Smith for the 1973-74 academic year;

2. granted him a one year leave of absence beginning October 1, 1973;

3. appointed petitioner as Acting Superintendent of Schools effective October 1, 1973;

4. authorized petitioner "***to act in the *capacity of Superintendent* prior to that date during the absence of the Superintendent.***" (P-21) *(Emphasis supplied.)*

Thus, it is clear that petitioner had authority to act as Superintendent subsequent to June 20, 1973 in the "absence" of Dr. Smith. It is equally clear that at least subsequent to July 1, 1973, petitioner did in fact so act as Superintendent and was required to perform the day to day duties of the office since Dr. Smith was engaged by necessity in the details of leaving not only the district of Asbury Park but the country. The hearing examiner so finds.

Such finding is grounded in substantial evidence:

1. From the testimony of Dr. Smith reported, *ante,* that by July 1, 1973, petitioner had the materials he needed to perform as Superintendent and that he (petitioner) made the "key decisions," interviewed candidates, formulated the Board meeting agenda, met with the County Superintendent, etc.; (Tr. II-29) (See also P-7.)

2. From the testimony of the secretary to the Superintendent reported, *ante*, that by July 1, 1973, petitioner had "taken over" the work of the Superintendent; (Tr. IV-65)

3. From the testimony of petitioner and a Board member, Mrs. Wisner, that petitioner alone was present with the Board at the Board's caucus meeting prior to the regular July 1973 meeting; (Tr. IV-137; Tr-VI-77)

4. From the testimony of the President of the Board during that time that, subsequent to June 20, 1973, he discussed school matters with petitioner and not with Dr. Smith; (Tr. IV-8)

5. From petitioner's own testimony which is nowhere refuted in its essential details that, subsequent to June 20, 1973, he had assumed responsibility for the "day to day" operation of the school system; (Tr. V-36)

6. From the documentary record. (P-3, 7, 8, 16, 19, 23, 28; R-3, 4)

The hearing examiner concludes that such evidence is indicative of what petitioner "did" during the period in question, although the specific finding that he performed duties as Acting Superintendent of Schools is limited to the period which began on July 1, 1973. Prior to that date, Dr. Smith reported regularly to his office, performed administrative duties and essentially terminated his responsibility. Subsequent thereto his role clearly changed and the correctness of such a statement is not tempered by the fact that he routinely signed two reports (R-1, 2) in July 1973, applicable to the 1972-73 academic year, nor that he made a comment at the meeting of July 18, 1973. While Dr. Smith still held the title, petitioner was acting in his stead.

May such action be counted toward a tenured accrual as Superintendent by petitioner even though the person who officially held the title of Superintendent was still in his office on occasion and present for the Board meeting of July 18, 1973? Have the precise conditions necessary for such an accrual been met?

In assessing such questions the hearing examiner finds little case law directly on the point but much of peripheral importance. In particular there are the citations of petitioner and the Board. Additionally, there are the decisions of the Courts in *Zimmerman v. Board of Education of Newark,* 38 *N.J. 65* (1962) and *Canfield v. Board of Education of Pine Hill,* 97 *N.J. Super. 483 (App. Div.* 1967), rev'd 51 *N.J. 400* (1968).

In *Zimmerman, supra,* the Court was also concerned with a claim that tenure had accrued to a teaching staff member, although such claim was pursuant to *R.S.* 18: 13-16 (now *N.J.S.A.* 18A:28-5), and it found a necessity to explore the philosophical background of the tenure laws and to arrive at a definition for "employment." The Court was also called upon to assess service in a position in the context of stated contractual terms. The Court quoted *Cammarata v. Essex County Park Commission,* 26 *N.J.* 404,412 (1958) in setting forth its philosophy with respect to the intent of the tenure laws:

> "***'It is difficult to evaluate the character, industry, personality, and responsibility of an applicant from his performance on a written examination or through cursory personal interviews. Knowledge and intelligence do not alone [suffice] ***. The crucial test of his fitness is how he fares on the job from day to day when suddenly confronted by situations demanding a breadth of resources and diplomacy. Many intangible qualities must be taken into account, and, since the lack of them may not constitute good cause for dismissal under a tenure statute, the [employer] *** is entitled to a period of preliminary scrutiny, during which the protection of tenure does not apply, in order that it may make pragmatically informed and unrestricted decisions as to an applicant's suitability.'***" (38 *N.J.* at 73)

The Court's interpretation of the word "employment" was one founded in a concrete factual example:

> "***Our former Supreme Court had occasion to interpret the word 'employment' contained in *N.J.S.A.* 18:13-16 under similar circumstances and held contrary to the position urged by Zimmerman. *Carroll v. State Board of Education,* 8 *N.J. Misc.* 859*** (*Sup. Ct.* 1930). There a teacher signed a one year teaching contract (and the Board approved it) on July 15, 1926, to begin teaching on September 7, 1926. Two subsequent annual teaching contracts were also entered into and each contained a provision that either party could terminate the agreement upon 30 days' notice. The board served notice on July 15, 1929, that it would terminate the relationship as of August 15, 1929. The court held that 'employment' had not originally commenced until September 7, 1926, and, therefore, the teacher had not been employed for three calendar years. Compare *Chalmers v. State Board of Education,* 11 *N.J. Misc.* 781*** (*Sup. Ct.* 1933).
>
> "We agree with this interpretation. Consequently, appellant was not employed for three calendar years prior to June 30, 1955, within the meaning of the statute. It follows that he is not entitled to tenure on that theory.***" (*Id.*, at p. 74)

Thus, in *Zimmerman, supra,* the Court held that service in a position, actual work experience in the performance of day to day duties, was required for a tenured accrual and that indeed the statutory use of the word "employment" was equated with such service.

While *Zimmerman, supra,* has been superseded in part on other grounds (*i.e.,* the affording of reasons to nontenured teachers who are refused a new contract) by *Donaldson v. Board of Education of Wildwood,* 65 *N.J.* 236 (1974), the dicta contained in *Zimmerman* with respect to the tenure laws would appear as valid today as in 1962. The decision in *Canfield, supra,* was a reinforcement of the principles in *Zimmerman.* The Commissioner's decisions in *Zielenski, McGlynn* and *Freeland, supra,* comport with these principles and hold that "employment," as so defined, for the applicable statutory period, if authorized by local boards *(Buehler, supra)*, entitles an employee to tenure.

In *Van Wagner, supra,* the Commissioner was concerned, as herein, with the service of a teaching staff member as Acting Superintendent, although unlike the instant matter, there was no title "Superintendent" on the scene. The factual situation and the conclusions were set forth by the Commissioner as follows:

> "1. From July 1, 1970 to May 1, 1973 – a period of two years and ten months – petitioner served continuously in the performance of duties as Superintendent of Schools.
>
> "2. During that period, the Board had contracted with petitioner as 'Superintendent of Schools' on two different occasions for the years 1971-72 and 1972-73.
>
> "Such facts, in the Commissioner's judgment, attest to the conclusion that petitioner's year of service as 'Acting Superintendent' during school year 1970-71 had been adjudged satisfactory. Accordingly, in the Commissioner's judgment, it is fallacious for the Board to argue that one year should be excised from petitioner's credited service accrual as Superintendent because the title the Board gave him during that year was not that of Superintendent of Schools.
>
> '***Where the title of any employment is not properly descriptive of the duties performed, the holder thereof shall be placed in a category in accordance with duties performed and not by title.***'
>
> "*N.J.A.C.* 6:3-1.10(f); *August Lascari v. Board of Education of Lodi, Bergen County,* 1954-55 *S.L.D.* 83, aff'd State Board of Education October 11, 1954, aff'd. 36 *N.J. Super.* 426 (*App. Div.* 1955)***"
>
> (at p. 494)

In he instant matter, the facts may be assessed in such a context and the assessment leads the hearing examiner to conclude that petitioner has earned a tenured entitlement as Superintendent. His service in the performance of duties of the office was continuous from July 1, 1973 to July 16, 1975, a period in excess of that required of tenured employees in a new position. (*N.J.S.A.* 18A:28-6) Such service was authorized originally by specific Board resolution which designated him as Acting Superintendent in the absence of the Superintendent. (P-21) The Superintendent, in practical effect, was absent from active supervision of the day to day administration of the district during the period July 1 to 18, 1973. Petitioner's service subsequent to that latter date was clearly that of a Superintendent or of a person acting in that capacity.

Finally, the hearing examiner finds little merit in a citation of *Rall, supra,* in support of an argument that the position of Superintendent may be filled by only one person at a time and that in July 1973, Dr. Smith held that title. We are not engaged here in a contest between two men for the entitlement to hold the same position but simply with the claims of one that for an initial period he performed all the important duties of the office and should be entitled to add the time of this period to a subsequent period of almost two years for a tenured accrual. The findings and conclusion of the hearing examiner are that he did and that he should be so entitled.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and the exceptions thereto filed by the Board. Such exceptions emphasize the testimony of Donald Smith that he considered himself to be Superintendent of Schools until he left the United States for his post in Europe on July 24, 1973 (Tr. II-100, 109-111), and that he functioned in this capacity at the Board meeting of July 18, 1973, and on other occasions during that month. The Board avers that the finding that Dr. Smith had not discussed items at that Board meeting was "***taken out of context as it was clearly the evidence that Smith would have discussed items if he disagreed with Jannarone.***" (Board's Exceptions, at p. 2) The Board also states that despite the resolution of the Board adopted on June 20, 1973 (P-21), it is "far from clear" that petitioner was authorized to act as Superintendent prior to July 24, 1973. It buttresses this position by emphasizing testimony of two Board members who stated they believed Dr. Smith to have been Superintendent during the period June 20 to July 24, 1973, and had not intended that petitioner act in such capacity prior to the time that Dr. Smith left the district. The Board further maintains that the hearing examiner "conspicuously absent[s]" the testimony of a school secretary that Dr. Smith signed a document on July 10, 1973, and that the hearing examiner paid "little attention" to or failed to consider the decisions of the Commissioner and the courts in *Buehler, supra,* and *Rall, supra.* (Board's Exceptions, at pp. 4-5) It further states that the finding that tenure accrued to petitioner because of the service he rendered

> "***is in essence stating that from June 20, 1973 to July 24, 1973 the Asbury Park Board of Education had two Superintendents of School. (sic) This is not only improbable and impossible it is illegal.***' (Board's Exceptions, at p. 5)

Thus, it is the Board's position that there was evidence that in the period June 20 to July 24, 1973, Dr. Smith was Superintendent, was regarded as such by some members of the Board and others and did in fact perform duties of the office. In the Board's view the totality of the evidence supports its position that petitioner should not be permitted to add his service during the period in question to latter service in order to gain a tenured status as Superintendent.

The Commissioner does not agree and concurs instead with the findings of fact and conclusions of law as expressed by the hearing examiner.

The statutory prescription for the establishment of the office of superintendent of schools is contained in *N.J.S.A.* 18A:17-15 *et seq.* and the general powers and duties of the office are set forth in *N.J.S.A.* 18A:17-20 which is recited in its entirety as follows:

> "The superintendent of schools shall have general supervision over the schools of the district or districts under rules and regulations prescribed by the state board and shall keep himself informed as to their condition and progress and shall report thereon, from time to time, to, and as directed by, the board and he shall have such other powers and perform such other duties as may be prescribed by the board or boards employing him.
>
> "He shall have a seat on the board or boards of education employing him and the right to speak on all educational matters at meetings of the board or boards but shall have no vote."

The subsequent statute imposes an additional duty; namely, the submission by each superintendent of an annual report to the Commissioner and the County Superintendent of Schools. *N.J.S.A.* 18A:17-21

Thus, a superintendent of schools is specifically empowered to exercise a general supervision over district schools. He is also entitled to a seat on the board of education and the right to speak on educational matters at meetings of the board. In essence the superintendent of schools in a district is the local board's chief executive officer and, additionally, an *ex officio* member of the board. In such a frame of reference some questions may be posed in the matter, *sub judice:*

1. Who exercised supervision over the district's school during the period July 1, 1973 to July 24, 1973 in Asbury Park?

2. Who during all of that time period held a seat on the Board and spoke, by the presentation of agendas and recommendations, on educational matters?

3. Who acted as the Board's chief executive officer during all of that time period?

In the Commissioner's judgment, petitioner did, and this determination is no less firm for the period July 1 to July 24, 1973, than for the much longer time period which followed. Petitioner alone attended the Board's work meeting in July 1973 and presented an agenda of items for consideration. He alone was responsible for the recommendations for action at both that meeting and the public meeting of July 18, 1973, and the Board's argument that Dr. Smith "would have discussed items if he disagreed" is not evidence which may belie the clear facts of participation and responsibility. The Commissioner so holds.

Further, the Commissioner concludes that the Board's resolution of June 20, 1973 (P-21, *ante*) which empowered petitioner to "act in the capacity of

Superintendent" prior to October 1, 1973 in Dr. Smith's absence was approved by the Board in full cognizance of the probability that petitioner would be required to so act. There is no evidence that any member of the Board questioned petitioner's presence, and/or Dr. Smith's absence, at the Board's caucus meeting of July 1973 or that they questioned petitioner's presentation of the agenda at the meeting of July 18, 1973, which followed. Indeed, there was no reason for question since the Board had already authorized him to act as Superintendent if the exigencies of the situation required such action. Dr. Smith's necessary preparation to leave the country imposed the necessity.

The Board in its exceptions, as noted *ante,* avers that the hearing examiner had failed to report (or "conspicuously absents") testimony of a school secretary that Dr. Smith had signed a document on July 10, 1973. Such exception is, the Commissioner determines, without merit since such testimony was in fact reported, *ante,* as follows:

> "***A secretary testified that Dr. Smith had signed the educational reports R-1 and R-2 in her presence on June 30 and July 10, 1973.***"
>
> (at p. 14)

The testimony is not significant, however, in a categorization of duties performed in July 1973 since the report in question was one pertinent to the 1972-73 academic year and it was Dr. Smith, and not petitioner, who could attest to its accuracy as a report of the school district to June 30, 1973.

Finally, the Commissioner determines that petitioner's initial employment in his new position, acting in the capacity of Superintendent, should be liberally construed in terms of his claim to a tenure accrual. In this respect the Commissioner cites *Margaret M. Wall v. Jersey City,* 1938 *S.L.D.* 614 (1936), reversed and remanded State Board of Education 618, affirmed 119 *N.J.L.* 308 (*Sup. Ct.* 1938). Petitioner therein had been classified as a "substitute" but maintained that the term used to describe her employment was not descriptive of her true status as an employee of the board of education and that she was, in fact, a regular teacher. The Commissioner held in *Wall* that tenure had not accrued. Such holding was reversed by the State Board of Education which adopted a liberal construction of the tenure of office statutes, which statutes are not essentially different at the present time, and said:

> "***The tenure of office statute was adopted for what the Legislature believed to be the good of the schools of the State. It has been upheld by the courts, as well as by this Board, in numerous decisions. It has been amended in the interest of the teachers, thus indicating that the Legislature believes it to be beneficent legislation. We think that under these circumstances it should be *construed liberally* and not be 'avoidable' or 'evadable' by resort to technical positions.***"
>
> (*Emphasis supplied.*) (at p. 622)

And further,

> "***though the Appellant was termed a 'substitute,' her regular continuous teaching of the same classes in the same schools for over three

> years made her in fact a regular steadily employed teacher regardless of the terms used to describe her position. It is the *actual realities of the situation which count,* not the words used to describe them.***"
>
> (*Emphasis supplied.*) (at pp. 622-623)

A later State Board of Education used similar reasoning to reverse a Commissioner's decision in *Zielinski, supra,* and the reversal was affirmed by the Superior Court.

The actual realities of the instant matter demand a similar liberal interpretation in the context of the precise conditions set forth in the statute *N.J.S.A.* 18A:28-6, *ante,* since here, as in *Wall, supra,* and *Zielinski, supra,* the Board had full knowledge of petitioner's actions in the performance of the duties of Superintendent in July 1973 and in fact ratified them by its acceptance of petitioner as "acting superintendent" at both its caucus and regular meetings. A ruling to the contrary, and an elevation of Dr. Smith's limited performance of duties during that month as that of the Superintendent would, in the judgment of the Commissioner, be a patently unfair categorization, an elevation of title over substance which cannot be sustained.

Accordingly, the Commissioner hereby reinstates petitioner forthwith to his legally tenured position as Superintendent of Schools in Asbury Park retroactive to the date of his dismissal by the Board from such position on July 16, 1975.

COMMISSIONER OF EDUCATION

May 5, 1976

David Payne,

Petitioner,

v.

Board of Education of the Borough of Verona, Essex County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Mandel, Wysoker, Sherman, Glassner, Weingartner & Feingold (Jack Wysoker, Esq., of Counsel)

For the Respondent, Booth, Bate, Hagoort, Keith and Harris (George H. Buermann, Esq., of Counsel)

Petitioner was employed for a period of three academic years from September 1971 through June 1974 as a teacher of social studies by the Board of Education of the Borough of Verona, hereinafter "Board," and accepted a contract to teach for the 1974-75 school year. (J-7) He was given thirty days' notice of termination by action of the Board on June 25, 1974. (J-9) Petitioner alleges that this action of the Board was violative of his constitutional and statutory rights by reason of being arbitrary, unreasonable, and capricious. He appeals to the Commissioner of Education to direct the Board to reinstate him to his position, to restore lost earnings and to afford him appropriate contractual and tenure rights, benefits and provisions.

Conversely, the Board, while admitting entering into a contract with petitioner for the 1974-75 school year, asserts that petitioner's termination upon thirty days' notice in writing was provided for by the terms of the contract and was in no way violative of his constitutional, contractual or statutory rights.

A plenary hearing in this matter was conducted by a hearing examiner appointed by the Commissioner at the offices of the Morris County Superintendent of Schools on March 4, April 11, July 16 and 17, 1975. The report of the hearing examiner follows and sets forth first those uncontroverted facts which reveal the context of the dispute:

The principal of the Verona High School, following a visitation to petitioner's classroom on December 6, 1973, provided him with the following summary evaluation:

> "***I think you have a great deal to offer the students of Verona High School. Your willingness to cooperate and volunteer for activities is most appreciated.
>
> "I look forward to your continued growth and development and wish to assure you that I will recommend that you be offered a contract for 1974-75." (J-5)

In January 1974 the principal recommended to the Superintendent that petitioner's contract be renewed. (Tr. III-124) The Superintendent similarly recommended to the Board that petitioner be reemployed (J-6; Tr. II-70), whereupon the Board approved and entered into a contract with petitioner dated March 26, 1974 to employ him for the 1974-75 school year. (J-6; J-7)

On June 17, 1974, the principal met with petitioner and expressed serious concerns about his continued employment (Tr. I-77), whereupon petitioner submitted his resignation. (Tr. III-59) Prior to the Board's acceptance of his resignation, petitioner reconsidered and on June 24, 1974, rescinded his resignation. (Tr. I-64, III-62) After conferring with the Superintendent, the principal notified petitioner by letter dated June 24, 1974, that it was his recommendation that petitioner's employment be terminated for the following reasons: (Tr. III-71)

> "1. General laxness in your classes during April, May and June 1974 in respect to the evaluating of and returning of assignments handed in by students.
>
> "2. The loss of student assignments turned in to you.
>
> "3. The lack of reporting student absences from your class to the main office.
>
> "4. The frequency and questionable relevance of films shown to your classes.
>
> "5. Repeated tardiness in reporting to school.***" (J-8)

The Superintendent made a similar recommendation to the Board. (Tr. II-57) The Board on June 25, 1974, voted to give petitioner thirty days' notice of termination, which notice was given in writing to petitioner on June 27, 1974. (J-9) On November 11, 1974, the Petition of Appeal was filed with the Commissioner.

Petitioner contends that the Board's notice of termination on June 27, 1974, was unfair, arbitrary, capricious, and unreasonable and cites, *inter alia,* in support of this contention, *Donaldson v. Board of Education of North Wildwood,* 65 *N.J.* 236 (1974), and *Elizabeth Rockenstein v. Board of Education of the Township of Jamesburg, Middlesex County,* 1974 *S.L.D.* 260, 1975 *S.L.D.* 191, aff'd State Board 199.

