State of New Jersey

Department of Education

Trenton

# NEW JERSEY

# SCHOOL LAW DECISIONS

January 1, 1971, to December 31, 1971

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

**Mary C. Donaldson,**

*Petitioner-Appellant,*

**v.**

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

*Respondent-Appellee.*

Decided by the Commissioner of Education, August 21, 1969. On Appeal from the State Board of Education, September 8, 1970.

DECISION OF THE SUPERIOR COURT (APPELLATE DIVISION)

The decision of the State Board of Education is affirmed.

June 22, 1971

Pending before the Supreme Court.

**Wharton Teachers' Association and Alexandra Linett,**

*Petitioners,*

**v.**

**Board of Education of the Borough of Wharton, Morris County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**Decision**

For the Petitioner, Walter C. Morris, Esq.

For the Respondent, Fullerton, Kenihan & Porfido (Eugene J. Porfido, Esq. of Counsel)

For the New Jersey School Boards Association, *Amicus Curiae*, Thomas P. Cook, Esq.

Alexandra Linett, hereinafter "petitioner," is a nontenure teacher whose contract was not renewed for the 1970-71 school year. She and the Wharton Teachers' Association, hereinafter "Association," jointly allege that the failure to renew the contract was an arbitrary and oppressive act, which was violative of her constitutional rights and of rights secured under the terms of a contracted

grievance procedure, since no hearing was afforded to her. The Wharton Board of Education, respondent, denies that it has any obligation to afford a hearing to a nontenure teacher, and that any of its actions were improper.

Oral argument was heard by a hearing examiner appointed by the Commissioner of Education in Trenton on November 17, 1970. Counsel also submitted Briefs. Counsel for the New Jersey School Boards Association participated in the oral argument and submitted a Brief *Amicus Curiae.* The report of the hearing examiner is as follows:

The undisputed facts of the matter are that petitioner was hired as a teacher in the Wharton School District for the 1967-68 school year. She was re-hired for the 1968-69 and 1969-70 school years. During these years she was a member of the Association.

The Association entered into and signed a written agreement with respondent on June 4, 1969 for the 1969-70 school year on behalf of the teachers in the Wharton School District. (Exhibit A attached to Petition) This agreement provided, *inter alia*, that "Any employee shall have the right to appeal the application of policies and administrative decisions affecting him through administrative channels."

Early in March 1970, petitioner was orally notified that she would not receive a contract for the 1970-71 school year. Her successive requests for a hearing were denied by the school principal, Superintendent of Schools and respondent.

Petitioner and the Association aver that this refusal to grant a hearing pursuant to the agreement on an appeal from an "administrative decision" was an illegal refusal to abide by the terms of the contracted grievance procedure and also a denial of the basic right to due process guaranteed by the 14th Amendment to the *United States Constitution.* In support of this latter contention she cites, in particular, some recent Federal Court decisions; namely, *Roth v. The Board of Regents of State Colleges,* 301 *F. Supp.* 972 (1970); *Klein v. Joint School District I,* 310 *F. Supp.* 984 (1970); *Orr v. Tinker, U.S.D.C., So. District of Ohio, Civil No.* 70-163 (Aug. 3, 1970). These decisions, petitioner maintains, hold that satisfaction of the requisites of state law is not in itself sufficient if constitutional rights to due process are abridged. In petitioner's view these rights need to be assured by conformance with the minimal requirements of procedural due process enunciated by Judge Kinneary in the *Orr v. Tinker* case, *supra.* These requirements were held by the Court to include:

1. A written statement of the reasons for the proposed nonrenewal of contract given to the teacher prior to final action.
2. Adequate notice of a hearing at which the teacher may respond.
3. A hearing at which the teacher must be afforded an opportunity to submit relevant evidence.
4. Stated reasons supporting the decision if the board of education finds the contract should not be renewed.

Petitioner and the Association contend that changes in the prior position of the Commissioner of Education on issues of this kind are needed, and that a new policy should embrace similar guidelines. Thus, they aver, there will be a balancing between the public and private interests.

While maintaining that constitutional rights were abridged, petitioner also maintains that contract rights derived from an agreement made pursuant to *N.J.S.A.* 34:13A-1 were not afforded to her. Specifically, petitioner and the Association maintain that the grievance clause of the agreement negotiated between the Association and respondent give petitioner, as an Association member, the right to appeal administrative decisions affecting her, but that respondent seeks to exclude the present grievance on the grounds that the subject matter is outside the intent of the contract. Petitioner avers that this is not the case. She contends that unilateral interpretation of the grievance clause by respondent to exclude the instant subject matter would leave members of the Association without a remedy. Petitioner and the Association allege that this is an abridgment of personal rights afforded all public employees in New Jersey, and, specifically, of the right to bargain for the sale of their labor and to negotiate the terms and conditions of employment.

Respondent's contention is that prior decisions of the Commissioner have already determined that failure to renew the contract of a nontenure teacher is not a grievable issue. He cites *Fitzpatrick v. Board of Education of the Borough of Wharton*, decided by the Commissioner of Education April 30, 1969, and *Eastburn v. Newark State College*, 1966 *S.L.D.* 223 in support of this contention. Respondent maintains that grievance procedures applied to this case would absurdly require that the school principal and Superintendent pass upon the nonaction of respondent, to whom they are both subordinate, and that finally respondent would be compelled to pass in judgment on its own inaction.

Respondent further maintains that petitioner has no right to a hearing concerning nonrenewal of her contract in the absence of an affirmative showing by petitioner that nonrenewal was based on unreasonable discrimination proscribed by the *New Jersey* or *United States Constitutions* or by statute. To buttress this contention respondent cites *Zimmerman v. Board of Education of Newark*, 38 *N.J.* 65, 70 (1962) and seven prior decisions of the Commissioner. He also cites federal courts of appeal cases to rebut contentions of petitioner that due process requires a hearing when the contract of a nontenure teacher is not renewed. *Jones v. Hopper*, *410 F. 2d* 1323 (10*th Cir.* 1969); *Brooks v. School District of the City of Moberly, Missouri*, 267 *F. 2d* 733 (8*th Cir.* 1959); *cert. den.* 361, *U.S.* 844, 80 *S. Ct.* 196 (1959) Respondent's contention is that these cases also applied the balancing of interests test, and determined that, as a general principle of law, in instances where a board of education fails to renew the contract of a nontenure teacher, the interests of the governmental agency involved have outweighed the private interests of the individual employees.

The *Amicus Curiae* limits his argument in support of respondent to the constitutional question, but avers that if petitioner and the Association were to succeed with this Petition, they would have overturned the fundamental policy

of this State with regard to probationary employees in our schools to the disadvantage of both public employers and employees. In effect, he argues that such success would mean that the Legislature had no constitutional power to make public employment probationary for a reasonable period of time.

Finally, respondent argues that the tenure statutes, *N.J.S.A.* 18A:28-5 *et seq.*, have as their prime purpose the protection and welfare of the public and the children within the school system, and that no person has a constitutional right to public employment. In this view, respondent avers that the tenure statutes are essential to the proper operation of our school system and that their principal provisions provide a reasonable probationary period prior to the accrual of tenure status by teachers or other teaching staff members.

* * * *

The Commissioner has reviewed the report of the hearing examiner and considered the contentions of the parties. He finds no essential differences between the issues *sub judice* and the issues of similar petitions brought before him in past years. The Commissioner's decisions in these cases and the decisions of New Jersey courts have rendered the issues raised by this Petition *res judicata.* The facts relative to the issues herein are not in contention and establish no cause for action on which relief can be granted.

Petitioner was a nontenure teacher in her third year of employment in the schools of respondent. Since she had not acquired the protection of tenure provided by *N.J.S.A.* 18A:28-5, she was a probationary teacher with the rights provided by the terms of her contract, but with no other rights to continued employment in respondent's schools. There is no allegation that contractual rights were infringed or that continued employment was denied to her for statutorily proscribed discriminatory practices, i.e. race, color, religion, etc. Respondent simply took no action to renew petitioner's contract for the 1970-71 school year, and her former contract expired by its terms on June 30, 1970.

In these circumstances, respondent had no obligation to give reasons for nonrenewal of contract or to grant petitioner a hearing. In *Zimmerman v. Board of Education of Newark*, *supra*, at page 70, the Court reaffirmed the long-historical precedent of prior decisions in New Jersey involving similar circumstances by citing *People ex rel v. Chicago*, 278 *Ill.* 160, *L.R.A.* 1917 *E*, 1069 (*Sup. Ct.* 1917):

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

In the instant matter, the Commissioner holds that respondent simply exercised its right to "decline to employ," and that in exercising it there was no obligation to give reasons or afford a hearing. There is certainly no obligation in

the statutes. To the contrary, *N.J.S.A.* 18A:6-10 requires reasons, or "charges" and a "hearing" only for teachers who have acquired tenure status. The presumption is clear that nontenure teachers do not possess such rights directly, and the Commissioner holds that they may not acquire them by indirection through grievance procedures in negotiated agreements. Any finding to the contrary would represent an usurpation of the constitutional powers granted to the Legislature for the control of free, public education in an instance where the legislative voice is clearly heard.

Pursuant to this view, the New Jersey Commissioner of Education has long upheld the right and the authority of a local board of education to employ nontenure staff members, or to refuse to employ them, according to the wishes of the majority of its membership, and that the board is bound only by the terms of the contracts that it approves. Such right has been and remains unfettered. *Gibson v. Board of Education of Collingswood et al.*, decided by the Commissioner of Education April 30, 1970, affirmed by the State Board of Education October 7, 1970; *Ruggiero v. Board of Education of Greater Egg Harbor Regional High School District*, decided by the Commissioner of Education March 17, 1970; *George Ruch v. Board of Education of the Greater Egg Harbor Regional High School District*, 1968 *S.L.D.* 7, dismissed by State Board of Education 11, affirmed by the New Jersey Superior Court, Appellate Division (March 24, 1969); *Taylor and Ozman v. Paterson State College*, 1966 *S.L.D.* 33; *Currie v. Board of Education of the School District of Keansburg*, 1966 *S.L.D.* 193; *Mannion v. Board of Education of the Township of Northampton*, 1938 *S.L.D.* 402.

The Commissioner is aware of a conflict of opinion in some recent federal court decisions concerned with basic constitutional rights of due process. However, in the case of *Jones v. Hopper*, 410 *F. 2d* 1323, 1327 (1969), *cert. den.* 379 *U.S.* 991 (1970), the Court said:

> "***The Supreme Court has consistently held, the interest of a government employee in retaining his job can be summarily denied. It has become a settled principle that government employment, in the absence of legislation, can be revoked at the will of the appointing officer.***"

See also *Cafeteria Workers v. McElroy*, 367 *U.S.* 886 (1960). The principles of *Jones* and *Cafeteria Workers* must thus be given weight when assessing cases cited by petitioners with contrary findings. In any event, the Commissioner holds that there is no present basis to upset the settled law controlling appeals of this kind in New Jersey, and, particularly, in this instance, where there is no evidence that employment was denied for a statutorily proscribed reason.

Accordingly, the Petition is dismissed.

COMMISSIONER OF EDUCATION

January 5, 1971
Affirmed by the State Board of Education September 30, 1971.

**Board of Education of the Northern Valley Regional High School District,**

*Petitioner,*

**v.**

**Boards of Education of Old Tappan and Northvale, Bergen County,**

*Respondents.*

**COMMISSIONER OF EDUCATION**

**Decision**

For the Petitioner, Burton Cohen, Esq.

For the Respondent Northvale Board, Fornabai & Hogger (James J. Hogger, Esq., of Counsel).

For the Respondent Old Tappan Board, Joseph R. Letcher, Esq.

Petitioner, the Northern Valley Regional High School District, demands a judgment that two of its constituent school districts, Old Tappan and Northvale, respondents, are required to reimburse petitioner for the transportation of students attending nonprofit private schools. Respondents disclaim responsibility for such reimbursement.

The Petition herein was filed with the Commissioner of Education on May 6, 1968, but has been delayed in its adjudication by a number of factors and for a variety of reasons. A review of the docket of the case, and related correspondence, shows that on ten occasions attorneys for one or both of the parties requested adjournments of conferences or hearings. On one other occasion, in October 1969, a hearing was postponed because of a heart attack suffered by the Assistant Commissioner in charge of the Division of Controversies and Disputes, State Department of Education, Trenton. Case submission was completed on November 30, 1970, at the conclusion of a hearing devoted to orgal argument held at the office of the Bergen County Superintendent of Schools in Woodridge before a hearing examiner appointed by the Commissioner. A Brief was filed by petitioner. The report of the hearing examiner is as follows:

The facts basic to this dispute are stipulated and exhibited in evidence as P-R-1. In summary form they may be stated as follows:

1. Petitioner is a regional school district composed of seven boroughs in Bergen County.
2. Both of the respondents are constituent districts of the regional district, and both have their own schools for children in grades K-8.

No child in respondent Northvale's district is transported to public school grades K-8. No child in respondent Old Tappan's district is transported to public school grades K-12.

3. In 1967, parents of children in each of respondents' districts filed applications requesting transportation to nonprofit private schools.

4. This transportation was arranged by petitioner, and it then billed each of the respondents for costs incurred. Respondent Old Tappan paid its bill of $4,602.84 under protest. Respondent Northvale refused to pay its bill of $255.59.

5. In 1968, applications for transportation were filed again in the same manner by parents. Respondents refused to approve the applications of parents living within their respective districts. No transportation for children or subsidies to parents were provided pursuant to *N.J.S.A.* 18A:39-1 for the 1968-69 school year.

6. In 1969, applications for transportation were filed again by parents for the 1969-70 school year. While petitioner included such applications in its solicitation of bids to provide this service, no bids below $150 were received. As a result of respondents refusal to give their unqualified consent to reimburse petitioner, no subsidies were paid to the applicants.

7. During each of these three years petitioner has provided transportation to elementary and high school pupils attending nonprofit, private schools remote from their residences in the other five districts that comprise the regional entity.

Petitioner contends that respondents, in that they refused to reimburse petitioner, without qualification, for transportation provided for pupils resident in their districts to remote private schools, have failed to comply with the terms of *N.J.S.A.* 18A:39-1, which reads in part as follows:

> "*** the cost of such transportation for pupils below the grade level for which the regional district was organized, *shall be prorated by the regional district among the constituent districts on a per pupil basis* after approval of such cost by the county superintendent***." *(Emphasis supplied.)*

In petitioner's view, this statute requires such reimbursement since under its terms petitioner has the obligation to provide the transportation on respondents' behalf, but also has a concomitant entitlement to a *pro rata* share of the costs incurred. Petitioner avers that when the reimbursement was denied, or made with qualification, for the 1967-68 school year, the costs involved could not be borne in whole or in part by other constituent districts of the regional district. For this reason, petitioner states, it refused to provide such transportation for children in respondents' school districts in the school years 1968-69 and 1969-70.

In support of its contentions, petitioner cites *Board of Education of Woodbury Heights v. Gateway Regional High School*, 104 *N.J. Super.* 76 (*Law*

*Div.* 1968). It also maintains that the recent holding of the Court in *West Morris Regional Board of Education v. Sills*, 110 *N.J. Super.* 234 (*Law Div.* 1970), to the effect that *N.J.S.A.* 18A:39-1, *supra*, is unconstitutional, should not be construed to work a hardship on the parties who have incurred costs pursuant to the stated mandate of the statute in prior years, even if the *West Morris* decision is upheld in appellate courts. In this view, petitioner maintains there is respectable authority for the proposition that an unconstitutional statute will not be applied so as to work a hardship, and quotes in part the Court in *Lang v. Bayonne*, 74 *N.J.L.* 455, 459 (*E&A* 1906):

> "*** I am unable to accept as sound the doctrine upon which it is rested, namely, that an unconstitutional law is void *ab initio* and affords no protection for acts done under its sanction. That it works injustice in its application to the citizen is apparent.***"

In the instant matter, petitioner avers, it placed reliance on *N.J.S.A.* 18A:39-1, *supra*, for a period of three years, and in the years 1967-68 complied fully within its understanding of the statute. The denial of reimbursement for its acts pursuant to this compliance would, it is charged by petitioner, work an injustice and hardship. In like manner, petitioner maintains that many parents relied on the statute's integrity when they placed their children in private schools for the school years 1968-69 and 1969-70 and that said parents are thus entitled to subsidies for those two school years.

Respondents, in separate answers and in oral argument, are united in believing they have no statutory obligation to approve applications from students living within the boundaries of their respective districts for private school transportation or to arrange to pay for same when it is afforded. They contend instead that the total responsibility for such transportation must be borne by the regional district.

In addition to these joint defenses, respondents advance individual argument based on differing circumstances. Old Tappan argues that it is unique as a district in that there is no child in grades K-12 transported from within its boundaries to a remote public school, and that the transportation of private school children would, therefore, be a discriminatory privilege. Respondent Old Tappan also avers that *N.J.S.A.* 18A:39-1, *supra*, violates home rule provisions of other statutes in that, if petitioner's interpretation is given effect, the statute would transfer to the regional district the rights and duties Old Tappan must assume in the determination of its own budgetary expenditures. Old Tappan further avers that any cooperative agreement worked out between county schools should not be used as the basis for prorating its costs.

Respondent Northvale admits that students in grades 9-12 living within its boundaries are transported to the Regional High School, but questions the right of the Regional Board to request reimbursement when students of the elementary grades, K-8, are transported to private schools. However, Northvale requests that, in the event the Commissioner holds it is not an exempt district, guidelines be established to clearly define the mechanics necessary to effectively implement the statute (*N.J.S.A.* 18A:39-1, *supra*).

* * * *

The Commissioner has reviewed the report of the hearing examiner and has noted the contentions of the parties. However, he notes that most of the issues raised herein were dealt with by the Court in *Woodbury Heights v. Gateway*, cited by petitioner, *supra*, in support of its argument. In that case the Court made it clear that a regional school district has the responsibility, upon request, to transport all students living within the boundaries of the regional district to remote nonprofit private schools, if any student within the regional district is transported to a public school. Thus, the Court said at page 84:

> "***Now so long as any public school pupil living remote is transported by a school district, *including a regional school district*, *** all nonpublic school pupils similarly situated are also to be transported. The Legislature not only drew no distinction based upon grade levels, it specifically mandated that they were irrelevant***." *(Emphasis added.)*

In this view of the Court, it is apparent that a child acquires the right to transportation to a private school pursuant to *N.J.S.A.* 18A:39-1, *supra*, by virtue of residence in the total area of the regional district, if any student within the regional district is transported to private schools. It matters not whether a constituent district of the regional district transports students to public schools or whether it doesn't. The practices or circumstances of the constituent district are superseded by those of a larger geographical entity – the regional organization. Therefore, by virtue of the *Gateway* decision, the Commissioner holds that the basic issue of this Petition is *res judicata* in New Jersey. It is petitioner's responsibility under the statute, *supra*, to arrange transportation for all children in grades K-12 within the confines of its district lines to nonprofit private schools, if requests are received for such transportation. The *West Morris* decision cited by petitioner, *supra*, has not changed this situation to date since the Court's opinion in that case is on appeal to the Appellate Division of the New Jersey Superior Court, and the schools of the State have been continuing to arrange private school transportation as in prior years.

Because of the clear direction of the Court in the *Gateway* citation, *ante*, the Commissioner believes that petitioner has an obligation to reimburse those parents with just claims for transportation to nonprofit private schools which they, as parents, have provided during the years 1967-70.

There remains the matter of the ultimate responsibility to pay for such private transportation costs. The Commissioner finds the argument of respondents without merit because of the explicit direction of *N.J.S.A.* 18A:39-1, *supra*, in this regard. It is clear that while the responsibility of regional districts is to *arrange* such transportation in the ways available to them, subject to the restrictions imposed by the statute limiting such expense to $150, the ultimate expense incurred by regional districts was meant by the Legislature to be borne by those "constituent districts" with pupils so transported. The Commissioner holds that a view to the contrary would be unreasonable and unfair, and of benefit only to those large districts with many pupils transported to private schools when the costs of such transportation could be borne by other districts with few children so transported.

Finally, the Commissioner finds that in arranging private school transportation the districts of the State are not prohibited from engaging in compacts to their mutual advantage in pooling of resources and in joint-scheduling arrangements. He knows of no statute imposing such restrictions on a regional district's freedom of action or compelling a regional district to arrange the transportation in a manner or on a schedule satisfactory to other boards of education for whom it renders the service. It is the regional board that has the responsibility. It alone must decide on the implementation of its mandate.

To implement these findings the Commissioner directs:

1. That petitioner reimburse all parents who filed applications for transportation to nonprofit, private schools on behalf of their children for the 1968-69 and 1969-70 school years, and that the reimbursement in lieu of the transportation, which was not provided by petitioner, shall be $150.

2. That petitioner bill respondents separately at the rate of $150 per pupil for each pupil living within the respective constituent districts.

3. That respondent Northvale remit forthwith the bill previously rendered by petitioner in the amount of $255.59 for the 1967-68 school year.

4. That petitioner arrange transportation for children in grades K-12 in its district who file applications for such transportation in the remaining months of the 1970-71 school year, or, in the alternate, that reimbursement be made to parents in the manner prescribed by law.

5. That all disputes about the mechanics of implementing these directives be referred to the office of the Bergen County Superintendent of Schools for adjudication.

COMMISSIONER OF EDUCATION

January 11, 1971

**John F. Phillips,**

*Petitioner,*

**v.**

**Board of Education of the Borough of Netcong, Morris County,**

*Respondent.*

## COMMISSIONER OF EDUCATION

### Decision

Petitioner is a prospective candidate for a three-year term on the Netcong, Morris County, Board of Education, hereinafter "Netcong Board." He alleges that he filed his nominating petition for this post at the proper time, but that he has been denied a place on the ballot since there is no petition on file with the Secretary of the Netcong Board. The Secretary avers that she has no recollection that such a petition was, in fact, filed, and that there is no such petition in her possession at the present time.

A hearing in this matter was held at Morris Plains on January 13, 1971, in the office of the Morris County Superintendent of Schools, before a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

Petitioner has been a member of the Netcong Board since February 1970. As an incumbent in office, he was given a nominating petition, filled out in part at the top by the Secretary of the Netcong Board, in early December 1970. At the same time, petitioner secured another nominating petition as a prospective candidate for a seat on the Byram-Netcong-Stanhope Regional Board of Education, hereinafter "Regional Board." It was petitioner's testimony that in subsequent days his wife secured the requisite number of names on each of the petitions, and that on December 24, 1970, she took the two petitions to a Notary Public for the requisite signature affirmation. Petitioner further avers that at approximately 3:45 p.m. on that date he personally gave both petitions to the Secretary of the Netcong Board since she also serves as Secretary to the Regional Board, and thus was the appropriate official to receive such applications. Following this filing, petitioner maintains that he did not speak with the Secretary again until December 31, 1970. On that date he testified that he called her to ascertain whether or not there was an opposition candidate for the seat for which he thought he had filed, and was told that there was no petition supporting even his own candidacy.

The Secretary of the Board confirmed certain of the facts as stated by petitioner, but avers that she never saw the petition nominating petitioner for a seat on the Netcong Board, but only the one for the Regional Board. She does not deny the possibility that both petitions may well have been filed with her on

December 24, 1970, as stated by petitioner. In any event, she maintains that an intensive search made for the petition in subsequent days has failed to produce it.

The Notary Public who testified at the hearing stated that on December 24, 1970, he affirmed the signature of petitioner's wife on the two petitions, and that the petitions were properly executed as of that date.

Petitioner's prayer is that the Commissioner direct the Netcong Board Secretary to accept a new nominating petition at this late date in lieu of the one allegedly submitted on December 24, 1970, and that petitioner's name be placed on the February 9, 1971, ballot for a three-year term on the Netcong Board.

The hearing examiner concludes from a review of the sworn testimony that two petitions endorsing petitioner's candidacy for separate seats on the Netcong and Regional Boards were properly signed and affirmed on December 24, 1970. The presumption is strong, and petitioner's testimony not refuted, that the petitions were properly filed with the Secretary to both Boards on that same afternoon, but that subsequently the Netcong petition was misplaced and lost. Therefore, the hearing examiner recommends that the new substitute petition dated and affirmed January 13, 1971, be accepted in lieu of the original, and that petitioner's name be placed on the February 9, 1971, ballot for the designated term.

* * * *

The Commissioner has reviewed the report of the hearing examiner. He notes in particular that it is the sworn testimony of petitioner, corroborated by a Notary Public, that two petitions for the respective Board seats did in fact exist in proper form on December 24, 1970. On the basis of this credible testimony, the Commissioner finds it reasonable to infer that the two petitions were subsequently filed in the manner stated, and that such filing was timely, and represented the expressed intent of a group of citizens in Netcong to propose petitioner as a candidate for both the Netcong and the Regional Boards in the February election. This intent or expressed will of the people may not be illegally suppressed. *In re Wene*, 26 *N.J. Super.* 363 (*Law Div.* 1953), affirmed 13 *N.J.* 185, 1953.

Accordingly, the Commissioner directs that the name of John F. Phillips be placed on the ballot for the school election of February 9, 1971 for a three-year term on the Netcong Board of Education.

COMMISSIONER OF EDUCATION

January 15, 1971

**Carrie Warwick Garrison,**

*Petitioner,*

**v.**

**Commercial Township Board of Education,**
**Cumberland County,**

*Respondent.*

## COMMISSIONER OF EDUCATION

### Decision

For the Petitioner, N. Douglas Russell, Esq.

For the Respondent, Allan H. Harbert, Esq.

Petitioner is a teacher under tenure in one of respondent's schools. She appeals from a decision of respondent, which, she alleges, denied her certain sick leave benefits and compensation. Respondent denies that any benefits were withheld from petitioner and maintains that her compensation as a teacher was in the correct amount.

A hearing in this matter was held by a hearing examiner appointed by the Commissioner of Education on October 9 and December 15, 1970, at the Millville City Hall. The report of the hearing examiner is as follows:

The chronological list of facts pertinent to the basic issues to be adjudicated in this case are stated as follows:

1. On January 14, 1969, respondent received a request from petitioner (R-4) for "a few days leave" in February 1969 to accompany her husband on his vacation. The recorded minutes of a meeting held by respondent on that date (R-7) say that the

> "***request was tabled until the dates are specified and that it be understood she would not be paid."

2. On January 28, 1969, petitioner notified respondent by letter (P-1) that it would be necessary for her to "***take the month of February for a complete rest."

This was accompanied by a note from her doctor (R-1) which said:

"Please excuse from school due to an anxiety reaction."

Subsequently, but without any official recorded action, respondent is said to have declared that the handling of this doctor's excuse was to be an "administrative matter."

3. On February 3, 1969, petitioner absented herself from school and accompanied her husband on his vacation to Florida.

4. Petitioner returned to her home from the vacation trip on February 26, and on the next day she received in the mail a letter (P-2) which had been sent to her on February 3, 1969, by the Secretary of the Board of Education at the direction of the administrative principal of the school. This letter is quoted in its entirety as follows:

> "The Board of Education of Commercial Township takes official cognizance of your notice of January 28, 1969 concerning the condition of your health.
>
> "Under the conditions as stated by you, the Commercial Township Board of Education will require a statement, from the School Physician, as to your condition and your fitness to return to a classroom, as a prerequisite to your resuming classroom duties."

5. On February 28, 1969, petitioner visited the school doctor, a general practitioner, who in turn referred her to a psychiatrist for consultation and possible treatment.

6. Petitioner visited the psychiatrist on three occasions; namely March 8, 13 and 28, 1969. She did not see the school doctor again during this month or subsequently in April.

7. On April 8, 1969, the school doctor informed the Board by letter (R-3) that he had discussed petitioner's condition with the psychiatrist and stated:

> "***he and I have concluded that at the present time she is able to resume her function as a school teacher but with careful scrutiny of her work by a supervisor."

8. On April 8, 1969, prior to receipt of the letter from the doctor, the administrative principal informed respondent of this conclusion. There was no formal action by respondent.

9. On April 11, 1969, the administrative principal informed petitioner that she could return to teaching as of April 14, 1969. She did return as of that date.

It is petitioner's contention that during the month of April 1969 a total of $159.25 was withheld from her compensation and that she is entitled to this amount. Her record of sick days' entitlement and days used was offered in evidence as P-7 to buttress this contention and to prove that the total entitlement was such as to cover the total period of the absence from February 3 to April 14, even if such entitlement should be properly assessed to the maximum extent. However, she further avers that she was ready, fit and willing to resume teaching on March 3, 1969, and that, in the absence of stated reasons for a finding to the contrary, she should have been allowed to do so. Since she was not apprised of such reasons, she avers that the suspension from her teaching duties was illegal and that her sick leave entitlement was illegally assessed.

Respondent offered a record of petitioner's sick leave entitlement in evidence as R-9. While recognizing the same accumulative entitlement as petitioner had calculated, it differed with petitioner's calculations with respect to the number of sick days used. In respondent's view, petitioner had exceeded this entitlement by three and one-half days at the time of her return to work, and thus the deduction made from total compensation due petitioner was in order.

Testimony at the hearing established the facts and positions as previously enunciated. There were two other positions established by the parties in the testimony that was elicited. Petitioner maintained that her first request for a "few days leave" to accompany her husband on vacation and her later decision to take a sick leave were both prompted by a traumatic experience; namely, the refusal of a college to grant her a degree in January 1969, to which she avers she was entitled. She stated that the refusal was not made known to her until the time she was actually standing in the procession at the time of the graduation ceremony.

A second position was established in the testimony by the administrative principal for the district; namely, that he was responsible for the initial decision to suspend petitioner, pending a report by the school physician, but that respondent was told of the decision and, in effect, ratified it, although no formal action was ever recorded in the minutes of the Board of Education.

The basic issues derived from the contentions of the parties are stated by the hearing examiner as follows:

(a) Was the suspension of petitioner from teaching duties on March 3, 1969, a proper and legal suspension?

(b) During the period February 3, 1969 to April 14, 1969, was petitioner afforded all of the legal benefits to which she was entitled?

The hearing examiner concludes the findings relative to (a) above may be properly made by the Commissioner on the basis of the facts as enunciated. However, the examiner concludes that a finding is necessary as to the total number of sick days available to petitioner prior to February 1969, since the records of petitioner and respondent are in basic conflict.

In this regard the hearing examiner believes that the sick leave entitlement record of petitioner is credible, and that the record of respondent is lacking in the kind of precise data required for a presumption of correctness. This latter record lacks, in some cases, a clear annotation of leave days distinguished by category as sick, death in the family, or personal days, and was recently compiled by the present Board Secretary from records, admittedly lacking in completeness, that were kept by others. Therefore, the hearing examiner concludes that the total of $159.25 deducted from the total compensation of petitioner because her sick leave had expired was a deduction made in error and should be restored to her regardless of other findings.

* * * *

The Commissioner has reviewed the report of the hearing examiner. He notes that the legality of the suspension of petitioner upon her return from leave in March 1969, is of prime initial importance.

The testimony of the administrative principal was to the effect that he had initiated the suspension of petitioner and her referral to the school doctor. His action in suspending her is held to be proper under the terms of *N.J.S.A.* 18A:25-6 which 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 *teaching staff member,* 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." *(Emphasis supplied.)*

However, both this statute and *N.J.S.A.* 18A:16-2 which states:

> "Every board of education shall require all of its employees, and may require any candidate for employment, to undergo a physical examination, the scope whereof shall be determined under rules of the state board, at least once in every year and may require additional individual psychiatric or physical examination of any employee, whenever, in the judgment of the board, an employee shows evidence of deviation from normal, physical or mental health.
>
> "Any such examination may, if the board so requires, include laboratory tests or fluoroscopic or X-ray procedures for the obtaining of additional diagnostic data."

make it plain that while a superintendent of schools or an administrative principal may suspend a teacher, such suspension must be reported to the "board forthwith," and it is the board, and the board alone, that is empowered to decide on the continuance of the suspension or the referral for medical evaluation.

In the instant matter, there is no evidence that respondent ever took action to require medical evaluation. Instead, there is the testimony of the administrative principal that the referral of petitioner to the school doctor was initially made by him and was at a later date, unofficially ratified by the Board. The Commissioner holds that such a procedure has no foundation in law, and that a board of education may not lawfully delegate decisions involving the lengthy suspension of tenure teachers to administrators. An affirmative act of the board is needed. In the case of *Smith v. Board of Education of the City of Camden,* 1966 *S.L.D.* 107, the Commissioner made this plain when he said at page 109, in referring to a board's discretion:

"*** The Commissioner does not agree, however, that this discretion extends to a board of education the right to keep a tenure employee on suspension for an indefinite period without taking affirmative action with respect to her status.***"

In the instant matter, the Board took no official action duly recorded in the minutes of the Board at any time either to affirm the suspension of petitioner, to refer her to a doctor or to readmit her to her teaching position. Since they did not, and since the responsibility for such affirmative action may not be delegated, the Commissioner holds that the suspension of petitioner from her teaching duties and her referral for evaluation were illegal acts, and that the tacit approval evidently given these acts does not constitute an approval with validity in law.

The Commissioner is not called upon in this decision to question the propriety of the sick leave in question or the way in which the time of the leave was spent, although such questions may well have prompted the events that followed. However, there was recognition by respondent of the necessity for the leave as a sick leave entitlement in the evidence that the teacher was paid for the month of February 1969. Having recognized the leave in this fashion, respondent was obligated to insure, by affirmative action and by correct referral, that petitioner was or was not in fact ready to return to a teaching status on March 31, 1969. Respondent having failed in that obligation, and lacking any documentary evidence or testimony to the contrary that in fact petitioner was not able to resume her duties, the Commissioner holds that her suspension of approximately six weeks was unconscionable and has no legal standing. Therefore, he directs that the sick leave days that had accrued to petitioner, but which were deducted from her entitlement for the period March 3, 1969 to April 14, 1969 be restored to her credit in the records of respondent.

Having found that the suspension of petitioner was improper, it follows that the deduction of the sum of $159.25 from her salary because her sick leave was said to have expired, was also unwarranted. The Commissioner further directs, therefore, that this amount be restored forthwith.

COMMISSIONER OF EDUCATION

January 20, 1971

**Charles Robbins and Kenneth Robbins, students, and Charles L. Robbins and Weslia Robbins, their parents,**

*Petitioners,*

**v.**

**Board of Education of the City of Burlington, Burlington County,**

*Respondent.*

## COMMISSIONER OF EDUCATION

### Decision

For the Petitioners, Wells, Hillman and Wells (Harold B. Wells, III, Esq., of Counsel).

For the Respondent, John E. Queenan, Jr., Esq.

Student petitioners herein were ninth grade pupils at Burlington City High School in the 1968-69 school year. They and their parents allege that their guaranteed right of free speech was violated on March 4, 1969, by their suspension for distribution of a certain leaflet, and again on March 5, 1969, for wearing a single black glove in the school. Respondent asserts that student petitioners acted in defiance of the authority of the school and of regulations reasonably designed to preserve good order and to prevent disruption of the operation of the school.

A hearing in this matter was conducted at the office of the Burlington County Superintendent of Schools, Mount Holly, on August 26 and December 17, 1969 and April 27, 1970, by a hearing examiner appointed by the Commissioner. Briefs of counsel have been filed. The report of the hearing examiner is as follows:

Upon information that student petitioners had withdrawn from respondent's high school, which was established as a fact in later testimony, counsel for respondent moved at the outset of the hearing that this matter be dismissed as moot. This motion was denied by the hearing examiner on the grounds that violation of pupils' basic rights was alleged in the pleadings, and that such disciplinary action as had been taken against petitioners could become a part of their school records. *Cf. Bertin v. Board of Education of Edison Township*, 1969 *S.L.D.* 24, 26.

The testimony establishes that on February 27, 1969, a group of pupils met in a high school classroom in the evening and there discussed, *inter alia*, some of the implications of the recently-announced decision of the U.S. Supreme Court in *Tinker v. Des Moines Independent Community School District*, 393 *U.S.* 503, 21 *L. Ed.* 2*d* 731, 89 *S. Ct.* 733. Petitioners did not

attend this meeting, and there is no clear evidence that the wearing of a black glove was specifically considered. However, on the following day, certain pupils, again not including petitioners but including some who had participated in the prior evening's meeting, wore black gloves in class. They were summoned from class to the office of the school disciplinarian, who asked them to remove the gloves. They complied, and, according to the disciplinarian's testimony, told him that they had worn the gloves to "see what the teachers had to say." (Tr. 366, 367) During the ensuing weekend a group of pupils who belonged to a group known as the Voice of Defense prepared and had reproduced approximately 150 copies of the following document: (P-1)

> "SCHOOL IN DIRECT VIOLATION WITH SUPREME COURT RULING
>
> "On Friday, February 28, serveral [sic] Black students were denied their right to an education by being rudely yanked out of class to the disciplinary office for wearing black gloves as a symbol of political protest. This was in direct conflit [sic] with a recent Supreme Court ruling that said in a 7-2 decision that school officials, in Des Moine, [sic] Iowa, had violated the First Amendment rights of three youngsters, 13 to 16 years of age, when they suspended them for wearing black armbands to show their political beliefs.
>
> "Justice Fortes, in the majority decision, said: 'In our system students may not be regarded as closed-circuit recipients of only that which the state chooses to communicate. In the absence of specific showing of constitutionally valid reacons [sic] to regulate their speech. Students are entitled to freedom of expression of their views.'
>
> "In view of the court decision we the brothers united in the 'Voice of Defense' ask the students to come to school with a black glove or a black armband on Wednesday, March 5, 1969. We are taking this action to aprise [sic] the establishment of our constitutional rights.
>
> Voice of Defense"

School was closed on Monday, March 3, because of inclement weather. On Tuesday, March 4, student petitioner Charles Robbins, at or near the cafeteria entrance during lunch period, was in possession of three copies of the document (P-1), which he testified he gave to other pupils who wished to read it. He denies that he distributed the document, but says that one student got a copy and gave it to a teacher. He testified further that "the school would obviously suspend me for handing it out," (Tr. 51) and had been so warned by another pupil. He was summoned to the administrative offices and there questioned by the vice-principal and the disciplinarian. He refused to agree not to hand out more copies of the document, and was notified that he was thereupon suspended. (The principal was out of the State attending a convention on this date, March 4, as well as on the following day.) Shortly thereafter the Superintendent of Schools arrived at the school, and when petitioner then agreed not to continue distribution, the suspension was lifted.

Later in the afternoon the following announcement was read over the school's public address system: (R-5)

"I am speaking in regard to the letter that has been circulated throughout your school concerning the Supreme Court decision on a student's right to wear a black arm band to show their political beliefs.

"The Board of Education and school authorities will certainly honor this decision. I would like to take this opportunity to inform the student body that no mention was made in the Supreme Court ruling concerning a glove or any other garment, other than the black arm band.

"I would also like to inform the students that if any student fails to comply with the request of the Board of Education and administration concerning wearing of garments other than the arm band disciplinary action will be taken.

"Furthermore, I would like to inform the student body that the distribution of any material to the student body on school property is prohibited unless permission is obtained from the Board of Education.

"Your cooperation in these two matters will be appreciated."

Petitioners admit hearing the announcement, although they are not certain that they heard the closing paragraph concerning distribution of materials without prior permission of the Board of Education. Respondent's witnesses testified that no permission had been sought or given for the distribution of P-1, that if need arose, permission could be given by the school principal, but that if permission had been sought for distribution of this particular document, it would have been denied because it contained false and misleading statements.

On Wednesday, March 5, Charles and Kenneth Robbins, along with eight other pupils, wore a single black glove in school. They were sent from class to the administrative offices. Seven of the ten pupils agreed to remove the gloves; of the remainder, two were the student petitioners herein. On their refusal to remove the gloves they were suspended from school and ordered to go home. In a later conference that day, involving petitioners' father and the Superintendent, the suspension was lifted and petitioners returned to their classes wearing black armbands but not the black gloves. The petition herein followed on April 15, 1969.

Petitioners testified that no disorder nor disruption of the educational program of the school accompanied either the distribution of the document P-1 on March 5 or their wearing of a black glove on March 5. It is their contention that their constitutionally-protected rights of free speech in the distribution of the pamphlet and of "symbolic speech" (*cf. Tinker, supra*) was violated by the enforcement of school rules against them.

The hearing examiner finds that the actions of student petitioners on March 4 and 5 were undertaken in a sincere effort to protest what they believed to be injustices and inadequacies of the school and its program toward black pupils. Cited in particular were insufficient books by black authors in the school

library, an alleged "padding" of the library shelves with borrowed books in anticipation of a school accreditation visit, lack of a black studies program, failure of some teachers to give proper recognition to their point of view in class discussions, exploitation of black athletes, improper recognition of academic achievement by black pupils, and failure to encourage and assist black pupils in entering better colleges. Testimony educed in cross-examination and by evidence offered by respondent showed that in some instances petitioners' beliefs were statistically unsupported, and in others that petitioners had failed to seek factual support for their beliefs. While in no sense minimizing the historic grievances of black people, and in no wise challenging the sincerity of petitioners' testimony, the counter-testimony of school officials compels the hearing examiner to conclude that petitioners' testimony reflects the influence of unsupported generalizations, suspicions based upon rumor, and peer-group pressure. The hearing examiner recites his findings on the background of petitioners' beliefs not to raise a question of the right to protest even if in error, but to show the mental climate in which petitioners' actions on March 4 and 5 are framed. The specific stimulus to those actions, the hearing examiner finds, was the incident of February 28, *supra*, and the preparation of the handbill (P-1) which followed thereon. The testimony makes it indisputable that the pupils who wore black gloves to class on February 28 were called from class without disturbance or disruption, certainly without violence, and upon their agreement to remove the gloves, returned to their class. Thus the statement in P-1 that "several Black students were denied their right to an education by being rudely yanked out of class" is utterly without foundation in fact. When questioned about this statement, one of petitioners' witnesses who assisted in writing the statement, and subsequently "edited" it, said that the expression "rudely yanked" was "a misprint," "a colloquialism," and should have been enclosed in quotation marks. When asked whether the language was chosen to "steam up" other pupils, the witness' answer was:

> "***A. No, I can say this is a misprint. This is a misprint and I think it has served its purpose.
>
> "Q. It has served its purpose.
>
> "A. No, I think if you – if we had put quotation marks around it, nothing would have been said.***" (Tr. 184)

But the benefit of the missing quotation marks was denied to student petitioners as to others. Thus petitioners engaged consciously in actions openly defiant of the authority of the school, not only in general protest of dissatisfaction, but also in reaction to what was represented to them as plain mistreatment of several of their fellow students.

Respondent offered extensive testimony of the Superintendent, the high school principal, its vice-principal, and the school's disciplinarian, the athletic director and a janitor, to show growing racial tension in the student body, specific incidents of violence and threats of violence, and the immediate events surrounding the actions here in question. The testimony traced events beginning

with a walkout of some 50-75 black pupils in April 1968, on the day following the assassination of the Reverend Martin Luther King. Thereafter, it was testified, tensions and disorders multiplied abnormally, necessitating the creation of an additional position of school disciplinarian. These conditions had definite racial overtones, it was testified. There was interracial fighting after athletic events, beatings in lavatories which pupils hesitated to report for fear of reprisals, an increased number of "shakedowns" of pupils by other pupils, an effort to induce black athletes to boycott athletic teams and an increasing number of incidents of pushing and shoving in locker rooms, especially in the physical education areas. Teachers, especially female teachers, expressed fear for their personal safety, and talked to administrative personnel of seeking employment elsewhere. A school custodian assigned to work in the cafeteria testified to deliberate incidents of throwing or dropping dishes, trays, and foodstuffs on the floor, accompanying their acts with racially oriented remarks about whose duty it would be to clean up the debris. It became necessary to increase the number of policemen employed to patrol basketball games and the crowds leaving such games from one or two to six. It was further testified that certain pupils felt compelled to participate in racially oriented activities to avoid being designated by an epithet connoting racial apathy or disloyalty. Thus, the conversation overheard by several administrators on the school's intercom system, taken in the climate of events of the preceding several months, was interpreted by them to mean that certain pupils were interested in means to create "complete unrest" in the school. (Tr. 300) The hearing examiner gives great credence to the testimony of these witnesses to conditions in the school. The vice-principal had previously served as a disciplinarian in the school, and had been the basketball coach working with both black and white players for 18 years, and was well qualified to speak of comparative conditions over a period of years. The disciplinarian was not cloistered in an office, but moved freely and frequently about the school building, often times resolving problems on the spot, and meeting pupils in informal, unstructured situations which gave him an insight into the climate of events and the feelings of pupils and staff. As petitioners were sincere in their beliefs, so were these witnesses sincere in their concerns for the safety and welfare of both pupils and the good order of their school.

When a teacher brought to the administrative offices at lunch time on March 4 a copy of the document P-1 which had been obtained from Charles Robbins, the pupil was called to the vice-principal's office and reminded that distribution of such material without prior permission was contrary to school policy. When Charles responded that he "did not know" (tr. 303) whether he would desist, the vice-principal testified, there was no alternative but suspension. Thereafter the public address announcement (R-5) was prepared and, after approval by the Superintendent, was read prior to the close of school.

Between that incident and the following morning, it was testified, evidences of further possible disorder were noted. Certain white pupils suggested that they would wear white gloves; many parents telephoned to ask whether safe conditions would exist in the school on the following day; notice was received

from the chief of police that trouble, perhaps violence, was rumored, and it was suggested that police be stationed in the school on March 5. Plans for dealing with possible disturbances were prepared, including establishing administrative stations on both floors of the school building, arranging for two plainclothes policemen, and a notice to teachers not to send to the office any pupils wearing black gloves until the first class period had begun.

On the morning of March 5, in addition to the ten pupils wearing a single black glove, many pupils were observed carrying gloves in their pockets. Many pupils wore armbands; one exaggerated armband was removed by official request; another armband adorned with a swastika created a minor disturbance. One pupil was reported to be carrying a black plastic baseball bat "for protection." (Tr. 315)

The hearing examiner finds that there was no written nor published policy available to pupils concerning distribution of writings without prior approval by or permission of school authorities or the Board of Education. He also finds that Charles Robbins participated in a form of distribution of the document P-1 in full awareness that by so doing he risked administrative disciplinary action.

The hearing examiner further finds that in wearing a black glove in school on March 5, Charles and Kenneth Robbins were consciously and openly in defiance of a regulation of the school authorities, of which they had been apprised by the public address announcement on the previous day.

Finally, the hearing examiner finds that actions taken by school authorities - specifically the vice-principal acting in the place of the absent principal - to suppress distribution of the document P-1, to forbid the wearing of a black glove in the school, and to take disciplinary action against Charles and Kenneth Robbins for persistent defiance of such prohibition were actions taken in a situation where real or imminent possibilities of disorder and disruption of the school, with attendant dangers to the safety of pupils and staff and school property, were recognized.

* * * *

The Commissioner has reviewed and considered the report of the findings of the hearing examiner as set forth above.

The Commissioner has heretofore expressed his determination that the right of pupils to freedom of expression under our Constitution is to be protected under school law, consistent with the safeguards set forth in the decisions of the courts. *Goodman v. Board of Education of South Orange and Maplewood*, decided June 18, 1969, remanded by the State Board of Education November 4, 1970; *Burke v. Board of Education of Livingston*, decided by the Commissioner November 4, 1970. In his decisions the Commissioner has looked to the doctrines expressed by the United States Supreme Court in *Tinker v. Des Moines Independent School District, supra*, and cases cited therein, as guidelines for his determination. It is eminently clear that students "are 'persons' under our

Constitution;" that "state-operated schools may not be enclaves of totalitarianism;" that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." 393 *U.S.* at pages 511, 508.

But, as in *Tinker*, "[o]ur problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities," *Id.*, at page 507. It is undeniable that boards of education are statutorily required to make rules and regulations for the government and management of the public schools under their control. *N.J.S.A.* 18A:11-1 It has also been established that where a board of education has not made an appropriate rule, the principal of a school "has authority under the law to make rules and regulations that tend to the better control and discipline of his school." *McCurran v. Board of Education of Trenton*, 1938 *S.L.D.* 577, 578, affirmed State Board of Education 575. Such rules must have a rational and substantial relationship to some legitimate purpose, and when challenged in a situation where overall student behavior is concerned, the evidence must "indicate that the reaction of other students was so grave as to be beyond control by the exercise of ordinary simpl[e] disciplinary measures." *Pelletreau v. Board of Education of New Milford*, 1967 *S.L.D.* 35, reversed State Board of Education 45, 47.

In the instant matter, petitioners' desire to protest is clear and not substantially challenged. That their basis for protest may not have had factual support or may reflect insufficient effort on their part to get full and correct information is not material. The protection of the First Amendment is broad enough to encompass the beliefs of all, even if error exists. *Cf. West Virginia State Board of Education v. Barnette*, 319 *U.S.* 624 (1938) concurring opinion of Justices Black and Douglas, at page 644. Nor is it necessary to make any effort to determine whether any nice legal distinction exists between an armband and a single black glove as symbols "closely akin to 'pure speech.' " *Tinker*, *id.*, at page 505.

It is clear from the language of the public address announcement on March 4 (R-5) that the school administration recognized no threat to safety, order, or the continuing educational process in the wearing of black arm bands. But the administration, in the exercise of its best judgment based upon its experience and first-hand evaluation of the immediate situation, foresaw that the wearing of the black glove might well exacerbate an already tense situation to one of violence and disorder. The Commissioner is reluctant to interpose an evaluation of the potential in a situation framed in a history of events and tensions such as those found here where the evaluation of qualified school administrators who have lived and worked daily on the scene of those events is so well supported by their testimony.

The essential question, rather, is whether the proscription of the document P-1 and the subsequent prohibition, supported by disciplinary action, of the wearing of a black glove, so far invaded petitioners' rights, vis-a-vis the necessity

to preserve the school processes from disruption and to protect other pupils, staff, and school property from harm, as to warrant a determination that petitioners' constitutionally protected rights have been violated.

The Commissioner does not so determine. He finds, as did the administrators on the scene, ample evidence of growing racial tension in respondent's high school in the ten months preceding the events of March 4 and 5, 1969, here in question. This tension resulted in both physical and verbal conflict, as well as emotional unrest, which certainly disrupted the reasonable, safe, and proper operation of the school. He finds the language of the document P-1, whether by design, editorial oversight, or misprint, provocative of counter action by the pupils to whom it was addressed. Thus the school authorities, when they became aware of its false and misleading contents, and the objective it sought to obtain thereby, had little choice but to forestall any further source of school disruption, both by preventing further distribution and by endeavoring to prevent the wearing of black gloves on the following day. Their concern was enhanced by the calls of worried parents whose fears must have found their basis in reports made to them by their children, and by the warning given by the chief of police. Their plan to cope with possible disturbances on the morning of March 5 was made to be unobtrusive and not to invite or provoke trouble. Yet trouble there was, fortunately not of serious degree, but sufficient to demonstrate that they had not acted out of "undifferentiated fear or apprehension of disturbance." *Tinker, supra* For the school officials to have done less under all the circumstances would have been incautious, if not foolhardy. The responsibility of school administrators, and in particular the responsibility of the principal, to exercise supervisory care for the safety of pupils was considered by the New Jersey Supreme Court in *Titus v. Lindberg*, 49 *N.J.* 66, 73-76 (1967). Concerning the responsibility of the principal, a defendant in the case, the Court said, at page 73:

> " ***The duty of school personnel to exercise reasonable supervisory care for the safety of students entrusted to them, and their accountability for injuries resulting from failure to discharge that duty, are well-recognized in our State and elsewhere. See *Doktor v. Greenberg*, 58 *N.J. Super.* 155, 158-159 (*App. Div.* 1959), certif. denied 31 *N.J.* 548 (1960); *Eastman v. Williams*, 124 *Vt.* 445, 207 *A.* 2*d* 146 (1965); *Cianci v. Board of Education*, 18 *A.D.* 2*d* 930, 238 *N.Y.S.* 2*d* 547 (1963); *Domino v. Mercurio*, 17 *A.D.* 2*d* 342, 234 *N.Y.S.* 2*d* 1011 (1962), affirmed 13 *N.Y.S.* 2*d* 922, 244 *N.Y.S.* 2*d* 69, 193 *N.E.* 2*d* 893 (1963). See *Annot.*, 'Personal liability of public school officers, or teachers or other employees for negligence,' 32 *A.L.R.* 2*d* 1163 (1953); *Annots.*, 'Tort liability of public schools and institutions of higher learning,' 160 *A.L.R.* 7 (1946); 86 *A.L.R.* 2*d* 489 (1962). *** "

The Commissioner well realizes that the evaluation of conditions and circumstances, and the weighing of fundamental individual rights in the balance, is an extremely difficult one for school officials to face. The danger of over-reaction and panicky response is extensive. But the responsibility of school officials for the protection of the children in their care, as well as of the

employees and the property of the school district, and for the orderly continuance of the educational process, is so great that where evidence of clear and present danger appears, as here, carefully considered and reasonable preventive and protective measures are necessary. *Cf. Terminiello v. City of Chicago*, 337 *U.S.* 1,5 (1949).

The Commissioner sustains the hearing examiner's determination not to dismiss this case as moot. The broader questions discussed herein transcend the immediate and narrower issues of specific relief to petitioners. However, the Commissioner notes the sincerity of petitioners' protest, even if misguided. While in no sense does the Commissioner condone open defiance of authority he finds that the suspension imposed upon petitioners was of very brief duration and was imposed not so much for the purpose of punishment as an administrative act to avoid further disorder. No suitable purpose will be served by the preservation of the history of this event upon the school records of the student petitioners. The Commissioner therefore directs that respondent's school records for these petitioners be expunged of any record of the suspensions of March 4 and 5, 1969. With this exception, the Petition herein is otherwise dismissed.

COMMISSIONER OF EDUCATION

January 21, 1971

**In the Matter of the Tenure Hearing of William G. Ford, School District of the Township of West Deptford, Gloucester County.**

**COMMISSIONER OF EDUCATION**

**Decision**

For the Complainant Board, Milton Hannold, Esq.

For the Respondent Teacher, Henry Bender, Esq.

Charges of conduct unbecoming a teacher and absence without just cause from the performance of contractual duties were filed with the Commissioner of Education against William G. Ford, a tenure teacher with eleven years' service, by the Board of Education of the Township of West Deptford. Respondent teacher was suspended without pay on May 18, 1970, by the complainant Board of Education after certification to the Commissioner of Education that such charges would be sufficient, if true in fact, to warrant dismissal or reduction in salary.

A hearing was held in the office of the Gloucester County Superintendent of Schools in Clayton on November 23, 1970, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

The complainant Board of Education charges that respondent teacher was absent from school on March 23, 24, April 8, 10, 15, 20, 1970, without just cause, and alleges that "William G. Ford did absent himself from the performance of his contractual duties and responsibilities as a teacher in the school district on the days and dates above mentioned for the purpose of working for or engaging to work for the U.S. Census Bureau." It further alleges that respondent notified the school on each of the days *before* his absences of April 8, 10, 15, and 20, to report that he had an attack of angina pectoris and would be unable to report to work the next day.

Respondent teacher denies being absent on March 23 and 24, although he submitted a physician's excuse dated April 30, 1970, and a signed personal letter to the Superintendent of Schools dated April 23, 1970, both of which acknowledge his absence on March 23, as well as those on April 8, 10, 15, and 20. Respondent readily admits his absence from school on April 8, 10, 15, and 20, and admits attending training meetings for census workers on those days. However, he gives as reason for his absence from school a physician's statement (P-8) which reads in part as follows:

> " *** When he has an attack of the chest pain he has been advised to take sublingual nitroglycerine and to rest; specifically, he has been instructed to absent himself from school when he is suffering from this pain and to stay off his feet and rest both during and after an attack.*** "

Respondent avers that attending a training session, where the activity is less rigorous than teaching school, constitutes reasonable use of his sick leave. He raises the issue of discrimination in that he avers he was punished because he headed the teachers' negotiation unit. He testified to having personal knowledge of another teacher who missed two days to go hunting during the 1967-68 school year and was simply "docked" compensation for those days.

Respondent asserts, finally, that even if the Commissioner should find his absences inexcusable, dismissal would be far too harsh a penalty to be imposed for the alleged infractions.

The principal testified that he and the Superintendent of Schools observed respondent teacher entering the building where the instruction lessons were given by the United States Census Bureau at 8:35 a.m. on three of the four dates in April. Testimony by another witness corroborated the story that respondent did attend the census lessons on all four dates, as charged, and remained until the completion of the sessions, which were some four and one-half to six hours long.

The principal further testified, however, that respondent was a "most cooperative" teacher and "has been very diligent in the performance of his duties." (Tr. 14)

The vice-principal's testimony clashed with that of respondent teacher concerning the absence of April 10. The vice-principal testified that respondent

came to his office on the morning of April 9 and told him that he would be absent on April 10 because of a physician's appointment, but that he could report to work at noon. The vice-principal said that he told respondent that he (respondent) would have to decide whether or not he should report to work at noon on April 10. He testified further that he made a note of the incident the day after it occurred and kept that note as a record for the principal.

Respondent testified, however, that he *became ill* on the afternoon of April 9, and that he notified the administration before going home from school that he would be absent the next day.

On the weight of the believable testimony, the hearing examiner does not accept respondent's version of reporting his absence for April 10. The vice-principal's testimony, however, was clear and convincing, and his written record of that date was not refuted. The hearing examiner concludes, therefore, that respondent teacher's excuse for his absence on April 10 is a misrepresentation of fact.

The testimony of a physician, who specializes in cardiology, was generally supportive of the description of the symptoms given by the respondent when he suffered his attacks of angina pectoris. The Board acknowledges respondent's letter from his physician stating that respondent has been under treatment for this cardiovascular condition for more than a year. The Board's expert medical witness testified, however, that it would be "inadvisable activity" to attend the training sessions, *supra*, after suffering the angina attacks as described. The physician testified further that his interpretation of rest and relaxation prescribed by respondent's own physician concurred with the advice he would have given his own patients, which would mean sitting or lying down at home without any activitiy. (Tr. 87)

The hearing examiner further concludes that respondent has not proven that his position as head of the teachers' negotiation unit was in any way material to his suspension from his teaching position, nor has any comparative basis been established for his allegation that others absented themselves from school but were treated differently. The lone issue in contention, therefore, is whether or not such absences of respondent teacher as described, *supra*, on April 8, 10, 15, and 20 are justified and excusable.

* * * *

The Commissioner has examined the report of the hearing examiner and concurs with his findings.

There is no factual dispute about the days of absence in the instant matter. Respondent teacher admits using his sick leave and being absent from his teaching position on April 8, 10, 15, and 20, 1970, to attend meetings for the purpose of receiving lessons that would qualify him as an enumerator for the United States Census Bureau. The Commissioner notes respondent's allegation that this activity is far less strenuous than that of teaching school and was, therefore, justifiable use of his time.

Sick leave is defined in *N.J.S.A.* 18A:30-1 which reads in part as follows:

"Sick leave is hereby defined to mean the absence from his or her post of duty, of any person because of personal disability due to illness or injury ***."

There is no question about respondent's right to his accrued sick leave because of personal disability; however, in the Commissioner's judgment, it was not the legislative intent that a teacher determine that if his particular illness is not too disabling, he may seek employment elsewhere, while still being paid by the local board of education, until he determines he is ready to face the rigors of the classroom.

Teachers are not penalized when they are ill and have accrued sick time. To the contrary, the benefit of absence from duty without loss of compensation, as provided in *N.J.S.A.* 18A:30-1 *et seq.*, is given so that ill teachers may properly care for themselves and return to school as soon as possible. If the census-training sessions, as described by respondent, were less rigorous than classroom teaching, one could logically argue that complete relaxation at home would allow for even faster and longer lasting recovery. The Commissioner finds the coincidences of angina pectoris attacks on the days before *four* previously-scheduled training sessions to be incredible. The Commissioner determines, therefore, that respondent teacher was absent from school on April 8, 10, 15, and 20, 1970, without justifiable reason.

The Commissioner notes that the Board offered no testimony nor evidence to show any poor record or incident of impropriety on the part of respondent teacher during his eleven years' service in the district. On the contrary, evidence was educed to show that respondent was a good teacher and was so evaluated by his principal.

The Commissioner cannot minimize the seriousness of the infractions by respondent teacher. The misuse of sick leave could, under other circumstances, be grounds for dismissal. However, the Commissioner is constrained to consider respondent teacher's good record of eleven years and determines that dismissal is too harsh a penalty to impose for respondent's improper actions. The compensation lost by respondent while suspended from school is sufficient penalty for his infractions.

The Commissioner directs, therefore, that respondent teacher be reinstated on February 1, 1971, and assigned teaching duties by the West Deptford Township Board of Education within the scope of his certificate.

The Commissioner further directs that respondent be placed on his proper step on the Board's 1970-71 salary guide, effective February 1, 1971, but with no back compensation.

COMMISSIONER OF EDUCATION

January 21, 1971

**Fair Lawn School Custodians Association,**

*Petitioner,*

**v.**

**Board of Education of the Borough of Fair Lawn, Bergen County,**

*Respondent.*

## COMMISSIONER OF EDUCATION

### Decision

For the Petitioner, Diamond, Diamond & Afflito (Michael K. Diamond, Esq., of Counsel)

For the Respondent, Maurice D. Emont, Esq.

Petitioner, an Association representing custodial, maintenance, grounds, and bus driver personnel in respondent's schools, complains that respondent Board of Education improperly rescinded a negotiated agreement concerning, *inter alia*, provisions for compensation for work during so-called "school use activities" after normal school activities. Respondent contends that services of custodians for school-use activities are different from those performed in normal custodial work, and, therefore, can be compensated at a different rate. It contends, therefore, that the Association's refusal to perform duties under respondent's proposed pay scale justified the rescission of all terms of the proposed agreement.

A hearing in this matter was conducted on March 3, 1970, at the office of the Bergen County Superintendent of Schools, Wood-Ridge, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

A "Statement of Facts" submitted by counsel sets forth the factual basis of the respective contentions in this matter. This statement reads in full as follows:

> "In the early part of 1969, the Fair Lawn Board of Education, hereinafter referred to as the 'Board', began its contract negotiations with the Fair Lawn School Custodians' Association, hereinafter referred to as the 'Association', in order to prepare its budget to present to the voting public during February, 1969, for the 1969-70 contract year. Several items were offered to the members of the Association in the way of increased benefits for the 1969-70 contract year, including an increase of $600.00 across the board for base salary, Blue Cross and Blue Shield coverage, together with major medical insurance and family coverage to the same extent as the teachers were to receive.

"The Association contends that the one major item in the contract negotiations that was not agreed upon between the parties concerned the school use over-time rate for the members of the Association. The Board offered to pay a minimum of $5.00 or $2.00 per hour on week days; $2.50 per hour on Saturday, Sunday and Holidays, when school is not in session; and time and a half for all work in excess of 40 hours per week in accordance with the Fair Labor Standards Act.

"The Board disagrees with this contention and feels that the Association had negotiated a package deal involving all monetary aspects of the 1969-70 contract, including the salary schedule for over-time school use activities. The Association's position is that it had rejected this offer and requested to be paid on the basis of time and a half the regular rate of each man, for all work done in excess of the 40 hours per week.

"The Association contends that pursuant to the negotiations prior to the budget being passed, the members of the Association accepted the offer of $600.00 increase across the board, $415.00 increase for the matron, and major medical coverages as referred to, leaving the remaining items to be negotiated with the Board. The Board, however, disagrees with this contention and takes the position that its understanding was that a verbal agreement had been reached to the general effect that among other things in return for an across the board increase of $600.00 for the Custodians and $415.00 for the Matron, together with increases and certain other fringe benefits that the members of the Association would continue to service the School Use Activities at the previously established rate.

"The budget which reflected no provision for an increase in School Use Activities custodial pay was subsequently approved and passed and as of July 1, 1969 the members of the Association have been paid in accordance with the aforesaid increase in salary, and have received the aforesaid medical insurance protection, despite the fact that a formal written contract was never signed, and the issue of over-time pay was not settled.

"In August of 1969, the Association received a proposed agreement between the Board and the Association for the 1969-70 school year, which agreement did not contain the provision concerning over-time pay that was acceptable to the Association.

"The Association contends that the position of the Board with regard to the amount of money it wishes to pay for over-time work to the members of the Association means that the members must work over-time for less money than they would get for the normal regular working day, while performing the same duties and functions. The Board on the otherhand disagrees with this position and maintains that School Use Activities constitute a different and separate classification of work with separate and different job descriptions with different rates of pay.

"Until this point in time, all over-time work was performed on a voluntary basis for those who wished to work over-time. By letter dated August 25,

1969, and directed to the Assistant Superintendent of Schools in Fair Lawn, the Association informed the Board that they rejected the proposed agreement, in light of the over-time pay offer, and stated that the members of the Association would not work over-time at lower rates than their normal regular rate of pay.

"On September 5, 1969, a memorandum was sent to all custodians, maintenance, grounds and bus driver personnel, from the President of the Board, which stated in part, 'Unless your Association members volunteered to cover these activities immediately, I have no choice but to recommend to the Board of Education, for action at the public meeting to be held on September 8, 1969 that the following steps be taken: (a) Rescind all terms of the proposed agreement which went into effect July 1, 1969 as if an agreement had been executed. This will mean the return of the old pay raise, medical insurance coverage, and terms and conditions of employment existing during the 1968-69 school year. (b) The adoption of this policy establishing a compulsory duty roster for School Use Activities for all custodial, maintenance, grounds and bus driver personnel. Failure to comply with this policy would constitute an act of insubordination.'

"At a special meeting of the Board, held on September 8, 1969, negotiations were still pending between the parties hereto, and the Board adopted a policy number 4223, which set up the aforementioned compulsory duty roster. The action to rescind the salary agreements were tabled to a later date. On September 10, 1968, the Association, through its President, sent a letter to the President of the Board, informing him that upon advice of counsel, the Association would abide by the Board policy number 4223, adopted September 8, 1969, but under protest. This was sent in the hopes that the further negotiations between the parties would resolve the situation.

"On Thursday, October 2, 1969, the Board met at a special meeting called for the purpose of acting on the matter of rescinding the proposed agreement, at which time the Board was again notified that the Association would not accept the offer on over-time pay, and the Board then voted to rescind all the terms of the proposed agreement which went into effect on July 1, 1969. After the act of rescission by the Board, the attorney for the Association, notified the Board, that the Association would not work over-time until either the impasse was settled or the members were paid time and a half in accordance with their demands. The Board was also then notified by the attorney for the Association that the Association would seek an Order restraining the Board from carrying out its act of rescission on the following morning from the Bergen County Superior Court.

"On October 3, 1969, the Superior Court of the State of New Jersey issued an Order to Show Cause with temporary restraint against the Board, ordering that the Board be restrained from carrying out its act of rescission

and also from enforcing its compulsory duty roster as adopted on September 8, 1969, until the matter could be heard. On October 6, 1969 on application of the Board of Education and consented to by the Custodians Association, this Order was modified, and the members of the Association returned to their normal duties of work for School Use Activities at the previously established rate of pay.

"It is the contention of the Board that the services of custodians covering night activities are different in all essential aspects, from custodial work and therefore the Board can establish different rates of pay for these two different jobs. The Association has however taken the position throughout all the negotiations, that the duties performed during the School Use Activities, after normal regular hours, are the same duties as those performed during the regular hours, and therefore the members are entitled to payment on the basis of time and a half the regular hourly pay."

Testimony at the hearing presented the divergent statements of the president of the Association and the Assistant Superintendent – Board Secretary as to the extent of agreement reached in negotiations between the Association and the Board. The Association president stated that although essential agreement was reached in January 1969 on across-the-board pay increases and fringe benefits, there was no agreement on the questions of overtime pay and pay for school-use activities, and that ultimately an impasse developed on these questions. The Assistant Superintendent – Board Secretary, on the other hand, stated that agreement was reached on "all monetary items" in late January, prior to adoption of the 1969-70 school district budget, with further negotiations needed on the number of holidays and the vacation schedule. It is clear that no signed agreement was ever executed, and in fact no proposed written agreement was offered by either party until the Board offered a written agreement, embodying the disputed "school use activity" pay scale, in August 1969. (R-3) The rejection of this written offer, the refusal of the Association to perform school-use activity services on a voluntary basis, the rescission by the Board of all terms of the agreement, and adoption of a policy providing for a compulsory duty roster followed thereafter, as set forth in the stipulation of counsel, *supra.* The testimony is inadequate to support respondent's contention that full agreement on all monetary items was ever reached, and that the Association accepted a continuance of the "school use activity" pay scale as a *quid pro quo* for across-the-board raises and other benefits. If such were the case, no suitable explanation has been offered to show what further negotiations prevented the execution of a written agreement, or even a proffer of a proposed agreement, until well after the beginning of the 1969-70 school year.

Testimony was also offered by several members of the Association, including custodians, the audio-visual technician, the head groundsman, an electrician, and a bus driver-maintenance man, each of whom testified that the work performed during "school use activity" hours was not essentially different from that performed in connection with "normal" work or when employed

overtime in their "normal" work, yet the rates of pay of these witnesses for "normal" overtime at one and a half times regular pay were in all cases over $5.00 per hour, while their school use overtime pay was fixed at a uniform $3.00 per hour. The president of the Association testified that as a custodian he was responsible for duties involving cleaning, maintenance, and protection of the building. In his assignments for "school use activity" he would set up chairs, make coffee, clean up the facilities used, police Board rules (such as a rule against smoking), assist those using the facilities, "take care of accidents," and protect against property damage. For overtime work as a custodian, at time and a half, he would be paid $5.24 per hour. For school-use activities he would receive $3.00 per hour on time and a half, and $3.75 on Saturdays, Sundays, and holidays. The head custodian at the Junior High School gave similar testimony, adding that men assigned for school-use activities must be licensed firemen. His normal hourly overtime rate is $5.77, as against $3.00 and $3.75 for school use activities. The electrician testified that his duties were to install, repair, and maintain electrical equipment, and that these duties were the same whether he received the normal overtime rate of $5.52 or the school use rates of $3.00 and $3.75. Similar testimony was given by the head groundsman and the audio-visual technician. Only the bus driver-maintenance man testified that he now receives his regular rate for all duties. It was testified by the Assistant Superintendent-Board Secretary that the difference in this case was established after a meeting with the Department of Labor.

Respondent relies upon its determination that the duties of its custodial and maintenance staff in school-use activities are sufficiently different from the normally-assigned duties to warrant the establishment of two different work classifications with different rates of pay. To this end respondent has prepared a "Job Description for the Position of Custodian" and a "Job Description for the Position of Building Use Assistant." The former sets forth detailed duties in connection with (1) general housekeeping; all types of cleaning activities; (2) ground care related to the school to which the custodian is assigned; (3) minor repairs to building, grounds, furniture and equipment; (4) mechanical services related to heating and ventilating systems; and (5) miscellaneous services and chores of an intermittent nature. (R-1) The school use job description is stated as follows: (R-2)

> "The man assigned as Building Use Assistant shall have the responsibility of carrying out the following items in accordance with the Building Use Application:
>
> 1. He shall be responsible for the setting up of chairs and tables when the requirements are such that one man can easily handle the set up. Large set ups will be handled by the maintenance man some time prior to the activity.
> 2. He shall make sure that the building is open at the time specified on the Building Use application.
> 3. He shall make sure that lights are on and that there is sufficient heat during cold weather.

4. During the activity he shall remain in the general area for the purpose of controlling smoking and any other violation of the Building Use Policy.
5. At the conclusion of the activity he shall put things away and generally straighten up the area.
6. After everyone has left the building he shall make sure that the thermostat is at the proper setting, that all the lights are out and that all doors and windows are securely locked."

Respondent introduced a letter from the Area Director, Wage and Hour and Public Contracts Division, U.S. Department of Labor, (R-5) which reviewed discussions based on the differentiation herein contested, and concluded as follows:

> " *** I informed you that in my opinion the two jobs were not different but because the issue was a close one, I would request an opinion from our Solicitor's Office. The opinion received from the Solicitor's Office concludes that they will not assert that the jobs are the same."

While no testimony was given establishing which, if any, of the custodial staff have acquired tenure, the argument was offered that the lower rate provided under the school-use activity scale constitutes a reduction in compensation for such tenured employees, contrary to law. *N.J.S.A.* 18A:17-3

The hearing examiner finds that on the basis of the testimony and evidence, members of the custodial and maintenance staff in respondent's schools perform duties in connection with school-use activities which, while not as extensive in every respect, are duties that they are expected to perform in their regular and normal custodial and maintenance duties, and which call upon skills, knowledge, and qualifications required in the performance of their regular duties.

In terms of framing the issues in this matter, attention is directed to the final order of the Superior Court, Law Division, Bergen County (Docket No. L 4137-69 P.W., dated Nov. 14, 1969), which was not cited in the Statement of Facts, *supra*, but was received in evidence as Exhibit R-10. In that Order, respondent was (1) restrained from putting into effect its rescission of the proposed agreement which became effective July 1, 1969, until the Commissioner ruled "as to whether or not the defendant may make such a rescission, and in turn revert back to a former pay rate schedule;" and (2) restrained from putting into effect Policy No. 4223, establishing a compulsory duty roster, until the Commissioner determined whether the policy is valid and binding. Petitioner, its members and associates, in turn, were ordered to continue to work overtime during school use activities at the old rate of pay until a decision is rendered by the Commissioner.

* * * *

The Commissioner has reviewed and considered the report of the findings of the hearing examiner as set forth above.

It is clear that the controversy here arose from a failure of the parties to pursue negotiations on all disputed points and arrive at a written agreement prior to the beginning of the 1969-70 school year. The misunderstanding which resulted from such failure might well have been resolved at the negotiating table, or through the procedures established by law for the resolution of impasses, rather than by recourse to the courts and to the Commissioner.

The Commissioner finds and determines, in the first place, that the duties assigned to and performed by the custodial and related personnel (as represented by the petitioner Association) when engaged in "school use activities," require skills, abilities, and responsibilities so much in common with those required in their so-called normal activities that a separate job classification is illogical and unreasonable, and therefore arbitrary and unsupportable. Respondent seeks to have school facilities maintained and protected to the fullest possible extent by regular Board of Education employees. (P-1) To this end it utilized its custodial and related maintenance and technical staff, on a voluntary basis as long as it was able to do so, and thereafter by an attempt at compulsion through its Policy No. 4223. Its reasons for utilizing such staff are clear and acceptable: these were the employees who were knowledgeable of the facilities and their operation, who knew the rules established for the safety and protection of school property, and who had, as a result of association and experience, some skill in dealing with pupils and adults using the facilities. If the Board had expected less of its employees in school-use activities, it might well have determined that the "special custodial assistance" sought by Policy No. 4223 could have been supplied by a separate employee staff. The Commissioner has previously spoken of the special position of trust occupied by the school custodian. *In the Matter of the Tenure Hearing of Joseph McDonald,* 1963 *S.L.D.* 213, 214 That special responsibility does not change when the school duties he performs are outside of the normal school hours. Respondent's effort to compel a lower rate of compensation for its custodial staff when engaged in school-use activities is therefore invalid, and, in the case of employees under tenure, constitutes a reduction in compensation inconsistent with the provisions of the statutes. *N.J.S.A.* 18A:17-3 It is accordingly set aside.

It follows, then, that respondent's actions to rescind the proposed agreement and to enforce compliance by the adoption of Policy # 4223, having been based upon an unlawful premise, are invalid and must likewise be set aside. The benefits granted to petitioner, its members and associates as of July 1, 1969, were contractual in nature, notwithstanding the absence of a written agreement between the Association and the Board, and the individual employees thereby acquired rights which could not be unilaterally abrogated by the Board. *Cf. Belli v. Board of Education of Clifton,* 1963 *S.L.D.* 95.

The Commissioner directs that the purported act of rescission of October 2, 1969, and the adoption of Policy # 4223 be set aside. He further directs that

the members and associates of petitioner Association be compensated at their regular rates of pay, including such provision for overtime payment as may be required by law in such cases, retroactively to July 1, 1969.

COMMISSIONER OF EDUCATION

February 4, 1971

**Faye Bullock,**

*Petitioner,*

**v.**

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

*Respondent.*

## COMMISSIONER OF EDUCATION

### Decision

For the Petitioner, Bryan V. Moore, Esq.

For the Respondent, Thomas P. Cook, Esq.

Petitioner brings this action on behalf of her son, a student enrolled in the fourth grade of respondent's John Witherspoon School in the 1968-69 school year. She alleges that corporal punishment was inflicted upon him by a school teacher on May 12, 1969, and that the Princeton Regional Board of Education, respondent, improperly refused to certify the charge to the Commissioner of Education for a hearing. Respondent avers that it acted properly and that petitioner's charge should not have been referred to the Commissioner since, even if the charge was true in fact, it was not of sufficient consequence to justify "dismissal or reduction in salary," the specified penalties that the Commissioner may impose pursuant to *N.J.S.A.* 18A:6-16.

The Matter is submitted on the pleadings and in Briefs of counsel. The facts that are pertinent to the instant adjudication are not contested.

On May 12, 1969, at the beginning of the school day, petitioner's son was involved in an altercation with a boy who, it was alleged, had tripped him. Some pushing and shoving ensued. The resultant noise and confusion came to the attention of a teacher in a classroom near to the altercation. The teacher inquired as to the cause of the distraction and moved to intervene. Following this intervention, the teacher caused petitioner's son to be separated from the other boys involved in the disturbance, and she talked with him in her classroom.

Petitioner alleges that at the time of confrontation between the teacher and petitioner's son, the teacher had misunderstood some things the boy had said and that the teacher struck at his face. However, petitioner states that the boy evaded the blow and that he was struck on the shoulder instead. Following a complaint about the incident by petitioner, her son was questioned by the school principal and respondent's attorney. On a subsequent occasion, respondent met with petitioner and her counsel. Following this meeting respondent concluded that the charge was not of sufficient gravity to warrant certification of it to the Commissioner of Education for a proceeding pursuant to *N.J.S.A.* 18A:6-10 *et seq.*, and no such certification was made. Petitioner contends that respondent's refusal to certify the matter to the Commissioner was based on a conclusion of fact that it was not authorized to make and that respondent's sole obligation upon receipt of the charge was to certify it to the Commissioner for determination.

To the contrary, respondent maintains that it has an obligation under the statute to make a preliminary finding similar to that of a grand jury and that its actions in this case were proper. It avers that petitioner was given an opportunity to present her contentions to respondent, but that the decision not to refer the charge to the Commissioner was one it was empowered to make.

The statute pertinent to the principal issues of this petition is *N.J.S.A.* 18A:6-11, which reads as follows:

> "If written charge is made against any employee of a board of education under tenure during good behavior and efficiency, it shall be filed with the secretary of the board and 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."

It is clear from a reading of this statue that respondent had an obligation in the matter *sub judice* to make a "determination" as to the gravity of the charge because charges against school staff members are to be certified only when of such a nature as to warrant, if true in fact, the serious penalties of "dismissal or reduction in salary." Having heard reports from its own school administrators and the views of petitioner, respondent concluded that the complaint was of too minor an order of significance to justify an assumption that the severe penalties of "dismissal or reduction in salary" might reasonably be imposed. Having so concluded, respondent refused to certify the charges to the Commissioner.

The Commissioner holds that such refusal was a proper exercise of respondent's discretion and consistent with the statutory mandate, *supra*, and previous decisions of the Commissioner. When such discretion is exercised in the proper manner, the Commissioner will not intervene.

In the case of *Thomas Cambria and Marilyn Cambria v. Board of Education of the Borough of Cliffside Park, Bergen County, and Gerard Wallace*, 1968 *S.L.D.* 248, the Commissioner said at page 250:

> " *** absent clear showing of bias, prejudice, or abuse of discretion on the part of the Board, no reason exists to warrant his (the Commissioner) intervention in the exercise of the Board's duties in accordance with the Tenure Employees Hearing Act***." *(Words in parenthesis ours.)*

Again, in *Roger Sheffmaker and Aida Sheffmaker v. the Board of Education of the Borough of Runnemede, Camden County*, 1963 *S.L.D.* 116, the Commissioner dealt with charges of similar impact. In this matter, and in the *Cambria* case cited, *supra*, the Board had denied petitioners an opportunity to demonstrate that the evidence in support of such charges as they preferred against a teacher would be sufficient, if true in fact, to warrant dismissal or reduction in salary of the teacher. The Commissioner, therefore, remanded each of the matters to the respective Boards so that such opportunities were afforded to petitioners. He then delineated in each case the Board's responsibilities when charges such as those *sub judice* were placed before it. At page 118 of *Sheffmaker* he said:

> " *** *R.S.* 18:3-25, *supra*, does not require that a board of education afford a formal hearing on charges filed with it - indeed the Tenure Hearing Act clearly precludes such a hearing - but *it does require that the board examine the evidence which the person preferring the charges has to offer.* The function of the board in such cases has been likened to that of a grand jury. The failure of respondent herein to examine the petitioners' evidence has denied them a right to be heard ***." *(Emphasis supplied.)*

In the instant matter there was no such denial of a right to be heard. The Board did listen to petitioner's complaint and properly exercised its judgment that the allegations of petitioner were of too minor a nature to warrant "dismissal or reduction in salary."

Accordingly, there is no reason for the Commissioner to intervene, and the Petition herein is dismissed.

COMMISSIONER OF EDUCATION

February 4, 1971

**Durling Farms,**

*Petitioner,*

**v.**

**Board of Education of the City of Elizabeth, Union County,**

*Respondent.*

## COMMISSIONER OF EDUCATION

### Decision on Motion to Dismiss

For the Petitioner, John T. Lynch, Esq.

For the Respondent, O'Brien, Daaleman & Liotta (Raymond D. O'Brien, Esq., of Counsel)

Petitioner declares that it was validly and properly awarded a contract to supply milk to respondent's schools for the 1970-71 school year, and protests the rescission by respondent of said contract. Respondent answers that its initial awarding of a contract to petitioner was based upon a failure on its part to recognize that the bid of petitioner was not responsive to the specifications, and that the contract is not legal and binding under *N.J.S.A.* 18A:18-1.

Petitioner contends that its bid was proper and that respondent awarded the milk contract for the school year 1969-70 to a bidder who qualified his bid as to the type of delivery cases in which the milk was to be delivered. Petitioner further contends that respondent, by awarding such bid and carrying out the contract, established a precedent in this regard which was known to petitioner and other bidders at the time the bids were submitted for the 1970-71 school year. Respondent argues that the circumstances were not the same for the 1969-70 milk bid, and states that some of the prior-year's bidders did in fact submit bids in accordance with those 1969-70 specifications.

Petitioner seeks an order declaring: (1) that the contract to supply milk for 1970-71 was validly and properly awarded to petitioner by respondent, (2) directing respondent to complete and carry out said contract, (3) declaring the rebidding of said contract to be illegal and void, and (4) prohibiting respondent from awarding said contract until this controversy is resolved.

Respondent has filed a Motion for Dismissal of the Petition of Appeal on the grounds that the Commissioner of Education has no jurisdiction in this proceeding. Counsel have filed memoranda addressed to this question.

The facts in this matter have been substantially stipulated in documents received and marked in evidence, and counsel have waived oral argument on the motion.

Respondent challenges the Commissioner's jurisdiction to decide this controversy on the grounds that it is not wholly within the school laws of this State, and that part of this dispute is a commercial matter. Further, respondent contends that this controversy could not be completely decided in all its parts by a determination made by the Commissioner and, therefore, petitioner should be left to pursue this matter completely within the courts.

Petitioner rejects respondent's contention and enunciates *N.J.S.A.* 18A:6-9 which states:

> "The commissioner shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws, excepting those governing higher education, or under the rules of the state board or of the commissioner."

Petitioner argues that this law was designed to provide a measure of control by the Commissioner over the activities of the various independent school boards and to provide a rapid and inexpensive means for resolving disputes which arise under the school laws. Petitioner avers this statute, as others, is "to receive a reasonable construction and application, to serve the apparent legislative purpose." *Wright v. Vogt et al.*, 7 *N.J.* 1, 5.

Respondent placed a legal notice in the *Daily Journal*, Elizabeth, New Jersey, which appeared on May 18, 1970, and which is quoted, in part, as follows:

> "NOTICE
>
> May 15, 1970
>
> "PROPOSALS: The Board of Education of the City of Elizabeth, County of Union, State of New Jersey, invites sealed proposals for the following:
>
> * * *
>
> MILK
>
> * * *
>
> "Proposals to be received at the Board of Education, 500 North Broad Street, Monday morning, June 1, 1970, at ten o'clock. Proposals may be delivered or mailed before that time to the office of the Secretary-School Business Administrator***'
>
> "Proposals submitted by bidders must be accompanied by an agreement of surety or a certified check, whichever is required in the specification. Specifications for the above may be secured at the office of the Secretary-School Business Administrastor [sic] ***.
>
> "The Board of Education reserves the right to reject any or all bids or proposals or parts of bids or proposals, waive any informalities and award contracts which in their judgment may be for the best interest of the Board of Education.
>
> * * *

COMMITTEE ON SCHOOL PROPERTIES"

The bid form attached to the specifications is quoted in part as follows:

"Having carefully examined the specifications entitled 'Furnishing and Delivering Milk to the Various Schools,' the undersigned proposes to furnish and deliver approximately 2,700,000 half pints of milk for the school year September 9, 1970 to June 25, 1971.

"Bid for approximately 2,700,000 half pints of milk. The prices in this bid are the margin that a bidder will require above the Class I price announced monthly by the Federal Market Administrator for the area in which the milk is to be delivered. The margin must cover the bidder's cost above the Class I Milk price.

| | | | | |
|---|---|---|---|---|
| Alt. | 1 | * | * | * |
| Alt. | 2 | * | * | * |
| Alt. | 3 | * | * | * |
| Alt. | 4 | * | * | * |

Four (4) vendors replied to the invitation to submit bids. Petitioner submitted a bid wherein it inserted the figure of $.03068 on the topmost line, leaving blank the four (4) lines for various alternates, which were for partial bids. Also, petitioner inserted the following statement at the bottom of the bid form:

"This Bid conditioned by following:
(1) 'ALL OR NONE BID'
(2) Milk to be delivered in plastic cases holding 60 half pints of milk"

Another of the four (4) bidders, Country Farms, Inc., submitted a bid form with the figures $.0344 inserted on the top-most line, leaving blank the four (4) lines for various alternates. This bid contained the following statement at the bottom of the bid form:

"Milk delivered in wire cases only, 60 ½ pints per case."

The third bidder, Union County Milk Company, Inc., trading as All Star Dairies, submitted a bid form with the figures $.037 inserted on the topmost line and on each of the four (4) lines for alternates.

The fourth bidder, Farm Stores, Inc., submitted a bid form with the figure $.034 inserted on the line provided for Alternate 1, with the topmost line and the lines for the remaining alternates left blank.

The specifications for this bidding are quite lengthy; therefore, only those parts specifically pertinent to this matter will be dealt with here.