Petitioner states that no administrator or department chairman either visited his classroom from December 6, 1973 through June 1974 or placed documentation in his personnel file after he was awarded a contract on March 26, 1974. He contends, therefore, that there was no evidence of deterioration of his teaching performance. Petitioner avers that, had such deterioration taken place, it would have been incumbent upon the school's administrators and supervisors to make such observations and evaluations and to make written records thereof. He further argues that the five complaints set forth by the

principal (J-8) are clearly unsubstantiated and totally undocumented except for a single memorandum relating petitioner's two errors in reporting homeroom attendance. (P-1) Petitioner asserts that, absent such proof, the reasons given by the principal must be labeled frivolous and meaningless. (Brief of Petitioner, at pp. 5-23)

Petitioner charges that the Board's action violated the spirit and the letter of *N.J.S.A.* 18A:27-10 *et seq.* which requires that the Board notify a nontenured teaching staff member by April 30 of his employment status for the ensuing academic school year. Petitioner maintains that, having issued a contract of employment, the Board could not legally terminate him for reasons "***so shallow, trivial, unsubstantiated and undocumented.***" (Brief of Petitioner, at p. 25) It is further argued that to allow such action to stand would not only nullify and defeat the purpose of the statute but invite other boards of education motivated by whim and caprice to do likewise, regardless of the validity of such action, thus depriving teachers of sufficient time to seek comparable employment. In this regard petitioner cites, *inter alia, Arthur L. Page v. Board of Education of the City of Trenton et al.*, 1973 *S.L.D.* 704, aff'd/rem. by State Board of Education May 1, 1974, decision on remand August 26, 1975, aff'd State Board January 7, 1976.

Petitioner argues further that, absent a pretermination hearing, the Board's action terminating him on thirty days' notice violated his constitutional right to due process as interpreted by the Supreme Court in *Board of Regents v. Roth,* 408 *U.S.* 564 and *Perry v. Sindermann,* 408 *U.S.* 593. In this regard petitioner asserts that he has a property interest which attaches to his claim of entitlement to employment by reason of the signed contract and *N.J.S.A.* 18A:27-10 *et seq.* He argues further that the Board's action was violative of Article 5:2 of the Board's negotiated agreement (J-1) which provides that:

> "No teacher shall be disciplined or reprimanded without just cause. Any such actions asserted by the Board, or any agent or representative thereof, shall be subject to the grievance procedure herein set forth."

For the foregoing reasons, petitioner prays for an order of the Commissioner reinstating him to his teaching position with restoration of his lost earnings and a declaration that tenure rights accrue as of the date of reinstatement. *Rockenstein, supra; North Bergen Federation of Teachers, Local 1060, AFL-CIO and Beth Ann Prudente v. Board of Education of Township of North Bergen,* 1975 *S.L.D.* 461

Conversely, the Board argues that its action was in no way violative of *N.J.S.A.* 18A:27-10 which provides that:

> "On or before April 30, in each year, every board of education in this State shall give to each nontenure teaching staff member *** either
>
> "a. A written offer of a contract for employment for the next succeeding year***, or
>
> "b. A written notice that such employment will not be offered."

The Board maintains that it was its prerogative to offer petitioner a contract and, subsequent to the April 30 date noted in the statute, to terminate that contract because of unsatisfactory performance in accord with the thirty-day termination clause contained in the contract. The Board contends that *N.J.S.A.* 18A:27-10 in no way modifies its discretion to review the performance of a nontenured teacher *throughout the entire three year probationary period. Canfield v. Board of Education of Pine Hill,* 51 *N.J.* 400 (1968)

The Board further contends that its action of June 25, 1974, was neither arbitrary, unreasonable, frivolous, nor capricious. *Donaldson, supra* In this regard, the Board states that its decision to terminate petitioner's employment was based on three full years of evaluation of his classroom and total school performance which, in the aggregate, proved to be unsatisfactory. (Memorandum of Law of Respondent, at pp. 7-9) The Board contends that unfavorable recommendations by the department chairman, the vice-principal and other evaluators, found in classroom observation reports of petitioner's performance, provide sufficient basis for its action to terminate petitioner. (*Id.*, pp. 9-19). Additionally, the Board enumerates problems arising from petitioner's sporadic tardiness, his errors in taking attendance, and an alleged erratic teaching performance which resulted in embarrassment to the school system by reason of parent and pupil complaints about lost homework, grading procedures and excessive use of motion picture films. (*Id.*, at pp. 9-36)

The Board contends that its exercise of discretion was in accordance with its statutory powers and that its determinations should not be upset, absent an affirmative showing of impropriety or illegality. (Memorandum of Law of Respondent, at pp. 36-38) In this regard the Board cites *Sally Klig v. Board of Education of the Borough of Palisades Park, Bergen County,* 1975 *S.L.D.* 168 and *John J. Kane v. Board of Education of the City of Hoboken, Hudson County,* 1975 *S.L.D.* 12 wherein it was stated:

> "***The Commissioner will not substitute his judgment for that of a local board when it acts within the parameters of its authority. The Commissioner will, however, set aside an action taken by a board of education when it is affirmatively shown that the action was arbitrary, capricious or unreasonable.***" (at p. 16)

The Board contends that there is no such affirmative showing herein and that, in view of the unanimity of unfavorable evaluations of his superiors, petitioner's charges must be viewed as "bare allegations," insufficient to trigger action to upset the determination of the Board. (Memorandum of Law of Respondent, at p. 38).

Additionally, the Board avers that no property right attached to petitioner's re-employment which would guarantee him the due process right to a hearing within the intendment of *Roth, supra,* and *Perry, supra. Margaret A. White v. Board of Education of the Borough of Collingswood, Camden County,* 1973 *S.L.D.* 261 is cited, wherein the Commissioner stated that:

> "***If petitioner's name had been included on the list of teachers awarded employment contracts for the 1972-73 academic year by the Board at its

> May 8, 1972 meeting, she would not have acquired a tenure status at that point in time, because she would still have been subject to a notice of termination clause in the employment contract. Tenure does not accrue for teaching staff members employed on an academic year basis until a teaching staff member completes three consecutive academic years of employment together with employment at the beginning of the next succeeding year.***" (at p. 270)

Finally, the Board asserts that its notice to petitioner was never intended to be a reprimand or disciplinary action, but was an action in conformance with its statutory right to terminate him because his teaching performance did not warrant his being clothed with tenure. *Sara Armstrong v. Board of Education of the Township of East Brunswick,* 1975 *S.L.D.* 112 117, affirmed in part/reversed in part State Board of Education June 4, 1975. Therefore, the Board maintains that its action was not violative of Article 5:2 of the negotiated agreement.

For these reasons the Board contends that it has acted in good faith in accord with its statutorily conferred discretionary powers and that petitioner is not legally entitled to the relief which he seeks.

The hearing examiner has carefully examined the documentation in evidence and the testimony elicited during the four days of hearing, and finds the following facts to be true and relevant to the instant controversy:

Petitioner was recommended by his principal for a successor contract in each of his three years of teaching for the Board. (R-2; R-3; R-6; J-5) Ten written evaluations were entered in evidence based on classroom observations made from November 9, 1971 through January 29, 1974. Five of these, including the December 6, 1973 evaluation by the principal, were highly commendatory with only minor suggestions for improvement. (R-1; R-2; R-3; J-4; J-5) Three were favorable but suggested that petitioner had failed to reach his potential as a teacher. (R-5; R-6; J-3) Two were distinctly unfavorable and expressed dissatisfaction with petitioner's performance in the lesson observed (R-8) and the pupils' reaction thereto. (R-9) It is also shown that, although the then principal recommended to the Superintendent that petitioner be re-hired for the 1973-74 school year, he did so with reservations. (R-7) No such reservations were expressed by the principal in his last written observation report of December 6, 1973, *ante,* wherein he forthrightly stated that he would recommend that petitioner receive a successor contract. (J-5)

It is evident that the principal's recommendation in January 1974 to re-hire petitioner was contrary to the advice of the vice-principal who had verbally recommended to the principal that petitioner *not* be re-hired. (Tr. II-97-98, 103; III-23) It is further evident that petitioner's department chairman had advised the principal prior to March 25, 1974, that he had reservations about recommending petitioner for reemployment. (Tr. II-118; III-21) Nevertheless, the principal did recommend that petitioner be offered a tenure contract. The principal testified at the hearing that:

"***I really wanted [petitioner] to make it as a teacher because of the empathy and compassion I had for him as a human being. And the decision I was making *** was one based on emotion rather than one in which my good sense and logic should have mandated.***"

(Tr. III-121)

In any event, *all of these classroom observations and recommendations were made and were available to the Board and its agents prior to March 26, 1974* when the Board voted unanimously to employ petitioner for the 1974-75 school year.

The Board President testified that in March 1974, the Board queried the Superintendent concerning his recommendation to place petitioner under tenure but that a determination was affirmatively and unanimously made to do so. (Tr. I-156)

A review of events which transpired after petitioner was issued a contract for the 1974-75 school year on March 25, 1974, is essential to determine whether the Board's notice of termination to petitioner on June 25, 1974, was capricious, arbitrary or unreasonable.

The Board President testified that it was not until June 18, 1974, that the matter of petitioner's continued employment was again raised at a conference meeting of the Board by the Superintendent who then advised that the principal had withdrawn has favorable recommendation and that petitioner had resigned. He further testified that, when petitioner rescinded his resignation, the Board, on June 25, 1974, without further review of petitioner's evaluation reports, acted solely on the recommendation of the Superintendent to invoke the thirty day termination clause of petitioner's contract. (Tr. I-141-146, 148)

The testimony of the Superintendent supports the conclusion that he, in turn, relied upon the judgment of the principal when he advised the Board to terminate petitioner. (Tr. II-77, 83)

The principal testified that in the spring of 1974 he conferred on two occasions with petitioner concerning semester examinations (Tr. III-26) and about certain parent and pupil complaints about his grading practices, the return of pupil assignments and the showing of films in his classes. (Tr. III-27, 31-34) Absent written records of such conferences, it is unclear whether these conferences took place before or after March 25, 1974. It is, however, abundantly clear that the principal made no written record of them and that he discarded the notes he used at those conferences. (Tr. III-90, 92, 98-99, 117) The hearing examiner concludes that the principal did not consider the problems discussed at those conferences to be of sufficient importance to reveal the names of the complaining pupils or to make a written record at that time. (Tr. I-59, IV-44) Instead, it appears that he was confident that they were satisfactorily resolved. (Tr. I-18)

Considerable testimony was elicited concerning the adequacy of petitioner's lesson plan book and its availability when called for by his supervisors. The hearing examiner observes that the plan book itself was not entered into

evidence for the reason that it was given by the department chairman to be of help to petitioner's replacement in September 1974. The hearing examiner finds it inconceivable that an inadequate plan book would have been provided to a new teacher by a responsible department chairman, and concludes that no proof of laxity on petitioner's part is shown by the testimony regarding that plan book. The testimony of the department chairman is also convincing that he did not call for the plan book of petitioner or certain others in his department on a regular weekly basis. (Tr. II-114)

It is of paramount importance that no supervisor, vice-principal, department chairman, principal or Superintendent visited petitioner's classroom to evaluate petitioner from February 1, 1974 through June 18, 1974. (Tr. III-86, 99, 143) Nor does a careful examination of the record reveal any unusual, unfavorable occurrence in petitioner's teaching performance from the time he was issued a contract until June 18 when the principal withdrew his recommendation. The record shows only that he failed to report the daily attendance accurately on April 29 and April 30 (P-1) and that he frequently arrived at school a few minutes later than the designated time for reporting because of his daughter's emotional disturbance. His tardiness did not prevent him from opening his homeroom at the required time except on one occasion when he asked his department chairman to cover his homeroom in order that he might retrieve his briefcase which he had lost enroute to school. (Tr. I-40-41)

The principal testified that it was his practice to return to observe any teacher whom he felt to be performing unsatisfactorily. He last observed petitioner on December 6, 1973. He testified that from January 1974 forward he "***began to get stronger vibrations that things were just not as they appeared to be.***" (Tr. III-25) Yet he neither returned to observe petitioner nor did he direct that a subordinate do so throughout the remaining six months of the school year. These facts support the conclusion that the principal was not aware of any unsatisfactory performance by petitioner during this period.

The department chairman testified that he observed petitioner only once during the 1973-74 school year. (Tr. II-138) He testified further that he was not called upon for a recommendation concerning petitioner after March 1974. (Tr. II-145) The vice-principal similarly testified that after this date he made no further recommendation to the principal concerning petitioner. (Tr. II-94)

The principal testified further that he became concerned when at a senior assembly in June a satirical comment was made with respect to the installing of a marquee over petitioner's room so that everyone would know what film was playing in his classes (Tr. III-56, I-66) He stated that he became further concerned when at a faculty luncheon a teacher said that the summer would afford petitioner "***ample opportunity to review all the films that he would be using for next year.***" (Tr. III-57)

The hearing examiner finds nothing evidential in remarks such as these made in the spirit of levity which pervades a senior assembly and a year-end faculty luncheon. Nor does the hearing examiner find convincing evidence that petitioner's classes were pervaded by laxness, or that serious problems arose

concerned with the grading and returning of pupils' assignments from March 25, 1974 through June 18, 1974. While it is clear that petitioner showed many films to his social studies classes (Tr. IV-27), there is no evidence that the films were not relevant or that he was uncooperative when cautioned by the principal to maintain a proper balance between films and other teaching devices. (Tr. III-33) The department chairman testified that he had never conducted a study of petitioner's use of films. (Tr. II-133)

Four pupils who were called to testify by petitioner stated that they noted no laxity in his classes in the spring of 1974 but that, if anything, there was a "tightening up" during that period. (Tr. I-88, 106, 120) They stated that they had had no problems concerning the returning of assignments (Tr. I-99, 113, 120) and that they found his classes helpful, pertinent and challenging. (Tr. I-89, 91, 95, 107, 117, 126, 128) They testified further that the films shown by petitioner were relevant, interesting and especially helpful to pupils with reading problems (Tr. I-100-101, 114, 124-125) and that they were required to discuss in class and make records in their notebooks of the content of those films. A sample pupil notebook introduced into evidence supports the conclusion that this pupil testimony is true in fact. (P-5)

In summary, the hearing examiner finds insufficient testimony or written evidence to support a conclusion that petitioner's teaching performance deteriorated from the time he was issued a contract on March 26, 1974 until he was terminated on June 25, 1974. Nor is there evidence that severe conflict or traumatic incidents occurred during that period to precipitate a reversal of the Board's offer of employment. Within such a factual context, it is recommended that the Commissioner determine that the abrupt termination of petitioner at the end of the academic school year, without prior additional observation or warning, was capricious and unreasonable.

It is further recommended that the Commissioner determine that the Board's action was not one of punishment within the context of Article 5:2 of the negotiated agreement and that the matter of petitioner's reemployment or other appropriate relief must be determined within the context of the statutory issues which are raised. *N.J.S.A.* 18A:27-10 *et seq.*; *Nancy Weller v. Board of Education of the Borough of Verona, Essex County,* 1973 *S.L.D.* 513; *Sallie Gorny v. Board of Education of the City of Northfield et al.*, 1975 *S.L.D.* 669

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed and carefully considered the record of the controverted matter including the exhibits in evidence, the testimony adduced at four days of hearing, the report of the hearing examiner and the exceptions thereto filed by counsel for respondent pursuant to *N.J.A.C.* 6:24-1.16.

The Board states in its exceptions that, in June 1974, it "***had the right to correct what was, in fact, a mistake in judgment when they gave to the Petitioner a contract in March, 1974.***" (Respondent's Exceptions to Hearing

Examiner's Report, at p. 5) The Commissioner agrees that the Board had the statutory right to review its prior evaluation. It has not only the right but the responsibility to review the performance of its tenured or nontenured teaching staff members at any time. *N.J.S.A.* 18A:11-1 lists certain mandatory powers and duties of boards of education providing, *inter alia,* that:

> "The Board shall:
>
> "a. Adopt an official seal;
>
> "b. Enforce the rules of the state board;
>
> "c. Make, amend and repeal rules ***for the government and management of the public schools and public school property of the district and for the employment, *regulation of conduct and discharge of its employees****;
>
> "d. Perform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district."
> (*Emphasis supplied.*)

See also *N.J.S.A.* 18A:27-4.

The Commissioner opines that no duty of a board of education is more crucial to the fulfillment of its constitutional mandate to provide a thorough and efficient system of education than is the responsibility of evaluating the performance of its employees and staffing its classrooms with skillful and effective teachers. It was said in *Gorny, supra,* that:

> "***One of the most significant of all factors which comprises a thorough and efficient system of education is a well-trained, scholarly, and highly competent faculty, described in the school law as teaching staff members. In the judgment of the Commissioner, the overall competence and effectiveness of the faculty, in any local school district, is a primary factor, more so than the schoolhouse, the library, and all other instructional materials and equipment, which directly and positively correlates with the quality of the educational program received by the pupils. Indeed, since the very inception of the institution known as the free public schools, or common schools as they were originally called, professional practitioners of the art of teaching have recognized that the system cannot function without the services of competent teachers, principals, and other educational specialists. This sound educational principle has, over the years, been cited with approval by the courts of this State. See *Redcay v. State Board of Education,* 130 *N.J.L.* 369 (*Sup. Ct.* 1943), aff'd 131 *N.J.L.* 326 (*E. & A.* 1944); *Kopera v. West Orange Board of Education,* 60 *N.J. Super.* 288 (*App. Div.* 1960)***." (at pp. 680-681)

In the instant matter, the Superintendent and the Board relied heavily on the recommendation of the principal when the determination was made to issue

a contract to petitioner in March 1974. It is clear that the principal was aware that the assistant principal and the department chairman were either opposed to or had strong reservations about reemploying petitioner. He was similarly aware that his predecessor had reservations about reemploying petitioner for the 1973-74 school year. (R-7) The principal testified that his recommendation in December was motivated by feelings of empathy and compassion for petitioner as a human being rather than by good sense or logic. (Tr. III-121) (See also Tr. III-25, 67.)

Evaluations which are less than candid do not reveal to teaching staff members or to the local board of education that which is essential to the improvement of education in a school district. As was said in *Gorny, supra:*

> "***The Commissioner has observed that many problems have been created, with extensive litigation, as the result of evaluation programs conducted in an excessively charitable manner, whereby beginning teachers have not had the benefit of candid and complete constructive criticisms of their deficiencies and shortcomings. When evaluations fail to enlighten the beginning teacher regarding his/her deficiencies and provide no suggestions for improvement, the teacher is mistakenly led to believe that his/her services and performance are at least adequate. Subsequently, when reemployment is not offered, the teaching staff member is at a loss to understand the reasons.***" (at p. 681)

The fact exists that petitioner was not notified by the Board that he would not be offered reemployment for the 1974-75 academic year pursuant to *N.J.S.A.* 18A:27-10. Rather, he was issued a contract in March 1974 without so much as a warning that there were any reservations about his ensuing employment. Thereafter, with no further *bona fide* classroom observation by the principal or supervisor, petitioner completed the school year without any significant deficiency being brought to his attention. Thereupon, he was abruptly notified that the recommendation of the principal was withdrawn and that he would not be reemployed in 1974-75. Such precipitate and untimely notice, absent significant disruptions attributable to petitioner or failure on his part to continue to perform his duties, constitutes capricious action on the part of the Board and its administrators. The Commissioner so holds.

It has been determined, herein, that the Board had the right to review its prior evaluation of petitioner at any time during his probationary period of service. Such statutory right and responsibility to review carries with it the prerogative to reverse a prior determination. The Commissioner finds nothing within the record which leads to the conclusion that the Board's reversal of its prior determination was either motivated by bad faith or violative of petitioner's constitutional rights. Petitioner, as a nontenured teacher had no property rights to continued employment. *Perry v. Sindermann, supra* Nor was his right to seek employment elsewhere impaired by any action of the Board as was the case in *Salvador R. Flores v. Board of Education of the City of Trenton, Mercer County,* 1974 *S.L.D.* 269. Therein it was determined that the Trenton Board had rated its Superintendent's morals on an evaluative document without affording him due process. In the instant matter there is no such unfair intrusion

on petitioner's personal rights or constitutional rights as was found to be the case in *Rockenstein, supra.* Petitioner has been afforded a statement of reasons for termination which, in the Commissioner's opinion, comports with the requirement of *Donaldson, supra,* to advise a nontenured teacher of reasons for nonrenewal.