Under the heading GENERAL CONDITIONS, fourteen (14) specific requirements are listed which pertain to the quality, packaging and delivery of the milk. The specific pertinent item is #12, which is quoted as follows:

"Milk to be delivered in sealed cardboard [sic] boxes holding not more than 40 half pints of milk. Cases shall be clean, dry and free from unpleasant odors."

There is no dispute concerning the remaining thirteen (13) specific requirements.

The 1970-71 milk bids were received as advertised on June 1, 1970, and were referred to respondent's Committee on School Properties for study and recommendations. This committee is composed of five (5) members of the Board of Education. The committee submitted a written report to the Board under date of June 30, 1970, which included fifteen (15) specific recommendations for the awarding of various contracts, including the contract for supplying milk for the 1970-71 school year.

This report states, *inter alia*, the following:

"**COMMITTEE ON SCHOOL PROPERTIES REPORT NO. 2**
Re: Award of contracts

Elizabeth, New Jersey
June 30, 1970

Board of Education:

"Your Committee on School Properties recommends that contracts be awarded as follows:

* * *

"That contract for furnishing and delivering milk to various schools be awarded to Durling Farms, Whitehouse, New Jersey, in the amount of $.03068 per half pint, lowest bid received, in accordance with specifications.***"

This report was signed by three of the five members of the committee. At the meeting of the Board held June 30, 1970, the recommendations of the committee, including the milk contract award, were adopted by motion and a roll call vote with six (6) affirmative and no negative votes.

A letter under date of July 1, 1970, was sent to Durling Farms by the Secretary-School Business Administrator which reads as follows:

"Durling Farms
Whitehouse, New Jersey

Gentlemen:

"This is to notify you that the Board of Education at a meeting held June 30, 1970, awarded you contract for furnishing and delivering milk to various schools in the amount of $.03068 per half pint. [sic]

"Formal order will follow.

"Counsel to the Board of Education, Mr. Raymond D. O'Brien, 27 Prince Street, Elizabeth, New Jersey, will communicate with you concerning the formal contract.***"

Another letter was sent under date of July 8, 1970, to Durling Farms by the Secretary-School Business Administrator which reads as follows:

"Durling Farms
Whitehouse Station, New Jersey 08889

Gentlemen:

"Please continue to process orders for milk for the summer programs but due to an oversight of the Board, the contract is being rescinded by the Board of Education and new bids advertised.***"

At a meeting of the Board held on July 14, 1970, the Committee on School Properties submitted a report which referred, *inter alia*, to the previously-awarded milk contract as follows:

"**COMMITTEE ON SCHOOL PROPERTIES REPORT NO. 1**
Re: Retirement, transfer of personnel, etc.

Elizabeth, New Jersey
July 14, 1970

Board of Education:

"Your Committee on School Properties makes the following report and recommendations:

"***That contract awarded at the meeting of June 30, 1970, for milk be rescinded and the Secretary-School Business Administrator be authorized to change specifications and receive new bids.***"

This report was signed by four (4) of the five (5) Board members who comprise this committee. The recommendations, including the aforementioned item on the milk contract, were adopted by a motion and a roll call vote of the Board with seven (7) affirmative and no negative votes.

An advertisement, identical in all respects save dates and the enumeration of items, was published on July 17, 1970, in the *Daily Journal*, *ante*, for the receipt of milk bids, among others, on Friday, July 31, 1970, at ten o'clock.

Milk bids were subsequently received on July 31, 1970, from five (5) vendors. For this second round of bidding, the specifications were changed in reference to the aforementioned item #12 which described the packaging. The revision now reads as follows:

"Milk to be delivered in plastic cases holding not more than 60 half pints of milk. Cases shall be clean, dry and free from unpleasant odors."

The following tabulation of milk bids received and the recommendation appears in the report of the Committee on Cafeterias dated August 6, 1970:

"*MILK*

| | |
|---|---|
| Union County Milk Co., Inc. t/a All Star Dairies | $.0257 |
| Country Farms, Inc. | .0298 |
| Durling Farms | .03068 |
| Cream-O-Land Dairy | .03499 |
| Farm Stores, Inc. | .035 |

"Recommend that contract be awarded to Union County Milk Co., Inc., t/a All Star Dairies, Metuchen, New Jersey, at .0257 per half pint above the Class I milk price, lowest bid received, in accordance with specifications."

Subsequently, the following recommendation signed by three members of the Committee on Cafeterias dated August 13, 1970, was adopted by a motion and roll call vote of the Board of Education with seven (7) affirmative and no negative votes:

"That contract for furnishing and delivering milk, be awarded to Union County Milk Co., Inc., t/a All Star Dairies, Metuchen, N.J., at $.0257 per half pint above the Class I milk price, lowest bid received, in accordance with specifications and with All Star having full knowledge of a possible dispute."

A contract dated August 13, 1970, was executed by the Board and Union County Milk Co., Inc., trading as All Star Dairies, for furnishing and delivering milk for the price of $.0257 per half pint "in accordance with the specifications and proposal annexed hereto."

This contract contains a provision which has direct bearing upon the dispute and is quoted as follows:

"3. However, the parties agree that this contract is conditioned upon a favorable decision to the Board of Education of the City of Elizabeth of the Commissioner of Education, the State Board of Education, and/or the Courts of this State on a present appeal by Durling Farms to set aside the rescission of an alleged contract, and such other relief as they may decree as a result of an alleged contract between Durling Farms and the Board of Education of the City of Elizabeth which was awarded on June 30, 1970. In the event the Commissioner of Education, the State Board of Education and/or the Courts of this State nullify the rescission and award the contract to deliver milk to the Board of Education of the City of Elizabeth to Durling Farms for the school year 1970-71, that this contract between Union County Milk Co. Inc., t/a All Star Dairies and the Board of Education of the City of Elizabeth will be null and void and no claim for damages or other relief arising out of said contract will be made by Union

County Milk Co. Inc., t/a All Star Dairies against the Board of Education of the City of Elizabeth, except for products that have already been delivered."

One of the issues here is that, through the experience of milk contract awards in previous years, the Board had set a precedent in regard to the packaging of milk in delivery cases. Therefore, the specifications and milk bids received for the prior years of 1969-70, 1968-69, and 1967-68 have been examined and made a part of this record.

A comparison of the 1969-70 specifications with those of 1970-71 discloses that both documents are substantially identical, with the exception of dates, quantities of milk required, and the fact that the bid form attached to the 1969-70 specifications had no provision for alternate bids as found in the 1970-71 specifications.

The item of primary concern, item 12 of the GENERAL CONDITIONS, reads as follows in the 1969-70 specifications:

"Milk to be delivered in sealed carboard [sic] boxes holding not more than 40 half pints of milk. Cases shall be clean, dry and free from unpleasant odors."

The 1969-70 milk bids were received as follows:

Country Farms, Inc. $.032222 per half pint

(The following condition was stated on the above vendor's bid form: "Milk delivered in wire cases only, 60 ½ pints per case.")

Wood Brook Farms Dairy, Inc.
t/a All Star Dairies $.0329 per half pint

(Typed under Item 12 was this statement "Note: Milk will be delivered in wire baskets holding not more than 60 half pints of milk.")

Clinton Milk Co. $.0389 per half pint

(Introductory statements in pare ses ours

A letter dated May 7, 1969, was sent to the Board by the president of the Clinton Milk Co., which reads in part as follows:

"***It has been called to my attention that our company made an oversight in submitting a bid to supply the Elizabeth school system with milk in corrugated boxes. Please be advised that we are not in a position to supply the schools with milk in corrugated boxes, but would be willing to supply the milk in wire cases.***"

A recommendation of the Committee on School Properties, dated June 10, 1969, and signed by four (4) of the five (5) Board members on the committee was adopted by the Board by a roll call vote with six (6) affirmative and no negative votes.

The recommendation relating to the milk contract award stated:

> "That contract for furnishing and delivering milk to the various schools in accordance with specifications, be awarded to Country Farms, Inc., Clifton, N.J., lowest bid received at $.032222 per half pint, bidders cost above the Class I milk price for the school year 1969-70."

It is clear that for 1969-70 all three (3) bidders qualified their bids by offering milk packaged in wire delivery cases rather than cardboard cartons, and that the Board accepted the condition and awarded the contract to the lowest bidder.

The executed contract and performance bond for the 1969-70 award both state that the successful bidder, Country Farms, Inc., would "furnish and deliver milk in accordance with the specifications and proposal annexed hereto."

A comparison of the 1968-69 specifications with those for 1969-70 and 1970-71 discloses again a substantial identity with the exception of dates, quantities of milk and the lack of provision for alternate bids on the bid form.

Item 12, under GENERAL CONDITIONS, reads as follows in the 1968-69 specifications:

> "Milk to be delivered in sealed cardboard [sic] boxes holding not more than 40 half pints of milk. Cases shall be clean, dry and free from unpleasant odors."

The first page of the 1968-69 specifications is dated April 26, 1968, and contains only the following statement:

> "ADDENDUM:
>
> FURNISHING AND DELIVERING MILK TO THE VARIOUS SCHOOLS ALTERNATE BID. Milk to be delivered in wire containers."

It is not possible to determine whether this addendum was furnished to the bidders as part of the original specifications or some time thereafter but prior to the date of submission of the bids.

An examination of the 1968-69 milk bids discloses the following tabulation:

| | | |
|---|---|---|
| (1) | Melville Dairy | $.02749 |
| (2) | Country Farms, Inc. | .026789 |

| | | |
|---|---|---|
| (3) | Wood Brook Farms Dairy, t/a All Star Dairies | .02479 |
| (4) | Dairymen's League, Inc. | .0627 |
| (5) | Waldron Farms, Inc. | .02467 |

with the qualifying statement, "in cardboard case" and added a second bid with the qualifying statement, "in plastic case."

The recommendation of the Committee on School Properties, dated June 11, 1968, and signed by three (3) of the five (5) Board members reads:

> "That contract for furnishing and delivering milk to the various schools for the school year September 5, 1968 to June 20, 1969, be awarded to Waldron Farms, Inc., Califon, N.J., lowest bid received, in accordance with specifications, at $.02467, margin above Class 1 price announced monthly (in cardboard containers)."

It is clear from the documentary evidence that the milk specifications for 1968-69 provided for delivery of milk either "in sealed cardboard boxes holding not more than 40 half pints of milk," or in "wire containers" as stated in the addendum. In this instance, the Board did not award the contract on the basis of the lowest bid, which was $.02432 for milk packaged in plastic cases, as submitted by Waldron Farms, Inc.

The 1967-68 milk specifications are substantially similar to those of 1968-69, 1969-70 and 1970-71 with the exception of dates, quantities to be delivered and with no provision for alternate bids on the bid form.

In the GENERAL CONDITIONS of the 1967-68 specifications, the item of specific concern, item 12, reads:

> "Milk to be delivered in wire containers. boxes [sic] holding not more than 40 half pint [sic] of milk. Cases shall be clean, dry and free from unpleasant odors."

Also, item 14, which appears in the General Conditions of the specifications from the three succeeding years, is absent here. This item 14 reads:

> "Where requested, supplier is to put in refrigerators."

The sense of item 14 is that the vendor is required to place delivered packages of milk in refrigerators if so requested.

The tabulation of milk bids received, dated May 9, 1967, indicates the following:

| | |
|---|---|
| Melville Dairy | $.0675 per half pint |
| Stanley Grochmal | .0608 per half pint |
| Waldrons Farms, Inc. | .02878 per half pint |
| | (Cost margin system) |

The report of the Committee on School Properties dated June 6, 1967, recommended that all bids be rejected and that the milk contract be rebid.

Bids were again received and tabulated on a document, also dated June 6, 1967, as follows:

| | |
|---|---|
| Wood Brook Farms Dairy | $.02488 |
| Tuscan Dairies, Inc. | .0284 |
| Waldrons Farms, Inc. | .0284 |
| Borden's Farm Products of N.J. | .02981 |
| Melville Dairy | .0256 |

The recommendation of the Committee on School Properties dated June 27, 1967, was adopted by a motion and roll call vote of the Board with eight (8) affirmative and no negative votes as follows:

> "That contract for furnishing and delivering milk to the various schools for the school year September 5, 1967 to June 21, 1968, be awarded to Wood Brook Farms Dairy, Metuchen, N.J., lowest bid received at $.02488, margin above the Class 1 price announced monthly."

An inspection of the bid form submitted by the lowest bidder discloses that no comment of qualification was inserted. It is not evident just how this successful bidder did interpret the aforementioned specification regarding the packaging of cases of milk or, indeed, in what manner of packaging he actually delivered the product. As has been noted, the specification used both the terms "wire containers" and "boxes."

In summary, the evidence reveals that in 1967-68 the milk contract was awarded to the lowest bidder, although the specifications in regard to packaging were not clear. The 1968-69 contract was awarded to the lowest bidder, although not for the lowest price, which was based upon plastic-case packaging. The specifications in this instance allowed either cardboard boxes or wire cases, and the successful bidder provided cardboard boxes. In 1969-70, the milk award was made to the lowest bidder, even though the bid did not conform to the specification calling for packaging in cardboard boxes. This successful bidder provided wire cases, and this was accepted by the Board. In 1970-71, in the original bidding, the Board again awarded the milk contract to the lowest bidder, the petitioner, although this bid did not conform to the packaging specifications. In this instance the successful bidder chose to provide plastic cases for the packaging of milk cartons.

For the second round of bidding in 1970-71, the Board changed the packaging specification, as has been shown, from cardboard boxes to plastic cases as proposed in petitioner's original bid.

Since the issue has been raised as to whether or not the Board did in fact enter into a contract with the petitioner for the award of the 1970-71 milk contract, it is necessary to analyze the specifications in this regard.

The 1970-71 specifications require, in part, the following:

"AGREEMENT OF SURETY

"All proposals submitted by the contractor must be accompanied in writing by an agreement of surety of a surety company authorized to transact business in the State of New Jersey, the effect of which shall be:

(1) That the contractor will within ten days from the date that he may be notified that the contract and bonds are ready for execution, execute and deliver a contract upon the terms and conditions mentioned in the proposal and specifications and such additional terms as are usually required by the corporation attorney.

(2) That the contractor and said surety company will execute and deliver the bond required by the specifications.

(3) That the said surety company will become surety in the full amount of the contract price for the faithful performance of the contract if awarded to said contractor.

(4) That if the contractor shall omit or refuse to execute the contract and bond within the said space of ten (10) days, the surety company will pay without proof of notice on demand to the Board of Education of the City of Elizabeth, and [sic] difference between the sum which the contractor would be entitled to receive on completion of the contract and such sum as the Board of Education of Elizabeth would be obliged to pay any bidder or person, persons or corporation to whom the contract may be awarded."

Respondent has presented the contention that the bid of petitioner was not responsive to the specifications. Several pertinent parts of the specifications bear directly upon this issue, and, accordingly, have been examined. The following pertinent portions are stated here:

"INTERPRETATION AND APPROVAL

"All supplies furnished must be in accordance with the specifications and will be subject to the approval of the Secretary-School Business Administrator of the Board. Should any dispute arise respecting the true construction and meaning of these specifications, same shall be decided by said Secretary-School Business Administrator, and his decision shall be final and conclusive."

"RIGHTS RESERVED

"It must be distinctly understood that the Board of Education reserves the right to reject any or all proposals or parts of proposals for the supplies or equipment specified as it may deem advisable or waive any defects therein or to increase or decrease the quantities mentioned and to award contracts, as in its judgment may be deemed best.

"The Board reserves the right to award contracts for individual low items or total low bid, whichever is deemed best, for the interests of the Board. Quantities given are approximate only and unit prices in proposal will be used in figuring cost of actual supplies delivered."

All of the specifications examined contain the following requirements:

"CERTIFICATION BY VENDOR

"The Board requires each vendor to certify in writing that he has purchased during the immediately preceding year fresh milk produced within the State at least equal in amount to the amount he seeks to furnish to the school district, and, in addition he agrees to purchase during the year in which he proposes to furnish such milk to the school district an amount of fresh milk produced within the State at least equal to the amount he proposes to furnish to the school district plus an amount equal to the amount, if any, he shall be required to furnish to any other school district in the state. *The vendor is to submit this certification in writing along with his bid." (Emphasis added.)*

An examination of the original bids received for 1970-71 indicates that three (3) of the four (4) bidders complied with this requirement. The remaining bidder, Farm Stores, Inc., inserted the following statement immediately below the above-quoted portion of the specifications:

"We have our supply of New Jersey Milk 100% Supply produced milk." [sic]

This concludes the findings and report of the hearing examiner.

* * * *

The Commissioner has reviewed the findings of fact as set forth above in the report of the hearing examiner.

In the first instance, the Commissioner is compelled to notice that the certification requirement contained in the 1970-71 specifications is defective, in that the requirement for certification of purchase during the preceding year has been rescinded by the courts of this State. See *Garden State Dairies of Vineland, Inc. v. Sills,* 46 *N.J.* 349 (1966), on remand 98 *N.J. Super.* 109 (*Ch. Div.* 1967), reversed and remanded 53 *N.J.* 71 (1968).

The Commissioner, in accordance with the decree of the Court, hereby instructs the Board of Education to remove from its specifications for milk bidding the requirement for certification of preceding-year milk purchases.

In numerous past instances the Commissioner has decided questions in which contract awards were involved. The quasi-judicial function of the Commissioner of Education is set forth in *N.J.S.A.* 18A:6-9, which reads in part as follows:

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

In considering the broad powers of the Commissioner under this statute the courts have noted:

> "***the legislative purpose to set up a comprehensive system of internal appeals with broad powers vested in the administrative tribunals to insure that controversies are justly disposed of in accordance with the School Laws." *Laba v. Board of Education of Newark*, 23 *N.J.* 364, 381 (1957)

The broad scope of the Commissioner's authority as an administrative tribunal has been discussed by the Supreme Court. *In re Masiello*, 24 *N.J.* 590, 607 (1958), and more recently *in Booker v. Board of Education of Plainfield*, 45 *N.J.* 161, 177 (1965) In the latter case, the court stated:

> "***that under *R.S.* 13:3-14 the Commissioner is to decide all controversies and disputes arising under the school laws or under the rules of the State Board or of the Commissioner, and that this involves a responsibility on his part to make independent determinations, giving due weight, of course, to the findings and actions and the measure of discretion vested below."

The primary issue in the instant matter is whether the Board did or did not properly discharge its duty under *N.J.S.A.* 18A:18-5 in awarding the milk contract for 1970-71. This statute reads in part:

> "Every board of education shall, prior to the beginning of each school year, advertise for proposals for furnishing the supplies, which shall be required by the schools of the district during the ensuing school year, so far as same shall be anticipated, and contract therefore, with the lowest responsible bidder, on the basis of the proposals so received***."

Boards of education are required by the aforementioned statute to advertise for bids to supply milk. *Robert S. Andrews and Shearer's Dairies, Inc. v. Board of Education of the City of Camden*, 66 *S.L.D.* 147 Also, *N.J.S.A.* 18A:18-20 states that:

> "No bid for the construction, alteration or repair of any building *or for supplies* shall be accepted which does not conform to the specifications furnished therefore *and all contracts shall be awarded to the lowest responsible* bidder." *(Emphasis ours.)*

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, (See McQuillin, Municipal Corporations § 29.28 (1950).) 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 v. Long Branch*, *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. *Sellito v. Cedar Grove*, 133 *N.J.L.* 41; *Frank P. Farrell, Inc. v. Board of Education of Newark*, 137 *N.J.L.* 408 The status of the lowest bidder on a public contract is not one of grace but one of right and may not be lightly disturbed for it is based upon competition, a State policy. *Sellitto v. Cedar Grove*, *supra* To reject the bid of the lowest bidder, there must be such evidence of the irresponsibility of the bidder as would cause fair-minded and reasonable men to believe that it was not for the best interest of the municipality to award the contract to the lowest bidder. *Sellitto v. Cedar Grove*, *supra* There is no question here of the fact that the petitioner is a responsible bidder.

The matter of an irregularity in a public bid has been dealt with by our courts. This question was reviewed by the Superior Court, Appellate Division, in 1954 in the case of *Bryan Construction Co. Inc. v. Board of Trustees*, 31 *N.J. Super.* 200, 206. The Court stated:

> "***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."

Also, the Court stated at p. 207:

> " '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.' *Phifer v. City of Bayone supra.*"

See also *Faist v. City of Hoboken*, 72 *N.J.* 361 (*Sup. Ct.* 1905); *Appolo Associated, Inc. v. Board of Education of Lakewood*, 1958-59 *S.L.D.* 93; *Taylor v. Board of Education of Gloucester*, 1955-56 *S.L.D.* 71, affirmed State Board of Education 75.

The requirement that bids must conform to the specifications, with no material or substantial deviation therefrom, has been clearly established by the

Supreme Court of this State. In *Hillside Township v. Sternin, supra*, at 324, 325, 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. (Cases cited) Minor or inconsequential variances and technical omissions may be the subject of waiver. (Cases cited) But any material departure stands in the way of a valid contract, and the defaulting person cannot be classed as a bidder at all. (Cases cited) This is because the requirements are generally considered to be mandatory or jurisdictional. (Cases cited) Substantial noncompliance cannot be waived by the municipality. (Cases cited) The reason for this bar is obvious. When the waiver occurs, the bidders no longer stand on a basis of equality and the advantages of competition are lost."

In this aforementioned decision, the Court reiterates an earlier decision in *Tufano v. Cliffside Park*, 110 *N.J.L.* 370, 373 (1932) which said:

> "***The municipal authorities should not be permitted to waive any substantial variance between the conditions under which bids are invited and the proposals submitted. If one bidder is relieved from conforming to the conditions which impose some duty upon him, or lays the ground for holding him to a strict performance of his contract, that bidder is not contracting in fair competition with those bidders who propose to be bound by all the conditions.***"

There is no question of the fact that petitioner's bid was the lowest in monetary terms, and there is no challenge here of petitioner's responsibility. The pivotal point in the instant matter is whether the bid submitted by the petitioner 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 hearing examiner has reported upon four (4) years of milk awards by respondent Board of Education, which provide essential facts in this matter.

In 1967-68 the Board initially received bids for milk from three (3) vendors, and subsequently rejected these bids. The intent of the specifications was obviously to receive bids based upon a margin price above the base price for Class I milk announced monthly by the Federal Market Administrator. Since only one (1) of the three (3) bidders complied with this requirement, the bids were rejected, and a readvertisement was made. On the second round of bidding, the bid was awarded to the lowest bidder, but since the specification was unclear in containing reference to both "wire containers" and "boxes," it is uncertain as to what type of packaging was utilized by the successful bidder.

In 1968-69, the original specifications required cardboard boxes, and the addendum allowed for alternate packaging in wire containers. The contract was

awarded to the lowest bidder, although an even lower bid was offered by this same vendor for milk packed in plastic cases, and this was rejected.

In 1969-70, the Board's specifications were changed, requiring packaging in the cardboard boxes with no provision for wire containers as in the previous year. The contract was awarded to the lowest bidder even though his bid was qualified by his statement as follows:

"Milk delivered in wire cases only, 60 ½ pints per case."

Both of the other two (2) bidders also qualified their bids with the statement that milk would be delivered only in wire containers.

In 1970-71 four (4) vendors submitted milk bids. The specifications again required cardboard boxes for milk packaging. The 1969-70 successful bidder again submitted a bid with the qualification of wire cases. Two (2) other bidders stated no qualifications, and petitioner stated a qualification of plastic cases on his bid. As was previously stated, the contract was awarded to petitioner.

The 1970-71 milk bids were received and publicly opened on June 1, 1970. The bids were examined by the Secretary-Business Manager whose duty was referred to in all of the aforementioned specifications under INTERPRETATION AND APPROVAL as follows:

> "All supplies furnished must be in accordance with the specifications and will be subject to the approval of the Secretary-School Business Administrator of the Board. Should any dispute arise respecting the true construction and meaning of these specifications, same shall be decided by said Secretary-School Business Administrator, and his decision shall be final."

(RIGHTS RESERVED)

Under another section of each of the specifications for the years examined, the Board reserved the right to act as follows:

> "It must be distinctly understood that the Board of Education reserves the right to reject any or all proposals or parts of proposals for the supplies or equipment specified as it may deem advisable or waive any defects therein or to increase or decrease the quantities mentioned and to award contracts, as in its judgment may be deemed best.
>
> "The Board reserves the right to award contracts for individual low items or total low bid, whichever is deemed best, for the interests of the Board.***"

It is clear that an examination of the milk bids for 1970-71 was made by the Secretary-School Business Administrator, who prepared a recommendation for consideration by the Board's Committee on School Properties. This

committee, after examining the items of business before it, submitted a signed recommendation to the full Board, which subsequently was adopted by a recorded roll call vote. All of these facts are clear from the documentary evidence.

It is significant that the Board did not reject all of the 1969-70 milk bids, none of which conformed to the specifications in regard to packaging, but chose instead to make the award to the lowest bidder.

The foregoing examination of the various specifications, bids and awards, for a four-year period clearly shows that no definite and precise procedure was established and adhered to regarding milk packaging, and, therefore, bidders were not required to rigidly conform to this item of the specifications. The procedure for examination and recommendation of the 1970-71 milk bids was thorough and covered an elapsed time from June 1, 1970, until the date of the Board's action on June 30, 1970. It is significant here also that the Board did not choose to exercise its reserved right to reject petitioner's bid or all of the bids, nor did the Board receive a recommendation to do so from its official agent or its committee. The only logical conclusion to be reached is that the variance from the specifications was not judged to be material or substantial so as to preclude the award of the contract to the lowest responsible bidder. Respondent's contention that petitioner's bid was not responsive is without merit.

There is no question in the instant case that an award of a contract was properly made by the Board at the meeting held June 30, 1970. The letter from respondent to petitioner, *ante*, testifies to this fact, as do the minutes of this meeting. At the meeting held July 14, 1970, the action of the Board in rescinding the previously-awarded contract, *ante*, also affirms the original award.

The specifications also define the procedure for formalizing the award as stated, *ante*, and the demand for surety guaranteed that the contract would be formalized. Failure of the successful bidder to execute the contract would result in the forfeiture of the security. In the instant case the surety company would be required to pay upon demand to the Board the difference between the sum which the contractor would be entitled to receive upon completion of the contract, and the sum the Board would be obliged to pay another person or corporation to whom the contract may be awarded. See specifications, *ante*. Also, the specifications allowed the successful bidder ten (10) days, from the date of notification that the contract and bonds were ready to execute, to execute and deliver a contract. See specifications, *ante*. These requirements are wholly proper and safeguard the Board from any resulting loss or expense by summary action without having to sue for damages. *Hillside Township v. Sternin, supra* Respondent's contention that a contract was not entered into is without merit in the instant matter.

The Commissioner finds and determines from the evidence that (1) the award of the milk contract to petitioner for 1970-71 was properly accomplished,

and that the variance from the specifications in petitioner's bid was neither material nor substantial so as to void the bid, and (2) the Board of Education did award a contract, for furnishing and delivering milk for 1970-71 to petitioner, in a proper manner and in accordance with the specifications.

The parties to the proceedings had requested that the Commissioner make a determination of the above-stated issues. Having done so, the Commissioner has exhausted the scope of his authority as an administrative tribunal. The remaining question is one of rescission of a contract. The Commissioner holds that the exercise of his expertise is limited to matters directly bearing upon education and school law and must be withheld in purely commercial matters. *Rainier's Dairies v. Boards of Education of Collingswood and the Township of Cinnaminson*, 1967 *S.L.D.* 258, reversed by State Board of Education 260. See also *Thielle et al. v. Board of Education of the Borough of Fair Lawn*, 1968 *S.L.D.* 245.

The Commissioner finds and determines, therefore, that the issue herein does not properly lie within his jurisdiction. Accordingly, for the reasons stated, the motion for dismissal of the Petition of Appeal is granted.

COMMISSIONER OF EDUCATION

January 29, 1971

**Union County Milk Co., Inc., t/a All Star Dairies,**

*Petitioner,*

**v.**

**Durling Farms and the Board of Education of the City of Elizabeth, Union County,**

*Respondents*

**COMMISSIONER OF EDUCATION**

**Decision**

For the Petitioner, Sachar, Sachar & Bernstein (Daniel S. Bernstein, Esq., of Counsel)

For the Respondent Elizabeth Board of Education, O'Brien, Daaleman & Liotta (Raymond O'Brien, Esq., of Counsel)

For Respondent Durling Farms, John T. Lynch, Esq.

Petitioner, a corporation of New Jersey, declares that it was validly and properly awarded a contract to supply milk to respondent Elizabeth Board of

Education's schools for the 1970-71 school year. Respondent Durling Farms answers that petitioner's allegation is false. Respondent Board of Education admits petitioner's allegation.

Petitioner prays for relief in the form of an order by the Commissioner of Education allowing it to intervene in the matter of *Durling Farms v. Board of Education of the City of Elizabeth, Union County*, or, in the alternative, a declaration by the Commissioner that the petition of appeal by Durling Farms is invalid because it did not include the Union County Milk Co., Inc., trading as All Star Dairies, as a party respondent. Petitioner also prays for relief in the form of a declaration by the Commissioner that it was validly awarded a binding contract by respondent Board of Education. Respondent Board of Education asks for a full hearing in this matter.

The matter of *Durling Farms v. Board of Education of the City of Elizabeth, Union County*, has been settled by a decision of the Commissioner on Motion to Dismiss which was rendered January 29, 1971. In that proceeding the Commissioner determined that (1) the award of the milk contract to Durling Farms for 1970-71 was properly accomplished, and (2) the Elizabeth Board of Education did award a contract, for furnishing and delivering milk for 1970-71 to Durling Farms, in a proper manner and in accordance with the specifications.

The remaining question in that proceeding was one of rescission of a contract. Since the Commissioner holds that the exercise of his expertise is limited to matters directly bearing upon education and school law and must be withheld in purely commercial matters, the petition of appeal of Durling Farms was accordingly dismissed.

The Commissioner finds and determines, therefore, that the issues are moot, and this petition is dismissed.

COMMISSIONER OF EDUCATION

February 9, 1971

**Ebner Dairies, Inc.,**

*Petitioner*

**v.**

**Board of Education of the Township of Franklin, Gloucester County,**

*Respondent.*

## COMMISSIONER OF EDUCATION

### Decision

For the Petitioner, Philip Lipman, Esq.

For the Respondent, Falciani, Cotton, Chell & Stoinski (Angelo J. Falciani, Esq., of Counsel)

Petitioner, a New Jersey corporation (hereinafter "Ebner") alleges that respondent Board of Education did properly award to it, as the lowest bidder, a contract for furnishing and delivering milk to the various schools within respondent's school district for the 1970-71 school year, that respondent has improperly advertised for and received additional milk bids for 1970-71, and that petitioner has not received any formal notice of termination of the original 1970-71 contract award from respondent Board.

Respondent Board answers that, following its original action of receiving and awarding milk bids for 1970-71, it discovered that petitioner's bid was not the lowest bid; therefore, the award of the contract to petitioner was *ultra vires* and void. Respondent requests that the petition be dismissed.

Petitioner prays for relief in the form of an order by the Commissioner of Education to (1) ratify the original action of award by the Board to petitioner, (2) allow petitioner to continue furnishing milk as contracted during the pendency of this action, and (3) restrain respondent Board from awarding another contract as the result of readvertising for bids until a final determination of this matter is made.

State Seal Dairy of Vineland (hereinafter "State Seal") possessing a direct and immediate interest in these proceedings, was granted permission to intervene as a third party.

The facts in this matter have been stipulated in documents received and marked in evidence, and briefs have been filed by counsel. Counsel waived hearing and argument.

Respondent Board advertised in the *Franklin Township Sentinel* on May 21 and 28, 1970, for bids for milk and other items to be received on June 10, 1970. The advertisement stated, *inter alia*, that:

* * *

"No bids will be accepted after 8:00 p.m., D.S.T. June 10, 1970.

"The Board reserves the right to reject any or all bids."

An examination of the specifications discloses that both aforementioned statements were repeated therein. The specifications for the milk bid consist of a one-page document, with no additional page provided by the Board for the use of bidders in submitting their bids. The following statement regarding certification of preceding-year milk purchases is contained in the specifications:

> "Each vendor is to certify in writing that he purchased during the immediately preceeding year fresh milk produced within the State at least equal in amount to the amount he seeks to furnish to the school district, and, in addition, to agree to purchase during the year in which he propeses to furnish such milk to the school dustrict an amount of fresh milk produced within the State at least equal to the amount he proposes to furnish to the school district plus an amount equal to the amount, if any, he shall be required to furnish to any other school district in the State."

Bids were received on June 10, 1970, as follows:

State Seal Dairy of Vineland $.0692 per half-pint, Ebner Dairies, Inc. .035 per half-pint.

The Ebner bid contained this statement:

> "The price in this bid, (.035) is the margin that we will require above class 1 (one) price announced monthly by the Federal Market Administrator for the area in which milk is to be delivered. The margin covers the cost above the Class 1 price."

Both bidders furnished with their bids the certification required by the specifications.

An examination of the minutes of the meeting of the Board of Education held June 10, 1970, reveals that the two (2) milk bids were opened and read, but action was not taken upon them at that time. The minutes of the meeting held June 30, 1970 record the following action:

> "The milk bids received at last meeting were discussed again. Mr. Masciarella moved that the milk bid for 1970-71 school year be awarded to Ebner's Dairy. Mr. Michie seconded the motion and it carried unanimously."

A letter was addressed to Ebner Dairies, Inc., under date of July 7, 1970, from the Board of Education Secretary which reads:

"Dear Sirs:

We are pleased to inform you that the Franklin Township Board of Education has awarded your company the Milk Bid for the school year 1970-71 as per bid requirements."

Also, the following letter was addressed to State Seal Dairy of Vineland, under date of July 7, 1970, by the Board Secretary:

"Dear Sirs:

The Franklin Township Board of Education has awarded the bid for *Milk* to *Ebner Dairies.* Thank you for your interest in our bidding."

Intervenor, State Seal, addressed a communication to the Board, under date of July 14, 1970, in which it avers that its bid of .0692 cents per one-half pint was lower than Ebner's margin bid of .035 cents above the Class I milk price announced monthly by the Federal Market Administrator. State Seal's argument is based upon the contention that the Federal market-price was $7.42 per hundred weight for the month of June and $7.45 for July. State Seal argues that, since there are 2.15 pounds per milk to a quart, the price per quart would be 15.95 cents in June and 10.02 cents in July. For one half-pint, State Seal contends, the price would be .0398 cents in June and .0400 cents in July, which added to Ebner's margin bid of $.035 produces a price per half-pint of $.0748 cents for June and $.0750 cents for July. State Seal argues that its bid of $.0692 is, therefore, lower than Ebner's bid for either June or July, 1970.

Respondent Board advertised on August 20 and 27, 1970, to receive milk bids on September 9, 1970. For this second round of bidding for the 1970-71 milk contract, the specifications were altered by the addition of the following items:

"1. All bids are to be margin bids.
"9. Supplier will pick up daily all unused milk at no cost to the schools.
"10. Supplier will return to schools within the half-hour when additional milk is needed.
"16. The vendor must certify that he will comply to all of the items, numbers 1-16, contained herein."

The remainder of the specifications are identical to the original ones. Also, the second advertisement is substantially identical to the original, with the exception of dates.

The second set of milk bids were received as follows:

| | |
|---|---|
| State Seal Dairy of Vineland | $.0330 per half pint |
| Ebner Dairies, Inc. | .035 per half pint |

Both bidders again furnished the aforementioned certification regarding milk purchase in accordance with *N.J.S.A.* 18A: 18-5.1.

The specific issue in the instant matter is whether the Board, in awarding the milk contract for 1970-71, did or did not properly discharge its duty, under *N.J.S.A.* 18A:18-5, which reads in part as follows:

> "Every board of education shall, prior to the beginning of each school year, advertise for proposals for furnishing the supplies, which shall be required by the schools of the district during the ensuing school year, so far as same shall be anticipated, and contract therefor, with the lowest responsible bidder, on the basis of the proposals to received ***."

Boards of education are required by the aforementioned statute to advertise for bids to supply milk. *Robert S. Andrews and Shearer's Dairies, Inc. v. Board of Education of the City of Camden*, 66 *S.L.D.* 147

Also, *N.J.S.A.* 18A:18-20 states that:

> "No bid for the construction, alteration or repair of any building *or for supplies* shall be accepted which does not conform to the specifications, furnished therefor *and all contracts shall be awarded to the lowest responsible bidder." (Emphasis ours.)*

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. McQuillan, Municipal Corporations*, § 29.28 (1959).) and one which is rooted deep in sound principles of public policy. *Wazen 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, extravagence 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 v. Long Branch, supra; McQuillan, 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*, 133 *N.J.L.* 41; *Frank P. Farrell, Inc. v. Board of Education of Newark*, 137 *N.J.L.* 408. The status of the lowest bidder on a public contract is not one of grace but one of right and may not be lightly disturbed for it is based upon competition (a State policy). *Sellitto v. Cedar Grove, supra.*

There is no question here of the responsibility of either of the two bidders. The question to be determined is precisely which bidder was the low bidder.

Before proceeding to determine this question, the Commissioner is compelled to notice that the certification requirement contained in both

versions of the 1970-71 specifications is defective, in that the requirement for certification of purchase during the preceding year has been rescinded by the courts of this State. See *Garden State Dairies of Vineland, Inc. v. Sills*, 46 *N.J.* 349 (1966), on remand 98 *N.J. Super.* 109 (*Ch. Div.* 1967), reversed and remanded 53 *N.J.* 71 (1968).

The Commissioner, in accordance with the decree of the Court, hereby instructs the Board of Education to remove from its specifications for milk bidding the requirement for certification of preceding-year milk purchases.

The Commissioner takes judicial notice of the following communication addressed to the Division of Business and Finance, New Jersey Department of Education, under date of June 8, 1970, from the Division of Dairy Industry, New Jersey Department of Agriculture as follows:

> "The preliminary Class I price per hundredweight for milk testing 3.5 per cent butterfat, as announced by the Market Administrators of the two Federal milk marketing orders that include New Jersey, are shown below, together with a breakdown on quart, pint and half-pint prices.

| | June 1970 | |
|---|---|---|
| | North Jersey Order No. 2 | South Jersey Order No. 4 |
| Prices per hundredweight for milk testing 3.5 per cent butterfat | $6.98 | $7.42 |
| Quarts | .15007 | .15953 |
| Pints | .07503 | .07976 |
| Half-pints | .03751 | .03988" |

A similar communication under date of July 13, 1970, listed the half-pint price for South Jersey as $.04004. These two prices, when added to the margin bid of $.035 by Ebner, result in prices of $.07488 for June and $.07504 for July. Both of these prices are higher than State Seal's price of $.0692. If, in any given month of the 1970-71 school year, the Class I milk price per half-pint would be $.03419, this added to Ebner's margin price of $.035 would total $.06919, which would be lower than State Seal's fixed price of $.0692. Thus, it is clear that the Board could not determine which bid would be the low price for the entire 1970-71 school year. The possibility exists, however remotely, that for any given month either bid might be the low bid. Such a state of affairs is unacceptable because it does not comply with the statutory mandate to guard the public purse by awarding the contract to the lowest responsible bidder. The Commissioner finds that the Board could not in fact determine the low bidder from the bids originally received for 1970-71.

It has consistently been held by the courts of this State that the two paramount aims of the bidding statutes are "that all bidders bid upon the same thing, and that the public know clearly what a bidder must give and the

municipality receive, for a consideration plainly stated." *Belousofsky v. Board of Education of City of Linden*, 54 *N.J. Super.* 219, 223 (1959) Both bids are invalid, and the Board cannot be permitted to breathe validity into invalid bids. Regardless of any circumstances which cause such a state of affairs, the fundamental principle, as well as the evil to be avoided, remain the same, and no erosion of this policy is permissable. *Hillside Township v. Sternin, supra*

The remaining question to be answered is whether the second round of bidding for the 1970-71 milk contract was properly conducted. At this point in time no action has been taken by the Board on the bids received, as heretofore noted.

The fact has been stipulated that the bid from State Seal Dairies was received at approximately 8:40 p.m. on September 9, 1970. The Board of Education had without announcement changed its meeting place, and the representative of State Seal Dairy consequently did not arrive at the meeting until approximately 8:25 p.m. The Court has held on this point that no bids shall be received and accepted after the appointed hour advertised for such a purpose. *Pangia Construction Co. v. Township of Cinnaminson et al.*, 136 *N.J.L.* 284, 285 The requirement that no bids would be received after 8:00 p.m. was stated both in the Board's advertisement and specifications.

Such a substantial departure from the advertised procedure creates a defect which invalidates the late bird. A waiver by the Board cannot be used to remedy this defect.

Another, and more serious, defect is present here, due to the fact that the Board changed its place of meeting without prior public announcement. The specifications stated that the bids would be publicly opened and read at the regular meeting to be held in the Main Road School at 8:00 p.m. D.S.T. on September 9, 1970, but the Board convened its meeting at the Memorial School. Such an action by the Board may obviously have prevented interested bidders from attending the meeting and presenting their bids. The Commissioner does not impute any sinister motives to the Board, nor does he find any evidence of fraud, corruption, favoritism or improvidence. However, the Commissioner does find that the Board's action is so palpably defective that he must determine that this second round of bidding was conducted in an improper manner.

Therefore, for the reasons heretofore stated the Commissioner finds and determines that:

(1) Respondent's first procedure for receiving bids and awarding a contract for milk delivery for 1970-71 is invalid; therefore, the action of the Board in awarding the milk contract is set aside, and the contract is declared a nullity.

(2) Respondent's second procedure for receiving bids for milk delivery for 1970-71 is improper, and the bids received as a result of the procedure are declared null and void.

The Commissioner directs, therefore, that the Board rebid the milk contract for 1970-71 as expeditiously as possible and in accordance with the tenets herein set forth.

COMMISSIONER OF EDUCATION

February 10, 1971

**In the Matter of the Annual School Election held in the School District of the Township of Voorhees, Camden County.**

**COMMISSIONER OF EDUCATION**

**Decision on Remand**

Attorney for the Petitioner, Weinberg & Fishman, (Arnold Fishman, Esq., of Counsel)

This matter is before the Commissioner of Education on remand from the State Board of Education. The decision rendered by the Commissioner on March 10, 1970, subsequent to a recount of the ballots cast in the 1970 school election, was appealed to the State Board of Education by petitioner, James L. Curran, on three points, and has been remanded by the State Board for resolution by the Commissioner because of a dispute as to the completeness of the record. Petitioner notified the Commissioner that, pending a decision on a second recount of the ballots cast in the election for him and candidate Braid, he would withhold pressing the additional points of the appeal; namely, that the Commissioner ruled incorrectly on four originally-contested ballots, and that the security of the ballots was inadequate immediately following the election.

The second recount of the ballots was conducted on November 16, 1970, by an authorized representative of the Commissioner in the Department of Education Building, Trenton.

The decision of the Commissioner dated March 10, 1970, following the first recount referred to, *ante*, and the subsequent examination and determination of four (4) contested ballots, set forth the following results:

| | Uncontested | Exhibits A.B.C.D. | Absentee | Total |
|---|---|---|---|---|
| Robert W. Braid | 365 | 1 1 1 1 | -0- | 369 |
| James L. Curran | 365 | -0- | 1 | 366 |

The Commissioner's representative reports that at the conclusion of the second recount of the uncontested ballots, with thirty-one (31) ballots referred to the Commissioner for his determination, the tally stood as follows:

| | At Polls | Absentee | Total |
|---|---|---|---|
| Robert W. Braid | 340 | -0- | 340 |
| James L. Curran | 369 | 1 | 370 |

It is noted that candidate Curran had four (4) more uncontested ballots at the end of the second recount than was shown in the previous decision of March 10, 1970. This is accounted for by the fact that in the second recount he received four (4) fewer votes which were cast for him and not for candidate Braid, but he received eight (8) more ballots cast for both him and candidate Braid. This resulted in a net gain of four (4) votes for candidate Curran.

* * *

The Commissioner makes the following determination with respect to the four (4) ballots referred to him subsequent to the first recount:

Having reexamined the four (4) original ballots marked Exhibits A, B, C, and D, respectively, the Commissioner reaffirms his decision of March 10, 1970, for the reasons so stated in that decision. Therefore, these four (4) ballots stand as awarded to candidate Braid.

The Commissioner makes the following determination in regard to the thirty-one (31) ballots referred to him in the second recount:

*District I* – Eighteen (18) ballots

*Exhibit* P-1: One (1) ballot on which the check (✓) marks are drawn substantially within the squares provided, but are made in a manner opposite to that in the example displayed within the printed instructions on the ballot. However, the mark, which appears to be one made by a left-handed person, meets the test of substantiality required by *R.S.* 19:16-3g, which requires, *inter alia*, the following:

> "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 ***."

Also, the Commissioner can find no reason to disqualify this ballot on the grounds that it was so marked by the voter for the purpose of identifying his ballot. The marks are plain and resemble the sample check (✓), with the only exception being that the check mark is made as would be commonly done by a person holding a pencil in his left hand. In the judgment of the Commissioner, distinguishing his ballot was not the intent of the voter, and the ballot is valid under the authority of *R.S.* 19:16-4, which reads in part as follows:

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

This ballot will, therefore, be counted for candidate Braid.

*Exhibit* P-2: One (1) ballot on which four (4) cross (x) marks are placed, too (2) in the squares to the left of the candidates' names and two (2) in the squares to the left of proposals No. 1 and No. 2. The voter had circled the word "NO" before proposals No. 1 and No. 2 and these circles are not totally erased. The marks are substantially within the squares provided in accordance with *R.S.* 19:16-3g, *supra.* There is no indication that the voter intended to distinguish his ballot. In fact, the incomplete erasure indicates the opposite. This ballot is valid under the requirements of *R.S.* 19:16-4 and 18A:14-55. See *In the Matter of the Recount of Ballots Cast at the Annual School Election in the Borough of North Caldwell, Essex County,* 1954-55 *S.L.D.* 110; *Application of Sadlon,* 88 *N.J. Super.* 37, 40 (*App. Div.* 1965). This ballot will be counted for candidates Braid.

*Exhibits* P-3 and P-5: Two (2) ballots, each marked by check (✓) marks in the squares provided before the names of three (3) of the five (5) candidates, and by check marks before the word "YES" in the squares before proposals No. 1 and No. 2. On P-3 the check mark to the left of the name of candidate Braid appears, at a glance, to consist of a slightly curved line. On closer inspection, however, it is obviously a check (✓) mark with the hook slighly less emphasized than on the other marks on this ballot. On P-5 the check (✓) to the left of candidate Braid's name has a discernable hook as required and is not merely a diagonal line. Previous decisions of the Commissioner and the Courts have held that a single, straight diagonal line cannot be counted as a vote since the mark is not substantially a cross (x) plus (+) or check (✓) as required by R.S. 19:16-3g, *supra. Petition of Wade,* 39 *N.J. Super.* 520 (*App. Div.* 1956); *In the Matter of the Annual School Election Held in the Township of Stafford, Ocean County,* 1968 *S.L.D.* 59 In the matter of *Petition of Keogh-Dwyer,* 45 *N.J.* 117 (1965), however, the Supreme Court held that where a mark in question is adequate to meet the "substantial" test set forth in *R.S.* 19:16-3g, *supra,* it is to be counted. Ballots P-3 and P-5 will be counted for candidate Braid.

*Exhibits* P-10, P-12, P-14, P-15 and P-16: Five (5) ballots, four (4) of which have check (✓) marks in the squares to the left of the names of two (2) or three (3) candidates and cross (x) marks in the squares to the left of proposals No. 1 and NO. 2. One (1) ballot has a check (✓) mark adjacent in the square to the left of a candidate's name and a cross (x) mark in the square to the left of a second candidate's name and in the square before the two proposals. All of these ballots have legal marks in the squares, but the same kind of mark is not used in all of the squares of each ballot. It is the opinion of the Commissioner that the ballots were not marked for purpose of identification. Therefore, the Commissioner cannot and will not void ballots on which legal marks are made. The illustrated ballots for school elections found in *N.J.S.A.* 18A:14-36 and 18A:14-37 specifically provide that a voter may make a cross (x), plus (+) or check (✓) mark in the squares before the names of candidates or before public questions. *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 These five (5) ballots (P-10, P-12, P-14, P-15 and P-16) will be counted for candidate Braid.

*Exhibit* P-4: One (1) ballot on which cross (x) marks to the left of candidates names are retraced, resulting in heavier or rougher marks than would normally appear. Marks such as these are not uncommon and are obviously the result of unskilled calligraphy, infirmity of hand, poor vision or visability, rough writing surfaces or other similar cause, rather than any attempt to distinguish the ballots. Each of the marks is substantially a cross (x), and each is substantially within the square and clearly was not made for an improper purpose. Although the marks are crudely and poorly made, they are substantially those required by *R.S.* 19:16-3g, *supra*, and *N.J.S.A.* 18A:14-55. It is the Commissioner's judgment that this ballot must be counted for candidate Braid.

*Exhibits* P-8 and P-11: Two (2) ballots which contain legal marks in the squares provided, but the legal marks are made with blue ink from a ball point pen. It has been determined in previous decisions that the use of a ball point pen with blue ink is a common and accepted practice for the marking of a ballot. The statutes, *N.J.S.A.* 18A:14-55, 18A:14-37 and *R.S.* 19:16-3g, *supra*, which require black ink or black pencil, cannot be construed so literally in view of the widespread use of ball point pens and felt tip pens, and the decline in use of the dip pen, fountain pen and quill. The Commissioner determines that these ballots must be counted. See *In the Matter of the Election Held in the Penns-Grove-Upper Penns Neck Regional Scool District, Salem County*, 1966 *S.L.D.* 69, affirmed State Board of Education, 69. See also *R.S.* 19:16-4, *supra.* These ballots (P-8 and P-11) will be counted for candidate Braid.

*Exhibit* P-9: One (1) ballot with legal marks in squares to the left of names of candidates and one of the proposals, but having a diagonal line across the word "YES" for Proposal No. 2 and a legal mark in the square to the left of the word "YES". It is the opinion of the Commissioner that this ballot was not marked in order to distinguish or identify it or to make it other than a secret ballot. It is declared valid under the authority of *R.S.* 19:16-4 and must be counted. See *In Re Recount of Ballots Cast at the Annual School Election in the Township of South Brunswick, Middlesex County*, 1957-58 *S.L.D.* 75; *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, 171; *In the Matter of the Recount of Ballots Cast in the Annual School Election in the Township of Union*, 1939-49 *S.L.D.* 92; *Bliss v. Woolley*, 68 *N.J.L.* 51, 52. This ballot (P-9) will be counted for candidate Braid.

*Exhibits* P-6, P-7 and P-8: Three (3) ballots containing erasures, either of a legal mark before a candidate's name or before a proposal. P-6 and P-7 contain legal marks in the form of a cross (x) before the names of two (2) candidates, and erasures of a legal cross (x) mark before the name of a candidate. It is obvious that the voter merely attempted to correct his vote because he made an error, changed his mind, or had some other reason such as deciding that he did not choose to vote for three candidates. There is no reason to suspect that the erasures were made with the intent to distinguish the ballots. These erasures are almost complete because of the voter's attempt to eradicate the legal mark. These ballots do not fall within the nullifying provision of *R.S.* 19:16-3 (a) and

(f), nor do they lose validity under *R.S.* 19:16-4, *supra*, as being marked by a voter to identify or distinguish his ballot. See *Goddard v. Kelly*, 27 *N.J. Super.* 517 (*App. Div.* 1953); *In the Matter of the Annual School Election in the Township of Waterford, Camden County*, 1968 *S.L.D.* 48, 49.

P-8 has an erasure in the square to the left of the word "NO" for proposal No. 2. The check (✓) marks in the squares for three (3) candidates are crude, two (2) are retraced, and all extend outside the squares. These marks meet the test of substantiality even though they are such as would be made by an infirm hand. The erasure does not invalidate this ballot for the same reasons as set forth above. See determination for P-4 above regarding imperfect calligraphy.

These ballots (P-6, P-7 and P-8) will be counted for candidate Braid.

*Exhibits* P-17 and P-18: Two (2) ballots which have legal marks to the right of the names of candidates, but have no marks whatsoever in the squares to the left of candidates' names. These ballots cannot be counted because the statutory requirement for casting a vote has not been met. *R.S.* 19:16-3c provides, *inter alia*, that:

> "If no marks are made in the squares to the left of the names of any candidates in any column, but are made to the right of said names, a vote shall not be counted for the candidates so marked, but shall be counted for such other candidates as are properly marked; *** "

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 before the name of the candidate 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 in Union Township, Union County*, 1939-49 *S.L.D.* 92; In the Matter of 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 Alloway Creek, Salem County*, 1968 *S.L.D.* 47. These ballots (P-17 and P-18) are declared void and cannot be counted for either candidate Braid or candidate Curran.

In summary, of the eighteen (18) contested ballots from District I, sixteen (16) will be counted for candidate Braid and two (2) are declared void and cannot be counted for either candidate Briad or Curran.

*District II* - One (1) ballot

*Exhibit* P-1: One (1) ballot with legal marks consisting of check (✓) marks in squares to the left of the names of two (2) candidates and cross (x) marks in squares to the left of proposals No. 1 and No. 2. One of the check (✓) marks is less pronounced than the other. The Commissioner determines this ballot to be valid for the reasons as set forth for Exhibits P-3 and P-5 in District I. Such a calligraphic idiosyncrasy is insufficient for invalidation. Also, see reasons set

forth for Exhibits P-10, P-12, P-14, P-15 and P-16 in District I, regarding legal marks of different types on the same ballot. This ballot will be counted for candidate Braid.

*District III* - Twelve (12) ballots

*Exhibits* P-1 and P-12: Two (2) ballots with legal marks in squares before the names of candidates and proposals and with erasures. P-1 has legal marks in the form of cross (x) marks before the names of three (3) candidates and evidence of an erasure before the name the name of another candidate. Legal check (✓) marks appear in squares before the proposals. P-12 has cross (x) marks before the proposals and a cross (x) marks before the name of one (1) candidate with two (2) erasures in other squares. For the reasons stated for Exhibits P-6 and P-7 in District I and also for Exhibits P-10, P-12, P-14, P-15 and P-16 in District I, the Commissioner determines that these ballots are valid. P-1 will be counted for candidate Braid; P-12 will not be counted for it contains no vote for either candidate Braid or Curran.

*Exhibits* P-2, P-4, P-6, P-7 and P-10: Five (5) ballots, all of which are marked with blue ink such as is found in ball pens. P-4, P-7 and P-10 are clearly marked with legal marks within squares. The cross (x) marks on P-4 are such as are commonly found written by an aged or palsied hand. P-2 contains legal cross (x) marks within squares with retracings of each mark. P-6 contains legal marks within squares, but the blue ink marks before candidates' names are traced over pencil marks. It appears that a pencil with a very poor point was employed at first and that the voter then changed to a blue ink ball pen. For the reasons given for Exhibits P-4, P-8 and P-11 in District 1, and because these ballots meet the test of substantiality, the Commissioner determines that they are valid. These five (5) ballots will be counted for candidate Braid.

*Exhibits* P-3, P-5, P-8 and P-9: Four (4) ballots with legal marks of different types on the same ballot. All are marked with pencil. P-3 and P-5 have check (✓) marks in squares before candidates' names and cross (x) marks in squares before proposals. On P-8 and P-9 the marks are made with cross (x) marks before candidates' names and check (✓) marks before proposals. For the reasons stated for Exhibits P-10, P-12, P-15 and P-16 in District I, the Commissioner determines that these ballots are valid. These four (4) ballots will be counted for candidate Braid.

*Exhibit* P-11: One (1) ballot with retraced legal marks. For the reasons stated for Exhibits P-10, P-12, P-14, P-15, P-16 and for P-2 and P-9 in District I, this ballot is valid but will not be counted since it contains no vote for either candidate Braid or candidate Curran.

In summary, the thirty-one (31) contested ballots are counted as follows:

*District I*

For candidate Braid - sixteen (16)
P-1, P-2, P-3, P-4, P-5, P-6, P-7, P-8, P-9, P-10, P-11, –12, P-13, P-14, P-15 and P-16

For neither candidate - two (2)
P-17 and P-18

*District II*

For candidate Braid - one (1)
P-1

*District III*

For candidate Braid - ten (10)
P-1, P-2, P-3, P-4, P-5, P-6, P-7, P-8, P-9, P-10,
For neither candidate - two (2)
P-11, P-12

When the votes decided by the Commissioner are added to the previous totals, the final results stand as follows:

| | | Dec. by 3/10/70 | | | |
|---|---|---|---|---|---|
| | **Uncontested** | **Comm.** | **Dec.** | **Absentee** | **Total** |
| Robert W. Braid | 340 | 27 | 4 | 0 | 371 |
| James L. Curran | 369 | 0 | 0 | 1 | 370 |

The Commissioner finds and determines that Robert W. Braid was elected at the annual school election on February 10, 1970, to a seat on the Voorhees Township Board of Education for a full term of three (3) years.

COMMISSIONER OF EDUCATION

February 19, 1971

**Dominic G. Bocco,**

*Petitioner,*

**v.**

**Board of Education of the City of Camden, Camden County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**Decision**

For the Petitioner, Dominic G. Bocco, Esq., *Pro Se*

For the Respondent, Leonard A. Spector, Esq.

Petitioner, the parent of four children residing in respondent's school district, complains that respondent unlawfully discriminates against him in refusing to reimburse him in cash for transportation of his children to a

non-public school, while it makes such cash payments to other parents, or provides private, rather than public carrier, transportation to other children attending non-public schools. Respondent denies that it has discriminated in any way against petitioner, and asserts that all of its pupil transportation arrangements are in accordance with law and the rules and regulations of the State Board of Education.

A hearing in this matter was conducted on January 8, 1970, and April 14, at the office of the Camden County Superintendent of Schools, Pennsauken, by a hearing examiner appointed by the Commissioner. As a result of the death of the court stenographer, transcripts of the testimony in this hearing were not delivered until December 16 and 17, 1970.

The report of the hearing examiner is as follows:

On or about March 18, 1969, petitioner filed with respondent an application for transportation of two of his children to a non-public school located in Woodbury, Gloucester County, less than 20 miles from petitioner's residence in Camden. It is conceded that under and within the limits of existing statutes (*N.J.S.A.* 18A:39-1) and rules and regulations of the State Board of Education pursuant thereto, petitioner's children are entitled to such transportation at public expense. On March 21, 1969, petitioner was informed that his application had been approved, that the children would be transported on public bus routes, and that bus tickets would be furnished by the Board of Education. On March 31, petitioner attended a meeting of the Board to seek cash reimbursement for his children's transportation in lieu of the proffered bus tickets. He asserted that other parents were receiving cash reimbursement, but was told that no such cash reimbursement was being paid, and that the transportation afforded his children was in accordance with law and Board policy. (R-1) Application was subsequently made for the transportation of all four of petitioner's children for the 1969-70 school year. One of these children was enrolled in kindergarten, another in first grade, and the older children in upper elementary grades of the Woodbury school during the 1969-70 school year.

The testimony establishes that the Board had, in fact, at the meeting of March 31, 1969, approved payment in cash for transportation provided by parents of three children attending non-public schools in the first four months of the 1968-69 school year. The testimony further discloses that these three parents had made proper application for transportation, but their applications were mislaid or misfiled in the Board's offices, and not discovered until some time in December 1968. Since the error was no fault of the parents, the Board accepted a recommendation of its assistant secretary that reimbursement be made in cash from the beginning of the school year until the date the applications were discovered, and thereafter bus tickets were furnished by the Board for the transportation of these pupils. The hearing examiner finds no evidence that except for the rectification of an administrative error, cash payments have been made except as provided by law, *supra.*

Evidence was also introduced to show that with respect to pupils attending two non-public schools, the Board had entered into agreements with the schools to purchase seats on buses operated by or under contract with such schools. Such arrangements were made, it was testified, because such transportation could be purchased more economically than it was possible for the Board to obtain by contract with private operators. The testimony further shows that with respect to such an agreement with a non-public school located in nearby Cherry Hill Township, the annual cost amounted to $120.00 per year, while transportation on a public route having a stop one-half mile from the school would cost considerably less. However, it was testified, the public carrier schedule provided limited service from Camden to Cherry Hill in the morning, and the afternoon schedule required a wait of 70 minutes from the school's closing to the scheduled bus departure. Respondent's transportation authorities considered the factor of schedule inconvenience to be sufficient to warrant the transportation arrangement, at a higher cost, with the non-public school.

The public transportation route provided by respondent for petitioner's children involves utilization of a public bus stopping near petitioner's home to center city in Camden. After crossing Broadway, a main traffic artery, the pupils would then board one of several bus routes operating through center city to a point near the non-public school which they attended in Woodbury. It was testified that the principal intersections which the pupils crossed are protected by traffic signals or policemen or school-crossing guards. Respondent's witnesses, who are responsible for making transportation arrangements, testified that the elapsed time for the trip would be approximately 45 minutes with allowance for traffic delays and waiting time at the transfer point. Petitioner's wife, the mother of the children here involved, testified that she had accompanied two of her children to school on the morning of April 14, 1970, and that the elapsed time was one hour and three minutes.

The testimony further disclosed that respondent had taken bids for small-vehicle transportation to the Woodbury school, and had received a low bid of $28.50 per day for a six-passenger vehicle, and a low bid of $22.50 per day for a ten-passenger vehicle. It is clear that neither bid could provide transportation at a cost of $150 or less per pupil per year, the point established by law (*N.J.S.A.* 18A:39-1) at which a board of education must pay the parent $150 in cash toward the cost of transporting his child to a qualified non-public school. By contract, it was testified, the cost of public bus tickets for petitioner's children is $0.64 per pupil per day.

Petitioner contends that respondent had failed to give proper consideration and weight to the "inconvenience" factor in the transportation provided for his children, as it did in case of pupils transported to the non-public school in Cherry Hill, *supra*. While by implication he challenges the overall convenience of the bus routing and elapsed travel time, he particularly stresses the safety factor of the transfer in Camden's center city, and more specifically, the unusual burden placed upon two of his children, one in kindergarten and one in first grade at the time of the hearing, who cannot read numbers or bus route

signs and thus cannot select from among several bus routes along Broadway, Camden, those which will take them to their stop in Woodbury. Respondent answers that it may not consider safety factors not within its power to control, and that the public bus transportation route offered is a suitable route, and the most economical that it can provide under the requirements of law.

Respondent raises in its answer the defense that as to any requirement for the school year 1968-69, the issues herein are moot, since the petition herein was filed on August 6, 1969, after the close of the 1968-69 school year. The hearing examiner finds that petitioner made diligent endeavors to pursue his request with the Board of Education following his appearance at the March 31, 1969, Board meeting and before the filing of the petition herein. Further, it has not been shown that the position of respondent has been changed to its disadvantage in any reliance on petitioner's acceptance of its offer of March 21, 1969. It is, therefore, recommended that the issues herein be adjudicated both as to the period from March 21, 1969, to the end of the 1968-69 school year, and for the 1969-70 school year.

* * * *

The Commissioner has reviewed and considered the findings and recommendations reported by the hearing examiner as set forth above.

The Commissioner concurs in the recommendation of the hearing examiner that the issues herein are, and continue to be, applicable both to the last part of the 1968-69 school year and to the entire 1969-70 school year. The determination of the Commissioner will be applicable to such of petitioner's children, separately and individually, as were enrolled in the non-public school in Woodbury from and after March 21, 1969.

The Commissioner concurs in the finding and conclusion of the hearing examiner that the cash payments made by respondent to certain parents for transportation furnished at said parents' expense for the early part of the 1968-69 school year were clearly in rectification of an error chargeable to respondent and its employees and do not establish a policy or practice which unlawfully discriminates against petitioner. There is no discrimination when the categories are so different as are found here.

Nor does the Commissioner find that the different treatment accorded pupils attending a non-public school in Cherry Hill Township, as set forth *supra*, constitutes discriminatory action by respondent *vis-a-vis* petitioner's children. The facts show that no cash payment in lieu of transportation was made by respondent to the parents of these pupils. Indeed, no cash payment would be lawful, since transportation could be and was provided at a cost less than $150 per year per pupil. In taking into consideration the bus schedule problems raised in considering the available public route from Camden to Cherry Hill, respondent acted in accordance with the reasoning set forth in the case of *Kelly v. Board of Education of Hamilton Township, 1968* S.L.D. 131. In that case,

respondent provided one bus for pupils from two non-public schools having closing times of 3:30 p.m. and 4:30 p.m., respectively. This hour's difference could be accommodated only by having pupils from one school wait a full hour until departure time, or requiring that pupils in the other school be excused before the scheduled closing hour. The Commissioner found neither alternative acceptable, and directed the respondent Board to arrange separate bus routes to accommodate the two different closing hours. In the instant matter, respondent exercised a proper use of its discretion in determining that the inconvenience of waiting 70 minutes for a public bus is such as to warrant utilization of the more expensive arrangement made between respondent and the administration of the non-public school.

No similar alternative is shown to be available in petitioner's case, and in fact the circumstances are significantly different. Respondent is charged with providing the most economical suitable transportation for petitioner's children. Such transportation could not be provided by contracted services within the limits established by statute (*N.J.S.A.* 18A:39-1). On the other hand public transportation was available on public carriers at a cost below $150 per year per pupil. In numerous earlier cases, the Commissioner has expressed his shared concern for conditions affecting the safety of pupils enroute to and from school. But despite that concern, he has consistently held that safety is not a condition of remoteness from school within the meaning of the school transportation laws, and that boards of education have neither the power nor the responsibility to provide for sidewalks, traffic controls and enforcement, crossing guards, or other elements clearly within the purview of other agencies of government. *Read v. Roxbury Board of Education*, 1938 *S.L.D.* 763, 765 (1927); *Iden v. Board of Education of West Orange*, 1959-60 *S.L.D.* 96; *Frank v. Board of Education of Englewood Cliffs*, 1963 *S.L.D.* 229; *Livingston v. Board of Education of Bernards Townshipp*, 1965 *S.L.D.* 29; *Peters v. Washington Township Board of Education*, 1968 *S.L.D.* 42;; *Friedman v. Board of Education of South Orange and Maplewood*, 1968 *S.L.D.* 53, affirmed State Board of Education, February 5, 1969.

The Commissioner accordingly finds and determines that respondent has discharged its responsibilities within the provisions of law by providing bus transportation on public carriers and furnishing bus tickets therefor to petitioner's children. He further finds that under the facts set forth herein, respondent has no authority to pay cash to petitioner in lieu of the transportation which it has provided for petitioner's children.

The Petition is accordingly dismissed.

COMMISSIONER OF EDUCATION

February 23, 1971

**Board of Education of the Borough of Haledon,**

*Petitioner,*

**v.**

**Mayor and Council of the Borough of Haledon, Passaic County,**

*Respondents.*

## COMMISSIONER OF EDUCATION

### Decision

For the Petitioner, Dominic Cavaliere, Esq.

For the Respondents, James V. Segreto, Esq.

Petitioner, hereinafter "Board," appeals from an action of the Mayor and Council of the Borough of Haledon, hereinafter "Council," certifying to the County Board of Taxation a lesser amount of appropriations for current expense purposes for the 1970-71 school year than the amount proposed by the Board in its budget which was defeated by the voters. An apparent settlement of this dispute was reached in the month of August 1970 between the parties, but such settlement was not concluded in written form, and the matter was referred to the Commissioner for adjudication in September 1970.

A hearing in this matter was scheduled for December 16, 1970, but was postponed at the request of the attorney for Council. The hearing began on January 5, 1971, and continued on January 18 before a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

At the annual school election on February 10, 1970, the voters rejected the Board's proposal to raise $438,451 by local taxes for current expenses of the school district in the 1970-71 school year. The budget was then sent to Council for its determination of the amount to be raised to provide a thorough and efficient school system.

After a review of the budget, and consultation with the Board, Council made its determination and certified the sum of $398,464 to the Passaic County Tax Board for current expense costs to be funded by local taxes in the 1970-71 school year. This was a reduction of $39,987 from the amount of the Board's proposal. As part of its determination, Council suggested items of the budget in which it believed economies could be effected without harm to the educational program. A listing of these reductions is noted below:

| | | | | |
|---|---|---|---|---|
| **ADMINISTRATION** | | | | |
| J110 | Salaries | $ 35,850 | $ 32,300 | $ 3,550 |
| J120 | Contr. Serv. | 2,600 | 2,000 | 600 |
| J130 | Other Expense | 3,675 | 3,225 | 450 |

| | | | | |
|---|---|---|---|---|
| **INSTRUCTION** | | | | |
| J200 | Salaries | 364,000 | 351,900 | 12,100 |
| J230 | Library | 3,662 | 3,400 | 262 |
| J240 | Teaching Supp. | 8,100 | 7,000 | 1,100 |
| J250 | Other Expense | 3,500 | 3,000 | 500 |
| **ATTENDANCE & HEALTH** | | | | |
| J410 | Sals. - Health | 9,200 | 8,900 | 300 |
| **OPERATION** | | | | |
| J610 | Salaries | 29,225 | 26,400 | 2,825 |
| J620 | Contr. Serv. | 4,900 | 2,400 | 2,500 |
| J630 | Heat | 5,500 | 4,200 | 1,300 |
| J650 | Supplies | 3,500 | 2,500 | 1,000 |
| **MAINTENANCE** | | | | |
| J720 | Contr. Serv. | 11,000 | 2,000 | 9,000 |
| J730 | Repl. of Equip. | 1,500 | 1,000 | 500 |
| J740 | Other Expense | 3,500 | 1,500 | 2,000 |
| **FIXED CHANGES** | | | | |
| J820 | Insurance | $ 11,500 | $ 9,500 | $ 2,000 |
| TOTALS | | $501.212 | $461,225 | $ 39,987 |

Prior to a discussion of specific budget details, some preliminary remarks are necessary to establish the present adjudication in a proper context.

The adjudication is made difficult by two factors, namely:

(a) the fact that the sum of $55,000, restored to the Board of Education for the 1969-70 school year by a decision of the Commissioner dated February 13, 1970, has still not been paid pending conclusion of litigation in the courts and

(b) the fact that the present budget appeal is presented for adjudication at so late a date (January 18, 1971), eleven months after the budget in question was defeated by the voters.

With regard to (a) above, the hearing examiner must call attention to the fact that a grand total of almost $95,000, the $55,000 referred to, *ante*, plus the $39,987 of this appeal, is money thought essential by the Board to operate the schools of Haledon in a thorough and efficient manner, but that it is in fact not available for such operation. This total sum, in the context of a total budget of $532,662, is of major significance. If the Commissioner's decision to restore the amount of $55,000 for the school year 1969-70 is eventually affirmed by the courts, the Board will have ended the school year 1969-70 with a surplus of $16,634.45 in current expense funds as of the June 30, 1970, audit. If the money is not restored, the audit report of that date shows that a deficit of $38,365.55 will remain to be funded.

Nevertheless, despite this enigma that remains from the adjudication of the 1969-70 budget, a new budget must be decided. The hearing examiner recommends that this discussion be based on the principal presumption that at

least the largest part of the $55,000 restored by the Commissioner to the 1969-70 budget will in fact be restored as the result of a decision by the court, but the examiner recommends that the surplus of record, $16,634.45, remain undisturbed by any part of the instant adjudication, so that it may serve as an available contingency fund if needed.

Under the mandate of *Chapter* 303, *Laws* of 1966, now embraced in the provisions of *N.J.S.A.* 34:13A-1 *et seq.*, the Board had negotiated salaries for 1970-71 with all of its various employees prior to the submission of this budget to the electorate in February 1970. However, while recognizing the Board's right to establish such salaries for classroom teachers, Council evidently denies such rights with regard to other employees; namely the vice-principal, Superintendent of Schools, etc., and would substitute its judgment for that of the Board in these instances. Disputes of this kind have been addressed in other budget decisions, but it has been uniformly held that the right to make such salary judgments for these "teaching staff members" is that of the board of education. That right may not be usurped. In *Board of Education of the Township of South Brunswick v. Township Committee of the 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 a board of education must be provided and are not subject to curtailment. *N.J.S.A.* 18A: 29-4.1 See also *Board of Education of Cliffside Park v. Mayor and Council of Cliffside Park****." *(Emphasis supplied.)*

The salary policies referred to, *ante*, *are clearly to be provided for all of* those personnel listed as "full-time teaching staff members." This is plainly stated in *N.J.S.A.* 18A:29-4.1:

> "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.)*

The phrase "teaching staff member" is defined in *N.J.S.A.* 18A:1-1 as follows:

> " 'Teaching staff member' means a member of the professional staff of any district *** holding office, position or employment of such character that the qualifications *** require him to hold a valid and *effective standard, provisional or emergency certificate*, appropriate to his office, position or employment ***." *(Emphasis supplied.)*

In this broad sense, the persons in this district of Haledon who serve as Superintendent of Schools, vice-principal, and psychologist are all "teaching

staff members" within the clearly-stated definition, and the power to "adopt a salary policy" (*N.J.S.A.* 29-4.1, *supra*) for each of these members of the school staff is thus expressly conferred on the Board of Education. For these reasons, the hearing examiner believes that Council's proposals to set these salaries on the basis of its judgment are clearly illegal.

It may be true, as Council opines, that some of the Board's salary adjustments were too large to approve in one contract year. It may be true that a more gradual adjustment to certain salary levels over a period of years might have been more desirable. However, the examiner does not agree that the salaries as adopted were so grossly excessive as to justify an abridgment of the Board's legal right to make such determination with regard to them. Therefore, the examiner will recommend, in the pertinent instances, that the Board's judgment be sustained.

On the other hand, the examiner cannot recommend that the Board be allowed to amend or increase certain accounts in a major way *ex post facto* without any indication of emergency. The *South Brunswick* decision, *supra*, also dealt with this tactic. At page 171 of that decision, the Commissioner said:

> "*** The Commissioner must take the position, however, that the *Board is bound by the budget which it prepared* and cannot, at this late date, seek to increase funds for certain items by seeking to have acceptable reductions in other accounts overridden for such purpose***." (*Emphasis supplied.*)

Finally, the hearing examiner notes in this preparatory discussion that the Board's budget, taken as a whole, does not smack of extravagence. To the contrary, the per-pupil expenditure of approximately $800 for current expense costs per pupil may be regarded as moderate for a district in this section of the State in this year of 1970-71. Some line items of the budget seem under-funded. For instance the budget for supplies of $10.00 per pupil per year provides a small amount of approximately twenty-five cents per pupil per week for supplies. Since the school system provides for children in two of the years of the junior high grade level experience; which is traditionally more expensive, the amount is relatively a small one.

In the context of these preparatory statements, the sixteen line-item accounts are discussed below:

*J110 Administration Salaries - Reduction $3,550*

The Board set the following salaries for administrative personnel for the 1970-71 school year. Council proposed to reduce the line-item account by $3,550 as itemized in column III:

| Position | I Board's Salary Proposal | II Proposed 1970-71 (Raise) | III Council's Proposal | IV Proposed Reduction |
|---|---|---|---|---|
| Bd. Secy. | $ 8,350 | $( 650) | $ 7,700 | $ 650 |

| | | | | |
|---|---|---|---|---|
| Supt. of Schools | 20,069 | (2,300) | 17,700 | 2,300 |
| Secy. to Supt. | 6,500 | ( 600) | 5,900 | 600 |
| Cust. of Funds | 1,100 | ( -0-) | 1,100 | -0- |
| | | | | $4,550 |

Since the Superintendent of Schools is a "teaching staff member" as defined by *N.J.S.A.* 18A:1-1, and since his salary was negotiated and set prior to budget passage by the Board (*N.J.S.A.* 18A: 29-4.1), the hearing examiner finds that this judgment may not be upset by the decision of Council. He recommends full restoration of the salary for this reason.

The salaries of the other school staff members itemized *ante*, are not so protected. However, the Board does have an obligation to negotiate the "terms and conditions of employment" of all employees in good faith under the terms of *N.J.S.A.* 34:13A-1 *et seq., supra.* Since the testimony shows that this was done in all of these instances, except in the case of the custodian of funds, and since the increments have the appearance of reasonableness, the hearing examiner also recommends that these amounts be restored in full.

| | | |
|---|---|---|
| Summary | Reduction by Council | $3,550 |
| | Amount Restored | 3,550 |
| | Amount not Restored | - 0 - |

*J120 Contracted Services - Reduction $600*

The Board had budgeted $600 for possible payment to a fact finder, if one was needed, following negotiations with its staff in the 1970-71 school year for a contract that would be in effect for the 1971-72 school year. Council's reason for cutting the account is in error in that Council applied its reasoning to events of the 1969-70 school year, which are not pertinent to the matter *sub judice.* The Board merely counters Council's argument with this fact and admits that the amount is in fact a contingency fund rather than a planned expenditure. Oral testimony is to the effect that the amount will not be needed for the budgeted purpose since negotiations with the staff have been concluded for the year 1971-72.

The hearing examiner believes that the planned budget expenditure was a proper one, but recommends that Council's reduction be sustained because events have proved the money was not needed for the budgeted purpose.

| | | |
|---|---|---|
| Summary | Reduction by Council | $600 |
| | Amount Restored | - 0 - |
| | Amount not Restored | 600 |

*J130 Other Expense - Reduction $450*

Council reasoned that the reduction of half of the amount budgeted for elections was appropriate since the second election on school budgets was eliminated by *N.J.S.A.* 18A:22-37, amended by *Chapter* 250, *Laws* of 1969. The Board avers that the reduction in costs is not directly proportionate to the decrease in the number of elections.

The hearing examiner notes that the Board's cost figures embodied in written testimony are not directly disputed by Council, and he recommends, therefore, that these figures be substituted for the amount cut by Council. They show that the reduction in costs because of the second election elimination amounts to $250.

| | | |
|---|---|---|
| Summary | Reduction by Council | $450 |
| | Amount Restored | 200 |
| | Amount not Restored | 250 |

*J213 Instruction-Salaries - Reduction $12,100*

Council proposes reduction in this line-item account as follows:

| | Board's Proposal | Council's Reduction | Council's Proposal |
|---|---|---|---|
| Vice-Principal | $ 14,600 | $ 2,100 | $ 12,500 |
| Teachers | 326,520 | 7,120 | 319,400 |
| Teachers-Aides | 2,880 | 80 | 2,800 |
| Psychologist | 7,200 | 2,000 | 5,200 |
| Secretary | 4,300 | 400 | 3,900 |
| Home Instruction | 2,000 | 400 | 1,600 |
| | $357,500 | $12,100 | $345,400 |

A review of the positions itemized above shows that the individuals serving as vice-principal and psychologist are school teaching staff members within the definition of *N.J.S.A.* 18A:1-1, *supra*, and the Board negotiated their salaries in good faith. Its discretion should not be abridged for the reasons cited, *ante*, and the hearing examiner recommends that these funds be restored.

Council's reduction in the teacher-aide account is in error by it own admission, and Council avers it did not wish to reduce this sub-account. The amount should therefore, be restored.

The testimony of the Board on the need for the money budgeted for home instruction is sufficient to provide justification for it. Expenditures in 1970-71 are thus far approximately the same as the Board expected they would be. Therefore, the hearing examiner recommends restoration of this amount cut by Council.

The examiner also recommends restoration of the cut in the appropriation for the salary of the school secretary. Since there was no evidence of an abuse of discretion on the part of the Board in setting this salary and since the established final salary has the appearance of reasonableness, the Board's judgment should not be abridged.

There remains the appropriation for teachers' salaries. Council maintains that it merely eliminated the sum of $2,000 originally budgeted as part of the salary for a teacher who had resigned and was replaced by a teacher with a salary $2,000 lower, and that otherwise it simply totaled the salaries of all staff

members in conformity with their places on the salary guide. The Board maintains that all but $350 of the total in this account is necessary and needed.

The hearing examiner believes that the reduction of $2,000 made by Council referred to, *ante*, was not an "improper" reduction at the time it was made, but reprsents an ill-advised judgment. This belief is founded on the fact that staff salary needs are difficult to make almost a year in advance of the start of a school year, and some flexibility must be provided to meet unforeseen needs of children who may need additional instruction time from school personnel. This very circumstance developed subsequent to the formation of this budget in that it was necessary for the Board to hire a teacher for half-day work to provide for three children classified as being unable to benefit from the regular instructional program.

The hearing examiner recommends, therefore, that all of the reduction made in this sub-account by Council be restored with the exception of the sum of $350 which, by the Board's most recent calculation, will not be needed.

| | | |
|---|---|---|
| Summary | Reduction by Council | $12,100 |
| | Amount Restored | 11,750 |
| | Amount not Restored | 350 |

*J230 Library and Audiovisual Aids - Reduction $262*

Both the reduction and the Board's budget for this item are unsubstantiated except in general terms. The hearing examiner recommends that the reduction be undisturbed.

| | | |
|---|---|---|
| Summary | Reduction by Council | $262 |
| | Amount Restored | -0- |
| | Amount not Restored | 262 |

*J240 Teaching Supplies - Reduction $1,100*

The Board admittedly based its budget for this item on past experience of need and the apportionment of $10 per pupil per year. Council rejects the dollar-per-pupil estimate as arbitrary and not correctly based on anticipated needs.

The hearing examiner believes that this line item cannot be budgeted precisely almost a year in advance and that the Board's estimate is reasonable. Therefore, he recommends full restoration.

| | | |
|---|---|---|
| Summary | Reduction by Council | $1,100 |
| | Amount Restored | 1,100 |
| | Amount not Restored | - 0 - |

*J250 Other Expense - Reduction $500*

The Board actually spent $5,076.08 from this account in the 1969-70 school year. A total of $3,500 was budgeted for the school year 1970-71.

Council cut this another $500. Council cites reduced expenses for graduation in substantiation of its cut.

The hearing examiner believes that the expenditure of $5,076.08 from this account in the school year 1969-70 was excessive in the context of the budget as a whole, but that it is a reflection of sparse budgeting in other accounts (e.g supplies) from which much of the money should have been spent in the first instance. However, he does not regard the budget *sub judice* as any more ample in its sub-accounting and any less likely to develop need for contingency appropriations. Therefore, he recommends restoration of the full amount.

| | | |
|---|---|---|
| Summary | Reduction by Council | $500 |
| | Amount Restored | 500 |
| | Amount not Restored | - 0 - |

*J410 Salaries-Attendance and Health Services - Reduction $300*

This small reduction is for salaries of a substitute nurse who may be needed on occasion ($200) and for salaries of health officers ($100). The budgeted amounts are reasonable. The hearing examiner recommends full restoration.

| | | |
|---|---|---|
| Summary | Reduction by Council | $300 |
| | Amount Restored | 300 |
| | Amount not Restored | - 0 - |

*J610 Operation-Salaries - Reduction $2,825*

The hearing examiner has carefully examined the testimony pertinent to this item and notes that even the Board's proposed budget will be overspent by $5,875 if the present expenditures from this account continue through the year. This situation develops from a late decision of the Board to hire a fifth custodian. The decision was made subsequent to the budget submission and defeat of February 1970, and the salary payable to the new fifth custodian was set at $6,875.

In the absence of a finding of an emergency situation, and none is alleged by the Board's own testimony, the hearing examiner believes that the late decision to hire a fifth custodian for the 1970-71 school year cannot be justified. While the funding the Board will use to cover this expenditure is in some respects obscure and while the position may well be justified in terms of the desirability and necessity for cleanliness, the hearing examiner believes the creation of the position in the context of a budget defeat and the reduction of Council cannot be logically defended.

Therefore, the hearing examiner recommends that Council's reduction of this account be sustained. His recommendation takes cognizance of the fact that we are dealing, in this instance, not with an original budgeted line item of the Board which the hearing examiner finds as reasonable, but with an account which the Board proposes to inflate by transfers to accomplish a purpose found to be unjustified in its present context.

| | | |
|---|---|---|
| Summary | Reduction by Council | $2,825 |
| | Amount Restored | - 0 - |
| | Amount not Restored | 2,825 |

*J620 Contracted Services - Reduction $2,500*

The Board had budgeted $1,500 of this account for the maintenance of outside grounds, but has subsequently planned to transfer this amount to pay for the services of a fifth janitor as detailed, *ante*. For the reasons already detailed in regard to Account Number J610, the hearing examiner recommends that this reduction of Council be sustained in this amount. The sum of funds thus deleted toward the payment for a fifth janitor total the $2,825 of Account J610 plus this $1,500 for a grand total of $4,325.

Additionally, the Superintendent of Schools testified that $1,000 of the money originally budgeted for summer help ($3,000 total) was not spent and is not needed for this purpose. Therefore, the examiner recommends that this reduction of Council also be sustained.

| | | |
|---|---|---|
| Summary | Reduction by Council | $2,500 |
| | Amount Restored | - 0 - |
| | Amount not Restored | 2,500 |

*J630 Heat - Reduction $1,300*

The Board spent a total of $9,910 on the interrelated items of heat and utilities in 1969-70. They proposed to spend $11,700 for the school year 1970-71. However, Council proposed to reduce this to an amount approximately 10% over last year's expenditures or a total of $10,400. The hearing examiner concludes that this will be a sufficient amount, and it was the testimony of the Superintendent that it appears to be adequate as reviewed in retrospect. Therefore, it is the hearing examiner's recommendation that the reduction be sustained.

| | | |
|---|---|---|
| Summary | Reduction by Council | $1,300 |
| | Amount Restored | - 0 - |
| | Amount Not Restored | 1,300 |

*J650 Custodial Supplies - Reduction $1,000*

The items in contention in this account are not detailed by either of the parties, but, instead, the appropriations for the present year are compared with expenditures and appropriations of the past. These are really not reliable gauges since the opening of a new building in 1969-70 occasioned unusual expense and a high expenditure. In the absence of a more reasoned presentation by the Board, the hearing examiner recommends that, in this instance, the reduction of Council be sustained.

| | | |
|---|---|---|
| Summary | Reduction by Council | $1,000 |
| | Amount Restored | - 0 - |
| | Amount Not Restored | 1,000 |

*J720B Contracted Services - Buildings - Reduction $9,000*

The Board had originally budgeted $15,000 for a list of contracted items in the 1970-71 school year, but prior to the budget submission to the voters, this total was reduced to $11,000. Council's reduction would provide only $2,000 for the year 1970-71. There is thus a wide difference of opinion between the parties as to the need for contracted expenditures to maintain the schools of the district.

Council contends that much of the budgeting herein is a duplication of funding approved and spent in other years and that the testimony offered by the Board at the budget hearing in the school year 1969-70 is proof of this fact. To the contrary, the Board argues, the money budgeted for this 1970-71 year, while in some instances for the same type of work, is "new" money required to properly maintain the schools in a thorough and efficient manner. There is also great disagreement as to whether or not many of the items in this account are properly placed in current expense.

Council argues, in this regard, that many of these items are capital expenditures which should be funded in another manner.

Some of the basic facts herein make a basic conclusion inevitable; namely, that money must be spent yearly in significant amounts to maintain two of the schools in the Haledon School District in a safe, efficient way. These facts are that the Kossuth Street School was built before the turn of the century and has never been extensively renovated. The Absalom Grundy School is 38 years old and, also, has never had major renovation.

In this context, the hearing examiner concludes that it is reasonable to expect rather high maintenance expenditures each year from this account absent any major renovation project to obviate the need. He recommends, therefore, that the sum of $8,000 be appropriated for this purpose in 1970-71 so that a thorough and efficient school system may be maintained.

| | | |
|---|---|---|
| Summary | Reduction by Council | $9,000 |
| | Amount Restored | 6,000 |
| | Amount Not Restored | 3,000 |

*J730A Replacement of Equipment - Reduction $500*

The Board appropriated $1,500 in this account. Council's proposal would reduce the expenditure by a third. However, the hearing examiner believes that an expenditure of little more than two dollars per pupil per year for replacement of equipment, as proposed by the Board, is a reasonable minimal expenditure, covering as it does, replacement of a multitude of items ranging from kindergarten blocks to 8th grade sewing machines and from student desks to duplicating machines. Therefore, the hearing examiner recommends full restoration of this amount as necessary for proper operation of a thorough and efficient system.

| | | |
|---|---|---|
| Summary | Reduction by Council | $500 |
| | Amount Restored | 500 |
| | Amount Not Restored | - 0 - |

*J740 Other Expense - Reduction $2,000*

The Board's appropriation of $3,500 was reduced to $1,500 by Council. The Board does not document its need for this money, but it spent a total of $3,922.01 from this account in the school year 1968-69.

The hearing examiner recommends a restoration of $1,500 of the amount cut by Council as a reasonable amount to be used for other expenses of the district.

| | | |
|---|---|---|
| Summary | Reduction by Council | $2,000 |
| | Amount Restored | 1,500 |
| | Amount not Restored | 500 |

*J820 Insurance and Judgment - Reduction $2,000*

The Board has adequately accounted for all but $571 of the amount of expenditure proposed to be expended from this account, in the opinion of the hearing examiner. Council bases its reduction on its own audit of the Board's books but does not document its proposed reduction.

The hearing examiner recommends restoration of $1,500 of the reduction proposed by Council.

| | | |
|---|---|---|
| Summary | Reduction by Council | $2,000 |
| | Amount Restored | 1,500 |
| | Amount not Restored | 500 |

The following table summarizes the hearing examiner's recommendations:

| Account No. | Item | Board's Budget | Council's Reduction | Amount Restored | Amt. Not Restored |
|---|---|---|---|---|---|
| **ADMINISTRATION** | | | | | |
| J110 | Salaries | $ 35,850 | $ 3,550 | $ 3,550 | $ - 0 - |
| J120 | Contr. Serv. | 2,600 | 600 | - 0 - | 600 |
| J130 | Other Expense | 3,675 | 450 | 200 | 250 |
| **INSTRUCTION** | | | | | |
| J200 | Salaries | 364,000 | 12,100 | 11,750 | 350 |
| J230 | Library | 3,662 | 262 | - 0 - | 262 |
| J240 | Teaching Supplies | 8,100 | 1,100 | 1,100 | - 0 - |
| J250 | Other Expense | 3,500 | 500 | 500 | - 0 - |
| **ATTENDANCE & HEALTH** | | | | | |
| J410 | Sals. - Health | 9,200 | 300 | 300 | - 0 - |
| **OPERATION** | | | | | |
| J610 | Salaries | 29,225 | 2,825 | - 0 - | 2,825 |
| J620 | Contr. Serv. | 4,900 | 2,500 | - 0 - | 2,500 |
| J630 | Heat | 5,500 | 1,300 | - 0 - | 1,300 |
| J650 | Supplies | 3,500 | 1,000 | - 0 - | 1,000 |

| | | | | |
|---|---|---|---|---|
| **MAINTENANCE** | | | | |
| J720 Contr. Serv. | 11,000 | 9,000 | 6,000 | 3,000 |
| J730 Repl. of Equip. | 1,500 | 500 | 500 | - 0 - |
| J740 Other Expense | 3,500 | 2,000 | 1,500 | 500 |
| **FIXED CHARGES** | | | | |
| J820 Insurance | 11,500 | 2,000 | 1,500 | 500 |
| TOTALS | $501,212 | $39,987 | $26,900 | $13,087 |

* * * *

The Commissioner has reviewed the findings in the report of the hearing examiner and has considered the conclusions and recommendations contained therein. He concurs with the total determination contained in this report and finds that the amount of $26,900 must be added to the amount previously certified by Council to be raised for the current expenses of the school district of Haledon in order to provide sufficient funds to maintain a thorough and efficient system of public schools in the district for the school year 1970-71. He therefore directs the Council of the Borough of Haledon to add to the previous certification to the Passaic County Board of Taxation of $398,464 for the current expenses of the school district the amount of $26,900, so that the total amount of the local tax levy for current expenses for 1970-71 shall be $425,364.

COMMISSIONER OF EDUCATION

February 23, 1971

**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 for two seats on the Board of Education of the Borough of Fieldsboro, Burlington County, for full terms of three years each at the annual school election held February 9, 1971 were as follows:

| | AT POLLS | ABSENTEE | TOTAL |
|---|---|---|---|
| James Lawson | 26 | -0- | 26 |
| Leon Carty | 22 | -0- | 22 |
| Edward Tyler | 14 | -0- | 14 |
| Frank Hegyi | 4 | -0- | 4 |

Pursuant to a request from candidate Tyler, a recount of the ballots cast for the candidates was conducted by a hearing examiner appointed by the Commissioner on February 18, 1971, at the office of the Burlington County Superintendent of Schools in Mount Holly. The report of the hearing examiner follows:

At the conclusion of the recount of February 18, 1971, thirteen (13) ballots were referred for determination and the tally stood:

| | |
|---|---|
| James Lawson | 24 |
| Leon Carty | 20 |
| Edward Tyler | 13 |
| Frank Hegyi | 3 |

Seven (7) of the thirteen (13) ballots, referred to the Commissioner for determination as *Exhibit F*, have no mark of any kind in the appropriate boxes before the names of any of the candidates. Six (6) of these seven (7) ballots have the name Edward Tyler, or a name with similar spelling, written in. Two (2) of the ballots contain the name of Frank Hegyi in written form.

The hearing examiner opines that these ballots may not be counted for either of these candidates since a proper mark in the appropriate box before the name is a necessary requisite for a vote to be counted. *In the Matter of the Annual School Election held in the Township of Medford, Burlington County*, 1967 *S.L.D.* 50; *In re Election for Mayor, Borough of Lavalette*, 9 *N.J. Misc.* 25

A total of six (6) ballots remain to be determined. However, while three (3) of these ballots have the name Edward Tyler or Taylor as a write-in candidate, they need not be discussed or determined since, even if all of them were added to the tally, the result would not be altered.

* * * *

The Commissioner has read the report of the hearing examiner and concurs with the expressed opinion and conclusions contained therein. The Commissioner finds and determines that James Lawson and Leon Carty were elected on February 9, 1971, at the annual school election held in Fieldsboro Borough to full terms of three years on the Fieldsboro Borough Board of Education.

COMMISSIONER OF EDUCATION

February 26, 1971

**In the Matter of the Annual School Election**
**Held in the School District of the Township of Deptford,**
**Gloucester County.**

**COMMISSIONER OF EDUCATION**

**Decision**

The announced results of the balloting for candidates for membership on the Deptford Township Board of Education, for three (3) full terms of three (3) years each at the annual school election held February 9, 1971, in the school district of the Township of Deptford, Gloucester County, were as follows:

| | AT POLLS | ABSENTEE | TOTAL |
|---|---|---|---|
| Thomas D. McHugh, Jr. | 591 | -0- | 591 |
| George Tash | 600 | -0- | 600 |
| Joyce Murphy | 640 | -0- | 640 |
| Joseph C. Masington | 577 | -0- | 577 |
| John M. Crain, Jr. | 616 | -0- | 616 |

Other candidates received from one (1) to six (6) votes.

Pursuant to a request from Thomas D. McHugh, Jr. and at the direction of the Commissioner of Education, a recount of the votes cast for the five candidates named above was conducted by an authorized representative of the Commissioner on February 22, 1971, at the office of the Gloucester County Superintendent of Schools in Clayton.

The Commissioner's representative reports that, at the conclusion of the recount, the tally stood as follows, with seven (7) ballots reserved as Exhibits for final determination if needed.

| | AT POLLS | ABSENTEE | TOTAL |
|---|---|---|---|
| Thomas D. McHugh, Jr. | 588 | -0- | 588 |
| George Tash | 597 | -0- | 597 |
| Joyce Murphy | 638 | -0- | 638 |
| Joseph C. Masington | 571 | -0- | 571 |
| John M. Crain | 608 | -0- | 608 |

Since the seven (7) ballots reserved for determination could not change the final result, it is unnecessary to consider them further.

* * * *

Accordingly, the Commissioner finds and determines that Joyce Murphy, John M. Crain and George Tash were elected on February 9, 1971, to full terms of three years each on the Deptford Township Board of Education.

COMMISSIONER OF EDUCATION

February 26, 1971

**In the Matter of the Annual School Election**
**Held in the School District of the Township of Shamong,**
**Burlington County**

**COMMISSIONER OF EDUCATION**

**Decision**

At the annual school election held on February 9, 1971, in the Township of Shamong, Burlington County, for candidates for two seats for full terms of

three years each on the Shamong Board of Education, and for current expenses and capital outlay appropriations, the announced results were as follows:

| | AT POLLS | ABSENTEE | TOTAL |
|---|---|---|---|
| Hobart Gardner | 137 | 1 | 138 |
| Domenic Marchiano | 141 | -0- | 141 |
| John Anderson | 139 | -0- | 139 |

| | AT POLLS | | ABSENTEE | | TOTAL | |
|---|---|---|---|---|---|---|
| | For | Against | For | Against | For | Against |
| Current Expenses | 114 | 115 | 1 | - 0 - | 115 | 115 |
| Capital Outlay | 118 | 90 | 1 | - 0 - | 119 | 90 |

Pursuant to a request from Candidate Gardner, a recount of the ballots cast for the candidates and of the vote for current expenses was conducted by a hearing examiner appointed by the Commissioner of Education on February 18, 1971, at the office of the Burlington County Superintendent of Schools in Mount Holly. The report of the hearing examiner follows:

At the conclusion of the tally, with three (3) ballots reserved for determination, the tally stood:

| | AT POLLS | ABSENTEE | TOTAL |
|---|---|---|---|
| Hobart Gardner | 139 | 1 | 140 |
| Domenic Marchiano | 144 | -0- | 144 |
| John Anderson | 139 | -0- | 139 |

| | AT POLLS | | ABSENTEE | | TOTAL | |
|---|---|---|---|---|---|---|
| | For | Against | For | Against | For | Against |
| Current Expenses | 115 | 106 | 1 | - 0 - | 116 | 106 |

There was no recount requested, or made, of the votes cast for or against the capital outlay appropriation.

A description of the three (3) ballots referred to the Commissioner in two exhibits is as follows:

*Exhibit A* - Two (2) ballots with a proper check mark in the appropriate box immediately preceding the name of John Anderson. Each of these ballots also contains a name written on the line provided for the names of write-in candidates, but there is no mark of any kind in the box before his name. The challenge of these ballots is grounded on an allegation that the written names may be distinguishing marks.

*Exhibit B* – One (1) ballot with a proper check in the appropriate box before the name of "Wytowize" in the space provided for write-in candidates with a proper mark in the appropriate box. The box preceding the name of John Anderson contains clear evidence of an erasure.

There are two votes on the three (3) ballots in Exhibits A and B against the current expenses appropriation.

The hearing examiner notes an error in the Report of Proceedings in that no absentee-ballot vote is recorded for Marchiano, although the report from the County Board of Elections indicates that one vote should have been added to his tally. He recommends, therefore, that this vote be added.

* * * *

The Commissioner has carefully reviewed the report of the hearing examiner and examined the Exhibits described therein.

He concludes that the two ballots of Exhibit A must be added to the tally for John Anderson. While there are two names written in the spaces for write-in candidates and while these names contain no marks in the proper boxes, there is no evidence to substantiate any supposition that the names were other than what they purport to be; namely, the choice of the voters for a person to serve as a candidate for a three-year term on the Board of Education. The failure to check the proper box is a very common one in instances of this kind. Having reached this conclusion with regard to Exhibit A, there is no need to consider Exhibit B since the result of the election could not be altered by it.

In summation, the Commissioner determines the final tally to be:

| | AT POLLS | ABSENTEE | TOTAL |
|---|---|---|---|
| Hobart Gardner | 139 | 1 | 140 |
| Domenic Marchiano | 144 | 1 | 145 |
| John Anderson | 141 | -0- | 141 |

Accordingly, the Commissioner finds that Domenic Marchiano and John Anderson have been elected to three-year terms on the Board of Education of the School District of the Township of Shamong, and that both the current expenses and capital outlay proposals were approved by the voters at the election held on February 9, 1971.

COMMISSIONER OF EDUCATION

February 26, 1971

**In the Matter of the Annual School Election Held in the School District of the Borough of Waldwick, Bergen County.**

**COMMISSIONER OF EDUCATION**

**Decision**

The announced results of the balloting for candidates for three (3) seats on the Board of Education of the School District of the Borough of Waldwick,

Bergen County, for full terms of three (3) years each at the annual school election held February 9, 1971, were as follows:

| | AT POLLS | ABSENTEE | TOTAL |
|---|---|---|---|
| Richard R. Biros | 506 | 3 | 509 |
| Harold C. Greenberg | 504 | 4 | 508 |
| James H. Poulin | 524 | 1 | 525 |
| Charles S. Goodman | 516 | 4 | 520 |

Pursuant to a request from Candidate Greenberg and at the direction of the Commissioner of Education, a recount of the votes cast on the voting machines for the above-named candidates was conducted by an authorized representative of the Commissioner on February 23, 1971, at the warehouse of the Bergen County Board of Elections in Carlstadt.

The Commissioner's representative reports that at the conclusion of the recount of the voting machine totals and the checking of the report of the canvass of the absentee ballots, as certified by the Bergen County Board of Elections, there was no change in the tally.

* * * *

Accordingly, the Commissioner finds and determines that James H. Poulin, Charles S. Goodman and Richard R. Buros were elected on February 9, 1971, to seats on the Waldwick Board of Education for full terms of three (3) years each.

COMMISSIONER OF EDUCATION

March 3, 1971

**Kenneth Norbe,**

*Petitioner,*

**v.**

**John Feinstein, Principal, Veterans Jr. High School and Dr. Charles Smerin, Superintendent of Schools, City of Camden School District, Camden County,**

*Respondents.*

## COMMISSIONER OF EDUCATION

### Decision

Counsel for Petitioner, Carl S. Bisgaier, Esq.

Counsel for Respondents, Leonard A. Spector, Esq.

Petitioner, a senior student at Glassboro State College, alleges that he has been discriminated against by being denied an opportunity to serve as a student

teacher in Veterans Jr. High School in the City of Camden School District, Camden County.

This matter was heard on January 8, 1971, in the office of the Camden County Superintendent of Schools in Pennsauken by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

Petitioner alleges that respondent principal rejected him as a prospective student teacher after an interview because he wore long hair and a beard. Petitioner further alleges that he is properly prepared in every way to carry out his student teaching obligation, and that his personal desire to wear long hair and a beard has not caused any disruption at college or in the Veterans Jr. High School. Petitioner avers that respondent principal is, therefore, prejudiced against long hair and beards, and that the principal's reasons for not accepting him are arbitrary and capricious and constitute a denial of his constitutional rights.

The principal denies rejecting petitioner because of the length of his hair or because he wore a beard. He also denies being prejudiced against long hair and beards. He testified that petitioner was rejected because he was unkempt, his clothing was in disarray and he appeared dirty.

The principal testified further that a disruption was caused in his outer office on the morning petitioner arrived for his interview because of petitioner's appearance, which he described as being "crummy" on that morning.

The principal also testified that during his interview with petitioner, he became aware of other atitudes expressed by petitioner that in his judgment would make him unsuitable as a student teacher in Veterans Jr. High School. He averred finally that he reached the conclusion that petitioner's appearance and attitudes could cause further disturbance in the school, and that he did, therefore, reject petitioner as a student teacher.

* * * *

The Commissioner has read the report of the hearing examiner.

The Commissioner finds that petitioner's allegations that he was denied the opportunity to do his student teaching in Veterans Jr. High School, because of the length of his hair, and that he was discriminated against because of his appearance, have not been proven.

The Commissioner is aware that the use of student teachers in the public schools of New Jersey is a common longstanding procedure. However, he finds and determines that local boards of education are not compelled to accept student teachers from colleges and universities, and that the selection and placement of student teachers within a school district in the public schools of the State is a matter lying wholly within the discretion of the local board of education.

The Commissioner determines further that absent a finding that respondents acted in an arbitrary or capricious manner, or that the standard applied for selection of student teachers was discriminatory, the Commissioner will not superimpose his judgment on that of the local Board or its officers.

The petition is, therefore, dismissed.

COMMISSIONER OF EDUCATION

March 3, 1971

**Decided by the Commissioner of Education, March 3, 1971.**

## STATE BOARD OF EDUCATION
### Decision

For the Petitioner, Carl S. Bisgaier, Esq.

For the Respondent, Leonard A. Spector, Esq.

(Oral argument waived)

Petitioner alleges that on November 2, 1970, he was denied the opportunity to serve as a practice or student teacher[1] at Veterans Junior High School, Camden, New Jersey, by action of the principal of that school and the district Superintendent solely because of the fact that he wore a beard and because of his hair style. The Commissioner of Education of the State of New Jersey, by his decision of March 3, 1971, dismissed the petition, and from that determination petitioner appeals to the State Board of Education.

The transcript of the proceedings before the Commissioner indicates that at the time of that hearing, petitioner was engaged in practice teaching at another school under circumstances that would enable him to meet the requirements for certification as a teacher. Because of this, we find the question raised by the appeal to be moot, and we therefore affirm the Commissioner's determination.

June 30, 1971

[1] A prerequisite to the issuance of a teacher's certificate is that petitioner serve 3 months as a student teacher.

**In the Matter of the Annual School Election Held in the School District of the Township of Woodbridge, Middlesex County.**

## COMMISSIONER OF EDUCATION

### Decision

The announced results of the balloting for membership on the Board of Education for three full terms of three years each at the annual school election held February 9, 1971, in the School District of the Township of Woodbridge, Middlesex County, were as follows:

| | AT POLLS | ABSENTEE | TOTAL |
|---|---|---|---|
| John P. Cassidy | 3804 | 3 | 3807 |
| Michael Karnas | 4589 | 6 | 4595 |
| Barbara A. Wyatt | 3698 | 3 | 3701 |
| Earl A. McCracken | 3380 | 4 | 3384 |
| Frank J. Gorczyca | 1377 | -0- | 1377 |
| Richard Kuzniak | 4076 | 6 | 4082 |
| Ralph E. McGrane | 3734 | 6 | 3740 |

The following were the announced results for candidates for a two-year term:

| | | | |
|---|---|---|---|
| Diana Rothman | 3943 | 5 | 3948 |
| Martin Litinger | 3967 | 5 | 3972 |

Pursuant to a request from several of the citizens and candidates and at the direction of the Commissioner of Education, a recount of the votes cast on the voting machines was conducted by a representative of the Commissioner on February 25, 1971, at the warehouse of the Middlesex County Board of Elections.

The Commissioner's representative reports that at the conclusion of the recount of the voting machine totals and the checking of the report of the canvass of the absentee ballots, there was only one announced change; namely, that candidate Rothman received 3947 votes instead of 3948.

Accordingly, the Commissioner finds and determines that candidates Michael Karnas, Richard Kuzniak and John P. Cassidy were elected to full terms of three years each, and that Martin Litinger was elected to the two-year unexpired term on the Woodbridge Township Board of Education at the annual election held February 9, 1971.

COMMISSIONER OF EDUCATION

March 8, 1971

**In the Matter of the Annual School Election Held in the School District of the Township of Piscataway, Middlesex County.**

## COMMISSIONER OF EDUCATION

### Decision

The announced results of the balloting for candidates for membership on the Board of Education for three full terms of three years each at the annual school election held February 9, 1971, in the school district of Piscataway Township, Middlesex County, were as follows:

| | AT POLLS | ABSENTEE | TOTAL |
|---|---|---|---|
| Frederick A. Organ | 723 | 2 | 725 |
| Charles E. Sutton | 527 | 1 | 528 |
| Gloria M. Jennings | 701 | 1 | 702 |
| Robert L. Izzo | 925 | 2 | 927 |
| John T. Meadows | 638 | 1 | 639 |
| Dominic R. Ciardi | 1033 | 3 | 1036 |
| Harvey J. Brudner | 624 | 3 | 627 |

Samuel Martinowich received a total of 1150 votes as a candidate for an unexpired one-year term.

Pursuant to a request from Gloria M. Jennings and at the direction of the Commissioner of Education, a recount of the votes cast on the voting machine for Candidates Organ and Jennings was conducted by an authorized representative of the Commissioner on February 25, 1971, at the warehouse of the Middlesex County Board of Elections.

The Commissioner's representative reports that, at the conclusion of the recount of the voting machine totals and the checking of the report of the canvass of the absentee ballots, there was no change in the official tally.

The Commissioner finds and determines that Dominic R. Ciardi, Robert L. Izzo and Frederick A. Organ were elected on February 9, 1971, to seats on the Piscataway Board of Education for full terms of three years each and that Samuel Martinowich was elected to an unexpired term of one year.

COMMISSIONER OF EDUCATION

March 8, 1971

"EE",

*Petitioner,*

v.

**Board of Education of the Township of Ocean, Monmouth County,**

*Respondent.*

## COMMISSIONER OF EDUCATION

### Decision

For the Petitioner, Chamlin and Schottland, (Michael D. Schottland, Esq., of Counsel)

For the Respondent, Peter Shebell, Jr., Esq.

Petitioner, a student in respondent's Ocean Township High School, complains that he has been improperly denied participation in a full academic schedule and attendance at and participation in all extracurricular activities of the school. He prays for immediate reinstatement in a full schedule and the setting aside of all limitations imposed by respondent Board of Education.

Respondent denies any improper or capricious action and contends that its actions were taken in accordance with law and the powers vested in it by the statutes.

Concurrently with the filing of the petition herein, petitioner moved for an order directing reinstatement in a full schedule of classes *pendente lite.* Oral argument on the motion was heard at the State Department of Education, Trenton, on December 16, 1970, before a hearing examiner appointed by the Commissioner of Education. Counsel waived the need for a decision on the motion because of the season's impending holidays, during which the school would be closed, and agreed that an early decision by the Commissioner would be dispositive of the matter.

Oral argument on the petition of appeal was held on January 15, 1971, in the Department of Education Building, Trenton, pursuant to petitioner's request. The report of the hearing examiner is as follows:

The facts of the matter are not in dispute. Petitioner and another student arranged to meet on the school grounds during a luncheon period to smoke "hash" in a pipe. They were joined by a third student who just happened by and was invited to participate. The vice-principal saw the smoking and asked the students what they were doing. Two admitted that they were smoking "pot" but the third student said he did not know what substance was in the pipe.

Petitioner was suspended from school October 12, 1970, until a Board of Education meeting to be held on October 22, 1970, and was continued on

suspension to a subsequent meeting scheduled for November 4, 1970. At the November 4 meeting, petitioner's suspension was again continued until December 7, 1970, when he was readmitted to school with the following restrictions imposed by the Board and stated in a letter to petitioner from the Board's Superintendent of Schools:

> " *** The Township of Ocean Board of Education has decided to continue the suspension from school of 'EE' until December 7, 1970, on which date he will be permitted to return to school. 'E' will be readmitted on a probationary and limited basis for the balance of this school year, subject to the following conditions:
>
> (1) 'E's' academic program is to be reduced to those courses required
> (a) for graduation, and
> (b) for college admission;
> (2) He is required to leave the building for the day at the end of Period 6 daily;
> (3) He is not permitted to eat lunch in school or on school grounds
> (4) He is banned from participation in, and attendance at, all extracurricular activities.
>
> " 'E's' probationary status will be reviewed by the Board of Education at the end of the present school year. The Board will consider his behavior while in school from December seventh until the end of the school year and make a decision whether to institute expulsion, continue the probationary status and limited program, or permit a full program to be reinstituted for 'E'. His program when he returns to school December seventh will be as follows:

| | | |
|---|---|---|
| Chemistry | Period 1 | Room D-131 |
| Chemistry-lab | Period 2, T | Room D-131 |
| Phys. Ed. | Period 2, M, W, | Room B-126 |
| Study | Period 2, Th. | Cafeteria |
| German III | Period 3 | Room C-222 |
| U.S. History II | Period 4 | Room D-112 |
| English III (honors) | Period 5 | Room C-206 |
| Alegebra II | Period 6 | Room C-117***." |

Petitioner argues that the Board is without statutory authority to restrict his school schedule and that he is not guilty of any of the causes for suspension or expulsion of pupils stated in *N.J.S.A.* 18A:37-2, which reads in part as follows:

> "Any pupil who is guilty of continued and willful disobedience, or open defiance of the authority of any teacher or person having authority over him, or of the habitual use of profanity or of obscene language, or who shall cut, deface or otherwise injure any school property, shall be liable to punishment and to suspension or expulsion from school.

"Conduct which shall constitute good cause for suspension or expulsion of a pupil guilty of such conduct shall include, but not be limited to, any of the following:

(a) continued and willful disobedience;
(b) open defiance of the authority of any teacher or person having authority over him;
(c) conduct of such character as to constitute a continuing danger to the physcial well being of other pupils; ***."

Specifically, petitioner contends that expulsion and suspension were intended to be used only in cases of *continued* and *willful* disobedience under the provisions of the statute, *supra.* He avers that the "single, isolated issue of misconduct does not warrant such a severe punishment." Petitioner further avers that his prior school record with respect to discipline matters and grades is further reason for his not being subjected to the curtailed program outlined, *supra*, and removal from the high school Honors program.

Petitioner alleges, also, that the respondent Board and the high school principal are without authority to make notations regarding his misconduct and punishment on his permanent record and transcript. He cites a Commissioner's decision in which, he avers, it was determined that only necessary information may be retained temporarily "under restricted and confidential conditions." *In the Matter of "G"*, 1965 *S.L.D.* 146, 151 Petitioner declares that any determination by an individual board of education about which matters should be included in a student's transcript is arbitrary and capricious. Since individual boards may adopt their own policies, petitioner argues, some may include confidential information that others may not since there is no State-wide policy on the matter. Such a position, he argues further, would not be consistent with "the Law of the State of New Jersey that any juvenile record will be expunged upon that person's eighteenth birthday, and that no person other than the judges and officers of the juvenile court are allowed access to these records." *Petitioner's Memorandum, p.* 11 Petitioner prays, therefore, that the Commissioner order that his record be expunged of all reference to the instant matter.

Petitioner argues that a State-wide policy relative to procedure for disciplining students found using drugs should be adopted and applied. Petitioner argues further that the Legislature clearly recognized the need for a drug-education training program for teachers and provided for the establishment and evaluation of such an education program by the Commissioner of Education. *Cf. Chapter* 85, *Laws* of 1970. He claims, therefore, that it is apparent that the legislative intent was that guidelines should be established by the Commissioner or the State Board of Education with respect to the disciplining of students for the misuse of drugs. This, he avers, would remove the punitive aspect of respondent Board's discipline procedures which, he alleges, amount to a discriminatory policy against drug users.

Petitioner, in arguing that his punishment is excessive and unduly harsh for the offense he committed, avers that the Board's action is in conflict with a Juvenile Court's action. He says that he has appeared before the Juvenile Court of Monmouth County which took no immediate action against him and which did not require him to report to a probation officer. The Court determined, he also says, that his case will be reviewed in six to nine months and dismissed if he remains on good behavior.

Petitioner contends finally that the Board does not have any authority except suspension for immediate disciplinary control of its students, and that to impose the kinds of sanctions applied to him is arbitrary, capricious and excessive.

Respondent Board does not agree that its action is arbitrary and capricious, and it asserts that *N.J.S.A.* 18A:37-2, *supra*, clearly grants it the authority to suspend and expel. The Board argues that since it has statutory authority to suspend and expel students, it logically has the authority to take a lesser action against school pupils; namely, curtailment of a pupil's school schedule and restriction of his attendance in all extracurricular activities.

Respondent Board avers that the action taken against petitioner by the Juvenile Court does not preclude any action that the Board deems reasonable and necessary in the instant matter. The Board argues that petitioner's offense was in violation of a criminal law and that it responded in a manner that would insure petitioner's continued education.

The Board asserts that it takes no position on whether or not there should be notations on a pupil's record with respect to disciplinary infractions while he is in school and that it will be guided, therefore, by the Commissioner's decision with respect to this issue.

* * * *

The Commissioner has read the report of the hearing examiner and notes that the issues are:

(1) whether the degree of punishment meted out by the respondent Board of Education for the offense committed and admitted by petitioner is excessive, and

(2) whether or not a notation of this offense should be a part of petitioner's transcript and permanent record.

The Commissioner is constrained to comment here about the punitive nature of respondent Board's action against petitioner. The Commissioner cannot condone any abuse or misuse of drugs by students. When such offenses are committed, the offending student(s) should be disciplined by professional educators and the Board of Education, but such punitive discipline should not

be excessive. Petitioner is obviously no threat or danger to his fellow students in the eyes of the Board. Had such a danger existed, petitioner would have rightly been denied reinstatement in school by the Board. There can be no question that the Board acted within the scope of its statutory powers and has the authority to suspend, expel or otherwise discipline its students. The Commissioner finds, however, that petitioner has already suffered the (1) loss of seven weeks of school, (2) a shortened school day with a reduced schedule different from that he had before his suspension, and (3) the burden of a hearing before a juvenile court judge which is in continuance for six to nine months, and (4) denial of participation in extracurricular activities.

Offenses involving the abuse of drugs are a serious menace to the mental health of our society, and the introduction and abuse of drugs in the public schools must be dealt with swiftly, in order to prevent their further introduction to other students.

The Commissioner determines that the Board's action denying the privilege of participation in extracurricular activities is a reasonable exercise of the Board's discretionary authority. Certainly this area of student involvement is less rigidly supervised than those regular activities occurring in the school day. Petitioner has deliberately acted in violation of school policy and the State laws on school grounds and during the school day. The confidence students expect of their teachers and administrators ordinarily should be and hopefully can be taken for granted. However, when a student decides that this confidence can be cast aside lightly, it must then be earned again before the student can expect to be accepted with the full trust he enjoyed before the incident.

The Commissioner further determines, however, that the restrictions placed on petitioner's academic schedule are set aside. The Commissioner cannot uphold the Board's limiting petitioner's academic schedule in such a way that his academic career will be affected for his entire lifetime.

With regard to the issue of notation of petitioner's offense on his transcript and permanent record, the Commissioner looks to the decision, *In the Matter of "G", supra*, in which the Commissioner stated at page 151:

> " *** With respect to petitioner's request that the school records be expunged of all reference to this matter, the Commissioner noted that certain information such as petitioner's attendance record cannot be removed. He is certain that the school authorities will record in permanent form only such data as are essential and will keep such other information related to the events herein as may be necessary to retain temporarily, under restricted and confidential conditions ***."

The Commissioner finds that no useful or beneficial purpose can be served by making notations of petitioner's school discipline infractions on his academic transcript and permanent record. Petitioner's juvenile indiscretion should not follow him interminably, and future doubt or suspicion should not be cast on an

otherwise unblemished school record because of his misconduct in this single, isolated incident. Certainly, a purpose of the schools is to perform those acts which will help students become good citizens. Youth needs guidance, help and understanding as well as punishment in such matters as the one *sub judice.* Respondent's proposed action of noting petitioner's offense in this matter on his permanent school record could have a deleterious effect on his educational future and on his standing in his community. The Commissioner directs, therefore, that no notation be placed on petitioner's permanent record and transcript, and that only that record of his offense that is necessary may be kept temporarily during his public school career.

The Commissioner directs, therefore, that petitioner be reinstated in his full academic schedule as it existed prior to his suspension, but that the denial of his participation in extracurricular activities by the Board will remain undisturbed unless and until in the Board's judgment reinstatement is deemed appropriate and proper.

COMMISSIONER OF EDUCATION

March 9, 1971

**In the Matter of the Annual School Election Held in the School District of the Township of Hillsborough, Somerset County.**

**COMMISSIONER OF EDUCATION**

**Decision**

The announced results of the balloting for candidates for membership on the Board of Education for three full terms of three years each and for one unexpired term of two years at the annual school election held February 9, 1971, in the school district of the Township of Hillsborough, Somerset County, were as follows:

| FOR THREE-YEAR TERM | AT POLLS | ABSENTEE | TOTAL |
|---|---|---|---|
| Leslie A. Schumacher | 888 | 6 | 894 |
| George P. Stoddard | 626 | 3 | 629 |
| Helen Magarello | 496 | 3 | 499 |
| Ray Corbin | 477 | 4 | 481 |
| Robert Young | 155 | - 0 - | 155 |

Alix Stevens was listed as having received a total of 638 votes for the unexpired term of two years. A total of 14 other candidates received 1 or 2 votes each, although the combined statement carries no term designation for these ballots.

Pursuant to a request from candidate Corbin, hereinafter "petitioner," dated February 17, 1971, the Commissioner of Education ordered an authorized representative to conduct a recount of the ballots cast and to hold an inquiry to

consider alleged irregularities in the conduct of the election. The recount and inquiry were conducted on February 26, 1971, at the warehouse of the Somerset County Board of Elections, Somerville, and at the office of the Somerset County Superintendent of Schools, Somerville.

At the conclusion of the recount the tally stood:

| FOR THREE-YEAR TERM | AT POLLS | ABSENTEE | TOTAL |
|---|---|---|---|
| Leslie A. Schumacher | 885 | 6 | 891 |
| George P. Stoddard | 625 | 3 | 628 |
| Helen Magarello | 496 | 3 | 499 |
| Ray Corbin | 449 | 4 | 453 |
| **FOR TWO-YEAR TERM** | | | |
| Alix Stevens | 633 | 5 | 638 |
| Ray Corbin | 25 | - 0 - | 25 |

In addition, single votes were cast for the names Cron, Conrad, Colbum, P. Corbin and Col (x)n and for other candidates whose names bore no similarity to any of the principal candidates' names mentioned, *ante*.

It is apparent, from a perusal of the totals contained in the "Combined Statement of Result of School Election" and the "Statement of Result" from each of the polling districts, that election officials did not properly record the 25 votes cast for petitioner in the column for candidates running for the unexpired two-year term. Instead, it seems clear that in the original tally by election officials, all of the votes cast for petitioner were added to his tally as a write-in candidate for one of the three-year terms.

It is petitioner's contention, developed in his letter of February 17, 1971, and at the inquiry, that many voters found the write-in process a difficult, if not impossible, one to complete, and that the votes written on the spaces on the paper roll provided for write-in candidates for a two-year term were written there when, on some occasions, the slots provided for candidates for a three-year term could not be activated. Petitioner also contends that the large and apparently unexpected turnout of voters resulted in long delays and some confusion at the polling places.

The Commissioner's representative confirms that it is somewhat difficult to cast a write-in vote on the machines used in this election. The slots for such votes are high on the machine and slanted. Nevertheless, there is no concrete evidence that the machines were not working correctly. To the contrary, a total of 449 persons were able to cast proper write-in votes for petitioner for a three-year term on the machines provided, and this fact alone would seem to be the best evidence that such an opportunity was available to all voters in the exercise of their franchise.

* * * *

The Commissioner has long recognized the many difficulties inherent in any election where persons run as write-in candidates for office, and the Commissioner has, over the years, had to deal with many disputes similar to the one herein. *In the Matter of the Annual School Election Held in the School District of Roselle Park, Union County, 1968 S.L.D.* 45; *In the Matter of the Annual School Election in the School District of Riverside Township, Burlington County*, 1968 *S.L.D.* 73.

Yet the Commissioner can find no concrete evidence in this instance that the will of the people was suppressed and could not be fairly determined. It is purely speculative to propose that if conditions in this election were different, the results would have been different. Such elections have not been set aside in the past absent clear proof that alleged irregularities did, in fact, constitute so major a factor as to nullify the apparent expression of the voters:

> "*** it has been held that gross irregularities when not amounting to fraud do not vitiate an election." 15 *Cyc.* 372 See also *Application of Wene*, 26 *N.J. Super.* 363 (*Law Div.* 1958); *Sharrock v. Keansburg*, 15 *N.J. Super.* 11 *(App. Div.* 1951).

There is cause for concern that election officials, in this instance, incorrectly tallied 25 votes cast for petitioner in the slots provided for candidates for a two-year term. These votes were simply added into the original count to the accumulated total of those cast for petitioner for a three-year term. This was an improper tally and might well have been decisive if the total vote was only slightly altered. Such irregularities must be deplored. The Commissioner also calls to the attention of all election officials that each Statement of Result must carry a designation of "term" opposite the name of each candidate for whom votes have been cast. Without such designation, the Secretary of the Board of Education cannot properly complete the Combined Statement of Result.

For the reasons cited, *supra*, the election conducted on February 9, 1971, for seats on the Hillsborough Township Board of Education must be given effect. Accordingly, the Commissioner finds and determines that Leslie A. Schumacker, George P. Stoddard and Helen Magarello were elected to full terms of three years each and that Alix Stevens was elected to the unexpired term of two years.

COMMISSIONER OF EDUCATION

March 10, 1971

**In the Matter of the Annual School Election in the School District of the Township of Mount Laurel, Burlington 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 February 9, 1971, in the School District of the Township of Mount Laurel, Burlington County, were as follows, excluding write-in candidates who received two or fewer votes:

| | AT POLLS | ABSENTEE | TOTAL |
|---|---|---|---|
| Richard E. Remington | 266 | 1 | 267 |
| Willard G. Fonner | 258 | 1 | 259 |
| Charles W. Porto | 249 | - 0 - | 249 |
| David L. Pickard | 241 | 2 | 243 |
| Joyce V. Capehart | 208 | 1 | 209 |

Pursuant to a letter request from Candidate David L. Pickard dated February 18, 1971, the Commissioner of Education directed an authorized representative to conduct a recount of the ballots cast. The recount, which was confined to the votes cast for the five above-named candidates, was conducted on March 1, 1971, at the office of the Burlington County Superintendent of Schools in Mount Holly.

The recount disclosed nine (9) ballots which, it was agreed, could not be counted for one or more of the following reasons:

1. No votes for any candidates were cast, *R.S.* 19:16-4
2. Cross (x), plus (+), or check marks were made to the right of the names of candidates voted for, but with no marks in the squares to the left of the names. *R.S.* 19:16-3c
3. Votes were cast for more than three candidates, *R.S.* 19:16-3f, 19:16-4

At the conclusion of the recount of the remaining, uncontested ballots the tally stood as follows:

| | AT POLLS | ABSENTEE | TOTAL |
|---|---|---|---|
| Richard E. Remington | 267 | 1 | 268 |
| Willard G. Fonner | 259 | 1 | 260 |
| Charles W. Porto | 247 | - 0 - | 247 |
| David Pickard | 242 | 2 | 244 |
| Joyce V. Capehart | 208 | 1 | 209 |

The Commissioner finds and determines that Richard E. Remington, Willard G. Fonner and Charles W. Porto were elected on February 9, 1971, to seats on the Mount Laurel Board of Education for full terms of three years each.

COMMISSIONER OF EDUCATION

March 12, 1971

**Jeffrey Goodman, Et Al.,**

*Petitioners,*

**v.**

**Board of Education of South Orange-Maplewood, Essex County,**

*Respondent*

## COMMISSIONER OF EDUCATION

### Decision on Remand

For the Petitioner, Chasan, Leyner & Holland (Lewis M. Holland, Esq., of Counsel)

For the Respondent, Cummis, Kent & Radin (Clive S. Cummis, Esq. of Counsel)

In the matter of *Jeffrey Goodman, et al. v. the Board of Education of South Orange-Maplewood, Essex County*, decided by the Commissioner of Education June 19, 1969, the Commissioner rendered his decision and retained jurisdiction until guidelines were adopted by the South Orange-Maplewood Board of Education governing the distribution of leaflets. Petitioners appealed from the decision of the Commissioner to the State Board of Education. Subsequent to petitioners' appeal, the State Board of Education remanded the matter to the Commissioner for final disposition *pending the establishment of such guidelines.* Counsel thereupon filed briefs for consideration by the Commissioner.

The Commissioner notes that subsequent to his decision in the above-mentioned matter, the Superior Court, Law Division, Essex County, adjudicated the matter, *"M" v. Cuddy, et al.*, Court Docket No. 1-12861-66. The Court found that in this matter the Superior Court determined that "M" 's rights were violated in that his name was denigrated. "M", a junior high school student in the South Orange-Maplewood school system, was libelled in the school year book, and a judgment was made against the Board of Education, Cuddy (a teacher) and the American Year Book Company for the total sum of $38,000.

This Court action quite naturally raises the issue of liability of school staff and the local boards of education when non-restrictive publishing privileges are granted to the students in their charge.

There can be, therefore, no confusion about a question of liability in the "*M*" matter, *supra*, as viewed by the Court. Libel has been defined as "False publication that humiliates a person and degrades one in the estimation of others and subjects a person to loss of social prestige." (See *Black's Law Dictionary.)* The Commissioner opines that guidelines should be adopted by local boards of education that would effectively protect them from the threat of such libel damages so demonstrably levied in "*M*", *supra.*

The Commissioner finds that the following guidelines, as proposed by the Student-Staff Committee of Columbia High School, School District of South Orange-Maplewood, for the distribution by students of leaflets and other written matter outside of usual school channels, are generally acceptable with the exception of provision "D."

**"GUIDELINES FOR DISTRIBUTION OF NEWSPAPERS AND LEAFLETS**

A. **Places**
On the school sidewalk in front of the main entrance to building and on the walk in front of the gym lobby. (In case of bad weather, two pupils only would be permitted each in the front main lobby and in the gym lobby. Specific approval to distribute materials inside would be required each time.)

B. **Time**
7:45 – 8:15 a.m.
2:46 – 3:15 p.m.

C. **Approval**
The previous day or earlier by appropriate class dean or principal, if dean should be absent. For materials not readily classifiable or approvable more than one day should be allowed.

D. **Sponsorship**
For a club or other regular school group, the person who serves regularly as sponsor. He may designate a substitute if he cannot be present during distribution activity. For individual students or a group not formally organized, any willing staff member may serve as sponsor provided he can arrange to be present to prevent problems during distribution activity.

E. **Littering**
All distributed items which are dropped in the immediate area (on the front sidewalk and lawn to the street, for example, or the two inside lobbies and adjacent corridor for 50-75 feet) must be removed by persons distributing material. Waste baskets will be provided.

F. **Unacceptable items**
"So-called 'hate' literature which scurrilously attacks ethnic, religious and racial groups, other irresponsible publications aimed at creating hostility

and violence, hardcore pornography, and similar materials are not suitable for distribution in the schools."

Materials denigrating to specific individuals in or out of the School.

Materials designed for commercial purposes – to advertise a product or service for sale or rent.

Materials which are designed to solicit funds, unless approved by the Superintendent or his assistant.

"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. . "

G. **Acceptable materials**
Materials not proscribed in section F unless dean or principal should be convinced that the item would materially disrupt classwork or involve substantial disorder or invasion of the rights of others.

H. **Appeal**
Pupil denied approval may appeal to the Principal who with a student advisory committee of one representative from each class will review the matter. Should the petition be denied, the petitioner may still appeal to the Superintendent, then to the Board of Education, etc."

The Commissioner disapproves of "D. *Sponsorship*," and directs that it be removed from these "Guidelines" since this provision would permit an unnecessary degree of restraint on students who wish to publish a paper and are unable to find a sponsor. Any necessary administrative control can be adequately managed through "C. *Approval.*" Otherwise, these rules are consistent with the spirit and intent of *Goodman*, and they provide freedom of expression for school-age youngsters to the degree that the Board of Education can reasonably and sensibly accept responsibility for all student publications.

The Commissioner directs, therefore, that the guidelines set by the South Orange-Maplewood Student-Staff Committee be adopted by the South Orange-Maplewood Board of Education as adequate and appropriate controls for the distribution of student newspapers and leaflets.

COMMISSIONER OF EDUCATION

March 12, 1971
Pending before the State Board of Education

**In the Matter of the Annual School Election**
**Held in the School District of the Borough of Lindenwood,**
**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, and for one member for a two-year unexpired term, at the annual school election held on February 9, 1971, in the School District of the Borough of the Borough of Lindenwold, Camden County, were as follows:

| FOR THREE-YEAR TERM | AT POLLS | ABSENTEE | TOTAL |
|---|---|---|---|
| William Robertson | 247 | 2 | 249 |
| Leslie L. Bredell | 242 | 2 | 244 |
| Vela B. Davidson | 203 | 1 | 204 |
| Thomas J. Sewter, Jr. | 129 | 1 | 130 |
| Jane Bowman | 116 | 2 | 118 |
| James H. Madon | 115 | 1 | 116 |
| John J. Somers | 104 | 0 | 104 |

| UNEXPIRED TWO-YEAR TERM | AT POLLS | ABSENTEE | TOTAL |
|---|---|---|---|
| Patricia N. La Porte | 123 | 2 | 125 |
| Kay A. Garvey | 119 | 0 | 119 |
| Raymond Morgan | 66 | 0 | 66 |

The names of Kay A. Garvey and Raymond Morgan were written in as personal choice votes for the vacant seat for a two-year unexpired term. Candidate Patricia N. La Porte had filed a nominating petition.

Persuant to a letter request dated February 11, 1971, from Candidate Kay A. Garvey, the Commissioner of Education directed an authorized representative to conduct a recount of the ballots cast. The recount, which, by agreement, was confined to the votes cast for Candidates Patricia N. La Porte and Kay A. Garvey, was conducted on Friday, February 26, 1971, at the office of the Camden County Superintendent of Schools, in Pennsauken.

At the conclusion of the recount, with twenty-five ballots referred to the Commissioner of Education for determination, the tally of the uncontested ballots stood as follows:

| FOR TWO-YEAR UNEXPIRED TERM | AT POLLS | ABSENTEE | TOTAL |
|---|---|---|---|
| Patricia N. La Porte | 123 | 2 | 125 |
| Kay A. Garvey | 106 | 0 | 106 |

The Commissioner's representative reports that since Candidate Kay A. Garvey was a personal choice or write-in candidate, the recount disclosed a number of acceptable variations in the spelling of her name written in the space provided on the ballot. Variations, however, such as misspellings, failure to use the full name or initials, etc. do not invalidate the ballot. Title 19, Elections, to which the Commissioner looks for guidance in deciding election problems provides:

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

See also *Joseph Flach. In Re Madison Borough School Election*, 1938 *S.L.D.*. 176; *In the Matter of the Annual School Election Held in the Borough of Butler, Morris County*, 1966 *S.L.D.* 25; *In the Matter of the Annual School Election Held in the Township of Lower Alloways Creek, Salem County*, 1968 *S.L.D.* 47.

The ballots referred to the Commissioner were grouped into five categories and are decided as follows:

*Exhibit A*: Thirteen ballots on which the name of Candidate Garvey was written in the space provided, but no mark of any kind was made in the square before the name of either Candidate Garvey or La Porte.

The Commissioner determines that these thirteen ballots cannot be counted because the statutory requirement of a proper mark in the square to the left and in front of the candidate's name has not been met. *R.S.* 19:16-3g provides:

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

See *In re Petition of Keogh-Dwyer*, 45 *N.J.* 117, 120 (1965).

*Exhibit B*: Six ballots on which the name of Candidate Garvey was written in the space provided, and proper marks were made in the square to the left and in front of the name of Candidate Garvey, but with various misspellings and variations of the name of the write-in candidate.

The Commissioner determines that five of these ballots can be counted for Candidate Garvey. On two ballots the full name appears, but with misspellings of the surname. On two other ballots only the surname has been written in and one is misspelled. On one ballot an incorrect initial for the Christian name is written in with the correct surname. One ballot cannot be counted because the surname Carney is written in, which differs substantially enough from the surname of Candidate Garvey to suggest that the voter may fully have intended to write in that name rather than the surname Garvey.. See *R.S.* 19:16-4, *supra.* Also, see *Joseph Flach, supra; In Re Butler, supra; In Re Lower Alloways Creek, supra.*

*Exhibit C:* Four ballots with marks in the square to the left and in front of the name of Candidate La Porte. Each of the marks is substantially a check mark, and each is substantially within the square, but each indicates individual idiosyncrasies in cursive writing skill. Although the marks are crudely and poorly made, they are substantially those required by R.S. 19:16-3g, *supra*, and *N.J.S.A.* 18A:14-55. See *In the Matter of the Annual School Election Held in the School District of the Township of Voorhees, Camden County*, decided by the Commissioner on remand from the State Board of Education, February 19, 1971. It is the Commissioner's judgment that these four ballots must be counted for Candidate La Porte.

*Exhibit D:* Two ballots, one for Candidate La Porte and one for Candidate Garvey. The ballot for Candidates La Porte has the square before her name half obscured by shading from a black pencil. The mark does not meet the test of substantiality required by *R.S.* 19:16-3g, *supra*, and *N.J.S.A.* 18A:14-55, *supra.* See *In the Matter of the Annual School Election in Union Township, Union County*, 1939-49 *S.L.D.* 92; ; *In the Matter of 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. This ballot is declared void and cannot be counted for Candidate La Porte.

The ballot for Candidate Garvey has a proper mark in the form of cross (X) in the square provided. A light pencil line was drawn through the name of Candidate La Porte, and a question mark was drawn after the name of the personal choice candidate Garvey. It is the opinion of the Commissioner that this ballot was not marked in order to distinguish or identify it or to make it other than a secret ballot. It is declared valid under the authority of *R.S.* 19:16-4, which reads in part as follows:

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

This ballot will, therefore, be counted for Candidate Garvey.

In summary, the twenty-five (25) contested ballots are counted as follows:

*Exhibit A:* Thirteen (13) ballots for Candidate Garvey. All are found to be void and cannot be counted.

*Exhibit B:* (6) ballots for Candidate Garvey. Five (5) are determined to be valid and are counted for Candidate Garvey. One (1) is declared void and cannot be counted.

*Exhibit C:* Four (4) ballots for Candidate La Porte. All four (4) are found valid and will be counted for Candidate La Porte.

*Exhibit D:* Two (2) ballots, one (1) for each candidate. The ballot for Candidate La Porte is declared void and cannot be counted. The ballot for Candidate Garvey is determined to be valid and will be counted.

When the votes decided by the Commissioner are added to the previous totals, the final results stand as follows:

| | Uncontested | Decided by Commissioner | Absentee | Total |
|---|---|---|---|---|
| Patricia N. La Porte | 123 | 4 | 2 | 129 |
| Kay A. Garvey | 106 | 6 | 0 | 112 |
| Void | | 15 | | |
| Total | | 25 | | |

The Commissioner finds and determines that Patricia N. La Porte was elected at the annual school election on February 9, 1971, to a seat on the Lindenwood Borough Board of Education for an unexpired term of two years.

COMMISSIONER OF EDUCATION

March 16, 1971

**In the Matter of the Annual School Election Held in the School District of the Township of Deerfield, Cumberland County.**

**COMMISSIONER OF EDUCATION**

**Decision**

The announced results of the balloting for candidates for three seats on the Deerfield Township Board of Education, Cumberland County, for full terms of three years each at the annual school election held on February 9, 1971, were as follows:

| | AT POLLS | ABSENTEE | TOTAL |
|---|---|---|---|
| Lillian April | 93 | - 0 - | 93 |
| Walter Butterfield | 158 | - 0 - | 158 |
| Cosmo Laurella | 143 | - 0 - | 143 |
| John Barbagello | 90 | - 0 - | 90 |

In addition, there was an election of a candidate to a vacant seat for an unexpired two-year term.

Pursuant to a letter request, dated February 10, 1971, from Candidate Barbagello, a recount of the votes cast for candidates for three-year terms was conducted by an authorized representative of the Commissioner on March 8, 1971, at the office of the Cumberland County Superintendent of Schools. The Commissioner's representative reports that at the conclusion of the recount, there were minor changes in the tally that did not affect the relative standing of the candidates.

Accordingly, with respect to candidates for the three seats for full terms of three years each, the Commissioner finds and determines that Walter Butterfield, Commo Laurella and Lillian April were elected on February 9, 1971, to the Deerfield Township Board of Education.

COMMISSIONER OF EDUCATION

March 16, 1971

**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, Ferrara and Glock (Michael J. Ferrara, Esq. of Counsel)

Petitioner, the Board of Education of the Borough of Maywood, hereinafter "Board," appeals from the action of respondent, 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 an amount of appropriation for current expense purposes for the 1970-71 school year $142,000 less than the amount proposed by the Board in its budget which was rejected by the voters.

The Board charges that Council's action was arbitrary, capricious, and unreasonable and that the action was an attempt to placate voters rather than to exercise its independent judgment. Council's action was taken, the Board claims, without any detailed discussion with the Board as to the effect the reductions would have upon the operation of the public schools. It is alleged by the Board that the reduction of funds by Council is so drastic as to make it impossible for the Board to carry out the duties imposed upon it, pursuant to the statutes, the decisions of the Commissioner of Education and the State Board of Education, and the decisions of the courts of this State. The Board avers that the amount certified by Council is insufficient to provide a thorough and efficient system of free public schools in the Maywood school district and prays for relief in the form of full restoration by the Commissioner of Education of the reduced amount of $142,000 for current expenses for the school year 1970-71.

Council replies that it consulted with the Board in accordance with *N.J.S.A.* 18A:22-37, and also consulted with the municipal accountant who had communicated with the Secretary of the Board, regarding the defeated school budget. As the result of these investigations, and a complete and detailed study of the Board's budget, Council avers it certified to the Bergen County Board of Taxation the final amount, $142,000 below the Board's budget for current expenses, which it considered sufficient to provide a thorough and efficient system of education and to maintain the educational standards of the Maywood public schools.

The facts of the matter were educed at a hearing before a hearing examiner appointed by the Commissioner on December 11, 1970, at the State Department of Education, Trenton. Exhibits prepared by the Board (A-1 through A-10) and exhibits presented by the Council (R-1 through R-3) were received in evidence. Both parties filed briefs following the hearing. The report of the hearing examiner is as follows:

At the annual school election held February 10, 1970, the voters of the district rejected the Board's proposals to raise $1,860,998.51 for current expenses and $6,441.00 for capital outlay. Immediately thereafter the Board delivered to each member of the Council an itemization of the defeated budget, in order to secure Council's determination of the amount of local tax monies required to maintain a thorough and efficient school system.

After reviewing the defeated budget and consulting with the Board on March 4, 1970, Council scheduled a special meeting for action on the school budget. It met on March 9, 1970, (Exhibit R-1) but failed to act on a proposed resolution for a reduction of $40,000 following public discussion. On March 12, 1970 (Exhibit R-2) Council convened another special meeting and adopted a resolution certifying to the Bergen County Board of Taxation the amounts of $1,718,998.51 for current expenses and $6,441 for capital outlay and $64,645.50 for debt service for the 1970-71 school year for a total reduction of $142,000.

The pertinent amounts are shown as follows:

| | Current Expense | Capital Outlay | Debt Service |
|---|---|---|---|
| Board's Budget | $1,860,998.51 | $6,441.00 | $64,645.00 |
| Council's Certification | 1,718,998.51 | 6,441.00 | 64,645.00 |
| Reduction | $ 142,000.00 | $ - 0 - | $ - 0 - |

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

| Acct. | Item | Board's Budget | Council's Proposal | Amount Reduced |
|---|---|---|---|---|
| J-200 | Sals.-Instr. | $950,628 | $925,628 | $ 25,000 |
| J-500 | Pupil Transp. | 62,059 | 52,059 | 10,000 |
| J-600 | Operation | 99,700 | 97,700 | 2,000 |
| J-870 | Tuition | 826,485 | 801,485 | 25,000 |
| | Sub-totals Current Expenses | | | $62,000 |
| | Unappropriated Balance | $64,014.49 | $144,014.49 | $120,000 |
| | TOTAL REDUCTIONS: | | | |
| | Current Expenses and Unappropriated Balances | | | $142,000 |

On the basis of the documentary evidence and oral testimony educed at the hearing, the findings and recommendations of the hearing examiner with respect to each of the items in dispute are set forth as follows:

*J-200 Salaries – Instructional*

The main items in contention under this general budgetary account are the salary for the Principal of the Intermediate School, shown in the proposed budget as $18,692, and the salary of the Principal's secretary shown as $6,804 - for a total of $25,496. Council's proposed reduction of these amounts was indicated by the round figure of $25,000.

Testimony educed from witnesses for the Board indicates the fact that three elementary schools comprise the Maywood School District, and that high school students in Grades Nine through Twelve are sent to Hackensack High School on a tuition basis. The Maywood Avenue and Memorial Schools contain Grades Six, Seven and Eight. Each of the aforementioned schools has had a principal for the last ten years, although the Intermediate School was formerly operated as a junior high school prior to September, 1969. The Intermediate School is physically a part of the Maywood Avenue Elementary School plant. The former Superintendent of Schools, who had prepared the proposed 1970-71 school budget, and the present Superintendent testified regarding the continuing need for the principalship of the Intermediate School. The effectiveness of the instructional program, the Board states, is largely dependent upon the administrative and supervisory leadership of the Principal.

Council testified that since the two elementary schools have Principals and there is also a Superintendent of Schools, there can be realized a substantial economy by eliminating the position of Principal of the Intermediate School.

The hearing examiner recommends, on the basis of the preponderance of evidence, that the amount necessary to continue this position be restored. This amount is $16,299.10, prorated from $18,692 due to the fact that the position was vacant for the two summer months of the 1970-71 school year.

The remainder of the portion reduced from this account is $6,849 for the salary of the secretary to the Principal of the Intermediate School. The hearing examiner recommends that this amount be restored in order to provide the Principal with the necessary secretarial and clerical assistance to function efficiently.

The total amount recommended for restoration in this line item is $23,148.10, leaving a net reduction of $1,851.90.

*J-500 Pupil Transportation*

The evidence educed in respect to this line item indicates that the amount budgeted for nonpublic school pupils was overestimated by $9,931.80, and the transportation costs for atypical pupils were underestimated by $8,552. The transportation costs for public school pupils were also underestimated by $700 for the 1970-71 school year. The facts plainly show that the need expressed by the Board is actual in order to provide this mandatory pupil transportation.

The hearing examiner recommends that the amount of $9,320.20 be restored from Council's reduction of $10,000, leaving a net reduction of $679.80.

*J-600 Operation-Utilities*

The Board states that the reduction by Council of $2,000 from this line item is unrealistic because the amount budgeted for 1970-71 is based upon actual costs incurred in the 1969-70 school year. Council states that it based its reduction upon the costs for the same prior year. The facts are as follows:

The official audit report for the 1969-70 school year indicates that expenditures were: for heat, $9,336.13; for water and sewer service, $1,316.99; for electricity, $12,098.73; for gas, $1,982.40; and for telephone service, $7,198.60 - a total of $31,932.85. The amounts budgeted for utilities for the 1970-71 school year are: for heat, $8,500; for water and sewer services, $1,400; for electricity, $12,000; for gas, $1,800; and for telephone service, $7,500 - a total of $31,200. This total is $732.85 less than the amounts actually expended for the 1969-70 school year.

The hearing examiner recommends that the total reduction of $2,000 in these accounts be restored to the 1970-71 school budget.

*J-870 Tuition*

The following facts were educed regarding tuition costs for the 1970-71 school year:

Tuition for high school is underestimated by $30,208. Based upon the current enrollment of 607 pupils at $1,300 per pupil, actual costs will be $789,100, plus a tuition adjustment billing for 1968-69 in the amount of $28,593.60, for a total of $817,693.60. This total exceeds the budgeted amount of $787,485 by $30,208.60. Atypical pupil costs, based upon current placements and tuition rates, will total $42,006, with the amount budgeted being $30,000, leaving a deficit of $12,006. The budgeted amount of $9,000 for the vocational school tuition item is overestimated by $3,050 since the actual requirement is $5,950. In total, tuition requirements exceed the $826,485 amount originally budgeted by $39,164.60.

The hearing examiner recommends the restoration of the total amount of the $25,000 reduction in this appropriation.

*Unappropriated Balance Budgeted for 1970-71*

The documentary evidence and testimony educed regarding the appropriation of balances indicate the following facts:

The total revenue balance as of June 30, 1970, is $145,352.05, distributed as follows: in J-current expenses, $116,706.97; in L-capital outlay, $19,465.29; in special reserve, $9,065.98; and in special projects (E.S.E.A.), $113.81.

Of the J-current expenses balance of $116,706.97, the Board had appropriated $64,014.49 to the 1970-71 school budget, leaving an unappropriated free balance of $52,692.48. From the L- capital outlay balance of $19,465.29, the Board had appropriated $10,592, leaving an unappropriated free balance of $8,873.29. The total of the unappropriated free revenue balances as of July 1, 1970, including the J-current expenses amount of $52,692.48; the L-capital outlay total of $8,873.29; the special reserve amount of $9,065.98; and the E.S.E.A. balance of $113.81, equals $70,745.56.

Documentary evidence and testimony indicate that Council's action of increasing the appropriation of free revenue balances to the 1970-71 school budget by $80,000 was based upon their assumption that such amount would be available as of June 30, 1970, in addition to the 1969-70 free balances previously appropriated by the Board. Also, Council assumed that at least $50,000 of additional free revenue balances might be generated by the close of the 1970-71 school year. Testimony by the Board disclosed that it was able to maintain certificates of deposit in the amount of $143,642.34 during the 1969-70 fiscal year.

A careful scrutiny of the audit report as well as the detailed documentary evidence discloses that the E.S.E.A. balance of $113.81 may not be disturbed because these funds are federal in origin. There is no authority to support the existence of the special reserve balance of $9,065.98. If this amount represents unpaid prior-year contracted orders, it should then be part of the cash, W-reserve, and should be liquidated by cash disbursements upon completion of the contractual orders. If the amount does not represent prior-year contractual

orders, then it is part of the unappropriated free balance of either the J-current expenses account or the L-capital outlay account, or both. There is no evidence that any improvement authorization has been approved by referendum, or that this reserve has been authorized as such. The hearing examiner recommends that this balance remain undisturbed and be considered by the Commissioner as a free balance for the purposes of this decision.

The hearing examiner finds that $42,000 of the $52,692.48 unappropriated revenue balance in J-current expenses is necessary for the maintainance of an efficient system of schools and accordingly recommends that this amount be restored from Council's reduction. The unappropriated revenue balance of $8,873.29 in the L-capital outlay account is not found to be necessary, and the hearing examiner therefore recommends that this amount of the reduction be sustained. Since there is no other source of unappropriated free revenue balance available to be appropriated to the 1970-71 school budget, the hearing examiner recommends that the amount of $29,126.71 of reduction be restored.

The hearing examiner's recommendations are recapitulated as follows:

| Acct. No. | Item | Proposed Reduction | Amount Restored | Amount Not Restored |
|---|---|---|---|---|
| J-200 | Sals.-Instr. | $25,000.00 | $23,148.10 | $1,851.90 |
| J-500 | Pupil Transp. | 10,000.00 | 9,320.20 | 679.80 |
| J-600 | Operation | 2,000.00 | 2,000.00 | - 0 - |
| J-870 | Tuition | 25,000.00 | 25,000.00 | - 0 - |
| Sub-Total-Current Expenses | | $62,000.00 | $59,468.30 | $2,531.70 |
| Appr. from Free Balance to Current Expense | | $80,000.00 | $71,126.71 | $8,873.29 |
| TOTALS | | $142,000.00 | $130,595.01 | $11,404.99 |

* * * *

The Commissioner has reviewed the findings and recommendations of the hearing examiner as reported above.

The Commissioner particularly concludes, and so holds, that the need to continue the Principalship of the Intermediate School is of paramount importance for the provision of a thorough and efficient system of education. Also, to preserve and promote the efficiency of this school, the restoration of funds for the position of secretary to the Intermediate School Principal is necessary.

The facts concerning the items of pupil transportation, utilities for the operation of the school plants, and the tuition appropriation preponderate for the need to restore these amounts in order to maintain an efficient school system.

The item of unappropriated free revenue balance is of paramount concern to the Commissioner, in view of the way and manner that Council acted upon this item. Council increased the amounts appropriated to the 1970-71 school budget based upon an incorrect assumption concerning the June 30, 1970, balances. Additionally, Council assumed that another substantial appropriation balance might be generated by the conclusion of the 1970-71 school year. On its face, this admitted action is unreasonable and cannot be sustained. The Commissioner concludes that the restoration of $42,000 of unappropriated free revenue balance to the current expense account is a minimal requirement for the maintenance of a thorough and efficient system of public schools. The Commissioner concurs with the recommendations of the hearing examiner that the reduction of the capital outlay balance be sustained. Also, the remaining reduction of $29,126.71 must be restored since there are no other free balances available to be appropriated.

The Commissioner has carefully reviewed the hearing examiner's report regarding the Board's special reserve account. He notices that the Board has no funds on deposit in the State capital reserve fund. The June 30, 1970, balance of $9,065.98 may represent unpaid, prior-year contractual orders. If so, the balance must be transferred to the W-reserve account, and liquidated by cash disbursements upon completion of the contractual obligation. If these balances do not represent unpaid, prior-year contractual orders, then they are unappropriated free revenue balances and must be indicated as such. The Commissioner notices that the Board's audit reports reflect no improvement authorization on the debt service schedules. He concludes, therefore, that the special reserve balance is not an improvement authorization. The Commissioner hereby directs the Board to remove the special reserve column from its books and records, since this account is not authorized as part of the system of accounting for New Jersey schools. Also, the Commissioner directs the Board to file with him an amended audit report for the 1969-70 school year, with the proper correction as directed herein.

In reviewing this record, the Commissioner takes notice of the fact that on March 3, 1970, Council, after deliberating upon the defeated budget for almost one month, abruptly withdrew a resolution, introduced and seconded, which called for a reduction of $40,000 in the certification of local school taxes. Three days later, on March 12, 1970, without consulting with the Board in the interim, the governing body passed a resolution calling for a reduction of $142,000. The Commissioner reminds the governing body of the words of the New Jersey Supreme Court which set forth the basic and fundamental rule applicable to actions of this kind 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 make up of the community ***." *Board of Education of East Brunswick v. Township Council of East Brunswick*, 48 *N.J.* 94, 105-106 (1966) (*Emphasis ours.*)

The Commissioner finds and determines that the amount certified by Council for current expenses is insufficient to provide a thorough and efficient system of education in the School District of the Borough of Maywood. Accordingly, the Commissioner directs the Mayor and Council to certify to the Bergen County Board of Taxation the additional amount of $130,595.01 to be raised by taxation for current expenses for the school year 1970-71.

COMMISSIONER OF EDUCATION

March 16, 1971

**Doris Van Etten and Elizabeth Struble,**

*Petitioners,*

**v.**

**The Board of Education of the Township of Frankford,Sussex County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**Decision**

For the Petitioners, Saul R. Alexander, Esq.

For the Respondent, Dolan and Dolan (William A. Dolan, II, Esq., of Counsel)

Petitioners, teachers in the Frankford Township School, Sussex County, allege that they were illegally denied salary increments which were due them under the stated terms of the salary guide of respondent Board of Education (hereinafter "Board"). The Board avers that its actions were legal and maintains that its decision to withhold petitioners' salary increments was a proper exercise of its discretion and judgment.

A hearing in this matter was conducted on February 2, 1971, at the office of the Sussex County Superintendent of Schools in Newton by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

Petitioners were tenure teachers, during the 1969-70 school year, in the Board's school. Their degree levels, experience, and salaries for that year are notated in the following table:

| | Degree | Year of Teaching | Salary 1969-70 |
|---|---|---|---|
| Doris Van Etten | Master's | 8 | $10,249.00 |
| Elizabeth Struble | Bachelor's | At Maximum | 10,753.50 |
| | Merit step for plus 20 yrs. | | +368.50 |
| | Total Salary | | $11,122.00 |

These salaries of petitioners for the 1969-70 school year represented a full implementation of the Board's salary guide for that year. (P-1) The merit step salary for petitioner Struble is a part of that guide since it was incorporated as one of three "additional provisions" This provision was worded as follows:

> "3. One additional increment may be allowed, on any scale, after completion of twenty years of meritorious teaching ***."

There are no other written provisions, of pertinence to this adjudication, as an incorporated part of this guide.

In January 1970, the Board negotiated a new salary guide (P-2) for its teaching staff for the 1970-71 school year, and included the requisite funding in its budget for the February 1970 referendum. This salary guide was a guide alone. It lacked any of the "additional provisions" that were notated at the bottom of the page containing the 1969-70 guide. However, it did contain a new step labeled "+20", and the presumption is clear that this step was in lieu of "additional provision 3" of the 1969-70 guide referred to *ante*. Under the stated terms of this 1970-71 salary guide, petitioner Van Etten thought her salary entitlement for the 1970-71 school year was to be that notated for the ninth level in the column for a teacher with a master's degree. This figure was $11,340. Petitioner Struble thought her salary for 1970-71 should be that for a teacher with "+20" years. This figure was $11,520.

On April 6, 1970, the Superintendent of Schools formally observed petitioner Van Etten and wrote a review of the observation. (P-3) This was the only occasion during the school year that he had formally observed either of the petitioners and reviewed such observation in written form.

On April 23, 1970, the Superintendent addressed the following letter (R-3) to each of the petitioners:

> "This letter is sent to formally notify you that I am not recommending you for an increment nor adjustment to the salary guide for the school year 1970-71. The reasons for my action were discussed with you on Thursday, April 16, 1970. You may request a hearing with the Frankford Township Board of Education if you so desire and present your position at that time. You may also be represented at that hearing."

Petitioners voiced objections to the Superintendent's recommendation, *ante*, in letters of their own to him (R-5 and R-7), but did not immediately

request the hearing the Superintendent had said they could have. However, such a request was made on their behalf by a committee chairman of the local teachers' association in a letter dated June 1, 1970 (R-9). Specifically, this letter requested a hearing pursuant to the provision of an adopted grievance procedure.

Subsequently, in a letter dated June 5, 1970, to the association chairman (R-10), the Superintendent stated that the Board of Education would "hear the alleged grievance" at 7:30 p.m. on July 15, 1970. However, on that same date of June 5th, in separate letters to petitioners, (R-11), the Superintendent indicated that he was requesting the Board to "take action" on his recommendation, to withhold the increments in question, at its regular June meeting scheduled for June 8, 1970, seven days before the grievance hearing scheduled to consider the denial of increments was to be held.

The Board met on June 8, 1970. The minutes of that meeting (R-17) indicate that petitioners' contracts for the 1970-71 school year were renewed at the same salary stipends approved in 1969 for the 1969-70 school year. However, petitioners were not formally apprised of the action prior to the grievance hearing of June 15, 1970.

The grievance hearing was held as scheduled by the Superintendent on June 15, 1970. Petitioners were accompanied to this hearing by a representative of the New Jersey Education Association.

On June 16, the Superintendent wrote a letter (R-1) to petitioners that formally notified them of the Board's action on June 8 in setting their salaries for the 1970-71 school year. This letter gave reasons for the action and is quoted in part as follows:

> " *** The reasons for this action were poor control, poor rapport with both students and parents, poor attitude toward students, poor parent-teacher relations and communications, and the fact that I felt you did not do the job you are capable of doing ***."

In another letter (R-15), dated July 13, 1970, the Superintendent informed petitioners that, subsequent to the grievance hearing of June 15, 1970, the Board had affirmed its action of June 8, 1970, which had the effect of denying salary increments to petitioners for the 1970-71 school year.

Petitioners, while not specifically denying the charges of the Superintendent found in the letter of June 16, 1970 (R-1), contend that the Board's action was not grounded on good cause and that there was a failure to award proper due process before the formal action was taken. They further aver that *N.J.S.A.* 18A:29-14, which authorizes a board of education to withhold salary increments "for inefficiency or good cause," cannot be construed to apply to a denial of such increments for reasons other than for unsatisfactory teaching or for other reasons properly documented in advance and communicated to the teacher.

The Board, on the other hand, maintains that petitioners were advised on or about April 16, 1970, of the reasons for the Superintendent's recommendation and that they knew, or ought to have known, that their superiors were dissatisfied with their teaching performances. The Board avers that due process was afforded petitioners as evidenced by the fact that opportunities to question the school administrator and the Board were scheduled both prior to, and following, the time of contract decision.

The testimony of the President of the Board at the hearing of February 2, 1971, established the fact that the Board had agreed to the stated levels of the 1970-71 salary guide (P-2) prior to the February 1970 referendum, although no formal adoption had been made by that time. A close examination of this guide shows that the former "additional provision 3" of the 1969-70 guide, recited, *supra*, that referred to "meritorious service," is not a part of any exhibit pertinent to the salary guide document for 1970-71. Neither are there other written auxiliary conditions or limitations that temper the dicta which the guide itself presents; namely, that teachers with specified academic credentials progress in a uniform manner according to years of accredited teaching service. The President of the Board did say that the Board had understood that salary increments could be withheld pursuant to law and that the Board's action in this case was based, in part at least, on a local policy of the Board of Education adopted in 1955. This policy (R-16), made a part of the 1955 guide provisions, reads in part as follows:

> " *** The Board of Education may withhold for inefficiency or good cause the employment increment, adjustment increment or both of any teacher in any year ***."

The Superintendent of Schools testified that there was no definition of the term "meritorious service," wich appears as a requisite along with 20 years of experience, in "additional provision 3" of the 1969-70 salary guide. He also stated that his decision to recommend the denial of salary increments for petitioners for the 1970-71 school year was grounded on a series of informal observations in addition to the one formal observation recited, *supra*. Four of these informal observations were recorded in written form, although there is no evidence that any of these summations were given to petitioners in such form during the 1969-70 school year.

The Board's decision of June 8, 1970, to deny salary increments to petitioners for the 1970-71 school year was based in part on the charges and recommendations of the Superintendent, but also on the judgments which the Board made independently as the result of its own separate findings. However, the hearing of February 2, 1971, before a hearing examiner was not a *de novo* proceeding with reference to the merit of the charges against petitioners which resulted in the withholding of increments, since the only stated charges contained in the petition are not specifically denied. Rather, the hearing of February 2, 1971, was confined to (a) an examination and review of the procedural date incidental to the Board's action and (b) a review of the

contractual relationship between petitioners and the Board. It is on these factors, which clarify the central issue, that the decision of the Commissioner must be based. This is so because the central issue posed by this petition is not whether there was good reason to deny salary increments to petitioners for the 1970-71 school year, but whether, even with cause, such increments could properly be denied at all in the absence of any corollary conditions to modify the clearly stated terms of the salary schedule.

* * *

The Commissioner has reviewed the report of the hearing examiner and considered the contentions of the parties to this dispute. He has come to the following conclusions:

The contentions in this case, and the issues posed by their consideration, contain, as the primary element, a dispute of the parties over the most basic of all "terms and conditions" of employment; namely, the compensation to be afforded teaching staff members for their service. Within the confines of the dispute *sub judice* can be found most of the elements which recent legislation has sought to obviate as causal in nature. However, a brief review of three similar cases adjudicated by the Commissioner in past years is necessary for consideration, in the proper context, of the issues raised herein; in particular, those issues posed by a lack of written salary policies as corollary conditions to the stated terms of a written salary guide.

The case of *Kopera v. West Orange Board of Education*, 1958-59 *S.L.D.* 96, affirmed State Board of Education 98, remanded to Commissioner of Education 60 *N.J. Super.* 288 (*App. Div.* 1960), decided by Commissioner on remand 1960-61 *S.L.D.* 57, affirmed Superior Court, Appellate Division, January 10, 1963, considered the matter of a similar denial of a salary increment. The Superior Court held, in that decision at page 298, that the West Orange Board:

> " *** would still have the right, *even in the absence of a written rule*, to refuse a raise or an increment to a poor teacher. *N.J.S.A.* 18A:13-13.7 recognized that right and regulated its use in connection with employment increments or adjustment increments under *L.* 1954, *c.* 249, as amended by *L.* 1957, c 153 ***." (*Emphasis supplied.*)

The Court also noted on the same page:

> " *** West Orange followed rules which had been followed for years and which were known to all. Therefore, even if the rule were not adopted with sufficient formality it would make no difference, for it would then be, at least, an appropriate administrative mechanism, well know to all, which West Orange has the right to use to separate the able from the sufferable ***."

The remand of this case to the Commissioner was for the purpose of finding the "underlying facts" and making a determination as to whether or not the rating of the teacher was reasonable. The Commissioner found the following pertinent excerpts from the Board's salary guide in effect at the time of that dispute:

> (a) All increases in all guides will be based on meritorious service.
> (b) 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.
> (c) Progress on the guides shall be automatic until the maximum is reached unless the services rendered are evaluated as unsatisfactory under the rules and regulations of the Board of Education.

He also found that the Board had an evaluation scale and procedures adequate to protect a teacher from the "withholding of an increment because of bias, prejudice, favoritism, or discrimination." His final conclusion was that because of these adopted policies and procedures, and various observation reports of administrators, there was a reasonable basis for those who made the evaluation to "justify their conclusions and for the Board of Education to withhold the increase on the basis of the evaluation."

Similarly, in the case of *Goldberg v. Board of Education of West Morris Regional High School*, 1964 *S.L.D.* 89, remanded to the Commissioner by the State Board for a *de novo* proceeding to examine cause, the Commissioner found at p. 93 that:

> " *** the local guide provides that increments may be withheld for unsatisfactory service or any other reason upon recommendation of the Superintendent ***."

He also found that:

> " *** the withholding of petitioner's salary increment for the school year 1963-64 *** was in conformance with terms of respondent's local salary guide for such year ***."

In both of the cases, *supra*, the Boards of Education had stated salary guides with written corollary conditions that tempered the full guide implementation. The Commissioner, in both instances, upheld the right of a board of education to withhold salary increments under such conditions. However, the Court had made it plain in *Kopera*, *supra*, that the local Board of Education had such right to withhold a raise or increment for cause "even *in the absence of a written rule," since the Court did not regard a salary guide as a* contract that conferred contractual rights on teachers, but merely as a declaration of legislative policy subject to abrogation by the Board of Education at any time. See also *Greenway v. Board of Education of Camden*, 1939-49 *S.L.D.* 151, affirmed State Board of Education 155, affirmed 129 *N.J.L.* 461 (*E. & A.* 1943).

However, in 1965 the Legislature enacted *Chapter* 236, *Laws* of 1965, which enabled local school districts "to establish salary policies, including salary schedules, which would give to their professional employees a precise statement of their salary expectation over the succeeding two years and at the same time would make it possible for boards of education to budget meaningfully to implement such schedules." *Ross v. Board of Education of the City of Rahway, Union County*, 1968 *S.L.D.* 26, 28 The Commissioner stated further in *Ross* at p.29:

> " *** the enactment of *Chapter* 236 clearly established the *contractual nature* of salary policies, including salary schedules, adopted by boards under the authority of that chapter ***." (Emphasis ours.)

Since the adoption of *Chapter* 236, the Legislature has also adopted *Chapter* 303, *Laws* of 1968, now enbodied in *N.J.S.A.* 34: 13A-1 *et seq.*, imposing on boards of education and other public employers the obligation to negotiate the "terms and conditions of employment." While there has as yet been no precise definition of that mandate, as regards peripheral meanings of the phrases, there is no argument that a salary schedule for teachers, and the directly associated provisions that affect compensation, are within the purview of the legislation. Presumably, these statutes (*N.J.S.A.* 34:13A-1 *et seq., supra,*) were enacted to reduce the number of disputes between public employees and governing bodies and to insure that machinery is available to process the disputes when they do arise. However, if, following negotiations pursuant to the mandate imposed by *Chapter* 303, the resulting "agreements" are not committed to writing but are left to vague "understandings" or the habits derived from custom, the Commissioner holds that the resultant "agreement" is no agreement at all except in so far as it is precisely stated. In the instant matter the Commissioner believes the Board made a contract with its teaching staff for the 1970-71 school year, and that the terms of this contract are those committed to writing and contained in the terms of the salary guide (P-2). The Commissioner knows of no reason why at the time this contract was negotiated, the Board could not have attached "additional provisions" to it, as it had for the guides adopted for the previous year and in 1955. Having failed to attach such provisions or conditions to the guide, whereby increments are conditional upon recommendations from the Superintendent or from others, the Commissioner holds that the Board and petitioners are bound only by the terms of the guide. Thus, petitioner Van Etten, with a Master's degree, must be moved to step 9 of the guide, and petitioner Struble is entitled to be moved to the step for teachers with a Bachelor's degree and "+20 years" of service. They have met these requirements, the only stated ones that can be found.

For purposes of clarification, it must be stated that *N.J.S.A.* 18A:29-14 has no application to the matter *sub judice*, since the Commissioner has previously found the applicability of this statute to be limited to the stated terms of the minimum salary law found in *N.J.S.A.* 18A:29-6 *et seq.* However, a variation of 18A:29-14 could have been adopted and published by the Board, if it had chosen to do so, as an additional provision of its salary guide for 1970-71. Such provisions may still be adopted in written form for future implementation.

Having found that the Board must be bound by the stated terms of the contract it made, the Commissioner need not consider the questions of due process raised in the pleadings.

Finally, the Commissioner determines for the reasons given, *supra*, that petitioner Van Etten is entitled to a salary of $11,340 for the 1970-71 school year, and that petitioner Struble's salary entitlement for the same year is $11,520. He directs, therefore, that they be compensated retroactively to September 1, 1970, and for the remainder of the 1970-71 school year at these salary levels.

COMMISSIONER OF EDUCATION

March 17, 1971

**Charles Brasher,**

*Petitioner,*

**v.**

**Board of Education of**
**The Township of Bernards, Et Al.,**
**Somerset County,**

*Respondents.*

## COMMISSIONER OF EDUCATION

### Decision

For the Petetioner, Young, Rose & Millspaugh (Gordon A. Millspaugh, Jr., Esq., of Counsel)

For the Respondents, Kearns & Bruder (Anthony P. Kearns, Esq., of Counsel)

Petitioner, a teacher in the Bernards Township School System, alleges improper actions against him by respondent Board of Education (hereinafter "Board"), and requests that he be granted salary increments withheld by the Board, and that he be transferred back to Ridge High School as a teacher.

Testimony was presented before a hearing examiner appointed by the Commissioner on November 19, 24 and December 11, 1970, in the office of the Somerset County Superintendent of Schools.

The report of the hearing examiner is as follows:

Petitioner alleges that his salary increments for the years 1969-70 and 1970-71 have been improperly withheld by the Board of Education. Petitioner

alleges also that he has been removed from the position of English department chairman and transferred from the high school to the junior high school as punitive reprisals for his inability to get along amicably with the school administrators.

Petitioner avers that he is a good teacher and that he had received generally very good to excellent evaluations over a period of several years prior to his removal as the department chairman for the school year 1966-67. Petitioner admits that the good working relationship between himself and his immediate superiors began to break down gradually after January 1965. A subsequent series of letters and replies to the school administrators failed to cause a better understanding between the parties. This friction led to the Board's action, on April 14, 1969, pursuant to the recommendation of the Superintendent of Schools, that denied petitioner his first salary increment for the school year 1969-70. Petitioner further avers that this salary increment was denied without his being notified in any way that such action was being contemplated by the Board.

Petitioner testified that in March 1970, he received a letter from the Superintendent of Schools saying that he would recommend that petitioner's salary increment be withheld for the school year 1970-71, also. As a result of this letter, petitioner filed a grievance with the Board of Education about the events leading to the Superintendent's recommendation, which petitioner attributed to the poor evaluations the Superintendent received from the department chairman and school principal. His grievance was subsequently denied by the Board. Petitioner avers finally that his transfer to the junior high school was made because of the principal's prejudice and that the principal's recommendation leading to his subsequent transfer was, therefore, discriminatory.

The Board does not deny withholding petitioner's salary increments for the school years 1969-70 and 1970-71; nor does it deny transferring petitioner to the junior high school and withdrawing its offer to him as an English Coordinator. The Board alleges that these actions were proper and pursuant to law, and that they were necessary to maintain order in the English department and to demonstrably support the school administration in its efforts to create a cooperative professional working relationship between petitioner and the administrative staff for the benefit of the entire school.

The principal testified that petitioner was aware of the specific concerns of the administrative staff and that petitioner was notified in writing about the areas in which he would have to improve in order to receive better evaluations and recommendations. The principal testified further that the following failures were shortcomings of petitioner:

He signed in and out only occasionally instead of daily as required; he did not supply his teachers adequately; he wrote poor lesson plans; inventory cards due May 12, 1966, were turned in on May 31, 1966; he committed infractions in

missing study hall and cafeteria assignments and seldom attended assembly programs; he created friction between department chairmen; and when his request to be excused from all assembly programs was denied, he replied, "Well there'll be no Diorama." (a literary magazine sponsored by petitioner)

The President of the Board of Education testified that the Board's action to withhold petitioner's salary increment was based on the Superintendent's recommendation which included the following reasons for denial of the increment:

Petitioner wrote no lesson plans; he did not have the daily flag salute; there was a lack of cooperation with the administration; he did not attend faculty meetings; and he showed an inability or unwillingness to follow the approval course of study.

The Board President testified further that the above reasons were a continuation of the same kinds of failings that led to the withholding of petitioner's 1969-70 increment, and that petitioner's inability to correct his failures was the basis for withholding his 1970-71 salary increment. He averred that petitioner was notified by letter, dated July 20, 1970, of the conditions under which his increment could be restored. The letter reads in part as follows:

> "*** We would like to make the same offer this year as last: we are withholding your increment for 1970-71 but will reinstate it upon the recommendation of the Administration that you have shown a genuine willingness to improve both your attitude and performance. The increment is there at the Annin School waiting to be picked up, and I am certain you will find Mr. Wagner as interested as you are in seeing that your work on his staff indicates that degree of professional competence and cooperation which will permit him to recommend to the Superintendent sometime next year that the increment be restored to your salary." (P-11)

In addition, several other witnesses for the Board testified about petitioner's shortcomings and his inability to work in close harmony with the school administration.

The hearing examiner notes that an analysis of the Board's salary guides for the years 1969-70 and 1970-71 shows that each of the guides is nothing more than a guide. No corollary conditions are set down for advancement on the guide; only years of service are necessary to advance from step to step.

* * * *

The Commissioner has read the report of the hearing examiner and finds that petitioner was warned and properly notified by the Superintendent of Schools that a recommendation to the Board to withhold his salary would be made for the school year 1970-71. He determines that petitioner was properly told of his shortcomings and advised that he would have to improve in specific areas in order that he be reconsidered for his proper step on the Board's salary guide.