Page, supra, is importantly distinguishable from the facts herein. Page was a tenured employee with all rights pertaining thereto. Petitioner, however, was not tenured. Petitioner had served a total of three consecutive academic years but had not begun employment at the beginning of the next succeeding academic year as required for tenure by *N.J.S.A.* 18A:28-5(b). Tenure accrues only by action of a board or *by the passage of time in actual employment. White, supra*

The Commissioner finds no evidence in the entire record that the Board's action was taken to punish petitioner in violation of Article 5:2 of the negotiated agreement. In any event, were such a finding to be made, it could not rise to the level which would preclude the Board from exercising its discretionary powers of determining whether the reemployment of petitioner was in the best interests of its educational program. *Weller, supra*

The Board, upon review of petitioner's service, determined to terminate the contract which it had previously issued to petitioner. Within the context of the hearing, it became evident that the reasons given by the principal in J-8, while not the only reasons, were substantially the ones upon which the Board relied in reversing its prior determinations. While the Commissioner opines that further classroom observations and evaluations of petitioner should have been completed to substantiate Reason No. 1, there is no finding on the part of the Commissioner that the reasons given were frivolous. In any event they were relied upon by the Board.

It was said by the Court in *Thomas v. Board of Education of Morris Township,* 89 *N.J. Super.* 327 (*App. Div.* 1965), aff'd 46 *N.J.* 581 (1966) that:

> "***We are here concerned with a determination made by an administrative agency duly created and empowered by legislative fiat. When such a body acts within its authority, its decision is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable. The agency's factual determinations must be accepted if supported by substantial credible evidence.***" [cases cited] (at p. 332)

The Commissioner finds no reason in the matter controverted herein to substitute his judgment for that of the Board in respect to the non-reemployment of petitioner. It has been consistently held, however, that boards of education may not act in ways that are arbitrary, capricious or unreasonable. See *Eric Beckhusen et al. v. Board of Education of the City of Rahway et al., Union County,* 1973 *S.L.D.* 167; *James Mosselle v. Board of Education of the City of Newark, Essex County,* 1973 *S.L.D.* 197; *Luther McLean v. Board of Education of the Borough of Glen Ridge et al., Essex County,* 1973 *S.L.D.* 217, aff'd State

Board of Education March 6, 1974. Similarly, the New Jersey Supreme Court determined in *Cullum v. North Bergen Board of Education,* 15 *N.J.* 285 (1954) and reiterated in *Ruch v. Greater Egg Harbor Regional,* 1968 *S.L.D.* 7 as follows:

> "***A board of education's discretionary authority is not unlimited, however, and it may not act in ways which are arbitrary, unreasonable, capricious or otherwise improper.***" (at pp. 8-9)

The Board and its administrators, herein, acted in a capricious manner as previously determined. While such action does not divest the Board of the right to terminate the contract it issued to petitioner in March 1974, such action may not be taken with impunity. The Commissioner so holds. Accordingly, it is ordered that the Board pay petitioner the entire amount of his contractual salary for the 1974-75 school year as specified by the contract entered into in March 1974, together with such emoluments and benefits, excepting tenure, which would normally have accrued to petitioner had he been employed by the Board during the 1974-75 school year. Petitioner's prayers for reinstatement and a declaration that tenure accrued therewith are denied.

COMMISSIONER OF EDUCATION

May 5, 1976

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, May 5, 1976

For the Petitioner-Appellant, Mandel, Wysoker, Sherman, Glassner, Weingartner & Feingold (Jack Wysoker, Esq., of Counsel)

For the Respondent-Appellant, Booth, Bate, Hagoort, Keith and Harris (George H. Buermann, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

December 1, 1976

Pending before Superior Court of New Jersey

Inez Nettles,

Petitioner,

v.

Board of Education of the City of Bridgeton, Cumberland County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Lummis, Kleiner, Moore and Fisher (Steven Z. Kleiner, Esq., of Counsel)

For the Respondent, Casarow, Casarow & Kienzle (A. Paul Kienzle, Jr., Esq., of Counsel)

Petitioner, employed as a teacher of music for three academic years by the Board of Education of the City of Bridgeton, hereinafter "Board," appeals a determination of the Board denying her employment for the 1975-76 school year. She contends that the Board's decision was arbitrary, capricious, unreasonable and based on incorrect information. Petitioner further contends that the Board's refusal to allow her attorney to cross-examine witnesses who supplied the Board with information upon which it relied concerning her teaching performance violated her constitutional rights of due process. Petitioner prays, *inter alia*, for an order of the Commissioner of Education directing the Board to reinstate her to an appropriate teaching position with lost earnings and attendant emoluments.

The Board denies any improper action on its part, or that petitioner's due process rights were violated.

A plenary hearing in the controverted matter was conducted on November 13, 1975 at the office of the Cumberland County Superintendent of Schools by a hearing examiner appointed by the Commissioner. At the conclusion of petitioner's case, the Board moved for dismissal of the Petition of Appeal. (Tr. 151) The hearing examiner determined that the Board's Motion to Dismiss was a substantive one and required consideration before a defense was required. The report of the hearing examiner is as follows:

Petitioner, at the direction of the Superintendent, met with the Education Committee of the Board on March 7, 1975 to discuss her employment status. (J-2) On March 11, 1975, petitioner was notified that the Education Committee would recommend that she *not* be issued a successor contract by the Board for the following stated reasons:

> "***[Y]ou were remiss in your planning for your school obligations, and *** your sporadic attendance interferred [sic] with continuity of instruction.***" (R-7)

Petitioner requested and was granted an informal appearance before the Board on April 8, 1975 at which time she was represented by counsel and was allowed to rebut the reasons given for her non-reemployment. (R-12) The Board advised petitioner on April 16, 1975 (R-13) that, for the reasons previously stated in R-7, *ante*, it had affirmed its prior decision not to reemploy her, whereupon petitioner filed the instant Verified Petition of Appeal.

The Board argues in support of its Motion to Dismiss that its determination not to reemploy petitioner is entitled to a presumption of correctness and that the testimony of witnesses called by petitioner supports the conclusion that the Board's determination was made in good faith and was neither hasty, unreasonable, arbitrary nor capricious. (Tr. 152) The Board avers that the reasons given for nonrenewal are in full compliance with *Donaldson v. Board of Education of North Wildwood*, 65 *N.J.* 236 in that the reasons were of such nature that petitioner could profit therefrom. Similarly the Board asserts that a written statement of reasons and a timely informal appearance before the Board to refute those reasons satisfies the due process requirements of *Donaldson* and *Barbara Hicks v. Board of Education of the Township of Pemberton, Burlington County*, 1975 *S.L.D.* 332. (Tr. 155)

The Board further grounds its Motion to Dismiss on *Phebe Baker v. Board of Education of the Lenape Regional High School et al.*, 1975 *S.L.D.* 471 wherein the Commissioner recognized that, pursuant to *Donaldson, supra,* a Board may consider in part or in whole reasons other than classroom performance, as a basis for the nonrenewal of a nontenure teacher. (Tr. 155) Additionally the Board cites, *inter alia, Richard Dooley and the Keansburg Teachers Association v. Board of Education of the Borough of Keansburg,* 1975 *S.L.D.* 540 and *Ronnie Abramson v. Board of Education of the Township of Colts Neck, Monmouth County,* 1975 *S.L.D.* 418, aff'd State Board of Education 424.

Petitioner argues that the Motion to Dismiss should be denied and contends that the arbitrariness and capriciousness of her nonrenewal is demonstrated by the fact that her own department chairman on February 25, 1975, recommended that she be placed under tenure. (J-1, at p. 18) (Tr. 159) She avers that her evaluation reports which indicate a high level of performance are evidence that the Board's nonrenewal of her contract was unreasonable. (Tr. 160)

Petitioner charges that the Board's letter of March 11, 1975 (R-7), is so nebulous that it fails to meet the requirement of *Donaldson, supra,* that she be apprised of the true reasons for her nonrenewal. (Tr. 161) Petitioner further contends that she planned well for her school obligations and that her absences from school were no more frequent than those contemplated by the Board's own sick leave policy. (Tr. 158) For these reasons petitioner asks that the Motion to Dismiss be denied.

The Board admits that petitioner's classroom performance, as evidenced by her classroom observation reports (J-1), was either satisfactory or commendable. However, it was revealed at the hearing that the Board's reasons

for nonretention were centered upon not only the number of times petitioner was absent, but also upon her alleged failure to notify the Board's agents in timely fashion of her impending absences, and her failure on occasion to meet her classes as scheduled when she was working.

The record reveals that petitioner was absent from school as follows:

School Year	Absences	Available Sick Leave Days
1972-73	26 days	10
1973-74	7½ days	10
1974-75	11½ days	14½
		(Tr. 15) (R-6)

Petitioner was injured in a bus accident in February 1973 which resulted in an extended absence of eighteen days. (Tr. 16) No other prolonged absences were recorded. Petitioner testified that she had been absent on a number of occasions as the result of severe sinus headaches which were aggravated by inclement weather. (Tr. 58) An analysis of petitioner's attendance reveals that she was absent a total of forty-five days in the three years of her employment during which period the Board provided its employees thirty-four and one-half days' sick leave. Exclusive of the absences resulting from the bus accident, petitioner used slightly fewer sick days than the Board provided its employees for sick leave.

Testimony by petitioner and others at the hearing reveals that, on certain days when she was ill, petitioner did not comply with the school regulation requiring teachers to notify the designated school secretary between 6:00 and 7:15 a.m. (R-3,4) (Tr. 52, 76) On one such occasion, the morning of March 4, 1975, petitioner's absence from school was reported by a friend as late as 10:45 a.m. (R-1; Tr. 56) (P-1, at p. 20)

Petitioner's schedule required that in certain weeks she report to school early in the morning. In other weeks, including the week of March 4, 1975, she was scheduled to report for work at 10:45 a.m. to a school that was on split session. Petitioner testified that on those days when she was scheduled to work a late schedule and was ill, she called in at 9:00 a.m. rather than at an earlier hour. (Tr. 52) It was not uncommon that others similarly scheduled did likewise. (P-1) (Tr. 75, 86) However, there is no evidence that the school administration sanctioned such a practice for petitioner or any others of its teaching staff members. (R-3,4)

On an indeterminate date in December 1974, petitioner left the school district during her lunch period at approximately 11:45 a.m. to go to a pharmacy in Vineland to procure a prescription for relief of sinus headache. She returned to the school at 12:35 p.m., approximately thirty-five minutes late, having missed one scheduled music class of twenty-five pupils, which she then proceeded to combine and teach with another scheduled class of similar size. (Tr. 24-25, 27, 43, 45, 61, 109, 126-127)

Petitioner's own testimony and the testimony of her supervisors leads to the conclusion that on a number of other occasions petitioner's health problems resulted in a similar combining of classes. (Tr. 27, 100) Her principal testified concerning her absences and combining of classes that:

> "***I felt that *** Mrs. Nettles was doubling up too much. *** I don't think that students benefited by having twice as many in a classroom as they normally should *** and after a period of time you couldn't help but develop some thoughts concerning the professional capacity due to her health problems***.
>
> "Generally speaking, I think the music program was somewhat diminished because of her lack of continuity.***" (Tr. 100-101)

The director of music stated that petitioner was sharply cautioned by her superior concerning both her lateness and the advisability of her working at a second job at a department store sixteen hours per week. (Tr. 50, 133, 138) The director also testified that during the first week of March 1975, he learned of petitioner's failure to properly notify the school authorities of her absence of March 4, 1975, and that this caused him to reconsider his prior recommendation that she be placed under tenure. (Tr. 139-141, 144) He further testified that in his opinion the Educational Committee's decision that petitioner was not to be recommended for a tenure contract was reasonable and had been arrived at with due consideration. (Tr. 142-143)

The hearing examiner has carefully examined and considered the exhibits in evidence and the testimony of witnesses called by petitioner and makes the following findings of fact and recommendations to the Commissioner:

1. Petitioner's three-year record of classroom and non-classroom performance was thoroughly and properly reviewed and considered by the Educational Committee and by the Board prior to the Board's original determination not to reemploy her for the 1975-76 school year. It is further found that the Board's determination was neither made in haste, nor was it in any way arbitrary, capricious, unreasonable, or made in bad faith. Accordingly, it is recommended that the Commissioner determine that the Board's reasons for nonrenewal of petitioner's contract were in fact predicated on accurate information, and in conformity with *Donaldson, supra,* wherein it was said by the Court that:

> "***The Legislature has established a tenure system which contemplates that the local board shall have broad discretionary authority in the granting of tenure and that once tenure is granted there shall be no dismissal except for inefficiency, incapacity, unbecoming conduct or 'other just cause.' *N.J.S.A.* 18A:28-5. *The board's determination not to grant tenure need not be grounded on unsatisfactory classroom or professional performance for there are many unrelated but nonetheless equally valid reasons why a board *** may conclude that tenure should not be granted.*** (Emphasis added.)* (65 *NJ.* at 240-241)

See also *Sallie Gorny v. Board of Education of the City of Northfield et al.*, 1975 *S.L.D.* 669; *Phebe Baker, supra; Frederick J. Procopio, Jr. v. Board of Education of the City of Wildwood, Cape May County,* 1975 *S.L.D.* 471.

2. Petitioner was notified in writing of nonrenewal of her contract prior to April 30, pursuant to *N.J.S.A.* 18A:27-10 *et seq.* She was afforded a timely informal appearance before the Board with opportunity to present witnesses on her own behalf, to be represented by counsel, and to seek to dissuade the Board from its prior decision. Such procedure is in full conformity with petitioner's due process rights as enunciated by the Court in *Donaldson, supra,* and by the Commissioner in *Barbara Hicks, supra*. Accordingly, it is recommended that the Commissioner determine that petitioner was afforded the due process to which she was entitled by law.

3. Finally, it is recommended that the Commissioner determine that, absent a showing of impropriety or abuse of discretionary powers by the Board, petitioner is not entitled to the relief which she seeks and that the respondent Board's Motion to Dismiss should be granted and that the action of the Board in the record, *ante*, be affirmed.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record of the herein controverted matter including the transcript of the hearing, the exhibits in evidence, the hearing examiner report and the exceptions filed thereto by petitioner pursuant to *N.J.A.C.* 6:24-1.16.

Petitioner contends that she could not rebut the reasons given by the Board for her non-reemployment because the reasons were vague and lacked sufficient detail. The Commissioner holds otherwise. The reasons given, although they could have been more explicit in respect to which areas of petitioner's planning for her school obligations were unsatisfactory, minimally met the criteria set forth in *Donaldson, supra*. Accordingly, it is determined that due process was afforded petitioner in respect to her non-reemployment. See *Donald Banchik v. Board of Education of the City of New Brunswick, Middlesex County,* 1976 *S.L.D.* 78; *Hicks, supra; Gorny, supra; Procopio, supra.*

Petitioner argues in the exceptions to the hearing examiner's report that any tardy telephone calls, lateness in reporting for class and illness resulting in the combining of music classes did not cause harm to the music program. In this regard the Commissioner opines that such determination must be made by supervisors, administrators and the Board who are charged with maintaining a viable, thorough and efficient system of education in the City of Bridgeton School District. It is abundantly clear that the music supervisor and the principal had concluded that petitioner's tardiness, absences and health problems were not in the best interests of a viable music program. (Tr. 50, 100-101, 133, 138-141, 144) Whether or not petitioner was warned of their incipient concern did not

limit or preclude the admissibility of such consideration when a determination respecting her continued employment was made.

Petitioner, as a nontenured teacher was in a probationary period of employment. The Board made its determination not to reemploy her for reasons other than her classroom performance. Boards of education are invested with broad discretionary powers. *N.J.S.A.* 18A:11-1 One of the most essential of these is the power to determine who shall be employed and reemployed to teach in the public schools in each successive year. That a board may consider elements of a teacher's performance other than classroom performance is made clear by the words of the New Jersey Supreme Court in *Donaldson, supra,* wherein it was stated that:

> "***The board's determination not to grant tenure need not be grounded on unsatisfactory classroom or professional performance for there are many unrelated but nonetheless equally valid reasons why a board***may conclude that tenure should not be granted.***" (65 *N.J.* at 241)

See also *Baker, supra.*

It is true that a board may not act in ways which are arbitrary, unreasonable, capricious, or otherwise improper. *Cullum v. North Bergen Board of Education*, 15 *N.J.* 285 (1954) The Commissioner determines that petitioner herein has failed to establish a *prima facie* case that the Board has acted in any way that was unreasonable, arbitrary, capricious or otherwise improper. Petitioner's charges stand as naked allegations which, in the absence of proof, require no defense from the Respondent Board.

Absent a showing of abuse of its discretionary powers, the Board's determination is entitled to a presumption of correctness. *Quinlan v. Board of Education of North Bergen Township*, 73 *N.J. Super.* 40 (*App. Div.* 1962) In such matters the Commissioner will not substitute his discretion for that of a local board of education. Nor does he find reason to do so in this instance. Accordingly, the determination of the Board is affirmed. The Petition of Appeal is found to be without merit and is dismissed.

COMMISSIONER OF EDUCATION

May 5, 1976

A Z Transportation Inc.,

Petitioner,

v.

Board of Education of the Woodbridge Township School District, James V. Curcio and George Dapper, Middlesex County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Blumberg, Rosenberg, Mullen & Blackman (William B. Rosenberg, Esq., of Counsel)

For the Respondents, Hutt, Berkow & Hollander (Stewart M. Hutt, Esq., of Counsel)

Petitioner, a New Jersey Corporation, hereinafter "A Z," alleges that Respondent Board of Education, hereinafter "Board," improperly awarded contracts for pupil transportation to Respondents James V. Curcio and George Dapper for three contracted routes on the basis that an increased mileage figure set forth in the bid forms was conjectural and hypothetical and, therefore, improper and void. Petitioner appeals to the Commissioner for an order setting aside the contracts for the three controverted transportation routes awarded to Respondents Curcio and Dapper and order that said contracts be awarded to petitioner or, in the alternative, that petitioner be awarded the difference between petitioner's bid price and the cost of performance.

The Board answers that the award of the contracts for the three pupil transportation routes controverted herein was made in compliance with the law in that (1) the specifications were and are legal and lawful and in accordance with the statutes and decisional law; (2) petitioner was not the low bidder in accordance with the specifications; (3) petitioner has no standing to bring the within action; (4) petitioner waived any alleged claim of irregularities in the specifications by submitting a bid on the basis of said specifications; and (5) petitioner fails to set forth a claim upon which relief can be granted.

The relevant material facts are not in dispute and have been stipulated in documents received and marked in evidence. Accordingly, Briefs have been filed and this matter is submitted for Summary Judgment by the Commissioner of Education. The facts in the case are set forth as follows:

The Board advertised for sealed bids for pupil transportation to be received and publicly opened on August 4, 1975 at 10 a.m. as required by *N.J.S.A.* 18A:39-3 and 39-5. Subsequently, on August 11, 1975 at a public meeting the Board awarded contracts for Group #1 and Group #3 to Respondent Curcio and Group #34 to Respondent Dapper.

The Board provided the prospective bidders with eight pages of documents which included the Advertisement for Bids (P-1), an Invitation for Bids (P-2), a three-page document entitled Specifications and Requirements for Transportation of School District Pupils listing twenty-eight separate items (P-3), a two-part Questionnaire with respect to surety bond and the bidder's familiarity with the conditions to be expected of the successful bidder (P-4), Bid Proposals (P-5) and an Explanation of Bid Forms. (P-6)

The Invitation for Bids stated, "The Board of Education reserves the right to reject any or all bids, in whole or in part, and to waive immaterial informalities." (P-2) The herein controverted specifications furnished by the Board stated, *inter alia*:

> "1. The successful Bidder agrees to increase or decrease the mileage on the route as established by the Board of Education for the sum set forth in the bid, per mile, during the initial contract year. For bid comparison purposes *only*, it is estimated that the increase per route will be 2 miles (round trip) per day for 180 days.
>
> ***
>
> "8. The Board of Education or its authorized representative retains the right to organize, alter and increase the Bus Stops, and the route of travel of each bus. If any change of route results in increased or decreased mileage, adjustment in the contract price will be made accordingly. The basis for any adjustment will be the separate and distinct per mile cost included in the bid.
>
> ***
>
> "23. The successful bidder agrees to transport only authorized students, and only to make authorized stops on contracted routes. *Routes are not to be changed unless approved by the Transportation Coordinator.* ***" (*Emphasis in text*.) (P-3)

An examination of the specifications, *ante*, discloses that all aforementioned statements were repeated therein.