However, the Commissioner finds no evidence of such warning and notification having been given to petitioner prior to the withholding of his 1969-70 salary increment. Petitioner was not advised during the school year 1968-69 that his salary increment would be withheld unless he improved in certain specified areas. The testimony and evidence show only that petitioner was handed a letter by the President of the Board on April 18, 1969, in which he was notified of the Board's action of withholding his increment for the school year 1969-70. Apparently, the Board reasoned that petitioner should have anticipated its action to withhold his salary increment because of petitioner's strong differences with the school administration and his inability to establish a sound professional working relationship with the administrators.

The board has the authority to withhold a teacher's increment when its salary guide is above that mandated by statute (*N.J.S.A.* 18A:29-6 *et seq.*) and the board has its own rules which regulate the granting and withholding of salary increments. However, the Commissioner notes that respondent Board has not adopted any such rules. The Commissioner held in *Zelda Goldberg v. Board of Education of the West Morris Regional High School District, Morris County*, 1964 *S.L.D.* 89, 93, remanded by the State Board of Education September 8, 1965, that the local board had not violated "the provisions *of its own salary guide*." (*Emphasis supplied.*) Also, in *Goldberg, supra*, the Commissioner said at p. 93:

> "*** This question has come before the Commissioner on previous occasions. In *Kopera, supra*, it was found that increments under West Orange's salary guide were granted automatically unless the services rendered were evaluated as unsatisfactory *under the rules and regulations* of the Board of Education. It remained for the Commissioner, on remand of the case from Superior Court, Appellate Division, to determine whether there was proper basis for the Board's determination that Miss Kopera's services were unsatisfactory. 1960-61 *S.L.D.* 57, affirmed Superior Court, Appellate Division, January 10, 1963. In *Wachter v. Board of Education of Millburn, supra*, at page 148, *the local salary guide provided that increments could be withheld* 'for reasons judged sufficient by the Superintendent and approved by the Board of Education.' The Commissioner determined that the Superintendent had found 'sufficient' reasons, which were approved by the Board. In *Belli v. Board of Education of Clifton*, decided by the Commissioner March 20, 1963, the local salary guide provided that 'in the event *** no action to the contrary is taken by this Board, the annual increments, as the same become due *** will become part of the salary ***.' *No provision was anywhere expressed for the withholding* of increments, and the Commissioner found that petitioner's increment has been improperly withheld ***." (*Emphasis supplied.*)

In *Francis M. Starego v. Stephen J. Malek, Secretary of the Board of Education of the Borough of Sayreville and the Board of Education of the Borough of Sayreville, Middlesex County*, 1964 *S.L.D.*. 100, the Commissioner said:

> "*** In *Goldberg, supra*, the Commissioner further held that when the salaries provided by a local salary guide are higher than those of the State schedule, *the rules of the local board of education* for administering such a guide are controlling ***."

In *J. Michael Fitzpatrick v. Board of Education of Montvale, Bergen County*, decided by the Commissioner on January 24, 1969, the Commissioner said:

> "*** in each of the cases cited the teacher was clearly informed by his superiors of his shortcomings, was given opportunity to present his own point of view, and was notified in advance that a recommendation would be made to withhold salary. In the instant matter petitioner was not so informed and learned of his salary denial and the basis of such refusal only after the action was taken ***."

and also:

> "*** The Commissioner cannot support respondent's action in this case. Even though a board of education has the power to withhold a salary increment, such authority cannot be wielded in a manner which ignores all the basic elements of fair play. Conceding further that a salary increment may be denied for reasons other than unsatisfactory teaching performance, the most elemental requirements of due process demand at least that the employee to be so deprived be put on notice that such a recommendation is to be made to his employer on the basis of the unsatisfactory evaluation and that he be given a reasonable opportunity to speak in his own behalf. This is not to say that deprivation of a salary increase requires service of written charges, entitlement to a full scale plenary hearing or the kind of formal procedures necessary to dismissal of tenured employees. But certainly any employee has a basic right to know if and when his superiors are less than satisfied with his performance and the basis for such judgment. Without such knowledge the employee has no opportunity either to rectify his deficiencies or to convince the superior that his judgment is erroneous ***."

In the case of *Kopera v. West Orange Board of Education*, 1958 *S.L.D.* 96, affirmed State Board of Education 98, remanded to Commissioner of Education 60 *N.J. Super.* 288 (*App. Div.* 1960), decided by the Commissioner on remand 1960-61 *S.L.D.* 57, affirmed Superior Court, Appellate Division, January 10, 1963, and in the case of *Goldberg, supra*, the Boards of Education had stated salary guides with written corollary conditions that tempered the full guide implementation. The Commissioner, in both instances, upheld the right of a board of education to withhold salary increments under such conditions. However, the Court had made it plain in *Kopera, supra*, that the local Board of Education had such right to withhold a raise or increment for cause "*even* in the absence of a written rule," since the Court did not regard a salary guide as a contract that conferred contractual rights on teachers, but merely as a

declaration of legislative policy subject to abrogation by the Board of Education at any time. See also *Greenway v. Board of Education of Camden,* 1939-49 *S.L.D.* 151, affirmed State Board of Education 155, affirmed 129 *N.J.L.* 46 (*Sup. Ct.* 1942), affirmed 129 *N.J.L.* 461 (*E. & A.* 1943).

However, in 1965 the Legislature enacted *Chapter* 236, *Laws* of 1965, which enabled local school districts "to establish salary policies, including salary schedules, which would give to their professional employees a precise statement of their salary expectation over the succeeding two years and at the same time would make it possible for boards of education to budget meaningfully to implement such schedules." *Ross v. Board of Education of the City of Rahway, Union County,* 1968 *S.L.D.* 26, 28 The Commissioner stated further in *Ross* at p. 29:

> "*** the enactment of Chapter 236 clearly established the *contractual nature* of salary policies, including salary schedules, adopted by boards under the authority of that chapter ***." (*Emphasis ours.*)

Since the adoption of *Chapter* 236, the Legislature has also adopted *Chapter* 303, *Laws* of 1968, now embodied in *N.J.S.A.* 34:13A-1 *et seq.*, imposing on boards of education and other public employers the obligation to negotiate the "terms and conditions of employment." While there has as yet been no precise definition of that mandate, as regards peripheral meanings of the phrases, there is no argument that a salary schedule for teachers, and the directly associated provisions that affect compensation, are within the purview of the legislation. Presumably, these statutes (*N.J.S.A.* 34:13A-1 *et seq., supra,*) were enacted to reduce the number of disputes between public employees and governing bodies and to insure that machinery is available to process the disputes when they do arise. However, if following negotiations pursuant to the mandate imposed by *Chapter* 303, the resulting "agreements" are not committed to writing but are left to vague "understandings" or the habits derived from custom, the Commissioner holds that the resultant "agreement" is no agreement at all except insofar as it is precisely stated. In the instant matter the Commissioner believes the Board made a contract with its teaching staff for the 1970-71 school year, and that the terms of this contract are those committed to writing and contained in the terms of the salary guide (P-2). The Commissioner knows of no reason why at the time this contract was negotiated, the Board could not have attached "additional provisions" to it. Having failed to attach such provisions or conditions to the guide, whereby increments are conditional upon recommendation from the Superintendent or from others, the Commissioner holds that the Board and petitioner are bound only by the terms of the guide. Petitioner has met these requirements, the only stated ones that can be found.

For purposes of clarification, it must be stated that *N.J.S.A.* 18A:29-14 has no application to the matter *sub judice,* since the Commissioner has previously found the applicability of this statute to be limited to the stated terms of the minimum salary law found in *N.J.S.A.* 18A:29-6 *et seq.* However, a

variation of 18A:29-14 could have been adopted and published by the Board, if it had chosen to do so, as an additional provision of its salary guide for 1970-71. Such provisions may still be adopted in written form for future implementation.

The Commissioner notes that the Bernards Township Board of Education has adopted no rules governing the withholding of increments for *any* reason. The procedural validity of its action in the instant matter is, therefore, in error. Although proceeding properly in 1970-71, respondent is without authority to withhold an increment without first establishing its own rules for doing so. It is now well established that a Board must have its own rules relative to the withholding of increments if that action is to be taken against any of its teachers. The Commissioner determines, therefore, that petitioner's salary increments for the school years 1969-70 and 1970-71 were improperly withheld by the Board of Education, and the matter is *res judicata. Fitzpatrick v. Montvale, supra; Doris Van Etten and Elizabeth Struble v. the Board of Education of the Township of Frankford, Sussex County*, decided by the Commissioner March 17, 1971

With respect to petitioner's request to be transferred back to Ridge High School, the Commissioner is constrained to say that the decision lies wholly within the power of the Board of Education. Pursuant to the statutes the local Board has the authority to make rules for the:

> "*** management of the public schools *** and for the employment, regulation of conduct and discharge of its employees ***." *N.J.S.A.* 18A:11-1c

and to:

> "*** make rules, not inconsistent with the provisions of this title, governing *** employment, promotion and dismissal *** and the employment of any person in any such capacity and his rights and duties with respect to such employment shall be dependent upon and governed by the rules in force with reference thereto." *N.J.S.A.* 18A:27-4

The Commissioner directs, therefore, that the Township of Bernards Board of Education restore Charles Brasher to his proper step on the salary guide and directs further that he be paid the increments that he was improperly denied for the school years 1969-70 and 1970-71.

COMMISSIONER OF EDUCATION

March 19, 1971

**Joseph F. Shanahan,**

*Petitioner,*

**v.**

**Norman A. Gathany,**

*Respondent.*

## COMMISSIONER OF EDUCATION

### Decision

For the Petitioner, Joseph F. Shanahan, *Pro Se*

Petitioner alleges that on January 4, 1971, he was denied an opportunity to view the poll lists, resulting from the 1970 school election for members of the South Hunterdon Regional High School District, by the Hunterdon County Superintendent of Schools. He requests the Commissioner to overrule the County Superintendent's action. There is no denial of the allegation by the County Superintendent. The fact of the charge is thus assumed, and the question may thus be posed; namely, does a citizen upon request, and in the absence of an allegation of an irregularity which might cause the results of a school election to be vitiated, have an inherent right to inspect the poll list?

The Commissioner, on his own motion, determines that since there are no facts in contention in this matter, it will be decided on the pleadings by summary judgment.

The Commissioner must rest his decision on the clearly-stated provisions of the statutes found in *N.J.S.A.* 18A:14-61 and 62. These statutes make it incumbent on the election officials to place

> "The tally sheets, poll list and ballots *** in a *sealed package* ***." (*Emphasis supplied.*)

which shall then be delivered

> "*** immediately to the secretary of the board of education of the district ***." (*N.J.S.A.* 18A:14-61)

The secretary of the board of education then is instructed to forward (*N.J.S.A.* 18A:14-62)

> "*** a sealed package containing a statement of the canvass of the votes in the school district, the ballots *** the *poll lists* *** to the county superintendent who *shall preserve them for one year.*" (*Emphasis supplied.*)

The law is thus plain that it is the duty of the County Superintendent to "*preserve*" such records in the sealed condition in which he found them unless

an allegation of irregularity is made that is of such magnitude as to trigger an inquiry into the announced results of such election. In this event, the Commissioner has the clear authority to order that the seal be broken and that the contents of the package be examined.

In the instant matter there is no allegation of irregularity. Even if there were, at this late date, there would be no reason for the Commissioner to intervene since more than a year has passed, since any alleged irregularity would suffer by *laches* and since a finding would be moot.

Since, therefore, the facts in this petition are not denied, since there is no authority for the County Superintendent of Schools or for the Commissioner to order a sealed package preserving election materials to be broken without just probable cause, since no such cause has been shown in this case and since, even if just probable cause existed, the request is barred by *laches* and is untimely, the relief requested may not be granted.

Accordingly, the petition is dismissed.

Affirmed by State Board of Education, June 30, 1971

COMMISSIONER OF EDUCATION

March 19, 1971

**Custodians–Maintenance–Matrons Service Association,**

*Petitioner,*

**v.**

**Bridgewater-Raritan Regional Board of Education, Somerset County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**Decision**

For the Petitioner, John T. Lynch, Esq.

For the Respondent, Blumberg, Rosenberg, Mullen & Blackman (William B. Rosenberg, Esq., of Counsel)

Petitioner, an association which serves as the majority representative for a collective bargaining unit under *Chapter* 303, *Laws* of 1968, maintains that the employments of its members are in fact permanent employments and not employments for fixed terms. Therefore, petitioner prays that the Commissioner

enter an order that the members of its unit are entitled to tenure and all of the benefits thereof. Respondent Board of Education, hereinafter "Board," denies tenure rights have accrued to any member of petitioner's unit since all members are employed by fixed-term contracts.

A hearing in this matter was conducted by a hearing examiner appointed by the Commissioner on March 2, 1971, at the office of the Somerset County Superintendent of Schools in Somerville. A total of six exhibits was received in evidence. At the conclusion of the hearing, there were oral summations by counsel. The report of the hearing examiner follows:

There are no disagreements with regard to some of the basic facts pertinent to an understanding of the issues in this dispute.

The Board has for many years employed members of its custodial and maintenance staff by contracts that provide, *inter alia*, a stated amount of salary as remuneration for work to be performed within a 12-months' period. Each of the contracts contains a date for the beginning of employment, a date to which the employment extends and a clause which provides that the contract may be terminated at any time "by either party giving to the other 30 days' notice." (R-2) Some members of the custodial force have received such contracts each year for many years - in one instance, at least, for more than 20 years - and have signed them and routinely returned them to respondent.

In the year 1969, the Association and the Board concluded an agreement (P-1) which was to continue in effect until June 30, 1970, at which time it will expire, except for the salary program (Schedule A) which will remain in effect for the period of two years as stated in the schedule. In June of 1970, a successor agreement (R-3) was signed which also was to continue for one year and also contained the salary scale with the corollary conditions that embraced a two-years' period. This latter agreement also contained, on page 4 of the attached Schedule A, the following sentence:

> "Other conditions of employment will be enumerated in the proposed handbook for non-instructional personnel."

This handbook (R-4) states on page 7:

> "Applicants for employment on the custodial-maintenance staff may be hired as
> 1. Regular full time employees on a twelve month basis 2.
> 2. Part-time hourly employees."

Again, at page 11, it is stated:

> "Employee contracts are offered on a 12 month basis. A 12 month contract begins on July 1 and ends on June 30 of the following year."

A sentence that follows indicates that the Board planned to renew contracts, if possible, prior to the Easter recess unless "a thirty day notification, in writing, is given to the employee."

It is petitioner's contention, however, that while these contracts were renewed yearly, such renewal was a *pro forma* action and that in fact the Board has viewed its employees in the custodial and maintenance service as permanent employees. Since this is so, in petitioner's view, and since many of the enrollments given to petitioner offer benefits for periods longer than those provided by the stated terms of the annual contract, petitioner avers that tenure rights have in fact accrued. However, petitioner further maintains that the statute, *N.J.S.A.* 18A:17-3, was not meant to deny tenure rights to janitorial employees employed for many successive years but only to those employed for "fixed terms" in limited short-term assignments.

The Board denies an intention to employ any of its custodial force for assignment in other than fixed-term positions. It maintains that the stated contract terms and the signatures affixed thereto are sufficient proof that all employments of its custodial and maintenance employees were for fixed terms and thus that there is no accrual of tenure rights. Further, the Board opines that the statutory provisions pertinent to this matter are clear and unequivocal and that any change in these provisions may come only through legislative action. The Board denies that the interpretive relief requested by petitioner can be a substitute for such legislative action.

At the hearing of March 2, 1971, members of petitioner's unit testified that, until recently, they had not understood that the signing of the yearly contract constituted, at least in respondent's view, a waiver of tenure rights. Instead, they indicated that they were led to believe, either by oral promises at the time of hiring or through the medium of newspaper advertisements, (P-2) that they were employed on a "permanent" basis. It was evidently not until June 1969, at a time when negotiations for a new contract were still in progress, that they became cognizant for the first time that they were not considered by respondent to be tenure employees and could, in fact, be subject to summary dismissal if they did not sign new contracts prior to the July 1 deadline date. Petitioner avers that this non-tenure status assigned to all men of the unit precludes the possibility of fair and open bargaining and is unjust and illegal since the men were not told and did not know that a signature on the contract each year constitutes the abandonment of a right. In this regard petitioner cites *State v. Freeholders, Hudson County*, 61 *N.J.L. 117 (1897); Williams v. West Orange*, 1938 *S.L.D.* 714, 717.

The issues that emerge from the pleadings and the contentions of the parties at the hearing were summarized at the conference of counsel held prior to the hearing. They are stated as follows:

1. Is the Board, by its employment practices, illegally denying tenure rights which ought to accrue to members of its custodial staff?

2. Is there an inconsistency between an employment that is in fact permanent and a non-tenure status grounded on the so-called janitors' tenure law?

3. Did the oral promises or newspaper advertisements of regular or permanent employment modify the stated terms of the contract?

4. Is there a remedy that the Commissioner can give in this instance?

The hearing examiner opines that while it may be true that all custodial and maintenance employees regarded their employment as permanent prior to the negotiations of 1969, they knew, or ought to have known, that each contract they signed was a contract of employment for a stated term. Their signatures to each of the documents attest to that fact, and the fact was reiterated by the Board in its handbook for 1970-71. (R-4) There was no conclusive evidence that anyone from petitioner's unit was ever hired in any other way.

* * * *

The Commissioner has reviewed the report of the hearing examiner and concludes that the issues raised herein have been rendered *res judicata* in New Jersey by a long succession of court decisions and decisions by the Commissioner. The most complete index of these decisions is found in *Frederick Olley v. Board of Education of Southern Regional High School, Ocean County*, 1968 *S.L.D.* 20, 22. In the list of citations in that case are found court decisions dating back to the early years of this century, and beyond; namely, *Horan v. Orange Board of Education*, 58 *N.J.L.* 533 (*Sup. Ct.* 1895); *Hardy v. City of Orange*, 61 *N.J.L.* 620 (*E. & A.* 1998); *Shepherd v. Seaside Heights Board of Education*, 1938 *S.L.D.* 737, affirmed State Board of Education 739, affirmed 119 *N.J.L.* 413 (*Sup. Ct.* 1937). In all of these cases there was a finding that with respect to the employment of janitorial personnel, no rights to employment survived the expiration of the period agreed upon.

In *Horan*, *supra*, the Court said at page 535:

"***His contract being for a definite time, his right to occupy the position of janitor ceased when the time fixed by the contract expired, and the positions became vacant ***."

This finding of the Court in *Horan* was cited in the *Shepherd* decision, *supra*, and was substantially incorporated as a part of the janitorial tenure law revision of 1960 contained in *N.J.S.A.* 18A:17-3, which provides that:

"Every public school janitor of a school district shall, *unless he is appointed for a fixed term*, hold his office, position or employment under tenure during good behavior and efficiency ***." (*Emphasis supplied.*)

In the instant matter there is no contention that petitioners did not in fact execute a "fixed-term contract" for each of the years. Since they did, and since the right to issue the contracts for fixed terms is an option given by the clearly-stated permissive clause of this law, the Commissioner holds that tenure rights could not accrue to petitioners. The Board simply exercised a prerogative given to it in this instance, and any arguments that it should not have the option or that the statute, 18A:17-3 *supra*, should be interpreted in a manner contrary to its clearly-stated terms, are arguments that call for legislative redress and not for administrative interpretation by the Commissioner.

In referring to previous decisions of the courts and the Commissioner concerned with janitorial tenure, the Commissioner held in *Olley*, *supra*, at p. 22 that:

> "*** Without exception, the decisions hold that tenure for janitors, unlike professional employees, is a matter of personal privilege which may be waived by the acceptance of employment for a definite term. Janitors may be employed without term in which case they may not be dismissed without a showing of good cause. *If, however, as here, a janitor is appointed for a specific term,* and he accepts the employment on that basis *no rights survive the expiration of the period agreed upon* ***. *(Emphasis supplied.)*

It is clear, in the instant matter, that petitioner, corporately and individually, accepted employment for specific terms, and it is, therefore, an exercise in futility to argue that they were not cognizant of the ramification of their actions or that the bargaining process is made more difficult as a result. The fact of the acceptance is sufficient. The acceptance was for term employment. Statutory tenure does not accrue to the credit of those who accept such employment.

Accordingly, the petition is dismissed.

Affirmed by State Board of Education, September 8, 1971

COMMISSIONER OF EDUCATION

April 1, 1971

**Patricia Meyer,**

*Petitioner,*

**v.**

**Board of Education of the Borough of Sayreville, Middlesex County,**

*Respondent.*

## COMMISSIONER OF EDUCATION

### Decision on Remand

For the Petitioner, Sauer, Boyle & Dwyer (George W. Canellis, Esq., of Counsel)

For the Respondent, Hayden & Gillen (Eugene F. Hayden, Esq., of Counsel)

Petitioner, a teacher employed by respondent Board of Education for three academic years, was not offered a fourth contract. The Commissioner of Education's decision of July 16, 1970, based on the pleadings and briefs of counsel, determined that the non-renewal of petitioner's contract was not an unlawful act by the Board of Education and that that Board's failure to comply with certain provisions of its contract with the teachers' organization did not establish a right to reemployment. The Commissioner further determined that petitioner's allegation that the Board refused to renew her contract solely because of her union activities was not supported in fact. Thereupon, the petition was dismissed.

Petitioner appealed from the Commissioner's decision to the State Board of Education; whereupon, the matter was remanded on December 2, 1970:

> "*** to the Commissioner for a hearing at which the parties should introduce full proofs through testimonial and documentary evidence. Certain matters, however, have been agreed upon by the parties and are already settled. These are:
>
> (a) The existance and validity of the agreement between the Board and the Association, and petitioner's status as a beneficiary of that agreement;
>
> (b) That petitioner, throughout her service as an employee of the Board, received 'consistently good reviews with respect to her classroom and related duties; and
>
> (c) That the Board gave no notice of intention not to rehire petitioner until March 28, 1969.

"The stage will thus be set for a factual inquiry into the nature and extent of petitioner's union activity and its effect on the Board's decision to refuse her reemployment."

A hearing was conducted, in accordance with the directions of the State Board of Education, in the Middlesex County Freeholders' Meeting Room, New Brunswick, on January 26, 27, 28, 1971 and in the State Department of Education Building on February 12, 1971, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

Petitioner readily admits her complete involvement with the teachers' union and avers that she actively helped organize the union to attract greater membership so it could be an effective organization in bringing about some of the changes she felt were necessary to create better working conditions for all teachers. She avers further that the school administration was very much aware of her activities and that they made punitive reprisals against her and some of the other teachers because of their involvement with the union. She alleges that one such reprisal was a late-to-work note given to her by the high school principal for the purpose of establishing a record to be used against her. She avers that another reprisal was the assignment of another union teacher to five geometry classes and alleges that such a teaching assignment would be intellectually very boring.

The Superintendent of Schools testified that petitioner was a good teacher and that he was aware of her active membership in the teachers union at the time *Chapter 303, Laws* of 1968, came into existence. He testified further that the Board favored the Sayreville Education Association as the teachers' representative organization and did not wish to have a teachers'union established in the district. However, he avers that his decision not to recommend petitioner for reemployment was based on her record of excessive absences from school and her tardiness in arriving at school which he discussed with the high school principal. The following record of the pattern of petitioner's absences during the three years of her employment by the Board was established: (P-5)

| **Absences for:** | **1966-67** | **1967-68** | **1968-69** |
|---|---|---|---|
| *Illness* | *17* | *15* | *16* |
| *Personal* | *3* | *3* | *3* |
| *Death in family* | | | *3* |
| *Total 20* | *18* | *22* | |

The Superintendent testified that petitioner was absent an additional day in March 1969, after the record above was completed. He further testified that the personnel report by the high school principal dated January 18, 1968, was considered also as one of the bases for his recommendation that petitioner's contract not be renewed. That personnel report (R-1) reads in pertinent part as follows:

"* Mrs. Meyer, during her year and a half in the school, has an extremely poor attendance record, one poor enough that it warrants special attention, I feel, by the superintendent.

"** Mrs. Meyer has been recommended for transfer to the Junior High School because of her own choice of not wanting to work in the higher maths. She has, consequently, showed dissatisfaction with some of the routines in the High School, so much so that she has fermented an air of dissatisfaction among other members of the faculty. Her loyalty and judgment can be questioned since this is her second year of employment and she made the deliberate choice of returning to this school, knowing what the work assignments were.

"Her major complaint centers around a corridor supervision assignment even though the time spent doing this can be devoted to planning on the part of the teacher. She also informed me that she did not like having an afternoon free period since she likes to eat a second breakfast in the morning. I fail to see that this is a justified or warranted complaint."

The Superintendent avers, therefore, that his decision not to recommend the reemployment of petitioner was based on the personnel report, discussions with the high school principal and petitioner's poor record of attendance.

The testimony of several members of the Board of Education was in part conflicting, and they denied knowing about petitioner's union involvement prior to their decision not to reemploy her. However, the Board witnesses testified that their decision was based on the recommendation of the Superintendent of Schools and not because petitioner was a member of the teachers union. One member testified that he had been a Board member for only two months when the Superintendent's recommendation was made. That Board member averred that he voted not to reemploy petitioner because of her excessive absences which seemed to set a pattern of absences on Mondays and Fridays and long weekends for petitioner.

The high school principal testified that she was concerned about petitioner's absences and so noted that concern in her personnel report of January 18, 1968. She avers that petitioner was often late to school with respect to the time teachers were supposed to report. However, petitioner counters that although she may have been infrequently late to school in terms of reporting time, she was late in arriving for her first class only once so that her class had to be covered by another teacher. The recommendation regarding petitioner to the Superintendent of Schools was made, the principal avers, on the basis of the total performance record of petitioner including teaching performance, absences, tardiness, cooperativeness, attitude and fulfillment of extra-class assignments, such as lunchroom and hall duty.

The principal testified, finally, that late notes were given to other teachers even before the initial employment of petitioner and have been used since

petitioner left the school. Such a note, she said, is used as an established procedure and not as a discriminatory practice. Assignment of five geometry classes to a "union teacher" was made, the principal said, because of the great number of geometry classes to be assigned and because the limited offerings of other higher mathematics in the high school would not permit another more varied assignment.

Although the weight of credible evidence does not rule out the possibility that individual Board members were aware of petitioner's union activity, petitioner's allegations have not been proven that this knowledge was the rationale for their action. The testimony of the Superintendent of Schools was uncontroverted, as was the testimony of the high school principal. Nor was there any contradiction of the validity of the record of petitioner's absences. Her defense for her 60 days' absences was that they were within the scope of the policy on absence permitted by the Board, and the Board did not question the legitimacy of her absences. It was established that petitioner received a reduced salary after her absences because of illnesses, exceeded the 10 days allowed by the Board each year.

* * * *

The Commissioner has read the report of the hearing examiner and agrees with his findings and recommendations.

The narrow issue before the Commissioner, on remand from the State Board of Education, is whether or not the refusal of respondent Board of Education to rehire petitioner was based on her active involvement in a teachers' union in the Sayreville School District.

The facts of petitioner's involvement in organizing and attempting to gain the Board's recognition of a teachers' union are not in dispute. The burden, therefore, was on petitioner to prove the allegation that her union activities were the sole reason for her not being rehired. Petitioner has failed to establish any factual basis on which to base such a claim.

Each of the Board's witnesses testified that the reason petitioner was not rehired was the lack of such a recommendation by the Superintendent of Schools. The Superintendent testified his recommendation not to reemploy petitioner was based on petitioner's absence record and the report of the high school principal, both of which were particularly revealing about petitioner's shortcomings as a *probationary teacher.* The Superintendent of Schools testified further that he first became aware of petitioner's involvement with a union at the time *P.L.* 303 was enacted into law. The Commissioner notes that *P.L.* 303 was enacted on September 16, 1968, and effective from July 1, 1968. These dates are important. The principal's personnel report was a significant document used by the Superintendent in not recommending that petitioner be rehired.

That report was completed on January 18, 1968 – almost *six months* prior to the passing of the law permitting teachers to negotiate contracts through bargaining units and *nine months* prior to the opening of school in September 1968.

The Commissioner finds and determines that the Board of Education fulfilled its obligations under the terms of their 1969-70 contract; he further finds and determines that petitioner has no further claim or right to demand rehiring by the Board, for the reasons set forth in the Commissioner's decision of July 16, 1970. Absent a finding, therefore, that petitioner was not rehired because of her union activities, the Commissioner's decision on remand of the matter from the State Board of Education is dispositive of the final issue in contention.

The petition is dismissed.

COMMISSIONER OF EDUCATION

April 7, 1971

Pending before State Board of Education

**John N. Harvey,**

*Petitioner,*

**v.**

**Board of Education of the Township of Brick and Ross W. Smith, Ocean County,**

*Respondents.*

**COMMISSIONER OF EDUCATION**

**Decision on Motion for Summary Judgment**

For the Petitioner, Joseph N. Dempsey, Esq.

For the Respondent, Ross W. Smith, Harold Feinberg, Esq.

For Respondent Brick Township Board of Education, Anton and Ward, (Donald Ward, Esq., of Counsel)

Petitioner avers that Ross W. Smith, an incumbent member of the Brick Township, Ocean County, Board of Education is disqualified as a *de jure* and *de facto* member of such Board by virtue of two alleged conflicts of interest and that funds appropriated by the Board for counsel fees for respondent Smith

were illegal appropriations. His prayer is that the Commissioner so declare. Respondent Smith denies that any conflict of interest exists. Respondent Brick Township Board, hereinafter "Board," declares that its expenditure of funds for legal fees, while seeking a declaratory judgment, was right and proper and pursuant to law.

Petitioner has moved for summary judgment based on the pleadings and buttressed by a Memorandum of Law. Counsel for respondents Smith and the Board have filed answering briefs. Oral argument on the Motion was heard on February 3, 1971, at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

I

Ross W. Smith, at the time of his election to the Board of Education in Brick Township, was employed by the State Department of Education, Trenton. He is still so employed. Petitioner alleges that this employment is such that respondent Smith is in a position to give counsel and assistance to the Commissioner and members of the Department under such circumstances as would give the public the appearance of conflict of interest, prejudice and bias on the part of the whole Department. Specifically, it is alleged that, in his official capacity as an accountant, respondent Smith is required to sit in judgment on the records of the Board of Education on which he serves. Petitioner avers that the offices are thus incompatible and that respondent Smith cannot retain both his membership on the Board, and his employment at the same time and that he ought to be barred from acting on any of the matters coming before the Board lest all actions be rendered *ultra vires.*

Respondent Smith maintains that his elective office and his salaried position are not in conflict and that there is no incompatibility in this regard. He opines that, absent a legislative prohibition, he has a constitutional right to run for elective office in a Type II school district. He avers that the duties and obligations carried on and exercised by him may be performed and fulfilled without any laxity in duty or disloyalty to the public he serves.

II

Petitioner also charges that, at the time of his election to the Board, respondent Smith was a stockholder and member of the Board of Directors of the Pineland State Bank which serves as the depository for the Board's funds and that, therefore, he had a direct and conflicting interest in the Bank's affairs. Petitioner classifies this relationship between the Bank and the Board as contractual and says respondent Smith is, therefore, in contravention of *N.J.S.A.* 18A:12-2, which provides that:

> "No member of any board of education shall be interested directly or indirectly, in any contract with or claim against the board."

Petitioner does not charge lack of integrity as a corollary to this charge, but maintains that the criterion is that the contravention of public policy in a given case is not the lack of integrity but the inherent capacity of the questioned arrangement to tempt toward improper conduct. *Economy Ent., Inc. v. Twp. Committee of Manalapan Twp.*, 104 *N.J. Super.* 373, 391 (*App. Div.* 1969)

Respondent Smith avers that he has not been an officer of the Bank since his election to the Board. He also states that he has never been a major stockholder of the Bank since his total stock holdings were less than 2 per cent of the total issued stock. He denies that the relationship that exists between himself, as a minority Bank stockholder, and the Board of Education, as a depositor in the Bank, is contractual in nature, but avers rather that the contract of the Board is with a corporate entity. Respondent Smith maintains that his holding of stock in the Bank is too remote to constitute a disqualifying interest.

III

The previous two recitals of alleged conflicts of interest comprise the first count of petitioner's complaint. The second count is that respondent Board voted illegally to pay for respondent Smith's legal fees, which he had incurred as the interested party in litigation commenced by the Board to determine the issues raised previously by the first count of this petition. Petitioner maintains that the Board could not properly compensate respondent Smith for such fees since litigation was not instituted against him by a third party for conduct while a member of the Board, but by the Board itself.

Specifically, when it was faced with charges that one of its members had conflicting interests that might render its own actions illegal, the Board sought a declaratory judgment in New Jersey Superior Court to ascertain whether or not they were of sufficient import to bar respondent Smith from his seat on the Board. In the Board's reasoning, there is discretionary power to pay such fees for separate counsel acting in respondent Smith's behalf, since he otherwise possessed all of the requirements for membership (*N.J.S.A.* 18A:12-3), had been duly elected by his constitutents, and was never charged with malfeasance in office or with any other impropriety. The Board bases the propriety of its payment of counsel fees for respondent Smith in the wording of *N.J.S.A.* 18A:12-20, which states:

> "Whenever a civil or a criminal action has been brought against any person for any act or omission arising out of and in the course of the performance of his duties as a member of a board of education *** the cost of defending such action, including reasonable counsel fees and expenses *** shall be borne by the board of education."

However, the petition by respondent Board for a declaratory judgment was not pressed, and the Court eventually dismissed the matter without an opinion.

In summation of this charge, it is the Board's view that since respondent Smith was already qualified as a board member in terms of *N.J.S.A.* 18A:12-3,

and since the legality of all of his acts was in question, there was a clear right of the Board to pay separate counsel fees so that he might properly defend himself without the imposition of financial burden. Additionally, the Board avers that the Motion for Summary Judgment should be denied and that this matter should proceed to plenary hearing to determine in fact whether or not there is a conflict of interest or interests and whether or not its payment for counsel fees for respondent Smith was right and proper.

* * * *

The Commissioner has reviewed the report of the hearing examiner and the pleadings in the matter *sub judice.* With respect to the first count of the petition – that respondent Smith has conflicting interests that bar his continued membership on the Board of Education – the Commissioner opines that even though he were to find at the conclusion of a hearing on the merits of the charges that such alleged conflicts were of such magnitude as to constitute reason why the office of member of the Brick Township Board of Education should be vacated by respondent Smith, the findings of the Commissioner would be only advisory in nature. Such a finding would be an exercise in futility since the removal of respondent Smith from his elected office could only be accomplished through court action following a *quo warranto* proceeding. *Koven v. Stanley*, 84 *N.J.L.* 446; *Swede v. Clifton*, 22 *N.J.* 303

The education statutes do contain in *N.J.S.A.* 18A:12-3 two ways in which a seat on the board of education may be declared vacant. This statute provides:

> "Whenever a member of a board of education shall cease to be a bona fide resident of the district, or of any constituent district of a consolidated or regional district which he represents, his membership in the board shall immediately cease and any member who fails to attend three consecutive meetings of the board without good cause may be removed by it. (*Emphasis supplied.*)

In the instant matter there is no question of *bona fide* residence or of regular attendance. If there were and if the local Board of Education had taken action to remove respondent Smith under the terms of this statute, the Commissioner would be involved in an appellate review capacity. He could then assume jurisdiction upon the filing of an appeal pursuant to the authority granted to him by *N.J.S.A.* 18A:6-9 to "hear and determine *** all controversies and disputes arising under the school laws ***." In such a mandate, in that context, there is an avenue for a conclusive determination. In the instant matter there is only the possibility of an inconclusive advisory opinion since the power to remove a board of education member under these circumstances is granted neither to the Board or to the Commissioner, but is reserved for our highest tribunals - the courts.

If it were otherwise, and members of local boards of education were subject to removal from office in ways other than by the clear words of a statute or by court action, the right of suffrage, and the mandate of the people emerging from the exercise of the right, might be too easily abridged. In this matter, *sub judice*, the voters of Brick Township elected respondent Smith to serve on respondent Board of Education. He possesses all of the statutory qualifications. Since this is so, the Commissioner is of the view that his removal may only be secured by appeal through a court of competent jurisdiction. *Sharrock v. Keansburg*, 15 *N.J. Super.* 11

The Commissioner observes that the Legislature could, in its wisdom, define in precise form the guidelines that should govern the conduct of all civil service workers and members of government at all levels. However, there has been little legislative action in this regard, and none with regard to the specific conflicts alleged herein. Instead, the Legislature has preferred to rely on judicial guidelines and the so-called "common law" generally said to be applicable in such matters. This law recognizes prohibitions against "biased decision makers," and at the same time holds that all public service should be free of even the taint of double standards. However, there is little guidance from the "common law" to be found for adjudication in peripheral areas. *Pressey v. Hillsborough Township*, 37 *N.J. Super.* 486; *Zell v. Borough of Roseland*, 42 *N.J. Super.* 75; *Aldorn v. Roseland*, 42 *N.J. Super.* 502 As applicable to school board members, the common law requires exclusive loyalty to the public and no mingling of the exercises of self-interest with the duties of the board.

However, in the absence of more precise legislative guidelines and because, as noted, the courts have traditionally been the arbiters of such disputes, the Commissioner leaves to the courts a determination of the allegations contained in Count I of this petition. It is observed that petitioner cites the case of *Russell v. Bendixen*, decided by the Commissioner January 12, 1970, in advancing the argument that the Commissioner has taken jurisdiction in the past over issues such as those contained herein. The argument is not without merit in the absence of knowledge of the circumstances of that decision. However, it is stated here for the record that that decision ensued at the request of the parties following a common agreement that no conflict existed. It is not a substantial base on which to rest a consideration of the issues raised herein.

With respect to the second count of this petition, the Commissioner does have jurisdiction, since the action is one taken by a local board of education in a way it understood was pursuant to law. The charge is not that the Board authorized its counsel to seek a declaratory judgment and agreed to defray the costs thereof, but that as a result of the initiation of this action, respondent Smith employed counsel to defend his interests and was at a later date reimbursed by the Board.

The Commissioner notes that there is no allegation contained herein that respondent Smith was not performing in good faith a duty of his office or position in furtherance of the work of the Board. It must be assumed, therefore,

that he was. In this context, the issue is stated: Was respondent Smith entitled to reimbursement of counsel fees paid for legal assistance when respondent Board sought a declaratory judgment as to his status on the Board and of the legality of its own acts.

The Commissioner holds that he was so entitled for the reasons expressed in *Famette v. Board of Education of the Borough of Wood-Ridge, Bergen County*, 1964 *S.L.D.* 42. At page 44 of that decision, the Commissioner quoted from Houston v. Board of Education of North Haledon, *1959-60* S.L.D. 73, affirmed 1960-61 *S.L.D.* 232, to arrive at a determination of whether or not a "board of education has implied power to use school funds to defray the legal expenses of one of its members for defense of a suit arising out of the member's performance of his duties." The Commissioner quoted the affirmance of the State Board:

> " *** In resolving the question here presented we should keep in mind the principles of public policy by which we should be guided. First, we should be alert to avoid improper use of public funds. Second, public money should not be expended for such retention of attorneys if indeed the acts upon which the suit is based were not related to official duties of the defendant. Third, the principles to be adopted should not serve to discourage interested citizens from assuming the burdens of such public service which they render in serving on or for, Boards of Education." (at p. 233)

In the instant matter, respondent Smith was duly elected to the Board, was sworn into office without challenge and is performing the duties of his office in a presumably satisfactory manner. Under these circumstances, it cannot reasonably be held, in the Commissioner's judgment, that respondent Smith should be denied the use of public funds for legal counsel, when, as the result of allegations made against him, respondent Board sought a declaratory judgment as to the status of respondent Smith so that its own acts might be assured of legal propriety. These were only allegations. When the Board took action on such charges, it had no right to leave respondent Smith without the counsel fees to defend his right to serve. Such a course would have acted as a "discouragement" of "interested citizens from assuming such public service," as referred to, *supra*, without remuneration and oftentimes at the cost of great personal expenditure of time and money.

The law is clear that such costs may be reimbursed, if incurred, and the Commissioner holds that the fact that the Board itself initiated the action for declaratory judgment, instead of a third party, in no way deprives respondent Smith of the right to counsel fees. The effect of the action on his right to serve was the same in either event. The law, *N.J.S.A.* 18A:12-20, provides:

> "Whenever a civil or criminal action has been brought against any person for any act or omission arising out of and in the course of the performance of his duties as a member of a board of education, and in the case of a

criminal action such action results in final disposition in favor of such person, the *cost of defending such* action, *including reasonable counsel fees* and expenses, together with costs of appeal, if any, *shall be borne by the board of education.*" (*Emphasis supplied.*)

In the matter herein, respondent Smith had not been found guilty of a conflict of interest. Until such time as he is, if ever, he has a right to represent his constituents. If, however, respondent Board initiates actions which reflect on these rights, the Commissioner holds that the counsel fees are reimbursable by the Board, since the action, while not "brought against" the person directly, is brought in a manner that may be considered to be brought against his interests by indirection. In any event, the interpretation of this statute, particularly the words "brought against," must be viewed within the principles of public policy referred to in *Famette v. Wood-Ridge*, *supra*, and particularly the third policy; namely, the "principles to be adopted should not serve to discourage interested citizens from assuming the burdens of such public service which they render in serving on, or for, Boards of Education."

In summation, with respect to the first count of this petition – that respondent Smith is in conflict of interest which should cause him to be removed from his position as a member of respondent Board of Education – the Commissioner declines jurisdiction on the grounds that there is no remedy that the Commissioner can afford even if the charge were to be proven true in fact. With respect to the second count of the petition, the Commissioner finds and determines that respondent Smith was entitled to attorney fees so that he might properly state his case on his own behalf, and without financial encumberance, when a request for declaratory judgment was entered on the docket of New Jersey Superior Court by respondent Board.

Accordingly, as to the allegations contained in count number one, the petition herein is dismissed without prejudice. The second count of this petition is dismissed.

COMMISSIONER OF EDUCATION

April 15, 1971

**Aetna Supply, Inc.,**

*Petitioner,*

**v.**

**Board of Education**
**of the City of Camden, Camden County**

*Respondent.*

## COMMISSIONER OF EDUCATION

### Decision

For the Petitioner, Kline and Kline (E. Barry Kline, Esq., of Counsel)

For the Respondent, Leonard Spector, Esq.

Petitioner, a New Jersey corporation (hereinafter "Aetna"), alleges that respondent Board of Education (hereinafter "Board") improperly awarded a contract for roofing repairs for three school buildings on the basis that two lower bidders did not present the affidavit of prequalification required by *N.J.S.A.* 18A:18-14 in a separate envelope as required by the Board. Petitioner prays that the Commissioner of Education grant relief either by setting aside the lower bids and awarding it the contract, or by ordering the Board to rebid this roofing repair project.

The Board answers that the award of the contract for roofing work for the three school sites was made in compliance with the law in that (1) the low bidder did have a prequalification affidavit from the New Jersey Department of Education which was submitted with his bid, and (2) the fact that the affidavit was not in a separate envelope is not a defect which the Board cannot waive, but is an informality and a technicality which can be waived in order to award the contract to the lowest bidder.

The facts in this matter have been stipulated in documents received and marked in evidence. Counsel waived hearing, argument and the filing of briefs.

The Board advertised in the Courier-Post on May 9, 1970, for bids for new roofs for three schools to be received on May 22, 1970, at 2:00 p.m. The advertisement indicated that the Board reserved the right to reject any or all bids and to waive any defects or informalities. The specifications furnished by the Board stated, *inter alia:*

> "*** The said Board of Education reserves the right to reject any or all bids and to waive any defects or informalities in any bid, should it be deemed for the best interest of the said Board of Education to do so.***"

In regard to prequalification, the following was stated:

"1-02. State Law Requiring Prequalification of Bidders on Public School Work: *** b. A bidder must submit with his bid, a notarized affidavit setting forth the type of work and the amount of work for which he has been qualified, that there has been no material adverse change in his qualification information, the total amount of uncompleted work on contracts at the time and date of the classification. Forms for this purpose are available from the Director of School Building Services, Department of Education, Trenton, New Jersey, 08625."

Under section 1-01, of the specifications, the following statement appeared:

"*** b. Any bid not prepared and submitted in accordance with the provisions described herein may be considered informal by the Owner, who reserves the right to waive any informalities in the bid or reject any or all bids.***"

A letter was addressed to the Board of Education under date of May 25, 1970, from the Board's architect, who had examined the bid proposals, bid bonds and affidavits, in which the architect recommended the awarding of the contract for roofing work to the lowest bidder, on a base bid of $29,395.00.

The minutes of the meeting of the Board held May 25, 1970, include the following tabulation of bids received for this project:

| | |
|---|---|
| Aetna Supply | $29,920.00 |
| I. Alper | 29,395.00 |
| Aronow Roofing | 29,850.00 |

The minutes also disclose that both the architect and the Board's Secretary-School Business Administrator recommended that the award be made to I. Alper, the lowest bidder, in the amount of $29,395.00. The following statement also appears in the minutes:

"(For a matter of record Aetna Supply Company protested the award to the low bidder, alleging the State qualification certificate was not enclosed in a separate envelope. This is referred to the Solicitor.)"

The statutory requirement for the submission of a prequalification affidavit is set forth in *N.J.S.A.* 18A:18-14 as follows:

"No person shall be qualified to bid on any contract with the board, the entire cost whereof will exceed $10,000.00, who shall not have submitted a statement as required by section 18A:18-10, within a period of 6 months preceding the date of opening of bids for such contract. *Every bidder shall submit with his bid an affidavit* that subsequent to the latest such statement submitted by him there has been no material adverse change in his qualification information except as set forth in said affidavit.***" (*Emphasis ours.*)

It is alleged that all bidders in the instant matter were required to submit the prequalification affidavit in a separate envelope. The documentary evidence discloses that the lowest bidder and the second lowest bidder did submit the required affidavit with their respective bids, but not in separate envelopes, whereas Aetna submitted its prequalification affidavit in a separate envelope.

In numerous past instances the Commissioner has decided questions in which contract awards were involved. See *Durling Farms v. Board of Education of the City of Elizabeth, Union County*, decided by the Commissioner of Education, January 29, 1971; *Ebner Dairies, Inc. v. Board of Education of the Township of Franklin, Gloucester County*, decided by the Commissioner of Education, February 10, 1971.

The primary issue in the instant matter is whether the Board did or did not properly discharge its duty under *N.J.S.A.* 18A:18-20 in awarding the building repair contracts for three public schools.

The pertinent statute, *N.J.S.A.* 18A:18-20, reads as follows:

> "*No bid* for the construction, alteration or repair of any building *** *shall be accepted which does not conform to the specifications* furnished therefore and *all contracts shall be awarded to the lowest responsible bidder.*" (*Emphasis ours.*)

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 (See *McQuillin, Municipal Corporation* § 29, 28 (1950).) and one which is rooted deep in sound principles of public policy. *Waszen v. City of Atlantic City*, 1 *N.J.* 232, 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, extravagence 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, and they should be rigidly adhered to. *Weinacht v. Board of Chosen Freeholders of County of Bergen*, 3 *N.J.* 330, 333 (1949); *Tice v. Long Branch, 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*, 133 *N.J.L.* 41; *Frank P. Farrell, Inc. v. Board of Education of Newark*, 137 *N.J.L.* 408. The status of the lowest bidder on a public contract is not one of grace, but one of right, and may not be lightly disturbed for it is based upon competition, a State policy. *Sellitto*

*v. Cedar Grove, supra*. If the bid of the lowest bidder 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 v. Cedar Grove, supra*. There is no question here of the fact that the lowest bidder is a responsible bidder.

The matter of an irregularity in a public bid has been dealt with by our courts. The Superior Court, Appellate Division, in 1954, in the case of *Bryan Construction Co. Inc. v. Board of Trustees*, 31 *N.J. Super.* 200, 206, 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 ***."

The Court also defined the precise nature of the permitted irregularity. At p. 207 the Court 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 ***.' "

See also *Faist v. City of Hoboken*, 72 *N.J. Super.* 361 *(Sup. Ct.* 1905); *Appollo Associated, Inc. v. Board of Education of Lakewood*, 1958-59 *S.L.D.* 93; *Taylor v. Board of Education of Gloucester*, 1955-56 *S.L.D.* 71, affirmed 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 deviations therefrom. In *Hillside Township v. Sternin, supra*, at p. 324, 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. [cases cited]. Minor or inconsequential variance and technical omissions may be the subject of waiver. [Case cited]. But any material departure stands in the way of a valid contract ***."

In the instant matter there is no question of the fact that the disputed contract was awarded to the bidder whose bid was lowest in monetary terms, and there is no challenge here of the responsibility of the lowest bidder. 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.

Prequalification of certain bidders is a requirement established by the Legislature of this State. As was previously stated, *N.J.S.A.* 18A:18-14, *supra*, sets forth the requirement for the submission of the prequalification affidavit. The pertinent part of this statute states the requirement in the following language:

> "*** Every bidder shall submit with his bid an affidavit ***."

The statute is silent in regard to any further obligation on the part of the bidder, such as submitting the affidavit in a separate envelope.

The Commissioner takes judicial notice of the affidavit form (C-101) provided for bidders by the Bureau of School Planning Services, Division of Business and Finance in the Department of Education. The following statement appears at the top of Form C-101:

> "TO THE BIDDER: This form must be submitted with your bid for public school work in a separate envelope marked 'AFFIDAVIT'."

The Commissioner finds that, absent any statutory authority for this requirement, the statement quoted above must be considered as merely a procedural instruction.

The lowest bidder did substantially conform to the specifications, and the variance therefrom was not material or substantial so as to preclude the award of the contract to the lowest responsible bidder. As stated in *Hillside Township v. Sternin, supra:*

> "Minor or inconsequential variance and technical omissions may be the subject of waiver."

The Commissioner determines that the Board properly performed its duty to secure, through competitive bidding, the lowest responsible offer, and, to effectuate that accomplishment, did waive a minor irregularity. See *Bryan Construction Co. Inc. v. Board of Trustees, supra.* Petitioner's averment that the Board acted improperly is wholly without merit.

Therefore, for the reasons heretofore stated, the Commissioner finds and determines that the Board of Education of the City of Camden properly discharged its duty and responsibility under *N.J.S.A.* 18A:18-20 in the award of the school roofing repairs contract to I. Alper.

Accordingly, the petition of appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

April 15, 1971

**In the Matter of the application of the Board of Education of the City of Vineland, Cumberland County, for the Termination of the Sending-Receiving relationship with the School Districts of Newfield, Pittsgrove, Weymouth and Buena Regional.**

## COMMISSIONER OF EDUCATION

### Decision

For the Petitioner, Frank J. Testa, Esq.

For Respondent Newfield Board of Education, Milstead & Ridgway (John Milstead, Esq., of Counsel)

For Respondent Pittsgrove Board of Education, George S. Friedman, Esq.

For Respondent Weymouth Board of Education, Edward W. Champion, Esq.

For Respondent Buena Regional Board of Education, Shapiro, Brotman, Eisenstat & Capizola (Michael D. Capizola, Esq., of Counsel)

The Board of Education of the City of Vineland, Cumberland County, petitioner, has long accepted the pupils of the school districts of Buena Regional, Newfield Borough and Pittsgrove and Weymouth Townships, respondents, on a tuition basis for enrollment in its high school. Now, because of rapidly rising enrollments, petitioner demands a severance of the sending-receiving relationship that has previously existed between itself and each of the respondents. Respondents are reluctant to sever this amicable relationship and oppose the application of petitioner contained herein.

A preliminary hearing was held in this matter on January 28, 1971, at the Office of the Cumberland County Superintendent of Schools, Bridgeton, by a hearing examiner appointed by the Commissioner. The hearing was continued on March 8, 1971. The report of the hearing examiner is as follows:

Petitioner's schools serve an area that, until recent years, was largely rural in complexion. The population growth rate was small, and the corresponding increases in school enrollments were modest. Thus, a review of the period 1960-65 shows that in each of those years petitioner had an average increase in its schools of 227 pupils per year. However, in 1966 the pattern changed. The extent of the change may be envisioned by a review of the table listed below:

**GROWTH BY YEARS**

| DATE | YEAR | INCREASED YEARLY ENROLLMENT |
|---|---|---|
| October 1 | 1965 | 255 |
| October 1 | 1966 | 481 |

| | | |
|---|---|---|
| October 1 | 1967 | 530 |
| October 1 | 1968 | 611 |
| October 1 | 1969 | 716 |

Faced with this growth in total student enrollment, and with the likelihood that the growth would continue at higher and higher levels in future years, petitioner told respondents, in a meeting assembled on March 27, 1968, of the problem and indicated that it would probably be forced to demand the termination of the sending-receiving relationships it had enjoyed in the past. Subsequently, on November 13, 1968, the Vineland Board of Education passed a resolution to institute proceedings to discontinue the sending-receiving relationships existing between it and each of the four respondents on a phased basis, grade by grade, beginning in 1970.

In the interim, between the meeting, *supra*, and the passage of the resolution, and thereafter, respondents were urged by County Superintendents of four counties and by members of the staff of the State Department of Education to develop plans on a voluntary basis prior to a hearing before a representative of the Commissioner so that viable alternatives could eventually be made available.

One of the respondents, Buena Regional, did develop preliminary plans for a new Senior HIgh School and requested from petitioner an extension of time to allow for full study of all of the ramifications of such a project, and for the submission of a proposal to its own electorate. Buena Regional's preliminary plans did reach a preliminary fruition in that they were eventually approved by the State Department of Education's Building Services Division, and their implementation was approved by a vote of the people. At this present point in time, Buena has an option on an 80-acre site on which to build its school; it has the approved final plans; and it has the vote of the people in favor of its proposals. It lacks only the documented agreements of some of its prospective sending districts as a bar to a request for bids and the beginning of construction.

While petitioner resolved in November of 1968 to petition the Commissioner to allow it to sever its relationships with its sending districts, this petition has been held in abeyance while Buena Regional's plans were developed. However, in September of 1970, Weymouth did remove its 9th grade students from petitioner's school and sent them to Buena Regional. Also, during this present 1970-71 school year, petitioner took two actions that emphasize the seriousness of its problem. It put all 7th and 8th Grade pupils on double sessions, and by resolution of February 10, 1971, it authorized the implementation of double sessions at Vineland High School for the 1971-72 school year.

Petitioner avers that even this latter move will not provide relief for long, and it offers a pupil-population projection (P-1) as proof. This chart shows that the present Senior High School building, designed to accommodate a maximum of 2,000 students, and now providing for 2,516, must provide for many more in the years ahead. The charted projection is shown below:

PROJECTED SCHOOL ENROLLMENT

| YEARS | GRADE 10 | GRADE 11 | GRADE 12 | SPEC. CLASS | SENIOR HIGH TOTAL |
|---|---|---|---|---|---|
| 1970 | 876 | 832 | 711 | 97 | 2,516 |
| 1971 | 997 | 815 | 757 | 91 | 2,660 |
| 1972 | 1,096 | 927 | 742 | 101 | 2,866 |
| 1973 | 1,125 | 1,019 | 844 | 111 | 3,099 |
| 1974 | 1,205 | 1,046 | 927 | 121 | 3,299 |
| 1975 | 1,361 | 1,121 | 952 | 131 | 3,565 |
| 1976 | 1,363 | 1,266 | 1,020 | 141 | 3,790 |
| 1977 | 1,538 | 1,268 | 1,152 | 151 | 4,109 |
| 1978 | 1,599 | 1,430 | 1,154 | 161 | 4,344 |
| 1979 | 1,745 | 1,487 | 1,301 | 171 | 4,704 |
| 1980 | 1,776 | 1,623 | 1,353 | 181 | 4,933 |
| 1981 | 2,031 | 1,652 | 1,477 | 191 | 5,351 |
| 1982 | 1,937 | 1,889 | 1,503 | 201 | 5,530 |

Petitioner's testimony is that its total enrollment in Grades K-12, in all of its schools will rise from the present 10,939 to 14,723 by 1982. The accuracy of these figures is not denied by any of respondents.

While apparently recognizing petitioner's crowded situation, respondents share the common felling of reluctance to terminate an arrangement they have all found beneficial. They jointly agree that petitioner has a well-rounded and complete curriculum, and they aver that the ties of tradition should not be severed at this time. Each of respondents has submitted a written statement with an elaboration of its views. These statements were submitted at the request of the hearing examiner and were admitted into evidence at the hearing of March 8, 1971. A brief discussion of these statements follows:

The statement of Newfield: (R-2) – Newfield states that it is immediately adjacent to Vineland, and is nearly assimilated by it. Newfield opines that it is left to choose between Vineland and Buena, but a choice of Buena will not be a permanent solution since, in a few years' time, Buena will be similarly in an overcrowded condition, and Newfield may well be asked to leave again. The contention is that a subsequent move will make an undue hardship and that the Borough of Newfield is too small an entity to ever work out its own solution.

The statement of Weymouth: (R-4) – Weymouth desires to send all of its students to Vineland until such time as the new school to be constructed by Buena Regional is completed and can accept students.

The statement of Buena: (R-5) – While requesting that the present sending-receiving relationship be continued, Buena also requests that "in the event that the Department of Education orders the termination of the relationship, the Buena District asks that all sending districts be terminated since

it would be inequitable not to do so and would cause the loss to Buena of sending districts." It maintains that it cannot operate its High School economically without these districts.

The statement of Pittsgrove: (R-7) – Pittsgrove avers that it will not be in a position to consider a high school of its own for several years to come, and that it has no alternative at the present time to the present sending-receiving relationship with Vineland. It states that the nearest point on its border is 16 miles to Buena, which is too great a distance to transport its students. Furthermore, Pittsgrove states that Delsea Regional District, which is the nearest possible placement other than Vineland, will not countenance the possibility of another sending district at this time.

In addition to the statement from the four respondent districts recited, *supra*, the district of Estell Manor, Atlantic County, was asked to submit a statement as to its intentions with regard to a sending-receiving relationship with Buena Regional. It states unequivocally that it will send its students to Buena Regional when and if that district builds its Senior High School, and that it has secured an agreement for release from its present obligation to Pleasantville as of the time its affiliation with Buena begins.

The Cumberland County Superintendent of Schools testified to the need for another regional district for high school students in the area north of Bridgeton and closer to Pittsgrove. He indicated, however, that when he invited possible interested districts to participate in preliminary discussions that might lead to a new alignment of school attendance patterns in this area, the only acceptance of his invitation was that of Upper Deerfield Township; Pittsgrove Township did not reply.

The hearing examiner has reviewed all of the evidence educed at the hearings. He makes the following findings of pertinence to this application:

1. That petitioner has presented firm and conclusive evidence of a burgeoning school population. He opines that the growth rate in petitioner's own district is such that, even without its sending districts, petitioner will be hard pressed to keep abreast of its school building needs in the coming decade.

2. That three of the four respondent districts have a readily viable alternative as an option. The hearing examiner believes that these districts – Newfield, Weymouth and Buena Regional — should exercise this option immediately in a clear and positive manner in a progression to a new and cooperative alignment. He cannot believe that anything can be gained by delay except an increasing sense of frustration that Vineland's problems will tend to impose on everyone alike unless changes are made.

3. That the fourth district, Pittsgrove Township, has no satisfactory alternative at the present time. However, the hearing examiner believes that, in this instance, alternative solutions for the problems of high school attendance

for the pupils of Pittsgrove have not really been explored by its Board of Education. He believes this exploration must be undertaken immediately and in depth. The examiner does not rule out the possibility of placement of some of the Pittsgrove students in the proposed new Buena Regional Senior High, but he sees no possibility of permanence in such an association, and he believes that the distance factors are so unfavorable as to preclude more than a token solution to part of the problem that must be faced by Pittsgrove.

4. That Buena Regional should make a firm decision and commitment by August 1, 1971, concerning the placement of its Grade 12 students in the year of the initial planned operation of its new Senior High in September 1973. Without such a firm decision, the examiner believes that there will be confusion in implementing the individual curriculum goals of students. With it, the examiner believes that individual students, as sophomores, can proceed in 1971 to map their own academic program in a realistic and positive way for all the years of their high school experience.

* * * *

The Commissioner has carefully reviewed the report and findings of the hearing examiner. He concludes that petitioner has a pressing and critical need to be allowed to plan a building program for its own students in the decade of the seventies, and that this task should not be complicated by a requirement that its taxpayers provide concurrently for hundreds of students of its present sending districts. This conclusion leads to one other observation; namely, that the well-developed plans of the Buena Regional district should be expedited forthwith.

Petitioner's application herein is grounded in the terms of *N.J.S.A.* 18A:38-21, which provides the following provision for relief when a district acting in a receiving capacity for students from its surrounding neighbors cannot reasonably be expected to continue to do so:

> "Any board of education which shall have entered into such an agreement may apply to the commissioner for consent to terminate the same, and to cease providing education to the pupils of the other contracting district on the ground that it is no longer able to provide facilities for the pupils of the other district ***."

The Commissioner's role on the receipt of such an application is clearly defined. If he finds just cause, as evidenced herein, he "shall give his consent" for a severance of the relationship, pursuant to the mandate of *N.J.S.A.* 18A:38-22, which states:

> "*** if the commissioner finds that there are good grounds for the application, as provided in this article, he *shall give his consent*, and the applying board of education shall thereupon be entitled to terminate the agreement ***." (*Emphasis supplied.*)

In considering the impact of these two statutes the Commissioner was recently constrained to make the following observations *In the Matter of the Application of the Board of Education of the Borough of Spotswood for the Termination of the Sending-Receiving Relationship with the School District of Spotswood, Middlesex County*, decided by the Commissioner December 14, 1970:

> "It is clear that the law thus provides for stability in sending-receiving relationships between districts while at the same time it provides flexibility if there is 'good ground' for a severance of the existing pattern. In the instant matter the two districts have had a long and amicable relationship, but the continuance of it at this time precludes a modernization of petitioner's High School curriculum in the future, and would seem to make mandatory alternatives which petitioner deems would cause hardship and deprivation for its own students and taxpayers. These alternatives seem to be the arrangement known as double sessions, or an expanded building program over and above the requirements petitioner would be obliged to finance for its own students. The Commissioner can find no reason to conclude that a receiving district must necessarily be forced to either of these alternatives. ***"

See also *In the Matter of the Termination of the Sending-Receiving Relationship between the Boards of Education of the Township of Lakewood and the Township of Manchester, Ocean County*, 1966 *S.L.D.* 12, 14. In the instant matter, petitioner has been forced already by its burgeoning school population to double sessions in its Junior High. Double sessions will be inaugurated for 2,500 Senior Hlgh students in 1971. In such a circumstance, combined with the population projection for future years, not refuted, there are ample "grounds" to trigger the mandate of the statute imposed on the Commissioner to "give his consent." Consent is, therefore, given, and the Commissioner directs that the present sending-receiving relationships now existing between Buena Regional, Newfield, Pittsgrove and Weymouth be severed by September of 1973, or as soon thereafter as it is practical to achieve such severance.

Pursuant to this direction, and because no viable alternative has yet been developed by Pittsgrove Township, the Commissioner directs that the Board of Education of that district develop alternatives by its own efforts in the immediate future, and that such efforts be reported within a 60-day period from the receipt of this decision. Until such time as these plans are received, the Commissioner will retain jurisdiction over this phase of the decision.

The Commissioner also directs the Buena Regional Board of Education to decide in the immediate future whether or not the placement of all seniors in its proposed new facility is to be accomplished in the initial year of its operation. He will also retain jurisdiction over this phase of the severance.

Finally, the Commissioner directs that the Vineland Board of Education initiate curriculum articulation meetings with the Buena Regional Board of

Education in the immediate future to provide for orderly transfer of students between the two systems in the year 1973.

COMMISSIONER OF EDUCATION

April 15, 1971

**In the Matter of the Annual School Election held in the West Morris Regional High School District, Morris County.**

COMMISSIONER OF EDUCATION

**Decision**

The announced results of the balloting for one member of the West Morris Regional Board of Education for an unexpired term of one year, at the annual school election held on March 30, 1971, in the constituent district of Mount Olive Township, Morris County, were as follows:

| | AT POLLS | ABSENTEE | TOTAL |
|---|---|---|---|
| Barbara Leymeister | 70 | –0– | 70 |
| Eugene R. O'Hare | 70 | –0– | 70 |
| Elizabeth S. Kenny | 66 | –0– | 66 |

Pursuant to a letter request dated March 31, 1971, from Candidate Leymeister, the Commissioner of Education directed an authorized representative to conduct a recount of the ballots cast. The recount, which was confined to the votes cast for the above-named candidates, was conducted on April 14, 1971, at the office of the Morris County Superintendent of Schools, in Morris Plains.

At the conclusion of the recount, with no contested or void ballots, the tally stood as follows:

| | AT POLLS | ABSENTEE | TOTAL |
|---|---|---|---|
| Barbara Leymeister | 70 | –0– | 70 |
| Eugene R. O'Hare | 71 | –0– | 71 |
| Elizabeth S. Kenny | 66 | –0– | 66 |

The Commissioner finds and determines that Eugene R. O'Hare was elected at the annual school election on March 30, 1971, to a seat on the West Morris Regional High School Board of Education for a term of one year.

COMMISSIONER OF EDUCATION

April 20, 1971

**Fred Bartlett, Jr.**

*Petitioner,*

**v.**

**Board of Education of the Township of Wall, Monmouth County,**

*Respondent.*

## COMMISSIONER OF EDUCATION

### Decision

For the Petitioner, Joseph N. Dempsey, Esq.

For the Respondent, Mirne, Nowels, Tumen, Fundler & Magee (William C. Nowels, Esq., of Counsel)

Petitioner was suspended without pay by the Board of Education of the Township of Wall, hereinafter "Board," pending the disposition of criminal charges against him. This matter was submitted to the Commissioner of Education on the briefs of counsel in which petitioner appealed for reinstatement and back pay. The report of the hearing examiner is as follows:

Petitioner avers that:

"1. In August 1969 the Board of Education of the Township of Wall suspended petitioner from his employment as a teacher. Petitioner was on the salary guide for the school year 1969-70 at $10,350.00 per year. He has remained under suspension and has not yet been notified that suspension has been lifted.

"2. On June 24, 1970 petitioner applied to the Board of Education for reinstatement and back salary of $10,350.00.

"3. In the meantime, on June 18, 1970 petitioner was acquitted of criminal charges which had been pending against him during the year by a jury. Notwithstanding the application for payment, a copy of which is annexed, the Board of Education has refused to reinstate petitioner or to pay him his salary in accordance with the law.

"WHEREFORE, petitioner prays that the Commissioner of Education enter an Order declaring that the suspension was illegal and that the petitioner is entitled to back pay in the amount of $10,350.00."

submitted with this Petition was the following letter addressed to the Board by counsel for petitioner:

"Dear Ladies and Gentlemen:

"On July 18, 1970 a petit jury before Judge William Huber, C.C.J., disposed of charges against Fred Bartlett by returning a verdict of not guilty. As you know, Mr. Bartlett was suspended without pay in August, 1969.

"In accordance with the provisions of *N.J.S.A.* 18A: 6-30, there being no charges pending against Mr. Bartlett at this time, he is entitled to his pay for the interval, having been unemployed during the months of September, October, November, December, January, February, March, April, May and June. Mr. Bartlett has lost salary in a total value of $10,350.00.

"I have had discussions with Mr. Nowels concerning this matter and I understand you are prepared to pay his losses for the interval, as required by law. In accordance with the findings of the Supreme Court in the *Laba* and *Lowenstein* cases, you are entitled to have set off against the amounts that Mr. Bartlett earned during the year.

"Amount due in salary ..... $10,350.00
Amount earned during interval ..... $ 1,206.80

"Mr. Bartlett may, in turn, set off against the amount he earned his attorney's fees which total in excess of $1,200.00, so that he is entitled to the full amount of his pay.

"Please act upon this matter promptly so that we may avoid a petition to the Commissioner of Education."

At a conference of counsel on October 1, 1970, it was agreed that the facts in the instant matter are not in dispute. Counsel agreed that $9,143.20 is owed to petitioner. This amount represents petitioner's 1969-70 salary of $10,350, mitigated by his earnings of $1,206.80 during his suspension from September 1, 1969 to June 18, 1970. Counsel for petitioner notified the Commissioner by letter of December 28, 1970, that the Board had paid petitioner this undisputed amount. The sole areas in disagreement are, therefore:

1. Whether or not petitioner is entitled to counter off-set counsel fees against earnings in the amount of $1,230.86, and

2. Whether or not the Board should award interest to petitioner on the amount owed.

The hearing examiner has searched the following cases cited by petitioner with respect to court precedent for his seeking interest and counter off-set counsel fees for his salary which he alleges was improperly withheld: *Morrissey v. Holland*, 79 *N.J. Super.* 279, 284 *(Law Div.* 1963); *Miele v. McGuire*, 31 *N.J.* 339, 352 (1970); *McGrath v. Jerry City*, 38 *N.J.* 31, 32 (1962); *Rosetty v.*

*Hamilton Township Committee*, 82 *N.J. Super.* 340, 352 *(Law Div.* 1964); *Mastrobattista v. Essex County Park Commission*, 46 *N.J.* 138, 148 (1965); *Lowenstein v. Newark Board of Education*, 35 *N.J.* 94, 123-124 (1961).

There is no question that petitioner is entitled to his salary off-set by mitigation against his earnings during the period of his suspension. However, nothing in the cases cited by petitioner over-rides the principle enunciated by the Commissioner in *Romanowski v. Jersey City Board of Education*, 1966 *S.L.D.* 219, in which the Commissioner said at p. 221:

> "*** there is no statutory authority for a board of education to pay interest as damages.
>
> " 'It has been held that interest is payable as damages for the improper withholding of funds by a governmental agency only when provided for by statute. *Brophy v. Prudential Insurance Co. of America*, 271 *N.Y.* 644, 3 *N.E.* 2*d* 464 *(Ct. App.* 1936).' *Consolidated Police, etc., Pension Fund Comm. v. Passaic*, 23 *N.J.* 645, 654 (1957) ***."

The statute under which petitioner makes his claim to the Commissioner is *N.J.S.A.* 18A:6-30, which reads as follows:

> "Any person holding office, position or employment in the public school system of the state, who shall be illegally dismissed or suspended therefrom, shall be entitled to compensation for the period covered by the illegal dismissal or suspension, if such dismissal or suspension shall be finally determined to have been without good cause, upon making written application therefore with the board or body by whom he was employed, within 30 days after such determination."

Nowhere does the statute authorize the payment of interest. It is the conclusion of the hearing examiner, therefore, that petitioner has not established his right in law to receive such interest.

Nor can there be found any precedent or statutory authority for awarding counsel fees as an off-set as claimed by petitioner.

* * * *

The Commissioner has read the report of the hearing examiner and agrees with his findings and conclusions.

The Commissioner has already treated this problem in *Romanowski, supra*, and in *David v. Cliffside Park Board of Education*, 1967 *S.L.D.* 192, in which the Commissioner said at p. 194-195:

> "*** With respect to petitioner's further claim for compensatory damages, the Commissioner has already construed the meaning of the work

'compensation' as used in *R.S.* 18:5-49.1 in the case of *Romanowski v. Jersey City Board of Education*, decided December 30, 1966, in which he said:

> 'The use of the term 'compensation,' even in a broad sense, must be interpreted to mean 'earnings.'

"See also *Mastrobattista v. Essex County Park Commission, supra.* The Commissioner holds, therefore, that claims for the payment of interest, of fees and other expenses, or of damages other than lost earnings, is not within the contemplation and meaning of the statute.***"

The Commissioner determines, therefore, that petitioner is entitled to his salary for the school year 1969-70 to off-set by mitigation against the amount earned by him during his suspension. The Wall Township Board of Education, having paid petitioner that amount herein determined to be due him,has no obligation, therefore, to make any further compensation to petitioner.

COMMISSIONER OF EDUCATION

April 21, 1971

Affirmed by State Board of Education, October 6, 1971

**Board of Education of the City of Trenton,**

*Petitioner,*

**v.**

**City Council of the City of Trenton, Mercer County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**Decision**

For the Petitioner, McLaughlin, Dawes & Abbotts (James J. McLaughlin, Esq. of Counsel)

For the Respondent, Victor Walcoff, Esq.

Petitioner, the Board of Education of the School District of the City of Trenton, hereinafter "Board," appeals from an action of respondent City Council of the City of Trenton, hereinafter "Council," certifying to the Mercer County Board of Taxation an amount of appropriations for school purposes for

the 1970-71 school year $921,371 less than that certified to Council by the Board of School Estimate.

Petitioner alleges that it is impossible to maintain the thorough and efficient system of public schools mandated by the *New Jersey State Constitution* or to provide suitable educational facilities and programs as required by law (*N.J.S.A.* 18A: 33-1) within the limit of appropriations certified by Council. Petitioner prays for relief in the form of an order by the Commissioner of Education: (1) determining that the resolution of certification adopted by Council is arbitrary, capricious and unreasonable; (2) declaring the amount of monies so certified by Council to be insufficient and ordering the restoration thereof; or (3) if the entire amount of reduction is not to be restored, fixing the portion thereof that the Commissioner finds necessary to provide a thorough and efficient system of free public schools.

Council answers that it held numerous conferences for the purposes of discussing the proposed 1970-71 school budget, and also conferred with representatives of the Board concerning the overall aspects of the proposed budget. Also, Council states that it has sought to effect savings which would not impair the quality of education, and has acted cautiously, 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 is thorough and efficient in view of the makeup of the community.

The petition of appeal was filed on April 20, 1970. As the result of a letter request from the attorney for Council, a thirty-day extension of time was granted for the filing of an answer. On May 19, 1970, the answer was received from Council. Both parties were notified by letter dated September 10, 1970, that a pre-hearing conference of counsel would be held on September 30, 1970. The conference was held as scheduled on the above-named date, and a conference report was sent to both parties on October 5, 1970. Counsel for the Board requested by letter of November 13, 1970, that the hearing date be postponed from November 30, 1970, to December 15, 1970. This request was granted, and the postponement was confirmed by letter of November 23, 1970. On December 14, 1970, a communication was sent to both parties by the Director of the Division of Controversies and Disputes informing them that the hearing must be postponed until December 23, 1970, due to the fact that required documentary evidence from Council had not been submitted, and similar documents from the Board had just been received on Friday, December 11, 1970, rather than five days prior to hearing as agreed upon by both parties.

Between the September 30, 1970, date of the conference of counsel and the initial hearing date of December 23, 1970, both parties optimistically anticipated that a mutually agreeable settlement would be concluded in the instant matter.

A hearing on the petition of appeal was held on December 23, 1970, January 4, 1971, and January 14, 1971, at the State Department of Education,

Trenton, by a hearing examiner appointed by the Commissioner of Education. Exhibits prepared by the parties as a result of a conference held on September 30, 1970, were received in evidence. Additional documentary evidence was received on February 11, 1971, at the request of the hearing examiner.

The report of the hearing examiner is as follows:

Trenton is a Type I school district having a Board of School Estimate. The Board of Education adopted and submitted to the Board of School Estimate a proposed budget for the 1970-71 school year in the total amount of $16,196,084, of which $11,125,137 was to be raised by local taxation. Following a public hearing, the Board of School Estimate, on March 4, 1970, fixed and determined the amount to be raised by local taxation for 1970-71 as $11,125,137, and submitted an appropriate certification of this action to the Council with the following breakdown:

| | |
|---|---|
| For Current Expense | $11,115,831.00 |
| For Capital Outlay | 399.00 |
| For Evening School for Foreign Born Residents | 8,907.00 |
| TOTAL AMOUNT TO BE RAISED | $11,125,137.00 |

Thereafter, following a conference with the Board and its own study of the proposed school budget, Council adopted, on March 20, 1970, Resolution No. 70-155 (B-1), fixing the amount of $10,203,766 to be raised by local taxation for the operation of the public schools for the fiscal year 1970-71, a reduction of $921,371 from the certification of the Board of School Estimate.

The total amount of Council's proposed budget reductions ($921,371) includes $772,345, which was restored to the 1969-70 school budget by the Commissioner of Education, plus additional items totalling $149,026. The total of $921,371 is itemized as follows:

| ITEM | PROPOSED REDUCTION |
|---|---|
| Staff Personnel | $172,000 |
| Salary Increases | 328,545 |
| School Nurses (2) | 16,800 |
| Operation of Plant (Heating) | 10,000 |
| Maintenance of Plant | 225,000 |
| Major Medical Insurance | 20,000 |
| SUB-TOTAL | $722,345 |
| Evening Vocational School | $ 71,026 |
| J110B Assistant Secretary-Business Administrator I | 11,000 |
| J110B Administrative Secretary | 6,000 |
| J110F Assistant to Assistant Superintendent for Personnel | 16,000 |

| | |
|---|---|
| J110F Director of Research & Evaluation | 16,000 |
| J110F Secretaries (2) | 10,000 |
| J212 Director of Secondary Education | 19,000 |
| SUB-TOTAL | $149,026 |
| TOTAL | $921,371 |

The hearing examiner's findings and recommendations in regard to each of the proposed reductions are as follows:

*Staff Personnel*

The Board proposed to continue the employment of twenty-one specialized teachers of art, music, science and physical education for the elementary schools, assigning them on rotating schedules to various schools. Also, four secondary teachers of reading and one junior high school guidance counselor, one secondary teacher of biology, one speech correctionist, fourteen teachers of special education, and four elementary teachers are budgeted for 1970-71, presumably as new positions. Without stating the specific positions which should be eliminated, Council states that positions in the aggregate amount of $172,000 should be deleted at this time as not essential to a thorough and efficient system of public schools.

A review of the record discloses a preponderance of evidence substantiating the need for the personnel for instructional programs in art, music, science and physical education for the elementary schools; and for special education programs, a junior high school guidance counselor, a speech correctionist, elementary helping teachers and a secondary biology teacher. Particularly, the evidence that between fifty and sixty percent of the Tenth Grade pupils are reading at a Fifth Grade level clearly indicates the need for not only additional reading teachers at the secondary level, but also for vigorous efforts of remediation throughout the Board's elementary schools.

It is recommended that the amount of $172,000 be restored to the 1970-71 school budget as necessary for a thorough and efficient system of public schools. The hearing examiner also recommends that in the future, the Board's budget for teachers' salaries should indicate a separate line item for special education teachers.

*Salary Increases*

The Board negotiated a salary schedule for 1970-71 (A-4) with representatives of the teachers' association, and, following mediation and fact-finding by the Public Employment Relations Commission, the Board formally adopted a salary schedule for teachers on July 16, 1970. This teachers' salary policy (A-4) provided, *inter alia*, for salary increases in the amount of $453,550. Council proposes eliminating $328,545 of the salary increases, which is similar to its proposed reduction for the 1969-70 budget, which amount was subsequently restored by the Commissioner of Education.

The Board's budget (A-1, page B-57) provides for a total of $585,920 for "salary adjustments." This amount is itemized as follows, including the dates of

the Board's official adoption of 1970-71 salary policies:

| EMPLOYEE UNIT | ADJUSTMENT AMOUNT | DATE POLICY ADOPTED |
|---|---|---|
| Teachers | $453,550 | July 16, 1970 |
| Administrators & Supervisors | 52,850 | July 16, 1970 |
| Secretaries | 23,250 | July 16, 1970 |
| Custodians | 37,170 | June 9, 1970 |
| Nurses | 11,000 | July 16, 1970 |
| Administration (Special Titles) | 8,100 | July 16, 1970 |
| TOTAL | $585,920 | |
| Security Guards | - 0 - | January 13, 1970 |

The above dates appear on Exhibit A-11, which also states that the report of the Fact Finder was accepted by the Board on March 2, 1970. Security guards are listed on Exhibit A-11, but do not appear on Exhibit A-1, page B-57.

The hearing examiner finds that the salary policy for teachers adopted by the Board for fiscal year 1970-71 is no more than competitive with those found in surrounding school districts of Mercer County. He recommends, therefore, the restoration of $328,545 for salary increases necessary to implement the Board's official salary policy.

*School Nurses*

The 1970-71 school budget includes provision for the addition of two school nurses, and the amount of $16,800 for this purpose was deleted by Council as unnecessary. The Trenton school district, with a pupil population of approximately 18,000 was serviced by 23 school nurses during 1969-70. A large number of disadvantaged pupils of low socio-economic background are included in the school population, and the records on file in the Department of Education clearly indicate that medical and dental defects are numerous among these urban school pupils. In view of the numerous urgent needs for school health services in this urban district, the ratio of school nurses cannot be found excessive, but must be deemed necessary to provide a minimum of efficiency. Therefore, the hearing examiner recommends the restoration of $16,800 for the two school nurse positions.

*Plant Operation (Heating)*

The amount of $127,607 for heating school plants was reduced by $10,000 by Council for the reason that the budgeted allocation is excessive. A review of the audit report (B-3) for 1969-70 discloses that actual expenditures were $124,936.68. By comparison the total of $127,607 budgeted for 1970-71 is reasonable and necessary, and the hearing examiner recommends, therefore, that the $10,000 reduction for heating school plants be restored in full.

*Maintenance of Plant*

Council recommends the reduction of $225,000 from the Board's 1970-71 maintenance budget of $968,642. This reduction is equal to the amount restored by the Commissioner of Education to the 1969-70 maintenance allocation. The 1969-70 maintenance budget originally totaled $1,193,642. From this amount, Council proposed a reduction of $450,000. Following the restoration of $225,000 by the Commissioner, the final 1969-70 maintenance budget totaled $968,642, which is identical to the amount proposed by the Board for 1970-71.

Council contends that the Board consistently requested more funds for maintenance than it has actually required. The Board denies this, and answers that after the budget had been reduced by Council each year, the Board then adjusted its maintenance spending to the available funds. Abundant evidence was educed from the Board, in both documentary and oral testimony, to support the need for extensive repairs and replacements to the various schoolhouses. Unfortunately, the documentary evidence is confusing in regard to the specific allocation of budgeted maintenance funds for 1970-71, as well as expenditures for 1969-70.

A careful scrutiny of the 1969-70 audit report (B-3) discloses the following facts:

The Commissioner's restoration of $225,000 for 1969-70 provided a total of $968,642 available for maintenance projects. The audit report shows the amount of $974,982 budgeted for 1969-70, which is $6,340 more than that fixed by the Commissioner. This increase presumably resulted from a budgetary transfer; however, the audit report does not show the original line item allocations or the amount of transfers, but merely lists budget items "modified by transfer." Under "Wages" the audit report indicates $595,756.62 budgeted and $419,629,30 expended with remaining balances of $176,127.32. Of the total $974,982.00, as modified by transfer, $786,164.49 was expended, leaving a balance of $188,817.51 in the maintenance account for 1969-70. As can be seen, this $188,817.51 balance consists mainly of $176,127.32 shown as unexpended salaries.

A comparison of the audit report with the advertised budget document (A-8) fails to clarify the problem of maintenance salaries. The column for 1969-70 of the 1970-71 advertised budget shows a total of $974,982 budgeted for maintenance, of which the amount listed for the salary line item is $579,939. This salary figure does not agree with the total of $595,756.62 in the audit report, probably because of a line item transfer not reflected in the audit report. The proposed 1970-71 budget (A-1) does not provide a line item for maintenance salaries or a total expenditure of such salaries for 1969-70. In fact, this budget Exhibit (A-1, pages E-1 through E-10) does not follow the accounting format for maintenance which is properly shown in the 1969-70 audit report. The salaries of full-time maintenance personnel are listed on pages E-12 through E-14. Thirty-two employees are listed by job classification, and the salary for each classification is shown, but the total amount of these salaries,

which is $305,300, is not shown.

A summary of this Exhibit, and the calculation of salary totals, is reported as follows:

| CLASSIFICATION | YEARLY WAGE | EXTENSION |
|---|---|---|
| Carpenter Foreman | $11,000 | $11,000 |
| Journeymen (5) x | 10,200 | 51,000 |
| Electrician Foreman | 11,700 | 11,700 |
| Journeymen (2) x | 11,200 | 22,400 |
| Mason Foreman | 11,100 | 11,100 |
| Journeymen (3)) x | 10,600 | 31,800 |
| Painter Foreman | 10,100 | 10,100 |
| Journeymen (4) x | 9,100 | 36,400 |
| Plumber Foreman | 11,700 | 11,700 |
| Journeymen (3) | 10,900 | 32,700 |
| Laborer Foreman | 8,300 | 8,300 |
| Laborers (7) | 7,700 | 53,900 |
| Maintenance Truck Driver | 6,000 | 6,000 |
| Shop Clerk | 7,200 | 7,200 |
| | TOTAL | $305,300 |

Testimony educed from the Board's witnesses discloses that the budgetary format for maintenance is based on individual job costs, and does not coincide, therefore, with the school accounting system prescribed by the Department of Education. The facts show that the proper accounting system is followed in the advertised budget format and in the audit report.

The evidence substantiates the critical need for extensive building repairs. The current problem is compounded by the fact that $272,345 of the total restored by the Commissioner to the 1969-70 school budget is in the process of appeal in the Appellate Division of the New Jersey Superior Court. These funds, most of which are allocated for maintenance projects, are listed as revenues receivable in the 1969-70 audit report.

In view of the fact that the Board's proposed maintenance budget does not adequately and clearly set forth a well-ordered and understandable expenditure plan for maintenance projects, the hearing examiner recommends that Council's reduction of $225,000 be sustained. Also, the hearing examiner recommends that the Board be directed to file revised 1970-71 maintenance budget exhibits providing no less than the line items set forth in the 1969-70 audit report.

*Major Medical Insurance*

As part of its salary policy (A-4), the Board provides major medical insurance premiums for family coverage for all employees. Council recommends a reduction of $20,000 for this purpose, declaring it to be unnecessary. The evidence educed shows that this fringe benefit was provided for all employees

during the 1969-70 school year, and that the 1970-71 budget provides for a continuation of this salary policy. The Board avers that this salary policy benefit is necessary to maintain a competitive position for the recruitment and retention of staff personnel. The hearing examiner concludes that this $20,000 is required to effectuate an established salary policy and recommends that it be restored for 1970-71.

*Evening Vocational School*

The Board's 1970-71 advertised budget provided the amount of $96,026 for Evening Vocational School. The revenue sources for this expenditure consist of $10,000 appropriated balance, $15,000 State Aid, and $71,026 from local taxes. The Board's proposed budget originally submitted to the Board of School Estimate under date of February 2, 1970, contained this break-down. On March 2, 1970, the Board amended its proposed budget by eliminating this budgetary category and transferring the $71,026 to the current expense totals, increasing that category from $16,024,151 to $16,095,177. Testimony of the Board's witnesses discloses that the Board made this transfer because of increased needs for salary adjustments, which had been negotiated subsequent to the adoption of the proposed budget. Also, agreements were reached by the Board to transfer jurisdiction of the Evening Vocational School program to the Mercer County Vocational Board of Education. The hearing examiner recommends that the reduction of $71,026 by Council be sustained due to a lack of demonstrable need by the Board. Also, it is recommended that the unappropriated free balance of $22,301.24 listed on page A-1 of the audit report be allocated to current expense revenue for 1970-71, since this Evening Vocational School Account is now inactive.