With respect to the Board's specification no. 1, *ante*, the bidder was required to complete the "Group Bid Form (Proposal #2)" (R-2), following the instructions as found in "Explanation of Bid Forms, Group Bid Form - Proposal #2." (P-6) Both documents are reproduced as follows:

"GROUP BID FORM (PROPOSAL #2) (R-2)

A. Group #	1. Basic Group Price
B. Unit mileage adjustment factor (per mile)	2. *For Bid Comparison Purposes* estimated 2 mile increase of trip per day, for 180 days (4 x 180 x unit mileage factor)

C. Group Bid Breakdown
Rt. #____Rt. #____

3. Total Bid (Item 1 plus Item 2)_____"

"EXPLANATION OF BID FORMS (P-6)

***

GROUP BID FORM - PROPOSAL #2

Item A. Fill in group number for route being bid.

Item B. Fill in cost of unit mileage adjustment factor. (Additional mileage figure)

Item C. Fill in individual price of each route in group.

Item 1. Fill in basic group bid.

Item 2. Fill in unit mileage factor by formula.

Item 3. Add items 1 and 2 together for total bid."

Pursuant thereto, the following bids were proposed and received:

Group #1	Base Bid	Mileage Bid	Total Bid	
A Z	$12,976.00	$.80 ($576.00)	$13,552.00	(R-3)
Curcio	$13,320.00	$.01 ($ 7.20)	$13,327.20	(R-4)
Group #3				
A Z	$12,976.00	$.80 ($576.00)	$13,552.00	(R-3)
Curcio	$13,320.00	$.01 ($ 7.20)	$13,327.20	(R-4)
Group #34				
A Z	$12,976.00	$.80 ($576.00)	$13,552.00	(R-3)
Dapper	$13,000.00	$.01 ($ 7.20)	$13,007.20	(R-5)

Petitioner argues that the basic group price was the controlling factor in the bidding procedure as set forth in the Board's specifications. Petitioner cites specification no. 1 wherein it states in part, "***For bid comparison purposes *only*, it is estimated that the increase per route will be 2 miles (round trip) per day for 180 days." (P-3) Petitioner asserts that since the estimated price of a two mile increase was only to be used for bid comparison, the basic group price controls and that petitioner was the lowest bidder in Groups #1, #3 and # 34.

The record reveals that petitioner's dollar amount in the basic group price was the lowest of the three controverted contracts.

Petitioner contends that the two mile increase was hypothetical and conjectural since there were no plans to increase or decrease the controverted routes at the time of bidding. Petitioner states that the specifications recognized the fact that the anticipated routes would be those basic routes and that no routes were to be changed without the approval of the transportation coordinator as cited in specification no. 23. (P-3)

Petitioner continues, *arguendo*, that it would also be the successful bidder for Group #1 and Group #3 in the event the routes were increased by 1.2 miles per trip per day, rather than the two miles per trip as stated in specification no. 1. (P-3) By way of illustrating this example, petitioner states that its additional mileage would amount to an additional dollar amount of $345.60 over the basic group price for a total of $13,321.60, as compared with Respondent Curcio's total bid amount of $13,324.33. With respect to Group #34, petitioner states that the difference begins after the mileage is increased by .08 of a mile wherein the total bid of petitioner would be $12,099.04 as compared with Respondent Dapper's total bid of $13,000.29.

In the event the Board was to decrease the mileage in any of the three controverted transportation routes, petitioner declares that it would have been the lowest bidder.

Petitioner argues that the contracts awarded to Respondents Curcio and Dapper should be voided and that the contracts for the controverted pupil transportation routes should be awarded to petitioner or, in the alternative, that petitioner be entitled to damages representing the difference between the awarded contract, petitioner's bid price, and the cost of performance. Petitioner cites *Cardell, Inc. v. Township of Woodbridge*, 115 *N.J. Super.* 442 (*App. Div.* 1971) in support of its claim for relief.

The Board submits its response to the allegations in its Reply Brief, at pp. 1-2, that:

> "1. Because of the inherent nature of the public work, i.e. transportation, the inclusion of a mileage factor variable in the specifications was required and proper; and
>
> "2. The 'two-mile increase' standard employed by Respondent for bid comparison purposes was reasonable and included in the specifications as required by law; and
>
> "3. The awards made by Respondent as based on basic group price plus the two-mile bid comparison standard were proper."

The Board avers that the inclusion of a mileage factor variable in the specifications was required and proper and is founded in case law as set forth in *A & S Transportation Company v. Bergen Sewer Authority,* 133 *N.J. Super.* 266 (*Law Div.* 1975) wherein the Court stated:

> "***[W]here, because of circumstances inherent in the particular public work, variables must be included in the structuring of a request for bids,

> the common basis or standard to be used to compare the bids must be stated in the specifications themselves and may not be determined, no matter how reasonable they then are, after the bids have been opened.***" (at p. 276)

The Board continues with its affirmative defense by stating that the Court explained the reasons why predetermined standards for bid comparison purposes were required in the specifications:

> "***The problem arises because in not determining that standard in advance of the bid opening, the Authority placed itself in the position of being thereafter able to favor either one of the two bidders.***" (*Id.*, at p. 275)

The Board further states that the Court in *A & S Transportation Company, supra,* relied upon the decision in *James Petrozello Company, Inc. v. Chatham Township,* 75 *N.J. Super.* 173 (*App. Div.* 1962) as follows:

> "***Invitations for bids in the form of unit prices, under proper circumstances, are not objectionable. *Browning v. Freeholders of Bergen,* 79 *N.J.L.* 494 (*E. & A.* 1910); *Armaniaco v. Cresskill,* 62 *N.J. Super.* 476 (*App. Div.* 1960). However, where the unit price method is employed, fair estimates of the quantities to be ordered should, wherever possible, be specified in advance of the bidding to avoid any possible juggling of the figures in aid of a favorite bidder. *Browning v. Freeholders of Bergen, supra.* The giving of the estimates is for the express purpose of forming a basis for the 'uniform comparison of bids.' *Walter v. McClellan,* 113 *App. Div.* 295, 99 *N.Y.S.* 78, 79 (*App. Div.* 1906); *Interstate Power Company v. Forest City*, 225 *Iowa* 490, 281 *N.W.* 207 (*Sup. Ct.* 1938); *Best v. City of Omaha*, 138 *Neb.* 325, 293 *N.W.* 116 (*Sup. Ct.* 1940); 10 *McQuillin, Municipal Corporations* (*3d ed.* 1950), § 29.54, p. 316.***" (at p. 179)

The Board states that all bidders were expressly advised that their total bids would be the sum of the basic group price and the cost of a two-mile increase per trip per day for 180 days (unit mileage factor). The Board declares that as a public body it must have the benefit and protection of competition with regard to potentially increased expenditures occasioned by pupil transportation changes in order to make appropriate budgetary provision for such increases. The Board asserts that the law requires only that (1) a standard of comparison must be stated in the specifications and may not be determined after bids are opened, and (2) the standard of comparison must be reasonable. The Board observes that petitioner does not allege that the "two-mile increase" standard is unreasonable.

With respect to petitioner's assertion that it would have been the low bidder in the event Group #1 and Group #3 were to be increased by 2.4 miles round trip per day instead of the four miles, the Board answers that a deviation from the "two-mile increase" (four miles round trip) standard of comparison would enable the Board to favor one bidder over others. The Board declares that the importance of the "two-mile increase" standard included in the specifica-

tions for the express purpose of bid comparison and strict adherence to same in the award determination process cannot be over-emphasized.

The Board submits that its specifications and its award of contracts on Groups #1, #3 and #34 were proper and petitioner's appeal should be dismissed.

The Board asserts that petitioner, as an unsuccessful bidder, has no standing to challenge its specifications by citing *Waszen v. Atlantic City,* 1 *N.J.* 272 (1949) wherein the Supreme Court held that the appellants had "***no standing to challenge the award of the contract to a rival bidder or to attack allegedly illegal specifications.***" The Court explained its ruling as follows:

> "***The rationale of such a holding is that one cannot endeavor to take advantage of a contract to be awarded under illegal specifications and then, when unsuccessful, seek to have the contract set aside.***"
>
> (at p. 276)

The Board observes that in the instant matter, petitioner challenges as illegal those same specifications upon which petitioner submitted its bids. The Board avers that, pursuant to established principles of law, petitioner has no standing to make such a challenge and its appeal should be dismissed.

The Board declares that the Commissioner has no authority to award damages to petitioner with respect to its alternative demand for the difference between petitioner's bid price and the cost of performance. The Board states that the decision of the Court precludes any such award of damages as set forth in *M.A. Stephen Construction Company, Inc. et al. v. Borough of Rumson,* 125 *N.J. Super.* 67(*App. Div.* 1973), *cert. den.* 64 *N.J.* 315 (1973). The Court held, therein, that the rejection of the bid of the lowest responsible bidder for public work, even if such rejection was in violation of the bidding laws, did not render a municipality liable in damages to the bidder, whether for loss of profits, increased cost of performance, cost of preparing and submitting the bid, or for other alleged consequential losses. The language of the Court is specifically cited as follows:

> "***It is true that, as the contractor-plaintiffs point out, a bidder claiming to be entitled to the award of a contract for public work has long been held to have sufficient standing to challenge the rejection of his bid or the letting of the contract to another bidder, and to compel the award of the contract to him, *McGovern v. Trenton,* 60 *N.J.L.* 402 (*Sup. Ct.* 1897). But such standing was granted simply and solely in order that the public interest might be served by compelling the lax or erring public official to properly perform his public trust. It was not thereby intended to create or establish in the bidder entitled to the award of the contract a right which, if violated, would render the public agency liable in damages to the bidder.***"
>
> (125 *N.J. Super.*, at p. 74)

The Board refutes petitioner's reliance on the decision cited in *Cardell, supra,* and states that the Court in *M.A. Stephen, supra,* refused to consider *Cardell* controlling as follows:

> "***We are not unaware of the case of *Cardell, Inc. v. Woodbridge Tp.*, 115 *N.J. Super.* 442 (*App. Div.* 1971), *certif. den.* 60 *N.J.* 236 (1972). As observed by the trial judge below in his opinion in *M.A. Stephen Construction Company v. Rumson*, 118 *N.J. Super.* 523, 527 (*Law Div.* 1972), no issue as to the liability of the municipality for damages was there raised or passed upon.***" (125 *N.J. Super.* at 75)

Respondent Board submits that in no event would petitioner be entitled to monetary damages.

In deciding matters such as the one controverted herein, the Commissioner frequently consults the wisdom and instruction of judicial interpretation. The philosophy and purposes of the statutes respecting public bidding have been enunciated in decisions of the courts upon numerous occasions. Contracts are to be awarded upon competitive bidding solicited through public advertisement. *Hillside Township v. Sternin*, 25 *N.J.* 317, 322 (1957) It is an almost universally recognized practice (*Cf. McQuillin Municipal Corporations*, § 29.28 (1959)) and one which is rooted deep in sound principles of public policy. *Waszen v. City of Atlantic City*, 1 *N.J.* 272, 283 (1949); *Tice v. Long Branch*, 98 *N.J.L.* 214 (*E. &A.* 1922) The purpose is to secure competition and to guard against favoritism, improvidence, extravagance and corruption. Statutes directed toward these ends are for the benefit of the taxpayers and not the bidders; they should be construed with sole reference to the public good, and they should be rigidly adhered to. *Weinacht v. Board of Chosen Freeholders of County of Bergen*, 3 *N.J.* 330, 333 (1949); *Tice, supra; McQuillin, supra*, § 29.29

It is settled in this State that, in the absence of a question as to the financial responsibility of a bidder, the low bidder is entitled to an award of the contract as a matter of right. *Sellitto v. Cedar Grove Township*, 133 *N.J.L.* 41 (*E. &A.* 1945); *Frank P. Farrell, Inc. v. Board of Education of Newark*, 137 *N.J.L.* 408 (*Sup. Ct.* 1948) The statutes regarding the lowest bidder on public contract are not ones of grace, but ones of right, and may not be lightly disturbed for they are based upon competition, a State policy. *Sellitto, supra* If the lowest bid is not accepted, 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 him the contract. *Sellitto, supra* There is no question here of the responsibility of either of the three bidders. The question to be determined is precisely which one was the low bidder.

The matter of an irregularity in a public bid has been dealt with by our courts. In *Bryan Construction Company, Inc. v. Board of Trustees, etc.*, 31 *N.J. Super.* 200 (*App. Div.* 1954), the Court stated the following:

> "***Further, a municipal body has a greater function in dealing with irregularities in such matters than merely exercising a ministerial and perfunctory role. It has inherent discretionary power, and what is more, a duty to secure, through competitive bidding, the lowest responsible offer, and to effectuate that accomplishment it may waive minor irregularities.***" (at p. 206)

The Court in *Bryan Construction Company, Inc., supra,* also defined the precise nature of the permitted irregularity. Quoting *Phifer v. City of Bayonne,* 105 *N.J.L.* 524, 527 (*Sup. Ct.* 1929) it stated:

> "***'It is not any kind of irregularity in specifications of proposed public work to be done that will have the effect of voiding the award. The irregularity must be of a substantial nature—such as will operate to affect fair and competitive bidding.'***" (at p. 207)

See also *Faist v. City of Hoboken,* 72 *N.J.L.* 361 (*Sup. Ct.* 1905); *Appollo Associates, Inc. v. Board of Education of the Township of Lakewood, Ocean County,* 1958-59 *S.L.D.* 93; *Taylor v. Board of Education of the Township of Gloucester, Camden County,* 1955-56 *S.L.D.* 71, aff'd State Board of Education 75.

The Supreme Court of the State has clearly established the requirements that bids must conform to the specifications with no material or substantial deviation therefrom. In *Hillside Township v. Sternin, supra,* the Court stated:

> "***The law is clear that bids must meet the terms of the notice. The significance of the expression 'lowest bidder' is not restricted to the amount of the bid; it means also that the bid conforms with the specifications. ***Minor or inconsequential variances and technical omissions may be the subject of waiver. *** But any material departure stands in the way of a valid contract***." (at p. 324)

In the instant matter, the pivotal point is whether the lowest bid was materially and substantially in accord with the specifications. This determination can be made by an examination of the stipulated facts and the documentary evidence.

The Commissioner takes notice of *N.J.A.C.* 6:21-13.2 wherein it is stated:

> "***The board of education reserves the right, with the approval of the county superintendent, to change the route. If any change of route results in increased or decreased mileage, adjustment in the contract price will be made accordingly. The basis for any adjustment will be the separate and distinct per mile cost included in the bid.***"

The lowest bidders did substantially conform to the specifications, and no material finding of facts was brought forth so as to preclude the award of the contracts to the lowest responsible bidders.

The Commissioner determines that the Board properly performed its duty to secure, through competitive bidding, the lowest responsible offer for its contracted pupil transportation. Petitioner's averment that the Board acted improperly is without merit.

For the reasons heretofore stated, the Commissioner finds and determines that the Board of Education of the Woodbridge Township School District

properly discharged its duty and responsibility under *N.J.S.A.* 18A:39-2 and *N.J.S.A.* 18A:39-3 in awarding pupil transportation contracts to James V. Curcio and George Dapper.

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

May 13, 1976

John C. Roy, II,

Petitioner,

v.

Board of Education of the Township of Middle, Cape May County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Ruhlman and Butrym (Paul T. Koenig, Jr., Esq., of Counsel)

For the Respondent, Cafiero and Balliette (William M. Balliette, Jr., Esq., of Counsel)

Petitioner is a teacher who was employed for the academic year 1974-75 by the Board of Education of the Township of Middle, Cape May County, hereinafter "Board," and was not reemployed. He alleges that the notice of his non-reemployment was statutorily defective and prays for reinstatement and any retroactive pay to which he is entitled.

The facts in this matter are not in dispute; therefore, it has been submitted to the Commissioner of Education for Summary Judgment on the pleadings, exhibits, and Briefs.

Petitioner was employed as a teaching staff member for the academic year 1974-75. (Exhibit A) At a meeting of the Board on March 17, 1975, the Board voted that it would not offer petitioner a contract for the 1975-76 academic year (Exhibit C); however, petitioner was not notified in writing as required by *N.J.S.A.* 18A:27-10 which reads as follows:

> "On or before April 30 in each year, every board of education in this State shall give to each nontenure teaching staff member continuously employed by it since the preceding September 30 either

> "a. A written offer of a contract for employment for the next succeeding year providing for at least the same terms and conditions of employment but with such increases in salary as may be required by law or policies of the board of education, or
>
> b. *A written notice that such employment* will not be offered." (*Emphasis supplied.*)

Additionally, *N.J.S.A.* 18A:27-11 reads as follows:

> "Should any board of education fail to give to any nontenure teaching staff member either an offer of contract for employment for next succeeding year *or a notice that such employment will not be offered*, all within the time and in the manner provided by this act, then said board of education shall be deemed to have offered to that teaching staff member continued employment for next succeeding school year upon the same terms and conditions but with such increases in salary as may be required by law or policies of the board of education." (*Emphasis supplied.*)

And, *N.J.S.A.* 18A:27-12 reads:

> "If the teaching staff member desires to accept such employment he shall notify the board of education of such acceptance, in writing, on or before June 1, in which event such employment shall continue as provided for herein. In the absence of such notice of acceptance the provisions of this article shall no longer be applicable."

The primary purpose of these statutes is to give teachers timely notice when they are not to be reemployed in order that they may seek other employment. However, because he was not notified in writing pursuant to statute, petitioner notified the Board by letter dated May 19, 1975, that he was accepting its offer of employment for the coming school year. (Exhibit B) The Superintendent of Schools responded by letter dated May 20, 1975, as follows:

> "This is to advise you that the Middle Township Board of Education voted on March 17, 1975 not to offer you a contract for the 1975-76 school year.
>
> "Although you were not given written notice as stated in 18A:27-10, you were notified at a meeting with Mr. Webb on March 25, 1975 and another meeting when I was present on April 9, 1975.
>
> "Because of secretarial error, I do not believe the 'intent' of the law can be dismissed.
>
> "I hereby notify you that a contract will not be issued for the 1975-76 school year." (Exhibit C)

(See also Exhibit D.)

Thereafter, at a meeting of the Board held on June 19, 1975, the Board took the following action:

> "Reverend Reasner made a motion that due to procedural irregularities a contract to offered to John Roy and [L.A.D.] and that they also be given a 60 day notice in accordance with the standard clause in the contract. Mr. Bruce seconded the motion which passed roll call vote, all present voting yes." (Exhibit D)

The practical and legal effect of this motion by the Board was to terminate petitioner in sixty days under the new contract. (Exhibit E)

The Superintendent's letter dated March 20, 1975 (Exhibit C), reveals that petitioner knew prior to April 30, 1975, that he would not be offered a contract to teach for the 1975-76 academic year. The content of this letter is not refuted by petitioner. Nevertheless, the Board failed to give petitioner timely written notice as it is required to do. *N.J.S.A.* 18A:27-10 Therefore, the Board's notice was inadequate and petitioner did in fact hold a contract to teach in the district notwithstanding the action of the Board in which it actually resolved to offer him a contract of employment for the 1975-76 academic year. (Exhibit D)

The matter herein controverted is similar in many respects to *Sarah Armstrong v. Board of Education of the Township of East Brunswick, Middlesex County*, 1975 *S.L.D.* 112, reversed State Board of Education for reasons of termination pay 117.

Armstrong knew also, prior to April 30 in the school year then in question, that her employment by the Board was doubtful to say the least; however, after the Board determined not to reemploy her for the coming school year, it attempted to notify her in writing. Through a clerical error the notice was mailed to the wrong address and Armstrong received her notice a few days after April 30. The Commissioner decided that the Board's notice did not meet the requirement of *N.J.S.A.* 18A:27-10; and thereafter, the State Board decided that Armstrong was entitled to sixty days' salary under the new contract.

The matter herein is similar. Petitioner knew prior to April 30 that he would not be reemployed for the 1975-76 academic year. However, because he did not receive a notice in writing that he would not be reemployed, he notified the Board in writing on May 19, 1975, that he was "***graciously accepting employment in the Middle Township School District" for the 1975-76 academic year. (Exhibit B) After receipt of the new contract of employment and the sixty day termination notice, petitioner requested a statement of reasons for his termination (Exhibit G), and those reasons were given to him by the Board. (Exhibit H)

There has been no showing by petitioner that his right to due process has been violated or that the Board has engaged in a subterfuge to preclude his employment for the 1975-76 academic year; nor has petitioner advanced any substantive reason for his assertion that he has a right to be heard. Likewise, there is no showing that the Board's action was arbitrary or capricious.

See *Donaldson v. Board of Education of the City of North Wildwood*, 65 *N.J.* 236 (1974); *Barbara Hicks v. Board of Education of the Township of Pemberton, Burlington County*, 1975 *S.L.D.* 332.

When a teaching staff member alleges that a local board of education has refused reemployment for proscribed reasons (*i.e.* race, color, religion, etc.) or in violation of constitutional rights such as free speech, or that the board was arbitrary and capricious or abused its discretion, and is able to provide adequately detailed specific instances of such allegations, then the teaching staff member may file a Petition of Appeal before the Commissioner which will result in a full adversary proceeding. *Marilyn Winston et al. v. Board of Education of Borough of South Plainfield, Middlesex County*, 1972 *S.L.D.* 323, aff'd State Board of Education 327, reversed and remanded 125 *N.J. Super.* 131 (*App. Div.* 1973), aff'd 64 *N.J.* 582 (1974), dismissed with prejudice by Commissioner of Education November 1, 1974

In *Winston, supra,* the Court stated that:

> "***It may be acknowledged that the bare assertion or generalized allegations of infringement of a constitutional right does not create a claim of constitutional dimensions. Cf. *Trap Rock Industries, Inc. v. Kohl*, 63 *N.J.* 1 (1973)***" (125 *N.J. Super.* at 144)

Nowhere does the record disclose a constitutional deprivation of petitioner's rights, nor is there any specific allegation of such a showing.

In the judgment of the Commissioner, the record does not support petitioner's contention that his termination was based on proscribed reasons, *ante*; nor has he shown that his due process rights have been violated.

In *Donaldson, supra,* the Court cited *George Ruch v. Board of Education of Greater Egg Harbor, Atlantic County,* 1968 *S.L.D.* 7, dismissed State Board of Education 11, aff'd New Jersey Superior Court, Appellate Division, 1969 *S.L.D.* 202 in support of an argument that "***the fears of tenure impairment and undue burden expressed by those who have thus far insisted on the withholding of reasons***" was an indication of how negligible such fears were. (65 *N.J.* at 248) In *Ruch*, as in the matter herein, the Commissioner and the Court were concerned with a subjective judgment made by a local board of education. Likewise, reasons for non-retention had been afforded a nontenured teacher and an adversary hearing was requested to disprove their validity. The Commissioner, however, found no reason in *Ruch* to order an adversary hearing and said:

> "***The fact that respondent made available to petitioner the report of his supervisor which was adverse to petitioner's interest, does not open the door automatically to a plenary hearing on the validity of the 'reasons' for nonrenewal of employment. To hold that every employee of a school district, whose employment is not continued until he acquires tenure status, is automatically entitled to an adversary type hearing such as petitioner demands, would vitiate the discretionary authority of the board of education and would create insurmountable problems in the adminis-

tration of the schools. It would also render meaningless the Teacher Tenure Act for the reason that the protections afforded thereby would be available to employees who had not yet qualified for such status.***

"While petitioner has charged respondent with arbitrary, frivolous and discriminatory conduct with respect to his further employment, such a bare allegation is insufficient to establish grounds for action. *U.S. Pipe and Foundry Company v. American Arbitration Association*, 67 *N.J. Super.* 384 (*App. Div.* 1961) Petitioner does not allege that race or religion or any other kind of unlawful bias influenced respondent's failure to reappoint him. Nor does he claim that respondent was motivated by frivolous considerations. Petitioner's charge of unreasonable and arbitrary action rests on the unfavorable report of his superior. But examination of the report, which petitioner attached to his pleadings, reveals that it is nothing more than his supervisor's written evaluation of petitioner's classroom performance and teaching competence. Supervisory evaluations of classroom teachers are a matter of professional judgment and are necessarily highly subjective. There is no allegation that the supervisor's report was made in bad faith, the result of personal animosity or bias, or in other ways improper. What is plain is that the supervisor, in the normal course of her duties, rendered a report of her evaluation of petitioner's competence as a teacher to the administration, that a copy was furnished to petitioner for his knowledge, that the administration and the Board of Education considered the report and, although it did not conduct an adversary type hearing such as petitioner demands, it did afford petitioner an opportunity to meet with the Board and express his point of view, and that as a result and with this information before it the Board simply chose not to reemploy petitioner. Under such circumstances the Commissioner finds no vestige of any unlawful, arbitrary or capricious motivation. The Commissioner cannot agree that because respondent made information underlying its decision not to place petitioner in a tenure status available to him, it bound itself to accord him a plenary hearing as a matter of right.***"
(1968 *S.L.D.*., at pp. 10-11)

The Court in *Donaldson* commented favorably on the Commissioner's decision in *Ruch* and said that the dismissal of the Petition by the Commissioner was grounded in an

"***opinion by the Commissioner which set forth substantive and procedural principles which appear to have been well designed towards protecting the teacher's legitimate interests without impairing the board's discretionary authority and without unduly encumbering the administrative appellate process.***" (65 *N.J.* at 247)

The Commissioner determines, therefore, that petitioner was terminated properly pursuant to the sixty day notice in his contract (Exhibit C) and the relief to which he is entitled is sixty days' pay in accordance with the terms of that new contract, but not to reemployment. *Armstrong, supra; Gladys M. Canfield v. Board of Education of the Borough of Pine Hill, Camden County*, 1966 *S.L.D.* 152, affirmed State Board of Education April 3, 1967, affirmed 97 *N.J. Super.* 483 (*App. Div.* 1967), reversed 51 *N.J.* 400 (1968)

Except for this salary consideration, the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

May 13, 1976

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, May 13, 1976

For the Petitioner-Appellant, Ruhlman and Butrym (Paul T. Koenig, Jr., Esq., of Counsel)

For the Respondent-Appellee, Cafiero and Balliette (W.M. Balliette, Jr., Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

August 4, 1976

Board of Education of the Borough of Union Beach,

Petitioner-Appellant,

v.

Mayor and Council of the Borough of Union Beach, Monmouth County,

Respondent-Appellee.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, December 17, 1975

For the Petitioner-Appellant, Mary Lou Ackerman, *Pro Se*

For the Respondent-Appellee, Healy and Falk (Patrick D. Healy, Esq., of Counsel)

The State Board of Education remands this matter to the Commissioner of Education for clarification of the financial data regarding the tuition account. The clarification of the financial data should be completed and the results reported to the State Board Legal Committee at its next meeting, which is set down for March 24, 1976.

March 3, 1976

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Mary Lou Ackerman, *Pro Se*

For the Respondent, Healy and Falk (Patrick D. Healy, Esq., of Counsel)

The decision of the Commissioner of Education in this matter dated December 17, 1975, was remanded by State Board of Education on March 3, 1976 for "clarification of the financial data regarding the tuition account." A hearing on the remand question was held at the State Department of Education on March 17, 1976 before a hearing examiner appointed by the Commissioner. The Board was represented by its Superintendent of Schools and the Board Secretary. The Council was represented by its attorney of record and, at the request of the Assistant Commissioner of Education in charge of Controversies and Disputes, an accountant from the Division of Administration and Finance was present for the purpose of reviewing with the litigants the Department of Education business records and audit reports regarding the Union Beach School District.

The Board's exception to the Commissioner's audit report (Exhibit A) is that the $765,000 found to be sufficient for tuition purposes by the hearing examiner did not take into account other tuition costs as enumerated in their letters dated January 27 and February 19, 1976, which set forth the need for an additional $48,156.61 for tuition purposes for the 1975-76 school year.

The additional evidence gathered at the hearing revealed the following:

1. The total budget was deliberately underestimated by the Board in an effort to keep the tax rate low. Therefore, even if the budget had been accepted by the voters, or after its defeat if no reductions were suggested by Council, the Board would still be unable to meet its financial obligations for the 1975-76 school year.

2. The Board's need for additional tuition moneys was adequately demonstrated; however, their financial data were not in accord with the interim audit report (Exhibit A) and a later report used by the litigants and the hearing examiner at the March 17, 1976 hearing. (Exhibit B)

3. The Board has again deliberately underestimated its 1976-77 budget which it submitted to the voters on March 9, 1976; therefore, even if it eventually receives all the money it seeks for the 1976-77 school year, it will not have sufficient funds to meet all its obligations for the 1976-77 school year.

4. The Board ended the school year on June 30, 1975 with a deficit of $23,175.14 in its current expense free appropriations balance.

5. The Board anticipates ending the school year on June 30, 1976 with another deficit in its current expense free appropriations balance.

The hearing examiner finds, therefore, that the Board is in dire need of the additional money it seeks in its tuition account. Even though its financial data regarding the tuition account does not agree with the audit reports (Exhibits A, B) prepared by the Division of Administration and Finance, State Department of Education, the Board's budget is inadequate for the 1975-76 school year.

The hearing examiner recommends, therefore, that in addition to considering the Board's request for additional moneys in its tuition line item, the matter thereafter remain in the jurisdiction of the Commissioner for the purpose of a thorough audit of the business records of the school district and to take other corrective action deemed appropriate by the Commissioner.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has read the report of the hearing examiner and the exceptions filed thereto by Council and the Board pursuant to *N.J.A.C.* 6:24-1.16.

The financial records of the Board and the testimony elicited from its representatives reveal that the 1975-76 school budget is inadequate to meet the demands of the school district for the 1975-76 school year. The Commissioner has commented previously in budget matters that his determination of the need for restoration of moneys would be made in the perspective of the "***total revenues available to meet the demands of a school system.***" *Board of Education of the Township of Madison v. Mayor and Council of the Township of Madison, Middlesex County*, 1968 *S.L.D.* 139, 142 In this regard, the Board has demonstrated a need for full restoration of the moneys originally reduced by Council. Therefore, in addition to the $22,000 ordered restored to the budget by the Commissioner in his decision dated December 17, 1975, the Commissioner will restore also the additional $50,000, or a total of $72,000.

The Commissioner hereby certifies to the Monmouth County Board of Taxation the additional amount of $50,000 which when added to the $22,000 restoration ordered on December 17, 1975, makes the total additional amount $72,000 to be raised by public taxation for current expenses for the Board's use in meeting its statutory obligations and in providing a thorough and efficient system of public education in the School District of Union Beach.

The Commissioner will not direct a further audit of the Board's business records at this time, as suggested by the hearing examiner; however, the Commissioner takes notice of the poor business practice of the Board, specifically in adding moneys to its budget for school purposes from a free appropriations balance which does not exist. (Exhibit A) The Commissioner directs the Board to stop this practice immediately. Further, in an effort to assist the Board in eliminating the deficit in its budget, the Commissioner directs the Board to submit a status report of its budget to the Division of Administration and Finance, State Department of Education, Trenton, beginning with a report on or about June 30, 1976 and at the end of each third month thereafter, until further notice. The specifics of those reports will be directed by that Division. Further assistance in the preparation of its budgets may be sought through the office of the Monmouth County Superintendent of Schools as required.

COMMISSIONER OF EDUCATION

May 13, 1976

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, December 17, 1975

Remanded by the State Board of Education, March 3, 1976

Decision on Remand by the Commissioner of Education, May 13, 1976

For the Petitioner-Appellant, Mary Lou Ackerman, *Pro Se*

For the Respondent-Appellee, Healy & Falk (Patrick D. Healy, Esq., of Counsel)

The decision on remand of the Commissioner of Education is affirmed for the reasons expressed therein.

June 2, 1976

Hazlet Township Teachers Association: Hazlet Township Teachers Association on Behalf of Gail Potash, Barbara McLeod, Joyce Angersbach, Diane Aerts, Thomas Hanlon and Christine Duncan; and Gail Potash, Barbara McLeod, Joyce Angersbach, Diane Aerts, Thomas Hanlon and Christine Duncan, Individually

Petitioners,

vs.

Hazlet Township Board of Education, Monmouth County,

Respondent.

CONSENT ORDER

This matter having been opened to the Commissioner of Education on a Notice of Motion for Interim Relief, which Motion was returnable on April 21, 1976, and Peter S. Falvo, Jr., of the firm of Morgan & Falvo, appearing on behalf of the petitioners, and Robert H. Otten, of the firm of Crowell & Otten, appearing for the respondent;

And the parties having agreed to a dispostion of this matter, hereby consent to the entry of the within Order;

And the Commissioner of Education, through its agent, August Thomas, having heard and considered the respective argument of counsel, hereby agrees to the entry of the following Order based upon the agreement of the parties;

IT IS on this 25th day of May, 1976, ORDERED that the hearing concerning the above captioned petitioners, is adjourned without date and without prejudice to either party pending a determination by the Commissioner of Education as to the status of these individuals, specifically as to whether or not they are tenured or non-tenured employees.

COMMISSIONER OF EDUCATION

Hazlet Township Teachers Association, and Gail Potash, Barbara McLeod, Joyce Angersbach, Diane Aerts, Thomas Hanlon, Christine Duncan, Carolyn Morris, Marcella McNamara, and Katherine Dougherty et als., Individually,

Petitioners,

v.

Board of Education of the Township of Hazlet, Monmouth County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Morgan & Falvo, (Peter S. Falvo, Jr., Esq., of Counsel)

For the Respondents, Crowell & Otten (Robert H. Otten, Esq., of Counsel)

Petitioners are teachers employed by the Board of Education of the Township of Hazlet, hereinafter "Board," who were notified prior to April 30, 1976, that they would not be reemployed for the 1976-77 academic year. Petitioners aver that they have acquired a tenure status and may be dismissed only pursuant to the relevant tenure statutes.

Hearings in this matter were conducted in the office of the Monmouth County Superintendent of Schools on July 1 and 2, 1976 before a hearing examiner appointed by the Commissioner of Education. The Board submitted in evidence Exhibits A through K. Exhibits A and H are summaries of each teacher's employment by the Board while the remaining exhibits give a synopsis of each teacher's service with a copy of his/her employment contracts attached thereto. The report of the hearing examiner follows:

Each petitioner named herein has been employed by the Board on a full-time basis for more than three academic years, and each petitioner has held an appropriate certificate issued by the State Board of Examiners at all times during his/her employment by the Board. (Tr. I-10-16, 35-41, 65-67, 84-87, 101-102, 114; Tr. II-3-16, 28, 40-41; Exhibits A, H)

The relevant statute in determining the tenure status of these petitioners is *N.J.S.A.* 18A:28-5 which reads in pertinent part as follows:

> *"The services of all teaching staff members including all teachers*, principals, assistant principals, vice principals, superintendents, assistant superintendents, and all school nurses including school nurse supervisors, head school nurses, chief school nurses, school nurse coordinators, and any other nurse performing school nursing services and such other employees as are *in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under*

any board of education, excepting those who are not the holders of proper certificates in full force and effect, *shall be under tenure* during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title, *** after employment in such district or by such board for:

"(a) three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or

"(b) *three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or*

"(c) *the equivalent of more than three academic years within a period of any four consecutive academic years****." (*Emphasis supplied.*)

The Board denies that petitioners have acquired a tenure status and avers that each was employed, at least for a time, as a "continuous progress floater teacher" or "interim readiness teacher" under a Title I federally funded program. (Exhibits A, H; Board's Answer, paragraph twelve) The Board admits paying petitioners at the rate of thirty dollars per diem; however, it avers that their duties and services were considerably different in scope from those of "classroom teachers" and that each petitioner agreed to and accepted the terms of his/her initial employment as a "per diem" teacher. (Board's Answer, Second, Third and Fourth Affirmative Defenses)

A review of Exhibits A and H clearly reveals that each petitioner has served more than three consecutive academic years, or has served the equivalent of more than three academic years within a period of any four consecutive academic years. *N.J.S.A.* 18A:28-5(b) (c) Each teacher testified that he/she served on a full-time basis every day (except for illness) and that he/she reported to school and departed at the same time as all "regular" teachers. The testimony of each teacher reveals that there was no difference between his/her duties and those duties performed by all other teachers. More than one teacher testified that they performed the exact duties after receiving contracts as when they were paid at the per diem rate. (Tr. I-11, 36, 72, 75) Each teacher testified that he/she was paid thirty dollars per day and received no other emoluments. When a day was missed for illness or other cause, petitioners received no compensation.

The litigants agree that in the interest of expedience, the tenure matter alone should be decided immediately. Petitioners do not abandon their right to seek back pay and emoluments if they prevail on the tenure issue. At the conclusion of petitioners' testimony, the hearing examiner stated that their testimony and Exhibits A through K, submitted in evidence by the Board, were sufficient for him to recommend to the Commissioner that each petitioner has acquired a tenure status. (Tr. II-69-71) There was no objection to this statement made by the hearing examiner and the Board did not elect to call any witnesses to discredit the testimony of petitioners; therefore, the hearing examiner accepts

petitioners' testimony as true and unrefuted. The hearing examiner recognizes that there may have been minor discrepancies between the recollections of building principals and petitioners if the principals had testified; however, the evidence submitted by the Board corroborates petitioners' testimony to the degree that a tenure status has been attained by each of them.

Counsel have waived the necessity for the filing of a hearing examiner's report in this matter, therefore it is ripe for determination by the Commissioner. This concludes the report of the hearing examiner.

* * * *

The Commissioner has read the report of the hearing examiner and notices that counsel have waived the filing of a hearing examiner's report. The Commissioner, therefore, accepts the findings and recommendations of the hearing examiner and adopts them as his own.

Tenure is a legislative status and, when its precise conditions set forth by statute are met, tenure may not be abrogated or waived by any person or any board of education. *Greenway v. Board of Education of the City of Camden,* 129 *N.J.L.* 46 (*Sup. Ct.*), aff'd 129 *N.J.L.* 461 (*E. & A.* 1942); *Lange v. Board of Education of the Borough of Audubon,* 26 *N.J.Super.* 83 (*App. Div.* 1953); *Ruth Nearier et al. v. Board of Education of the City of Passaic, Passaic County,* 1975 *S.L.D.* 604; *Zimmerman v. Board of Education of the City of Newark,* 38 *N.J.* 65 (1962), *cert.* denied 371 *U.S.* 956, 83 *S. Ct.* 508 (1963); *N.J.S.A.* 18A: 28-5

The Commissioner has previously ruled on the question of the employment status of teachers employed with federal funds in *Jack Noorigian v. Board of Education of Jersey City, Hudson County,* 1972 *S.L.D.* 266. See also *Henry Butler et al. v. Board of Education of the City of Jersey City, Hudson County,* 1974 *S.L.D.* 890, aff'd State Board of Education, April 2, 1975, affirmed in part/ reversed in part Docket No. A-2803-74, New Jersey Superior Court, Appellate Division, July 9, 1976 and *Nearier, supra.* These decisions of the Commissioner have held that the source of funds used to compensate teaching staff members may not be employed to set one group apart from others similarly qualified and with similar professional duties. As the Commissioner said in *Noorigian:*

> "***Once funds are made available to a local school district from any source, those funds become resources of the district receiving them, and persons employed with those funds may not be separated by category from other persons employed by the Board.***
>
> "Any employment arrangement into which the Board enters, irrespective of the source of the funding, binds the Board and its employees to all the terms and conditions of employment as set forth by the Legislature in the school laws (*N.J.S.A.* 18A, Education) ***." (at p. 270)

The record shows, also, that petitioners were steadily employed on a full-time basis for more than three consecutive academic years, or were employed for more than the equivalent of three consecutive academic years within a period of any four consecutive academic years; therefore, the Commissioner determines that each petitioner has acquired a tenure status and cannot be dismissed except by statutory prescription pertaining to tenure teachers. No determination is now made on the remaining issues; however, the hearing examiner is directed to pursue those issues with the litigants in an expeditious manner and in accordance with the Commissioner's determinations in *Noorigian, supra; Nearier, supra;* and *Butler, supra.*

COMMISSIONER OF EDUCATION

August 3, 1976

"F.G.," guardian ad litem for "R.G.,"

Petitioner,

v.

Board of Education of Caldwell-West Caldwell, Joseph Vuono, Principal; Eugene Bradford, Superintendent; Dorothy Kassak, Ruth Nussbaum, R. Rusinow, Essex County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Lawrence M. Koenig, Esq.