*J110B Assistant Secretary - Business Administrator I*

Testimony educed from the Board's witnesses discloses that this new position has been added to the 1970-71 school budget mainly due to the substantial increase in the number of new programs, primarily financed with Federal funds, which have been added to the Board's total school operations during recent years. The facts are clear that there has been a significant increase in fiscal activity as the result of the Board's expanded programming, particularly of Federally-funded projects. The expenses resulting from the need for an additional position to administer the fiscal affairs of these Federally-funded projects should be met from the program allocations. The Board should make this provision within the scope of its Federally-funded projects rather than include the position in its current expense budget. The hearing examiner recommends, therefore, that Council's reduction of $11,000 for this position be sustained.

*J110B Administrative Secretary*

Council made a reduction of $6,000 for this new position, which is planned for the Assistant Secretary-Business Administrator I. As was stated above, this position, although necessary to provide efficient secretarial service for the administrator of Federally-funded projects, should be included within

such project allocations rather than the Board's current expense budget. Accordingly, the hearing examiner recommends that the reduction of $6,000 be undisturbed.

*J110F Assistant to Assistant Superintendent for Personnel*

Council proposed a reduction of $16,000 for this new position. Testimony of the Board's witnesses indicates that expanded duties in the personnel office require the addition of an assistant administrator. The facts show that approximately 150 positions must be recruited each year; extensive negotiations are conducted annually with seven separate employee units; and numerous grievances are processed. The personnel office formerly consisted of one administrator, and this addition of one assistant raises the total to two. The hearing examiner recommends the restoration of $16,000 for this position in order to provide a thorough and efficient system of public schools.

*J110F Director of Research and Evaluation*

The Board's budget proposed the addition of this new position with an allocation of $16,000, which Council reduced as unnecessary. Testimony educed at the hearing disclosed that this position has been transferred to a Federally-funded program. Therefore, the hearing examiner recommends that Council's reduction be upheld.

*J110F Secretaries (2)*

Council reduced the Board's budgetary allocation of $10,000 for two secretarial positions for the Assistant to the Assistant Superintendent for Personnel and the Director of Research and Evaluation. One of these secretarial positions has been transferred to a Federally-funded program. Abundant facts support the need for secretarial service for the additional administrator in the personnel office. Accordingly, the hearing examiner recommends that $5,000 for this purpose be restored, and the reduction of $5,000 for the transferred secretarial position be sustained.

*J212 Director of Secondary Education*

Council proposed a reduction of $19,000 for this new position as unnecessary for a thorough and efficient system of education. Council also contends that an additional new position of Director of Music has been established by the Board at a salary of $15,000 and that this position is unnecessary. Testimony was educed regarding the entire range of numerous administrative and supervisory positions. The Board's witnesses aver that the position of Director of Secondary Education is necessary to provide thorough and efficient education in that only through this position can the instructional programs of the five Junior High Schools be properly coordinated, and further that more efficient articulation is required between these schools and the Senior High School. The position of Director of Music, the Board contends, is necessary to bring proper organization to a system-wide program in music at all grade levels of the various schools. The hearing examiner recommends that the amount of $19,000 be restored for the position of Director of Secondary Education,

which is necessary to provide a thorough system of education in a large, urban school district. The hearing examiner further recommends that the amount of $15,000 budgeted for a new position of Director of Music be deleted for 1970-71. The growth and development of the curriculm in music is important to all pupils, and most particularly for those who are culturally deprived. However, in view of the scope of the present program, this position cannot be deemed essential this year, when considered in regard to the total fiscal needs of the school district. Therefore, the hearing examiner recommends the net restoration of $4,000 of Council's reduction for a Director.

*Unappropriated Balances*

At the time when Council proposed the total of $921,371 in reductions for the 1970-71 school budget, the exact amount of unappropriated free balances from the 1969-70 fiscal year were not known. The board had appropriated $90,000 of the anticipated free balance from 1969-70 to the current expense account for 1970-71. Also, $10,000 was appropriated from the anticipated balance from the Evening Vocational School Account. These amounts are set forth in the advertised budget statement for 1970-71 (A-8).

A careful scrutiny of the 1969-70 audit report, together with a review of the testimony educed at the hearing, discloses that the actual 1969-70 revenue balances for current expense are $392,510.20, excluding the revenue receivable of $272,345 which is on appeal to the courts. The revenue balance for Evening Vocational School of $22,301.24 was previously stated. The hearing examiner recommends that $215,000 of the current expense balance be combined with the $22,301.24 balance from the Evening Vocational School Account, and that the total of $237,301.24 be appropriated to the current expense account of the 1970-71 budget. This will result in a remaining unappropriated balance of $177,510.10, which should be sufficient for any emergencies that may occur during the remainder of the 1970-71 fiscal year. Since $90,000 is presently allocated to the 1970-71 budget, the remainder recommended for allocation to current expense is $147,301.24.

*Budgetary Accounting*

The hearing examiner notes the absence of a schedule for line item J216, Other Salaries for Instruction, in the Board's budget (A-1), and recommends that this schedule be filed in order to complete the record of these proceedings. Testimony was provided by the Board's witnesses regarding special programs for 1970-71. Although the revised 1970-71 Budget Exhibit lists these programs for 1971-72 on pages B-59 and B-60, the original 1970-71 Budget Exhibit (A-1) does not contain this information. It is recommended that this information be filed, with appropriate line item code numbers for identification, in order to fully complete this record. Athletic activities, with all expenses related thereto, should be shown under the appropriate budget codes for such student activities rather than commingled with instruction line items. The annual audit report should reflect original line-item amounts, a column to indicate transfers to and from various line items, and a column of revised line-item amounts as well as an expenditure column and balance column.

In summary, the recommendations of the hearing examiner with respect to the total budget reductions are listed in the following table:

| ITEM | PROPOSED REDUCTION | AMOUNT RESTORED | AMOUNT NOT RESTORED |
|---|---|---|---|
| Staff Personnel | $172,000 | $172,000 | $ - 0 - |
| Salary Increases | 328,545 | 328,545 | - 0 - |
| School Nurses (2) | 16,800 | 16,800 | - 0 - |
| Plant Operation (Heating) | 10,000 | 10,000 | - 0 - |
| Maintenance of Plant | 225,000 | - 0 - | 225,000 |
| Major Medical Insurance | 20,000 | 20,000 | - 0 - |
| Sub-Total | $772,345 | $547,345 | $225,000 |
| Evening Voc. School | $ 71,026 | $ - 0 - | $ 71,026 |
| J110B Asst. Secretary-Business Admin. I | 11,000 | - 0 - | 11,000 |
| J110F Admin. Secretary | 6,000 | - 0 - | 6,000 |
| J110F Asst. to Asst. Supt. for Personnel | 16,000 | 16,000 | - 0 - |
| J110F Director of Research & Evaluation | 16,000 | - 0 - | 16,000 |
| J110F Secretaries (2) | 10,000 | 5,000 | 5,000 |
| J212 Director of Secondary Education | 19,000 | 4,000 | 15,000 |
| TOTALS | $921,371 | $572,345 | $349,026 |
| Less: Balance appropriated to current expense in excess of $90,000 | - 0 - | $147,301.24 | - 0 - |
| TOTAL RESTORED | $425,043.76 | | |

* * * *

The Commissioner has reviewed the findings of fact and recommendations of the hearing examiner herein set forth. The Commissioner is aware of the difficult and unique problems which are present in a large urban school district. He is cognizant of the effort being made by the Trenton Board of Education as shown by the proposals advanced herein, and particularly as set forth in the laudatory long-range plans and goals established for its public schools. The Commissioner notes that many desirable and systematically-planned programs are being advanced in an effort to solve many of the problems which are peculiar to city school systems.

The Commissioner considers it unfortunate that undue and unreasonable delay in the prosecution of the instant matter by both parties has prolonged this final determination for an inordinate length of time. The apparent reason for the delay occasioned by both parties to these proceedings was the unrealized anticipation that a mutually-agreeable settlement would preclude the necessity

for a final determination by the Commissioner. Such optimism should not have deterred the vigorous and diligent prosecution of this matter through the proper procedures provided by the statutes.

The Commissioner notices that the major portion or $772,345 of the total $921,371 reduction proposed by Council from the 1970-71 school budget represents the identical items controverted and amounts subsequently restored by the Commissioner in the matter of the 1969-70 school budget. The record shows that Council contests these identical items for the "same reasons," without elaboration, as set forth in the prior-year's budget dispute. Also, the additional recommended reductions for 1970-71 consist primarily of personnel positions, which Council simply states are "unnecessary." The Commissioner reminds Council of the words of the New Jersey Supreme Court which set forth the basic and fundamental rule applicable to actions of this kind 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. This is particularly important since,* on the board of education's appeal *** *the Commissioner will* undoubtedly *want to know* quickly *what individual items in the budget the governing body found could properly be eliminated or curbed and on what basis it so found." Board of Education of East Brunswick v. Township Council of East Brunswick*, 48 *N.J.* 94, 105-106 (1966) (*Emphasis ours.*)

The Commissioner has carefully reviewed the hearing examiner's report regarding the Board's maintenance budget and budgetary accounting. In regard to the maintenance budget, the Commissioner finds that the accounting system employed, although probably of value for internal use, does not provide the type of analysis which is necessary to coincide with prescribed New Jersey school-accounting procedures for the general budget, the advertised budget and the annual school audit. Also, this budget account does not adequately set forth a well-ordered expenditure plan for maintenance projects which would be clear and understandable to the general public. Therefore, the Commissioner directs petitioner to file an appropriate amended schedule for this budgetary item, and to comply with the remaining items concerning budgetary procedures as set forth herein.

In reviewing this record, the Commissioner takes notice of the extreme difficulty encountered in order to determine the facts, the lengthy period of

time elapsed since the filing of the petition of appeal to the time of this final determination, and the consequent upon the program of the public schools during this 1970-71 fiscal year. The Commissioner is constrained to remind both parties that the courts of this State have, in numerous instances, iterated the fact that members of local boards of education and councilmen hold positions of public trust, and must at all times discharge their duties with the public interest as their primary goal. See *Cullum v. Board of Education of the Township of North Bergen*, 15 *N.J.* 285, 292 (1954); *Aldom et al. v. Borough of Roseland et al.*, *N.J. Super.* 495, 500 (*App. Div.* 1956)

The public interest, in the matter controverted before the Commissioner, requires compliance with the mandate set forth in the organic law of this State, supported by legislative enactments and administrative requirements "for the maintenance and support of a thorough and efficient system of free public schools ***." *New Jersey Constitution*, *Art.* 8, § 4, *par.* 1 The public schools were created and are supported for the benefit of the pupils therein and the resulting benefits to their parents and the community at large. Every effort must at all times be put forth to properly effectuate this State policy.

The jurisdiction of the Commissioner in this case is limited to determining the sum of monies necessary for the maintenance and operation of a thorough and efficient system of public schools in the City of Trenton for the 1970-71 school year. Having examined the report of the hearing examiner, the Commissioner concurs in the recommendations as supported by the finding of fact. He notices from the record that Council has informed the Board of its intention to turn over Urban Aid funds to the Board in the event that such funds are received from the State for 1970-71. As was previously stated, Council gave the Board $500,000 of Urban Aid funds toward the support of the 1969-70 school budget. If these funds are received by the Board, the amount of monies necessary to be raised by taxes for school purposes for 1970-71 will be substantially reduced.

The Commissioner directs that the Mayor and Council of the City of Trenton certify to the Mercer County Board of Taxation an additional sum of $425,043.76 to be raised by taxation for current expenses for the public schools of Trenton in the 1970-71 school year.

COMMISSIONER OF EDUCATION

April 21, 1971

**In the Matter of Duncan Raymond**
**and the Board of Education**
**of the Township of Montgomery, Somerset County**

COMMISSIONER OF EDUCATION

**Order**

It appearing that the controversy over the residency of Duncan Raymond has not been resolved; and it appearing that prior correspondence from the Commissioner and his designees has determined that Duncan Raymond's official residence is in Montgomery Township with his parents; and it appearing that it is the duty of the Montgomery Township Board of Education to provide a suitable facility and program of instruction for him; and it appearing that the Montgomery Township Board of Education may pay tuition for Duncan to attend an improved program outside of the Montgomery Township School District; and it appearing that the responsibility for Duncan's education rests with the Montgomery Township Board of Education; and it appearing that the Supreme Court decision in *Mansfield Township Board of Education v. State Board of Education*, 101 *N.J.L.* 474, 129 *A.* 765 (1925), established the criterion for residence in New Jersey to wit:

> "A child, in law, can have no residence of its own, and can only lawfully acquire one when it has been emancipated. Its residence under school law follows that of its parent or guardian or other person having *legal* control of it." (*Emphasis added.*);

and it further appearing that Duncan Raymond's legal residence is in Montgomery Township; now therefore

IT IS ORDERED on this 22 day of April, 1971, that the Montgomery Township Board of Education provide an appropriate program of studies for Duncan Raymond, in its own schools, or in the alternative pay for his tuition in an appropriate class in another school of its choosing. It is further ORDERED that the Montgomery Township Board of Education provide for Duncan's transportation from the place where he is domiciled to the selected school. Nothing in this ORDER prohibits a joint arrangement for Duncan's transportation, between the Montgomery Township Board of Education and any other board of education.

COMMISSIONER OF EDUCATION

**"P", by her Parent and Natural Guardian,
and by her Guardian Sister,**

*Petitioner,*

**v.**

**Board of Education
of the City of Irvington, Essex County,**

*Respondent.*

## COMMISSIONER OF EDUCATION

### Decision

For the Petitioner, Fahey and Fahey (Raymond F. Fahey, Jr., Esq., of Counsel)

For the Respondent, William R. Miller, Esq.

Petitioner in this case, hereinafter "P," protests the action of the Board of Education of the City of Irvington, hereinafter "Irvington Board" in denying her an opportunity to attend its schools.

The facts in the instant matter were presented to a hearing examiner appointed by the Commissioner on March 16, 1971, in the office of the Essex County Superintendent of Schools. The report of the hearing examiner is as follows:

The following allegations and prayer constitute P's appeal before the Commissioner:

> "1. The infant petitioner was dismissed from Irvington's Schools on September 10, 1970 and told not to return there to school.
>
> "2. The infant petitioner has resided in Irvington more than two years and continues to reside in Irvington and is compelled to reside there in the future.
>
> "3. The infant petitioner, by her parent and natural guardian * * * has made application to the Newark Board of Education but has been advised that she has not been properly transferred from the Irvington School System and is not a proper person to attend Newark schools by reason of her questionable domicile.
>
> "4. Infant petitioner has not attended school since her dismissal on September 10, 1970.
>
> "5. The infant petitioner will suffer serious and irreparable harm if she is not admitted to school immediately.

"6. The respondent Board of Education has been made aware of these facts but has failed to act to protect the interests of the infant petitioner from irreparable harm.

"WHEREFORE, the petitioner prays that she be immediately reinstated in the Irvington School System by a temporary order of the Commissioner until such time as her petition for full reinstatement can by (sic) heard; and that she be afforded such further relief as may be just."

At a conference of counsel held in the Commissioner's office, Trenton, on November 12, 1970, counsel agreed that P should attend the Westside High School in Newark, without prejudice, pending adjudication of this petition. Arrangements for her admittance there were made by the hearing examiner through the Essex County Superintendent of Schools. P, however, has not attended any school since September 10, 1970, because her mother has not sent her to school in Newark.

Two essential issues were raised at the conference, *supra*, as follows: (1) Residency of P's guardians will be determined pursuant to a plenary hearing, and (2) In the event it is determined that P is not in compliance with the provisions of *N.J.S.A.* 18A:38-1(a) or (b), is P entitled to attend the Irvington School System in view of her unusual family circumstances?

P's mother testified that she lives between two or three places and not primarily in Newark. She said she goes " back and forth" between family members' homes in Westfield and Irvington. P's mother testified further that her home in Newark has insufficient bedroom space for P. Therefore, she decided more than two years ago to place P in the home of another of her daughters who is married and lives in Irvington, thus establishing P's right to attend the Irvington Schools.

P's mother avers that she has the right to determine what living circumstances are best for her child. She avers also that the placement of P in her daughter's home in Irvington was also helpful to the older married daughter in that she (the married daughter) was often subject to fainting and required help.

Under cross-examination, P's mother admitted that she owns a home in Newark where her husband resides and that their taxes are paid to the City of Newark. She admitted also that on her driver's license she uses the Newark address, that her phone there is in the family name and that she is registered to vote in Newark. She further admitted she did provide some financial support in buying P "whatever she needs" from the money given her by her husband. However, she avers that one of her sons provides the primary support for her and P since neither she nor her married daughter are working. Her testimony revealed also that her married duaghter is also unable to support P. Further testimony showed that P's mother had not filed an affidavit with the Irvington Board of Education pursuant to *N.J.S.A.* 18A:38-1 (b), nor had she any intention of doing so.

Although her testimony revealed other personal family hardships, the hearing examiner determines that the testimony of P's mother, *supra*, is the only evidence that is necessary for the Commissioner to decide the instant matter.

* * * *

The Commissioner has read the report and the findings of the hearing examiner.

The right to attend a public school is clearly granted by law. *N.J.S.A.* 18A:38-1 provides in part that:

> "Public schools shall be free to ***
>
> "(b) Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the district, if so required by the board, a sworn statement that he is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term ***."

In the instant matter the Commissioner determines that P's domicile is with her parents in the City of Newark. It is also clear from the testimony of P's mother that P's domicile is geographically located in Newark, and the evidence educed at the hearing leads to this inescapable conclusion. The Commissioner has said before that a child's domicile is determined by the father's residence. See *Rutgers, the State University et al. v. Board of Education of the Township of Piscataway, Middlesex County*, 1963 *S.L.D.* 163; *Board of Education of the Borough of Franklin v. Board of Education of the Township of Hardyston, et al.*, 1954-55 *S.L.D.* 80.

The New Jersey Supreme Court said in *Kurilla v. Roth*, 132 *N.J.L.* 213, 215 (*Sup. Ct.* 1944):

> " *** 'Domicile' is the relation which the law creates between an individual and a particular locality or country. In a strict legal sense, the domicile of a person is the place where he has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning, and from which he has no present intention of moving. 17 *Am. Jr.* 588, 590; 28 *C.J.S.* 3. It is the place with which he has a settled connection for certain legal purposes, either because his home is there or because that place is assigned to him by law. *Croop v. Walton*, 199 *Ind.* 262, 157 *N.E. Rep.* 275; 53 *A.L.R.* 1386; *Fisher and Van Gilder v. First Trust Joint Stock Land Bank*, 210 *Iowa* 531; 231 *N.W. Rep.* 671; 69 *A.L.R.* 1340; *Shenton v. Abbott*, 178 *Md.* 526; 15 *Atl. Rep.* (2*d*) 906.

This is the rule adopted by the American Law Institute. *A.L.I. Conflict of Laws*, § 9. And every person, in all circumstances and conditions, is deemed to have a domicile somewhere; and, in general, a domicile once established continues until superseded by a new domicile, and the old domicile is not lost until a new one is acquired. *In re Dorrance Estate*, 115 *N.J. Eq.* 268; affirmed. *Dorrance v. Thaver-Martin*, 13 *N.J. Mis. R.* 168, affirmed, 116 *N.J.L.* 362; 17 *Am. Jur.* 590, 601. *** "

The Commissioner finds and determines, therefore, that P has the right to a free public school education in the City of Newark. P did not file an affidavit as required by the Board of Education of Irvington under the provisions of *N.J.S.A.* 18A:38-1 (b), *supra*, nor does it appear that she is eligible to file an affidavit. Therefore, for this and other reasons set forth herein, the Commissioner further finds and determines that P has established no factual basis on which she can be granted relief, nor is there any relief to which she is entitled pursuant to law. Having found that P has the right to attend the Newark Schools, the Commissioner directs the Board of Education of the City of Newark to cause the infant petitioner to attend its schools or to see that she attends school elsewhere.

Accordingly, the petition is dismissed.

COMMISSIONER OF EDUCATION

April 23, 1971

**Rev. Joseph J. Meyer,**

*Petitioner,*

**v.**

**Board of Education of the Township of Montville, Morris County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**Decision**

For the Petitioner, Alfred J. Villoresi, Esq.

For the Respondent, John Dorsey, Esq.

For the New Jersey School Boards' Association, *Amicus Curiae*, Thomas P. Cook, Esq.

Petitioner, the Rev. Joseph J. Meyer, is the chief administrator of the St. Pius X School, a private, parochial elementary school containing grades

Kindergarten through Eight, which is situated within the boundaries of the School District of the Township of Montville. Petitioner declares that respondent Montville Township Board of Education (hereinafter "Board") failed to recognize or consider the daily hours of operation of the St. Pius X School, which were 8:30 a.m. to 2:45 p.m., when it awarded contracts for pupil transportation for public and private school pupils for the 1970-71 school year. Respondent answers that petitioner did not make known to the Board of Education's Secretary any specific times that he would require for the transportation of pupils to the St. Pius X School during 1970-71, and, therefore, the Board Secretary prepared the total pupil transportation plan in accordance with prior years' arrangements.

Petitioner contends that the Board, by arbitrarily and unreasonably establishing time schedules for the transportation of pupils to the St. Pius X School, has in effect imposed its own hours of operation upon the St. Pius X School. Respondent Board replies that its total transportation plan includes transporting all of the resident pupils attending St. Pius X School on the same basis as public school pupils, with the same buses, according to an identical school calendar, and with due consideration given to the diocesan regulation requiring a six hours and fifteen minutes school day for the parochial school.

The Board also charges that petitioner failed to take timely and appropriate action and is therefore barred from relief by laches.

Petitioner prays for relief in the form of an order by the Commissioner of Education directing the Board to provide transportation for the resident pupils attending the St. Pius X School in accordance with the total hours of operation and opening and closing times established by the parochial school.

Testimony and documentary evidence were educed at a hearing conducted on November 12 and 13, 1970, at the office of the Morris County Superintendent of Schools, Morris Plains, before a hearing examiner appointed by the Commissioner of Education. Thereafter, counsel for both parties submitted briefs, and counsel for the New Jersey School Boards' Association submitted a brief *amicus curiae*. The report of the hearing examiner is as follows:

The St. Pius X School has been in continuous operation since the 1963-64 school year. The Board has provided transportation for all resident pupils attending this parochial school during each year since 1963-64, in accordance with applicable statutes. The dispute in the instant matter arises as the result of the Board's provision for pupil transportation to petitioner's school for the 1970-71 school year. Petitioner testified that for each school year prior to 1970-71, he was consulted by representatives of the Board in regard to the times that his pupils would be transported to and from the St. Pius X School. Sister John Mary, Principal of the St. Pius X School since 1963-64, offered uncontradicted testimony that, in a telephone converstaion with the Board Secretary sometime during the month of March 1970, she inquired regarding the

specific times of day when the resident parochial school pupils would be delivered to and picked up from the St. Pius X School by the Board's buses, beginning in September 1970. Sister John Mary further testified that the Board Secretary replied that the transportation schedule had been determined by the Board at a meeting held on a previous evening during the same week, and that the decision had been made to provide pupil transportation for the St. Pius X School during 1970-71 with delivery and pick-up times of 9:15 a.m. and 3:45 p.m., respectively. When Sister John Mary indicated surprise at the lateness of these times, her testimony disclosed that the Board Secretary agreed that the times were late, and he suggested that she or petitioner call the President of the Board in order to secure a change in these times. Petitioner testified that he visited the Board Secretary's office on Tuesday, March 31, 1970, after receiving the aforementioned transportation schedule from Sister Mary. On the occasion of this visit, the Board Secretary advised him personally that the above-stated transportation schedule had been determined by the Board, and that if petitioner wished to raise an objection, he should do so immediately. Accordingly, petitioner testified that he advised the parents of his parish of this situation via a newsletter, encouraging them to attend the next meeting of the Board of Education scheduled for April 14, 1970.

The Board Secretary testified that prior to April 14, 1970, he had consulted petitioner regarding the names and addresses of parochial school pupils to be transported, and had also discussed with him several specific bus stops on certain routes. He further testified, however, that he never did, in fact, consult with petitioner regarding the specific hours when transportation would be provided, other than to simply inform petitioner that the Board had determined these hours to be 9:05 a.m. to 3:45 p.m.

Testimony of the Board's witnesses indicates that prior to the April 14, 1970, Board meeting, the Board Secretary and the Superintendent of Schools reviewed the entire transportation plan and decided to recommend to the Board a change in the operating time of the new High School schedule to open in 1970-71, which would then enable a change in the proposed pupil transportation times for the St. Pius X School from 9:15 to 9:00 a.m. and from 3:45 to 3:15 p.m.

Testimony of witnesses for both parties established that approximately forty to fifty parents of St. Pius X School pupils attended the April 14, 1970, meeting of the Board. During this meeting a committee of five parents conferred in executive session with the Board and indicated their disapproval of the Board transportation plan for the St. Pius X School. The Board, later that same evening, informed the concerned parochial school parents that it would change the hours of transportation from 9:15 to 9:00 a.m. and from 3:45 to 3:15 p.m. for the 1970-71 school year. The parents indicated their dissatisfaction with this proposal and left the meeting.

A legal advertisement, placed by the Board, appeared in *The Boonton Times - Bulletin* on Thursday, April 9, 1970, for the receiving of transportation

bids at 9:00 p.m. on April 28, 1970. Although the fact is not stated in the advertisement, testimony discloses that these bids were for pupil transportation for the 1970-71 school year. According to the advertisement, specifications were available for bidders on April 9, 1970. The following appears in the minutes of the April 14, 1970, Board meeting:

> "Mr. Rogovin moved, Mr. Glick seconded that the Board of Education adopt the official times as to when school buses should run for next year, and that these be added to contracts and routes which the Board is now officially adopting also for the nexr (sic) school year:"
>
> "Montville High School - 7:30 a.m. - 2:45 p.m. William Mason, Cedar Hill, Montville, Towaco, Etta Konner, and Woodmont Schools - 8:15 a.m. - 2:00 p.m. Central School - 9:00 a.m. - 3:30 p.m. St. Pius School - 9:00 a.m. - 3:15 p.m. ***."

This motion was carried on a recorded roll call vote with four affirmative and three negative votes.

The next item in the Board minutes of the April 4, 1970, meeting also pertains to transportation as follows:

> "Mr. Rogovin moved, Mr. Glick seconded that the Board of Education formally ratify the Board Secretary's action concerning transportation for the 1970-71 school year. Unanimously carried on roll call."

The Board's determination regarding the 1970-71 transportation-time schedule was conveyed to petitioner by letter under date of April 21, 1970, from the Board Secretary. This letter, which was submitted in evidence (P-3) states in part:

> " *** This, therefore, will mean that *buses will arrive at your school at 9:00 a.m. and pick up the children at 3:15 p.m.* With this arrangement, while admittedly it might not be most desirable for your purposes, it allows all of your children to be bused to your school that are in your system. *If the time has to be rearranged, it will have to be done under law, but our interpretation under law says that any child less than two (2) miles from the school need not be bused.* It is the Board's intention to try to supply buses for all of our pupils, and it is for this reason that the hours were arrived at for the bus schedules ***." (*Emphasis ours.*)

The letter also included the reminder that the Board would receive bids for 1970-71 pupil transportation at its April 28, 1970, meeting.

The Board Secretary testified that following the April 14, 1970, Board meeting, he notified all prospective bidders by letter of the changes in the time schedules which the Board had formally adopted at that meeting. He further testified that the Board decided to receive transportation bids for 1970-71 during the month of April in order to secure the most competitive prices.

A letter under date of April 24, 1970, was sent to the Morris County Superintendent of Schools by petitioner, Sister John Mary, and the chairman of the parents' committee, which requested the County Superintendent to intercede and settle the dispute regarding pupil transportation. This letter (P-1) is quite lengthy; therefore, the most pertinent portion is quoted as follows:

> " *** On April 23, 1970 the Board President informed the committee that he had been advised that the private school transportation law had not been tested in these matters and had not been ruled on by you. We therefore petition you to direct the Board of Education of the township of Montville:
>
> 1. to confer with the Administration of St. Pius X School as to opening and closing times of the school and the length of the school day before drawing specifications for transportation bids, and
>
> 2. to advertise for transportation in accordance with the appropriate laws and regulations and in accordance with its own standing policy, and
>
> 3. to cease from threatening the loss of transportation unless the private school opens and closes for busing purposes as the Board might like it to, and
>
> 4. to reject *** or to hold in abeyance any bids for St. Pius X School routes which the Board will receive *** at the meeting of April 28, 1970.
>
> "Finally, *** A private school must by definition be free from any interference and safe from any threat by any public agency, and that no public agency, however benigh, should arrogate to itself any decision-making power that affects the educational integrity, the education philosophy and planning, or the educational welfare of the students of the private school."

Testimony disclosed that the County Superintendent was on vacation during this period of time, and therefore, was not able to respond to this communication until May 22, 1970.

At a meeting held on Tuesday, April 28, 1970, the Board received and opened transportation bids. The minutes disclose that a member of the parents' committee from the St. Pius X School requested that the Board meet with the committee on Thursday, April 30, 1970, and the President of the Board agreed, adding the stipulation that the conference would not be open to the public. The Board voted unanimously to hold the transportation bids for consideration at an adjourned meeting scheduled for Tuesday, May 5, 1970. A communication under date of April 29, 1970, (P-4) was addressed to petitioner by the Board president, notifying him of the pending April 30, 1970, conference with the committee of parents and inviting petitioner and Sister John Mary to attend.

Testimony of petitioner's witnesses indicates that the committee of parents left the conference with the understanding that the Board would explore various possibilities for accommodating the St. Pius X School. Conversely, the Board's witnesses offered testimony that, in their judgment, the controversy was settled at this conference since the Board had taken the position that they could not provide the transportation hours requested by the parochial school.

Petitioner addressed a brief letter, dated April 28, 1970, (P-5) to the Board which stated:

> "Please be advised that the school day at St. Pius X School, *** begins at 8:30 a.m. and closes at 2:45 p.m."

This letter was received by the Board on May 2, 1970.

The attorney for the parents' association addressed a letter to the President of the Board under date of May 1, 1970, (P-12) which strongly suggested that various specific points concerning the transportation controversy be thoroughly reviewed by the Board, and reiterated that the St. Pius X School intended to operate between the hours of 8:30 a.m. and 2:45 p.m. The St. Pius X Church bulletin dated May 2, 1970, (P-11) contained, *inter alia*, the following statement as part of a report from the School parents' committee:

> " *** The Board did agree to explore several possibilities offered by the Committee for solving the impasse. *** No reply has been received from the County Superintendent of Schools, to whom an appeal on the matter was made on April 24th."

The Board's counsel, by letter dated May 2, 1970, (P-9) advised the Board concerning the May 1, 1970, communication from counsel for the parents as follows:

> " *** In the final analysis, it would appear, *** that his clients want St. Pius to be treated as a private school for transportation purposes and not as a part of the public school system ***."

The minutes of the adjourned meeting of the Board held May 5, 1970, disclose that transportation contracts for 1970-71 would be awarded at the May 12, 1970, meeting. Also, the minutes include a letter (P-7) submitted by the chairman of the parents' committee of the St. Pius X School. This letter (P-7) restates the position of the committee regarding the operational hours of the parochial school, and also mentions that the committee was awaiting a reply from the County Superintendent who was on vacation. The minutes of the Board meeting held May 12, 1970, record the award of the 1970-71 pupil-transportation contracts.

The County Superintendent replied by letter dated May 22, 1970, (P-2) to petitioner's letter of appeal, and thoroughly reviewed and answered the points

raised therein. Also, the County Superintendent urged both parties to resolve their differences in the instant matter and offered his assistance for this purpose.

Further correspondence was exchanged by both parties via petitioner's letter dated July 28, 1970, (P-13) and the Board's reply dated August 6, 1970 (P-14).

The Board Secretary testified that the Board directed him, during August 1970, to determine the amount of additional costs which would be required to provide the transportation hours requested by the parochial school parents. He subsequently reported to the Board that additional buses would be required, and the cost for this service would be prohibitive. Further testimony by the Board Secretary discloses that the Board's deliberations concerning the problem of accommodating the parochial school were limited to possible time changes of previously-planned bus routes and never included the alternative of redesigning the total transportation plan. Therefore, in August 1970, after all transportation contracts for 1970-71 had been awarded, the Board Secretary could find no solution to this problem other than the addition of more buses.

The Board's witnesses conceded that the parochial school is not seeking separate and distinct busing for its pupils, but is merely requesting a more suitable accommodation to its hours of operation under the existing transportation plan.

Additional testimony educed from the Board's witnesses reveals the fact that the Board transports resident pupils to special education classes outside of its school district, and also transports Twelfth Grade pupils to Boonton High School. Also, the Montville Board contracts with a neighboring board of education for the transportation of resident pupils to De Paul Diocesan High School and to Morris Catholic Regional High School. In these instances, the Board admits, transportation must be provided to coincide with the hours of operation of each particular school.

Petitioner avers that in past years he was consulted regarding transportation hours, and he has always compromised with the Board in order to keep transportation costs to a minimum and thereby provide savings for the taxpayers of Montville.

* * * *

The Commissioner has reviewed the findings of fact as set forth above in the report of the hearing examiner.

In the first instance, the Commissioner must consider the defense of laches raised by respondent Board of Education. The factual findings in the instant matter clearly disclose, on their face, that petitioner has continuously and persistently asserted his claim to certain specific rights under law, from the onset of this dispute during March 1970, through the period ending August 11, 1970,

at which time this Petition of Appeal was filed with the Commissioner of Education. The Commissioner can find no evidence of "unconscionable, undue, unexcused, unexplained or unreasonable delay" in the assertion of rights by petitioner in the instant matter. (See *Black's Law Dictionary*, 4th Ed. Rev., 1968, West Publishing Co., p. 1017.) Nor can the Commissioner find any facts to support a presumption that petitioner waived his right or claim, or that any alleged failure to act by petitioner resulted in "disadvantage, injury, injustice, detrement or prejudice" to respondent Board of Education. *Ibid.* p. 1016

In numerous past instances the Commissioner has decided questions regarding pupil transportation. The quasi-judicial function of the Commissioner of Education is set forth in *N.J.S.A.* 18A:609, which reads in part as follows:

> "The Commissioner shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws *** or under the rules of the state board or of the commissioner."

The primary issue in the instant matter is whether the Board did or did not act reasonably under the circumstances and fully discharge its duties and responsibilities under *N.J.S.A.* 18A:39-1 in awarding transportation contracts for the 1970-71 school year. This statute reads in part as follows:

> "*Whenever* in any district *there are pupils residing remote from any schoolhouse, the board of education* of the district *may make rules and contracts for the transportation of such pupils to and from school, including the transportation of school pupils to and from school other than a public school,* except such school as is operated for profit in whole or in part.
>
> "*When any school district provides any transportation for public school pupils* to and from school pursuant to this section, *transportation shall be supplied to school pupils residing in such school district in going to and from any remote school other than a public school,* not operated for profit in whole or in part, located within the State *provided such schools are not more than* 20 miles from the residence of the pupil provided the per pupil cost of the lowest bid received does not exceed $150.00 *and if such bid shall exceed said cost then the parent, guardian or other person having legal custody of the pupil shall be eligible to receive said amount toward the cost of his transportation to a qualified school other than a public school,* regardless of whether such transportation is along established public school routes.*** Any transportation to a school, other than a public school, shall be pursuant to the same rules and regulations promulgated by the State board as governs transportation to any public school ***." (*Emphasis ours.*)

It is well established in this State that boards of education are required to provide transportation to and from school for all children who reside remote from a schoolhouse.

In *Board of Education of the Borough of Woodbury Heights v. Gateway Regional High School District et al.*, 104 *N.J. Super.* 76 (*Law Div.* 1968), the Court reviewed the history of the pupil-transportation law and clearly defined the requirement for providing transportation thereunder. The Court noted at p. 81 that, in *Board of Education of Frelinghuysen Township v. Atwood*, 73 *N.J.L.* 315 (*Sup. Ct.* 1906), affirmed 74 *N.J.L.* 638 (*E. & A.* 1906), it was held that a board of education was under no statutory obligation to provide for the transportation of public school children. In 1907, *N.J.S.A.* 18:11-1 (now *N.J.S.A.* 18A:33-1) was amended with the term "suitable school facilities" broadened to expressly include "convenience of access to the public schools." *L.* 1907, *c* 123 § 1 *N.J.S.A.* 18A:33-1 reads, in part, as follows:

> "Each school district *shall provide,* for all children who reside in the district and are required to attend the public schools therein and those who reside therein or elsewhere and are entitled or permitted to attend the schools of the district pursuant to law, *suitable educational facilities including* proper school buildings and furniture and equipment, *convenience of access thereto,* and courses of study suited to the ages and attainments of all pupils between the ages of five and 20 years ***." (*Emphasis ours.*)

In *Board of Education of Woodbury Heights v. Gateway Regional High School District et al., supra,* the Court quoted *N.J.S.A.* 18:11-1, the progenitor of *N.J.S.A.* 18A:33-1, and stated at pp. 81 and 82:

> " *** The Legislature specifically stated then that each school district 'shall' provide suitable school facilities and accommodations for all children who wish to attend public school in the district and that such facilities and accommodations 'shall include *** convenience of access thereto.' *Thus, in the discharge of its mandatory obligation to provide 'convenience of access' a board of education was henceforth required to provide free transportation to public school children living remote from the schoolhouse.* See *Board of Education of West Amwell Township in Hunterdon County v. State Board of Education*, 5 *N.J. Misc.* 152 (*Sup. Ct.* 1927) ***." (*Emphasis ours.*)

Transportation benefits were extended to children attending nonpublic schools by a 1941 amendment to *N.J.S.A.* 18:14-8 (now *N.J.S.A.* 18A:39-1, *supra*). Public reaction created by the 1941 amendment culminated in the landmark case of *Everson v. Board of Education of Ewing Township*, 133 *N.J.L.* 350 (*E. & A.* 1945), affirmed 330 *U.S.* 1, 67 *S. Ct.* 504, 91 *L. Ed.* 711 (1947), holding that the amended statute, *N.J.S.A.* 18:14-8 (now *N.J.S.A.* 18A:39-1, *supra*), did not transgress the *First Amendment* of the *United States Constitution. Ibid.* p. 82

In *Woodbury Heights v. Gateway Regional High School, supra,* the Court referred to an earlier decision regarding the pupil transportation law as follows:

> " *** As recently noted in *Fox v. Board of Education, West Milford Tp.*, 93 *N.J. Super.* 544 (*Law Div.* 1967), the framers of our 1947 Constitution subsequently incorporated the *Everson* principles into our fundamental law. See *N.J. Const., Art.* VIII § IV, *Par.* 3; *Fox v. Board of Education, West Milford Twp., supra*, at pp. 558-559 ***."

In *Fox*, *supra*, the Court found that the local school board had no authority under the existing pupil transportation law (*N.J.S.A.* 18:14-8, now *N.J.S.A.* 18A:39-1, *supra*) to transport children to nonpublic school along independent routes. In *Woodbury Heights*, *supra*, the Court made the following observation at p. 84 regarding the amended pupil transportation law:

> " *** In essence, then, all the Legislature has done in *N.J.S.* 18A:39-1 is to expand the scope of its predecessor by effectuating legislatively what the court refused to do judicially in the *Fox* case. No longer need private nonprofit school pupils living remote have to depend upon established public school bus routes in order to be entitled to transportation to school. *Now, so long as any public school pupil living remote is transported by a school district*, including a regional school district – except handicapped, vocational or technical school students – *all nonpublic school pupils similarly situated are also to be transported.* The Legislature not only drew no distinction based upon grade levels, it specifically mandated that they were irrelevant." (*Emphasis ours.*)

The Court further stated at pp. 85 and 86:

> " *** *N.J.S.* 18A:39-1 clearly treats all similarly situated pupils equally. *** *N.J.S.* 18A:39-1, like its progenitor *N.J.S.* 18:14-8, is predicated essentially upon a remoteness criteria ***."

New Jersey parents are required to send their children to school. *N.J.S.A.* 18A:38-25 *et seq.* But a parent may, by exercising his statutory prerogative, send his child to a nonpublic school. (See *State v. Massa*, 95 *N.J. Super.* 382 *Cty. Ct.* (1967). ) If the distance to such school requires a considerable financial expenditure, then the State may pay for such costs. (See *Woodbury Heights v. Gateway Regional High School*, *supra*, at p. 86.) The Court, in *Woodbury*, *supra*, noted that the *Everson* case recognized that the pupil transportation statutes "became complimentary to and in aid of the compulsory education statutes." At p. 86 the Court made the following observation regarding *Everson:*

> " *** In affirming, the United States Supreme Court iterated this thought, stating that all that *N.J.S.A.* 18:14-8 did, and properly so, was to assist all parents in getting their children safely and expeditiously to and from any accredited school. See 330 *U.S.*, at p. 18, 67 *S. Ct.* 504. *** "

In its conclusions, the Court stated in *Woodbury*, *supra*, at p. 86:

> " *** Thus, the Legislature has deemed it to be an essential public purpose to benefit children living remote by guarding them against the hazards

attendant upon traveling to school. The Legislature *** did not choose to distinguish between whether a child had to travel to a public school or a nonpublic school, for a child is a child and the hazards of travel do not depend upon the school which the child attends *** ."

In the instant matter, the Commissioner must consider the judicial interpretations of *N.J.S.A.* 18A:39-1, *supra*, specifically as they pertain to pupils attending private, nonprofit schools. In *McCanna*, et al. v. Sills, et al., *103 N.J. Super.* 480 (*Ch. Div.* 1968) at p. 489, the Court set forth the exclusionary aspects of the statute as follows:

" *** no child who attends a private school, profit or non-profit, is entitled to transportation if he lives (a) within 2 miles of the school and is in an elementary grade; (b) within 2.5 miles of the school and is in a secondary grade; (c) more than 20 miles from the school regardless of grade level; (d) in a district which provides no transportation for its public school students; (e) in a district which only transports handicapped children pursuant to *N.J.S.* 18A:46-23; (f) in a district which only provides transportation to children attending public vocational school, or (g) at such a distance that it would cost in excess of $150 to transport him to school ***."

The Commissioner takes notice that, in the instant matter, the Board of Education provides transportation, with certain specific exceptions, for all resident pupils attending both public and private, nonprofit schools regardless of the remoteness criteria. The authority for providing transportation for non-remote pupils is found in *N.J.S.A.* 18A:39-1.1, which reads in pertinent part as follows:

"In addition to the provision of transportation for pupils living remote from any school house, *** *the board of education* of any district *may* provide, *by contract or otherwise, in accordance with law and the rules and regulations of the state board*, for the transportation of other pupils to and from school ***." *(Emphasis ours.)*

In the instant matter, the pivotal question is whether or not the Board acted reasonably under the aforementioned statutes in providing a plan of pupil transportation. The specific issue set forth by the petitioner centers upon the hours of operation; namely, 8:30 a.m. - 2:45 p.m., established by the St. Pius X School. Petitioner contends that he is precluded from operating his school during these desired hours by the Board's refusal to provide concomitant hours of transportation.

An examination of the facts discloses that the Board did, in fact, determine the hours of 9:15 a.m. and 3:45 p.m. for the transportation of pupils attending the St. Pius X School for 1970-71, and that this determination was made without prior consultation with the officials of the parochial school, although the Board had in each preceeding year initiated such consultation

before it made final determinations regarding the hours of transportation for the St. Pius X School pupils. When the Board's action in regard to 1970-71 precipitated a spirited reaction of protest from the parents of the parochial school pupils, the Board made a second determination setting the hours of 9:00 a.m. and 3:15 p.m. The record in the instant matter clearly shows that the Board merely shifted the hours of planned bus routes in arriving at its compromise determination of 9:00 a.m. and 3:15 p.m., but at no time did the Board indicate a willingness to rearrange any planned bus routes in order to accommodate the St. Pius X School.

Testimony educed from the Board's witnesses clearly discloses that its transportation plan for 1970-71 was drawn to accommodate an increased number of pupils, the opening of a new high school, and a reorganization of the public schools resulting from the cessation of double session programs. Also, the Board planned the fullest possible utilization of school buses, and attempted to secure the most competitive prices by completing the bidding process as early as possible prior to 1970-71. The Commissioner considers the Board's efforts to secure economy, standing alone, as worthy of commendation.

In the instant matter, however, the Commissioner notes several distinct circumstances which must be considered. The Board is presently operating three elementary schools containing Grades Kindergarten through Four; three schools encompassing Grades Kindergarten through Five; a middle school for Grades Six and Seven; and a new high school for Grades Eight through Eleven. The six elementary schools operate on a common time schedule, while the middle school and the high school follow separate differing schedules. By comparison, the St. Pius X School encompasses Grades Kindergarten through Eight, an organizational plan not found in any of the public schools, and desires to operate on a time schedule which does not coincide with any of the three utilized by the public schools.

The Commissioner takes cognizance of the unique needs of an elementary school encompassing Grades Kindergarten through Eight, and determines that the hours of operation planned by the St. Pius X School are reasonable and desirable for these elementary grades.

Another distinguishing feature here is that no board of education other than respondent is providing transportation to this parochial school. It is logical to conclude that if two or more local school boards were transporting pupils to St. Pius, each would be required to comply with the operational hours determined by that School. It is significant that respondent contracts with a neighboring school board to transport resident pupils to De Paul Diocesan High School and Morris Catholic Regional High School at hours required by those schools. Also, the Board transports its Twelfth Grade pupils to Boonton High School, again at hours over which it has no control.

The Commissioner has considered the facts in the instant matter, and has examined the judicial interpretations mentioned herein. The Commissioner finds

no authority for respondent Board's action in unilaterally setting the pupil transportation time schedule for the St. Pius X School. The exclusionary provisions of the transportation statute set forth by the Court in *McCanna, et al. v. Sills, et al., supra,* clearly iterate the financial limitation of $150 per pupil. Therefore, the argument, vigorously advanced by the Board, that its contested action was taken for the purpose of economy is groundless. The Board is clearly limited to the expenditure of $150 per pupil for transportation to any private, nonprofit school, including the St. Pius X School. If the $150 limitation per pupil would be exceeded as the result of providing transportation at the hours required by petitioner's parochial school, the Board could do no more than pay to the parent or legal guardian of each pupil $150 toward the cost of such transportation. *N.J.S.A.* 18A:39-1, *supra.*

In *Richard H. Kelly V. Board of Education of the Township of Hamilton, Mercer County,* 1968 *S.L.D.* 131, the Commissioner decided a controversy which centered upon transportation of a resident pupil by a local board of education to a private, non-public school. Although that case is clearly distinguishable in several specific respects from the instant matter, the general principle enunciated therein has some bearing here.

In *Kelly, supra,* the petitioner appealed to the Commissioner to compel the local board of education to provide transportation to and from the private, nonpublic school in accordance with the time schedule of the school. Petitioner's son was required to participate daily in an afternoon athletic program established as a basic element of the curriculum. Under such circumstances the Commissioner held that the board of education could not require either that the nonpublic school excuse petitioner's son early or that the school curtail its program in order to comply with the board's busing schedule established for resident pupils attending three private, nonprofit schools. Accordingly, the board was directed to provide appropriate transportation for petitioner's son from the school to his home, departing at the conclusion of the daily schedule of classes. It must be noted that in *Kelly, supra,* the transportation contracts were established under *N.J.S.A.* 18A:39-1 prior to the amendment *(L.* 1968, c 29) which placed a ceiling of $150 per pupil on the cost of transportation to a private, nonprofit school.

The Commissioner takes cognizance of the fact that were he to direct respondent Board to provide additional transportation routes and buses for the purpose of transporting the St. Pius X School pupils at the desired hours of 8:30 a.m. and 2:45 p.m. for the remainder of this 1970-71 school year, the resultant additional expenditure may inflate the per pupil cost so as to exceed the $150 limitation. In such event, these parochial school students would be deprived of their bus transportation by an artificial set of circumstances, thereby creating more controversy. Therefore, the Commissioner's decision in the instant matter will be effective for the school year 1971-72 for remote pupils as defined in *McCanna, et al. v. Sills, et al., supra.*

The Commissioner takes judicial notice of the fact that pupil transportation contracts are annually reviewed and approved by the County

Superintendents of Schools acting as official agents of the Department of Education. In granting approval of such contracts, the County Superintendents have for many years allowed provisions in school busing schedules whereby pupils may be delivered to and picked up from a school within approximately thirty (30) minutes prior to and following the official opening and closing times of the individual school. In the judgment of the Commissioner this provision is reasonable, particularly in view of the fact that any other arrangement would seriously curtail the multiple utilization of school buses, thereby increasing the cost to the taxpayers of this State.

The Commissioner finds and determines, for the reasons stated, that respondent Board of Education did not properly discharge its duties and responsibilities under *N.J.S.A.* 18A:39-1 in providing transportation for the St. Pius X School. The Commissioner finds, and so holds, that the Board of Education's action, in establishing a transportation plan for 1970-71 for petitioner's parochial school, was unreasonable, albeit prompted by meritorious motives to guard the public purse.

The Commissioner orders the Montville Board of Education to: (1) consult with the officials of the St. Pius X School in order to determine the operational hours of said school for the 1971-72 academic year, and (2) include such hours in the transportation plan propounded for 1971-72.

The Commissioner leaves to the Montville Board of Education the decision whether or not to continue providing transportation under *N.J.S.A.* 18A:39-1.1 for similarly situated, non-remote pupils.

COMMISSIONER OF EDUCATION

April 23, 1971

Affirmed by the State Board of Education, September 8, 1971

**In the Matter of the Annual School Election held in the Manalapan-Englishtown Regional School District, Monmouth County.**

COMMISSIONER OF EDUCATION

**Decision**

The announced results of the voting for three members of the Board of Education for full terms of three years each at the annual school election on April 6, 1971, in the Manalapan-Englishtown Regional School District, Monmouth County, were as follows:

| | AT POLLS | ABSENTEE | TOTAL |
|---|---|---|---|
| Joseph F. Bergen | 556 | 2 | 558 |
| John J. Engel | 495 | 3 | 498 |
| Louis J. Gartz | 485 | 3 | 488 |
| Robert H. Werner | 484 | 2 | 486 |

and others in lesser amounts.

Pursuant to a letter request for a recount dated April 7, 1971, from Candidate Robert H. Werner, a recheck of the voting machines used in this election was made by a hearing examiner appointed by the Commissioner of Education on Tuesday, April 20, 1971, at the storage depot of the Monmouth County Board of Elections, Freehold. The recount confirmed the previously-announced tally stated above.

The Commissioner finds and determines that Joseph F. Bergen, John J. Engel and Louis J. Gartz were elected on April 6, 1971, to seats on the Manalapan-Englishtown Regional Board of Education for full terms of three years each.

COMMISSIONER OF EDUCATION

April 27, 1971

**Sayreville Education Association, Inc.,**

*Petitioner,*

**v.**

**Board of Education of the Borough of Sayreville, Middlesex County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**Decision**

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

For the Respondent, Hayden & Gillen (Eugene F. Hayden, Esq., of Counsel)

The Sayreville Education Association, Inc., hereinafter "petitioner," demands a judgment that an action of the Sayreville Board of Education, hereinafter "respondent," in placing certain notations in the personal files of its

teachers was illegal. Respondent admits the alleged action, but opines that such action was a proper one to take in the circumstances.

This matter is submitted on an agreed stipulation of facts and on briefs of counsel. The stipulated facts are as follows:

"1. On September 10, 1970, the Board of Education of Sayreville passed a resolution, a copy of which is attached hereto, marked Exhibit A."

"*Exhibit A*

"RESOLUTION

"WHEREAS, on March 10, 11, 12 and 13, 1970, approximately 275 of the professional certificated personnel employed by this Board of Education went on strike against the school system operated by this Board of Education; and

"WHEREAS, said strike was a violation of law as well as a breach of the contract between the association representing said personnel and this Board of Education, as well as a breach of the individual contract between many of said personnel and this Board of Education; and

"WHEREAS, said strike disrupted said school system and placed undue burden upon those personnel and administrators who did report for duty; and

"WHEREAS, said strike could only have a harmful effect on the students of this school district; and

"WHEREAS, the Commissioner of Education of this State was informed immediately that said strike existed, both by telephone and later by telegram;

"NOW THEREFORE, BE IT RESOLVED by the Board of Education of the Borough of Sayreville in Middlesex County, New Jersey, as follows:

"1. A Memorandum to the effect that the certificated person employed by this school district took part in an illegal strike against this Board of Education shall be placed in the personnel file of each certificated person whose absence on March 10, 11, 12 and/or 13, 1970, was not excused and a copy of said Memorandum shall be delivered to said person.

"2. A statement that said person's file contains the aforesaid Memorandum shall be contained in any reply made to an inquiry by a prospective employer concerning said person's record of employment with this school district.

DATED: September 10, 1970

AYES: 5
NOES: 4"

"2. Pursuant to said resolution there was placed in the personnel file of each teacher a memorandum stating that the aforesaid teacher took part in an illegal strike where the Board of Education made a determination that the said teacher was absent on March 10, 11, 12 and/or 13, 1970, without excuse.

"3. The Board of Education of Sayreville has notified prospective employers of some of the teachers whose files were so marked that the memorandum so described was part of the teacher's record.

"4. No teacher has been given an opportunity to be heard with respect to the aforesaid resolution and subsequent action of the Board of Education of Sayreville.

"5. Some of the teachers who left the employ of the Board of Education of Sayreville applied for jobs in other communities, and prospective employers made inquiry of the Board of Education of Sayreville and were notified that the personnel record of the teacher contained a memorandum described above.

"6. Some of the teachers of whom prospective employers made inquiry of the Borough of Sayreville were not employed by employers to whom they had made application for employment."

On the basis of this stipulation, it is petitioner's contention that due process was denied to individual teachers, since no hearings prior to the placement of the file notations were held and no notice of such markings was given in advance of the fact. Petitioner contends that such unilateral action by respondent may play a part in ultimate dismissal of individual teachers, could lead to the withholding of increments, and could have important consequences with respect to the employment of the individual teachers both within and without the system. Since this is so, petitioner opines, a hearing or notice was a prerequisite to the act and the act is otherwise *ultra vires.* In support of its view, petitioner cites *Wisconsin v. Constantineau,* decided by the *U.S. Supreme Court* on January 19, 1971. In that opinion, rendered in the context of whether or not a state law was constitutional, the Court held:

"*** Where a person's good name, reputation, honor or integrity are at stake because of what the government is doing to him, notice and an opportunity to be heard are essential ***."

Petitioner maintains that in the instant matter the action of respondent was a disciplinary action and as such required proper due process before the punishment was inflicted. Its prayer is that the action of respondent should be reversed and the resolution recited, *supra,* should be set aside.

Respondent maintains that each of the individuals affected by its resolution was given a copy of it and that none of petitioner's group was denied a hearing for the simple reason that no teacher asked for one. Respondent also observes that there is no denial that the teachers as individuals did indulge in a strike, and opines that the Commissioner has no jurisdiction over the events that followed since personnel records are under the control of the local board and that there is no statute in school law that gives the Commissioner the power of review in this instance. In respondent's view, the case of *Wisconsin v. Constantineau, supra,* has no pertinence with regard to the matter *sub judice,* since in that case the affected person was held up to disgrace and ridicule before the public, which is not the situation herein. Respondent further asserts that teachers have no right to strike, but, if they do strike, the employer has the right to place a notation to this effect in the teachers' files.

* * * *

The Commissioner has carefully reviewed the contention of the parties in this case and observes that the kernel of the complaint is embedded in an action, of a teachers' association, which is specifically prohibited from striking by the terms of *N.J.S.A.* 34:13A-8 which provides:

> "Nothing in this act shall be construed to interfere with, impede or diminish in any way the right of *private* employees to strike or engage in other lawful concerted activities."

Pursuant to the clearly-stated terms of this statute, it has been repeatedly held by the Commissioner and by the courts that strikes by *public* employees are prohibited. *Perth Amboy Teachers' Association et al. v. Board of Education of the City of Perth Amboy, Middlesex County,* 1965 *S.L.D.* 159; *New Jersey Turnpike Auth. v. Amer., etc. Employees,* 83 *N.J. Super.* 389 *(Ch. Div.* 1964); *Delaware River and Bay Authority v. International Org., etc.,* 45 *N.J.* 138 (1965); *McAlees v. Jersey City Incinerator Authority,* 79 *N.J. Super.* 142 *(App.Div.* 1963) In the *Perth Amboy* decision, *supra,* the Commissioner said that he "deplores in strongest possible terms the unlawful activities on the part of teachers in picketing and striking in complete defiance of the law." In the years since that decision was handed down, there has been no change in the law, and there can be no more tolerance by the Commissioner of strikes by teachers now than there was in 1965.

However, in the instant matter the Commissioner is not asked to adjudge whether the strike of a teachers' association is legal or illegal, but to decide whether the action of respondent taken after the fact of a strike was a proper exercise of its discretionary or statutory powers. In arriving at a decision as to the validity of respondent's action, the Commissioner must first of all speculate as to the reason for the action and its probable effect on all of those against whom it was invoked.

It seems clear to the Commissioner that the action taken by respondent is punitive in its effect, since it imparts the stigma of an illegal action on the record of all but a few of its teaching staff members. This stigma is presumably attached permanently to the record and thus has a continuing effect, and such effect may not be mitigated in future years by exemplary conduct or devoted service. The effective punishment remains for each teacher a part of the "records" which have been described in one court as "the mind and memory of a corporate body." *Brown v. Webster City*, 115 *Iowa* 511, 88 *N.W.* 1070 (1902).

Since respondent took an action which in the Commissioner's judgment is punitive in its effect, if not in its intent, two questions are posed for consideration; namely, (1) is such an action reviewable by the Commissioner and (2) was the action taken pursuant to law and statutory authority?

With respect to the first question, the comprehensive nature of the Commissioner's jurisdiction to review the actions of local boards of education has been stressed by the Supreme Court of New Jersey in several opinions. *Laba v. Newark Board of Education*, 45 *N.J.* 161 (1965); *In re Masiello*, 25 *N.J.* 590 (1958); *Booker v. Plainfield Board of Education*, 45 *N.J.* 161 (1965); *Kopera v. West Orange Baord of Education*, 60 *N.J. Super.* 288 *(App. Div.* 1960). In *Kopera* the Commissioner quoted the *Masiello* case, *supra*, and said:

> "*** the Commissioner must determine whether the action under review is violative of the law and, if it is, 'the proper discharge of his duty requires corrective action.' ***"

The answer to the first question posed above is found in that statement from *Masiello, supra.* TheCommissioner, therefore, determines that the action of respondent, in the matter *sub judice*, is reviewable and within his jurisdiction.

The second question posed, *supra*, must deal with the merits of petitioner's complaint. Having already found that respondent's resolution was punitive in its effect the Commissioner has searched the statutes for the authority of a local board of education to invoke such a continuing punishment. There are, of course, many statutes which grant specific powers to local boards, i.e. "to make and amend rules," *N.J.S.A.* 18A:11-1; to remove its own members, *N.J.S.A.* 18A-12-3; to reduce the number of teaching staff members, *N.J.S.A.* 18A:28-9; to adopt a salary policy, *N.J.S.A.* 18A:29-4.1. However, when charges are to be made against "employees of a board of education," the statutory language is clear that the "board shall determine by majority vote 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 reduction in salary." *N.J.S.A.* 18A:6-11. If the determination of the board is that the evidence to buttress the charge is sufficient, the charge must be forwarded to the Commissioner, who alone is given power by *N.J.S.A.* 18A:6-10 to invoke either or both of the prescribed penalties or punishments – dismissal or reduction in salary – after a hearing held

pursuant to this statute. There are no other specific punishments authorized by the statutes contained in *N.J.S.A.* 18A, although school employees may, of course, be prosecuted and punished by a court of law when found guilty of a statutory violation.

In the instant matter, none of petitioner's members were prosecuted in a court of competent jurisdiction. There were no charges certified to the Commissioner that would cause any of petitioner's members to be dismissed or reduced in salary. Therefore, the Commissioner finds that the effective punishment invoked by respondent for an allegedly illegal act is without statutory foundation and is *ultra vires* and improper.

Even if the finding, *supra*, is set aside, *arquendo*, the question arises as to whether or not the respondent's actions in passing the resolution, "Exhibit A," and in incorporating it into the personnel files of its teachers is a fair and reasonable exercise of respondent's broad and general discretionary powers. In this regard the Commissioner is constrained to state that, in his opinion, the continuing nature of the effective punishment constitutes a sentence of undue severity because of its continual aspersion on the character of all of these teachers.

The Supreme Court of Pennsylvania has put the proper emphasis on the importance of "a good character" to teachers as individuals when it said in *Trustees of State Normal v. Cooper*, 150 *Pa. St.* 78, 24 *Atl.* 348:

> "A good character is a necessary part of the equipment of a teacher. Take this away, or blacken it, and the doors of professional employment are practically closed against him. Before this is done there should be at least a hearing, at which the accused may show that the things alleged are not true, or if true are susceptible of an explanation consistent with good morals and his own professional fidelity. We think it is plain, too plain for serious discussion, that the action of the trustees was irregular and unjust to the applicant."

In the instant matter, the action of respondent would blacken the names of hundreds of its employees for an indeterminate future since there is not contained in the resolution, "Exhibit A," any possibility of commutation of the enforcement procedure. Accordingly, the Commissioner finds that even, *arguendo*, if respondent could adopt a resolution that is in effect a punishment of the sort described herein, the actual resolution in this case constitutes an unusually severe action that in the Commissioner's judgment cannot be sustained as equitable and fair.

Having found that there is no statutory basis for respondent's action which occasioned the petition, *sub judice*, and that the action even as an exercise of the general discretionary powers of a local board of education is not equitable or fair, the Commissioner directs that the resolution, "Exhibit A," *supra*, is *ultra vires* and may not be an incorporated part of the personnel files of respondent.

Therefore, he directs that all copies of this resolution be removed from these files forthwith.

COMMISSIONER OF EDUCATION

April 28, 1971

Affirmed by the State Board of Education, November 3, 1971

**Parents, on behalf of "W.E.,"**

*Petitioners,*

**v.**

**Board of Education of the City of Rahway,
Union County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**Decision on Motion**

For the Petitioners, Comerford and Dietz (John N. Post, Esq., of Counsel)

For the Respondent, Magner, Abraham, Orlando & Kahn (Leo Kahn, Esq., of Counsel)

The parents of "W.E.," petitioners, maintain that their son's punishment, expulsion from school by the Rahway Board of Education, hereinafter "Board," was *ultra vires* and excessive. They have moved that the Commissioner set aside the action *pendente lite*. The Board opposes the Motion and avers that its decision to expel W.E. was a proper exercise of discretionary powers granted to it by statutory authority.

Oral argument on the Motion was held before a hearing examiner appointed by the Commissioner at the State Department of Education, Trenton, on March 30, 1971. The report of the hearing examiner is as follows:

W.E. is a boy who, on February 1, 1971, was 14 years of age and a pupil in the Ninth Grade in the Board's Junior High School. On that date, he was removed from class by the assistant principal at approximately 1:45 p.m. and taken to the office. He was confronted there by a member of the Rahway Police Department and school administrators, and was advised by the police that he had been identified by another student as the seller of a plastic bag containing a vegetable substance. The substance was identified by the purchaser as marijuana, and the sale price was stated to be one dollar and thirty cents.

Officers of the Police Department's juvenile squad were summoned, but before and after their arrival, W.E. refused to make any statement concerning the allegations. The initial period of interrogation by school administrators and the police lasted approximately one hour, according to petitioners and, during this time, W.E. had access to no persons other than school administrators and members of the Rahway Police Department.

The police departed at approximately 2:45 p.m., and the school principal continued to talk with W.E. The substance of that conversation, as reported to counsel for petitioner by counsel for respondent, is found in Exhibit #1, attached to the petition. Quoting in part from that Exhibit and in summation of the prospective testimony of the principal, counsel for the Board said:

> "W.E. stated it was the second time he had sold marijuana to R.W. About a week before he had bought one ounce from an Eighth Grade student for $15.00. Several weeks before that he had bought three nickel packets from a senior high school student. *** During the past summer he had gone in to New York to purchase marijuana and in turn had sold some by the church near Colonia not far from his home. He also said that he had been in a male student's home several times where he and other male students had smoked marijuana. ***"

This excerpt from the letter of counsel was evidently buttressed by further detail from the principal in a hearing concerning this matter held by the Board on March 16, 1971. The transcript of this hearing was submitted to the hearing examiner by the Board.

During the course of the initial interrogation of W.E. referred to, *supra*, his locker was searched by the assistant principal who found a pipe therein. At the conclusion of the two periods of questioning, W.E. was released in the custody of Rahway police officers who contacted the boy's mother.

After the statement of W.E., referred to, *supra*, was given to the principal, on February 1, 1971, W.E. was suspended from school, and later in February was referred to the school district's child study team. This team conducted a series of interviews and tests and issued a report attached to the petition as Exhibit #2. The report was dated February 11, 1971, and contained the following recommendations on page 2:

"1. It is recommended that [W.E.] continue to live at home *** and *return to regular school attendance. (Emphasis supplied.)*

"2. It is further recommended that he be referred for therapy to either the Youth and Family Counseling Agency in Westfield, or the Union County Psychiatric Clinic in Elizabeth in order that he and his parents continue the investigation of the basis for his recent behavior ***."

The therapy recommended above was commenced by petitioners.

On February 9, 1971, a complaint against W.E. was filed in Union County Juvenile and Domestic Relations Court by school officials for allegedly possessing and selling marijuana. However, this complaint was dismissed by the Court on March 15, 1971, when it was advised by an Assistant County Prosecutor that the State Police Laboratory in Trenton had tested the substance found in the possession of the boy, who said he had purchased it from W.E., and had determined that it was not marijuana and that there was not enough residue in the pipe found in the locker of W.E. to conduct any tests thereon.

Despite this finding by the Court, the Board conducted a hearing in the instant matter on March 16, 1971, and as a result of the hearing, W.E. was expelled from school.

The reports of this hearing educed from the arguments of counsel and a reading of the transcript submitted by the Board indicate that it was basically in conformity with the principles enunciated in *Scher v. Board of Education of the Borough of West Orange*, 1968 *S.L.D.* 92, and no departure from the rules for procedural due process is noted.

Additionally, the hearing examiner finds no inherent fault in the two periods of interrogation referred to, *supra*, despite the contentions of petitioners in this regard. The interrogations seem to be similar to those found *In the Matter of G*, 1965 *S.L.D.* 146. In that decision, at p. 149, the Commissioner dealt with such interrogations in some detail and said:

"*** Pupils in the public schools are required to submit to the authority of the teacher, *R.S.* 18:14-50, and the teacher stands, in a limited sense at least, in *loco parentis*.***" *(Emphasis ours.)*

The hearing examiner believes there are four other details of note on which a decision on the Motion for *pendente lite* relief must be based, at least in part. They are:

1. that the boy to whom W.E. allegedly sold marijuana in the past has evidently categorically denied such a sale ever took place.

2. that W.E. had been an average-to-above average student prior to the incident on February 1, 1970. Exhibits 7, 8, and 9 attached to the petition are progress reports that so indicate.

3. there is no prior record of disciplinary infractions of a measure of seriousness requiring any administrative punishment.

4. the report of a caseworker from the Home and Family Counselling Service, attached to the petition, concludes with this sentence:

> "The most thereapeutic thing that can be done for this boy is immediate readmittance to school and the opportunity to resume a normal life. [W.E.] is not an adverse influence in the community nor is there any danger that he will unfavorably affect his school mates."

The hearing examiner finds, as result of a review of the pleadings of petitioners, the arguments of counsel and a study of the transcript submitted by the Board, that the penalty imposed on W.E. by the Board is excessive and unduly punitive in the context of all of the circumstances comprising this adjudication. W.E. has now missed more than 12 weeks of school, and has appeared before a juvenile court and found not guilty. Therefore, the hearing examiner recommends that there be a moderation of the punishment.

* * * *

The Commissioner has reviewed the report of the hearing examiner and concurs with the recommendations expressed therein. He notes that the prime issue here presented is whether the suspension and expulsion of W.E. was warranted and properly imposed within the scope of the Board's discretionary authority, or whether it was so unreasonable, arbitrary or unfounded as to require the Commissioner's intervention.

The Commissioner notes that the elements on which petitioners' appeal are based were not denied during oral argument on the Motion. Principally, the Commissioner observes that:

1. W.E. was said to have had an average-to-good academic record at the time this one incident occurred.

2. W.E. had not been suspended from school on any prior occasion and and had not been a behavior problem before.

3. W.E.'s parents have cooperated fully with the recommendations of the school since the time of his initial suspension.

4. the child study team unequivocally recommended that W.E. should be reinstated in regular school attendance.

5. the alleged offense of W.E., selling marijuana, was not factually supported by the State Police Laboratory, and the case against W.E. was dismissed by a juvenile court.

6. the boy to whom W.E. allegedly sold marijuana on a prior occasion evidently categorically denies the charge.

As a result of the review and study of all of these elements, the Commissioner notes that in effect he is asked, in this instance, to sustain a judgment of the Board of Education that resulted in the most severe penalty that may be imposed by such a board; namely, the expulsion of a pupil from school. The Commissioner is asked by the Board to do this while cognizant of the fact that a court of competent jurisdiction found no guilt and assessed no penalty as a result of a study of the same event which triggered the instant appeal.

The Commissioner was asked to review a set of circumstances similar in some respects in the matter of *E.E. v. Board of Education of the Township of Ocean, Monmouth County*, decided by the Commissioner March 9, 1971. The remarks on page 8 of that decision have pertinent value with regard to the matter *sub judice:*

> "*** The Commissioner cannot condone any abuse or mis-use of drugs by students. When such offenses are committed, the offending student(s) should be disciplined by professional educators and the Board of Education, but such *punitive discipline should not be excessive.* Petitioner is obviously no threat or danger to his fellow students in the eyes of the Board. Had such a danger existed, petitioner would have rightly been denied reinstatement in school by the Board. ***" *(Emphasis supplied.)*

The above quotation has an applicability to the instant matter in two respects; namely, (1) the evidence clearly indicates that the punishment was excessive and (2) on the basis of all the evidence, the Commissioner cannot agree that W.E. can be classified as a "danger" the Board evidently envisions.

The Commissioner *ORDERS*, therefore, that W.E. be reinstated immediately in all his regular classes in the Rahway Junior High School.

His punishment of missing more than 12 weeks of school has severely hampered his chances for having a successful school year, but should serve as a warning to those who experiment with drugs in and around the school that the consequences for their indiscretions are indeed serious.

COMMISSIONER OF EDUCATION

April 26, 1971

**In The Matter of The Annual School Election Held in The School District of The Township of Cedar Grove, Essex County**

## COMMISSIONER OF EDUCATION

**Decision**

The announced results of the balloting for candidates for membership on the Board of Education for two full terms of three years at the annual school election held February 9, 1971, in the School District of the Township of Cedar Grove, Essex County, were as follows:

| | AT POLLS | ABSENTEE | TOTAL |
|---|---|---|---|
| Albert Riggs | 859 | 1 | 860 |
| Robert Youngs | 769 | 3 | 772 |
| Franklin Ewing | 756 | 1 | 757 |
| Paul Jacobovitz | 303 | 1 | 304 |

Pursuant to a request dated February 18, 1971, from Franklin Ewing and at the direction of the Commissioner of Education, a recheck of the votes cast on the voting machines for the four candidates listed, *supra*, was conducted at the warehouse of the Essex County Board of Elections.

The rechecking of the voting machine totals and the inspection of the poll list of the Leonard R. Parks School only, the polling place in which the procedure was challenged by Candidate Ewing, confirmed the previously-announced results stated above. The hearing examiner found no error or irregularity in the poll list.

At an inquiry on the same day at the office of the Essex County Superintendent of Schools in East Orange, it was agreed that counsel for the Board of Education would submit to Candidate Ewing and the Commissioner answers to a list of questions there presented by Candidate Ewing, which challenged procedures at the Leonard R. Park School polling place. Having rendered these answers, the hearing officer determines that they are responsive to the questions raised.

*  *  *  *

The Commissioner has read the report of the hearing examiner and determines that Albert Riggs and Robert Youngs were elected on February 9, 1971, to membership on the Board of Education of the Township of Cedar Grove for full terms of three years each.

There is no determination of irreparable error nor any further relief from the Commissioner which petitioner can be offered.

The result of the election will stand and the petition is hereby dismissed.

COMMISSIONER OF EDUCATION

May 3, 1971

**Charles H. Knipple,**

*Petitioner,*

**v.**

**Board of Education**
**of the Township of Egg Harbor,**
**Atlantic County,**

*Respondent.*

## COMMISSIONER OF EDUCATION

### Decision

For the Petitioner, Robert H. Davisson, Esq.

For the Respondent, Thomas P. Cook, Esq.

Petitioner seeks reinstatement in his position as Superintendent of Schools of the Egg Harbor Township school system with full salary from July 1, 1968, and the subsequent entrance by respondent Egg Harbor Township Board of Education, hereinafter "Board," into good faith negotiation with him to terminate his services in the manner provided for in the contract of employment between him and the Board.

The matter is submitted to the Commissioner on briefs of counsel. The report of the hearing examiner is as follows:

Petitioner entered his initial contract with the Egg Harbor Township Board on November 29, 1966. That agreement, dated November 29, 1966, set forth the conditions that June 30, 1968, was the termination date and that petitioner's salary would be $15,000 per year with any amount in excess of that to be decided after negotiation with petitioner. Both parties agreed that this contract would remain in full force and effect unless terminated sooner in accordance with the statutes *(N.J.S.A.* 18A, Education).

On May 11, 1967, while the initial "agreement" had more than 13½ months to run, the Board issued petitioner a new contract for the period July 1, 1967, to June 30, 1970. Salary terms in the new agreement were the same as those provided in the initial agreement, $15,000 per year with any amount in excess of that to be decided by the Board after negotiation with petitioner.

On June 28, 1968, two days before the initial contract was to have ended, the Board passed a resolution terminating the Superintendent's services on June 30, 1968, and granting him termination pay of $1,400 per month for the two-months' period from July 1, 1968, to August 31, 1968.

Petitioner, thereupon, appealed to the Commissioner of Education and requested that the Commissioner grant the following prayers for relief:

> "A. Re-instating him as Superintendent of Schools in and for Egg Harbor Township;
>
> "B. Directing respondent to specifically perform its contract with petitioner;
>
> "C. In the alternative, a judgment for compensatory damages for the losses he has sustained by reason of the breach of his agreement;
>
> "D. For punitive damages for the willful and malicious breach of his contract by the respondent."

Petitioner also claims that it was the intent of the Board to grant him immediate tenure upon the award of the second contract, and that it was with that understanding that the second contract was agreed upon.

The respondent Board of Education applied to the Commissioner of Education for the entry of summary judgment dismissing the amended petition herein, on the basis that the amended petition, the Board's answer thereto, and the facts and documents stipulated before the Commissioner on April 11, 1969, show that the petitioner has no valid claims of the nature set forth in the amended petition. Counsel filed countering briefs on the Board's Motion for Summary Judgment, and the Commissioner decided on December 8, 1970, that the issues in contention were not sufficiently clear to grant the Motion; whereupon, the Motion was denied.

The Board again appealed to the Commissioner asserting that it *assumes*, for the purposes of argument, that petitioner's employment was terminated without a hearing and that he did properly perform his duties, but arguing further, however, that the Board is entitled to summary judgment as a matter of *law*, for two reasons: (1) Petitioner's second contract dated May 11, 1967, was null and void; therefore, the status of his employment was governed by the dates, terms and agreements of the first contract dated November 29, 1966; (2) Petitioner did not have tenure, nor was he granted tenure by the Board.

At a second conference of counsel held in the Commissioner's office on February 22, 1971, counsel agreed that there are two issues of law to be determined which are: (1) whether or not petitioner has tenure, and (2) which of the two contracts, *supra*, was in full force and effect.

Counsel did not agree on the issues of material fact in the instant matter; however, the hearing examiner determines that the factual issues in dispute are immaterial and that a Commissioner's decision rendered on the points of *law* in dispute, *supra*, would be dispositive of the Board's Motion for Summary Judgment.

*  *  *  *

The Commissioner has read the report of the hearing examiner and agrees with his determinations. With respect to the issuance of the second contract by the Board of Education, that matter is *res judicata*. There is no fault to be found in the Board's original agreement with petitioner. Such an agreement is within the scope of the Board's authority *(J.J.S.A.* 18A:17-15), even though its terms extended beyond the official life of the employing Board and was binding on its successors. However, in 1967, there was no vacancy in the office of Superintendent of Schools of the Egg Harbor Township school district, and no necessity for any action by the Board then in power to reach forward beyond its own official life and into the term of its successor to make a decision not due until then. *Brown v. Meehan*, 45 *N.J.L.* 189 *(Sup. Ct.* 1883); *Firch V. Smith*, 57 *J.J.L.* 526 *(Sup. Ct.* 1895; *Dickinson v. Jersey City*, 68 *N.J.L.* 99 *(Sup. Ct.* 1902). The Commissioner said in *Cummings v. Board of Education of Pompton Lakes and William F. Brown*, 1966 *S.L.D.* 155, 158:

> "*** The Commissioner agrees with respondents that the elements of bad faith present in *Cullum v. North Bergen Board of Education*, 15 *N.J.* 285 (1954), and in *Thomas v. Morris Township Board of Education*, 89 *N.J.* 581 (1966) are not present here. He does not question the motivation of the Board of Education to quiet any uncertainty and retain the services of a Superintendent who had been carefully selected, had demonstrated his competence, and had inspired confidence in his leadership. But however meritorious its objectives may have been, respondent Board did not have the authority to perform the action herein contested, and it must therefore be set aside.***"

Such is the case herein. There is no question of the motive of the Board as constituted on May 11, 1967, when the new agreement was consummated with the Superintendent; however, there was no vacancy, nor was there any necessity for that Board to award a new and extended contract to the Superintendent. Therefore, that action will be set aside.

With regard to the question of tenure, the Commissioner notes the absence of any resolution or statement by the Board that shortened the time for acquiring tenure which is fixed by *N.J.S.A.* 18A:28-5, the relevant portion of which reads as follows:

> "The services of all *** superintendents *** shall be under tenure during good behavior and efficiency*** 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* ***." *(Emphasis supplied.)*

In the matter of *Clifford L. Rall v. the Board of Education of the City of Bayonne, Hudson County, New Jersey, and the State Board of Education, State of New Jersey*, 54 *N.J.* 373, the Board of Education adopted a resolution granting tenure to its Superintendent of Schools after 6½ months of service and the Supreme Court said:

> "***Therefore we hold that the [Board's] resolution shortened the period for acquisition of tenure for superintendents of schools generally ***."

This language is significant in the instant matter, however, since the Board did not adopt any such resolution. Nor is any evidence to be found in the Board's minutes or the "Agreement" with petitioner that it was the intent of the Board to grant tenure with its contract offered on May 11, 1967. Absent any specific provision made by the Board to deliberately shorten the time to be served by its Superintendent before the acquisition of tenure, the governing statute is, therefore, *N.J.S.A.* 18A:28-5, *supra.*

The Commissioner finds and determines, therefore, that petitioner has not served the time required by the statute *(N.J.S.A.* 18A:28-5 (a), *supra)* to acquire tenure, and that the Board did not shorten the period of time required for the accrual of tenure by the Superintendent of Schools. Consequently, no such benefits may be conferred upon petitioner.

The Commissioner further finds and determines that petitioner and the Board have properly fulfilled the terms of the initial contract which expired on June 30, 1968, and that neither party, therefore, has any further obligation to the other. For this and other reasons set forth herein the petition is dismissed.

COMMISSIONER OF EDUCATION

May 3, 1971
Affirmed by the State Board of Education, December 1, 1971

**In The Matter of The Tenure Hearing of Thomas Dilworth, School District of the City of Plainfield, Union County**

**COMMISSIONER OF EDUCATION**

**Order**

It appearing that the Board of Education of the City of Plainfield, hereinafter "Board," having filed charges against Custodian-Fireman Thomas Dilworth, hereinafter "respondent," and it appearing that such charges would be sufficient, if true in fact, to warrant dismissal; and it appearing that the Board had properly certified said charges to the Commissioner of Education on August 19, 1970, and notified respondent of said charges; and it further appearing that notification of the charges filed by the Board was sent to respondent by the Assistant

Commissioner of Education in charge of Controversies and Disputes by letter dated August 26, 1970; and it appearing that respondent has not filed an Answer to the charges made against him nor replied to any communication sent to him; and it further appearing that the charges filed with the Commissioner of Education by the Board of Education of the City of Plainfield, have not been contested by respondent Thomas Dilworth; now therefore

IT IS ORDERED on this 14th day of May, 1971, that he be dismissed from his position or employment with the Board of Education of the City of Plainfield, effective on the date of his suspension, if that be the case, or on the termination date of his last contract.

COMMISSIONER OF EDUCATION

May 14, 1971

**Edwin Holroyd, William J. Stephens, Joseph W. Walker, James Marlin, Robert B. Arthur, and Thomas F. Baker,**

*Petitioners.*

**v.**

**Board of Education of the Borough of Audubon, and John F. Regan, Superintendent, Camden County,**

*Respondents.*

## COMMISSIONER OF EDUCATION

### Decision

For the Petitioners, Orlando & Orlando (J. Robert McGroarty, Esq., of Counsel)

For the Respondent Audubon Board of Education, Brown, Connery, Kulp, Wille, Purnell & Greene (George Purnell, Esq., of Counsel)

For the Respondent John F. Regan, Hyland, Davis & Reberkenny (William C. Davis, Esq., of Counsel)

Six members of the Board of Education of the Borough of Audubon, petitioners, allege that an action of the previous Board in which a new three-year contract was tendered to the incumbent Superintendent of Schools was procedurally and otherwise defective and an usurpation of the authority of the present Board. They request that the action be declared null and void and that the contract be set aside. Respondent Superintendent of Schools, hereinafter "Superintendent," avers that the new contract tendered him by the previous Board was a proper document that expressed all the terms of a previously-negotiated agreement.

The petition herein is in amended form with the parties delineated above. The original petition named, as party respondent, the Board of Education of the Borough of Audubon and was filed by four members of that Board. The defense by the Board of a petition initiated *by* four minority members has thus become a petition *from* the Board majority brought before the Commissioner against its Superintendent of Schools.

A hearing in this matter was held on March 18, 1971, at the office of the Camden County Superintendent of Schools, Pennsauken, by a hearing examiner appointed by the Commissioner. The hearing was continued on April 1. The report of the hearing examiner is as follows:

The Superintendent was employed by the Audubon Board of Education by a contract dated May 16, 1968, to serve in the Audubon School District from July 1, 1968, and continuing for a three-year period. This contract (P-1), hereinafter "first contract," provided for salaries of $18,500 for the first year of employment, $19,500 for the second year of employment and $20,500 for the third year. It also contained the following notice clause:

> "*** It is hereby agreed by the parties hereto that this contract may be terminated, by either party giving to the other sixty days' notice in writing of intention to terminate the same, provided, however, *that said notice shall not be given by either party prior to April 30, 1971.****" *(Emphasis supplied.)*

In December 1969, respondent Board's solicitor was evidently asked by the Board to prepare a new contract, and he did so. A letter of December 19, 1969, (R-1) to the President of the Board, from the solicitor, states in its last paragraph:

> "*** The contract extends Dr. Regan's term for a period beyond three years from his first employment, so that at least upon the expiration of three years from his original employment on July 1, 1968, he will have acquired tenure."

The terms of that contract (P-2), hereinafter "new contract," are stated in their entirety below:

> "It is agreed between THE BOARD OF EDUCATION OF THE BOROUGH OF AUDUBON, IN THE COUNTY OF CAMDEN, party of the first part, and DR. JOHN F. REGAN, party of the second part, that said Board of Education has employed and does hereby engage and employ the said party of the second part as Superintendent in the public schools of the Borough of Audubon, under the control of said Board of Education, from the 1st day of July, 1970, to the 30th day of June, 1973, at the salary of Twenty-one Thousand Dollars, ($21,000.00), for the School Year 1970-71, Twenty-two Thousand, Five Hundred Dollars, ($22,500.00) for

the School Year 1971-72, and Twenty-three Thousand, Five Hundred Dollars, for the School Year 1972-73, to be paid in twenty-four equal semi-monthly installments each year, on the 15th and 30th days of each month, and that the said party of the second part holds an appropriate Superintendent's certificate issued in New Jersey now in full force and effect.

"The said party of the second part hereby accepts the employment aforesaid and agrees to faithfully do and perform duties under the employment aforesaid, and to observe and enforce the rules prescribed for the government of the school by the Board of Education.

"Upon execution and delivery of this contract by both parties hereto, the existing contract between the parties entered into May 22, 1968, shall be terminated as of June 30, 1970.

"Dated this 12th day of January, 1970."

The contract was duly executed by the President of the Board, the Secretary of the Board and the Superintendent following the Board's approval of its terms in regular meeting assembled on January 12, 1970. The motion of approval as recorded in the minutes of that meeting (P-3) was as follows:

"Motion by Mr. Hancock, seconded by Mr. Doren, to award a new contract to Dr. John F. Regan as Superintendent of the Audubon Public Schools from the first day of July 1970 to the 30th day of June 1973 at the salary of $21,000 for the school year 1970-71, $22,500 for the school year 1971-72 and $23,500 for the school year 1972-73 and that the existing contract dated May 22, 1968 shall terminate as of June 30, 1970. Motion approved unanimously."

It is noted here that there was no 60-day notice of termination in this second contract or in the motion that purported to approve it.

Petitioners ground their argument that the action herein was *ultra vires* on a series of contentions:

1. That such an action by the 1969-70 Board was an usurpation of the authority of future Boards to decide whether or not the Superintendent should be granted tenure.

2. That the motion to adopt the contract was procedurally defective in that it purported to terminate a previous agreement "dated May 22, 1968" when in actuality the original contract of employment was executed on May 16, 1968.

3. That all members of the Board assumed the 60-day clause was contained in the proposed contract revision in essentially the same form as it had been included in the original document, and that in the absence of direction to the contrary it should have been.

4. That the proposed contract change should have been effectuated by resolution and not by motion.

5. That it was represented on January 12, 1970, by the Board President that the new contract would not give Dr. Regan tenure.

6. That the new contract proposal was not on the agenda for the meeting of January 12, 1970.

Respondent adopts the answer originally submitted by the Board of Education as his own and asserts that the contract referred to speaks for itself.