For the Respondents, Stickel, Kain and Stickel (Harold M. Kain, Esq., of Counsel)

Petitioner is the mother of an elementary grade pupil who contests the grade placement of her daughter by the Board of Education of Caldwell-West Caldwell, hereinafter "Board." Petitioner prays that the Commissioner of Education direct the Board to set aside her grade placement and to properly place her at a grade level consistent with her achievements.

A hearing in this matter was conducted on April 21, 1975 in the office of the Somerset County Superintendent of Schools, Somerville, before a hearing examiner appointed by the Commissioner. The report of the hearing examiner follows:

Petitioner's daughter was born on December 8, 1967, and was about seven years of age when the Petition of Appeal on her behalf was filed by her mother.

Petitioner's daughter entered the Wilson School's K-1 class in September 1973, and in June 1974 she was notified that she would be placed in a combined class including grades one, two and three. The Board considers its Wilson School to be an ungraded school which also contains combined classes including grades two and three. It is this distinction in the classes which gives rise to the instant Appeal. Petitioner demanded that her daughter be placed in a class comprised of grades two and three, rather than a combined class of grades one, two, and three. Her daughter actually attended a private school in 1974-75.

At the hearing the hearing examiner determined that the testimony offered was repetitive and, therefore, he directed the litigants to file Briefs at a date selected by petitioner as to why the hearing should be continued. No such Briefs were filed despite letters addressed to litigants by the hearing examiner on June 9 and August 14, 1975.

On September 17, 1975, the hearing examiner sent the following letter to petitioner:

> "I have not heard from you since our hearing on April 21, 1975. By letter of August 14, 1975, I directed that your Brief be filed in this office by September 15, 1975. We have not received your Brief, nor have we been advised that one would not be submitted.
>
> "Now that we have begun a new academic year, it would appear to me that this matter might have been settled between the parties, thereby rendering all of the issues moot. However, if it has not been settled, I shall recommend to the Commissioner that it be dismissed with prejudice for lack of prosecution on September 29, 1975, unless good and sufficient reason can be shown why it should be continued."

Petitioner answered by letter of September 26, 1975, and requested that a decision be rendered on the record to date and the evidence adduced at the hearing.

The record shows that more than one year has gone by since the filing of the Petition of Appeal in this matter. In the hearing examiner's opinion, the grade placement of petitioner's daughter has changed in this time and the relief petitioner requests, even if petitioner prevailed in her contentions, is no longer possible.

If and when petitioner's daughter re-enters the district's schools, she will be subject to placement by school officials and to testing prior to such placement. (Conference Agreements)

It has been well established that the Commissioner does not decide moot issues. See *Sharon Ann Pinkham v. Board of Education of South River et al., Middlesex County,* 1974 *S.L.D.* 1103, aff'd in part/reversed in part State Board of Education June 26, 1975; *Tedesco v. Board of Education of Lodi, Bergen County,* 1955-56 *S.L.D.* 69; *McAllister v. Board of Education of Lawnside, Camden County,* 1951-52 *S.L.D.* 39; *Rodgers v. Board of Education of Orange,*

Essex County, 1956-57 *S.L.D.* 50. In *Moss Estate, Inc. v. Metal and Thermit Corporation,* 73 *N.J. Super.* 56, 67 (*Chan. Div.* 1962), the Court said:

> "***It is the policy of the courts to refrain from advisory opinions, from deciding moot cases, or generally functioning in the abstract, and 'to decide only concrete contested issues conclusively affecting adversary parties in interest." *Borchard, Declaratory Judgments* (2*d ed.* 1941), pp. 34-35***."

In *Paul E. Polskin v. Board of Education of North Plainfield, Somerset County,* 1968 *S.L.D.* 217, 218, the Commissioner stated:

> "***[I]t being well established that the Commissioner of Education, consistent with the policy of the Courts, will not hear and decide controversies which are moot***."

The hearing examiner recommends, therefore, that the Commissioner confirm his finding that the matter herein is moot and that no determination need be made.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has read the report of the hearing examiner and notices that no exceptions have been filed thereto.

The Commissioner, therefore, adopts the findings, conclusions, and recommendations of the hearing examiner in their entirety. The matter herein has been rendered moot; accordingly, the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

June 10, 1976

In the Matter of the Annual School Election Held in the Township of Pittsgrove, Salem County.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Donald James Reed and Fred Laning, *Pro Se*

For the Respondent, George S. Friedman, Esq.

Pursuant to a Petition filed under date of March 18, 1976 by Candidates Donald James Reed and Fred Laning alleging irregularities in the conduct of the annual school election held on March 9, 1976 in the Township of Pittsgrove, an inquiry was conducted by a hearing examiner appointed by the Commissioner of Education at the office of the Salem County Superintendent of Schools in Woodstown on March 30, 1976.

The report of the hearing examiner is as follows:

The Notice of Appeal enumerates the following allegations:

1. Mr. Carl W. Harris, Secretary to the Board of Education, redrew ballots without notice to the petitioners with only the Board President present.

2. Mr. Carl W. Harris, Secretary to the Board of Education, actively campaigned in behalf of the opposing slate of candidates by:

a. "using the school board meeting as a forum for berating our candidacies and the citizens group endorsing us, leaving us without recourse since the Board President would not permit rebuttal from the audience;

b. "personally engaging in the destruction of our telephone pole campaign signs;

c. "personally appearing with the opposing slate of candidates at *** a mobile home park, to which we *** were expressly denied invitation by management;

d. "writing a letter to the local papers *** sending in his capacity as Secretary to the Board *** a letter in which he cast aspersions on [us] and in which he *** fractured the truth.***"

3. Certain inappropriate, if not illegal, activities occurred at polling places.

a. Opposing candidates at the polling places engaged in handshaking and disruptive salutations.

b. There was improper, or lack of, signature verification.

4. Campaign expenditures in excess of a thousand dollars happened without access to records.

The charges will be considered first separately and then as a whole.

Allegation No. 1

Petitioner Reed asserts that a redrawing of ballots was conducted by the Board Secretary without prior notification to him and with only the Board President present. Direct testimony by the Board Secretary adduced that a redrawing for position on the ballot did occur on advice of the County Superintendent's office, on January 30, 1976, and was conducted by the Board Secretary. (Tr. 7-8) He further testified that all Board members were notified of the redrawing including incumbent candidates Frank Reaves and Everett Walker. (Tr. 8) He testified other candidates were not notified and that the Board President was not present at the redrawing. (Tr. 9)

The hearing examiner finds this procedure in conformance with the applicable statute *N.J.S.A.* 18A:14-13 and for this reason recommends that this allegation be dismissed as having no merit.

Allegation No. 2

A. Petitioner Reed testified that at a regular meeting of the Board held on March 1, a dialogue occurred between Secretary Harris and petitioners (Tr. 10) during which the Board Secretary referred to the opposing citizens as a dissident group. (Tr. 12) Petitioner further testified that in attempting to rebut the comment he was cut off. (Tr. 13) Further testimony adduced that none of this dialogue appeared in the minutes of the Board meeting.

B. Petitioner offered no proof that Secretary Harris was observed destroying telephone pole campaign signs.

C. Mr. Harris testified that he appeared at a mobile home park on request of one of the candidates, Schaper, Reaves, or Walker, on March 8, 1976, and participated in a form of campaign rally. (E-3) He further testified that he appeared at this meeting in the role of a private citizen. (Tr. 18) Petitioners testified that they were not invited.

D. Petitioner Laning further offered testimony from a letter to the editor from the Thursday, March 4, 1976 *Elmer Times* signed by Carl W. Harris, R.D. #2, Elmer. This letter constituted a lengthy communication in support of and praise of the Pittsgrove Township School System and incumbent candidates Reaves, Schaper, and Walker. Additionally, reference was made in the letter to the prognosticated actions of "this dissident group" and purported ousting of various employees (including Board Secretary Harris) "if this group is given power." (E-1)

Mr. Harris testified that he had not written the letter in his role as Secretary to the Board and intended it to be a communication from a private citizen. (Tr. 19)

Petitioner Laning, in subsequent testimony, questioned the ethical basis of this letter, if not its legality. (Tr. 51) No evidence was offered by petitioner to prove that any vote was changed because of the aforementioned communication. (Tr. 52) Both Petitioners Laning and Reed denied ever attacking the continued service of any employee of the Board.

The hearing examiner observes ample evidence showing involvement and participation in local school issues by concerned citizens and leaves judgment of the propriety of this involvement to the Commissioner.

Allegation No. 3

Petitioner Reed's description of the polling place (Tr. 24) revealed a relatively confined area with four or five feet of space between the table, register book, and the open door. Petitioner claimed such confinement led to excessive noise and confusion as "disruptive salutations" were offered by members of the opposing slate in their greetings to people standing in the voting line. (Tr. 22) Further contention was made by petitioner that the use of a standard wireback notebook and its physical location in the room, contributed to the insufficient verification of signatures and voter identification. (Tr. 29)

Mrs. Goldfein, a member of the election Board present at the March 9 election and a resident of the community for twenty-eight years, testified to the small size of Pittsgrove and concomitant personal recognition of seventy percent of the voters and in the event of persons not recognized "some checks were made of signatures." (Tr. 32)

Mrs. Patricia Ann Junghans, a candidate in the March 9 election, expressed concern for the physical location of the registration and sign-in books, separated as they were by a table length, and this concern was voiced in the subsequent testimony of Peggy Chamberlain, a challenger in the election. Petitioner Reed also testified that the matter had been referred to Mrs. Goldfein who had promised to mention it at her next meeting with a view to having it rectified. (Tr. 41)

Allegation No. 4

Petitioner Laning placed a campaign flyer and a compilation of campaign advertisements from various local newspapers all in favor of the incumbent candidates Reaves, Schaper, and Walker into evidence. (E-2) Petitioner raised no question of form and no expert evidence was adduced as to the cost of these items.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record in the instant matter and the report of the hearing examiner as set forth above.

The narrow question which is dispositive in the first allegation is whether the facts as set forth show compliance with the requirements of the applicable statute, *N.J.S.A.* 18A:14-13, which reads in pertinent part as follows:

> "The position which the names of candidates shall have upon the annual school election ballot in each school district shall be determined by the secretary of the board of education of the district by conducting a drawing in the following manner:
>
> a. The drawing of names shall take place at 8 p.m. on the day following the last day for filing petitions for the annual school election at the regular meeting place of the board of education. In case the day fixed for the drawing of names falls on a Sunday, or on the day of, or the day immediately preceding, a public holiday, enumerated in R.S. 36:1-1, the drawing shall be held on the next succeeding day which is not a public holiday. The drawing shall be done by the secretary, or in the event of his sickness or disability or absence from the district, by a person designated by the president of the board of education. The person making the drawing shall make public announcement at the drawing of each name, the order in which the name is drawn and the term of office for which the drawing is made.***"

The Commissioner observes that the statute is silent on the issue of notifying candidates of such drawing. However, the Commissioner holds that the basic elements of fair play should be dispositive in order that all candidates be treated similarly in the determination of notification. If incumbent candidates are so notified certainly others who aspire to a seat on the board of education should be afforded the same information. The requirements of the statute have otherwise been met.

The allegations set forth in item No. 2 reflect the high spirits generated by the consideration of meaningful local issues and the resultant expressed concerns of involved citizens and as such are of subjective judgment rather than issues of law. Sub-items a, c and d fall directly into this description and the Commissioner urges and encourages the exercise of prudence and fair play on the part of each concerned individual within the framework of the freedom of self-expression. He notes that no evidence was offered in support of sub-item b and this item is therefore dropped from consideration.

A serious problem is presented by allegation No. 3 that there was disruptive noise and confusion at the polling place and insufficient verification of signatures and voter identification. Failure of election workers to compare signatures as provided by statute cannot be upheld or condoned. It does not constitute an irregularity for which the election in this case can be set aside, however, absent a showing that the omission resulted in the casting of illegal votes which could have affected the outcome. *Purdy v. Roselle Park Board of Education,* 1949-50 *S.L.D.* 34; *In re Clee,* 119 *N.J.L.* 310 (*Sup. Ct.* 1938); *In re Wene,* 26 *N.J. Super.* 363 (*Law Div.* 1953); *Sharrock v. Keansburg,* 15 *N.J. Super.* 11 (*App. Div.* 1951)

A strict and meticulous observance of the school election laws is required of all persons having responsibility for the conduct of a school election. The Commissioner cautions the Board of Education and most particularly the members of the election board to give scrupulous attention and conformance to the statutes governing school elections. Most importantly an environment should be created and maintained such that each citizen who wishes to exercise his/her franchise may do so promptly and expeditiously without extraneous disconcertion or disturbance.

The allegation set forth in No. 4, of excessive campaign spending, was not supported by credible evidence and is, therefore, dismissed.

The Commissioner concludes that, taken as a whole, the testimony falls far short of that needed to invalidate an election. It is well established that elections are to be given effect whenever possible and are not to be set aside unless it can be shown that the will of the people was thwarted, was not properly expressed, or could not fully be determined.

> "***It is well established that irregularities which are not shown to affect the results of an election will not vitiate the election. The following is quoted from 15 *Cyc.* 372, in a decision of the Commissioner in the case of *Mundy v. Board of Education of the Borough of Metuchen,* 1938 Edition of School Law Decisions, at page 194:
>
> > 'Where an election appears to have been fairly and honestly conducted, it will not be invalidated by mere irregularities which are not shown to have affected the result, for in the absence of fraud the courts are disposed to give effect to elections when possible. And it has been held that gross irregularities when not amounting to fraud do not vitiate an election.'***" *In the Matter of the Recount of the Annual School Election in Ocean Township,* 1949-50 *S.L.D.* 53, 55

See also *Love v. Freeholders of Hudson County,* 35 *N.J.L.* 269 (*Sup. Ct.* 1871).

There is no such showing here and accordingly the will of the electorate must be given effect.

COMMISSIONER OF EDUCATION

June 10, 1976

Thelma Bradley,

Petitioner,

v.

Board of Education of the Borough of Freehold, Monmouth County,

Respondent.

COMMISSIONER OF EDUCATION

ORDER

For the Petitioner, Morgan and Falvo (Peter S. Falvo, Jr., Esq., of Counsel)

For the Respondent, Vincent C. DeMaio, Esq., of Counsel

This matter having been opened before the Commissioner of Education by Peter S. Falvo, Jr., Esq., counsel for petitioner, by formal Petition of Appeal in which interim relief is sought in the form of an Order restraining the Board of Education of the Borough of Freehold, Monmouth County, hereafter "Board," from effectuating the reassignment of petitioner from a kindergarten class to a second grade class for the 1974-75 school year pending a plenary hearing and subsequent determination of the merits of the matter by the Commissioner of Education; Vincent C. DeMaio, Esq., Counsel for the Board; and

The arguments of counsel having been heard regarding the allegation by petitioner that she will suffer irreparable harm unless the Board is restrained from transferring petitioner pursuant to its resolution adopted May 23, 1974; and

Further argument of counsel having been heard regarding the allegation by petitioner that the Board denied her due process of law;

The Commissioner, having reviewed the transcript of the argument on petitioner's Motion and the Record in the instant matter, finds that no irreparable harm will befall petitioner as the result of being transferred and further finds that the Board did not deny petitioner due process of law;

The Commissioner is constrained to state that the action of the Board in this instance constitutes an exercise of its authority to transfer personnel. *N.J.S.A.* 18A:25-1 The courts of this state have determined in previous instances that an action of an administrative agency, such as a local board of education, is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such action was arbitrary, capricious or unreasonable. *Thomas v. Board of Education of the Township of Morris,* 89 *N.J. Super.* 327, 328 (*App. Div.* 1965) Petitioner is required to carry the burden of proof in showing that the determination of the Board to transfer her is, in fact, arbitrary, capricious or unreasonable; therefore

IT IS ORDERED that the the restraint requested by petitioner against the Board of Education of the Borough of Freehold is hereby denied.

The parties will be notified regarding any further proceedings which may be necessary to complete the record in this matter for adjudication by the Commissioner of Education.

Entered this 21st day of August, 1974.

COMMISSIONER OF EDUCATION

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Morgan & Falvo (Peter S. Falvo, Jr., Esq., of Counsel)

For the Respondent, DeMaio & Yacker (Vincent C. DeMaio, Esq., of Counsel)

Petitioner, a teaching staff member who has acquired a tenure status in the employ of the Board of Education of the Borough of Freehold, hereinafter "Board," alleges that the action of the Board by which she was involuntarily transferred from one teaching assignment to another is arbitrary, capricious, unreasonable and is grounded upon improper reasons. Petitioner now seeks re-assignment to her former position and an order from the Commissioner of Education to prevent the Board from an alleged harassment to secure her resignation. The Board denies the allegations set forth herein and avers that its determination to transfer petitioner is proper in all respects, and further denies any effort on its part to improperly or illegally secure petitioner's resignation from her tenured employment.

A hearing was conducted in this matter on January 9, 1975 at the office of the Monmouth County Superintendent of Schools, Freehold, by a hearing examiner appointed by the Commissioner. Thereafter, Briefs were filed by the parties, and petitioner filed a Memorandum of Law in reply. The report of the hearing examiner is as follows:

Prior to a recitation of the testimony and evidence adduced at the hearing on petitioner's behalf, the hearing examiner notices that on August 21, 1974, the Commissioner denied petitioner's application for restraint against the Board from carrying out the disputed transfer for the 1974-75 academic year pending a plenary hearing. (See *Thelma Bradley v. Board of Education of the Borough of Freehold, Monmouth County,* decided on Motion, August 21, 1974.) Finally, petitioner acknowledges the statutory authority of the Board to transfer its teaching staff members within the scope of their certificates pursuant to *N.J.S.A.* 18A:25-1. (Tr. 4-5)

The essential facts which give rise to the controversy herein are these.

Petitioner has been employed by the Board for twenty-seven years, and for twenty-six of such years she was assigned as a kindergarten teacher at the Broad Street School. (Tr. 70-71) Petitioner was notified by letter (C-1) dated April 4, 1974 from the Superintendent of Schools that her teaching assignment was being changed for the 1974-75 academic year and that she was to be transferred from the Broad Street School. On May 23, 1974, the Board conducted a public meeting, an adjournment of its regular monthly meeting held on May 13, 1974. The minutes of the meeting held May 13 (C-2) reflect that the Board determined to transfer petitioner to a second grade assignment at its Park Avenue School Annex. Thereafter, the Board Secretary notified petitioner, by letter (C-3) dated May 24, 1974, of her new assignment for the 1974-75 academic year.

While petitioner does not challenge the statutory authority of boards of education to transfer personnel, she does challenge the basis upon which the Superintendent recommended her transfer to the Board, and the Board's action which caused the instant controversy.

Petitioner asserts that the Board, through its Superintendent, began a program of harassment and intimidation during October 1972 in an effort to secure her resignation. (Petition of Appeal, par. 4) It is further alleged that, as one result of that effort, the Board, through its counsel, advised petitioner by letter (C-4) dated November 21, 1973, that pursuant to the authority of *N.J.S.A.* 18A:16-2, it required of her a physical and psychiatric examination. Petitioner was further advised that the Board would meet with her on December 3, 1973 to explain its reasons for such request.

The meeting did not occur on December 3, 1973, but was held on January 7, 1974, at which time petitioner was represented by counsel. By letter dated January 10, 1974, petitioner was notified, *inter alia:*

***

"The Board is seriously concerned about the inability of [petitioner] to get along with her fellow teachers, her apparent temper and with the use of some inappropriate language before young students.***

"Based upon the medical reports you submitted [J-1-3], which are all dated in the month of December 1973 *** [t]he Board is *** withdrawing its request for a medical examination.***" (C-5)

Petitioner, in response thereto, informed the Board, by letter dated February 28, 1974, that she strenuously objected to the allegation that she did not get along with her fellow teachers, that she displayed a temper, and that she used inappropriate language before pupils. Petitioner concluded her letter by stating:

"***Since this matter [of the request by the Board for a physical and psychiatric examination] is now being laid to rest, [I] do not wish to pursue it any further, but request that a copy of this letter be made a part of [my] permanent file.***" (P-13)

The hearing examiner observes that the Superintendent testified that a copy of the letter, *ante,* was not placed in or made part of petitioner's permanent file. (Tr. 48)

Petitioner testified that she was first informed of her transfer by the Superintendent's letter (C-1) of April 4, 1974. Therein, the Superintendent advised petitioner that:

"***Your principal *** has recommended a change in grade for you and I concur.***

"Effective September 1, 1974, you will be assigned to the Intermediate School***."