Testimony at the hearing of February 18, 1971, dealt at some length with a work meeting of the Board held in October or November of 1969 at which time the provisions of the second contract, *sub judice*, were discussed. The bulk of the rest of the testimony was devoted to the events that transpired at the meeting of January 12, 1970, at which the new contract (P-2, *supra*) was adopted. Other testimony centered around the affirmation of that contract embodied in the minutes of the Board of Education of April 13, 1970. (R-2) Additionally, three witnesses for petitioners testified on April 1, 1970, concerning alleged remarks of the Superintendent at an Audubon Council meeting of February 1970. This testimony will be reviewed in three principal sections; namely, (1) that regarding the Fall 1969 meeting, (2) that regarding the meeting of January 12, 1970, and other testimony pertinent and relevant to the new contract.

The meeting held in the Fall of 1969 was probably attended by a majority of the members of the Board of Education. (Tr. 21, 84, 124) It was a caucus meeting or work meeting of the Board, and since it was budget-preparation time, most of the matters under discussion were probably related to budget items. One such item under review was a new contract for the Superintendent of Schools. This subject was broached by the President of the Board (Tr. 86), and there was general agreement by all members present that the Superintendent should be given a new contract to insure that he would not leave the district (Tr. 21, 127) at the end of the first contract period (P-1, *supra*) in which he was then serving. As a result of this general consensus of the members present, not refuted by any witness, the Board as a whole negotiated the terms of a new contract with the Superintendent. The period of negotiation lasted approximately one-half hour. (Tr. 97) During this period, most of the conversation dealt with salary terms although there was apparently some talk of tenure status. There was apparently no discussion at all of whether or not there should be a 60-day contract termination clause similar to, or the same as, the one contained in the existing contract (P-1). (Tr. 23, 45, 94, 126) One Board member later said he had assumed that the proposed new contract for the Superintendent would contain a

60-day clause. (Tr. 23) The contract was not discussed again at any session of the Board until January 12, 1970. In the interim, however, the Superintendent had contacted the solicitor, and the solicitor had prepared the new contract and sent it together with the covering letter (R-1) referred to, *supra*, to the President of the Board of Education. It was the testimony of the President that the contract "contained exactly what we had discussed and agreed to at that caucus meeting."

At the meeting of January 12, 1970, the President of the Board introduced a document purporting to be the new contract and evidently read from it. (Tr. 36, 44, 16) It is not clear whether he read the whole contract word for word or excerpts from it. In any event, following his introduction of the document, it was passed down the table to a Board member three or four places removed. (Tr. 90, 16) This member proposed a motion which evidently embraced all the terms of the new contract. (Tr. 16, 90, 128) The motion was duly seconded and passed unanimously by a voice vote. (P-3) There were eight members of the Board of Education present. There was no discussion about tenure rights and none about the presence or absence of a 60-day termination of contract clause.

It is alleged that on two subsequent occasions, respondent was asked whether or not the new contract contained a 60-day clause. On the first occasion, in response to a question from a Board member, the response of respondent was said to be that "*** it was the usual contract with the sixty-day notice clause on either party's part." On the second occasion, in response to a question from a member of the Audubon Borough Council, respondent was alleged by one witness to have used approximately the same terminology. However, two other witnesses from the Council were not definite in their recollection that there was any discussion of a 60-day termination clause, *per se*, on this second occasion.

At the culmination of what was evidently a rather long period of discussion between and among members of official community groups and other interested citizens, the Board of Education felt impelled to discuss the new contract documents again. They did so on April 14, 1970. Following this discussion, a motion was introduced by the Board President "fully supporting the three year contract *** made by the Audubon Board of Education and Dr. Regan, as Superintendent of Schools ***." The motion carried by a vote of 5 to 4.

The hearing examiner observes that the 60-day termination of contract clause that had existed in the first contract was not the usual 60-day clause. To the contrary, it was a clause that could be exercised by either of the parties on or after April 30, 1971, but not before that date. The effect of this clause was to give the Superintendent an assurance of employment from the period July 1, 1968 to April 30, 1971, but to deny the automatic accrual of a tenure right, since on or after that date, the Board could terminate the Superintendent's service.

Under the terms of the new contract, the Board may also terminate service on April 30, 1971. However, in the absence of the 60-day clause contained in the first contract (P-1), compliance with the mandated salary terms of the new contract (P-2) will require total funding in excess of $40,000 to terminate contractual obligations. Petitioners maintain this is unreasonable.

The hearing examiner finds that the weight of the credible evidence is that the new contract contains all of the terms agreed upon by a majority of the members of the Board at the Fall meeting in 1969 and that there is no evidence that any member of that Board ever raised the question of the inclusion or exclusion of the 60-day termination clause in question prior to the adoption of the contract terms on January 12, 1970. Neither is there any supportable evidence that the contract (P-2, *supra*) was ever misrepresented at any time prior to such adoption. To the contrary, the document was almost certainly much in evidence on January 12, 1970. The President discussed it and passed it along the table. Another Board member formulated his resolution according to its stated terms. Such a physical presence of the document, in the opinion of the hearing examiner, was an accurate representation of what the document contained.

The hearing examiner also finds as credible the statement by respondent that he had not discussed the lack of a 60-day termination clause (Tr. 147) in the new contract with the Board solicitor and that this official had indicated it was left out since its inclusion would have been superfluous. The testimony has the ring of truth since such a clause as contained in the first contract could not receive an implementation in the new contract (P-2). This is so since in the third year of the mandated terms of the new contract, respondent will already have acquired a tenure status if his service has not been terminated prior to July 1, 1971.

The Commissioner has reviewed the report of the hearing examiner and the findings expressed therein. He opines that if the contentions of the parties to this dispute were to be resolved solely on the basis of what the Audubon Board of Education meant to do or accomplish at its meeting of January 12, 1970, with regard to the contract of its Superintendent of Schools for the three-year period July 1, 1970 to July 1, 1973, this matter would have to be resolved in favor of the Superintendent. The action of the Board on that evening was firm and decisive, and such an action by a board would usually carry with it a presumption of finality, despite the second thoughts which evidently occurred to some members of the Board, subsequent to that meeting. The new document was present on the evening of the vote, and when the vote on its stated terms was taken, the vote was directly related thereto.

However, the legal questions raised by petitioners are not to be solved by such a finding. 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.*

This finding is grounded on the statement of law enunciated most clearly and succinctly in *Henry S. Cummings v. Board of Education of Pompton Lakes, Passaic County and William F. Brown,* 1966 *S.L.D.* 155. The factual situation in that case was similar in most respects to the instant matter except that in the action herein the Board proposed to abort a continuing contract as of a future date and replace it with a new and different document, whereas in *Cummings, supra,* the Board reached beyond its own term of jurisdiction in an attempt to add a new contract to the completed term of an old one. The practical effect, in both instances, was, and is, to remove from a succeeding Board a power it ought to have, a power to determine at appropriate times whom its employees shall be. The appropriate time in the instant matter was dictated by the terms of the first contract as of April 30, 1971, and the Commissioner holds that commitment was an important facet of the contractual agreement reached by the parties at the time of the initial employment of the Superintendent of Schools and ought not be breached by a unilateral act of intervention.

In *Cummings, supra,* following a review of the legislative history of the laws pertinent to the employment of a superintendent of schools, the Commissioner said at p. 158:

> "*** Applying the law to the facts in this case, the Commissioner finds no fault with the action of the 1963 Board which entered into an agreement with the Superintendent for initial employment for a period of three years less one day. Such an agreement was within the scope of the Board's authority under *R.S.*18:7-70 even though its terms extended beyond the life of the initially employing Board and became binding on its successors. With the normal passage of time the contract would expire in June 1966 and the Board in office at that time *** would be empowered to decide whether to continue the Superintendent's employment *** In this case, however, the 1965 *Board intervened* in June 1965 to 'extend' the agreement *** for an additional three-year period. This action, petitioner contends, was invalid and the Commissioner agrees.
>
> "There was no necessity for the 1965 Board to act on this matter, and to do so usurped the prerogative of the 1966 Board. *There was no vacancy* to be filled in June 1965, and the Board then in power had no authority to reach forward beyond its own official life and into the term of its successor to make a decision not due until then. *Brown v. Meehan,* 45 *N.J.L.* 189 (*Sup. Ct.* 1883); *Fitch v. Smith,* 57 *N.J.L.* 526 (*Sup. Ct.* 1895); *Dickinson v. Jersey City,* 68 *N.J.L.* 99 (*Sup. Ct.* 1902) ***." *(Emphasis supplied.)*

In the instant matter, the 1970 board also intervened so as to completely obliterate a continuing clause of major importance – the clause providing for a 60-day termination notice on or subsequent to April 30, 1971. It is the deletion of this clause to which the Commissioner specifically objects and not to the adjustment of the salary level for the school year 1970-71, which is of minor significance as a part of this adjudication.

Accordingly, the Commissioner finds that the new contract introduced as P-2 in evidence cannot be sustained as a document that applies to employment of the Superintendent for the school years 1971-72 and 1972-73, but that its provision for salary payment to the Superintendent during the school year 1970-71 may stand as an amended payment of the sum originally proposed in the first contract (P-1). In all other respects the Commissioner finds the first contract in force and of full and continuous effect.

COMMISSIONER OF EDUCATION

May 14, 1971

**Board of Education of the City of Asbury Park,**

*Petitioner,*

**v.**

**Boards of Education of the Shore Regional High School District, Borough of Deal and Borough of Interlaken, Monmouth County,**

*Respondents.*

## COMMISSIONER OF EDUCATION

### Decision

For the Petitioner, Joseph N. Dempsey, Esq.

For the Respondent Shore Regional High School Board of Education, Potter and Gagliano (S. Thomas Gagliano, Esq., of Counsel)

For the Respondent Deal Board of Education, DeMaio and Yacker (Stanley Yacker, Esq., of Counsel)

Petitioner, the Board of Education of the City of Asbury Park in the County of Monmouth, hereinafter "Asbury Park Board," a receiving district for high school students from several sending districts, alleges that several students who should be attending Asbury Park High School are being accepted as tuition students in respondent Shore Regional Board of Education's High School. Petitioner joined the Boards of Education of the Borough of Interlaken and the Borough of Deal, two of Asbury Park High School's sending districts, as parties

respondent in this matter so that any order in petitioner's favor compelling the return of the students to Asbury Park High School and the payment of their tuition to the Asbury Park Board of Education, can be enforceable, since the financial burden would fall upon the Boards of Education of the Borough of Interlaken and the Borough of Deal.

This matter has been submitted for adjudication on briefs of counsel. The report of the hearing examiner is as follows:

The Asbury Park Board avers that it is entitled to receive all of the public secondary school students from the Borough of Interlaken and the Borough of Deal and that the Interlaken and Deal boards are bound by law to direct the attendance of their public school secondary students at Asbury Park High School. It alleges that not only has the Shore Regional Board acknowledged acceptance of a number of students from the aforementioned sending districts of Asbury Park, but has also indicated that it intends to accept more in the future. Petitioner claims that this practice of the Shore Regional Board is contrary to law and further claims that:

> "3. The persistence of the Board of Education of the Shore Regional High School District to accept Asbury Park public school secondary school students on a tuition basis is further obnoxious to the law in that it creates a private school system at the expense of the taxpayers of the districts composing the Shore Regional High District, and increases the overcrowding which already exists in that school system. It is further harmful in that it denies the Board of Education of the City of Asbury Park of income from the students and further increases the potential of de facto segregation of the Asbury Park High School by reducing the number of white students in attendance there." (Petition of Appeal – p.2)

Petitioner's brief assumes that all of the students paying tuition to Shore Regional High School who come from Asbury Park High School's sending districts are white. Petitioner argues, therefore, that the:

> "*** concern of the Asbury Park Board of Education is that the constant elopement of the white students from the sending districts now affiliated as a consequence of prior litigation and statute, *N.J.S.A.* 18A:38-13, will ultimately result in a racial imbalance in the Asbury Park High School. At present, as the Commissioner may note by taking judicial notice of his records, the student population of the Asbury Park High School has a narrow majority of white students enrolled. The continual erosion of the number of white students contributed by the sending districts, if tolerated, would cause the student population to change so that it might become predominantly black. In the case of the latter consequence the result to the Asbury Park Board of Education is advised, and the studies of the Department of Education will disclose, that there would then be an

acceleration of withdrawals from the public secondary school located in the City of Asbury Park, leading to *de facto* segregation of that education facility and eventual denial of equal protection of the laws as enunciated in *Brown v. Board of Education.* ***"

Petitioner argues further that Shore Regional High School in accepting these students is operating a *de facto* private school, that the use of State Aid monies "and impacted area funds from the State and Federal governments permits the Shore Regional High School Board of Education to operate a private school with a substantial subsidy of public treasure in violation of law", and that:

"*** THE SHORE REGIONAL HIGH SCHOOL IS NOT ENTITLED TO ACCEPT PUPILS FROM THE ASBURY PARK HIGH SCHOOL DISTRICT UNDER AUTHORITY OF *N.J.S.A.* 18A:38-3 WHERE SUCH ACTION CONTRIBUTES TO THE CREATION OF RACIAL IMBALANCE IN THAT DISTRICT ***" (Petitioner's Brief, *supra,* p. 3)

Petitioner also avers that:

"While the Commissioner cannot compel a pupil who opts for a private school education to return to the public schools, he may not remain idle when a local school board uses its statutory authority to accept tuition pupils to serve the private school needs of those who find the integrated public school repugnant. The court in *U.S. v. Jefferson County Board of Education,* 372 *F2d* 846, 850, 51 (*5th Cir.* 1966), noted the problem in its observation that: 'Some determined opponents of desegregation . . . rather than send their children to schools with Negro children . . . flee to the suburbs, reinforcing urban neighborhood school patterns. The flight of white children to these new schools and to established private and parochial schools promotes resegregation.' ***" (Petitioner's Brief, *supra,* p. 6)

Petitioner avers finally that Shore Regional High School is overcrowded and that the Shore Regional Board has "improperly and illegally added to the overcrowded condition by the absurd device of enrolling students properly served by a school system in need of them (Asbury Park)."

Wherefore, the petitioner prays that the Commissioner of Education prohibit the Shore Regional Board of Education from accepting any students resident in the City of Asbury Park or in its sending districts and compel it to disgorge to the Asbury Park Board any tuition sums received from students who should properly be attending Asbury Park High School as their designated public secondary school.

Respondent Shore Regional Board of Education:

"***admits that *** the Shore Regional High School District has accepted a limited number of students from the Boroughs of Deal and Interlaken, New Jersey. The students so accepted at Shore Regional High School are admitted on the condition that all tuition and transportation costs are and shall remain the responsibility of the parents of each child and on the further condition that acceptance of said students will not cause additional teaching staff or administrative staff to be hired or employed by Shore Regional High School. In addition, any students accepted must meet certain educational standards and no disciplinary problems are tolerated." (Respondent's Answer - p. 2)

The Shore Regional Board alleges that:

"The action of the Shore Regional High School District in accepting certain students upon payment of tuition by those students and *upon other terms and conditions,* is strictly in accordance with the terms of the aforesaid statute and allowable by law and not subject to challenge by another school district." *(Emphasis supplied.)* (Respondent's Answer – p. 5)

and,

"1. Students accepted from any municipality outside of the Shore Regional High School District are obliged to pay for their own tuition, their own transportation and said tuition costs are based upon the highest per capita cost paid by any of the constituent municipalities of the Shore Regional High School District.

"2. Such students, since they are no longer the responsibility of their individual sending districts, do not affect the sending districts in any way. Such students have and will have no connection with the Board of Education of the City of Asbury Park, and therefore, the Board of Education of the City of Asbury Park has no standing before the Commissioner of Education to challenge the right of these students to attend***." (Respondents Answer - p. 3)

Respondent Interlaken Board of Education alleges that it knows of only one person presently attending Shore Regional High School, who is a resident of the Borough of Interlaken. Such student is attending Shore Regional High School at his own election and at no cost or expense to the Interlaken Board. If said student should decide to attend Asbury Park High School, the Interlaken Board asserts, it will pay the cost. However, the Interlaken Board denies that it has any right or obligation to endeavor to cause such student to attend the Asbury Park High School and further denies that the Asbury Park Board has any right to compel such student to attend its schools if he pays the tuition fee required by the school that he does attend.

Similarly, respondent Deal Board of Education denies:

> "***that it has any duty or power to compel children residing in the Borough of Deal to attend Asbury Park High School.***"

The hearing examiner has examined the Commissioner's records with respect to some of the history of Shore Regional High School. With reference to alleged "overcrowding" of Shore Regional High School, the following information is a part of the Commissioner's records and is on file in the State Department of Education:

The Shore Regional Board of Education applied to the State Department of Education for an extension of credit, and a hearing on the application was granted on March 11, 1969. That hearing was attended by the present Shore Regional Board of Education's attorney, the Board-Secretary, two Board members and architects to support the Board's request for additional school construction. The Commissioner's record of that conference reads in part as follows:

> "Mr. Elbert M. Hoppenstedt, Superintendent of Schools, testified as to the need for the new facilities, stating that every classroom is in use during every period of the day and areas are being used for classrooms which were not originally intended for this purpose. The auditorium is being used for courses; the cafeteria is being used for study halls and in many of the science classes a portion of the classes each week must be held outside of the laboratory areas. The point has now been reached where there is no adequate space. The high school is in excess of the functional capacity as the building was built for 958 students and it now houses 1,000 students. Mr. Hoppenstedt is of the opinion that the proposed new addition would take care of student population increase for the next five or six years." (From minutes of the meeting of March 11, 1969)

It is significant to note that Shore Regional High School was severely overcrowded then with 1,000 students and that current records indicate that the enrollment is now 1,077 students. Despite the testimony, *supra*, and the evidence of even more severe overcrowding, the Shore Regional Board has accepted additional pupils from *selected* sending districts of Asbury Park High School as long as they meet the "terms and conditions," *supra*.

* * * *

The Commissioner has examined the report of the hearing examiner and notes with consternation the allegations of the Asbury Park Board.

The law in the instant matter is clear. *N.J.S.A.* 18A:38-3 permits the enrollment of non-resident pupils by any board of education. The Commissioner would find repugnant, however, any deliberate act by a parent or an accommodating board of education through spurious means to circumvent the

positive attempts by the Commissioner and the courts to bring about meaningful racial integration in the public schools of this State in accordance with the law. Petitioner has not proved, however, that such is the case herein.

The Commissioner notes that the Shore Regional Board's policy of admission of private non-resident tuition students is apparently well established. The Commissioner finds quite alarming, however, the testimony of the Superintendent of Schools that Shore Regional High School is severely overcrowded, and the later *denial* by the Shore Regional Board that its High School is overcrowded. The Commissioner deems it necessary to accept the Board's position stated at the extension of credit hearing, *supra*, when it pleaded for relief *because of overcrowding of its High School by its own students.* Acceptance of that position as an established fact, therefore, leads to a conclusion that selected students have been admitted to Shore Regional High School despite its overcrowded condition. The Shore Regional Board's reasons for accepting these tuition students are not now fully understood. However, the Commissioner attaches considerable credibility to the allegations made by the Asbury Park Board, *ante.*

In *Booker, et al. v. Board of Education of the City of Plainfield, Union County,* 45 *N.J.* 161, 180, the New Jersey Supreme Court considered the withdrawal of majority students in a school system by saying that:

> "*** trends towards withdrawal from the school community by members of the majority must be viewed and combatted, for if they are not, the results may be as frustrating as the inaction complained about by the minority.***"

Such is the case herein. A trend has developed at the Shore Regional High School which must be thwarted if the determined directions of the Commissioner, the State Board of Education, the courts of this State and Nation are to be vigorously pursued.

In the spirit of cooperation and on the basis of proper moral posture, the Shore Regional Board should accept the warning from the Asbury Park Board that dire consequences for its (Asbury Park's) school district are being caused by the withdrawal of selected students.

While the Commissioner finds no violation of law in the instant matter, the rules of the State Board of Education with respect to meaningful integration of the public schools are clear. Plans are being formulated and implemented statewide by local districts for the racial integration of the schools as mandated by the Commissioner, the State Board of Education and the courts. The Commissioner cannot, therefore, allow any practice to continue that would cause any eroding of those efforts.

Public high schools in this State are created primarily for the purpose of serving the resident pupil population and those students from *bona fide* sending districts approved by the Commissioner and the State Board of Education. Certainly, the intent of *N.J.S.A.* 18A:38-3, *supra*, is not to provide an avenue permitting individual parents or local boards of education to circumvent the law requiring the integration of the public schools.

A resolution of the State Board of Education, dated November 5, 1969, states:

> "*** *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 in its *Statement of Policy* of the same date, the State Board said:

> "*** 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* ***." *(Emphasis supplied.)*

The sending school districts herein joined as respondents by the Asbury Park Board of Education have no cause or authority to act further. They acknowledge the fact that some of their students are being accepted outside the Asbury Park High School receiving district; however, they are powerless to stop the practice, and they confirm that they can and will pay the tuition and transportation expenses of any and all of their students who elect to attend the Asbury Park High School.

The Commissioner, therefore, remands this matter to the Shore Regional Board of Education consistent with the principles as enunciated in *Booker*, *supra*, and retains jurisdiction pursuant to the following directives:

The Board of Education of the Shore Regional High School must submit within 75 days of this date:

1. written guidelines for the acceptance by the Shore Regional High School of non-resident private tuition students.

2. the geographic limits of such guidelines by area, streets or by towns.

3. the racial make-up of the pupil population of Shore Regional High School (percentages of blacks, whites and others).

4. the number of white non-resident private tuition students accepted for the last three years.

5. the number of black non-resident tuition students accepted for the last three years.

6. the name, age, grade, address and race of each non-resident student presently enrolled.

The Commissioner *ORDERS*, therefore, that until the information requested *supra*, is received, evaluated and a final determination made, that the Shore Regional High School Board of Education's practice of accepting selected non-resident private tuition students from Asbury Park's sending districts for enrollment in its already overcrowded High School be terminated and that all such students already enrolled be returned to Asbury Park High School, effective September 1, 1971.

COMMISSIONER OF EDUCATION

May 17, 1971

## NEW JERSEY STATE BOARD OF EDUCATION

### Decision

The Board of Education of Asbury Park, a receiving district for Deal, Interlaken and other districts, filed a petition against the Board of Education of Shore Regional High School District seeking an order, essentially, to

(a) compel disclosure of the names and addresses of all non-resident students in the district,

(b) prevent respondent from accepting students from the sending districts of Asbury Park, and

(c) compel the release by respondent Shore Regional of all students residing in Asbury Park's sending districts.

Shore Regional admits it has received 8 such students (all of whom are white) under authority of N.J.S.A. 18A:38-3[1]. Asbury Park contends, among other things, that while N.J.S.A. 18A:38-3 permits Shore Regional to accept non-resident students, otherwise elibigle for admission, such action has and will contribute to the creation of racial imbalance in the Asbury Park School District.

In his decision of May 17, 1971 sustaining the position of Asbury Park, the Commissioner of Education of the State of New Jersey ordered in part that Shore Regional's practice of accepting selected non-resident private tuition students from Asbury Park's sending districts be terminated, and that such students who may be attending Shore Regional be separated for enrollment at Asbury Park High School.

The parties have represented to us that a stipulation is to be filed under the terms of which Shore Regional will no longer accept students from Asbury Park's sending districts. The 8 students known to be affected by the Commissioner's determination filed an application for leave to intervene. We permitted appearance and oral argument by their counsel and hereby formally grant leave to intervene. Intervenors have also moved for a stay of the Commissioner's decision as it applies to them.

The application for stay is denied. We affirm the Commissioner's decision substantially for the reasons expressed in his opinion.

[1]That statute provides that "Any person not resident in a school district, if eligible except for residence, may be admitted to the schools of the district with the consent of the board of education upon such terms, and with or without payment of tuition, as the board may prescribe." Shore Regional required that all tuition and transportation costs be paid by the parents, and that the students accepted meet "certain education standards and no discipline problems are tolerated." The "educational standards" have not been defined to us.

Shore Regional attacked the Commissioner's determination on the ground that his findings with respect to overcrowding at its high school were based, at least in part, on records submitted by Shore Regional to the Department of Education in 1969 in support of an application for extension of credit based upon overcrowded conditions, which records were not received as part of the evidence in this proceeding, and that in any event that situation no longer exists. We do not so read the Commissioner's decision. To us, it is clear that irrespective of the overcrowding issue, the determination was based upon the Commissioner's obligation under the constitution, laws and judicial decisions of New Jersey and the policies of the State Board of Education to combat and eliminate racial imbalance in the public schools.

Shore Regional further argued that the principles enunciated in *Booker v. Board of Education, Plainfield*, 45 N.J. 161 (Sup. Ct. 1965), relied on by the Commissioner, were not sound bases for determining that the discretion allowed a local board under N.J.S.A. 18A:38-3 must give way to the constitutionally and statutorily based policies of New Jersey designed to eliminate racial imbalance in public schools. Whatever may have been thought to be the limitations on the applicability of the principles of *Booker* in the face of statutes which might seem to suggest a conflict has been settled by the Supreme Court of New Jersey in the case of *Jenkins v. Township of Morris School District, et al*, N.J. (Sup. Ct., June 25, 1972) which defined the broad scope of the Commissioner's and the Board's authority in carrying out the educational goals and policies as expressed in our constitution and statutes. N.J.S.A. 18A:38-3 imposes no mandatory course of action on any local board. It allows discretionary action by such a board in certain situations if a board is so inclined to act. We see no conflict whatever between the principles of *Booker and Jenkins* as here involved and the provisions of the cited statute; and even if there were, the educational goals and objectives underlying *Booker* and *Jenkins* would have to be given primacy.

Shore Regional finally claimed that the release of the 8 students for attendance at Asbury Park High School would not be in the best interests of the students. In this, Shore Regional was joined by intervenors who relied on affidavits of parents of the 8 children. These affidavits emphasize the desirability and convenience which the parents feel will be concomitant with continuance of the 8 at Shore Regional rather than any impactive disadvantage or emotional or educational harm that would attach to attendance at Asbury Park. We find nothing persuasive in them to indicate the need for any modification of the Commissioner's determination in this respect.

The matter is remanded to the Commissioner.

DATED: August 20, 1971

**In the Matter of The Annual School Election**
**Held in the School District of the Borough of Carteret,**
**Middlesex County.**

## COMMISSIONER OF EDUCATION

### Decision

The announced results of the balloting for three members of the Board of Education for full term of three years each at the annual school election held on February 9, 1971, in the school district of the Borough of Carteret, Middlesex County were as follows:

| | At Polls | Absentee | Total |
|---|---|---|---|
| Joseph Lamb | 749 | 4 | 753 |
| Monroe Jacobowitz | 1,156 | 5 | 1,161 |
| Mildred Commerford | 750 | 3 | 753 |
| William Sitar | 874 | 7 | 881 |
| Louis Mangieri | 713 | 2 | 715 |

Write-in votes were also cast for two other candidates.

Pursuant to a letter request dated February 11, 1971, written on behalf of Louis Mangieri, a recount of the ballots cast was conducted by an authorized representative of the Commissioner on March 2, 1971, at the warehouse of the Middlesex County Board of Elections, Edison, New Jersey. The report of the representative follows:

At the conclusion of the recount there was no change in the announced tally. At that time Mr. Mangieri evidently intended to secure a court order to require a recount of the absentee ballots. Accordingly, the report contained herein has been delayed for more than two months in the expectation that a new tally from the County Election Board could be added to the totals which were announced at the conclusion of the recount of March 2, 1971. To date, however, there has been no notice from the Middlesex Board of Elections that such a court order has been secured. Therefore, a formal interim decision at this time is in order. If a later recount of absentee ballots is, in fact, certified to the Commissioner before the time when such a certification would render a contrary decision moot, the Commissioner can fully affirm or reverse the decision based on this report at that time.

* * * *

The Commissioner has reviewed the report of the hearing examiner and concurs with the opinion of his representative expressed therein.

Accordingly, the Commissioner finds that Monroe Jacobowitz and William Sitar were elected at the annual school election on February 9, 1971, to seats on the Carteret Board of Education for full terms of three years each. He also finds that there was a failure to elect a third member since the reported tie vote is not definitive and this member must therefore be appointed by the Middlesex County Superintendent of Schools pursuant to the statutory authority found in *N.J.S.A.* 18A:12-15.

COMMISSIONER OF EDUCATION

May 17, 1971

**In The Matter of The Special School Election Held in The School Districts of The Townships of Fredon, Hampton, Stillwater and Sandyston-Walpack, Sussex County.**

**COMMISSIONER OF EDUCATION**

**Decision**

The announced result of the balloting at a special election held in the Township of Stillwater, Sussex County, on May 4, 1971, for a proposition that would unite the Township of Stillwater with the school districts of the Townships of Fredon, Hampton and Sandyston-Walpack, Sussex County, to create a new Regional School District for the establishment and development of a six-year school (Grades 7-12) was as follows:

| | |
|---|---|
| Yes | 206 |
| No | 214 |

Thirteen ballots were marked by election officials as void.

Pursuant to a request from the President of the Regional Study Commission, Mr. William Melchinger, an authorized representative of the Commissioner was delegated to conduct a recount of the ballots cast in Stillwater Township. The report of the representative is as follows:

The recount of the ballots cast in Stillwater Township was conducted on May 14, 1971, at the office of the Sussex County Superintendent of Schools, Newton. At the conclusion of the recount the tally stood:

| | |
|---|---|
| Yes | 205 |
| No | 213 |

15 ballots were reserved for determination by the Commissioner.

Ten of these ballots were marked as Exhibit A. Each of these ballots is properly marked, and would have been tallied at the polls by election officials and at the recount by the Commissioner's representative except for one technical deficiency; namely, that they are all marked in blue ink contrary to the stated statutory mandate, 18A:14-55, which provides that only "black ink" or "pencil" may be used. The tally of these 10 ballots is:

| | |
|---|---|
| Yes | 3 |
| No | 7 |

The Commissioner's representative opines that these ballots must be counted because of prior decisions of the Commissioner and the courts for the reason most succinctly given in the decision of the Commissioner, *In the Matter of the Recount of the Ballots Cast at the Annual School Election in the Township of Delaware, Camden County*, 1957-58 *S.L.D.* 92, 93 wherein it is stated:

> "*** In counting and voiding ballots in school election controversies, the Commissioner has also looked to the General Election Law for guidance, although that law is not binding in school elections. Section 19:16-4 of the Revised Statutes states in part that:
>
> > "'*** No ballot shall be declared illegal by reason of the fact that the mark made with ink or the mark made with lead pencil appears *other than black.*'***" *(Emphasis supplied.)*

Therefore, with these 10 ballots added to the tally, the count would stand:

| | |
|---|---|
| Yes | 208 |
| No | 220 |

Since the remaining five ballots reserved for determination could not change the result, the election results are therefore conclusive.

* * * *

The Commissioner has reviewed the report of his representative and concurs with the opinion expressed therein. He finds and determines that the proposition contained on the ballots submitted to the voters of Stillwater Township, Sussex County, on May 4, 1971, was not approved.

COMMISSIONER OF EDUCATION

May 21, 1971

**Eugene Kelley, a minor by his parents and natural guardians, Lornnie Kelley and Proverta Kelley,**

*Petitioner,*

**v.**

**Board of Education of the City of Vineland, Et Al., Cumberland County,**

*Respondent.*

## COMMISSIONER OF EDUCATION

### Decision

For the Petitioner, Leonard H. Wallach, Esq.

For the Respondents, Frank Testa, Esq.

In September 1970, petitioner appealed his expulsion from respondent Board of Education's High School to the Commissioner of Education and moved for immediate reinstatement *pendente lite.* The Motion was denied by the Commissioner in a decision dated September 18, 1970. This decision concluded with the following sentence:

> "***However, he [the Commissioner] directs the Vineland Board of Education to furnish a typed copy of the transcript of the second hearing so that all of the charges embodied in the petition may be carefully reviewed and evaluated and so that the penalty imposed may be weighed against the evidence educed."

Subsequent to the issuance of the Commissioner's decision, but prior to receipt of the transcript, *supra,* by the Commissioner, petitioner had enrolled in another school system.

Nevertheless, with the review of the transcript completed at this juncture, the Commissioner finds for the record that the decision on the Motion to Dismiss is dispositive of petitioner's contentions embodied in the pleadings. Additionally, he finds that the actions of the Vineland Board of Education with regard to this matter are sustained in all respects as a proper exercise of statutory authority granted to it to expel students from its schools for just cause as provided in *N.J.S.A.* 18A:37-5.

COMMISSIONER OF EDUCATION

May 27, 1971

**The Parents of "K.K.",**

*Petitioners,*

**v.**

**Board of Education of the Town of Westfield, Union County,**

*Respondent*

## COMMISSIONER OF EDUCATION

### Decision

For the Petitioner, Schechner & Targan (David Schechner, Esq., of Counsel)

For the Respondent, Nichols, Thomson & Peek (William D. Peek, Esq., of Counsel)

Petitioners are parents of a child formerly enrolled in the second grade of the Westfield Public Schools, Union County. They allege that their child, hereinafter "K.K.", was not properly classified as a handicapped child by the Westfield Board of Education, hereinafter "Board," in the spring of 1970, and that the school placement afforded to her at that time was inappropriate and contrary to law. Petitioner's prayer is that the Board be required to pay tuition costs and provide transportation to a private school in which petitioners enrolled K.K. for the 1970-71 school year. The Board maintains that K.K. is not so handicapped as to require either classification or placement as a handicapped child and that her placement in a regular class was right and proper.

A hearing in this matter was conducted at the office of the Union County Superintendent of Schools in Westfield on February 1, 1971, and continued on March 16, 1971, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

Petitioners resided in the State of Illinois prior to January 1970, and K.K. was enrolled in a school there in a standard second grade program. In January 1970, petitioners placed a phone call to the school in Westfield where their daughter was soon to be enrolled and talked with the principal and the head of the special services team. (Tr. 28) In the course of the conversation petitioners indicated, according to their testimony, that their daughter had "problems in school, starting at about the middle of the first grade; that she was hyperactive, couldn't read and reversed letters and words." (Tr. 29)

Subsequently, K.K. was enrolled as a second grade student in a regular class in the Westfield School System in January 1970. There was no formal objection to such placement by petitioners. The classroom teacher was not apprised at the time of K.K.'s enrollment, either by written reports or verbally, that the enrollment was other than routine. At a later date, this teacher did receive reports from Illinois that indicated to her that K.K. was an "average" child. (Tr. 58)

Approximately three weeks after K.K's enrollment in Westfield, her classroom teacher recognized that K.K. had academic deficiencies in reading and arithmetic (Tr. 58) and problems of adjustment to class routine. The teacher spoke to the principal regarding the observation, and he, in turn, referred the problems of K.K. to the head of the district's basic child study team for evaluation. (Tr. 58)

Approximately three weeks following this referral and six weeks following the initial enrollment of K.K. in the Westfield School System, a testing program began. A remedial reading teacher administered diagnostic reading tests which included the Durrell test, the Botell phonics test and a test to measure auditory discrimination. The results of these tests are summarized in the report of the remedial reading teacher and admitted into evidence as R-3. K.K.'s reading level rate was "low first grade," with "fair comprehension." Listening comprehension was rated "About third grade level."

Tests were also administered by the district's psychologist and one of the district's learning disability specialists. Reports of these tests were admitted into evidence as R-2 and R-3, respectively. For purposes of this report, it need only be stated that test results showed K.K. to be a child of average to slightly-above-average intelligence, who was not performing commensurate with her ability. Neither report made a determination of the reasons for this disparity. However, they did recommend a "parent interview" (the report of the psychologist) and "further evaluation" (the report of the learning disability specialist).

As a result of this testing, the Westfield Child Study Team recommended that K.K. receive individualized reading one hour a day with a remedial reading teacher, and found that a continuous evaluation of her problems and

"handicaps" was necessary. At no time did the team ever "classify" K.K. (Tr. 96) in accordance with the classifications established by the provisions of *N.J.S.A.* 18A:46-14.

While the child was receiving special help with reading in public school, she was also taken out of school by petitioners "two or three" mornings a week (Tr. 55) for special assistance in reading at a private clinic or institute in Princeton, New Jersey. This service was one purchased privately by the parents. K.K.'s classroom teacher testified that these regular absences for private instruction were frequently the causes of more disturbed or agitated behavior. (Tr. 72) Thus, the testimony showed:

> "Q. And so far as you could tell, as a classroom teacher, there was no degree of predictability as to whether the flareup would occur?
>
> "A. The only time that you could predict that she would be upset, or high strung would be on the days that she came back from Princeton, when she would come back in the middle of the afternoon." (Tr. 72)

and again on page 78 of the transcript:

> "Q. Would you say that the Princeton expeditions affected her classroom behavior, and contributed to this increase? [of problems]
>
> "A. Yes, especially when she would come back, in the middle of the afternoon."

K.K. finished the 1969-70 school year in the Westfield School System. At that time, despite the problems manifested on occasions, it was the opinion of the classroom teacher that K.K. could learn in the environment of a regular classroom (Tr. 80), and that the program proposed by the Board during the 1970-71 school year would be "extremely beneficial." (Tr. 81) In like manner, the members of the special services team and the school principal testified that K.K.'s educational development might best proceed in a regular classroom atmosphere. Accordingly, K.K. was assigned to a regular third grade classroom for the 1970-71 school year. She never reported. In the interim between the end of school in June and September 1970, petitioners secured a private placement for K.K. and, without informing the Board of the change, arranged for K.K. to begin in that private school in September 1970.

This completes a summary recital of the interactions of petitioners and the Board during the period January to September 1970. The contentions of the parties evolve from this context. From these contentions, the issues become apparent.

Petitioners contend that, as a handicapped child, K.K. should have been classified pursuant to statutory mandate (*N.J.S.A.* 18A:46-10) and the rules of the State Board of Education (*N.J.A.C.* 6:28-1 *et seq.*).

Petitioners assert that the testimony at the hearing and the reports of professional evaluations made in Illinois attest to the fact that the evidences of specific handicaps displayed by K.K. are such that the law should have been triggered, that classification should have resulted, and that special class placement was, and is, clearly indicated. Since such classification or placement was not provided, it is petitioner's view that the Board has failed to meet its legal obligation. Petitioners base their assertion, in part, on the reports of the private examinations made in Illinois prior to the family's moving to New Jersey.

These examinations (P-2, P-3) were performed on June 10, 1969, and in late November 1969 by a physician and a psychologist respectively. They did not result in K.K.'s placement in a special class facility either in public school or in private school in Illinois. Neither should the examinations, in the hearing examiner's opinion, be substituted, as a greater weight of credible evidence, for the combined decision of a basic child study services team properly certified by New Jersey standards. In any event, the psychological report (P-2) was a year old by the time classification or placement of K.K. was under discussion for the 1970-71 school year. While this report does say that K.K. should "be considered for all practical purposes to be a perceptually handicapped child and should be placed in school even though she does not meet the commonly accepted definition of the term," the report of the physician (P-1) found K.K.'s tendency to "reversals" to be within normal limits, and he reported that a psychiatrist, whose report he had evidently read, felt there was "no essential psychopathology, but that she was merely immature." The Board's basic child study services team was never given an opportunity to reconsider its previous decision regarding classification in September 1970, since the child was no longer enrolled in the Westfield School System and therefore not eligible for such reexamination. A re-enrollment for the 1970-71 school year would have been sufficient, in the opinion of the hearing examiner, to cause the members of the Board's team to reexamine their own findings.

The Board does not deny that K.K. is a child with handicaps of various kinds including, but not limited to, auditory, visual and communication handicaps, with possible other involvements. The Board does not deny that the child is hyperactive. The Board asserts, however, that in its collective judgment, these handicaps are not of such consequence, or of such severity in their effect on the learning process, or so quickly and easily measurable, as to have justified a classification of handicapped, or classification in any category, at the close of school in June 1970.

The reports from staff members of the Willis School in New Jersey, compiled after placement of K.K. had been made there by petitioners for the 1970-71 school year, concur in these tentative findings. They confirm what the Board maintains, in the opinion of the hearing examiner, namely, that a further

period of observation was needed to properly evaluate or classify K.K. Thus, the private school psychologist says in his recommendations contained in P-5:

> "*** K.K. should be followed up over a period of time, as *it may be some time before the ambiguous etiology of her behaviorial traits can be sorted out.* ***" *(Emphasis supplied.)*

This was exactly what the Board's team had contended.

Nevertheless, in late August 1970, petitioners, through their attorney, contacted the State Department of Education, and forwarded the Willis School's findings to the Department's Director of the Bureau of Special Education Services. This official said in a letter to the Board of August 27, 1970:

> "*** We strongly feel that the Willis material is sufficient for classification of this child, and we urge that you accept this material and classify the child accordingly in order that she be programmed immediately upon the opening of school.***"

No such classification was made since the child has been removed from public school.

From the contentions contained in the petition herein, the issue is discerned and may be stated as follows:

> Was K.K. so handicapped in the Spring of 1970 as to require classification as a handicapped child in one or more of the categories of *N.J.S.A.* 18A:46-14? If she was, and was not so classified, is the Board liable for the private school costs incurred by petitioners?

The hearing examiner, having examined the evidence educed at the hearing and having reviewed the testimony offered by the parties makes the following observations and findings:

1. K.K. is a child who has learning problems at least to some degree. The evidence of this may be found in the testimony of the classroom teacher, the testimony of the members of respondent Board's special services team who tested K.K., and in the reports of the professionals who examined the child in Illinois. (P-1, P-2) However, in this regard, the hearing examiner finds no evidence more compelling than the evidence offered in testimony by the Board of Education's team. This testimony, in its essence, is that the learning problems of K.K. were not such as to warrant her classification in the Spring of 1970 and placement in a special class situation. Mere assertions by petitioners that the handicaps are of such a magnitude as to require classification according to the terms of *N.J.S.A.* 18A:46-14 do not, in the hearing examiner's opinion, constitute an expert judgment. Nor is the hearing examiner convinced that the written submissions of the private professional reports from Illinois (P-1 and

P-2), or the report of the educational therapist of the private school dated June 1970, (P-3) are of such weight as to constitute clear and definite reason why the concerted joint opinion of the Board's psychologist, remedial reading teacher, learning disability specialist and the classroom teacher, who instructed K.K. for most of a six-months' period, should be set aside.

2. The hearing examiner notes that the basic child study services team of the Westfield School District handles a case load of approximately 900 children. All of these children have handicaps of one sort or another. Most of them are not considered by the team as so handicapped as to require special class placement, or even classification, in many instances.

Therefore, to argue, as petitioners do, that the mere designation of a child as "handicapped" should trigger the requirement for "classification" pursuant to *N.J.S.A.* 18A:46-10, is to argue that the expert judgment of a qualified psychological services team is not a necessity for such classification and for the resultant placement. The hearing examiner can find no substantiation for such an argument in any of the statutes promulgated by the New Jersey Legislature or in the rules of the State Board of Education.

* * * *

The Commissioner has carefully reviewed the report of the hearing examiner and concurs with the findings expressed therein.

*N.J.S.A.* 18A:46-6 provides:

> "Each board of education shall *identify* and *ascertain*, according to rules prescribed by the commissioner with the approval of the state board, what *children* between the ages of five and twenty in the public schools of the district, if any, *cannot be properly accommodated through the school facilities usually provided because of handicaps.*" *(Emphasis supplied.)*

It is clear from a reading of this statute that there is a judgment involved prerequisite to classification, namely, whether or not the child under study can, or cannot, "be properly accommodated through the school facilities usually provided." It is also clear that the task of judging the severity of handicap is one that is delegated specifically by statute (*N.J.S.A.* 18A:46-11) to the "psychological examiner" and "special education personnel" employed by each board of education in the State.

Admittedly, this is a difficult task, but in order to insure that it is carried out properly, the State Board of Education has required each district to employ highly-qualified personnel representing many disciplines. The certification standards for these team members are high. When, as in this instance, such a team makes a judgment it is qualified and mandated to make -- to classify or not to classify a child as handicapped and in need of special class or other special

placement –, that judgment will not be determined to be faulty or incorrect by the Commissioner, absent a clear showing of procedural fault or an arbitrary exercise of discretion without proper diagnostic information.

In the instant matter, the basic child study services team was asked to diagnose the development of K.K., who had been enrolled in a regular school program in another state for over two years. It responded within a three-week period. Three members of the team administered a variety of tests, and they had the advice of a classroom teacher, who saw the child every day. Their concerted judgment was that the child should be placed in a regular classroom with special help in reading, but no classification of the handicap was made.

The allegation herein is not that the team was not qualified to make the judgment that it made, but that its judgment was faulty. However, the judgment was made only after prompt, yet detailed, study and consultation, and the team's power to act in the manner it did need not be abridged by contrary findings of private specialists who may hold contrary opinions. Such contrary findings and opinions may, of course, be given consideration.

The Commissioner observes that petitioners made two decisions as the result of their disagreement with the Board of Education concerning the placement of K.K. in the Westfield School System during the spring and summer of 1970. First, they decided to withdraw K.K. from the Board's program for part of the regular instructional period. Secondly, they decided to withdraw the child entirely and to send her to private school. 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. *Malcom Woodstein and Ina Woodstein v. Board of Education of the Township of Clark, Union County*, decided by the Commissioner July 17, 1970; *In the Matter of "R" v. the Board of Education of the Town of West Orange*, 1966 *S.L.D.* 210

Accordingly, having found that the Westfield Board of Education psychological services team made a judgment it was empowered to make and that such judgment was made after a proper and careful determination, the Commissioner finds the petition herein to be without merit. It is therefore dismissed.

COMMISSIONER OF EDUCATION

June 1, 1971

## NEW JERSEY STATE BOARD OF EDUCATION

There seems to be no doubt that petitioners' daughter is a handicapped child within the meaning of *N.J.S.A.* 18A:46-1. Their petition filed with the Commissioner of Education of the State of New Jersey was dismissed by him on June 1, 1971.

The child, a pupil in respondent's district from January to June, 1970, was examined and evaluated by a child study services team pursuant to *N.J.S.A.* 18A:46-1 et. seq.[1] Petitioners contend, among other things, that there were irregularities in the evaluation process and team composition, and that the ultimate finding by that team was erroneous to the extent that it did not classify the child under one of the categories set forth in *N.J.S.A.* 18A:46-8[2].

The record before us indicates that the team was unable to so classify the child either because of diagnostic difficulties, or the lack of sufficient data and observation, or both. The record further indicates that this may have been caused in part by the withdrawal of the child by petitioners from respondent's district for private placement. Petitioners have suggested to us that they may be financially unable to continue the child in the private school which it was attending at the time of the Commissioner's decision. In these circumstances, an adjudication of the issues raised by this appeal at this time would serve no useful purpose and would not carry out the spirit and intent of the statutes enacted for the benefit of handicapped children.

The identification, examination and classification required by *N.J.S.A.* 18A:46-8 shall be made within 30 days following the opening of the 1971-72 school year, *provided* petitioners enroll the child in the appropriate school of respondent's district for the 1971-1972 school year.

The matter is remanded to the Commissioner for further action consistent herewith.

DATED: August 26, 1971

[1]There were two similar prior examinations: One made in Illinois prior to relocation of the family in Westfield in 1970, and the other made by members of the staff of Willis School, a private New Jersey institution, in the latter part of 1970.

[2]The statute mandates that handicapped children be "identified, examined and classified" under one of 10 specified categories.

**Mitchell Klein,**

*Petitioner,*

**v.**

**Board of Education of the Township of Weehawken, Hudson County,**

*Respondent.*

## COMMISSIONER OF EDUCATION

### Decision on Motion

For the Petitioner, Chasan, Leyner, Holland & Tarleton (Arthur N. D'Italia, Esq., of Counsel)

For the Respondent, Leroy D. Safro, Esq.

Mitchell Klein, hereinafter "petitioner," alleges that he was dismissed from his employment as a teacher by the Township of Weehawken Board of Education, hereinafter "respondent," because he exercised the constitutionally-guaranteed right of free speech in a manner deemed inappropriate by respondent. He contends that a dismissal on such grounds is illegal and void and demands from the Commissioner a declaration that the contract termination was invalid. Respondent denies that petitioner was dismissed for such a reason, and maintains that the contract between the parties was terminated in this instance in accordance with its terms.

Respondent moves at this juncture for dismissal of the petition on the ground that there exists no claim upon which relief can be granted. The motion is argued in briefs of counsel.

The basic facts of petitioner's contractual relationship with respondent are not a subject of controversy. He was employed by respondent as a teacher in its schools by a contract dated September 1, 1969, at a salary of $7,050 per year. This contract extended to June 30, 1970. In May of 1970, petitioner entered into a subsequent contract for the school year 1970-71 at a salary of $8,400, and began teaching service under the terms of this contract in September 1970. Both of the contracts referred to *supra*, contained the following agreement:

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

In a letter dated November 19, 1970, from respondent's Superintendent of Schools to petitioner, this 60-day notice clause was exercised. The contents of the letter are as follows:

> "This is to notify you that your probation employment with the Weehawken School System will be terminated on February 1, 1971. This notice is given to you at this time so you can seek other employment."

Petitioner contends that following receipt of this letter, he contacted the Superintendent of Schools and was advised that he had been discharged at the specific instruction of respondent, but that inadequate or improper teaching was not the basis for the action. Petitioner further avers that subsequent to this discussion, he contacted the President of the Board of Education, and was advised by this official that his discharge was based upon a conversation which petitioner had had with the Mayor of the Town of Weehawken wherein petitioner had criticized the school system for an alleged serious shortage of material supplies available for teachers and students. There is a denial by the President of the Board that petitioner was ever so advised. This denial is contained in an affidavit that accompanies the Notice of Motion. It is reproduced in full below:

> "1. I am the President of the Weehawken Board of Education and held such office at all times pertinent to this matter.
>
> "2. I have read the Petition and Amended Petition in this matter and am fully aware of the contents thereof.
>
> "3. On or about November 20, 1970 the Petitioner entered the office at my place of business unannounced and demanded, among other things, to know the reason 'why I was fired'.
>
> "4. I informed the Petitioner that it was the policy of the Board in such circumstances to give no reason whatever and that none would be given in this case.
>
> "5. I further informed Petitioner that it was also the policy of the Board to deny a hearing to a non-tenured teacher whose contract was either not renewed or terminated, as was his.
>
> "6. The Petitioner stated that he was being fired because of statements he made to the Mayor and Commissioner. I replied that that was his conclusion, not mine.
>
> "7. At no time did I discuss with the Petitioner the Board's reasons for his termination.
>
> "8. The Board voted to terminate the contract of the petitioner pursuant to its terms after full and lengthy discussion by all present and upon a determination that it was dissatisfied with the petitioner. The Board's vote was not based upon any one reason but a combination of reasons."

This affidavit from the President of the Board has thus posed the first question of fact since petitioner's contentions in this regard are by contrast a direct dichotomy.

A second question of fact develops from petitioner's contention that a negotiated agreement between the Weehawken Education Assqciation, in which organization petitioner holds membership, and respondent contains the clause:

> "No teacher shall be disciplined, reprimanded, reduced in rank or compensation or deprived of any professional advantage without just cause. Any such action asserted by the Board, or any agent or representative thereof, shall be subject to the grievance procedure herein set forth."

Respondent denies that such a clause was contained in the final negotiation agreement between it and the Association, but contends that the clause as stated, *supra*, was contained in the original proposal advanced by the Association but later deleted. Respondent has affixed the entire agreement to its Notice of Motion in support of this contention.

I.

With respect to the first question of fact, the Commissioner observes that a series of decisions by the Commissioner and the courts have held that New Jersey teachers who have not attained tenure status are not entitled to a statement of reasons when their contracts are not renewed, or to a hearing before the employing board of education, since all such teachers are employed by specific contractual terms which may be exercised by either party. *George A. Ruch v. Board of Education of the Greater Egg Harbor Regional High School District, Atlantic County*, 1968 *S.L.D.* 7; *Taylor and Ozman v. Patterson State College*, 1966 *S.L.D.* 33; *John N. Ruggerio v. Board of Education of the Greater Egg Harbor Regional School District, Atlantic County*, decided by the Commissioner March 17, 1970; *Ruth Burstein et al. v. Board of Education of the Borough of Englewood Cliffs, Bergen County*, decided by the Commissioner September 23, 1970; *Florence Fitzpatrick v. Board of Education of the Borough of Wharton, Morris County*, decided by the Commissioner April 30, 1970; *Zimmerman v. Board of Education of Newark*, 38 *N.J.* 65 (*Sup. Ct.* 1962) The Commissioner reaffirms this position, but notes that the instant matter is not one that demands that a reason for failure to renew a contract or for dismissal be given, but is one that maintains, instead, that the reason for dismissal was advanced and was improper since it represented an infringement of a constitutional right to free speech.

The Commissioner observes that the State Board of Education recently considered a similar allegation in a decision based on an appeal in *Patricia Meyer v. Board of Education of the Borough of Sayreville, Middlesex County*, decided by the State Board of Education December 2, 1970. In that case the teacher alleged that she was denied employment because she had participated in union activities. Her petition before the Commissioner was dismissed, following argument on a Motion, without a hearing. The decision of the State Board embodied the opinion that the right to participate in such activities is expressly granted by the *New Jersey Constitution* of 1947, *Article* 1, *Paragraph* 19. The matter was therefore remanded to the Commissioner "for factual inquiry into the nature and extent of petitioner's union activity and its effect on the Board's decision to refuse her reemployment." (P-8) This remand was grounded on expressions of the courts, particularly those found in *Zimmerman, supra.* Thus, the State Board said in part in *Meyer:*

> "*** As shown earlier in this opinion, the majority opinion of our Supreme Court in *Zimmerman* stated that the powers of a local board of education to employ and discharge persons are limited 'not only by the terms of the contract of employment, but also by the *New Jersey Constitution.*' *Laba* held that the *dismissal* of a non-tenure teacher from an existing employment founded on the exercise of a Fifth Amendment constitutional right could not be sustained. We regard it as equally true, as Chief Justice Weintraub indicated in his concurring opinion in *Zimmerman* *** *that neither the employment nor reemployment of a teacher in a public school may be refused 'upon a basis which would violate any express constitutional policy.'* ***"

In the instant matter, the detailed allegation that constitutes petitioner's view of the reason for his dismissal by respondent is one that, if found to be true in fact, would be in contravention of a guarantee afforded by the *Constitution of the United States*; specifically, the protection afforded freedom of speech. The Commissioner holds that such an allegation, if proved, would be reason for his intervention since it would be an improper use of powers granted to boards of education in New Jersey and clearly *ultra vires.*

In this regard the Commissioner said in part in *Florence Fitzpatrick, supra:*

> "*** The Legislature has invested local boards of education with broad discretionary authority with respect to the day-to-day functioning of the public schools and in particular with the employment, assignment, compensation and dismissal of employees. *N.J.S.A.* 18A:11-1 *As long as those powers are not exceeded or unlawfully abused, the Commissioner is without authority to intervene to interpose independent judgment.* ***" *(Emphasis supplied.)*

In contrary fashion, the Commissioner's intervention is required if statutory powers are "exceeded" or "unlawfully abused."

In the instant matter, it is clear that if the factual allegations are proved true in fact, the Commissioner's intervention would be necessary. Accordingly, the Motion to Dismiss is denied with respect to the first question posed for determination, and a hearing examiner will be assigned forthwith to conduct a hearing limited in scope to an examination of this factual controversy; namely, whether or not petitioner was dismissed from his employment because he was critical of certain aspects of respondent's program of education.

## II.

With respect to the second fact in controversy, the Commissioner observes that petitioner's documentation of the alleged negotiated agreement between the Teachers Association and respondent is incomplete, while respondent's submission is stated to be the agreement in its entirety. This latter document

contains the signatures of school officials and members of the Association and has every appearance of authenticity. For this reason and because, in any event, the Commissioner has held on a prior occasion that the exercise of the stated terms of a contract by one of the parties is not a grievable issue – *Fitzpatrick, supra* –, there is no need for a factual determination with regard to this facet of the dispute. The propriety of petitioner's dismissal is not hinged on such a determination. To this extent the Motion to Dismiss is granted.

COMMISSIONER OF EDUCATION

June 2, 1971

Pending before United States District Court.

**Carl Moldovan, Donald Clark, and John Wietecha,**
*Petitioners,*

**v.**

**Board of Education of the Township of Hamilton, Mercer County,**
*Respondent.*

**COMMISSIONER OF EDUCATION**
**Decision**

For the Petitioners, *Pro Se*

For the Respondent, Henry F. Gill, Esq.

Carl Moldovan, Donald Clark and John Wietecha, hereinafter "petitioners," are teachers employed by the Board of Education of the School District of the Township of Hamilton, Mercer County, hereinafter "Board." Petitioners allege that respondent Board acted improperly in deducting the amount of one day of wages from their respective monthly salaries, as the result of their absence from duty on October 12, 1970, a public holiday, when the Board's public schools were in regular session. The Board answers that its action in making the aforementioned deductions from petitioners' salaries was proper, in that petitioners' absence was in direct contravention of an agreement of employment negotiated between and mutually agreed upon by the Board and representatives of the Hamilton Township Education Association, hereinafter "Association." The Board also states that the Association is the exclusive and sole representative for collective negotiations concerning the terms and conditions of employment for all full-time classroom teachers, including petitioners.

Petitioners pray for relief in the form of an order of the Commissioner of Education directing the Board to reimburse petitioners for the salary deductions made as the result of their absence on the public holiday of October 12, 1970, known as Columbus Day.

The facts in this matter have been stipulated and documents have been received and marked in evidence. The parties waived hearing and oral argument.

Petitioners state that they absented themselves from their public school employment on October 12, 1970, and that the public schools under the control of the Board were in regular session on that day. The Board did in fact make a wage deduction from the monthly salaries of petitioners as a result of their absence.

The Legislature has enacted *N.J.S.A.* 18A:25-3, which bears directly upon the matter herein controverted before the Commissioner. This statute reads as follows:

> "*No teaching staff member shall be required* to perform his duties on any day declared by law to be a public holiday and *no deduction shall be made* from such member's salary by reason of the fact that such a public holiday happens to be a school day and *any term of any contract* made with any such member which is *in violation of this section shall be void.*" *(Emphasis supplied.)*

The progenitor of *N.J.S.A.* 18A:25-3 is *N.J.S.A.* 18:13-115, which was adopted October 19, 1903, as part of "An Act to establish a thorough and efficient system of free public schools, and to provide for the maintenance, support and management thereof." *L.* 1903 *(2d. Sp. Sess.), c.* 1, § 110, p. 44 From the time of enactment in 1903 until January 11, 1968, when the statute was editorially revised, a period spanning approximately sixty-five years, *N.J.S.A.* 18:13-115 read as follows:

> "No teacher shall be required to teach school on any day declared by law to be a public holiday, and no deduction from a teacher's salary shall be made by reason of the fact that a school day happens to be a day declared by law to be a public holiday. Any contract made in violation of this section shall have no force or effect as against a teacher."

From this review of the history and language of the statute, *N.J.S.A.* 18A:25-3, *supra*, the Commissioner finds that the intent of the Legislature is explicit and clear. The construction and interpretation of statutes has been enunciated and clarified in decisions of the courts of this State on numerous occasions. The decision of the Supreme Court in *Duke Power Company, Inc. v. Edward J. Patten, Secretary of State of New Jersey, et al.*, 20 *N.J.* 42 (1955) bears directly upon this matter. The Court stated at p. 49:

"***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, *Zietko v. New Jersey Manufacturers Casualty Ins. Co.*, 132 *N.J.L.* 206, 211 (*E. & A.* 1944); *Bass v. Allen Home Improvement Co.*, 8 *N.J.* 219 (1951); *Sperry & Hutchinson Co. v. Margetts*, 15 *N.J.* 203, 209 (1954); 2 *Sutherland, Statutes and Statutory Construction* (*3rd ed.* 1943), section 4502.***"

The courts have also ruled on the importance of long usage and long standing in establishing the intent of legislative enactments. In *State of New Jersey, Department of Civil Service, et al. v. James P. Clark, et al.*, 15 *N.J.* 334 (1954), the Supreme Court stated the following at p. 341:

"The principle is well established by a wealth of authority that resort may be had to long usage, contemporaneous construction and practical interpretation in construing statutes, to ascertain the meaning of technical terms, *to confirm a construction deduced from the language*, to explain a doubtful phrase or where the meaning is obscurely expressed. *Suburban Electric Co. v. Elizabeth*, 59 *N.J.L.* 134 (*Sup Ct.* 1896).*** *(Emphasis supplied.)*

Also, the Court stated at p. 340:

"***Such a contemporaneous construction over a period in excess of 40 years [here 65 years] is of substantial importance in weighing the issues where there is a debatable question. Under such circumstances the long-continued exposition exhibited in the usage and practice requires the construction put upon it to be accepted by the courts as a true one.***"

Having examined several pertinent decrees of the courts, the Commissioner finds that the statute, *N.J.S.A.* 18A:25-3, *supra*, is clear on its face, and that its long standing over a period in excess of sixty-five years removes any question here of the intent of the Legislature.

The next item requiring consideration is the definition of the phrase "any day declared by law to be a public holiday." *N.J.S.A.* 18A:25-3, *supra* On October 12, 1970, when the incident of petitioners' absence took place, the controlling statutory authority concerning public holidays was *N.J.S.A.* 36:1-1, which read in pertinent part as follows:

"The following days in each year shall, for all purposes whatsoever *** be treated and considered as public holidays: *** *October 12, known as Columbus Day* ***."

For the benefit of all local boards of education, the amended version of *N.J.S.A.* 36:1-1, which was amended by *L.* 1969, *c.* 132 § 1, and which became effective January 1, 1971, is set forth in part as follows:

"The following days in each year shall for all purposes whatsoever***be treated and considered***as public holidays: January 1, known as New Year's Day; February 12, known as Lincoln's Birthday; *the third Monday in February*, known as Washington's Birthday; the day designated and known as Good Friday; *the last Monday in May*, known as Memorial Day; July 4, known as Independence Day; *the first Monday in September*, known as Labor Day; *the second Monday in October*, known as Columbus Day; *the fourth Monday in October*, known as Veteran's Day; *the fourth Thursday in November*, known as Thanksgiving Day; December 25, known as Christmas Day; any general election day in this State; every Saturday; and any day heretofore or hereafter appointed, ordered or recommended by the Governor of this State, or the President of the United States, as a day of fasting and prayer, or other religious observance, or as a bank holiday or holidays.***"

The Board argues that its admitted action in making a wage deduction from the salaries of petitioners was valid and proper because petitioners' absence was in direct contravention of an agreement of employment negotiated between and mutually agreed upon by the Board and representatives of the teachers' Association. The Board further avers that the mutual employment agreement (R-2) is binding upon all employees in the category of petitioners, that petitioners had thereby contracted to teach on the day in question, October 12, 1970, and that said day was not, therefore, a public holiday for petitioners.

"The board shall-***

"c. *Make, amend and repeal rules****for its own government and the transaction of its business and *for the government and managment of the public schools****.

"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,****and maintenance *of the public schools of the district.*" *(Emphasis supplied.)*

*N.J.S.A.* 18A:36-1 provides that:

"The school year for all schools in the public school system shall begin on July 1 and end on June 30."

The Legislature has also enacted *N.J.S.A.* 18A:36-2 which provides that:

"The board of education *shall determine* annually the dates, between which the schools of the district shall be open, in accordance with law." *(Emphasis supplied.)*

New Jersey parents are required to send their children to school. *N.J.S.A.* 18A:38-25 reads in part:

> "Every parent***having custody and control of a child between the ages of six and 16 years *shall cause such child regularly to attend the public schools of the district****." *(Emphasis supplied.)*

The statutes also define the days when children are required to regularly attend school. *N.J.S.A.* 18A:38-26 states in pertinent part:

> "*Such regular attendance shall be during all the days and hours that the public schools are in session in the district****." *(Emphasis supplied.)*

If a child between the ages of six and 16 is repeatedly absent from school, and his parent is unable to compel him to attend school, he "***shall be deemed to be a juvenile delinquent and shall be proceeded against as such" in accordance with *N.J.S.A.* 18A:38-27. In case of violation of the compulsory attendance requirement, the statutes require that formal written notice be served upon the parent to cause the child to attend school, *N.J.S.A.* 18A:38-29; and that a parent who fails to comply with the provisions of the law "***shall be deemed to be a disorderly person and shall be subject to a fine***." *N.J.S.A.* 18A:38-31

The courts of this State and the United States Supreme Court have upheld the principle that compulsory education in New Jersey is a matter of public concern and legislative regulation, and that it should be enforced so long as statutory requirements are reasonable, subject to constitutional limitations. See *Everson v. Board of Education of Ewing Township*, 133 *N.J.L.* 350 (*E. & A.* 1945), affirmed 330 *U.S.* 1, 67 *S. Ct.* 504, 91 *L. Ed.* 711 (1947), rehearing denied 330 *U.S.* 855, 67 *S. Ct.* 962, 91 *L. Ed.* 1297.

The Commissioner takes notice of the words of Judge Lewis of the Appellate Division of the New Jersey Superior Court in the case of *Victor Porcelli, et al. v. Franklyn Titus, Superintendent, and the Newark Board of Education*, 108 *N.J. Super.* 301 (*App. Div.* 1969), *cert. den.* 55 *N.J.* 310 (1970), which bear directly upon the instant matter. The Court stated at p. 307:

> "***There can be no doubt***that the teachers***as public employees, had the right to organize and, through organizational representation, the right to make proposals which could be effectuated by an enforceable agreement between the school board and its organized employees. *N.J. Const.* (1947), *Art.* I, 'Rights and Privileges' par. 19. This right was expressly recognized in the recently adopted, 'New Jersey Employer-Employee Relations Act.' *L.* 1968, *c.* 303, *N.J.S.A.* 34A:13A-1 *et seq.* The enactment mandates that negotiations concerning terms and conditions of employment shall be made in good faith and that when an agreement is reached such terms and conditions shall be embodied in a signed agreement. *N.J.S.A.* 34:14A-5.3***"

The agreement (R-2) between the Board and the Association includes the following reference to the school calendar under *Article V, School Year* at p. 7:

"A. *The Superintendent will consult with representatives* of the Association *before recommending the school calendar* for the next school year. *Final determination of the school calendar will rest with the Board.* The calendar shall be set forth in Schedule B." *(Emphasis supplied.)*

The school calendar (R-1) formally adopted by the Board of Education for the 1970-71 school year includes Columbus Day, October 12, 1970, as a day of regular school session among the total of 183 school days scheduled for this school year.

In the judgment of the Commissioner, an explanation of the purpose of a school calendar needs to be set forth for the benefit of all local boards of education. An understanding of this purpose can be educed from a review of several pertinent statutes which are *in pari materia.*

Local school districts governed by boards of education are agencies of the State, created by the Legislature to carry out the State educational policy of providing, "***for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years." *New Jersey Constitution, Article VIII, Section IV, Paragraph 1* Since the school districts of New Jersey are under the control and jurisdiction of the State and its executive officers, their authority must be conferred by enactments of the Legislature. The primary enabling authority conferred upon these local agencies is set forth in *N.J.S.A.* 18A:11-1, which states, *inter alia,* the following:

The statutes relating to state school aid have long required that no apportionment of such aid "***shall be paid to any district which has not provided public school facilities for at least 180 days during the preceding school year***." *N.J.S.A.* 18A:58-16 The progenitor of this statute was 18:10-29.44 (*L.* 1954, *c.* 85, p. 531, § 15), and this requirement can be traced back to *L.* 1903 (2*d. Sp. Sess.*) c. 1, § 27, p. 16, adopted October 19, 1903, *supra.* The statute providing for apportionment of school building aid also requires the operating of the public schools within a local district for a minimum of 180 days. *N.J.S.A.* 18A:58-31 (formerly *N.J.S.A.* 18:10-29.60, *L.* 1956, *c.* 8, § 12)

The whole of these parts clearly indicates that the Legislature has provided for: (1) a defined school year, (2) the adoption of a school calendar, (3) a minimum number of 180 days of operation of public schools in order for a local board to receive an apportionment of state aid, and (4) compulsory school attendance with penalties for the violation thereof. These statutes *in pari materia* serve the State policy and the deeply-rooted purpose of the law to provide for "***a thorough and efficient system of public schools for the instruction of all the children in the State***."

These statutory provisions are *in pari materia,* and as stated by Judge Lewis in *Porcelli v. Titus, supra,* at p. 309:

"***it is axiomatic that such enactments are to be construed together 'as a unitary and harmonious whole, in order that each may be fully effective.' *Clifton v. Passaic County Board of Taxation, supra.*, 28 *N.J.*, at 421. Accord, *Brewer v. Porch*, 53 *N.J.* 167, 174 (1969)."

In *Clinton F. Smith et al. v. The Board of Education of the Borough of Paramus et al., Bergen County*, 1968 *S.L.D.* 62, affirmed State Board of Education 1968 *S.L.D.* 69, dismissed New Jersey Superior Court, Appellate Division, September 8, 1969, the Commissioner has held that any agreement between a local board of education and representatives of its employees, whatever it may be labeled, cannot constitute a surrender by the board of education of its responsibility to conduct the schools within its charge in the best interests of the children to be served. This overriding purpose of the public schools is clearly expressed as follows in *Bates v. Board of Education*, 72 *P.* 907 (*Calif. Sup. Ct.* 1903), *McGrath v. Burkhard*, 280 *P.* 2*d* 864 (Calif. App. 1955), quoted with approval in *Victor Porcelli, et al. v. Franklyn Titus, Superintendent, and the Newark Board of Education*, 1968 *S.L.D.* 225, 229, affirmed by State Board of Education April 2, 1969, affirmed 108 *N.J. Super.* 301, 312 (*App. Div.* 1969), *cert. den.* 55 *N.J.* 310 (1970):

"'***The public schools were not created, nor are they supported for the benefit of the teachers therein***but for the benefit of the pupils and the resulting benefit to their parents and the community at large.***'"

In the Commissioner's judgment, a local board of education has the authority and the required duty to adopt a school calendar as part of the instructional plan, which will best serve the interests of the children attending the public schools within the district. This statute, *N.J.S.A.* 18A:36-2, *supra*, confers a specific duty upon all local boards of education that may not be either countermanded or surrendered by agreement. *Clinton F. Smith, et al. v. Board of Education of the Borough of Paramus and George Hopkins, Superintendent of Schools, Bergen County, supra;* also, *Board of Education of the Town of Newton v. The Newton Teachers' Association, Sussex County*, decided by the Commissioner of Education, December 31, 1970.

In the instant matter, the agreement (R-2) between the Association and respondent Board states that the Superintendent will consult with representatives of the employees before making his recommendation to the Board regarding a school calendar for the next school year. The Commissioner is aware that a Superintendent of Schools does frequently consult with members of his administrative, supervisory and instructional staffs before making final decisions or recommendations to the Board of Education, and this procedure is a proper exercise of the Superintendent's prerogatives. The agreement also provides, that the "***Final determination of the school calendar will rest with the Board.***" *Article V*, *supra* This provision is not repugnant to the statute, *N.J.S.A.* 18A:36-2, *supra*, or to the purpose of the calendar as heretofore stated.

The Board's allegation that the school calendar was the subject of negotiations is without merit, and its argument that October 12, 1970, was not a holiday for petitioners is groundless.

The Board did in fact properly adopt a school calendar (R-1) for the 1970-71 school year, which provided that the public schools of the district would be in session on October 12, 1970, known as Columbus Day, a public holiday under *N.J.S.A.* 36:1-1, *supra.* The school calendar is in essence the prescribed time schedule for effectuating the instructional plan for the school year. Except as provided for by *N.J.S.A.* 18A:25-3, *supra,* the calendar is binding upon all employees of the school district, but does not limit the particular days or the number of days that the local board of education may require various employees or groups of employees to report for duty. For example, the Commissioner notices that, in many school districts, teachers as well as other employees are required to perform duties and services on days which are designated by the school calendar as vacation days for the pupils.

The clear intent of this long standing statute, *N.J.S.A.* 18A:25-3, *supra,* is that teaching staff members shall not be required to perform duties on any public holiday, that no salary deduction shall be made for absence because a public holiday happens to be a school day, and that no contract term may violate this statute. It is evident that this statute does not prohibit school sessions on public holidays, but instead protects the right of teaching staff members to be absent on public holidays without suffering financial loss. In the instant matter, petitioners' absence from the school session held on October 12, 1970, was within the rights bestowed upon teaching staff members by *N.J.S.A.* 18A:25-3, *supra;* therefore, their salaries were not subject to a deduction because of such absence.

Accordingly, for the reasons stated, the Commissioner finds and determines that the Hamilton Township Board of Education acted improperly in making salary deductions from petitioners' wages, and orders that the amounts of said salary deductions be restored in full to petitioners in their next salary payment.

COMMISSIONER OF EDUCATION

June 8, 1971

**Anthony G. Pekich, Principal,**

*Petitioner,*

**v.**

**Board of Education of the City of Bridgeton, Cumberland County,**

*Respondent.*

## COMMISSIONER OF EDUCATION

### Decision

For the Petitioner, Henry Bender, Esq.

For the Respondent, Samuel J. Serata, Esq.

Petitioner, who is under tenure as principal of Bridgeton Senior High School, Cumberland County, appeals to the Commissioner of Education to restore his salary increment for the school year 1970-71, which was withheld by the Bridgeton Board of Education, hereinafter "Board."

A hearing was held on March 2, 1971, in the office of the Cumberland County Superintendent of Schools by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

At the start of the hearing, petitioner moved for Summary Judgment by introducing a Memo of Law, which declared that the Board's action of withholding his increment was fatally defective and must be set aside because of noncompliance with the relevant statute, *N.J.S.A.* 18A:29-14, as amended by the *Laws* of 1968, *Chapter* 295, § 13.

In that Memo, petitioner alleges that:

1. The power of a board to withhold an increment is statutory.

2. The procedure used by a board in withholding an increment is also statutory.

3. Any action by a board in withholding an increment can only be taken publicly by a "recorded roll call vote" of the "full membership" of the board. (Petitioner's Memo of Law – p. 2)

Petitioner alleges also that the Board's action against him was taken pursuant to the *old statute*, *N.J.S.A.* 18A:29-14, which had already been amended on September 9, 1968, to read as follows:

"Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year *by a recorded roll call majority vote of the full membership of the board of education.* It shall be the duty of the board of education, within 10 days, to give written notice of such action, together with the reasons therefor, to the member concerned. The member may appeal from such action to the commissioner under rules prescribed by him. The commissioner shall consider such appeal and shall either affirm the action of the board of education or direct that the increment or increments be paid. The commissioner may designate an assistant commissioner of education to act for him in his place and with his powers on such appeals. It shall not be mandatory upon the board of education to pay any such denied increment in any future year as an adjustment increment." *(Emphasis supplied.)*

Petitioner alleges that he was present at the Board meeting of May 25, 1970, when the resolution was adopted that denied his salary increment and that a roll call vote was not taken or recorded.

Petitioner's Memo of Law, at pp. 3-4, concludes as follows:

"*** Our principal contention is the lack of compliance with the amendment and the point is amply emphasized in the letter itself. The President, *in order to avoid any misunderstanding,* quotes the full text of the legislation on which the Board relies! The only trouble is that what he quotes is the old version which, for the previous 19 months had been superseded and which, whether the date be regarded as April 9, 1970 or April 14, 1970 was no longer a correct statement of the applicable law and of the full prerequisites. The quotation is obviously intended to provide, in dispositive and verbatim form, the statutory basis for the disciplinary action taken. The mistaken citation warrants the inference that the Board did not consider as applicable and did not fulfill as mandatory, the new requirement imposed on September 9, 1968. That observation is pertinent whether the critical meeting was held at the so-called "work session" of March 23, 1970 or on the date admitted in the Board's Answer, paragraph 1, May 25, 1970. We respect that this feature, in the context of the failure to deny at any point the petitioner's vital allegation about noncompliance with the altered statute is procedurally fatal.

"We respectfully urge that the action taken by the Board and here under review was nonstatutory and is therefore invalid.

"We respectfully urge that the denial of the increment should be set aside without the requirement of any testimony."

The hearing examiner has examined the allegations of petitioner and the record submitted to the Commissioner in the Petition of Appeal, the Answer and the Exhibits.

With respect to petitioner's allegations of noncompliance with *N.J.S.A.* 18A:29-14, as amended by *Laws* of 1968, *Chapter* 295, § effective September 9, 1968, the hearing examiner determines that the allegations are true in fact and that the resultant Board action in withholding petitioner's salary was in fact procedurally defective. The Board took its action against petitioner pursuant to *N.J.S.A.* 18A:29-14, which had already been amended, *supra.* Exhibit B in the Board's Answer, reads in part as follows:

> "'*** Any board of education may withhold, for inefficiency or any other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a majority vote of all the members of the board of education. It shall be the duty of the board of education, within 10 days, to give written notice of such action, together with the reasons therefor, to the member concerned. The member may appeal from such action to the commissioner under rules prescribed by him. The commissioner shall consider such appeal and shall either affirm the action of the board of education or direct that the increment or increments be paid. The commissioner may designate an assistant commissioner of education to act for him in his place and with his powers on such appeals. It shall not be mandatory upon the board of education to pay any such denied increment in any future year as an adjustment increment.'"

The statute, *supra,* as amended, is similar to its progenitor; however, one significant alteration was made and that was the requirement of a "recorded roll call vote of the full membership of the board," a statutory requirement not considered by the Board when it adopted the resolution to withhold petitioner's increment. Respondent further admits in its Memo of Law that it neglected to take a roll call vote. The hearing examiner concludes, however, that the facts in the instant matter also need to be examined.

Respondent asserts also in its Memo of Law that the withholding of petitioner's increment was a disciplinary measure taken against him for generally unsatisfactory performance of his duties. Specifically, respondent alleges that petitioner failed to carry out a duty assigned to him to remove a S.W.A.M.P. (Students Wildly Against Muddy Parking) sign as he was directed to by the assistant superintendent of schools. Respondent also alleges that petitioner's efforts to control vandalism in the school lavatories, and to better regulate student freedom in the school, were ineffectual.

Testimony by the school janitor was supportive of petitioner's efforts to reduce vandalism in the lavatories. Petitioner introduced voluminous records documenting his effort to control student traffic in the school through organized student sign-out procedures, which he instituted for students who had to leave the classroom. This testimony and evidence were not refuted.

The hearing examiner determines on the weight of the believable testimony that petitioner did in fact try to carry out the directives of the Superintendent of Schools and the Board of Education with respect to controlling vandalism in the lavatories.

Introduced in evidence was a document (P-2) entitled *Bridgeton Board of Education and Association of Bridgeton Administrators*, which was the agreement reached between the parties, *supra*, that contained the agreed-upon salary guide and general working conditions. Nowhere in that document are there rules or regulations for the withholding of increments for any reason. That document reads in part on page 9 as follows:

> "4.3 No employee shall be disciplined, reprimanded, reduced in rank or compensation, or deprived of any professional advantage without just cause. Any such action asserted by the Board, or any agent or representative thereof, shall be subject to the grievance procedure set forth in ARTICLE 3.
>
> "4.4 Whenever any employee is required to appear before the Superintendent, Board or any committee or member thereof concerning any matter which could adversely affect the continuation of that employee in his office, position, employment or any salary or any increments pertaining thereto, then he shall be given prior written notice of the reasons for such meeting or interview and shall be entitled to have a representative of the ABA present to advise him and to represent him during such meeting or interview."

The Board, apparently did not follow the terms of its own agreement with the Administrators Association, *supra*, since no evidence of a grievance procedure was put in motion that would grant petitioner all the elements of due process and fair play to which he is entitled.

* * * *

The Commissioner has read the report of the hearing examiner and agrees with his findings, determinations and conclusions.

The Commissioner has ruled on the withholding of salary increments in several cases and has determined that a board of education is required to establish its own rules for doing so when its guide is above that mandated by statute. The instant matter is, therefore, *res judicata*.

The Commissioner ruled in *Charles Brasher v. Board of Education of the Township of Bernards, Somerset County*, decided March 19, 1971, that:

> "*** in 1965 the Legislature enacted *Chapter* 236, *Laws* of 1965, which enabled local school districts 'to establish salary policies, including salary schedules, which would give to their professional employees a precise statement of their salary expectation over the succeeding two years and at the same time would make it possible for boards of education to budget meaningfully to implement such schedules.' *Ross v. Board of Education of the City of Rahway, Union County*, 1968 *S.L.D.* 26, 28 The Commissioner stated further in *Ross* at p. 29:

> '*** the enactment of *Chapter* 236 clearly established the *contractual nature* of salary policies, including salary schedules, adopted by boards under the authority of that chapter ***. *(Emphasis ours.)*
>
> "Since the adoption of *Chapter* 236, the Legislature has also adopted *Chapter* 303, *Laws* of 1968, now embodied in *N.J.S.A.* 34:13A-1 *et seq.*, imposing on boards of education and other public employers the obligation to negotiate the 'terms and conditions of employment.' *** However, if following negotiations pursuant to the mandate imposed by *Chapter* 303, the resulting 'agreements' are not committed to writing but are left to vague 'understandings' or the habits derived from custom, the Commissioner holds that the resultant 'agreement' is no agreement at all except insofar as it is precisely stated. In the instant matter the Commissioner believes the Board made a contract with its teaching staff for the 1970-71 school year, and that the terms of this contract are those committed to writing and contained in the terms of the salary guide (P-2). The Commissioner knows of no reason why at the time this contract was negotiated, the Board could not have attached 'additional provisions' to it. Having failed to attach such provisions or conditions to the guide, whereby increments are conditional upon recommendations from the Superintendent or from others, the Commissioner holds that the Board and petitioner are bound only by the terms of the guide. Petitioner has met these requirements, the only stated ones that can be found.
>
> "For purposes of clarification, it must be stated that *N.J.S.A.* 18A:29-14 has no application to the matter *sub judice*, since the Commissioner has previously found the applicability of this statute to be limited to the stated terms of the minimum salary law found in *N.J.S.A.* 18A:29-6 *et seq.* However, a variation of 18A:29-14 could have been adopted and published by the Board, if it had chosen to do so, as an additional provision of its salary guide for 1970-71. Such provisions may still be adopted in written form for future implementation.***"

The Commissioner determines, therefore, that petitioner's salary increment for the school year 1970-71 was improperly withheld by the Bridgeton Board of Education. *J. Michael Fitzpatrick v. Board of Education of Montvale, Bergen County,* decided by the Commissioner January 24, 1969; *Doris Van Etten and Elizabeth Struble v. the Board of Education of the Township of Frankford, Sussex County,* decided by the Commissioner March 17, 1971; *Charles Brahser v. Board of Education of the Township of Bernards, et al., Somerset County, supra.*

The Commissioner directs, therefore, that the Board of Education of the City of Bridgeton restore petitioner's increment that was improperly withheld for the school year 1970-71.

COMMISSIONER OF EDUCATION

June 8, 1971

Affirmed by State Board of Education, December 1, 1971.

**In the Matter of the Tenure Hearing of Raymond Exum,
School District of the City of East Orange, Essex County.**

COMMISSIONER OF EDUCATION

**Order**

It appearing that the Board of Education of the City of East Orange, hereinafter "Board," having filed charges of conduct unbecoming a teacher against Raymond Exum, hereinafter "respondent"; and it appearing that such charges would be sufficient, if true in fact, to warrant his dismissal; and it appearing that the Board properly certified said charges to the Commissioner of Education on October 21, 1969; and it appearing that service of said charges by the Assistant Commissioner of Education, Division of Controversies and Disputes was attempted unsuccessfully by certified mail to respondent's last known address on October 28, 1969, and October 30, 1969; and it appearing that the Essex County Superintendent of Schools attempted unsuccessfully to serve the charges in person twice at different times on November 13, 1969, at respondent's last known address, 175 Prospect Street, East Orange, New Jersey; and it appearing that respondent had not occupied the premises for two weeks prior to the County Superintendent's visits nor had he left any forwarding address, according to the building guard; and it appearing that respondent pleaded guilty to several criminal counts in the Essex County Court, Law Division – Criminal Indictment No. 3493-69 on February 25, 1971; and it appearing that respondent was sentenced to seven to ten years in prison plus a $1,000 fine; and it further appearing that his admission of guilt of possessing narcotic drugs, pornographic films, and a revolver, and of selling a narcotic drug and maintaining a disorderly house, constitute sufficient reasons for his dismissal; now therefore IT IS ORDERED on this 11th day of June 1971, that Raymond Exum be hereby dismissed as a tenure teacher for the School District of the City of East Orange, effective October 21, 1969, the date of his suspension.

COMMISSIONER OF EDUCATION

June 11, 1971

**Jonathan Traurig, by his parents and natural guardians, Robert B. Traurig and Edith Traurig,**

*Petitioner,*

**v.**

**Board of Education of the Township of Livingston, Essex County,**

*Respondent.*

## COMMISSIONER OF EDUCATION

### Decision

For the Petitioner, Benjamin I. Kreitzberg, Esq.

For the Respondent, Riker, Danzig, Scherer & Brown (Peter N. Perretti, Jr., Esq., of Counsel)

The parents of Jonathan Traurig, petitioner, allege that the proposed placement of their son in a special class in the school system of respondent Livingston Township Board of Education, hereinafter "Board," for the 1970-71 school year was improper in that it failed to give individual attention to the needs of petitioner, hereinafter "J.T." They request that the Board be required to continue the former 1969-70 school year placement of petitioner during the 1970-71 year on a tuition-expense basis. The Board denies that its proposed placement of J.T. for the 1970-71 school year was improper, and maintains, instead, that the placement was in all respects a legal exercise of discretion on the part of the Board and its administrative personnel.

A hearing in this matter was held on March 11, 1971, and continued on April 2, 1971, before a hearing examiner appointed by the Commissioner. Counsel also filed briefs. The report of the hearing examiner follows:

J.T. is a child who, under normal academic progression, would now be enrolled in a fifth grade classroom. He was placed in a regular classroom during his first two full years of school and for at least part of the third. He was then classified as neurologically impaired, and assigned to a special class program during the 1968-69 school year. His progress during that year may best be described as minimal.

In the spring of 1969, school authorities evidently devoted considerable attention to a placement for the boy for the 1969-70 school year. The whole effort seemed to be centered on finding a well-qualified teacher with whom he could build good relationships and a healthy rapport. The actual assignment for the year 1969-70 seems to have been made by the Director of the "West Essex Cooperative Organization," which is a voluntary association of school districts in the Essex County area. The Director is its only professional employee, and until the time of the instant dispute, he seems to have exercised a considerable degree of authority in assigning handicapped students from area schools, with an

alignment to the Cooperative, to special classes within or adjacent to the general area. In this instance, in the spring of 1969, the Director, with the evident concurrence of the Board's school administrators, and members of its child study team, assigned J.T. to a special class for neurologically-impaired children located in the nearby Essex Fells Schools. This school was in another school district, and the distance from J.T.'s home to it was approximately three miles. The teacher of the class was Mrs. Rose DiRuggiero – a teacher with ten years of prior experience in teaching handicapped children and a master's degree from Columbia University.