The hearing examiner observes that the Park Avenue School Annex to which petitioner was finally transferred by the Board, appears to be either physically joined to the Intermediate School or located in close proximity thereto. The Superintendent testified that his office was located in "***that complex***" and that a principal and vice-principal were also assigned there. (Tr. 58-59)

The remainder of the Superintendents's letter (C-1) of April 4, 1974, simply advised petitioner that transfer of personnel was not only the prerogative of the Board but a tradition as well; that, in the Broad Street School where petitioner had been teaching, two transfers of grade level assignments had been carried out; that transfers of assignments were good professionally in order that teachers acquire an understanding of all grade levels; and, finally, that in her new assignment she would have the benefit of a preparation period.

At this juncture, the hearing examiner observes that by letter dated March 29, 1974, the principal had advised the Superintendent as follows:

"After reviewing [petitioner's] performance record as Kindergarten Teacher at Broad Street School for the current school year, I am recommending that [petitioner], for the 1974-1975 school year, be assigned to teach older pupils. I feel that preadolescent youth will not be adversely effected (sic) emotionally as much as five-to-ten year olds by [petitioner's] changing moods, whatever may be causing them.

"[Petitioner] should be assigned to a school with adequate, full time administrative staffing. This, plus the peer pressure from fellow team

members, may be helpful in keeping [petitioner] to schedules and in encouraging her to develop more positive attitudes toward fellow staff members. Most of the incidents that occurred at Broad Street School between [petitioner] and other teachers and non-professional personnel took place when the Principal was not in the building. [Petitioner's] demeaning attitude toward non-professional staff members should be less demoralizing in a larger school." (P-2)

Thereafter, petitioner apparently filed a grievance. On May 6, 1974, the Board provided petitioner an opportunity to be heard with respect to her opposition to the proposed transfer. (Petition of Appeal, par. 10) It is clear that the meeting was not adversary in nature for the Board adopted the position that it had the discretionary authority to transfer its employees and it did not take an active part in the grievance hearing. (Board's Answer, par. 10)

At the regularly scheduled public meeting of the Board which commenced on May 13, 1974, *ante,* petitioner, through her representative, requested the Board for its reasons for her transfer. The Board asserts that it advised petitioner at that time it would not discuss personnel matters at a public session. The Board did advise petitioner, however, to make an appointment with the Superintendent who would discuss the entire matter in detail with her. (Board's Answer, par. 11)

Petitioner did not make an appointment with the Superintendent for on May 22, 1974, he directed the following letter to her:

"At the public meeting of the Board of Education held on Monday, May 13, 1974, you and your two representatives asked why you were transferred ***. At that meeting I indicated to you that I would be pleased to meet with you *** to explain why the recommendation was made. It is now May 22, 1974, some nine days since that meeting and I have not heard from you, therefore, I am going to outline the reasons for you.

"It is the recommendation of your principal that you be assigned to a school that has a full time principal. He bases his recommendation on the fact that most of the incidents that occur between you and other staff members happen when the principal is not in the building. It is his strong conviction that it is important for you as well as your associates that you teach in a building where there is an administrator on duty full time. I concur with [the principal's] recommendation.

"As justification for this recommendation, I will point out to you some of the confrontations you have had with the members of the staff at the Broad Street School and other incidents of insubordination:

[Here follow fourteen paragraphs detailing allegations of confrontations with various persons who are or were in the employ of the Board and which involved petitioner. The dates of the allegations are from October 9, 1972 through May 20, 1974.]

> "I believe a transfer would be in your best interest as well as the interests of your students and fellow teachers. You are fully certificated to teach grades Kindergarten through eight. You taught a combination grade five and six before you came to Freehold. The recommended assignment for you is in a combination grade five and six. You will have the benefit of a full time principal and assistant principal on call every day of the week." (P-1)

The hearing examiner observes, however, that the Board transferred petitioner to a second grade assignment, not to a combination fifth and sixth grade; that petitioner, although assigned to a second grade, testified that she teaches reading to first and second grade pupils (Tr. 100); and that at the time of the transfer, the Park Avenue Annex was administered by the assistant principal when the principal, who also administered the Broad Street School, was not present.

The fourteen paragraphs in the Superintendent's letter (P-1) with respect to confrontations that petitioner was alleged to have had with her colleagues while at the Broad Street School are set forth here in general terms:

1. On October 9, 1972, petitioner was alleged to have failed to notify her principal that she would not be present during a professional day. (R-6)

2. On October 26, 1972, petitioner was alleged to have spanked a pupil in her kindergarten class. Petitioner was alleged to have admitted to her principal that she spanked a pupil. (P-3; P-4; P-5; P-6; R-1)

3. On November 7, 1972, the Superintendent requested a report from petitioner with respect to the alleged spanking incident. Thereafter, on November 9, 1972, the Superintendent met with petitioner with respect to the incident. As a result of this meeting the Superintendent stated in his letter (P-1) "***I could only conclude that you did spank the child and that I would have to make the letter of reprimand a part of your official file.***" (at p. 1) (P-3; P-4, P-5; P-6; R-1)

4. On November 10, 1972, petitioner was alleged to have reported late to school, screamed at the secretary, and made insulting remarks about the now-deceased husband of the secretary, which resulted in the secretary crying. (R-7)

5. On October 19, 1972, petitioner was alleged to have engaged in a confrontation with a teaching aide and a remedial reading teacher. (P-7; P-8)

6. On May 18, 1973, petitioner was alleged to have angrily refused to take her afternoon kindergarten class on a scheduled field trip to Holmdel Park. (P-9)

7. Later, on the same day, petitioner was alleged to have engaged in a confrontation over the signing of get-well cards for persons who were hospitalized. (P-10)

8. On June 7, 1973, petitioner was alleged to have engaged in an argument with her teacher aide and to have used less than acceptable language. (P-11)

9. On October 9, 1973, petitioner was alleged to have engaged in a confrontation with the same remedial reading teacher as in paragraph 5 above. (R-2; R-3)

10. On October 11, 1973, petitioner was alleged to have had a confrontation with a school crossing guard and, again, was alleged to have used inappropriate language. (P-12; R-4)

11. On March 19, 1974, petitioner was alleged to have returned her pupils ten minutes late to class from the outside play area. (P-14)

12. On an unspecified date, petitioner was alleged to have made anti-Semitic remarks to a colleague and also was alleged to have accused another teacher's husband of seeing another woman.

13. During the 1971-72 school year petitioner was alleged to have verbally abused another teacher who has since left the employ of the Board.

The fourteenth paragraph is reproduced here in full:

> "You have had difficulty with your fellow teachers, former teachers, the principal, the secretary, the custodian, the teacher aide, the crossing guard and with some parents. It is common knowledge that some of the teachers of the Broad Street School go out to lunch or merely take a walk during lunch hour just to avoid you. I might also point out that as recently as May 20, 1974, you left the building at 8:25 A.M. without permission which is a violation of the rules and regulations." (P-1)

Petitioner complains that these allegations against her were, for the most part, the subject of the hearing afforded her on January 7, 1974 with respect to the Board's request of her, subsequently rescinded, to secure a physical and psychiatric examination. (Petitioner's Brief, at p. 2) Petitioner further complains that, in preparation for that hearing, she had requested permission to peruse her personnel file to prepare a proper defense. Petitioner testified that she discovered at that time reports and memoranda filed therein with respect to eleven of the fourteen allegations set forth by the Superintendent in his letter (P-1) of May 22, 1974. (Tr. 71) Prior to that time, petitioner complains she had no idea that such reports, letters or memoranda had ever been filed against her. It is these reports which the Superintendent testified were shown to and reviewed by the Board (Tr. 43) at the January 7, 1974 hearing and which, according to the Superintendent's letter (P-1), afforded the justification for her transfer which petitioner strongly protests.

The hearing examiner proposes to discuss the specific reports, memoranda and letters which had been made part of petitioner's file, allegedly unknown to her, and presented to the Board at its January 7, 1974 meeting with petitioner. These documents also support eleven of the fourteen allegations set forth in the Superintendent's letter (P-1) which outlines the reasons for petitioner's transfer.

Petitioner testified with respect to her failure to attend a professional day on October 9, 1972, that she received a copy of a letter (R-6) from the Superintendent advising her that she would lose a day's pay. (Tr. 89) Petitioner testified she was sick and was not aware of the proper procedure in affording notification to the principal that she would be absent. (Tr. 89)

Several reports are in petitioner's personnel file with respect to the spanking incident. Petitioner herself filed a report (P-3) on October 27, 1972, which simply states that one pupil hit another pupil. Nothing is mentioned of a pupil being spanked. In fact, petitioner denies the spanking of a pupil. (Tr. 77) On the same day petitioner submitted her report (P-3), the principal submitted a report (P-4) to the Superintendent on the spanking incident after he talked with petitioner. There, the principal asserts that petitioner admitted spanking the pupil. Petitioner testified that she did not make such an admission to the principal (Tr. 79) and that she was unaware the principal filed his report (P-4) or that a copy was placed in her file. (Tr. 77) Another report on the incident was filed by the school nurse which states, in pertinent part:

"***[Petitioner] then spanked [the pupil] twice on his bottom.***"
(P-5)

Petitioner did not testify as to whether or not she was aware that the school nurse's report (P-5), or a copy thereof, was made part of her personnel file. Petitioner did testify that at the time of hearing she had no knowledge of the person who accused her of spanking a pupil. (Tr. 79) The hearing examiner finds this testimony incredible because the school nurse's report (P-5) was offered as evidential in support of her own case.

The Superintendent himself prepared a memorandum (P-6) on November 9, 1972, subsequent to a conference with petitioner with respect to the alleged spanking. Petitioner did not testify of her awareness of the existence of this memorandum (P-6) in her file. In any event, therein the Superintendent asserted that petitioner denied spanking a pupil and that after petitioner left his office she called to request the matter be dropped. (Tr. 20-21) The Superintendent testified that a copy of his report (P-6) for filing was not given petitioner. (Tr. 21)

The principal submitted a letter (R-7) to petitioner in regard to petitioner's alleged confrontation with a school secretary after arriving late to school, on November 10, 1972. (Tr. 95) Petitioner testified that she did not have a confrontation with the school secretary on November 10, 1972.

The remedial reading teacher and a teacher's aide filed reports (p-7; P-8) in support of petitioner's alleged confrontation with them on October 19, 1972, which were made part of petitioner's personnel file. Petitioner testified she had no knowledge those reports were made part of her file (Tr. 80-81) and, further, she was never informed of the allegation of confrontation as set forth therein. Petitioner testified that the reports (P-7; P-8) do not reflect accurately what had occurred. (Tr. 80-81)

The principal prepared a memorandum (P-9) for the file outlining, in his view, the events of the day with respect to the allegation of petitioner's original refusal to take her pupils on a scheduled trip to Holmdel Park. Petitioner testified that she was not aware of the report (P-9) in her file and she totally denies its contents. (Tr. 81-82) In fact, petitioner testified that she took her pupils on the trip (Tr. 83) and the principal's memorandum (P-9) asserts that petitioner did appear to go on the trip.

The occurrence on the afternoon of May 18, 1973 with respect to the signing of get-well cards is supported by a statement (P-10) of a Mrs. J. Nardone. Petitioner denies the allegation of a confrontation therein and asserts that she, petitioner, simply had a conversation with Mrs. Nardone. (Tr. 83) Petitioner did testify she had no knowledge that the statement (P-10) was made part of her file. (Tr. 83)

The principal prepared a memorandum (P-11) to file in support of the allegation that petitioner, on June 7, 1973, was to have engaged in an argument with her aide and used inappropriate language. Petitioner was not asked about the alleged incident nor was petitioner aware that the principal prepared the memorandum (P-11) for her file. (Tr. 84)

The remedial reading teacher prepared a report (R-2) as did the principal (R-3) in regard to the allegation that petitioner had another confrontation with the remedial reading teacher on October 9, 1973. No testimony was elicited from petitioner in regard to these two reports, although the Superintendent testified that he had no knowledge of whether or not petitioner was made aware that they were placed in her personnel file. (Tr. 39)

A school crossing guard addressed a letter complaint (P-12) to the Superintendent with respect to the alleged confrontation with petitioner on October 11, 1973. The principal, thereafter, talked with petitioner regarding the complaint and then filed his own memorandum (R-4) in her file. Petitioner denies the allegation of a confrontation with the school crossing guard and denies the use of inappropriate language. (Tr. 84, 97)

The principal advised petitioner by letter (P-14) dated April 5, 1974, that on March 19 she returned her pupils ten minutes late to class from the outside play area. Petitioner does not deny that she brought her pupils into class late. A review of the direct examination of the Superintendent reveals a complaint that petitioner was not informed of the person who notified the principal she was late. (Tr. 51)

Petitioner denies each of the remaining allegations of the Superintendent's letter (P-1) set forth in paragraphs 12, 13, and 14, *ante.* (Tr. 86-87) The Superintendent testified that the allegation that petitioner made anti-Semitic remarks and accused another teacher's husband of seeing another woman was purely hearsay. (Tr. 52) Any substantiation of these allegations is totally missing from the record.

The recitation of the above factual allegations is set forth not as a prelude to a finding of fact by the hearing examiner. Rather, it is set forth for the Commissioner to examine petitioner's complaint of alleged harassment and intimidation.

This complaint poses the question for adjudication with respect to whether or not the action by the Board to transfer petitioner should be rendered a nullity because it was grounded in allegations contained in petitioner's file of which she was unaware and to which she could not reply.

Petitioner, in her Brief, argues that she was denied the elemental due process right of facing her accusers and cross-examining them on the contents of their letters, reports, and memoranda which now constitute her personnel file. Petitioner argues that that opportunity should have been presented to her and cites *Frank v. Mangum*, 237 *U.S.* 309 (1914) and *Towne v. Eisner,* 245 *U.S.* 418 (1918).

Petitioner also cites *Donaldson v. Board of Education of North Wildwood,* 65 *N.J.* 236 (1974) in support of her position that basic fairness dictates that she should have been informed when the various reports were placed in her personnel file. Petitioner asserts that the action to transfer her was taken as a punitive measure by the Superintendent for the very same reasons that the Board considered prior to the decision to have her submit to a physical and psychiatric examination, which request was withdrawn on January 7, 1974. Consequently, petitioner contends the Board's action in transferring her was arbitrary, improper, and violated her constitutional rights and cites *Marilyn Winston v. Board of Education of South Plainfield*, 125 *N.J. Super.* 131 (*App. Div.* 1973), affirmed 64 *N.J.* 582 (1974).

Finally, petitioner cites the Family Educational Rights and Privacy Act of 1974, a federal law, which opens pupil records to parents and adult pupils with a subsequent right to challenge the contents thereof. Petitioner argues that her right as a teacher should be no less than that of the pupils she teaches.

The Board, to the contrary, argues that it has the statutory right to transfer its employees, and that its teaching staff members who have acquired a tenure status do not have an entitlement to a specific assignment and cites *Anne U. Clark v. H. Francis Rosen, Superintendent of Schools and Board of Education of the City of Margate, Atlantic County*, 1974 *S.L.D.* 678, aff'd State Board of Education March 5, 1975, aff'd Docket No. A-2196-74 New Jersey Superior Court , Appellate Division, January 8, 1976, and cases cited therein.

The Board argues that the record is clear that petitioner was having difficulty in her relationships with other teachers and nonprofessional employees. The Board states that it attempted to remedy the problem by determining whether petitioner's conduct was caused by medical reasons. The Board contends that petitioner requires full-time supervision by a principal and/or assistant principal.

The Board asserts that the case herein is unlike the factual pattern in *Sayreville Education Association, Inc. v. Board of Education of the Borough of Sayreville, Middlesex County,* 1971 *S.L.D.* 197 wherein the Commissioner ordered certain documents to be expunged from teachers' files because it was found that the documents were placed there for punitive reasons. The Board argues that the reports made part of petitioner's file were for internal use only.

Consequently, the Board asserts that petitioner failed to prove improper action or violation of due process in its action to transfer her and seeks dismissal of the Petition.

The hearing examiner observes that while petitioner may not have seen the specific reports, memoranda or letters placed in her file, the principal, in most instances, discussed the incidents with her. Petitioner does not argue that she was ever denied the opportunity to review her file; rather, she does argue that she was not aware of what it contained. The hearing examiner finds petitioner's complaint that her transfer was predicated upon improper reasons is without merit. As argued by the Board, petitioner has no claim to a specific assignment. Consequently, no harm was caused her by the transfer.

Finally, the hearing examiner recommends that the Commissioner direct the Board to review and revise its policies with respect to the maintenance of files of teaching staff members. Such revision should obviate the inclusion in the files of deleterious information grounded in hearsay or rumor and afford teachers an opportunity for the expression of an opposite point of view when serious allegations are made against them.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner, the objections and exceptions filed by petitioner and the record in the instant matter.

The Commissioner observes that the whole of petitioner's exceptions take issue with the finding of the hearing examiner that the transfer was not motivated by improper reasons. In the Commissioner's judgment, the report of the hearing examiner supports such a finding, which the Commissioner adopts as his own.

A board of education may transfer teaching staff members pursuant to *N.J.S.A.* 18A:25-1. Such a transfer may be based upon the Board's determination that the teaching staff member, or the individual school, or the entire community or a combination thereof may individually or collectively benefit by such a transfer. For a teaching staff member who is transferred to establish that the underlying reasons for such an action are improper or illegal requires substantial proof that the board acted in a manner which was illegal, or improper, and to the exclusion of all other *bona fide* reasons. In the instant matter, petitioner failed to sustain this burden of proof.

The Commissioner does hereby direct the Board to establish a policy with respect to information to be maintained in its teaching staff members' files.

With the exception of the above stated directive, and having found no other basis to intervene, the Commissioner of Education hereby dismisses the instant Petition of Appeal.

COMMISSIONER OF EDUCATION

June 10, 1976

Elinor Kuett, H. Evelyn MacRitchie, Bette Lee Lipschultz, Judith Tretiak, Iris Schornstein, Edith H. Gunter, Jane Griffin,

Petitioners,

v.

Board of Education of Westfield, Union County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

This matter having been opened before the Commissioner of Education (Daniel B. McKeown, Assistant Director, Division of Controversies and Disputes) through the filing of a Petition of Appeal (Mandel, Wysoker, Sherman, Glassner, Weingartner & Feingold, Jack Wysoker, Esq., appearing) which seeks, *inter alia*, interim relief in the form of a restraint against the Board of Education of the Town of Westfield, Union County, hereinafter "Board," (Nichols, Thomson & Peek, William Peek, Esq., appearing), by which its action taken on April 6, 1976 to abolish certain positions entitled "supplemental teacher" would be enjoined pending a full hearing on the merits, and

Oral argument of the parties having been heard on May 28, 1976 at the State Department of Education by a representative of the Commissioner, the facts of the matter are these:

Petitioners have each been employed by the Board for varying amounts of time and, in each instance, petitioners appear to have served the requisite period of time to have acquired a tenure status. *N.J.S.A.* 18A:28-5 In each instance, petitioners had been assigned by the Board to the positions of supplemental teacher of handicapped pupils in its Special Services Department. The Commissioner observes that while each petitioner possesses a valid certificate to teach as required by *N.J.S.A.* 18A:26-2 and as set forth in *N.J.A.C.* 6:11-4.1 *et seq.*, no one petitioner is in possession of certification as a teacher of the handicapped pursuant to *N.J.A.C.* 6:11-8.4(c)4.

The Superintendent explains in his affidavit (R-1) filed that the Board abolished the positions of supplemental teacher of the handicapped because of a reorganization of the Special Services Department. The Board plans the creation of resource rooms for handicapped pupils for the 1976-77 academic year consistent with *N.J.A.C.* 6:28-3.2(b)(1)ii. The Commissioner observes that the State Board regulation of reference allows certain options with respect to educational programs for the handicapped, one of which is the creation of a resource room and/or learning center.

The Superintendent further explains that by letter (R-1B) dated January 26, 1976, the Deputy Assistant Commissioner in charge of the Branch of Special Education and Pupil Personnel Services advised him that teaching staff members who are assigned to resource rooms for the handicapped must possess certification as teachers of the handicapped.