In September 1969, J.T. began his attendance in this school with this teacher. According to the testimony of the teacher, J.T. was "bright" but extremely fearful – (Tr. 21) particularly of new situations – and frustrated over prior school experiences in which he had experienced failure, insecurity and apprehensiveness. This particular school situation was the fourth different school assignment for J.T. in a four-year period. The teacher testified that she freed J.T. from strict disciplinary demands, and tried patiently over a long period of time to establish mutual feelings of trust and friendship. (Tr. 22) She stated that these feelings slowly and gradually developed and that the boy – after mid-year – began a period of more stable conduct. J.T. began to be interested in academic learning, and his progress from that point to the end of the year was one of marked improvement although it was punctuated by periods of retrogression. (Tr. 26)

In March of 1970, this teacher, who had observed J.T. daily, and who had guided this slowly developing progress, made a recommendation in writing for his placement for the school year 1970-71. It was that he be reassigned to her room. Her testimony was that she could not believe he would not be so assigned (Tr. 30), and she described J.T.'s actions at that time as still having the potential of a "keg of dynamite." (Tr. 31) In the opinion of this teacher, J.T. was not capable of going to a "new" situation in September of 1970 – for the fifth time in 5 years – and at the same time continue the progress which he had made.

J.T.'s teacher for the 1969-70 school year submitted her recommendations for J.T.'s 1970-71 placement to the Director of the West Essex Cooperative. This official had also observed J.T. on three or four occasions during the year (Tr. 107) and had previously conferred with the teacher, and probably, according to what appeared to be the custom, with the Board's school officials. In June of 1970, the Director of the Cooperative assigned J.T. again to the classroom of Mrs. Rose DiRuggiero in the Essex Fells School for the 1970-71 school year. The letter of assignment introduced in evidence as P-8 is reproduced below:

> "The records and reports of your child, J.T., have been very carefully evaluated, studied and discussed by many highly qualified special personnel. Our procedures this year consisted of a teacher summary, psychologist and social worker evaluation, individual district approval and finally consideration by the superintendents.

"Our organization and development of programs and additions only points up the amount of effort and consideration that went into every pupil class placement for next fall. All placements and decisions were made with the entire district staff's recommendations and approval.

"We trust that you will be pleased with the carefully selected program for your child, which is:

| | | |
|---|---|---|
| "*Mrs. Rose DiRuggiero* | *Essex Fells School* | *Essex Fells* |
| Teacher | School | Location |

"Any problem or question regarding this matter may be referred to our office as listed above or by calling 228-2290 or 228-2291.

"Best wishes for a pleasant summer."'

However, following this assignment, the Board decided to establish its own class for neurologically-impaired children for the 1970-71 school year and to assign J.T. to it. Accordingly, a new assignment letter was sent dated July 1970 (P-3) directing J.T.'s parents to "disregard" the earlier announcement. The parents promptly appealed this reassignment, but the Board deemed the matter as "administrative," in nature and would not intervene. The Board's school officials would not countermand the reassignment unless the psychiatrist for the Cooperative and for the Board indicated, as the result of a new examination, that such a placement was definitely not advisable. This psychiatrist had previously addressed a letter to the Board's Department of Special Services on July 10, 1970. This letter (P-1) said:

"Because of the above named student's significant neurological impairment and emotional disorder it is recommended that he continue his education in a special class. I understand that he had made excellent progress with a teacher he had last year. Therefore, it would be detrimental to his growth if he is not allowed to continue with her.

"I have received a written report from his teacher presenting his progress."

However, in August 1970, following a new office consultation with J.T., and after having been told by the Board's director of special services that the "decision for placement was an educational one" (P-R1), the psychiatrist sent a new letter on August 28, 1970, (P-2) to the Board's director which concluded:

"***I feel you have to evaluate his placement as to what is best for him, as I do not feel I can make this decision."

The dialoge continued, and was still not really resolved by September. On September 3, 1970, the Director of the West Essex Cooperative sent the following letter to the director of the Board's child study team. The letter is quoted in part below:

"This letter is a follow-up on our telephone conversation of Wednesday, September 2, 1970, regarding the special education placement of J.T., 74 Sykes Avenue, Livingston. We placed this child last year in our class for Neurologically-Impaired Children at Essex Fells. Taking all factors into consideration, this was an ideal placement for J.T. who, up to this point, had developed severe negative reactions to school in general. Toward the end of the past year, J.T. began to show good signs of academic progress, however, his fear of failure and rejection as indicated by his lack of involvement and participation in group activities is still present. Any change in program at the present will have an intensifying effect on this child's feeling of inadequacy. His adjustment to this teacher, her program and the pressure free environment existing indicate the need for this child to continue another year at Essex Fells school.

"In general and in many cases, the policy of the West Essex Special Education Cooperative has been to maintain a child for 2 years within a particular special education program particularly when the first year indicated productivity.

"On May 22, 1970, a conference was conducted at my office with the Livingston Special Services Director and two social workers at which time all tentative placements were gone over and this one was particularly emphasized with all in agreement on continuing the excellent program for J.T. As Director of the West Essex Special Education Cooperative, I am requesting that J.T. therefore continue at the Essex Fells School.***"

However, the letter had no effect in changing respondent's opinion as to what J.T.'s assignment should be for the sschool year 1969-70. Despite this refusal of the Board to reconsider the matter, J.T.'s parents reenrolled him in the Essex Fells School in September of 1970, and the boy continues his attendance there to the present time on a tuition basis. J.T.'s parents have privately assumed the payments.

In the documentation of this matter, there is one other letter of note – a letter from the Essex County Superintendent of Schools to the Board's director of special services, dated September 22, 1970, (P-6). The second paragraph of this letter is quoted below:

"***While we find no reason to challenge your decision in this matter, it would
appear that you did in fact act unilaterally in departing from the regulations set up for the
operation of the West Essex Cooperative in this instance.***"

In the opinion of the hearing examiner, this supports a principal contention of J.T.'s parents.

On the other hand, the Board maintains that its notice of a change of assignment (P-3), given in July 1970, was ample notice to J.T.'s parents, and that there is nothing contained in the education statutes or in rules of the State Board of Education by which such a notice could be adjudged untimely. Further, the Board avers that in July 1970, it had obtained a qualified teacher, and was prepared to establish a suitable facility; therefore, the Board maintains it has an unabridged autonomous right to assign its own students to this class as it saw fit. The Board denies that the Director of the West Essex Cooperative had a right to exercise powers delegated by law to its own Superintendent of Schools.

The hearing examiner heard no evidence to refute the Board's claim that it had indeed established a suitable facility, with a properly-certified teacher, for the housing of a class of neurologically-impaired children in September 1970. Nor does the examiner believe that the notice of change of assignment *per se* was untimely or ill-advised as a fact standing alone, but J.T.'s parents' contentions in this case are that the fact does not stand alone – that it stands instead in a long history of J.T.'s poor school adjustment, and of frequent changes of school assignments which were a causal factor in previous impairment.

The hearing examiner also makes the following observations:

1. This dispute is not between a private school and privately-engaged professionals and officials. It is a dispute instead that revolves around the contentions of two separate and distinct groups working within the public school framework.

On the one hand are the Director of a Cooperative, a public school teacher and a psychiatrist. These officials knew J.T. well. From the documents in evidence and from the testimony, it is clear that in the spring months of 1970, they were unanimous in strongly supporting the idea that J.T. should remain for a second year in a placement where he had at last found a measure of success.

On the other hand there are the Board's special services team and school administrators. During the 1969-70 school year there is no evidence that any of these officials saw J.T. even once. Nevertheless, they supported the decision to place him in Essex Fells for a second year in May and June of 1970. It was only later that J.T.'s needs and the recommendations of those who knew him best were ignored because of reasons that might be labeled administrative expediency. At that point J.T. was reassigned.

2. J.T. and his parents were the innocent victims of a jurisdictional dispute between these two groups. On the one hand, the Director of the West Essex Cooperative had placed special education pupils from the districts comprising the Cooperative in former years. (Tr. 96) This was evidently a principal component of his responsibility. In implementation of his duty as he saw it, he assigned J.T. again in June 1970. When the Board intervened in July of

1970, to reassign J.T., it did so, the hearing examiner opines, by a unilateral reassumption of powers which had previously been delegated to the Director of the Cooperative.

3. The placement of J.T. for a second year in the school in Essex Fells for the school year 1970-71 was clearly evident as the best for him. The question remains as to whether or not it was the only suitable placement. The hearing examiner holds that it was. The primary basis for this finding is the long and graphic description by the classroom teacher of J.T.'s problems and progress during the 1969-70 school year. This finding is buttressed by the strong recommendations of the Director of the West Essex Cooperative and by the first letter of the Board's psychiatrist, which was written prior to the time when issues other than J.T.'s best individual welfare were brought into play.

In summary, the hearing examiner finds that the issue raised by this petition is not whether the facilities and program proposed to be provided by the Board for the education of J.T. during the 1970-71 school year were "suitable" in the usual sense of that word, but whether in the important context of J.T.'s whole experience he should have been moved there by tardy reassignment in the summer of 1970. The examiner holds that the proposed reassignment was an arbitrary and callous act under the circumstances and that the imposition of such a transfer under the auspices of powers granted to boards of education that are clearly meant to protect individual children with handicaps represents a misuse of such power which should not be supported. Therefore, the examiner recommends that the parents of J.T. be reimbursed for the tuition and transportation expense incurred by them on his behalf, which expense the Board had first agreed to assume during the 1970-71 school year.

* * * *

The Commissioner has reviewed the report of the hearing examiner and concurs with the findings and recommendations contained therein. The Commissioner observes that in numerous instances he has been called upon, in his quasi-judicial capacity to make determinations concerned with the reasonableness of the actions of local boards of education, and both the Commissioner and the courts have said that the actions of these boards when taken pursuant to statutory mandate will not be rendered as invalid unless unreasonableness clearly appears. *Boult v. Board of Education of Passaic City*, 136 *N.J.L.* 521, 57 *A.* 2*d* 12 (*E. & A.* 1948); *Liva v. Board of Education of Lyndhurst Twp.*, 126 *N.J.L.* 221, 18 *A.* 2*d* 704 (*Sup. Ct.* 1941) In the instant matter the unreasonableness of the Board's action in July 1970 in the reassignment of J.T. is clearly apparent to the Commissioner.

In that month, J.T. had completed four years of attendance in four different schools. He had begun to make some progress. Those who knew him best believed and reported that his prime need for the fifth year in school was a kind of stability that would enable the progress to continue. There was every assurance that it would since the Board had already agreed to continue the same

school placement for another year, and the agreement was consistent with the policy of the West Essex Cooperative, which the Board supported in part. However, at that point in time, the Board proposed an action which completely reversed what the Commissioner believes was a firm previous commitment. The advice that the Board previously relied on was ignored. A policy of the Cooperative was cast aside.

The Commissioner holds that this reversal by the Board of a previously-held position in July 1970 cannot be sustained as a reasonable exercise of responsible authority. If implemented, the Commissioner holds that the Board's reversal might well have caused great harm to J.T. and that his parents were therefore justified in re-enrolling him in his former placement for the school year 1970-71.

The situation herein differs markedly from *Malcolm Woodstein and Ira Woodstein v. Board of Education of Clark, Union County*, decided by the Commissioner July 17, 1970. In that matter, the Board of Education delayed a placement decision for a handicapped child until July, but when the decision was announced it was not one that constituted a complete reversal of this position, nor was there a preponderance of credible opinion, offered by properly-certified public school employees, that the proposed placement might in fact be harmful to the child concerned. The Commissioner sustained the action of the Board and quoted *R. v. The Board of Education of West Orange*, 1966 *S.L.D.* 210 as follows:

> "It is clear that R was *** placed in private school on her parents' volition and with no *involvement* on the part of respondent. Under such circumstances the financial obligations incurred by that action devolve solely upon the parents and not the Board of Education." *(Emphasis supplied.)*

In the instant matter there is an involvement by the Board of Education and its administrators in the placement of J.T. as a pupil in an adjoining public school as a tuition student, since such a placement was made in June 1970 by the Board. The Commissioner holds that this placement was a proper exercise of the Board's discretionary authority and that when it was announced to J.T.'s parents the announcement constituted a commitment which, under the circumstances, *supra*, could not be abrogated by the Board without a mutual agreement with J.T.'s parents.

Accordingly, the Board is directed to reimburse J.T.'s parents for the expenses of such placement as were incurred by them for tuition and transportation costs for the 1970-71 school year.

COMMISSIONER OF EDUCATION

June 16, 1971

Affirmed by the State Board of Education, November 3, 1971.

**Board of Education of the Township of Middletown,**

*Petitioner,*

**v.**

**Township Committee of the Township of Middletown, Monmouth County,**

*Respondent.*

## COMMISSIONER OF EDUCATION

### Decision

For the Petitioner, Lane and Evans (Peter P. Kalac, Esq., of Counsel)

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

Petitioner, hereinafter "Board," appeals from an action of respondent, hereinafter "Council," pursuant to *N.J.S.A.* 18A:22-37 certifying to the Monmouth County Board of Taxation a lesser amount of appropriations for the 1971-72 school year than the amount proposed by the Board in its budget which was rejected by the voters. The facts of the matter were educed at a hearing before a hearing examiner appointed by the Commissioner of Education on May 24, 1971, at the Department of Education, Trenton. The report of the hearing examiner follows:

At the annual school election held on February 9, 1971, the legal voters of the Township of Middletown rejected the appropriations for school purposes proposed by the Board. The proposed appropriations presented to the legal voters of the school district were as follows:

| | |
|---|---|
| Current Expense | $9,511,354.00 |
| Capital Outlay | 112,567.00 |

Within the time prescribed by law, Council conferred with the Board and determined that the amount to be raised by taxation be reduced as follows:

| | From | To | Reduction |
|---|---|---|---|
| Current Expense | $9,511,354 | $9,221,354 | $290,000 |
| Capital Outlay | 112,567 | 102,567 | 10,000 |
| | $9,623,921 | $9,323,921 | $300,000 |

Council, in keeping with the guiding principles laid down in *Board of Education of East Brunswick v. Township Council of East Brunswick*, 48 *N.J.* 94 (1966), set out certain items which it suggested could be reduced. The sum of the suggested reductions amount to a total of $300,000 as follows:

**CURRENT EXPENSE**

| Account | Item | Budgeted by Board | Recomm. by Council | Amt. Reduced |
|---|---|---|---|---|
| J213 | Sal.-H.S. Tchrs. | $1,846,725 | $1,738,725 | $108,000 |
| J213 | Sal.-Jr. High Tchrs. | 2,067,015 | 1,986,015 | 81,000 |
| J213 | Sal.-Elem. Tchrs. | 3,433,500 | 3,388,500 | 45,000 |
| J213 | Sal.-Sub. Tchrs. (H.S.) | 48,600 | 45,600 | 3,000 |
| J213 | Sal.-Sub. Tchrs. (Jr. H.S.) | 56,700 | 53,700 | 3,000 |
| J213 | Sal.-Sub. Tchrs. (Elem.) | 90,000 | 86,000 | 4,000 |
| J214C | Psychological Personnel | 106,000 | 70,000 | 36,000 |
| J740B | Repair to Buildings | 126,074 | 116,074 | 10,000 |
| | Sub-Total – Current Expense – Reduction | | | $290,000 |

**CAPITAL OUTLAY**

| | | | | |
|---|---|---|---|---|
| L230C | Remodeling | $112,567 | $102,567 | $ 10,000 |
| | Sub-Total – Capital Outlay – Reduction | | | $ 10,000 |
| | **TOTAL** Amount Reduced | | | $300,000 |

The Board stipulated at the hearing that it will not contest Council's reductions of certain items and that it accepts the amounts suggested by Council for the following accounts:

| Account | | Budgeted by Board | Suggested by Council | Reduction |
|---|---|---|---|---|
| J710 | Repair of Bldgs. | $126,074 | $116,074 | $ 10,000 |
| L1230C | Maintenance of Plant | 112,567 | 102,567 | 10,000 |

The hearing examiner will not consider these items, and recommends that the amounts deleted by Council be allowed to stand.

The other budgeted requests of the Board have been carefully considered in the context of the arguments advanced by Council, and the following facts and circumstances have been noted as of particular significance:

1. There is a diversity of opinion with regard to the accuracy of the student enrollment increase projected by the Board for the 1971-72 school year. Council avers that the Board's projected increase of 405 students, which serves

as the basis for much of the Board's budget planning, is too high and is unrealistic, since the Board projected an increase of 500 students for the school year 1970-71, and the increase was only 275 students. Council further maintains that the Board employed 29 or 30 teachers prior to the beginning of the 1970-71 school year, for the projected enrollment increase of 500 students, and that the smaller increase of 275 students, which in fact developed, should have resulted in an improved pupil-teacher ratio. In Council's view, an increase in this ratio from its present low point would be desirable at this juncture.

On the other hand, the Board states that the acknowledged error in the projection of pupil population for the 1971-72 school year was an unusual error – the largest one in 25 years – and that its estimate of an increase of 405 students for the school year 1971-72 is an unrealistic one. The Board also observes that an agreement negotiated with its teachers pursuant to the mandate imposed by *Chapter* 303, *Laws* of 1966, has provided this year that teaching-period assignments for each teacher in grades 7-12 may not exceed five. The effect of this agreement, the Board maintains, has been a complete utilization of the available teaching periods created through the employment of additional teaching personnel for the year.

The hearing examiner has reviewed the conflicting arguments in this regard, and believes that there is merit in each of the respective positions but that the factors inherent in the arguments are largely offsetting. Therefore, he opines that some provision must be made in the 1971-72 year for the factor of student-population growth. The examiner recommends that this growth be charted to provide for a total increase of approximately 300 students, and his recommendations will be in general conformity with this figure.

2. The Board has appropriated a total of $200,000 from appropriated balances and surplus funds. This includes the entire amount of $140,196.00 listed as the current operating appropriation balance in the audit report of June 30, 1970. A further sum in excess of $59,000 is to be obtained from surplus revenues, which will be generated during the 1970-71 year. It is now calculated that a very small balance of only $16,000 will remain in the current expense budget for use in emergencies during the school year which will begin on July 1, 1971. The hearing examiner observes that this is a minute sum when compared with proposed current expense expenditures for school purposes in excess of $12,000,000 for the education of more than 14,000 students for an academic year.

There is no need to discuss each of the sub-accounts in detail, since the problem posed by the arguments herein is one of sufficient funds to maintain a thorough and efficient school system. Accordingly, the hearing examiner will discuss the disputed accounts in three broad categories; namely, the salaries accounts and the account labelled "Psychological Personnel."

### J213 Salaries – Teachers – Reduction $234,000

The Board proposed to employ 26 new teachers in the district in the 1970-71 year to maintain the present class - size ratio of 18.3 students per teacher in the elementary grades. Council deleted funds for all such new personnel and proposes to increase the pupil-teacher ratio. The Board's budget for new teaching positions is predicated on an increase of 51 students in the elementary schools and 354 in the high school. The Board's allotment of the new positions to provide for these increased enrollments is as follows:

| | |
|---|---|
| High School | 12 |
| Junior High | 9 |
| Elementary | 5 |
| TOTAL | 26 |

As part of the planning for its elementary schools, the Board proposes to inaugurate a double-session schedule for all twelve sections of one elementary grade level. In the Board's scheduling, this will require the creation of three new positions. The hearing examiner believes that the district's enrollment and school housing situation justifies this scheduling, and recommends that the $27,000 provided for three teachers for its implementation be restored, but that the cut of Council for the other two positions at the elementary level should be sustained.

At the junior and senior high school level, the hearing examiner recommends that the increase in student population be projected at approximately 250 pupils and that 11 teaching positions be restored for funding to provide for a pupil-teacher ratio approximately the same at these grade levels for the 1971-72 school year. This recommendation requires the restoration of an additional $99,000.

**Summary**

| | |
|---|---|
| Reduction by Council | $234,000 |
| Amount Restored | 126,000 |
| Amount Not Restored | 108,000 |

### J213 – Salaries - Substitutes – Reduction $10,000

The hearing examiner observes that the Board spent $173,000 for substitutes in the 1969-70 school year, but budgeted only $138,000 for expenditures during the school year 1971-72. Testimony at the hearing educed the fact that fringe benefits awarded to the teachers following negotiation mandated by *Chapter* 303, *Laws* of 1966 will require additional expenditure of funds to provide for additional personal leave days for teaching personnel.

The hearing examiner believes that the Board's total financial picture, as outlined, *supra*, is such that a reduction of $10,000 should not be sustained in this account, since past expenditures and new Board commitments are rather convincing evidence that expenditures will exceed the $175,300 allocated by Council. Therefore, the examiner recommends a restoration of $7,000 from the reduction proposed by Council for the salaries of substitute teachers.

**Summary**

| | |
|---|---|
| Reduction by Council | $10,000 |
| Amount Restored | 7,000 |
| Amount Not Restored | 3,000 |

**J214C – Psychological Personnel – Reduction $36,000**

The Board proposes to hire four new teachers from the funds budgeted in this account. Specifically it is proposed to hire an additional learning disability specialist and three classroom teachers of the handicapped. Testimony at the hearing was that two of these three new teachers were "needed", and that the third teacher would "possibly" be needed. There was no written or oral testimony buttressing the request for the new learning disability specialist. Council argues that even the reduced budget appropriation of $70,000 represents an increase of 50 per cent in this account in a one-year period, and that reasons for an increase above this figure have not been advanced.

The hearing examiner observes that the Board budgeted $45,000 for psychological personnel in the 1970-71 school year, and that its proposed budget for 1971-72 totaled $106,000. Some of this planned increased expenditure is for salary improvements for present personnel.

The hearing examiner recommends that funds for two classroom teachers be restored in order to provide for the needs of those children already classified as handicapped and lacking proper special class assignment, but that Council's reduction be sustained with regard to the other two positions.

**Summary**

| | |
|---|---|
| Reduction by Council | $36,000 |
| Amount Restored | 18,000 |
| Amount Not Restored | 18,000 |

In summary, it is recommended that the combined line-item accounts discussed, *supra*, be determined as follows:

| Account | Item | Amt. of Reduction | Amt. Restored | Amt. Not Restored |
|---|---|---|---|---|
| J213 | Sal.-Tchrs. | $234,000 | $126,000 | $108,000 |
| J213 | Sal.-Sub. Tchrs. | 10,000 | 7,000 | 3,000 |
| J214C | Psychological Pers. | 36,000 | 18,000 | 18,000 |
| J740B | Repair to Bldg. | 10,000 | -- | 10,000 |
| | Sub-Total Current Expense | $290,000 | $151,000 | $139,000 |
| L1230C | Remodeling | 10,000 | -- | 10,000 |
| | Grand Total | $300,000 | $151,000 | $149,000 |

* * * *

The Commissioner has reviewed the report of the hearing examiner and concurs with the recommendations contained therein. Accordingly, the Commissioner finds and determines that the amount of school appropriations certified by the Middletown Township Committee is insufficient to provide a thorough and efficient program of education in the Middletown School. Therefore, the Commissioner directs that an amount of $151,000 be added to the earlier certification made to the Monmouth County Board of Taxation and raised for the current expense purposes of the Middletown Township School District for the school year 1971-72.

COMMISSIONER OF EDUCATION

June 17, 1971

**Board of Education of the Borough of Mountain Lakes,**
*Petitioner,*

**v.**

**Mayor and Council of the Borough of Mountain Lakes, Morris County,**
*Respondent.*

## COMMISSIONER OF EDUCATION

### Decision

For the Petitioner, Young and Sears (Lawrence K. Eismeier, Esq., of Counsel)

For the Respondent, Walter J. Lilley, Esq.

Petitioner, hereinafter "Board," appeals from an action of the Borough Council of Mountain Lakes, hereinafter "Council," certifying to the Morris County Board of Taxation a lesser amount of appropriations for current expense and capital outlay purposes for the 1971-72 school year than the amount proposed by the Board in its budget which was defeated by the voters. The facts of the matter were educed at a hearing conducted on May 27, 1971, at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

At the time of the public hearing held to consider the Board's budget prior to the submission of it to the school district's legal voters on February 9, 1971, adverse comments, on its proposed totals, were offered by citizens residing in the district. As a result of these comments, and for other considerations, the Board reduced the amounts to be raised by local taxation by a total of $34,800. Thus, the submission to the legal voters of the district at the election of February 9, 1971, was a request for approval of the following amounts to be raised by taxation:

| | |
|---|---|
| Current Expense | $1,959,653 |
| Capital Outlay | 18,889 |

These propositions were rejected at the polls.

Subsequent to the defeat of the propositions, the budget was submitted to Council for its study. Council then took action pursuant to *N.J.S.A.* 18A:22-37 and certified to the Morris County Board of Taxation a lesser amount of appropriations for school purposes for the 1971-72 school year than the amount proposed by the Board. Specifically, Council's proposal was for a reduction of a total of $102,000 from current expense appropriations and $1,000 from expenditures for capital outlay. The new totals were:

| | |
|---|---|
| Current Expense | $1,857,653 |
| Capital Outlay | 17,889 |

On March 8, 1971, the Board voted to appeal the determination of Council to the Commissioner of Education, and the parties met in a pre-hearing conference on April 20, 1971, in the office of the Morris County Superintendent of Schools. At that time, the participants discussed Council's proposals in detail, and the Board agreed to accept reductions totaling $76,900, but to continue the appeal to the Commissioner with regard to current expense items totaling $25,000 and a capital outlay item of $1,000. Therefore, this matter, *sub judice*, is concerned only with these items totaling $26,100. The other reductions determined by Council, to which the Board has agreed, need not be considered except in the context of the budget as a whole entity.

However, at this juncture the hearing examiner observes that the grand total of the reductions, to which the Board has now agreed, is $111,700 when the reductions made by the Board itself, at the time of the hearing on the budget, are included. The hearing examiner believes that these cuts *in toto* have already cast grave doubts that the Board can properly fund its many commitments, meet unexpected emergencies, and provide a thorough and efficient system of education for its projected enrollment of 1853 students in the school year 1971-72.

These doubts are given credence by the fact that in the present school year of 1970-71, the Board's budget proved under-funded by approximately $19,500, and is saved from a projected deficit only by the use of all available unappropriated balances and by an action of Council in December 1970, which provided for an emergency transfer of $20,000 of Council's balances. It is now estimated that the Board's unappropriated balances that will remain for use in emergencies on June 30, 1971, will total $436.01 as contrasted with an audit report that showed that the amount of $69,771 of such funds was available for appropriation on June 30, 1970. The difference in the two figures is startling, and probably constitutes the best evidence that the present 1970-71 budget was not a realistic projection of need.

In this context, the hearing examiner has examined the total projected expenditures for school purposes in Mountain Lakes for the 1971-72 school year, as contrasted with the expenses incurred in 1970-71. As a part of this examination, he included all of the reductions of Council to which the Board has agreed. It is the hearing examiner's firm belief, based on this examination, that the Board's ability to maintain even its present program of education, which appears to be thorough and efficient, but not elaborate, can easily be jeopardized by the very kind of emergency expenditures, which caused a deficit to develop in its budgeted accounts in the school year 1970-71. Furthermore, the examiner believes that some of the reductions of Council, (i.e., J120D – $4,000; J820B – $1,700; J1020 – $1,500) to which the Board has already agreed, can add significantly to the jeopardy in this regard.

The specific reductions of Council, to which the Board still specifically objects are as listed below:

| Item | Account No. | | Reduction Amount |
|---|---|---|---|
| | | **Current Expense** | |
| (1) | J213 | Sals. – Tchrs. (English) | $ 9,000 |
| (2) | J213 | Part-Time Tchr. – Music | 4,450 |
| (3) | J410A.3 | Sals. – Nurses | 2,000 |
| (4) | J215C | Clerical Aides | 5,400 |
| (5) | J215C | Child Study Secretary | 3,000 |
| (6) | J820B | Fringe Benefits | 1,250 |
| | TOTAL – Current Expenses | | $25,100 |
| | | **Capital Outlay** | |
| | L1230C | Remodeling | $ 1,000 |

The hearing examiner determines that expenditures for items (1) and (2) above are reasonable and necessary for the developed curriculum needs of the district and that items (3), (4), and (6) are required expenditures to be made pursuant to the Board's mandate granted by *Chapter* 303, *Laws* of 1966, to negotiate the "terms and conditions" of employment. He further determines that the workload of the present secretarial force has been so increased by new and increasing requirements pertinent to the education of handicapped children that the additional help programmed here is necessary so that the child study team, employed part time, may function efficiently.

Therefore, for these reasons, the examiner recommends the restoration of $25,100 of the total reduction of $102,000 made by Council from the amounts proposed by the Board for current expenses of the school district for the year 1971-72. He further recommends that the Board be permitted to apportion any or all of this money for the specified proposed purposes, if a thorough new budget projection and review to be completed by August 15, 1971, demonstrate conclusively that total budget revenues will in all probability be at least equal to the total expenditures projected for the year, but that otherwise, $10,000 of these appropriations be deferred until such time as a positive determination to this effect has been made.

The hearing examiner also recommends that the cut of $1,000 made by Council from the funding proposed by the Board for capital outlay expenses be allowed to stand. There remains a total of $17,889 in the capital outlay appropriations. There is no convincing proof that the sum of $1,000, which is in dispute herein, may not be realized by a reordering of priorities within this total expenditure.

Summary – **Current Expenses**

| | |
|---|---|
| Reduction of Council | $102,000 |
| Amount Restored | 25,100 |
| Amount Not Restored | 76,900 |

**Capital Outlay**

| | |
|---|---|
| Reduction of Council | $ 1,000 |
| Amount Restored | -- |
| Amount Not Restored | 1,000 |

* * * *

The Commissioner has reviewed the findings of the hearing examiner, *supra*, and has carefully considered his recommendations. In concurring therein, the Commissioner finds and determines that the sum of $25,100 must be added to the amount previously certified by the Mayor and Council to be raised for the current expenses of the Mountain Lakes School District in order to provide sufficient funds to maintain a thorough and efficient school system for the school year 1971-72. He therefore directs that this sum be added by the Mayor and Council to the sum for current expenses, which was previously certified, so that the total tax levy for these expenses shall be $1,882,753.

Additionally, the Commissioner directs that a sum of $10,000 of this restoration be held by the Board as an unappropriated reserve until such time as a new and detailed budget review by the Board demonstrates conclusively that such funds may be expended for the purposes detailed herein, within the context of the total budget expenditures that are in balance with total projected revenues for the school year 1971-72.

COMMISSIONER OF EDUCATION

June 21, 1971

**Inez B. McClintock,**

*Petitioner,*

**v.**

**Board of Education of the Borough of Englewood Cliffs, Bergen County,**

*Respondent.*

## COMMISSIONER OF EDUCATION

### Decision

For the Petitioner, Greenberg and Covitz (Morton R. Covitz, Esq., of Counsel)

For the Respondent, Shenier, Gilady and Harwood (Daniel Gilady, Esq., of Counsel)

Petitioner, a tenure teacher in the school system of the Englewood Cliffs Board of Education, hereinafter "Board," alleges that she has been improperly and illegally transferred from her position as a reading teacher to that of a third grade teacher as of September 1, 1971.

Depositions were taken December 7, 1970, and submitted to the Commissioner on January 11, 1971. A Memorandum of Law was also submitted by petitioner as part of the record, and the Board filed a brief. A plenary hearing was held on April 5, 1971, in the office of the Bergen County Superintendent of Schools in Wood-Ridge. The report of the hearing examiner is as follows:

Petitioner asserts that she is 59 years old, a highly qualified reading specialist, and has had many successful years as a reading teacher in the Englewood Cliffs School System. She had also held the position of reading coordinator in the Englewood Cliffs System. She alleges that the Board abolished the position of reading coordinator on April 14, 1970, the position to which she was assigned, and thereafter improperly and illegally transferred her against her wishes to a position of third grade teacher.

Petitioner avers that she is properly certified as a reading teacher in grades K-12, and that she is not certified to teach third grade, except under the provisional certificate she acquired subsequent to her transfer. She alleges that she has seniority as a reading teacher in the Englewood Cliffs School System, and that she has acquired tenure as a teacher of reading. Therefore, the Board's action, she alleges further, was arbitrary and capricious and should be set aside in view of her exceptional preparation, proper certification, tenure, seniority and her years of good and faithful service with the absence of any mediocre or poor evaluations.

Petitioner avers further that the Board acted to transfer her because of petty partisan reasons after the February 1970 school election in which the majority members of the Board, who approved of her services, became the minority, and that the wife of one of the members of the new majority is a reading teacher in the Board's school system.

Petitioner alleges that the Board hired a new reading teacher for a four-day-a-week assignment during the summer of 1970, and the record indicates that no offer was made to petitioner to fill this new position.

A portion of one Board member's testimony given at the deposition hearing and not refuted is as follows: (Tr. 91-92)

"Mr Covitz [attorney]: I believe I said and if I did not, I will say it now, do you know the reason why the position of reading coordinator was abolished and Mrs. McClintock was assigned to the third grade?

"A. No, I don't believe I do.

"Q. (by Mr. Covitz) You do not know the reason?

"A. No.

"Q. Was it based on any evidence presented to the Board based on her competency as a reading teacher?

"A. Not in my presence, no.

"Q. Was there ever any written or oral objections from any Administrator or parent presented to the Board of Education with reference to Mrs. McClintock's competency as a reading teacher during your stay on the Board of Education?

"A. No, not – never presented to the Board at a meeting at which I was present, no.

"Q. Did the Board at meetings at which you were present ever discuss her ability as a reading teacher?

"A. No, I don't believe so.

Mr. Covitz: Nothing further."

The Board President's testimony is also relevant here as to reasons for the Board's action and is excerpted as follows: (Tr. 133-134)

"Q. Do you have any knowledge as to her functioning in the actual reading-teacher setting?

"A. Not on actual, but merely what I had seen her as a coordinator.

"Q. Did you ever see her function as a reading teacher?

"A. No.

"Q. Did you ever review any evaluation of her as a reading teacher?

"A. No.

"Q. Did you ever speak to any of her superiors about her ability as a reading teacher?

"A. No.

"Q. So you really know nothing about her as a reading teacher, do you?

"A. Only from what I observed in her other function which was her important function.

"Q. Coordinator?

"A. That's right.

"Q. You did not like her as coordinator?

"A. Absolutely not.

"Q. And you called this to the attention of the then Superintendent of Schools who was Mr. Evans. Is that so?

"A. Right.

"Q. Did you receive any satisfaction from Mr. Evans.

"A. Satisfaction to the extent that he then called a meeting, the second meeting, for the entire Board to discuss this matter.

"Q. What was Mr. Evans' opinion with reference to the reading program?

"A. Oh, he was in favor of it.

"Q. He was in favor of the program?

"A. Yes.

"Q. You were opposed to the program?

"A. Yes."

The testimony of the new Superintendent of Schools given at the deposition hearing is in pertinent part as follows: (Tr. 50)

"Q. Doctor, you have gone through the entire personnel file of Mrs. McClintock. Am I correct in assuming that you found nothing of a derogatory nature with respect to her performance in the file?

"A. You are correct."

The New Jersey School Boards Association's Handbook which gives general advice to board members reads in pertinent part as follows:

"***HERE'S WHAT A GOOD MEMBER DOES***

"1. Recognize their responsibility is not to run the schools, but to see that they are well run.***

"6. Try to interpret to the school staff the attitudes, wishes, and needs of the people of the district, and try to interpret to the people the needs, problems, and progress of the schools.***

"12. Vote only for the best-trained technical and professional employees who have been properly recommended by the appropriate administrative officer.***"

The Board does not deny that petitioner is well qualified as a reading teacher and that her teaching evaluations were good. It is also stipulated that petitioner had a proper reading certificate for her assignment and that she has tenure as a teacher. The Board denies, however, that its action to transfer her was in any way arbitrary or capricious. The Board avers that the majority of its members were dissatisfied with the reading program for which petitioner was in part responsible as the reading coordinator. The President of the Board testified at the deposition hearing that there was much dissatisfaction among many parents about the reading program, and that his personal knowledge of different methods of reading being used throughout the school system constituted the basic reason for petitioner's transfer. He admits that her professional evaluations were all entirely satisfactory.

The hearing examiner notes that testimony educed at the hearing revealed that petitioner was held in high esteem during all her years of employment with the Board and that all her *professional* evaluations were outstanding. It is also a matter of record that petitioner was awarded a sabbatical leave for further study in reading and related disciplines during the school year 1969-70, and the Board admits that petitioner's performance as a reading teacher was satisfactory.

Several Board members testified that they were, however, dissatisfied with the reading program. The record indicates, also, that additional reading time was added in two of the schools, and that a new reading teacher was employed for the 1970-71 school year to teach four days a week.

The testimony also reveals that petitioner is 59 years of age, and that her transfer with the concomitant requirement of a provisional certificate would cause her to return to college for 4 credits per year as mandated by the regulations governing provisional certificates.

* * * *

The Commissioner has read the report of the hearing examiner and notes that there are two essential issues in question. They are: (a) Did petitioner have tenure as a reading teacher, and (b) Was petitioner improperly and illegally transferred?

It has been stipulated that petitioner has tenure as a teacher, but she claims tenure as a reading teacher. The relevant statute is *N.J.S.A.* 18A:28-5, which reads in part as follows:

> "The services of all teaching staff members including all teachers *** and such other employees as are *in positions which require them to hold appropriate certificates* *** shall be under tenure***." *(Emphasis supplied.)*

The Commissioner notes also that the facts in the instant matter lend themselves for adjudication pursuant to the terms of *N.J.S.A.* 18A:28-9 *et seq.*, which reads as follows:

> "Nothing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of teaching staff members, employed in the district whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause upon compliance with the provisions of this article.

A board of education, therefore, has clear authority to abolish a position pursuant to precise statutory provisions. The Commissioner finds no fault with the Board's determination to abolish the position of reading coordinator pursuant to the terms of the statute, *supra.* However, the Commissioner cannot reconcile the circumstances which would permit the increase of reading time in two schools including the hiring of a new reading teacher, and at the same time the abolishing of the reading coordinator's position with her subsequent reassignment to a third grade position.

The provisions of *N.J.S.A.* 18A:28-10 set forth in part that an employee may not be dismissed by reduction of staff because of

> "***residence, age, sex, marriage, race, religion or political afiliation but shall be made on the basis of seniority ***."

*N.J.S.A.* 18A:28-11, which reads in part as follows:

> "In the case of any such reduction the board of education shall determine the seniority of the persons affected according to such standards and shall notify each such person as to his seniority status, and the board may request the commissioner for an advisory opinion with respect to the applicability of the standards to particular situations ***."

clearly charges the board with the responsibility of determining seniority and making its staff reduction accordingly. In the instant matter the reading teacher with the least seniority would lose her position. Petitioner, on the other hand, has a statutory right to be transferred to any resultant reading vacancy occurring as the result of "bumping."

The provisions of *N.J.S.A.* 18A:28-12, which reads in part as follows:

> "If any teaching staff member shall be dismissed as a result of such reduction, such person shall be and remain upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified and he shall be reemployed by the body causing dismissal, if and when such vacancy occurs and in determining seniority, and in computing length of service for reemployment, full recognition shall be given to previous years of service ***"

preserves the eligibility of employees to regain positions abolished, if and when such positions are reestablished

It would appear, also, that little purpose could be served by granting petitioner a sabbatical leave for study in the related fields of reading as a specialty and subsequently reassigning her to a position of third grade classroom teacher.

The Board has established that the reason for petitioner's transfer was that it was dissatisfied with the reading program. Nowhere in the testimony or evidence was any *professional* concern expressed about petitioner's competence as a reading teacher or as a reading coordinator. The Board took its action, according to the testimony educed at the deposition hearing, because some townspeople were not happy with the reading program. The decision to transfer was not made by the new Superintendent of Schools after an evaluation of her certificate, her demonstrated capabilities and her evaluations, but was made by the Board for the alleged reasons, *supra.*

Certainly, the Board is acting within its authority when it transfers teachers within the scope of their certification. *Josephine DeSimone v. Board of Education of Fairview*, 1966 *S.L.D.* 43; *Greenway v. Camden Board of Education*, 1939-49 *S.L.D.* 151, affirmed State Board of Education 155, affirmed New Jersey Supreme Court, 129 *N.J.L.* 46 (1942) However, it would appear that very important considerations in any transfer would be the resultant benefit to school children and the effect of such a transfer on the teacher. In the instant matter neither consideration was made, apparently, since petitioner was transferred to a new position without even having her certificate examined or her qualifications checked for such a position. The transfer was also made prior to any discussions with petitioner by the Superintendent or Board. She was simply told that the transfer would be made. The Board and the Superintendent should have considered her background experiences and her qualifications before assigning her to any grade assignment, and consideration should have been given to the effect of this assignment on her third grade class.

It appears also that her sabbatical leave was given without consideration for her assignment on her return or for reasons not stated by the Board. The Board's own Faculty Handbook, reads in pertinent part as follows:

"Sabbatical Leave –

> "*** As a condition of eligibility for sabbatical leave, the teachers shall promise to return to service in Englewood Cliffs for at least one year following such leave.***" (P-8)

Certainly one intention of such a policy is to take advantage of the teacher's newly-gained knowledge.

To require a 59-year-old teacher to return to college for 4 credits per year for certification purposes when she is clearly certified in several other areas and does not wish the transfer, and when a position for which she was clearly certified to teach was vacant prior to the 1970-71 school year, can only be viewed as a punitive measure against her. Nothing in the record is at all indicative of any reason why petitioner should be transferred out of reading. On the contrary, there is documented evidence and testimony from the former Superintendent that her work in the school system was entirely satisfactory.

Tenure is granted to teachers, not positions, and petitioner has tenure as a teacher. However, in the instant matter the Commissioner determines that the decision of the Board of Education of Englewood Cliffs to transfer petitioner was arbitrary, capricious and not in the best interest of petitioner or the school children to which she was assigned. The result of the transfer requiring petitioner to earn 4 credits per year amounts to a punitive assignment for which there is no stated reasons. Alternatives were available to the Board after the position of reading coordinator was abolished, which would accommodate petitioner and not punish her.

The Commissioner determines, therefore, that petitioner is qualified and certified to teach reading, and that she has the right and privilege pursuant to the statutes, *ante*, to a reading position in the Englewood Cliffs School System.

The Commissioner ORDERS, therefore, that the Board of Education of Englewood Cliffs reinstate petitioner in a reading position for the school year 1971-72, or, if the position of reading coordinator is reestablished, that petitioner be reinstated in that position pursuant to the provisions of *N.J.S.A.* 18A:28-12, *supra.*

COMMISSIONER OF EDUCATION

June 22, 1971

Motion For Stay of Commissioner's Decision Denied by State Board of Education, September 18, 1971.

**In the Matter of the Tenure Hearing of Herman B. Nash, School District of the Township of Teaneck, Bergen County.**

**COMMISSIONER OF EDUCATION**

**Decision**

For the Complainant Teaneck Board of Education, Parisi, Evers & Greenfield (Irving C. Evers, Esq., of Counsel)

For the Respondent Herman B. Nash, *Pro Se*

Charges were filed on March 14, 1969, against Herman B. Nash, a tenure teacher in the Teaneck School System, hereinafter "respondent." The charges essentially allege insubordination and interference with the orderly process of Teaneck High School. On March 12, 1969, the Teaneck Board of Education, hereinafter "Board," certified that the charges would be sufficient, if true in fact, to warrant dismissal or reduction in salary, and at the same time suspended the respondent without pay.

A general denial was filed on behalf of the respondent on June 11, 1969. Affirmative defenses alleging certain shortcomings in the Teaneck School System were also filed on behalf of the respondent.

Hearings commenced on June 13, 1969, and ended on January 21, 1971. They were originally begun before an Assistant Commissioner of Education, who was compelled by ill health to withdraw from the case. He was replaced by another hearing officer appointed by the Commissioner. In August of 1969, the respondent, through his ten attorneys, brought a motion to have the hearings

begun anew so that one hearing officer would hear the entire case. The Commissioner rendered a decision denying the motion.

Since that decision, there was a delay occasioned by the withdrawal from the case of the respondent's attorneys. Extra time was granted at the respondent's request to allow him time to secure new counsel or otherwise prepare his case. In March of 1970, the attorney for the Board brought a motion to have a firm date set for the continuation of the hearing (and to have affirmative defenses struck because of the respondent's failure to answer interrogatories). Subsequent dates set were adjourned at the request of the respondent. Hearings finally resumed on November 16, 1970, over the respondent's protests, and were concluded on January 21, 1971. During these latter hearings, the respondent represented himself *Pro Se*. Ample time was allowed thereafter for the filing of post-hearing briefs.

The following Charges of conduct unbecoming a teacher and conduct otherwise improper were filed against the respondent by the Board on March 14, 1969, pursuant to *N.J.S.A.* 18A:6-10, *et seq.:*

**Charge 1**

1. That on or about March 6, 1969, the said Herman Nash, having been engaged for the purpose of teaching and having assumed the obligation to teach in said system, did, in violation of his undertakings and obligations fail and refuse to teach on said date and did in fact, abandon his teaching obligations.

**Charge 2**

2. That on or about March 6, 1969, the said Herman Nash having the responsibility under the provisions of *R.S.* 18A:25-2 to hold pupils under his authority accountable for disorderly conduct in school, did in violation of his responsibilities and duties and contrary to the provisions of the statute aforesaid, did urge, counsel, advise and abet pupils under his authority to commit acts of disorderly conduct by leading said pupils into the office of the principal of the Teaneck High School when said pupils had no lawful right to be there, and then and there did seize control of said office.

**Charge 3**

3. That on or about March 6, 1969, the said Herman Nash, knowing full well that pupils in the public schools are required, under the provisions of *R.S.* 18A:37-1 to comply with the rules established in purusance of law for the government of such schools, to pursue the prescribed course of study and submit to the authority of the teachers and others in authority over them, did, nevertheless, in violation of the provisions of said statute, urge, counsel, advise, abet and lead his pupils in defying lawfully constituted authority by illegally and improperly seizing the office of the principal of the Teaneck High School.

**Charge 4**

4. That on or about March 6, 1969, the said Herman Nash, having failed and refused to carry out his teaching duties, and having been ordered by Dr. William Hendry, principal of the Teaneck High School, on several occasions to return to his class and resume his teaching duties, failed and refused to obey said orders.

**Charge 5**

5. That on or about March 6, 1969, the said Herman Nash, having failed and refused to carry out his teaching duties, and after having been ordered by his principal to resume his teaching duties and having refused to obey said orders, was then suspended by Joseph Killory, Superintendent of Schools and ordered to report to the Central Office; that notwithstanding said Order by the Superintendent of Schools, he failed and refused to obey same.

**Charge 6**

6. That the said Herman Nash, on or about March 6, 1969, after having urged, counseled, advised and abetted pupils under his authority to violate the provisions of *R.S.* 18A:37-1 as charged in Paragraph 3 above, did urge, counsel, advise, and abet other pupils to violate the provisions of said law.

**Charge 7**

7. That the said Herman Nash did, on or about March 6, 1969, commit an assault and battery upon the person of Dr. William Hendry, principal of the Teaneck High School, contrary to the provisions of *R.S.* 2A:170-26.

**Charge 8**

8. That the said Herman Nash did on or about March 6, 1969 lead and direct a group of students in taking over the principal's office at the Teaneck High School thereby disrupting school affairs and then and there did unlawfully disturb and interfere with the quiet and good order of the said Teaneck High School contrary to the provisions of *R.S.* 2A170-28.

**Charge 9**

9. That the said Herman Nash did, on or about March 6, 1969, after having been forbidden to trespass upon the property of the Teaneck High School, nevertheless unlawfully trespass upon said property, contrary to the provisions of *R.S.* 2A:170-31.

**Charge 10**

10. That the said Herman Nash did, on or about March 6, 1969, unlawfully and illegally imprison William Hendry, Principal of the Teaneck High School in his office.

**Charge 11**

11. That the said Herman Nash did, on or about March 6, 1969, improperly, illegally, and unlawfully interfere with and prevent William Hendry, Principal of the Teaneck High School from carrying out his normal duties.

**Charge 12**

12. That the said Herman Nash did, on or about March 6, 1969, interfere with and/or prevent Joseph Killory, Superintendent of Schools in the Teaneck School System, from carrying out his duties.

**Charge 13**

13. That during the month of December, 1969, the said Herman Nash, having been requested to meet with the Superintendent of Schools refused to comply with such requests.

**Charge 14**

14. That the said Herman Nash, having been directed by letter dated December 30, 1968 to meet with the Superintendent in his office on January 6, 1969, failed and refused to obey said directive.

**Charge 15**

15. That on or about April 25, 1968 the said Herman Nash was guilty of insubordination by failing and refusing to answer questions put to him by the principal of Teaneck High School who was then and there in the performance of his duties.

**Charge 16**

16. That the said Herman Nash has on occasions during the year 1968 and in 1969 distributed to students, teachers and others, unauthorized materials without first having obtained permission for such distribution.

**Charge 17**

17. That on or about November 20, 1968, the said Herman Nash committed a breach of professional ethics by sharing with his students an alleged

verbatim conversation had between himself and the principal of the Teaneck High School relative to the distribution of unauthorized material.

**Charge 18**

18. That on or about May 3, 1968, the American Problems Club, of which Club the said Herman Nash was sponsor, held a meeting at which meeting the said Herman Nash failed to appear although it was his obligation and responsibility to attend. That although he did not appear, he made no effort to cancel the meeting.

**Charge 19**

That on or about December 13, 1969, the said Herman Nash did, without proper authority, seize control of the public address system at the Teaneck High School and did proceed to disrupt the school by the use of said public address system.

**Charge 20**

20. That although the General Bulletin for School Personnel in the Teaneck School System requires teachers to maintain complete and detailed lesson plans for at least a day in advance, the said Herman Nash has failed to comply with this requirement and failed to have such a lesson plan available on or about November 5, 1968.

**Charge 21**

That the said Herman Nash did, on or about March 6, 1969, fail to have a lesson plan available or, if one was available, he failed and refused to follow it.

**Charge 22**

22. That although the General Bulletin for School Personnel in the Teaneck School System, at page 14, prohibits the release of school pupils during school hours without a direct written request from the parent or guardian addressed to an [sic] approved by the principal, the said Herman Nash did, on or about March 6, 1969 in direct violation of said provision, release his pupils for the purpose of having them participate in illegal and/or unauthorized activity.

**Charge 23**

23. That although there has been in effect in the Teaneck School System a grievance procedure, the details of which are set forth in the General Bulletin for School Personnel at pages 23 and 24, the said Herman Nash on or about February 27, 1969 after having received a summary evaluation report from Dr. William Hendry, his school principal, did deliberately seek to bypass and avoid

said procedure by causing to be circulated a memorandum addressed to members of the Teaneck Teachers Association and others interested [sic] criticizing said evaluation.

**Charge 24**

24. That the said Herman Nash has caused to be circulated among students attending the Teaneck High School certain statements seeking to incite, arouse and stir up the students, which statements have assailed the integrity of the administration of the Teaneck School System and the integrity of the Board of Education, and which statements are false, misleading, and contain unwarranted and improper innuenices. [sic]

**Charge 25**

25. That although the General Bulletin for School Personnel, at page 24, makes provision for requests of a special nature to be made through the school principal or immediate superior, and notwithstanding the fact that this procedure has been expressly called to the attention of Mr. Nash, he had repeatedly failed and refused to invoke this procedure by appearing at meetings of the Board of Education and making irresponsible and intemperate comments without first having complied with established procedure.

**Charge 26**

26. That the said Herman Nash did, during a period of time when the Teaneck Board of Education was engaged in collective negotiations pursuant to the provisions of *Chapter* 303, *Laws of* 1968, seek to create disharmony and friction between the Board and its staff and did seek to interfere with said negotiations by falsely charging that the Teaneck Board of Education was exploiting its employees and by urging his students to interfere at a time when negotiations were in progress.

*Charge 20* was subsequently withdrawn by the Board. *Charge 27* was filed as a supplementary *Charge* on June 13, 1969, and reads as follows:

**Charge 27**

27. That after the Teaneck Board of Education at a regular meeting held on April 9, 1969 had adopted a policy covering the processing of grievances by Students and Parents, pursuant to directions of the State Board of Education issued on or about March 14, 1969, the said Herman Nash, then being a teacher under suspension in the Teaneck School System, did on or about May 5, 1969, on May 14, 1969 and at other times, seek to flaunt, ignore, disregard and otherwise set at naught said policy by urging, advising, counselling, and importuning persons to deliberately ignore said policy and instead to forward to state and local officials complaints about the Teaneck School System.

The respondent's answer filed on June 11, 1969, was in the nature of a general denial. At the same time he filed affirmative defenses claiming that certain defects existed in the Teaneck School System, and that the actions he took on March 6, 1969, were the only actions reasonably likely to result in corrective action by the Board. His answer to the supplemental *Charge*, also a denial, was not filed until December 10, 1969.

At the hearing the Board through its witnesses – who included persons who were as of March 6, 1969, the Teaneck Superintendent of Schools, the principal, assistant principal and vice-principal of Teaneck High School, the School Business Administrator/Board Secretary, and the executive secretary to the Superintendent of Schools – clearly and convincingly demonstrated the occurrence of the following account of events on March 6, 1969:

At about 8:45 a.m., the respondent, leading a group of students from his first period class, forcibly interrupted a meeting that was being conducted at the office of the principal of Teaneck High School. He entered the office by physically pushing the principal, who had come to the door in response to knocking; both the door and the respondent came into contact with the principal with the result that he was pushed back toward the middle of the room. The respondent, asserting that he was taking full responsibility for his actions, then had his students follow him into the office.

The respondent was asked by the principal to leave the office and return to his classroom. He refused to leave; instead he guarded the door and physically thwarted the principal's attempts to leave the office. The principal was not permitted to leave until the arrival of the Teaneck Superintendent of Schools about an hour later. Although there is some confusion in the record as to who was called and when, it is apparent that on one occasion the respondent forcefully prevented the principal from using the telephone.

The respondent's asserted reason for imposing an immediate audience with the principal was to demand answers as to why certain situations and conditions continued to exist at the High School. One of the respondent's immediate demands was that the first-period practical biology class be divided into two groups as of the following morning. Later on in the day, a list of written demands was submitted to the school authorities. The list of demands is in evidence as P-17.

At approximately 9:30 a.m., the Superintendent of Schools arrived at the High School and was permitted to enter the principal's office. Upon entry, he observed the respondent and some 15 to 20 students in the office with the principal. After some discussion, the Superintendent asked the students to return to their classrooms. The respondent, in turn, asked two students to stay. Most of the students did leave at that point, but a few remained.

The Superintendent again asked and then ordered the respondent to return to his classroom. When this order was not obeyed, the Superintendent suspended

the respondent and directed him to report to the central office. This direction was not followed either; instead, the respondent went to the door leading to the hallway and announced in a raised voice, presumably aimed at students in the hallway, that he had been suspended and that they, the students, should come and join him.

Thereafter, the respondent (with a few digressions to attend meetings with parents and students later on that day and evening) and a varying number of students continued to occupy the principal's office until approximately 4:00 a.m. the next day, March 7, 1969. In the meantime, the Superintendent and other school personnel were occupied in trying to resolve the situation in as orderly a manner as possible.They spoke with the respondent, met and conversed with groups of students, held a program in the auditorium to which students were invited to air problems. They met with Board members who were called in on the evening of March 6, 1969. They met with parents of students who came to see what was going on and to try and help resolve the situation. They attempted to ease the sense of tenseness that apparently pervaded the school.

At about four o'clock in the morning of March 7, 1969, it was announced that the building had to be cleared or the police would be called in. At that point, the respondent and the students left the building.

With respect to all of the above-described details of the physical takeover and occupation of the principal's office, the respondent presented absolutely no contradictory proof.

The hearing officer finds as fact the above account of the occurrences of March 6 and 7, 1969.

Nor did the respondent offer evidence in contradiction of testimony with respect to other *Charges* made by the board:

– In November of 1968, the Superintendent of Schools requested by telephone that the respondent come to his office to talk with him. The respondent replied that he would have to consult legal counsel and then respond to the request. He did not respond.

– On November 27, 1968, the Superintendent wrote a letter to the respondent (P-20) asking again that the respondent contact him to set a meeting date. The respondent did not do so.

– On December 30, 1969, the Superintendent, referring to his earlier attempts to arrange a meeting, wrote another letter (P-21) directing the respondent to appear at his office on January 6, 1969, at 4:00 p.m. The respondent did not appear. Instead, he wrote a return letter dated January 3, 1969, (P-22) asking for a written statement as to what would be discussed so that he could determine whether or not he needed representation at such a meeting. The meeting did not come off.

– On April 25, 1968, the High School principal asked the respondent to answer a question as to whether or not the respondent provided leadership to the American Forum Club, a student organization for which he was the sponsor. The respondent did not answer this question, claiming he needed legal advice.

– On or about December 13, 1968, the respondent made unauthorized use of the school's public address system for the purposes of inviting students to attend an after-school assembly that had been cancelled.

– At public meetings of the Board in May of 1968, while the respondent was under suspension, he advocated forms of protest not related to the then recently-established parent-student grievance procedure.

– The respondent repeatedly ignored or by-passed a Board rule requiring requests of a special nature to be made through the principal or immediate superior, and took many demands directly to the Board at public meetings.

The hearing officer finds as facts the above list of occurrences.

These findings establish the truth of the basic factual allegations contained in *Charges 1* through *15*, and in *Charges 19*, *25*, and *27*. *Charges 16* through *18* and *21* through *24* and *Charge 26* have not been sufficiently established so as to warrant findings of punishable wrongdoing by the respondent. However, it must be said that proof presented under these latter charges did serve to indicate that the respondent did not work together with the administration in a spirit of cooperation toward the solution of problems. *Charge 20*, as noted earlier, was withdrawn by the Board.

The respondent's efforts at presenting his case, while apparently not directed at disputing the above-described events, seemed to have been directed instead at developing a framework for his actions. It was his apparent aim to demonstrate some form of justification in context. Toward that end, he first put on the then vice-principal of the High School (now principal) and the person in charge of guidance; he asked both of them general questions about the running of the Teaneck School System. His attempt was to demonstrate the existence of shortcomings that needed correction. He attempted to prove that he had tried for years in many ways to achieve these corrections through proper channels. He did not meet with much success in these proofs.

One of the respondent's witnesses was an expert in the science education area whom the respondent had subpoenaed from the State Department of Education. This witness supported some of the respondent's views about education in general and about the teaching of science in particular, e.g., that it was better to have small classes rather than large ones to educate students who needed special attention; that it was educationally more desirable for science students to have facilities to carry out manipulative experiments; that certain conditions, if they existed, would be undesirable and even unsafe.

The State science expert was also questioned about a letter written by the respondent to the Commissioner of Education (P-2) and about the response to that letter (P-3). The respondent tried to establish a basis for his criticism of his superiors and of the alleged inadequacy of the "through channels" method of change by showing that the offer in the letter from the Department of Education to make the very same State science expert available to the school system was never acted upon by school authorities. His point was somewhat undermined, however, by the testimony of the expert that he had himself participated in a science day program at Teaneck High School just three months prior to the correspondence between the respondent and the Department of Education – a program which the respondent had missed (he said that no one had notified him in advance of the visit).

The respondent called only two other witnesses. One was his former attorney in the case, who was subpoenaed to testify but could not speak on the merits of the case. The other was the parent of one of the respondent's students, who was able to testify with regard to some of the activities that took place on the evening of March 6, 1969.

Neither of these witnesses nor any other of the respondent's witnesses disputed the basic factual allegations of the Board. None of his witnesses presented a portrait of conditions that would have led a reasonable citizen and/or teacher in the Teaneck School System to take the course of action that he took.

The respondent never took the stand to testify on his own behalf. A good deal of what he had to say, however, came out in the form of statements made by him during his questioning and cross-examination of witnesses; his case can be inferred from the direction of these statements and questions. Jumping over the technicality that his presentation was not made in proper form, his thrust seems to have been and might be *paraphrased* as follows:

I was vitally concerned as a teacher and citizen about certain conditions at the Teaneck High School and in the Teaneck School System. (A number of the respondent's basic criticisms were not limited to Teaneck alone, but were generally found throughout schools in the State; Teaneck was often just a specific example of the ills of the education system.) I was concerned specifically with items such as the existence, operation and effect of a "tracking" system; the relative sizes of classes; the desirability of smaller classes to deal with students needing remedial help; the availability of laboratory facilities for general science students as well as college science students; and the existence of inadequate and unsafe conditions respecting storage of science materials. I attempted to effect corrective action "through channels" and by calling conditions to the attention of the Board of Education. I was totally frustrated in my attempts to have remedial action taken, and, being dedicated – even at considerable potential risk to myself and my personal career – to the eradication of the evils that I claim exist in the educational system, I felt compelled by my own conscience to take the stand that I did and the actions

that I did. A good part of any improvement made in the system since my suspension was due in large part to my having made the fuss and furor that I did.

The hearing officer finds that the respondent did in fact sincerely believe these things and did act out of a motivation to effect change for the good of students. Further, he did act out of a conviction born of his own sense of frustration – whether warranted or not – that the actions he took on March 6 and 7, 1969, were the only way to achieve meaningful movement toward the correction he thought was necessary.

Having said that, the hearing officer wishes now to make clear that, whatever the respondent's believes might have been, he did not in fact establish the existence of sufficient provocation to justify his behavior. While some of his concerns have merit, he does not seem to possess a realistic view of the powers, duties and responsibilities of boards of education; he does not seem to comprehend the problems and ramifications of trying to achieve reasonable goals within feasible fiscal limits. There is frequently a long road between the recognition of a problem and the eradication of it. A board must decide what weight to give to each aspect of its entire educational system. It must do this within limitations set by the monies available to it. The Board of Education, while it obviously does not agree with everything the respondent says, and especially with the way that he says it, did indicate at the hearing a long-time awareness and concern on the part of its administrators with respect to a number of the problems the respondent talks about. Testimony also indicated that progress in some areas has been made on a continuing basis (the Board denies the respondent's claims that any improvement since March 6, 1969, was due to his efforts). Other areas are still of concern to the Board.

Apart from his understanding or lack of understanding of the Board's role in running the system, the respondent's assertion that he pursued corrections of alleged deficiencies in the system through proper channels, and resorted to unusual means to achieve his goals only when the established-channels method proved totally unproductive, cannot be supported by the proofs. Testimony of several witnesses, including two that he called to testify on his own behalf, clearly indicated that he rarely resorted to proper channels and, when he did, he did not properly follow through.

He did not pursue relief through his department chairman or the principal, despite established practice and specific advice. One apparent exception was when he did request the use of certain facilities not usually available to him; at that time his request was granted. Despite efforts of the science department chairman and the administration to cooperate with him respecting his request for use of facilities, he did not continue to take advantage of the request-through-channels method of assistance. He nevertheless continued to complain that he was being denied the use of or access to certain equipment. In this connection, it should also be noted that the man in charge of purchasing for the science department testified that he never received a purchase request from the respondent.

The respondent publicized his dissatisfaction with the way he was being treated; for example, he seems to have issued a message to the faculty regarding an adverse evaluation he received (see P-8). But he never pursued that or any other complaint through the established grievance procedure.

While he was under no obligation to pursue grievances, his not having done so certainly weakens his argument that he pursued all avenues of relief prior to March 6, 1969.

It should likewise be noted that the respondent did not file any formal petition of appeal with the Commissioner of Education. His letter to the Commissioner (P-2) referred to above was in fact answered (P-3). Although the respondent apparently believes the powers of the Department of Education to be broad, he has not sought further relief from the Commissioner or the Department of Education.

This is not to say that the respondent never attempted to inform the Board of the existence of problems before taking precipitous action. In fact he did appear at Board meetings. But what the hearing officer does find is that his assertion of legitimate frustration with established and normal means of communication – presumably offered as a mitigating factor – has not been demonstrated at the hearing. In fact there seems to have been a disregard of some of the channels open to him.

* * * *

The Commissioner has reviewed the record and agrees with the findings of the hearing officer's report.

The Commissioner agrees specifically with the conclusion that the respondent did not have sufficient provocation to justify his behavior. But the Commissioner states further that, even were the provocation real and extreme, the use of such forceful defiance of those charged with the responsibility of administering a school system cannot be tolerated. No school system needs to harbor a teacher who arrogates unto himself the authority to supercede the statutory scheme of school operation.

The respondent's actions, even though motivated by his own desire to effect his own version of improvement of the educational system, cannot be said to contribute to the proper administration or proper progress of education in Teaneck. He did not fairly analyze or exhaust available avenues of communication and potential resolution of his problems before resorting to insubordination and interference as a technique. Means to accomplish positive and productive progress are available through proper channels within a school system, and, if they should fail and a proper case can be made, appropriate relief is available through the right of direct appeal to the Commissioner of Education. *N.J.S.A.* 18A:6-9

A teacher, as any citizen, who decides to take any form of action or inaction does so at his own risk. No matter what the ultimate objective sought, the individual must accept the responsibility for his actions – as the respondent has stated on a number of occasions – and must accept the consequences of his actions. The Commissioner finds and determines that the penalty for the respondent's action in this particular case must be dismissal without pay.

The Commissioner does not make this determination lightly. He does, in fact, recognize, as was conceded at the hearing, that the respondent has the ability to be a very good teacher. However, it must be emphasized that no teacher can act in the manner that the respondent has in this case and remain immune to consequences of a severe nature. The present situation is not one in which a good teacher has a momentary fit of anger or pique. The pattern established by the teacher is quite long and quite deliberate. In the context of the Teaneck School System, he does not seem to be able to confine his criticism to channels that will not interfere with the proper functioning of the educational process.

The Commissioner's basic and fundamental concern must be in the welfare of the students in the Teaneck School System and, therefore, in the proper administration of that School System. This paramount interest militates against the return to the system of the respondent in the matter herein, who cannot comfortably live within the rules of that System.

The Commissioner finds that the *Charges* concerning the incidents of March 6 and March 7, 1969, as stated in the complaint by the Teaneck Board of Education, are true, and determines and orders that Mr. Herman Nash be dismissed without pay as of the date of his original suspension by the Teaneck Board of Education.

COMMISSIONER OF EDUCATION

June 22, 1971

**Edward A. Applegate,**

*Petitioner,*

**v.**

**Board of Education of South Orange and Maplewood, Essex County,**

*Respondent.*

## COMMISSIONER OF EDUCATION

**Decision on Petition**
**and**
**Motion to Amend Petition**

For the Petitioner, *Pro Se*

For the Respondent, Cummis, Kent & Radin (David Samson, Esq., of Counsel)

Petitioner is the father of a son, Steven Kenneth, who is a pupil enrolled in the respondent's schools. He alleges that his son is not being educated in accordance with the laws of the State. Respondent denies the allegation and throughout the proceedings herein has contended that the petition and its supplements should be dismissed as moot.

In the original petition under consideration, filed February 14, 1968, petitioner alleged that his son "is not being educated in accordance with the laws of the State of New Jersey," without further specification of facts. Respondent moved to dismiss the petition as moot, and argument on the motion was heard. Subsequent to the hearing of argument, but before the Commissioner's decision thereon, petitioner filed a supplemental petition, setting forth further allegations of fact. The Commissioner therefore ruled in a decision on the motion dated December 5, 1968, that while he might have granted respondent's motion as to the original petition, the addition of the factual contentions established by the supplemental petition required that the motion be denied.

After a considerable delay occasioned in part by the illness and unavailability of an essential witness, and further compounded by scheduling difficulties resulting from the extended illness of the then Assistant Commissioner in charge of Controversies and Disputes, a hearing on the original and aforementioned supplemental petition was held on May 18, 1970, at the office of the County Superintendent of Schools in East Orange. The report of the hearing examiner is as follows:

At the time of the original petition, Steven was enrolled in the sixth grade at the Seth Boyden School, where he received instruction in both a "regular" and a "special" class. In a letter to petitioner dated June 11, 1968 (S-1) the

director of the district's Child Study Department expressed pleasure with Steven's progress, and announced plans for the 1968-69 school year as follows:

> "Succinctly, our plans for Steven include the regular graduation from grade six at Seth Boyden School this June, and his entering grade seven at South Orange Jr. High School in the fall. Steven will be sectioned into a class group at junior high school where his abilities and skills can be challenged, but where he will be able to do the work that is presented daily. Should he need further individualization he would, of course, be eligible for supplementary instruction which can be arranged in those areas where a deficiency is noted. Should this be necessary, Steven's guidance counselor, Mr. Podesta, and Miss Kernan can work out a satisfactory program of individual or small group instruction."

On receipt of this letter, petitioner proposed a "stay" of hearing on his petition, but when respondent did not respond affirmatively, petitioner withdrew his proposal. Thereafter, counsel for respondent moved for dismissal of the petition as moot. A hearing of argument on the motion was conducted on September 16, 1968.

At the plenary hearing on May 18, 1970, the testimony of school employees was that in the month of October 1968, Steven displayed difficulties of adjustment at Junior High School (Tr. 63), and it was determined by the Child Study Team that "his behavior was such that he could not be contained beyond that point of November 1." (Tr. 115) Steven was, according to a letter sent by the principal to petitioner, "stricken from the rolls" of South Orange Junior High School on or about November 1, 1968, and transferred to Central Office rolls. (Tr. 132, 133) On November 4, the Child Study Team evaluated Steven's case, and proposed four possible courses of action, the first being that Steven should be placed in a boarding school situation. This option was explored with Steven's parents but not found acceptable to them. (Tr. 106) The second option was placement in a special class for the emotionally disturbed, and Steven was accordingly placed in such a class at Seth Boyden School, on or about November 15, 1968.

In the month that followed, arrangements were made to set up a special class for Steven and certain other pupils at South Orange Junior High School, and on or about December 16, 1968, Steven was enrolled in that class, where he continued to be enrolled at the time of the hearing herein reported. Petitioner stipulates that Steven has been continuously enrolled in either Seth Boyden School or Junior High School since November 15, 1968.

Petitioner contends in his supplemental petition, filed November 14, 1968, that the action of respondent Board, the principal of the Junior High School, and the director of the Child Study Department in removing Steven from the Junior High School is unlawful and in violation of the statutes. He characterizes the action as tantamount to suspension or expulsion from school, without appropriate procedural steps, including an evaluation of Steven and a report

thereof to petitioner. The employees and officials named, who were called by petitioner as witnesses, testified that Steven was not suspended or expelled, that he was transferred to Central Office rolls pending study of his case and the exploration of alternative courses of action, and that his total absence from school before his transfer to the special class at Seth Boyden School was approximately eight school days. The Superintendent testified that if a special class placement had not been possible, home instruction would have been provided, but that arranging for such instruction takes some time. (Tr. 106)

Petitioner further endeavored to elicit testimony concerning certain assaults upon Steven by other pupils at the Junior High School during October 1968, and the alleged inadequacy of supervisory efforts to prevent such assaults. The hearing examiner sustained respondent's objections to such testimony on the grounds that it is not germane to the pleadings in this matter. Whether or not such assaults occurred, or are in any way related to the Child Study Team's recommendation that Steven be provided an educational program outside of the "regular" program of the Junior High School, as petitioner contends, does not sufficiently mitigate the fact that Steven has a long history of emotional behavioral problems. The hearing examiner finds that the Child Study Team acted in the best interests of the welfare of Steven and the school situation. The hearing examiner further finds it significant that petitioner makes no complaint about the present placement of Steven but seeks, as will be elaborated, *infra*, continued jurisdiction by the Commissioner and continuing surveillance of Steven's educational program.

Near the conclusion of the hearing on May 18, 1970, after adverse rulings by the hearing examiner on the recalling of a witness whose testimony had been completed (Tr. 150), and the calling of a witness present in the hearing room other than those whom counsel had been asked to present without subpoena (Tr. 158), petitioner announced that he was "terminating the proceeding" pending the filing of an appeal "before the State Board of Commissioners." (Tr. 163) Respondent thereupon renewed the motion for dismissal on the grounds that the issues raised by the petition and supplemental petition have been rendered moot by the enrollment of Steven in an educational program on and since November 15, 1968. Counsel argues that even if, for the purpose of the motion, it is admitted that Steven was improperly kept out of school for eight days in November 1968, his return to school renders any further relief impossible. Petitioner rejects this argument, saying that a public body such as a board of education should not be allowed to escape the consequences of an improper action simply by correcting it before the grievance can be adjudicated.

The hearing examiner reserved decision on the motion for the Commissioner's determination, and continued the hearing for a period of not less than two weeks to permit petitioner to perfect such an appeal as he might find appropriate, as well as to take such steps to compel the appearance of a witness under subpoena as he might also find appropriate.

On May 26, 1970, petitioner filed before the Commissioner a "Notice of Motion," seeking an order from the Commissioner "to correct the injustices and

procedural and substantive denial of Petitioner's Rights as further Hearings." Petitioner thereafter specifies in seven paragraphs procedural errors which he claims were made by the hearing officer and which he seeks to have corrected at future hearings. The eighth paragraph seeks a ruling on what was argued as the essential issue at the hearing on May 18, 1970. The ninth paragraph asks the Commissioner to rule on the present adequacy of the educational program now being provided for Steven. The tenth paragraph asks the Commissioner to continue jurisdiction in view of the past history of litigation over Steven's educational program "and to prevent the formality of repeated petitions." The eleventh paragraph seeks an investigation, including a hearing if warranted, to determine whether the classification of Steven was proper. Paragraph twelve asks the Commissioner to rule whether he can afford any relief when respondent has voluntarily readmitted Steven to school. Finally, petitioner asks that this Notice of Motion be treated as an amended Petition for such relief as has been sought.

Finally, under an order of the Honorable T. James Tumulty, Judge, Superior Court and Law Division: Essex County, a copy of a report by Alvin Friedland, M.D., of an examination of Steven Applegate on March 1, 1968, was submitted under seal to the Commissioner of Education "for consideration and relevancy" in this matter, "or for such other use as the Commissioner of Education may determine, whose decision will be binding on all points." The hearing examiner finds that this report is not relevant to the issues herein, and recommends that it be placed under seal in the records of this case.

* * * *

The Commissioner has reviewed the report of the hearing examiner.

As to the original and supplemental petitions, the Commissioner determines that any issues raised by the very brief exclusion of Steven from school for a period of eight school days in November 1968 are now moot. This period of time for the study of a behavioral case and the exploration of alternative solutions is not unreasonable, and if in the best judgment of school authorities involved it was not feasible to have Steven in school during this brief time, the Commissioner will not challenge their discretion. In any event, Steven is in school, engaged in a program about which petitioner records no specific complaints, even in the final "Notice of Motion," *supra.* Thus no further remedy is available under the allegations and issues presented by the Original and supplemental petitions. The Commissioner will not decide a moot issue. *Tedesco v. Board of Education of Lodi,* 1955-56 *S.L.D.* 69; *American Jewish Congress v. Board of Education of Jersey City*, 1958-59 *S.L.D.* 101; *Pullen v. Board of Education of Hainesport*, 1965 *S.L.D.* 140

As to the Notice of Motion filed subsequent to the hearing reported herein, the Commissioner will dismiss that also. Having dismissed the original and supplemental petitions, there will be no necessity for further hearing thereon. The Commissioner will refrain from any comment on the alleged procedural errors, such comments being properly within the province of an appropriate appellate body. Rulings of law arising out of the original and

supplemental petitions are disposed of by the dismissal thereof. With respect to the remainder of petitioner's Notice of Motion, which essentially seeks some form of continuing jurisdiction and continuing surveillance or investigation of respondent, absent specific allegations of unlawful conduct, the Commissioner does not deem such activities a part of his quasi-judicial function. The Commissioner is directed by statute to decide controversies and disputes arising under school law. No controversy or dispute is set forth in paragraphs 9, 10, and 11 of the Notice of Motion. The Notice of Motion, and its effect as an amended petition, are accordingly dismissed.

Finally, the Commissioner directs that the report of Dr. Alvin Friedland be kept under seal in the records of this case.

COMMISSIONER OF EDUCATION

June 23, 1971

**DEBORAH JEAN CAPEN, a minor by her parent and Guardian ad Litem, James F. Capen;**
**MICHAEL VOLPE, a minor by his parent and Guardian ad Litem, Dorothy Volpe;**
**SUSAN E. LAENG, a minor by her parent and Guardian ad Litem, William R. Laeng;**
**MARGOT HOWELL, a minor by her parent and Guardian ad Litem, Carolyn C. Howell;**
**JERRY WHELESS, a minor by his parent and Guardian ad Litem, Curtis Wheless;**
**DAVID B. NOLLE, a minor by his parent and Guardian ad Litem, Glenna G. Nolle,**

*Petitioners,*

**v.**

**Board of Education of the Town of Montclair, Essex County,**

*Respondent.*

## COMMISSIONER OF EDUCATION

### Decision On Motion

For the Petitioners, Connell & Connell (Raymond R. Connell, Esq., of Counsel)

For the Respondent, Charles R.L. Hemmersley, Esq.

Petitioners, six resident minor pupils attending the Montclair Public Schools, by their parents and guardians *ad Litem*, have appealed to the

Commissioner of Education to hear and decide a controversy under the school laws, challenging the validity and financial and educational soundness of the plan of the Montclair Board of Education, hereinafter "Board," for racial integration known as the Interim Plan.

The Board denies petitioners' allegations as being unfounded in fact and in law, and asserts that the Interim Plan provides both for racial integration for grades Five through Twelve inclusive, and for a one-year period of widespread community dialogue concerning the formulation of a long-range plan for integration of grades Kindergarten through Four.

Petitioners have filed a Motion for an Order to temporarily restrain the Board from taking any action toward the implementation of the Interim Plan until a plenary hearing has been held on the merits and a decision issued by the Commissioner of Education.

Oral argument was heard by a hearing examiner appointed by the Commissioner on Monday, June 14, 1971, at the Department of Education, Trenton. The report of the hearing examiner is as follows:

Petitioners allege that the Interim Plan provides for redistricting of neighborhood school boundary lines, the transporting of numerous children and the expenditure of public funds, all of which factors will cause irreparable harm to approximately 1400 pupils within the Montclair Public Schools. Further, petitioners contend that, if the Commissioner permits the Board to take any action toward the implementation of the Interim Plan, petitioners' case will be either severely prejudiced or rendered moot. Also, petitioners allege that the Interim Plan was hastily conceived, does not have the support of the community, and may cause unfortunate community reactions. Petitioners opined that the Interim Plan should not have been approved by the Commissioner because the Board did not present all of the facts in seeking approval. Although the issue was not raised by petitioners in their pleadings, they now argue that any action by the Board to implement the Interim Plan will result in a large-scale withdrawal of pupils by their parents from the Montclair Public Schools, thus causing irreparable harm to the entire School District.

The Board denies the allegations of petitioners, and contends that it is merely continuing to implement the decisions of the Commissioner of Education in *Rice, et al. v. Board of Education of the Town of Montclair*, 1967 *S.L.D.* 312, and 1968 *S.L.D.* 192, affirmed by State Board of Education and remanded to the Commissioner to retain jurisdiction, 199. The Board also answers that the Interim Plan is only for 1971-72, and will provide for one year of widespread community discussion to assist the Board in developing a long-range integration plan for grades Kindergarten through Four. Also, the Board argues that the Interim Plan has received the approval of the Commissioner of Education; therefore, the extraordinary remedy of a restraining Order should not be granted since such action could in fact prevent the Board from implementing the Plan in

September 1971, even if petitioners fail to overturn the Board's action as the result of a full hearing on the merits of their appeal. The Board also contends that petitioners are six pupils and do not represent hundreds of other pupils as they allege. Since the school session does not resume until September 1971, the Board states, the six petitioners cannot be harmed by any preparatory planning on its part. A restraint at this juncture, the Board contends, would surely cause the demise of the Interim Plan by preventing the completion of the necessary planning arrangements. If the Interim Plan is set aside by the Commissioner of Education following a full hearing, the Board argues, then the Plan will simply be abandoned and other arrangements will prevail. The Board concludes that petitioners have failed to show that irreparable harm will result if the restraining Order is not granted.

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. The Commissioner notices that the Interim Plan has been adopted by respondent Board in an effort to meet the requirement of alleviating racial imbalance in the Montclair School District. He notices, also, that this Interim Plan has received the approval of the Department of Education and the Commissioner and that the Board is attempting to complete preparatory arrangements for the implementation of this Plan in September 1971.

The words of the Appellate Division of the Superior Court of New Jersey in the case of *Thomas v. Morris Township Board of Education*, 89 *N.J. Super.* 327 (*App. Div.* 1965) bear directly upon the instant matter. The court stated at p. 332:

> "*** 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.*** *Quinlan v. Board of Education of North Bergen Tp.*, 73 *N.J. Super.* 40 (*App. Div.* 1962)***."

The instant matter is tentatively scheduled for plenary hearing on June 29, 1971, at which time petitioners will have the opportunity to prove that the presumption of correctness, which pertains to the Board's action of adopting the Interim Plan, should be overturned. A final decision should be forthcoming prior to the opening of the Montclair Public Schools in September 1971. The Commissioner can find no evidence that petitioners will suffer any irreparable harm if the Board continues to complete preparatory arrangements for the implementation of the Interim Plan in September 1971. On the other hand, the Commissioner concludes that a restraint upon the Board at this time could preclude any possibility of implementing the Interim Plan by September 1971, even if the Board's action withstands petitioners' attack.

The Commissioner reminds both parties that this controversy will receive a fair adjudication, even is such adjudication results in a decision finding the Commissioner's judgment to be in error. This is what all the citizens of this State have a right to expect from the resolution of any controversy arising under the school laws.

The Commissioner finds and determines, for the reasons stated above, that petitioners will not suffer irreparable damage if the Board continues preparatory planning for the implementation of its Interim Plan in September 1971. Also, the Commissioner finds that the Board could be precluded by a restraint from implementing this plan in September 1971, even if successful in the matter controverted here. Accordingly, the Commissioner holds that the Motion for an Order to restrain the Montclair Board of Education from planning the implementation of its Interim Plan is without merit and is therefore denied.

This matter will proceed to a full hearing on the merits on the earliest possible date.

COMMISSIONER OF EDUCATION

July 1, 1971

**In the Matter of the Tenure Hearing of Mary Louise Connolly, School District of the Borough of Glen Rock, Bergen County.**

**COMMISSIONER OF EDUCATION**

**Decision**

For the Complainant Glen Rock Board of Education, Parisi, Evers & Greenfield (Irving C. Evers, Esq., of Counsel)

For the Respondent Mary Louise Connolly, Harold N. Springstead, Esq.

Charges against respondent have been certified to the Commissioner, pursuant to *N.J.S.A.* 18A:6-10 *et seq.*, by the complainant Glen Rock Board of Education, hereinafter "Board." The gravamen of the charges is that respondent uttered expressions offensive to citizens of the black race, and that such expressions constitute conduct unbecoming a teacher. Respondent denies any such utterance.

A hearing in this matter was conducted on April 27, 28, 29, 1971, by a hearing examiner appointed by the Commissioner at the office of the Bergen County Superintendent of Schools in Wood-Ridge. At the conclusion of the hearing, there was an oral summation by counsel. The report of the hearing examiner is as follows:

Respondent is a tenure teacher of English in the Board's employ, and her professional background includes fifteen years of prior teaching experience. On January 5, 1971, she was serving in this capacity, and her lesson plan for the day included a brief review of the book "Black Priest/White Church," by Lawrence Lucas, in each of her classes. The charges contained herein are directly related to this review and are specifically applicable to only one of her class assignments that day; namely, that of the fourth period. During that period, it is alleged, she used the following phrases in the discussion of the book. These phrases as listed below comprise the charges certified to the Commissioner by the Board:

> 1."I'm not prejudiced against 'niggers.' 2.When I'm walking down the hall or street and see one 'nigger' it doesn't bother me, but when I see more than one, it frightens me and I might turn around and walk the other way. 3.'Niggers' are getting uppity. 4.A 'nigger' called me a white racist."

The hearing examiner will consider the charges *seriatim*, and report the testimony pertinent thereto as it was given by students, respondent and others, but he believes such a review of the testimony might better follow a summary capsule review of the first pages of the book itself, which were those referred to by respondent, so that the testimony appears in a pertinent context, particularly with regard to the author's use of the objectionable word in question. A capsule review of the first part of the book is as follows:

The book "Black Priest/White Church" contains on its cover a picture of a young black cleric garbed in priest's raiment and standing in front of what appears to be a stone church. The lettering of the title page is white. Other contrasting shades are black, and the stone of the church is gray.

> "***I am angry and disappointed because I am a black man and a Roman Catholic priest. Being black and Catholic, like being black and anything else in America, is extremely difficult. Being black and a Roman Catholic priest today is an almost impossible combination.***"

Following this exposition, the author proceeds to give his personal background. He was born in Harlem and educated entirely in Catholic schools. This narrative account of his formative years contains examples of the "difficulty" he referred to on page 4. In describing these examples, the term "nigger" is used on occasion. Thus on page 24, in describing one such difficulty, he says:

> "***It's like white folks who invest much money and maintain property values. Then all you need is one black face to come into that neighborhood, look at one house and, zoom, those property values go spiraling downward. It *takes a nigger only a few seconds to destroy years of hard work of good white folk.****" (*Emphasis supplied.*)

Later on in the same paragraph the term "nigger" is used again when the author says:

> "***For those who remained, the Negroes were a psychological boon: they no longer had to feel they were low men on the totem pole. *They could always feel superior to the niggers.****"

Again on page 41, the author states:

> "***There was a white Catholic gentleman with money. He owned a place in Peach Lake which served as a mission chapel for St. Joseph's in the summer. But negroes were not permitted. *Peach Lake was out of bounds for niggers.****" (*Emphasis supplied.*)

And on page 41:

> "***I have never laid eyes on William Peach nor do I know if he ever laid eyes on me. *But to the white man, a nigger is a nigger.****" (*Emphasis supplied.*)

The hearing examiner has quoted these excerpts as examples of the author's way of making a dramatic point that the white man, as a member of a racist society, has, in the past, assigned a predetermined status to the black man and stigmatized him by the thought pattern of a derogatory term.

The book that contained these excerpts was the one the teacher reviewed on January 5, 1971, and basic questions to be decided at this adjudication are whether or not she reviewed it in a sympathetic manner, whether or not she quoted from portions such as those given as examples above, or whether she adopted the words and manner of the author in describing the book and its ideas in her own way.

At the hearing on April 27 and 28, 1971, a total of seventeen students testified. Seven of these witnesses were called by the Board. The rest of them, the balance of the class, appeared for respondent. A review of the testimony of these students establishes some things as probable fact; namely, the atmosphere of the fourth period class on January 5, 1971, the time devoted to a review of this book, and some specific items directly related to the book itself.