The Board adopted a resolution (R-1C) on April 6, 1976 by which it abolished the positions of full-time supplemental teacher, which petitioners herein held, and created nine resource rooms for the handicapped for the 1976-77 school year. The Superintendent explains that the academic records of each petitioner were reviewed and it was established that no one of them possessed certification as a teacher of the handicapped. Consequently, the Board determined at a meeting held on April 20, 1976, that it would not offer employment to six of the seven petitioners herein and so notified them. The remaining petitioner, Petitioner Tretiak, was offered continued employment, which she accepted, as a teacher of a first grade for which she is properly certified.

The Superintendent explains that, since an announcement of vacancies for teachers in the nine resource rooms with proper certification as teachers of the handicapped has been posted, there have been at least 150 applicants for the position who hold the required certificate, in addition to petitioners herein who do not possess proper certification.

Petitioners argue that individually they have the necessary course credits to be granted provisional certificates as teachers of the handicapped. The Commissioner notices that a provisional certificate is a substandard one-year certificate which is issued in fields of teacher shortage and upon request of the employing board. *N.J.A.C.* 6:11-4.3 Petitioners argue that in the area of special education there is, in fact, a teacher shortage and that by virtue of their prior employment with the Board, the Board must apply for provisional certificates on their behalf as teachers of the handicapped.

The Board argues that to request a provisional certificate for a teacher it must state that it cannot locate a properly certificated teacher for a position. Thus, in view of the existence of 150 applicants for the nine resource room positions, all of whom are properly certificated, it has rejected petitioners' request to make application for provisional certificates.

The Commissioner agrees with and affirms this action of the Board to refuse to apply for provisional certificates on behalf of petitioners. While in certain areas of the State the field of special education may be considered a field

of teacher shortage, the circumstances herein clearly establish that properly certificated teachers are available for the nine resource room vacancies.

The Commissioner notices that petitioners seek to have the Board and its agents restrained from interviewing applicants for the disputed vacancies pending a full hearing on the merits. The Commissioner finds no basis in fact or in law to issue such a restraint.

The Commissioner does observe, however, that Petitioner Kuett has been employed by the Board a total of seventeen years, eleven of which were on a part-time basis while the last six years were on a full-time basis. Petitioner MacRitchie has been employed by the Board a total of eleven years, five of which were part-time and the last six years on a full-time basis. Petitioner Lipschultz has been employed by the Board for twelve years, six years part-time and the last six full-time. Petitioner Tretiak has been employed by the Board for the last four years on a full-time basis. Petitioner Schornstein has been employed by the Board thirteen years, seven of which were part-time while the last six years were on a full-time basis. Petitioner Gunter has been employed the last four years on a full-time basis, while Petitioner Griffin has been employed by the Board the last three years full-time and an additional one and one-third years on a part-time basis.

The Commissioner observes that tenure is a legislative status (*Greenway v. Board of Education of the City of Camden*, 129 *N.J.L.* 46 (*Sup. Ct.* 1942), affirmed 129 *N.J.L.* 461 (*E.& A.* 1942)) which is designed to protect teachers in their positions of employment by reasons of years of service. *Downs v. Board of Education of Hoboken*, 13 *N.J. Misc.* 853 Teaching staff members who have acquired a tenure status may not be dismissed or be reduced in pay except as provided in law. *N.J.S.A.* 18A:6-10 Boards of education, however, have the authority to abolish positions. *NJ.S.A.* 18A:28-9 That authority is not without limit. *N.J.S.A.* 18A:28-10 provides, in pertinent part, that:

> "Dismissals [of teaching staff members with a tenure status] resulting from any such reduction [abolition] ***shall be made on the basis of seniority according to standards to be established by the commissioner with the approval of the state board."

The standards for determining seniority are set forth in *N.J.A.C.* 6:3-1.10. The Board is required at *N.J.S.A.* 18A:28-11 to determine the seniority of persons affected by a reduction in force or the abolition of positions. The statute of reference also allows the Board to seek an advisory opinion with respect to the application of seniority standards.

In the instant matter, the Board has failed to meet the legislative mandate in regard to the seniority status of each petitioner considering the respective years of employment, certification and assignments. Accordingly, the Board is directed to proceed forthwith to establish the seniority status of petitioners as compared to other teaching staff members in its employ. Until and unless the Board establishes that it properly terminated each of petitioners' employment based on seniority, each petitioner shall remain in the employ of the Board and shall be assigned as teachers within the scope of their certificates.

Two other considerations remain. Firstly, the Commissioner observes that the employment of Petitioner Tretiak has not been terminated. The Board has transferred her to a position of first grade teacher for which she is properly certificated. Petitioner Tretiak presses a claim herein for assignment as a resource room teacher. The authority of a board of education to transfer its teaching staff members within the scope of their certificates is clear and unequivocal. *N.J.S.A.* 18A:25-1; *Dorothy Agress v. Board of Education of Hamilton Township*, 1975 *S.L.D.* 984 A transfer is not a demotion or a dismissal. *Cheeseman v. Gloucester City*, 1 *N.J. Misc.* 318 (*Sup. Ct.* 1923) Consequently, Petitioner Tretiak has no claim in the instant matter and is hereby severed as a party petitioner.

The Commissioner notices that the Board is of the judgment that Petitioner Griffin has not served the requisite period of time to have acquired a tenure status. While the Commissioner will not render a Declaratory Judgment with respect to whether Petitioner Griffin has acquired a tenure status on the basis of the record before him, it appears that Petitioner Griffin has served the requisite period of time to have acquired tenure. *Ahrensfield v. State Board of Education*, 126 *N.J.L.* 543 (*E.&A.* 1941) Should this question not be amicably resolved, the parties may take the necessary measures to seek a Declaratory Judgment from the Commissioner.

NOW, THEREFORE, it is ordered that the Board of Education of the Town of Westfield establish the respective seniority status for each of the named petitioners herein, excepting Petitioner Tretiak, prior to terminating their employment.

Ordered on this 16th day of June 1976.

COMMISSIONER OF EDUCATION

Marjorie S. Payne,

Petitioner,

v.

Board of Education of the Village of Ridgewood, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Saul R. Alexander, Esq.

For the Respondent, Greenwood, Weiss & Shain (Stephen G. Weiss, Esq., of Counsel)

Petitioner, a teaching staff member who has acquired a tenure status in the employ of the Board of Education of the Village of Ridgewood, Bergen County, hereinafter "Board," alleges that the Board violated her tenure rights as a teaching staff member by its improper assignment of her to the position of permanent substitute teacher. Petitioner demands Summary Judgment in her favor which would require the Board to assign her to the position of classroom teacher within the scope of her certificate. The Board denies the allegations set forth and asserts that its action with respect to the assignment of petitioner is proper and legally correct.

Oral argument on petitioner's Motion for Summary Judgment was heard on October 8, 1975 at the State Department of Education, Trenton, by a representative of the Commissioner of Education. The transcript of that argument and the record, including the pleadings, exhibits, and affidavits of the parties subsequently filed, are now before the Commissioner for adjudication.

Petitioner is certified to teach kindergarten through eighth grade. She has been employed as a teaching staff member by the Board for thirty-two years. Petitioner complains that by letter (C-1) dated July 25, 1975, the Superintendent of Schools assigned her to the position of substitute teacher and teacher resource center associate for the 1975-76 academic year. According to that letter, petitioner is assigned as a substitute teacher on call at five of the Board's seven schools for three days a week; the other two days petitioner spends as a teacher resource center associate.

Petitioner complains in her filed affidavit (C-14) that her function as a substitute teacher is to be a "babysitter." Petitioner complains that because she is not assigned as a regular classroom teacher, she belongs to no one school's faculty, she misses staff announcements because she is assigned to five different schools, and she has no home base or desk. Petitioner also asserts that as a teacher resource center associate she performs the duties which would normally be assigned to a clerk. Petitioner explains that she spends hours cleaning out files, sorting catalogs, preparing copies of standardized tests for use by classroom

teachers, and otherwise performing menial tasks, none of which directly relate to her tenured position of teaching staff member. Petitioner asserts that her present assignment is demeaning, embarrassing, and abhorrent to her as a professional educator.

The Commissioner opines that while petitioner's 1975-76 assignment precipitated the instant Petition of Appeal, proper adjudication of the matter demands consideration of prior Board action with respect to petitioner's assignments since September 1971.

On July 14, 1971, the then Superintendent submitted a three-page memorandum (C-13) to the Board with respect to petitioner's assignment for the 1971-72 academic year. While the reasons for the memorandum to the Board are not relevant here, it is relevant to note that the memorandum establishes that sometime in March or April 1971, the Board informally approved the Superintendent's recommendation that petitioner be transferred from her first grade teaching assignment at the Travell School for the 1971-72 academic year. (C-13, at pp. 1-2) The memorandum also establishes that the recommendation for petitioner's transfer was the direct result of the Travell School principal's evaluation of petitioner's teaching performance as unsatisfactory, lacking warmth and rapport between and among her pupils. (C-13, at p. 1) The memorandum establishes that the Superintendent agreed with the principal's evaluation of petitioner and that he, the Superintendent, agreed with the need to transfer petitioner from her first grade teaching assignment at the Travell School. (C-13, at p. 2)

The Commissioner further observes that the memorandum establishes that sometime in April 1971 subsequent to the determination that petitioner would, in fact, be transferred for 1971-72, she was given a list of first grade openings in each of the Board's other schools. The memorandum states that the principals of two of the schools where first grade vacancies existed interviewed petitioner at that time but selected other applicants, both of whom were new to the Board's employ. (C-13, at p. 2)

The memorandum establishes that the Superintendent requested the Board to formally transfer petitioner to an "unassigned" position for the 1971-72 academic year on the Monday following July 14, 1971, the date of the memorandum. The Superintendent recommended that the transfer be to an "unassigned" position because he had "not finally determined specifically what her role will be" for 1971-72. (C-13, at p. 3) The Superintendent, in urging that the Board transfer petitioner to an "unassigned" position for 1971-72 concluded his memorandum by stating, *inter alia*:

> "***[Petitioner's] transfer has represented the long hoped for realization that poor teaching will not be tolerated on a work-as-usual basis.***"
> (C-13, at p. 3)

Between September 1971 and June 30, 1975, the "unassigned" position which petitioner had may be referred to generically as that of general teacher. Petitioner asserts in her appeal that during this period of time she worked with

small groups of pupils on remedial or supplemental assistance. (Petition of Appeal, paragraph 2) The principal of the Board's Willard School, in a letter (C-5) dated January 31, 1975 to petitioner, refers to her position of "helping teacher."

The principal advised petitioner that he would not recommend her for a full-time teaching position at the Willard School for 1975-76 and that because of budgetary constraints "***we will not be able to continue the 'helping teacher' arrangement that you have been working under during the past year.***" (C-5) The Commissioner observes that there is no explanation in the record as to who the "we" is as referred to by the principal.

The record establishes, with respect to the position of general teacher, that the Superintendent recommended its abolition to the Board at a work session held on February 10, 1975. (C-2)

Thereafter, the Superintendent advised petitioner by letter (C-6) dated February 28, 1975, that because her position of general teacher was abolished by the Board on February 10, 1975, she was "free to apply for positions [existing vacancies in the school district] in your area of competence and certification." The Commissioner observes that contrary to the Superintendent's conclusion that the Board abolished the position of general teacher, there is no proof herein that the Board took such action.

The principal of the Willard School advised the Superintendent by letter (C-9) dated March 27, 1975, that he did not wish to have petitioner assigned to his school in any regular, classroom teaching assignment for 1975-76. The principal justifies this recommendation in his assertion that, based on the several occasions petitioner substituted for regular teachers in the Willard School, her performance was unsatisfactory and insensitive. The principal further expressed the view that "***it would not be satisfactory to have her [petitioner] assigned to any full-time teaching position in our school.***" (C-9)

The Superintendent by letter (C-10) dated March 31, 1975, assured petitioner that she was being notified of vacancies as they occurred so that she might apply for appointment for 1975-76.

The record establishes that the Superintendent again recommended to the Board that the position of general teacher at the Willard School be abolished. (C-4) The basis for this latest recommendation was that the 1975-76 current expense budget provided no funds for that position.

The record (C-3) establishes that at a private session of the Board held on April 14, 1975, three members of the five member Board approved the Superintendent's recommendation to abolish the position of general teacher at the Willard School. There is no evidence that such action was ever taken at a public meeting of the Board.

The Board, on June 30, 1975 at its continuation of a meeting adjourned from an earlier date, determined to approve its teaching staff members' salaries

for 1975-76, and it also determined to approve the 1975-76 salary of petitioner. (C-11) The Commissioner notices that the Board also took action to transfer twenty of its teaching staff members by a roll call vote of its members. Petitioner was not one of these persons transferred. Instead, the Board approved her salary and categorized her for 1975-76 as unassigned. The Board asserts that its adopted budget for 1975-76 does not provide for a general teacher at the Willard School. Consequently, it set forth her role as unassigned because by June 30, 1975, there were no suitable vacancies for her for the 1975-76 academic year.

The Superintendent then advised petitioner by letter (C-1) dated July 25, 1975 of her assignment as part-time substitute teacher on call and as part-time teacher resource center associate.

The Superintendent asserts in his affidavit (C-12) that petitioner's assignment for 1975-76 has been that of "professional substitute teacher *** under the direct supervision of five elementary principals. Her duties entail functioning as a substitute in place of an absent classroom teacher on a short term basis.***" (C-12, at pp. 1-2)

The Superintendent also asserts with respect to the two-day a week assignment as a teacher resource center associate that petitioner is responsible for the updating of the elementary schools' math-management program through the cataloging and filing of curriculum materials, work sheets, and text materials. (C-12, at p. 2) The Superintendent explains that petitioner is also assigned to be "involved" in tests and measurements for grades kindergarten through eight, and to be "involved" in the analysis of data and calculations of item analysis, correlation, and the development of pupil profiles. The Commissioner observes that the "involvement" is not delineated. (C-12, at p. 2)

Petitioner argues in the first instance that her former position of general teacher was not properly abolished by the Board. Petitioner asserts that the Board must abolish positions only by resolution and at public meetings.

Next, petitioner contends that the Board did not remove petitioner from the position of general teacher because of reasons of economy, or reorganization, or reduction of pupils. Rather, petitioner asserts, she was removed from her position because of the allegations of unsatisfactory performance. This being so, petitioner argues, such an action is in direct contravention of *N.J.S.A.* 18A:6-10 and *In re Fulcomer*, 93 *N.J. Super.* 404 (*App. Div.* 1967).

Petitioner asserts that the Board is deliberately attempting to force her resignation through its continuing assignment of her to positions that are of less importance than those of a classroom teacher. Petitioner argues that such an action has already been set aside by the Commissioner as invalid and cites *Carmine Giannino v. Board of Education of the City of Paterson, Passaic County,* 1968 *S.L.D.* 160.

Petitioner maintains that the Board assigned her to the position of general teacher and to her present position, substitute teacher/teacher resource center associate, because neither position is set forth in *N.J.S.A.* 18A:28-5 as one which

accrues tenure. Thus, petitioner reasons, the motive of the Board is to sever her employment relationship.

Finally, petitioner demands Summary Judgment in her favor on the basis of an argument that the Board's dissatisfaction with her teaching performance does not justify the abolition of her position, nor does it justify her assignment as a substitute teacher or as a teacher resource center associate. Petitioner asserts that her established seniority over a large number of regular classroom teachers justifies her assignment as a regular classroom teacher.

The Board asserts that notwithstanding the fact that it did not take specific action to transfer petitioner or to abolish the position of general teacher, its actions of June 30, 1975, whereby it approved her role as "unassigned" for 1975-76 and its adoption of the 1975-76 budget without that position therein, effectively serve the same purpose. The Commissioner observes that the Board's position in this regard is directly contrary to law. *N.J.S.A.* 18A:25-1 requires boards of education to transfer by recorded roll call vote of its full membership. *N.J.S.A.* 18A:28-9 *et seq.* sets forth the requirements of a board of education with respect to a reduction of its teaching staff members.

The Board argues that it may transfer teachers when their performance interferes with the best interests of the school system. In the matter, *sub judice,* the Board reassigned petitioner to her present position for 1975-76 because of an allegation of unsatisfactory performance. The Board explains, and it is stipulated by petitioner, that it did not reduce petitioner's salary, fringe benefits, or other emoluments which were her due as a professional teaching staff member in its employ. However, the Board maintains that it is convinced that petitioner should not be placed in a regular full-time teaching position.

It is established herein and the Commissioner so holds that petitioner was assigned to her present position of substitute teacher/teacher resource center associate because of her alleged inferior teaching performance. The issue therefore is whether the Board, in this instance, acted within the authority of law.

Local boards of education are empowered to transfer tenured teaching staff members from one position to another subject only to the limitation of the statute *N.J.S.A.* 18A:25-1 which provides:

> "No teaching staff member shall be transferred except by a recorded roll call majority vote of the full membership of the board of education by which he is employed."

Such power of local boards is more directly and explicitly stated in decisions of the courts. In *Cheeseman v. Gloucester City,* 1 *N.J. Misc.* 318 (*Sup. Ct.* 1923), the Court held:

> "***The Gloucester City Board of Education had the power of transfer*** " (at p. 319)

In *Wilton P. Greenway v. Board of Education of the City of Camden,* 129 *N.J.L.* 461 (*E.&A.* 1942) the Court held:

> "The district boards are expressly invested with authority to transfer principals and teachers.*** The exercise of the power rests in sound discretion ***. The transfer was in no sense a demotion***. (at p. 465)

See also *John C. McGrath v. Board of Education of the Town of West New York, Hudson County,* 1965 *S.L.D.* 88; *James Mosselle v. Board of Education of the City of Newark, Essex County,* 1973 *S.L.D.* 197; *Dorothy Agress et al. v. Board of Education of the Township of Hamilton, Mercer County,* 1975 *S.L.D.* 984.

Thus, the power of a board of education to transfer teaching staff members to comparable positions within its school district is clear, absent a showing that in some manner the Board's discretion has been abused.

In the instant matter, however, the Board violated not only the provisions of statutory law, *N.J.S.A.* 18A:25-1 and *N.J.S.A.* 18A:28-9 *et seq.*, in its attempt to either transfer, reassign, and/or abolish the position of general teacher to which petitioner had been assigned, but it also violated petitioner's expectation to be assigned as a teaching staff member. The assignment of petitioner as a substitute teacher is clearly not an assignment as a teaching staff member. A substitute teacher is not a teacher within the contemplation of *N.J.S.A.* 18A:1-1. *Zielenski v. Board of Education of the Guttenburg, Hudson County,* 1970 *S.L.D.* 202, reversed State Board of Education 1971 *S.L.D.* 664, aff'd Superior Court of New Jersey 1972 *S.L.D.* 692

The Commissioner lends great credence to petitioner's attestation that as a teacher resource center associate she performs the role of clerk. Petitioner is a certificated teacher who, as a teaching staff member with a tenure status, enjoys the benefit of tenure protection. *N.J.S.A.* 18A:28-5 Petitioner may not be assigned to responsibilities less than those responsibilities similarly assigned to other teaching staff members employed by the Board.

The Board's argument that petitioner's performance is of such poor quality that it may not assign her on a continuous basis to work with pupils is wholly without merit. The Board may not assume the simultaneous roles of judge, jury, and prosecutor. *In re Fulcomer, supra* If petitioner's performance is of such low quality the Board has appropriate options it may take. *N.J.S.A.* 18A:6-10 The option, however, of assigning petitioner as a substitute teacher/ teacher resource center associate is not one which is legally correct. The Commissioner so holds.

The Commissioner observes that the record is void of a description of the duties of a general teacher. If consideration is to be given to the assignment of petitioner to that position, the Board is directed to submit a job description of the duties of that position to the Bergen County Superintendent of Schools for approval prior to such assignment.

The Commissioner finds and determines that the assignment of Marjorie S. Payne to the position of substitute teacher/teacher resource center associate for the 1975-76 academic year by the Board of Education of the Village of Ridgewood is *ultra vires* and is hereby set aside. Summary Judgment is granted and the Board is directed to forthwith assign Marjorie S. Payne, within the scope of her certificate, to a position commensurate with and comparable to that of other teaching staff members it employs.

COMMISSIONER OF EDUCATION

June 16, 1976