It seems probable that Period Four began that day with a question from a pupil addressed to the teacher. That question contains the offensive word "nigger," but it was voiced by the student as part of a quest for an opinion and not by respondent. The dialogue, with regard to this part of the class period, as told by the student in direct examination, was as follows: (Tr. 111-115)

"Q. Would you tell us how the class started, that day?

"A. Well, I came into the class early, as I do every day, because my previous class is right next to it, and for the book report, I turned in, the day before, I had read *Black Like Me*, and –

"Q. Excuse me; what is that book about?

"A. It is a book about racism that takes place down in the South. The guy changes the color of his skin from white to black, and he just experiences what it is like to be a negro, and I started talking with Mrs. Connoly (sic) about the book.

"Q. About your book?

"A. About my book, at first, and that brought to mind the book she was reading, Black Priest, White Church, and it became more of a class conversation, because the class period had begun, and we talked about that book.

"Q. Did you contribute anything toward the discussion, that you recall?

"A. Yes, I did. I mentioned something that *** in the book I read *** 'Black Like Me,' the author wrote something that was of great interest to me. *The author said it's all right for a negro to call another negro a nigger, but it is offensive if a white calls a negro a nigger."* (*Emphasis supplied.*)

Subsequent to this discussion, initiated by one student, respondent evidently launched into a description of the book "Black Priest/White Church," *supra*. The introductory remarks and discussion that followed probably lasted about twenty to thirty minutes. (Tr. 90/2)*

As part of her introductory remarks, respondent evidently held the book up for the class to see, and she pointed to the pictorial cover representation and the use of black, white and gray. She also said that she had known the man who had designed the cover, and she evidently explained why he had used the three colors. (Tr. 47, 64, 71, 81, 89, 104) Following these remarks about the cover, respondent testified that she read the dedication paragraph word for word as it appears in the book. It is as follows:

> "To my mother, family, and Malcolm X, who have made me black: to Lorez Harden, fighter for good; to Tom Buck, who urged me to write; to Ann Brennan, friend and secretary; to black Catholics wherever they are; to all real Christians black and white and yellow; everywhere – this book is affectionately dedicated."

*Transcript-Page 90, Volume 2

When asked on direct examination why she had read this dedicatory passage to the class, word for word, respondent said in reply: "I thought it was moving." (Tr. 76-2)

Following these introductory remarks, respondent discussed the book itself. According to the testimony, she probably read parts of the book while discussing it. (Tr. 47, 71, 120, 123) Respondent's testimony is that sometimes she "was reading," and sometimes she was "paraphrasing," with regard to approximately the first 90 pages of the text of the book. (Tr. 74/2) Her testimony stated that she herself had not progressed in her reading beyond this point. In any event it was either the reading from the book, or the discussion which occurred in the subsequent few minutes, which occasioned the charges *sub judice*. The consideration and findings with respect to the four specific charges is as follows:

1. The First charge - that respondent said on one occasion "I'm prejudiced against niggers" receives scant substantiation in the testimony. Two witnesses testified that respondent uttered these words (Tr. 55, 60), but two other witnesses flatly stated she had not. (Tr. 89, 5/2) Respondent herself avers that she never uttered the phrases. (Tr. 110/2) Thirteen of the other students in the class offered no testimony in this regard.

The hearing officer finds, therefore, that the evidence cannot constitute support of the allegation as true in fact, since it falls far short of a preponderance of the evidence needed for such a finding, and the little evidence that there is, is a direct dichotomy when compared with other testimony.

2. The second charge - that respondent said "When I'm walking down the hall or street and see one nigger it doesn't bother me but when I see more than one it frightens me and I might turn around and walk the other way," also receives little positive substantiation in the testimony. On the one hand , two students testified that respondent had used words to this effect (Tr. 5, 70), and another witness stated flatly that respondent had not said these things (Tr. 5/2), and gave another reason for what could have occasioned the charge. This alternate version of the alleged dialogue is found at Tr. 5/2 and is as follows:

"A. It seems to me that she said, a friend of mine I know told me that when she walks down the street when she sees one Negro she is not afraid but if there is a whole group there she might turn the other way.

"Q. And what was she saying that as an example of, do you know?

"A. Because there was an instance in the book where some white priests and a black priest were walking down a street or they were in a car, I'm not sure which, and this was a street, I guess, in the ghetto area and the white priests acted sort of afraid to go down there and then the black priest said it was all right, you know, he wanted to go down there, down the street, he wasn't afraid."

The book (R-1, pp. 35-37) has references which may be pertinent to this testimony. Respondent herself flatly and unequivocally denies this charge as stated, *supra.* (Tr. 110/2)

The hearing examiner finds that the evidence in support of this charge also falls far short of the preponderance of the credible evidence that is necessary for a finding that the charge is true in fact. On the one hand, there are the statements of two witnesses who say respondent uttered these words. Another student offers a direct refutation of the charge, and thirteen students are silent. Respondent's flat denial of the charge and her explanation of the book's exposition from which it could have developed into the quotation alleged herein (Tr.81/2) receives a direct substantiation in the testimony of the student quoted, *supra,* from the transcript. (Tr. 5/2) The hearing examiner believes, therefore, that the phrase attributed to respondent and contained in this charge was a tragic misrepresentation of an honest attempt by her to describe the feelings of fear that the book "Black Priest/White Church" portrays on pages 35-37.

3. The third charge - that respondent said "niggers are getting uppity," is substantiated in testimony by only one student (Tr. 79), and this testimony is tentative. The answer from which this charge receives even this one substantiation is not definite. The answer was:

"A. Oh, well I *believe* she said I never said anything about any niggers, or—and niggers are getting uppity. *(Emphasis supplied.)*

Fourteen students are silent on this allegation. One student offered direct testimony in opposition. (Tr. 128) The dialogue in this regard was:

"q. Did you say that, for example, a group of kids said that she said the niggers are getting uppity? I didn't hear that or anything like it. Did you also say that?

"A. Yes.

Respondent's answer to the question, "At any time during that class did you say the niggers are getting uppity?" was "No, sir."

The hearing examiner finds that this specific charge is almost totally unsubstantiated by proof elicited at the hearing, and that the testimony of one witness in this regard would be a flimsy reason either standing alone or in a context with others, to deny respondent any of the rights she has earned as a tenure teacher with long service to the schools.

4. The fourth charge - that respondent said a "nigger called me a white racist," received support from only two of the seventeen students in the class. The first of these witnesses was not as definite in her testimony (Tr. 18) as the second witness (Tr. 74). A third witness on this charge offered this testimony: (Tr. 109)

"Q. Did she ever say that she had been called any name, in connection with members of the negro race?

"A. Yes, she did.

"Q. What did she say about that?

"A. She said that one time in her previous class she had been called a racist."

Later – at Tr. 110 – this witness said:

"Q. What did Mrs. Connolly say, in connection with the fact that someone had once referred to her as a racist?

"A. That it was not true."

Later – at the same page:

"Q. And at no time did you ever hear the expression nigger used?

"A. No; I didn't."

Respondent herself replied that she had "never" made the statement contained herein.

The hearing examiner concludes that the testimony relative to this charge is also contradictory and inconclusive, and that it cannot be found to be true in fact while grounded on so insubstantial a base.

Having found the charges to be unsupported by the weight of the testimony, the hearing examiner also observes that the testimony about what respondent is alleged to have said has been clouded by the passage of time and colored by hearsay and gossip. (Tr. 101, 118, 7/2, 20, 42,66, 84, 108) However, the hearing examiner does conclude that the word nigger was probably used in the class:

(a) first, by the student who posed a question with use of the offensive word included in it.

(b) probably, by respondent in reading from or paraphrasing the book "Black Priest/White Church."

However, even this conclusion is not definite because of the contradictory nature of the evidence. Some students say they heard the word. (Tr. 36, 41, 54, 113, 123, 19-21) Others say it was not used. (Tr. 89, 95, 97, 105, 5/2, 13/2)

In any event the school discussion that followed ballooned into an extraordinary exaggeration within the school community best evidenced by the testimony of one student (Tr. 7/2), who said he was asked by a friend whether or not it was true that respondent had used the word fifty times or more in class. The boy's reply, uttered in words that expressed amazement at the exaggerated charge, were "I didn't hear it" and "I was totally surprised." (by the question) (Tr. 7/2)

However, if the word was used at all, and the examiner believes it was probably used in the manner stated, *supra*, the basic issue that remains is how it was used. Was it used in derogation, or was it used as found in the context of the book's exposition?

In this regard, one witness testified that he was urged by another student to go and "tell the people that Mrs. Connolly had used the term derogatorily against the black race." He refused, however, because he maintained that respondent "didn't say anything." (Tr. 97) He was joined in this refusal by many others (Tr. 113, 6/2, 19/2), and the hearing examiner opines that if the word was used, it was not used derogatorily, but as the book used it and in exposition of the author's ideas of a racist society as he perceives it to be.

However, the examiner's finding in this regard is based not so much on the testimony with its many conflicts, but on the background, record and character of respondent. The examiner firmly opines that a perusal of her record belies any supposition that the word in question could have been used or was used in a derogatory manner. She had marched in the Martin Luther King procession at the time of his death with a child in her arms because she, and friends who were with her, wanted their children to be able to say when they grew up that "they

had participated in some way." (Tr. 67/2) She had previously, and without incident, reviewed other books with an exposition of racial viewpoints that were different. (Tr. 68) She had been picked for this 10th grade English assignment by virtue of the fact that she had already proven she could sympathetically treat and teach the sensitive material to be covered during the year. (Tr. 166) Many persons have attested to her fairness, lack of previous examples of bias, and fine teaching record. In addition, the examiner holds that the testimony conclusively proves that all of respondent's introductory remarks about the cover of the book "Black Priest/White Church," and her reading of the dedication page were sympathetic to the book itself, and that allegations that derogatory comments were later made are implausible when viewed in such a context.

Thus, when viewed against the whole previous record of respondent, the charges contained herein appear as unlikely, and ill-founded, since there is no prior evidence of bigotry or any other substantial reason why respondent could have or would have said the things she is charged with saying. To the contrary, the total record denotes a teacher of sensitive concern for all students and of all races who, on January 5, 1971, was continuing, as she had in the past, a policy of reviewing the books of many authors and doing so in a professional manner.

The hearing examiner opines that some of the testimony against respondent may have been motivated by malice (Tr. 15, 27, 37, 45, 69), and that other testimony was derived from an immature understanding of a sensitive and rather sophisticated explanation of racism and a racist society, as expounded by the author and reviewed by respondent. The net effect of this incident, however, is that the allegations which were made, enlarged upon, exaggerated and distorted have caused suffering to be inflicted on members of the school's black community, on respondent and on the school itself.

In conclusion, the hearing examiner has carefully reviewed all of the testimony educed at this hearing, and he finds that the weight of the credible evidence against respondent with respect to the specific charges of this petition falls far short of conclusive proof that she ever said the things attributed to her or that she ever said anything detrimental to the black race. To the contrary, the examiner believes that respondent's testimony is credibly supported by the majority of those who testified on her behalf, and supports the conclusion that on the day in question, respondent was trying in a conscientious manner to give the class she was teaching a series of insights into what white racism is all about. Particularly, he believes she was reviewing the tone and frank viewpoint of an author, who is both forthright and frank, and that in so doing, she may have used the very language he used. The author's words may have been her words. The author's ideas were the ones she tried to convey. When these ideas are viewed in retrospect, it appears that both respondent and her fourth-period class became enmeshed in a web of misquotations, vicious hearsay and distortion to the harm of everyone concerned.

It is clear to the hearing examiner that the charges contained herein are not supportable and should be promptly dismissed.

The Commissioner has carefully reviewed the report of the hearing examiner and concurs with the findings expressed therein. He observes that this adjudication rests primarily on the basis of testimony given by students, and that it calls anew for a reiteration of the caution which the Commissioner has previously voiced with regard to such testimony. It must be examined with extreme caution, and with meticulous care. *Palmer v. Board of Education of Audubon*, 1939-49 *S.L.D.* 183; *In the Matter of the Tenure Hearing of Pauline Nickerson, Peapack-Gladstone, Somerset County*, 1965 *S.L.D.* 130; *In the Matter of the Tenure Hearing of Mary Worrell, School District of the Township of Lumberton, Burlington County*, decided by the Commissioner November 16, 1970.

In *Palmer v. Board of Education of Audubon, supra*, at p. 188, the Commissioner made the following observation equally applicable to the matters considered herein:

> "*** It is the opinion of the Commissioner that testimony of children *** against a teacher, whose duty it is to discipline them must be used with extreme care. It is dangerous to use such testimony against a teacher; it is likewise dangerous not to use it. The necessities of the situation sometimes make it necessary to use the testimony of school children. If such testimony were not admissable, the children would be at the teacher's mercy because *there is no way to prove certain charges except by the testimony of children. (Emphasis supplied.)*

In the instant matter the testimony of students is conflicting and provides no basis for a finding that respondent said the things that were attributed to her. Therefore, the petition herein is dismissed, and the Commissioner directs that respondent be restored to her teaching position.

The Commissioner is also constrained to express the hope that the incidents which were the subject of this adjudication will not restrain either Mrs. Connolly or any other teacher from speaking freely in open and frank discussion about the critical problems which must be faced by all members of our society. This expression is based on the firm belief that in such discussion there is learning, and that an open consideration of the viewpoints of other people offers the only practical remedy for the alleviation of prejudice.

Such open discussion is also an important component part of academic freedom without which all of our schools would become sterile instruments of rote recitation. While the exercise of this freedom, as practiced here by Mrs. Connolly, is at times painful, and while on occasion, it may grate on prejudice and clash dissonantly with preconceived notions, it is certainly true that our society in the United States has thrived on just such a diet of grating and opinions freely expressed for 200 years, and that the present, of all times, can ill afford a repressive alternative.

COMMISSIONER OF EDUCATION

July 2, 1971

**Norman A. Ross,**

*Petitioner,*

**v.**

**Board of Education of the City of Rahway,
Union County,**

*Respondent.*

## COMMISSIONER OF EDUCATION

### Decision on Motion

For the Petitioner, *Pro Se*

For the Respondent, Magner, Abraham, Orlando & Kahn (Leo Kahn, Esq., of Counsel)

Petitioner, a teacher under tenure in respondent's schools, alleges that the position he held as dean of students was improperly and unlawfully abolished by respondent. The allegations are denied by respondent, who has moved for dismissal of the Petition as a matter of law.

A hearing on the motion was held on April 28, 1970, at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner. Certain documents from which excerpts were read at the hearing were subsequently received and marked as evidence. Letters sent by petitioner to the president of respondent Board were received only as evidence that such letters had been written, but not as to the substance of the letters themselves. A copy of respondent's report and opinion of a grievance proceeding brought by petitioner was stipulated to be a part of the record herein. Respondent has filed a Memorandum of Law. The report of the hearing examiner is as follows:

The facts in this matter are developed from the uncontested statements of fact contained in the pleadings, and from the documents stipulated or received in evidence. On or about April 17, 1968, petitioner, then a classroom teacher, was appointed to a newly-created position as dean of students in respondent's high school. It is acknowledged that respondent created the position in a period of unrest, with the intent that the position might provide an improved liaison between the school administration and the students. The evidence indicates that respondent regarded the position as experimental, but petitioner contends that he was led to believe that it was to be permanent. In any event, petitioner occupied the position and performed the duties thereof for the remainder of the 1967-68 school year, receiving extra compensation for extra services.

At its meeting on August 21, 1968 (R-1c), respondent voted to continue the position of dean of students as a full-time position, with specific assignment of duties, but with no provision for extra compensation, on a semiannual basis,

and petitioner was appointed to the position for the half year ending February 1, 1969. Petitioner filed a grievance pursuant to respondent's grievance procedure, protesting the semiannual nature of the position. A hearing on the grievance was held by the Board on October 14, 1968, after which respondent rendered an opinion reaffirming its contention that the position was experimental and of a temporary nature, and stating that the position "would be best served by a change of face from time to time." (Opinion-Grievance Procedure No. 8) However, respondent voted to reconstitute the position as an annual one, and extended petitioner's appointment for the period ending June 30, 1969. Respondent denied any discrimination in eliminating the extra compensation for the position, contending that no policy, practice nor rule prohibited such a determination.

Petitioner continued as dean of students to June 30, 1969. He made application for reappointment pursuant to the "posting" of the position for 1969-70. However, on July 18, 1969, respondent took official action to abolish the position of dean of students, and petitioner reverted to his former teaching position. The Petition herein was filed on August 22, 1969, and is based upon a provision of respondent's grievance procedure providing for an appeal to the Commissioner of Education from the adverse decision by respondent on petitioner's grievance.

Petitioner contends that he satisfactorily performed the duties of his position, and he is aggrieved by respondent's decision to "post" the position regardless of his success therein, and without consultation with him, actions which petitioner describes as discriminatory against him. Petitioner therefore seeks an order directing respondent to reestablish the position and to reappoint him thereto, with the restoration of the extra compensation originally attached to the position. Petitioner alleges, but without offer of substantive proof, that the Board's actions in this matter are retaliatory for his successful pursuit of a salary-adjustment petition before the Commissioner of Education. See *Ross v. Board of Education of Rahway*, 1968 *S.L.D.* 26.

In support of its motion that the Petition be dismissed as a matter of law, respondent points out that petitioner completed his appointment to the position prior to its abolition, and that petitioner had acquired no tenure right to the position under the existing statute. *(Cf. N.J.S.A.* 18A:28-6.) Respondent further argues that the determination to abolish a position lies solely within the discretion of the Board of Education, and even if petitioner had in fact occupied the position at the time it was abolished, his reassignment to his prior position was within the power of the Board. *Lascari v. Lodi Board of Education*, 1954-55 *S.L.D.* 83, affirmed State Board of Education 89, affirmed 36 *N.J. Super.* 426 (*App. Div.* 1955); *McDonald v. Board of Education of Jersey City*, 1965 *S.L.D.* 119. In *McGrath v. Board of Education of West New York*, 1965 *S.L.D.* 88, reversed State Board of Education 1966 *S.L.D.* 247, the State Board recognized that the respondent Board of Education had, by reducing the number of deans, in effect abolished a position, but held that the incumbent petitioner, even

though not under tenure in the position was protected by his seniority over other incumbents from transfer to a prior teaching position. The hearing examiner finds in the instant matter that petitioner was not incumbent in the position at the time it was abolished, having completed the term for which he was appointed to the position.

Respondent also urges that petitioner is barred by laches from appealing the Board's determination to post the position of dean of students annually. The determination of the Board to this effect is dated November 20, 1968. Petitioner's appeal to the Commissioner was filed on August 22, 1969, some nine months later.

The Commissioner has reviewed the report of the hearing examiner as set forth herein.

The Commissioner finds and determines that petitioner was appointed to the position of dean of students for the period ending June 30, 1969. Since the record produces no information concerning petitioner's possession of a proper certificate for such a position, which partakes of the nature of guidance (see *McGrath, supra*), it cannot be definitively determined that petitioner's appointment falls under the protection of *N.J.S.A.* 18A:28-6. However, assuming *arguendo* that the appointment was to a position requiring a particular certificate and that petitioner is in possession of such a certificate, the statute clearly provides that the employing board of education may return petitioner to his prior position before the conditions for acquiring tenure of position have been met. This was done in petitioner's case, and petitioner was fully aware of the Board's intention to do so if it so elected. The position became vacant, therefore, on June 30, 1969. Subsequently, and before the vacancy was filled, the Board took appropriate action to abolish the position. Full authority for such action is found in *N.J.S.A.* 18A:28-9, and in the decisions of the Commissioner, the State Board of Education, and the courts cited, *supra.* Respondent has acted in accordance with the law and in the exercise of its discretion, and under such circumstances it is well settled that the Commissioner may not intervene. *Frank et al. v. Board of Education of Englewood Cliffs*, 1963 *S.L.D.* 229, 231.

Having so determined, the Commissioner finds no need to consider the question of laches. For the reasons set forth, the Petition is dismissed.

COMMISSIONER OF EDUCATION

July 15, 1971

**Gerard E. Murphy,**

*Petitioner,*

**v.**

**Board of Education of the Borough of Cliffside Park, Bergen County,**

*Respondent.*

## COMMISSIONER OF EDUCATION

### Decision

For the Petitioner, Gladstone, Hart, Kronenberg, Mandis, Rathe & Shedd (Joseph C. Woodcock, Esq., of Counsel)

For the Respondent, Gigante & Aslanian (Nicholas L. Gigante, Esq., of Counsel)

Petitioner, the Superintendent of Schools of the Borough of Cliffside Park, Bergen County, hereinafter "petitioner," appeals from an action of the Board of Education of the Borough of Cliffside Park, hereinafter "Board", which rescinded a prior Board resolution granting him tenure.

The facts in the matter were presented to a hearing examiner appointed by the Commissioner on May 4, May 20 and May 27, 1971, in the office of the Bergen County Superintendent of Schools, Wood-Ridge, and on June 1, 1971, in the Freeholder's Room, Bergen County Administrative Building, Hackensack. The report of the hearing examiner is as follows:

Petitioner was originally employed by the Cliffside Park Board of Education for the period beginning August 1, 1969, through June 30, 1970. Under the contract of employment, petitioner was to assume the duties of the Superintendent of Schools. The contract was renewed for a one-year period beginning July 1, 1970, and ending June 30, 1971.

However, on December 30, 1970, the Board passed a resolution by a five to four vote granting the petitioner tenure in the position of Superintendent of Schools after limiting the probationary period necessary for the acquisition of tenure to one year, five months. The history of the procedure of the Board leading to its grant of tenure to petitioner is as follows:

During early December 1970, the question of early tenure for petitioner was raised among some Board members. No exact date was elicited from the testimony. However, several Board members testified that the question was openly discussed in a caucus meeting of the Board on December 14, 1970, at which time all nine members of the Board were present and expressed their opinions.

The testimony revealed also that the Board discussed the idea of early tenure with its counsel who advised the Board to follow the procedures as outlined in the opinion of the New Jersey Supreme Court in the *Rall* matter. *Cf. Clifford L. Rall v. Board of Education of the City of Bayonne, Hudson County*, and the *State Board of Education, State of New Jersey*, 54 *N.J.* 373.

The Board, following the advice of its counsel, announced publicly its intent to grant early tenure to the Superintendent of Schools. Thereafter, it held a public hearing on December 28, 1970, to invite comments from the public and to allow the Board members the opportunity to answer questions from the public and to state individually their own reasons for entertaining the early tenure question. The comments of the President of the Board to the public at that hearing, as contained in the official minutes of the Board, are pertinent and are reproduced fully as follows:

"CLIFFSIDE PARK BOARD OF EDUCATION

MINUTES

of a

Public Hearing held for the purpose
of discussion of tenure for the
Superintendent of Schools

December 28, 1970

"The public hearing convened at 8:00 P.M. on Monday, December 28, 1970 in the Auditorium at School No. 5, Day Avenue, Cliffside Park, New Jersey. The following members of the Board of Education were present:

Mr. Allen, Mr. Bucco, Mr. Dreyfuss, Mr. Hirt, Mr. LeRose, Mr. Spadaccini and Dr. Salandra.

Mr. Apkarian arrived at 8:15 P.M.
Dr. Cangiano arrived at 8:30 P.M.

"Mr. Allen called the hearing to order at 8:00 P.M., and read the following ground rules, which he stated would be strictly adhered to during the meeting:

" '1. Discussion will be limited to Subject at hand: 'To discuss whether the tenure of the position of Superintendent of Schools in Cliffside Park should be considered.

" '2. Comments will be limited to three minutes per person.

" '3. No one will be heard a second time until every other person has been heard.

" '4. Comments from Audience will be limited to citizens of Cliffside Park or Cliffside Park Board of Education Staff members.

" '5. It is expected that everyone present will conduct themselves with proper decorum and will preserve the dignity of this hearing.

" '6. A short recess will be called at 10:00 P.M. ' "

"Mr. Allen then read the following prepared statement:

" 'This public hearing was called for the sole purpose of discussing whether the tenure of the position of Superintendent of Schools of Cliffside Park should be considered.

" 'First let me begin by telling you why I am in the position to make this proposal. Almost two years ago, you, the citizens of Cliffside Park, elected me to the position of Trustee of our school system. That meant you had confidence in my integrity and judgment to make important decisions concerning the educational welfare of some 2600 students. It is with this deep sense of responsibility that I carefully considered, checked the legality of and finally made the following proposal.***

" 'On Monday, December 14, 1970, I proposed to the Board of Education the reduction of the probationary period for tenure from 3 years to 1 year and 5 months for the position of Superintendent of Schools.

" 'I imagine the question that is foremost in your minds is, 'Why do you want to reduce the probationary period?' I'll answer that question saying that a full 3 years probation is not always necessary. In some cases, the full 3 year period might be necessary for an administrator to show his full potential. This may be especially true if the person is from outside the system, needing precious time to familiarize himself with the staff, the curriculum, etc. Dr. Murphy has shown his unusual ability to absorb this and more pertinent information, analyze the facts, plan a course of action and implement it, in less than a year and a half.

" 'I make this statement from my personal observation of the Superintendent.' "

"Mr. Allen then stated that the meeting was open for remarks or questions from the audience.

"Mr. John Cassesse requested that the other board members voice their opinions concerning the issue. Several other members of the audience concurred with Mr. Cassesse in this request. Each board member present then stated his views.

"The following individuals then made comments on the issue:

John Cassesse, J Vedelli, B. Kunz, A. Schwerzler,
F. Biasco, C. Calvano, M. Babbini, N. Gigante,
K. Nilson, J. Terranova, P. Scala, C. Hennessey,
S. Wzyrzykowski, F. Gramerstorf, P. Rotondi,
D. Christy, C. Flick, W. Heydel, M. Kingman,
H. Umandky, O. Gravemen, R. Gaetano, C. Cavaliere,
B. Wiess, M. Pepe, B. Dietrich, Mr. Bigelow,
C. Aleia, L. Manowitz, J. Bucco, J. Fatigo, P. Scala,
S. DiFiore, N. Lazarri, J. Ray.

"After everyone who wished to present his views had done so, Mr. Allen declared the meeting adjourned. The time of adjournment was 9:55 P.M.

Roberta L. Lee, Secretary "

Testimony was educed from one witness that about 80% of the people present at the public meeting of December 28, 1970, who spoke on the issue of early tenure, were against early tenure for the Superintendent. Other testimony indicated that the responses from the audience were about evenly divided on the issue.

On December 29, 1970, the Board met again in caucus session to discuss its proposed action and its reactions to the public hearing held on the previous night. All nine members were present, and they all expressed their views on the early-tenure proposal. On the next evening, December 30, 1970, the Board held its previously-announced public meeting and passed the following resolution by a five-to-four vote:

"BE IT RESOLVED, Tl.at the Board of Education of the Borough of Cliffside Park, after due consideration and deliberation, hereby changes the policy pertaining to the probationary period necessary for gaining tenure for the office of Superintendent of Schools of the Borough of Cliffside Park from the statutory period of three years, to a period of one year and five months, effective immediately."

Immediately thereafter, the Board passed a second resolution to wit:

"BE IT RESOLVED, That in the exercise of its discretion, and acting in accordance with the statutes in such case made and provided, the Board of Education of the Borough of Cliffside Park hereby grants to and confers upon Dr. Gerard E. Murphy tenure in his position of Superintendent of Schools of the Borough of Cliffside Park, effective immediately."

Subsequent to the February 8, 1971, school board election, when a new majority bloc gained control of the Board of Education, the new Board, by a vote of six to three, adopted the following resolution at its regular meeting on March 11, 1971:

> "BE IT RESOLVED, that the two Resolutions of the old Board adopted on December 30, 1970, and more particularly set forth hereinabove at length are hereby revoked and repealed ab initio thereby declaring said Resolutions invalid from their inception and more particularly revoking the automatic tenure which was conferred and granted to the said Dr. Gerard E. Murphy in his position as Superintendent of Schools of the Borough of Cliffside Park and further revoking the Resolution reducing the statutory period from three (3) years to one (1) year and five (5) months; and
>
> "BE IT FURTHER RESOLVED, that since the automatic tenure, conferred and granted to Dr. Gerard E. Murphy, in his position as Superintendent of Schools, is hereby immediately revoked, the Board recognizes only the original one (1) year contract entered into between the said Dr. Gerard E. Murphy and the prior Boards and the renewal one (1) year contract of employment as Superintendent of Schools of the Borough of Cliffside Park entered into on the 29th day of January 1970, neither of which confers tenure; and
>
> "BE IT FURTHER RESOLVED, that before Dr. Gerard E. Murphy can acquire tenure as Superintendent of Schools of the Borough of Cliffside Park, he must fulfill his entire probationary period as more particularly set forth in *N.J.S.A.* 18A:20-5."

In adopting this resolution, the Board alleged that the procedures and the resolutions passed on December 30, 1970, were a "sham." The new majority bloc of members aver that the old Board was mindful of the upcoming elections and acted "arbitrarily," "capriciously" and in bad faith to grant the Superintendent tenure while the old Board still had the majority - bloc vote. They further aver that petitioner's second one-year contract is the only one in full force and effect and that it should terminate by its own provisions on June 30, 1971.

To support its contention of "bad faith," the new Board argues that most of the people present who spoke at the public hearing of December 28, 1970, were opposed to early tenure for the Superintendent of Schools and that the Board ignored those public responses.

The Board argues further that there was at least one private meeting of the old Board majority at which the minority members did not attend and petitioner's tenure was discussed, and that the old Board therefore knew it had the votes, and proceeded accordingly to set up the subsequent public hearing on

December 2 1970, the caucus meeting on December 29, 1970, and the public meeting on December 30, 1970, to give its planned action the cloak of a court-accepted procedure. *Rall, supra* Such procedure, avers the Board, was in bad faith and was an arbitrary and capricious action which must be set aside.

The new Board majority further relies on *George I. Thomas v. Board of Education of the Township of Morris, Morris County*, 89 *N.J. Super.* 327, affirmed 46 *N.J.* 581, in which the Court set aside the action of a board of education granting its superintendent of schools (Thomas) early tenure. In establishing "bad faith," the Court determined that the matter of early tenure for the superintendent in *Thomas, supra*, "was privately discussed and planned in advance, but notice thereof was withheld from the other board members and the public." It also appears that the minority board members in that matter were not even permitted to have some questions answered before the resolution granting the superintendent tenure was put to a vote and adopted. Such is not the case herein.

In the instant matter, testimony was educed which alleged that the majority Board members had met, and that the entire procedure was pre-planned and in bad faith. Bad faith is defined in *Black's Law Dictionary* as follows:

> "The opposite of 'good faith,' generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive.***"

The Board of Education, as constituted on December 30, 1970, executed a resolution granting petitioner early tenure. (P-2) That resolution was passed subsequent to the following series of events:

a. In early December 1970, the question of early tenure for petitioner arose.

b. December 14, 1970, - A caucus meeting of the Board was held to discuss early tenure.

c. December 22, 1970 - The Board discussed the idea of early tenure with its counsel.

d. The Board announced a public hearing date and a public meeting date to discuss and determine the possibility of early tenure for the Superintendent.

e. A public hearing was held on December 28, 1970.

f. A Board caucus meeting was held on December 29, 1970, to discuss the meeting of the 28th.

g. A public meeting was held on December 30, and a resolution was passed shortening the period for granting tenure to a superintendent to 17 months, and a resolution was then passed granting petitioner immediate tenure. (P-2, *supra*)

In all of the meetings, every Board member was present and had an opportunity to express himself.

The Superintendent of Schools has not been charged with nonperformance of his duties. Moreover, several witnesses spoke highly of new programs instituted by the Superintendent and the revitalization of existing programs that had already improved the quality of education in the school system. However, the new Board President testified that he opposed petitioner's original appointment because he felt that a better qualified man for the position was already in the employ of the Board and should be given the job. Despite the testimony and cross-examination of several witnesses, the hearing examiner concludes that the elements of "bad faith" have not been established by the Board.

On the first day of the hearing, respondent made a motion to dismiss on the grounds that petitioner had not proved his case which alleged that the new Board had improperly revoked tenure for the Superintendent. The hearing examiner reserved decision on the motion for the Commissioner and proceeded to hear the merits of the instant matter.

* * * *

The Commissioner has read the report of the hearing examiner and reviewed his findings and conclusions.

The Board, which subsequently granted petitioner early tenure, was duly empowered to do so by law. Their action was taken pursuant to *N.J.S.A.* 18A:28-5, which reads in pertinent part as follows:

> "The services of all teaching staff members including *** superintendents *** shall be under tenure during good behavior and efficiency and they shall not be dismissed *** except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause *** after employment in such district or by such board for:
>
> (a) three consecutive calendar years, or *any shorter period* which may be fixed by the employing board for such purpose ***." (*Emphasis supplied.*)

The Board's action at all times was in the open. Their consideration of early tenure was discussed with all Board members on more than one occasion. Moreover, the Board held a public meeting to explain its intent and to weigh the feelings of the community. This hearing was followed by another caucus meeting to discuss that public hearing before the Board finally met in public to pass the resolutions (a) shortening the period of time necessary for a Superintendent to acquire tenure in the Cliffside Park School System, and (b) granting immediate early tenure to its Superintendent of Schools.

In *Thomas, supra,* the Court said:

> " *** 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. *** " (at p. 332)

And also:

> " *** On the other hand, the October 18, 1961 episode, no matter how well intentioned, inasmuch as it involved a change in board policy in such a vital matter, lacked the essential elements of notice, deliberation and fair opportunity to be heard. In short, the action was not taken in good faith. As noted in *Cullum,* at *p.* 294, 'if a public meeting is to have any meaning or value, final decision must be reserved until fair opportunity to be heard thereat has been afforded.' *** " (at pp. 334-335)

The new Board makes the point that most of the people who spoke at the public hearing on December 28, 1971, spoke out against early tenure for petitioner. But, other testimony denies this allegation and avers that the remarks were about half and half. Being an autonomous body, the Board must act independently after analyzing information it receives relative to any matter. To suggest that the Board would weigh the "pros and cons" and rule always in favor of the majority, suggests that the Board should govern by public concensus or ballot on controversial issues. Such a conclusion is clearly not the legislative intent in granting boards of education statutory powers pursuant to *N.J.S.A.* 18A:28-5, *supra,* which authorizes a board of education to set a shorter period of time for a category of persons to gain tenure.

Absent a determination that the Board, by granting early tenure, acted in bad faith or that its action was arbitrary, capricious, or unreasonable, the resolution granting petitioner tenure was a proper exercise of the discretionary authority of that Board. In *Rall, supra,* the Court said:

> " *** Under the circumstances we think the legislative act of the Board - the resolution - should be construed broadly to do what it was intended to

do, *i.e.*, meet and satisfy the requirement of the statute. Therefore we hold that the resolution shortened the period for acquisition of tenure for superintendents of schools generally - not just for Dr. Rall - to six and one-half months of service. That rule now prevails and will continue to do so unless and until a board of education adopts another rule of general application fixing a different tenure qualifying period. *** "

The Commissioner directs, therefore, that the Cliffside Park Board of Education's resolution of March 11, 1971, setting aside the earlier resolution of the Board, dated December 30, 1970, which granted petitioner tenure, be declared null and void and of no force and effect.

Dr. Gerard E. Murphy is, therefore, Superintendent of Schools in the Borough of Cliffside Park and remains under tenure in that capacity pursuant to *N.J.S.A.* 18A:28-5, *supra.*

COMMISSIONER OF EDUATION

July 16, 1971

**Board of Education of the Woodstown-Pilesgrove Regional School District,**

*Petitioner,*

**v.**

**Mayors and Councils of the Borough of Woodstown and Township of Pilesgrove, Salem County,**

*Respondents.*

## COMMISSIONER OF EDUCATION

### Decision

For the Petitioner, Burton D. Zehner, Esq.

For the Respondents, Acton and Point (Lawrence W. Point, Esq., of Counsel)

Petitioner, hereinafter "Board," appeals from an action of respondents, hereinafter "Councils," pursuant to *N.J.S.A.* 18A:22-37, certifying to the Salem County Board of Taxation a lesser amount of appropriations for the 1971-72 school year than the amount proposed by the Board in its budget which was rejected by the voters. The facts of the matter were submitted to a hearing examiner appointed by the Commissioner on June 4, 1971, at the State Department of Education, Trenton.

At the annual school election on February 2, 1971, the legal voters of the Regional School District of Woodstown-Pilesgrove rejected the appropriations for school purposes proposed by the Board. The proposed appropriations presented to the legal voters of the School District were as follows:

| | |
|---|---|
| Current Expense | $762,285 |
| Capital Outlay | 29,970 |
| Total | $792,255 |

Within the time prescribed by law, Councils conferred with the Board and, after discussion, determined that the amounts to be raised by local taxation be reduced or changed as follows:

## REVENUE – APPROPRIATION BALANCE

| Acct. No. | Item | Budgeted by Board | Councils' Proposal | Amt. Approp. from 1970-71 Surplus |
|---|---|---|---|---|
| 1A | Current Expense as of July 1, 1970 | $ 7,500 | $52,400 | $44,900 |
| 1B | Capital Outlay as of July 1, 1970 | 2,500 | 7,500 | 5,000 |
| | Totals | $10,000 | $59,900 | $49,900 |

## CURRENT EXPENSE

| Acct. No. | | Budgeted by Board | Councils' Proposal | Amt. Reduced |
|---|---|---|---|---|
| J110F | Sal.-Supt.'s Office | $ 53,000 | $ 32,000 | $ 21,000 |
| J211 | Sal.-Principals | 49,300 | 46,600 | 2,700 |
| J213 | Sal.-Teachers | 1,002,700 | 963,200 | 39,500 |
| J420C | Misc. Exp.-Health Services | $ 12,950 | $ 5,950 | $ 7,000 |
| Sub-Total-Current Expense | | $1,117,950 | $1,047,750 | $70,200 |

## CAPITAL OUTLAY

| | | | | |
|---|---|---|---|---|
| L1220 | Sites | $ 10,000 | $ 4,000 | $ 6,000 |
| L1230 | Buildings | 2,800 | 500 | 2,300 |
| L1240 | Equipment | 20,170 | 10,170 | 10,000 |
| Sub-Total-Capital Outlay | | $ 32,970 | $ 14,670 | $18,300 |
| | Totals | $1,150,920 | $1,062,420 | $88,500 |

Councils' allocation of surplus of $44,900 from current expense and $5,000 from capital outlay from the 1970-71 school budget further reduced the amount to be raised by taxation by $49,900, setting the final total reduction at $138,400.

The testimony of the auditor for the Board and that of the auditor for Councils differ on their determination of the Board's actual budget balance in the 1970-71 school budget account. On the basis of the Board's records and the testimony of the Board's auditor and the Superintendent of Schools, the hearing

examiner recommends that the Commissioner accept the Board's proposal for Revenue-Appropriation Balance as of July 1, 1970, as follows:

| | | |
|---|---|---|
| 1A | Current Expense as of July 1, 1970 | $7,500 |
| 1B | Capital Outlay as of July 1, 1970 | $2,500 |

In the case of *Board of Education of East Brunswick v. Township Council of East Brunswick*, 48 *N.J.* 94 (1966), the Court laid down guiding principles for the review of rejected school budgets by the municipal governing body 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 page 105)

The Court also defined the functions of the Commissioner when, after the governing body has made its determinations, the Board appeals from such actions:

> " *** the Commissioner in deciding the budget dispute here before him, will be called upon to determine not only the strict issue of arbitrariness but also whether the State's educational policies are being properly fulfilled. Thus, if he finds that the budget fixed by the governing body is insufficient to enable compliance with mandatory legislative and administrative educational requirements or is insufficient to meet minimum educational standards for the mandated 'thorough and efficient' East Brunswick school system, he will direct appropriate corrective action by the governing body or fix the budget on his own within the limits originally proposed by the board of education. On the other hand, if he finds that the governing body's budget is not so inadequate, even though significantly below what the Board of Education had fixed or what he would fix if he were acting as the original budget-making body under *R.S.* 18:7-83, then he will sustain it, absent any independent showing of procedural or substantive arbitrariness." (at page 107)

* * * *

The Commissioner has reviewed and considered the findings of the hearing examiner. The Commissioner does not deem it necessary to consider each of the contested items separately and and to record his evaluation in detail on each suggested economy. Suffice it to say, that from his study of the hearing examiner's report, the Commissioner considers the following items to be essential to the adequate functioning of the school program for the school year 1971-72:

| CURRENT EXPENSE | | Budgeted by Board | Councils' Reduction | Amount Restored |
|---|---|---|---|---|
| J110F | Sal.-Supt.'s Office | $ 53,000 | $21,000 | $ 8,800 |
| J211 | Sal.-Principals | 49,300 | 2,700 | 2,700 |
| J213 | Sal.-Teachers | 1,002,700 | 39,500 | 26,500 |
| J420c | Misc. Expense-Health Services | 12,950 | 7,000 | 7,000 |
| Sub-Total-Current Expense | | $1,117,950 | $70,200 | $45,000 |
| **CAPITAL OUTLAY** | | | | |
| J1220 | Sites | $ 10,000 | $ 6,000 | $ - 0 - |
| J1230 | Buildings | 2,800 | 2,300 | - 0 - |
| J1240 | Equipment | 20,170 | 10,000 | 10,000 |
| Sub-Total-Capital Outlay | | $ 32,970 | $18,300 | $10,000 |
| | GRAND TOTALS | $1,160,920 | $88,500 | $55,000 |

Councils' recommended appropriations from surplus ($44,900 from current expense and $5,000 from capital outlay) having been determined as inaccurate are, therefore, set aside. The amounts proposed by the Board from surplus ($7,500 in current expense and $2,500 in capital outlay) are the amounts, therefore, to be applied from surplus to the 1971-72 school budget.

**SUMMARY**

| | Current Expense | Capital Outlay |
|---|---|---|
| Budgeted by Board | $1,117,950 | $329,900 |
| Councils' Reductions | 70,200 | 18,300 |
| Amount Restored | 45,000 | 10,000 |
| Amt. Restored from Surplus | 44,900 | 5,000 |
| Total Restoration | $ 89,900 | $ 15,000 |
| **Sources of Revenue** | | |
| Certified Tax Levy | $647,185 | $ 6,670 |
| Additional Amount to be Raised by Taxes | 89,900 | 15,000 |
| Totals | $737,085 | $21,670 |

The Commissioner directs, therefore, that additional monies in the amount of $104,900 ($89,900 for current expense and $15,000 for capital outlay) must be added to those funds already certified to the Salem County Board of Taxation by the Mayors and Councils of the Borough of Woodstown and Township of Pilesgrove for the thorough and efficient operation of the Woodstown-Pilesgrove Regional School System for the school year 1971-72.

COMMISSIONER OF EDUCATION

July 22, 1971

**Board of Education of the Borough of Clayton,**

*Petitioner,*

**v.**

**Mayor and Council of the Borough of Clayton, Gloucester County,**

*Respondent.*

## COMMISSIONER OF EDUCATION

### Decision

For the Petitioner, Milton L. Silver, Esq.

For the Respondent, Granite & Granite (Alvin E. Granite, Esq., of Counsel)

Petitioner, hereinafter "Board," appeals from an action of respondent Mayor and Council of the Borough of Clayton, hereinafter "Council," certifying to the Gloucester County Board of Taxation a lesser amount of appropriations for current expense purposes for the 1971-72 school year than the amount proposed by the Board in its budget which was rejected by the voters. The facts of the matter were educed at a hearing conducted on July 2, 1971, at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

Following defeat by the voters of the Board's proposal to raise $595,403 by local taxes for current expense purposes for 1971-72, the Board forwarded its budget to Council and met with the Councilmen at a subsequent date. Thereafter, Council fixed the amount to be raised for current expenses at $565,403, a reduction of $30,000. This reduction comprises the extent of this appeal.

Following Council's determination, and the appeal contained herein, the solicitor of the Borough of Clayton addressed the following letter to the Board on April 13, 1971:

"Dear Mr. Silver:

"Please be advised that at the meeting of the Mayor and Borough Council held April 8, 1971, I was authorized to do what I think is proper in order to defend the action which you brought on behalf of the Board of Education. I conferred with the various Borough Officials and have concluded as follows:

"Their major reason in reducing the budget $30,000.00, was not so much that the school system did not need the money; but, that that sum could

be taken from surplus; that perhaps an obligation existed to make certain deductions based upon the results of the election. There were other arguments advanced that need not be mentioned in this letter.

"As their Counsel, I have determined that their reasons, although intelligent and legitimate, do not constitute legal justification in the technical sense.

"Therefore, the Borough will not file an answer and contest this action."

Nevertheless, and despite the letter, the tax certification of Council to the Gloucester County Board of Taxation remained as a certification of record, and plans for a hearing before a representative of the Commissioner of Education were not aborted. As stated, *supra*, a hearing was held on July 2, 1971, and although no members or representatives of Council were present, the Board was asked to document and review its need for the sum to update its financial condition, particularly with regard to the unappropriated balances that are currently available.

As a result of the Board's review, the hearing examiner finds that:

1. All of the Board's proposed expenditures for current expense costs are reasonable and necessary for the thorough and efficient operation of the Clayton Public Schools in the 1971-72 school year. This conclusion confirms the judgment of Council as expressed by its solicitor in the letter, *supra.*

2. An additional sum of $4,000 may be apportioned from unappropriated balances in the current expense account. This sum, when added to the $30,000 previously apportioned, results in a total allocation of $34,000 from such balances in the 1971-72 school year, and probably precludes future funding from this source in the immediate future.

3. A total of $26,000 must be added to the total of $565,403 certified to the Gloucester County Board of Taxation for current expense costs of the Clayton School District during the 1971-72 school year.

The hearing examiner observes that on June 30, 1971, the Clayton School District had balances of $123,000 in its current expense account. Of this total, $30,000 was appropriated and used during the 1970-71 school year and another $30,000 was appropriated for use in the 1971-72 school year. Thus, the balance of record at the time of this adjudication was $63,000. However, testimony at the hearing gave conclusive proof that this balance is more fictional than real since a series of unplanned and totally unexpected emergency appropriations in the 1970-71 year, and a deficit in expected revenues, have seriously depleted reserve funds of the Clayton School District. As a result, in the opinion of the hearing examiner, the sum of $4,000 is an absolute maximum of funds which are available as an additional appropriation at this time.

* * * *

The Commissioner has carefully reviewed the report of the hearing examiner and has considered his conclusions and recommendations. In concurring therein, the Commissioner finds and determines that an amount of $26,000 must be added to the amount previously certified by Council to be raised for the current expenses of the Clayton School District in order to provide sufficient funds to maintain a thorough and efficient system of public schools. He therefore directs the Council of the Borough of Clayton to add to the previous certification to the Gloucester County Board of Taxation of $565,403 for the current expenses of the Clayton School District the amount of $26,000, so that the total amount of the local tax levy for current expenses for 1971-72 shall be $591,403.

COMMISSIONER OF EDUCATION

July 28, 1971

**In the Matter of the Tenure Hearing of Victor Lomakin, School District of the City of South Orange-Maplewood, Essex County.**

**COMMISSIONER OF EDUCATION**

**Decision**

For the Complainant Board of Education, Sills, Beck, Cummis, Radin & Tischman (David Samson, Esq., of Counsel)

For the Respondent Victor Lomakin, Rothbard, Harris & Oxfeld (Emil Oxfeld, Esq., of Counsel)

Complainant Board of Education of the School District of South Orange-Maplewood, Essex County, hereinafter "Board," received a written charge against Victor Lomakin, hereinafter "respondent," a physical education teacher in the Board's Columbia High School, which was made by the mother of one of respondent's students. The Board determined that the charge would be sufficient, if true in fact, to warrant dismissal or reduction in salary, and thereupon certified said charge to the Commissioner of Education.

A hearing in this matter was held in the office of the Essex County Superintendent of Schools, East Orange, New Jersey, on May 21, 1971. The report of the hearing examiner follows:

The charge alleges:

> "*** that Victor Lomakin 'on January 5, 1971, grabbed, shoved, pushed, threw against the wall, held in a head lock (or hammer lock) slammed against steel equipment and generally assaulted the said student.*** ' "

The aggrieved student is 17 years old and a junior in Columbia High School. He testified that he cut his gym class earlier in the school day on January 5, 1971, and that he was reporting to his last-period class in the gym lobby when he was confronted by respondent who questioned him about his earlier absence. He testified further that he cut his gym class because he was assigned to the wrestling section and that he did not want to wrestle. He avers that students were customarily given the opportunity to select their gym-class activity, and that he had no opportunity to choose his so he cut his class. Respondent thereupon instructed the student to report to the school's dean of the junior class because of the earlier cut. The student refused to go, saying that he had "no respect" for the dean, and that the dean knew where he was and could come to see him (the student) if he wanted to. Thereupon, he turned to walk away. The student avers that respondent then grabbed him around the body, threw him against the wall, pulled or pushed him, while still enclosed in respondent's arms, into the gym-equipment room, and called to the dean.

The student admitted that he had been suspended from school several times earlier in the year, and that January 5, 1971, was his first day back in school following his last suspension.

Three high school boys who had witnessed the incident testified. Although their stories were not exact in all details, they were essentially the same and entirely credible to the hearing officer. Their testimony is that respondent grabbed the student around the body and pushed or pulled him into the gym-equipment room and that the student did not forcefully resist, but did try to "hold his ground" to prevent being pulled into the room. One witness saw a bumping of the teacher and student into the wall as the teacher attempted to pull the student into the gym-equipment room. Another saw no contact with the wall at all, and there were no witnesses who alleged that there was any deliberate throwing or bumping of the student against the wall by the teacher.

The dean testified that he went to the gym-equipment room as soon as respondent called to ask him to look into the matter. It was then, he said, that he learned of the incident reported, *supra.* He testified further that he instructed the student to accompany him to his office to make a written statement about the incident, *ante.* The student refused to go, said he would "get some organization to assist him in suing the school and the teacher," and thereupon walked out of the building.

The dean averred that the student had been suspended several times during the school year for such offenses as: wearing a hat in school even after being warned against doing so, for cutting his English class, for disturbing an auditorium program by giving fist salutes, and not leaving the auditorium when he was asked to do so.

Respondent did not deny that he grabbed the student around the body, walked him into the equipment room and called the dean; however, he denied inflicting any physical harm on the boy and throwing or bumping him into the wall.

Nowhere is there any testimony to corroborate the seriousness of the charge as detailed, *supra*. None of the witnesses testified to the student's being "generally assaulted," or held in a "head lock (or hammer lock)." Nor did the aggrieved student testify to any such assault. The only testimony educed from any of the witnesses is that respondent put his arms around the student, walked him into the equipment room despite his resistance and his attempt to "hold his ground" and called the dean.

The hearing officer concludes, therefore, that the evidence educed does not support all the elements of the charge as certified to the Commissioner of Education.

* * * *

The Commissioner has examined the report of the hearing examiner.

The Commissioner has never condoned the use of corporal punishment of students which has been forbidden by statute in this State since 1867. See *In the Matter of the Tenure Hearing of Frederick L. Ostergren, School District of Franklin Township, Somerset County*, 1966 *S.L.D.* 185; *In the Matter of the Tenure Hearing of James Norton, School District of the Borough of Ridgefield, Bergen County*, decided by the Commissioner of Education September 2, 1969; *In the Matter of the Tenure Hearing of Pauline Nickerson, School District of Peapack-Gladstone, Somerset County*, 1965 *S.L.D.* 130; *In the Matter of the Tenure Hearing of Mary Worrell, School District of the Township of Lumberton, Burlington County*, decided by the Commissioner of Education November 16, 1970.

The applicable statute is *N.J.S.A.* 18A:6-1 which reads as follows:

"No person employed or engaged in a school or educational institution, whether public or private, shall inflict or cause to be inflicted corporal punishment upon a pupil attending such school or institution; but any such person may, within the scope of his employment, use and apply such amounts of force as is reasonable and necessary:

(1) to quell a disturbance, threatening physical injury to others;

(2) to obtain possession of weapons or other dangerous objects upon the person or within the control of a pupil;

(3) for the purpose of self-defense; and

(4) for the protection of persons or property;

and such acts, or any of them, shall not be construed to constitute corporal punishment within the meaning and intendment of this section.

> Every resolution, bylaw, rule, ordinance, or other act or authority permitting or authorizing corporal punishment to be inflicted upon a pupil attending a school or educational institution shall be void."

In the Matter of the Tenure Hearing of Thomas Appleby, decided by the Commissioner of Education November 25, 1969, the Commissioner said:

> " ' *** While the Commissioner understands the exasperations and frustrations that often accompany the teacher's functions, he cannot condone resort to force and fear as appropriate procedures in dealing with pupils, even those whose recalcitrance appears to be open defiance. The Commissioner finds in the century-old statute prohibiting corporal punishment (*N.J.S.A.* 18A:6-1) an underlying philosophy that an individual has a right not only to freedom from bodily harm but also freedom from offensive bodily touching even though there be no actual physical harm. *In the Matter of the Tenure Hearing of Frederick L. Ostergren*, 1966 *S.L.D.* 185, 186 ***.' "

and:

> " ' *** that such a philosophy with its prohibition of the use of corporal punishment or physical enforcement does not leave a teacher helpless to control his pupils. Competent teachers never find it necessary to resort to physical force or violence to maintain discipline or compel obedience. If all other means fail there is always a resort to removal from the classroom or school through suspension or expulsion. The Commissioner cannot find any justification for, nor can he condone the use of physical force by a teacher to maintain discipline or to punish infractions.*** ' " *Ostergren, supra*

and, also:

> "Thus, when teachers resort 'to unnecessary and inappropriate physical contact with those in their charge (they) must expect to face dismissal or other severe penalty.' " *Ostergren, supra.*' "

In terms of deciding any issue of corporal punishment, this matter is, therefore, *res judicata:*

> "Corporal punishment has been defined by the Commissioner in *Craze v. Allendale Board of Education,* 1938 *S.L.D.* 585, as 'any punishment causing or intended to cause bodily pain or suffering.' The legal philosophy underlying the proscription of such disciplinary measures is that 'an individual has a right to freedom from bodily harm or any impairment whatever of the physical integrity of his person by the infliction of physical pain by another. There is also a right to freedom

from offensive bodily touching by another altho no actual physical harm be done.' (*Teacher Liability for Pupil Injuries*, National Education Association of the United States, p. 8)" *In the Matter of the Tenure Hearing of Pauline Nickerson, supra*

In the instant matter, the Commissioner finds that the student was clearly recalcitrant and in need of the disciplinary authority of the school officials. The public schools cannot become havens for all who have an axe to grind, and for students who deliberately refuse to accept to carry out reasonable directives given to them by their teachers. The student in this case was unreasonably recalcitrant, and should have reported to the dean's office as directed by respondent. Had he done so, no further incident would have occurred. His reply, in refusing to report to the dean of his class, was that he had "no respect for the dean." This type of response and the student's concomitant action of walking out of the school when the dean directed him to his office cannot be condoned if public school officials are expected to levy minimal and reasonable controls over the students in their charge. However, the Commissioner finds that respondent had no need to force the student into the equipment room. The student's refusal to do as told was sufficient reason for reporting him to the school administration so that further appropriate disciplinary action could be taken.

The Commissioner is aware that some adults react instinctively, under provocation of adolescents, in a purely physical manner. However, such reaction, as exhibited by respondent in the instant matter, is not responsible professional behavior and cannot be condoned. A major responsibility of the teaching profession is to demonstrate restraint in the face of child-like behavior on the part of those in their charge. In this instance respondent did not shoulder this responsibility in a manner which could be reasonably expected of a member of the teaching profession. Respondent teacher is cautioned, therefore, against any repetition of unnecessarily applying physical contact with students to cause compliance with a directive.

The Commissioner further finds, however, that no physical harm was done to the student, nor has there been established that there was any intent to inflict pain or suffering. Absent any corroborative testimony to support the more serious aspects of the charge, *ante*, the Commissioner determines that the charge is insufficient to warrant respondent's dismissal or a reduction of his salary.

The Commissioner directs, therefore, that the charge filed against Victor Lomakin be and is hereby dismissed.

COMMISSIONER OF EDUCATION

July 29, 1971

**Joseph J. Dignan,**

*Petitioner,*

**v.**

**Board of Eduation of the Rumson-Fair Haven Regional High School, Monmouth County,**

*Respondent.*

## COMMISSIONER OF EDUCATION

### Decision

For the Petitioner, Labrecque, Parsons & Bassler (William G. Bassler, Esq., of Counsel)

For the Respondent, Abraham J. Zager, Esq.

Petitioner, a teacher in the Rumson-Fair Haven Regional High School, disputes the procedural action taken by the Rumson-Fair Haven Regional Board of Education, hereinafter "Board," in declining to appoint him as faculty advisor for the school newspaper for the 1970-71 school year. Petitioner also alleges that the Board's action was arbitrary, capricious and punitive in retaliation for petitioner's activities in advocating that the teachers' association seek recognition as the exclusive representative in collective negotiations with the Board.

The Board denies that its action in declining to reappoint petitioner to the extracurricular activity of faculty advisor for the school newspaper was arbitrary, capricious or punitive, and avers that its action was proper and within its discretionary authority

Petitioner prays for relief in the form of an Order by the Commissioner of Education directing the Board to reinstate him as faculty advisor for the school newspaper with the financial compensation currently being paid for that activity, and that any reference to the Board's action be expunged from petitioner's employment record.

Testimony and documentary evidence were educed at a hearing conducted on March 22 and 23, 1971, and April 8, 1971, at the office of the Monmouth County Superintendent of Schools, Freehold, before a hearing officer appointed by the Commissioner of Education. The report of the hearing officer is as follows:

Petitioner was initially employed as a teacher in the Rumson-Fair Haven Regional High School, beginning September 1, 1961, and has been in continuous employment as a teacher until the present time. (Exhibit R-1) He acquired tenure status as a teacher during the 1964-65 school year. At the beginning of

his initial employment in September 1961, petitioner was assigned the extracurricular duty as faculty advisor for the school newspaper, the "Rumsonian," by the Board upon the recommendation of the Superintendent of Schools. Petitioner was assigned this duty without monetary compensation each year from 1961-62 through 1965-66, a period of five years. The Board first adopted a teacher-recognition plan for the payment of honoraria for some non-athletic extra-classroom assignments on April 4, 1966, for the 1966-67 school year. (Exhibit R-2) Pursuant to the plan, an honorarium of $250 was paid to petitioner for the three school years 1966-67 through 1968-69. For 1969-70, the Board increased this honorarium to $500. (Exhibit R-2)

The minutes of the Board of Education meeting held June 22, 1970, disclose that petitioner was not included on the list of teachers to receive honoraria for extra-classroom assignments for the 1970-71 school year, as adopted by the Board upon the recommendation of the Superintendent of Schools. (Exhibit R-2) By letter under date of June 23, 1970, petitioner was notified by the Superintendent that the Board did not appoint him as faculty advisor. In his letter, petitioner stated that he desired to be represented by counsel at this conference. (Exhibit P-1)

A conference was held on Friday, September 17, 1970, between petitioner and the three assistant superintendents. Petitioner was represented by counsel, the president of the local teachers' association and a field representative from the New Jersey Educaton Association were also present at this conference. Uncontradicted testimony of the petitioner discloses that the three assistant superintendents admitted during this conference that they had recommended to the Superintendent that petitioner not be assigned as faculty advisor for the school newspaper for 1970-71. Petitioner testified that all three administrators declined to state their reasons for their respective recommendations. (Tr. 76) The grievance was not resolved at this conference. Therefore, at a later time on the same date (September 17, 1970), a conference was held between petitioner, represented by counsel, and the Superintendent, with the Board's counsel also in attendance. The Superintendent testified that he had stated during this conference that he had recommended to the Board a change of faculty advisor for the school newspaper for 1970-71, and he had declined to state his reasons either orally or in writing for this recommendation. (Tr. 246, 247)

Petitioner's counsel addressed a letter to the Superintendent under date of September 18, 1970, requesting a conference with the Board to further express petitioner's dissatisfaction with the Board's decision. This letter also requested that the president of the local teachers' association and a field representative from the New Jersey Education Association be permitted to attend the conference with petitioner and his counsel. (Exhibit P-1) The Board's counsel responded by letter dated October 1, 1970, stating that the Board had discussed petitioner's request and would set a date for conference between petitioner and the personnel committee of the Board; however, petitioner's request for additional representatives other than his counsel was denied. (Exhibit P-1) By

letter dated October 5, 1970, the Board's counsel confirmed the conference for Wednesday, October 14, 1970, at the office of the Superintendent of Schools. (Exhibit P-1) Following this conference between petitioner and the personnel committee of the Board, a report dated October 20, 1970, was sent to the President of the Board by the chairman of the Board's personnel committee recommending that the grievance be denied and that petitioner be so informed by letter. (Exhibit P-6) A letter under date of October 22, 1970, was addressed to petitioner by the Board President which stated the following:

> "The Board of Education has denied your grievance that you were improperly removed as advisor to the *Rumsonian*. According to law, a teacher does not have tenure in supervising extra-curricular activities. The Board believes that it must maintain its prerogatives in teacher assignments and that it is good educational practice to rotate advisorships from time to time among the faculty." (Exhibit P-1)

The minutes of the meeting of the Board of Education held October 26, 1970, disclose that the recommendation of the Board's personnel committee that petitioner's grievance be denied was unanimously adopted by the Board. (Exhibit R-2)

Petitioner addressed a letter to the President of the Board under date of November 4, 1970, requesting a public hearing before the entire Board with respect to his grievance. (Exhibit P-1) Counsel for the Board replied to petitioner's request by letter, under date of November 11, 1970, which stated in pertinent part the following:

> " *** Accordingly, Mr. Dignan's grievance has been heard in accordance with the agreed upon grievance procedure and the Board will not agree to an additional hearing of Mr. Dignan's grievance. *** If you will recall, at the proceedings of October 14, Mr. Witman indicated that it was the experience of private employers and employees over the years to avoid public hearings. His comment was that it was abundantly clear that the purpose of a grievance procedure is to provide a means for the private resolution of disputes. Because of this, I am sure you will agree that it would not be in the interest of either the Board or the teacher to hold any public hearings with respect to grievances." (Exhibit P-1)

Petitioner testified that, in his opinion, he had never received any adverse criticism from the school administration in regard to his performance as faculty advisor for the school newspaper, although he did recall several instances when he discussed policies concerning the school newspaper with the various administrators. (Tr. 44, 99, 100) In March 1967, according to petitioner, he asked the Superintendent to remove him as faculty advisor because of a critical comment by one of the administrators regarding his performance. Petitioner testified that the Superintendent characterized the problem as a misunderstanding and rectified the matter. (Tr. 50) On another occasion,

petitioner testified, he sought the assistance of one of the administrators in a conference with a parent regarding an article which appeared in the school newspaper. (Tr. 101) In February 1969, petitioner testified further, he and the editorial staff were asked to confer with one of the administrators regarding an issue of the school newspaper which contained quotes of poetry which were criticized by the administration. (Tr. 107) Further testimony from petitioner disclosed that he had filed a grievance against one of the school administrators who had conferred with several student editors and discussed the school newspaper without petitioner's presence. (Tr. 115)

Testimony educed from the Board's witnesses discloses that two of the assistant superintendents spoke to petitioner a number of times regarding problems with the school newspaper. (Tr. 138, 264, 280) These problems concerned the accuracy of articles which appeared in the publication. The administrators testified that some of these problems were caused by reactions of parents, teachers and students to articles in the paper. (Tr. 139-141) Also, the administrators testified that on several occasions petitioner was reminded not to leave the student newspaper staff unsupervised. (Tr. 264, 265) Testimony provided by the Superintendent of Schools disclosed that he had at least five conferences with petitioner regarding articles in the school newspaper and policies relating to the paper. (Tr. 235) Testimony from the Board's witnesses indicated that in two instances petitioner stated that articles which appeared in the school newspaper had "slipped by" him. (Tr. 139 and 235) The Superintendent also testified that he received unanimous recommendations from his administrative staff to assign another faculty member as advisor to the school newspaper for 1970-71. (Tr. 236, 247, 291)

Testimony was educed regarding petitioner's contention that the Board did not appoint him to a summer school teaching assignment in 1969 because of his activities in the teachers' association. The facts regarding petitioner's employment in the summer school programs are basically uncontested. Petitioner was first employed in the 1967 summer school as a teacher of English. In 1968 petitioner was requested to teach a course in developmental reading, although he was not certified for this position, because of the sudden unavailability of the original teacher. Petitioner taught the developmental reading course in 1968, but he was not employed in the summer school in 1969. (Tr. 135, 136, 258) Testimony educed from witnesses for both petitioner and the Board disclosed that petitioner was not employed in 1969 because he was informed that another teacher had seniority for the only vacancy. Petitioner testified that he believed that seniority referred to total years of service within the school district, but he was informed by the Board's administrators that seniority in the summer school was based upon actual years of service in the summer school. Testimony of administrators disclosed that this policy had been established by the Board when the summer school was first organized, but the policy was not in written form either in the Board's minutes or in the teachers' manual. (Tr. 285)

The Board's witnesses testified that they attempted to secure employment for petitioner for the summer of 1969 in a curricular position since the summer school staff had no available vacancies. These efforts were unsuccessful because of a lack of funds for this purpose. (Tr. 137, 284)

Petitioner was elected president of the local teachers' association for a two-year term including 1968-69 and 1969-70. (Tr. 108) Testimony of petitioner disclosed that he resigned this position in January or February 1970, because the teaching staff had become polarized over the problem of seeking recognition from the Board as the exclusive representative in negotiations. (Tr. 109, 110)

Testimony from witnesses for both parties substantiated the fact that there was disagreement among members of the teaching staff regarding the signing of cards to designate the teachers' association as the exclusive agent in negotiations. Witnesses for the Board testified that in their judgment the Board desired to know the wishes of the teaching staff regarding formal recognition, but that there was no condemnation of any teachers by the Board because of these efforts. (Tr. 18, 22, 27, 28) A letter from the chairman of the Board's personnel committee to all members of the teaching staff regarding this matter of recognition was received into evidence. (Exhibit P-3) This letter stated the position of the Board regarding formal negotiations and requested answers to several questions regarding the scope of the representation to be requested by the association.

* * * *

The Commissioner has reviewed the findings of fact as set forth above in the report of the hearing examiner and the record in the instant matter.

Petitioner attacks the failure of the Board to reappoint him to an extra-classroom assignment for 1970-71 on two grounds. First, petitioner alleges that he has acquired a special status in the extra-classroom assignment which he has performed for nine consecutive years. Secondly, petitioner alleges that the Board's failure to reassign him to the particular extra-classroom duty was an action which was arbitrary, capricious and punitive in nature.

It is well established in this State that the obligation of public school teachers to perform extra-classroom duties is mandatory. In a previous decision, *Clinton F. Smith et al. v. the Board of Education of the Borough of Paramus et al.*, 1968 *S.L.D.* 62, affirmed State Board of Education without written opinion, February 5, 1969, appeal dismissed Appellate Division, New Jersey Superior Court, September 8, 1969, the Commissioner found and determined the following pertinent conclusions at p. 69:

> " *** (1) the teacher's day is comprised of the minimum hours set by the employing board of education plus the amount of time required for

discharge of such duties and services as may be reasonably expected and required of a member of the professional staff of a public school;

(2) extracurricular or cocurricular activities comprise all those events and programs which are sponsored by the school and may reasonably be characterized as a supplement to the established program of studies in the classroom in order to enrich the learning and self-development opportunities of pupils;

(3) petitioners are legally bound to perform such activities as may be reasonably assigned them by the Board of Education ***."

It is clear that petitioner holds an appropriate teacher's certificate and is employed and has acquired a tenure status in the Rumson-Fair Haven Regional High School. It is also clear that in certain years, namely, 1961-62 through 1969-70, petitioner has been assigned the extra-classroom duty of faculty advisor for the school newspaper in addition to his regular classroom-teaching assignment. The evidence discloses that this was an annual assignment, and that for each of the last four years, 1966-67 through 1969-70, petitioner was paid a sum as an honorarium in addition to his regular salary as a teacher.

Given these facts, the Commissioner can find no basis for petitioner's claim to any special status or tenure as a faculty advisor for the school newspaper. He has tenure in his position as a teacher from which he cannot be dismissed or suffer a reduction in salary except for cause determined by a hearing. *N.J.S.A.* 18A:6-10, 18A:28-5 In the instant matter petitioner is threatened by neither of these misfortunes. His only loss is that of the honorarium he has received for his services as a faculty advisor in addition to his teacher's salary. It is clear that a board of education has the right to assign and transfer or reassign teachers in its employ. *N.J.S.A.* 18A:27-4 states as follows:

"Each board of education may make rules, not inconsistent with the provisions of this title, governing the employment, terms and tenure of employment, promotion and dismissal, and salaries and time and mode of payment thereof of teaching staff members for the district, and may from time to time change, amend or repeal the same and the employment of any person in any such capacity and his rights and duties with respect to such employment shall be dependent upon and governed by the rules in force with reference thereto."

Also, see *N.J.S.A.* 18A:11-1, *N.J.S.A.* 18A:16-1, *N.J.S.A.* 18A:25-1. A transfer is not a demotion. *Lascari v. Lodi Board of Education*, 36 *N.J. Super.* 426 (*App. Div.* 1955) In this particular instance, petitioner was relieved of an extra-classroom duty which had been assigned to him each year for a certain number of years. The Board was not obligated to continue this assignment for each succeeding year. Petitioner's duties as faculty advisor were not permanently engrafted on his duties as a teacher, either by rule or by the terms of his employment. In fact, the Board is without authority to make such an assignment

for more than one year under the well-established principle that a board of education is a noncontinuous body which cannot bind its successors except in matters specifically permitted by statute. *Skladzien v. Bayonne*, 1938 *S.L.D.* 120, affirmed State Board of Education 123, affirmed 12 *N.J. Misc.* 602 (*Sup. Ct.* 1934), affirmed 115 *N.J.L.* 203 (*E. & A.* 1935)

Teachers in public schools direct and supervise a variety of activities which are part of the curriculum but which are not necessarily directly related to their classroom-teaching assignments. The Commissioner can find no basis for differentiating between petitioner's extra-classroom assignment as faculty advisor for the school newspaper and the various other kinds of assignments which teachers perform. Therefore, a logical conclusion would be that if a tenure status accrues to petitioner's assignment, the same status must apply to all other such positions. Such a resulting circumstance would seriously interfere with and impair the sound administration of public schools, and would place unreasonable obstacles in the way of the development of a good educational program. A similar issue was raised in the case of *Nello Dallolio v. Board of Education of the City of Vineland, Cumberland County*, 1965 *S.L.D.* 18. In that case a teacher appealed the Board's failure to reassign him as a coach of football claiming that he had acquired a tenure status. The Commissioner stated the following at p. 21:

> "***The Teachers Tenure Act was not enacted for such a purpose as petitioner contends, nor was it intended to fix school personnel practices in as rigid and inflexible a structure as would be the case if petitioner's argument were upheld. The Teachers Tenure Act is the enunciation by the Legislature of a public policy with regard to the employment and dismissal of teachers for the primary purpose of insuring the education welfare of children and only secondarily as a protection of teachers. *Wall v. Jersey City Board of Education*, 1938 *S.L.D.* 614, affirmed State Board of Education 618, affirmed 119 *N.J.L.* 308 (*Sup. Ct.* 1938) The over-protection claimed by petitioner would be a disservice to the schools, in the Commissioner's judgment, and is not in contemplation of the statute. Indeed, strong argument could be made in favor of changing the assignments of teachers from time to time. 'Transfers are often advisable in the administration of schools for many reasons.' *Cheeseman v. Gloucester City Board of Education*, 1 *N.J. Misc.* 318 (*Sup. Ct.* 1923) Repetition of the same duties may increase competency and efficiency in a particular area but it can also act to stultify both the teacher and the program. There is a middle ground in this respect, and the school administration's hands should be kept free to make those assignments which will most effectively perform the schools' function.***"

It is clear that the extra compensation ceases when the extra-classroom assignment is no longer performed. *Reed and Hills v. Trenton Board of Education*, 1938 *S.L.D.* 437, affirmed State Board of Education 44 Also, see *Dallolio v. Board of Education, City of Vineland, Cumberland County, supra.*

The Commissioner has reviewed the facts in the instant matter and the decisions in similar cases controverted before him in past years. The Commissioner holds that a board of education has the authority to assign and reassign teachers to extra-classroom curricular duties in addition to their regularly-scheduled classroom-instruction assignment and to pay such additional remuneration as it deems reasonable and appropriate therefor; that absent a requirement for a certificate other than that of a teacher, no tenure status accrues to such assignments, and they are renewed or discontinued at the discretion of the board. In the judgment of the Commissioner, this issue of whether a tenure status accrues for such extra-classroom assignments is *res judicata.* The facts relative to this issue are not in contention and establish no cause for action on which relief can be granted.

The second allegation stated by petitioner is that the Board's failure to reassign him as faculty advisor was arbitrary, capricious and punitive in nature in retaliation for petitioner's activity as president of the local teachers' association. To substantiate this allegation, petitioner states that he did not receive an appointment to the summer school in 1969, and that he did not receive reasons for the Board's decision not to reappoint him as faculty advisor either from the school administrators or the Board.

The uncontested facts are that petitioner was first employed in the summer school in 1967 as an English teacher. In 1968 he was requested to teach a course in developmental reading, although not certified for this position, because of the untimely withdrawal of the original teacher and the unavailability of any properly-certified teacher. Petitioner was not employed in the 1969 summer school program because another English teacher who had taught more years in the Board's summer school was appointed to the only available position.

In the judgment of the Commissioner, the Board's statutory authority to employ, assign, transfer or reassign teachers clearly includes the conduct and maintenance of a curricular or recreational program of instruction during the months of the summer season. *N.J.S.A.* 18A:27-4, *supra;* also, *N.J.S.A.* 18A:16-1, 18A:11-1.

In the instant matter the Board contends that it had an unwritten policy defining that a seniority system existed for teachers with the greatest number of years of employment in the summer school. The Commissioner notices that the facts disclose no evidence of the adoption of any such rule or policy by the Board of Education. Therefore, the Commissioner concludes that this criteria of longevity is not a rule or policy of the Board, but is merely one of several criteria utilized by the school administrators in seeking qualified applicants to recommend for appointment by the Board to positions in the summer school. The Commissioner takes notice of the words of Judge Lewis of the Appellate Division, New Jersey Superior Court, in the case of *Victor Porcelli, et al. v. Franklyn Titus, Superintendent, and the Newark Board of Education,* 108 *N.J. Super.* 301 (*App. Div.* 1969), *Cert. Den.* 55 *N.J.* 310 (1970), which bear directly upon the matter *sub judice.* The Court stated at p. 312:

" *** We endorse the principle, as did the court in *Kemp v. Beasley*, 389 *F.* 2*d* 178, 189 (8 Cir. 1968), that 'faculty selection must remain for the broad sensitive expertise of the School Board and its officials,' ***."

In the instant matter petitioner filed a formal grievance under the established local policy because of the Board's failure to reassign him as faculty advisor for the 1970-71 school year. Hearings were conducted separately both before the three assistant superintendents and the Superintendent of Schools. On both occasions, petitioner was denied reasons for the recommendation made by these school administrators to the Board to assign another faculty member to the duty previously performed by petitioner. A hearing was also conducted for petitioner before the personnel committee of the Board. Neither the personnel committee nor the Board as a whole disclosed to petitioner the reasons for the Board's decision. In the Commissioner's judgment, the Board erred in notifying petitioner of its decision by letter signed by the Board President and dated four days before the meeting date at which the Board formally adopted the recommendation of its personnel committee. The Board's President had been informed by letter of the personnel committee's findings and recommendation, and presumably he notified the other Board members. Nevertheless, the action taken by the Board should properly have preceded the notification sent to petitioner.

As has been stated, no tenure status accrues to extra-classroom assignments such as that performed by petitioner, and they are renewed or discontinued at the discretion of the Board. Since no tenure status can accrue in this instance, petitioner possessed only the rights provided by the terms of his contract for extra renumeration for these duties. There is no allegation that his contracted rights were infringed or that a reassignment was denied to him for statutorily-proscribed, discriminatory practices, i.e. race, color, religion, etc. Respondent simply took no action to reassign petitioner as faculty advisor for 1970-71, and instead assigned another faculty member to this duty. Petitioner's assignment in this capacity expired by its terms on June 30, 1970.

Under these circumstances, the Board had no obligation to give reasons for not reassigning petitioner or in fact to grant petitioner a hearing. In *Zimmerman v. Board of Education of Newark*, 38 *N.J.* 65 (1962), at p. 70, the Court reaffirmed the long established precedent of prior decisions in New Jersey involving nontenure employment by citing *People ex rel v. Chicago*, 278 *Ill.* 160, *L.R.A.* 1917 *E.* 1069 (*Sup. Ct.* 1917) as follows:

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

In the instant matter the Commissioner holds that the Board merely exercised its right to decline to reassign a teacher to a nontenure duty, and, in exercising this discretion, it had no obligation to give reasons or to afford a hearing. The applicable statute, *N.J.S.A.* 18A:6-10, requires reasons or charges and a hearing only for teachers who have acquired a tenure status. As was previously stated, petitioner's tenure status as a teacher was not threatened in this instance. It is clear that teachers in a nontenure status do not possess such rights statutorily, and the Commissioner holds that they may not acquire them by indirection through grievance procedures or negotiated agreements. The Board's action in relieving petitioner of an extra-classroom duty which had been assigned to him each year for several years is not a grievable issue. If, as in the matter *sub judice*, an individual attacks such an exercise of a board of education's discretion on the grounds that it is arbitrary, capricious or unreasonable, then the proper appeal is to the Commissioner of Education. *Ruth Ann Singer, by her parent and guardian ad litem, Nathan Singer v. the Board of Education of the Borough of Collingswood et al., Camden County*, decision of the Commissioner of Education on Motion, March 24, 1971

*In Clinton F. Smith et al. v. the Board of Education of Paramus, et al., supra*, the Commissioner stated the following at p. 69:

> " *** It is to be recognized that it is an administrative responsibility to see that assignments to extracurricular responsibilities are reasonably and equitably distributed among faculty members. *** the Commissioner points out that where instances of inequities are believed to exist, teachers have recourse to grievance procedures established by the local school district to effect a satisfactory resolution of the problem.*** "

The Commissioner reiterates the above statement in relation to the eqitable distribution of extra-classroom duty assignments among the faculty members of a school. Such contested matters are the proper subject of a grievance procedure within the local school district. The issue in the instant matter is clearly distinguishable, and is not embraced in the Commissioner's decision in *Smith v. Paramus, supra.*

The primary issue before the Commissioner is whether the Board exercised its discretion in a manner that was arbitrary, capricious and punitive in nature. In numerous decisions, the Commissioner has reiterated his position regarding challenges to discretionary actions taken by local boards of education. The Commissioner must, when called upon, examine the actions of local boards of education and determine whether such actions were taken in good faith and not irresponsibly. See *Singer v. Collingswood Board of Education, supra*, and the cases cited. The Commissioner will not, however, question the wisdom of the Rumson-Fair Haven Regional Board of Education's decision to assign the duties of faculty advisor for the school newspaper to another teacher. The Board has the statutory right to assign teachers as it sees fit, subject to the limitations of certification and reasonableness. *Tensby v. Lodi Board of Education*, 1938

*S.L.D.* 505; *Greenway v. Camden Board of Education*, 1939 *S.L.D.* 151, affirmed State Board of Education 155, affirmed 129 *N.J.L.* 46 (*Sup. Ct.* 1942), affirmed 129 *N.J.L.* 461 (*E. & A.* 1942); *Chesseman v. Gloucester City Board of Education*, 1938 *S.L.D.* 498, affirmed State Board of Education, 500, affirmed 1 *N.J. Misc.* 318; *Downs v. Hoboken Board of Education*, 12 *N.J. Misc.* 345 (*Sup. Ct.* 1934), affirmed 113 *N.J.L.* 401 (*E. & A.* 1934); *Dallolio v. Vineland Board of Education, supra*

As the Commissioner previously stated in *Boult and Harris v. Board of Education of Passaic*, 1939-49 *S.L.D.* 7, affirmed State Board of Education 14, 135 *N.J.L.* 329 (*Sup. Ct.* 1947), 136 *N.J.L.* 521 (*E. & A.* 1948) at p. 13:

> " *** boards of education are responsible not to the Commissioner but to their constituents for the wisdom of their actions. ***"

The Commissioner takes notice of the following language of the Court in *Thomas v. Morris Township Board of Education*, 89 *N.J. Super.* 327, 322 (*App. Div.* 1965), which is directly to the point of the instant matter:

> " *** 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. *** " *Quinlin v. Board of Education of North Bergen*, 73 *N.J. Super.* 40 (*App. Div.* 1962)

In the instant matter the Commissioner finds the charge that the Board's action was arbitrary, capricious and punitive in nature is unsupported by the facts and credible evidence and is therefore without merit. The facts do not support the claim that petitioner was denied reappointment as a faculty advisor as retribution for his activities in the teachers' association. Also, petitioner's contention that he failed to receive a summer school teaching assignment for the same reason is unsupported by the evidence and is groundless. The evidence educed discloses that there were several instances where each of the four administrators indicated criticism of petitoner's performance as faculty advisor to the school newspaper. It is significant that each of the four administrators made the identical judgment to recommend that the Board not reassign petitioner to this duty for the 1970-71 school year.

The Commissioner finds and determines that the Rumson-Fair Haven Regional Board of Education acted reasonably and within its discretionary authority in relieving petitioner of his extra compensation, and assigning that responsibility and extra renumeration to another member of the faculty. Accordingly, for the reasons stated, the Petition is dismissed.

COMMISSIONER OF EDUCATION

Pending before the State Board of Education

July 29, 1971

**Board of Education of the Borough of Union Beach,**

*Petitioner,*

**v.**

**Mayor and Council of the Borough of Union Beach, Monmouth County,**

*Respondent.*

## COMMISSIONER OF EDUCATION

### Decision

For the Petitioner, Peter Edwardsen, Esq.

For the Respondent, Philip Blanda, Esq.

Petitioner, hereinafter "Board", appeals from the action of respondent, 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 1971-72 school year than the amount proposed by the Board in its budget which was rejected by the voters. The facts of the matter were educed at a hearing conducted on July 6, 1971, at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

Following the defeat by the voters of the Board's proposal to raise $928,695 by local taxes for current expense purposes for 1971-72, the Board forwarded its budget to Council and met with that body to discuss and review the budget proposals. Subsequent to this meeting, Council determined that a total sum of $164,771 could be taken as a reduction from the Board's proposed expenditures for current expenses of the Union Beach School District during the 1971-72 school year, and certified a sum of $763,924, which embraced the reduction, *supra*, to the Monmouth County Board of Taxation. Council accompanied its certification with line-item deductions which in its judgment, were appropriate and which, in total amount, were equal to the total deduction recited, *supra.* These deductions are itemized as follows:

| Acct. No. | Item | Board's Proposal | Council's Reduction | Council's Proposal |
|---|---|---|---|---|
| J110b | Sals.-Bd. of Ed. off. | $ 18,450.00 | $ 1,850.00 | $ 16,600.00 |
| J110f | Sals.-Supt.'s Off. | 21,000.00 | 1,000.00 | 20,000.00 |
| J130a | Bd. Member's Exp. | 2,000.00 | 1,000.00 | 1,000.00 |
| J130b | Secy.'s Off. Exp. | 600.00 | 300.00 | 300.00 |
| J130f | Other exp.-Admin. | 750.00 | 500.00 | 250.00 |
| J130m | Print.&Publishing | - 0 - | 300.00 | 300.00 |
| J130n | Misc. Exp.-Admin. | 300.00 | 300.00 | - 0 - |
| J211 | Sal.-Principal | 17,000.00 | 1,000.00 | 16,000.00 |
| J213 | Sals-Teachers | 560,040.00 | 44,800.00 | 515,240.00 |

| | | | | |
|---|---|---|---|---|
| J214a | Sal.-Librarian | 7,500.00 | 600.00 | 6,900.00 |
| J215c | Other Secy. Serv. | 10,550.00 | 650.00 | 9,900.00 |
| J216 | Other Sals.-Instr. | 36,354.00 | 2,200.00 | 34,154.00 |
| J216a | Sals-Playground | 2,880.00 | 2,880.00 | - 0 - |
| J220 | Textbooks | 13,694.00 | 1,000.00 | 12,694.00 |
| J230a | Library Books | 7,474.00 | 3,000.00 | 4,474.00 |
| J230b | Periodicals & Newspapers | 1,585.00 | 1,000.00 | 585.00 |
| J230c | A.V. Materials | 8,692.00 | 5,000.00 | 3,692.00 |
| J240 | Supps.-Instr. | 19,036.00 | 7,000.00 | 12,036.00 |
| J250a | Misc. Supps.-Instr. | 1,500.00 | 500.00 | 1,000.00 |
| J250b | Travel Exp.-Instr. | 200.00 | 150.00 | 50.00 |
| J250c | Misc. Exp.-Instr. | 600.00 | 300.00 | 300.00 |
| J410a-3 | Sals.-Nurses | 18,781.00 | 2,181.00 | 16,600.00 |
| J420a | Supps.-Health Serv. | 1,150.00 | 400.00 | 750.00 |
| J420b | Travel Exp.-Health Serv. | 30.00 | 30.00 | - 0 - |
| J510a | Sals-Pupil Transp. | 10,300.00 | 4,300.00 | 6,000.00 |
| J520a | Contr. Serv. (to - from school) | 24,000.00 | 7,200.00 | 16,800.00 |
| J550 | Other Exp.-Trans. | 7,200.00 | 6,000.00 | 1,200.00 |
| J610a | Sals.-Operation | 55,240.00 | 5,980.00 | 49,260.00 |
| J620 | Contracted Services | 1,800.00 | 1,800.00 | - 0 - |
| J650 | Supplies | 9,000.00 | 1,000.00 | 8,000.00 |
| J710b | Sals.-Maint. | 6,550.00 | 6,550.00 | - 0 - |
| J720a | Contr. Serv.-Upkeep of Grounds | 5,000.00 | 2,000.00 | 3,000.00 |
| J720b | Contr. Serv.-Repr. of Bldgs. | 3,900.00 | 900.00 | 3,000.00 |
| J720c | Contr. Serv.-Repr. of Equip. | 1,000.00 | 500.00 | 500.00 |
| J130a | Repl. of Inst. Equip. | 1,500.00 | 750.00 | 750.00 |
| J730b | Repl. of Non-Instr. Equip. | 500.00 | 500.00 | - 0 - |
| J740a | Other Exp.-Upkeep of Grounds | 3,925.00 | 2,000.00 | 1,925.00 |
| J740b | Other Exp.-Repair of Bldgs. | 2,850.00 | 1,850.00 | 1,000.00 |
| J870 | Tuition | 489,480.00 | 45,000.00 | 444,480.00 |
| J1030 | Student Body Activ. to Cover Deficit | 1,000.00 | 500.00 | 500.00 |
| | Totals: | $1,373,411.00 | $164,771.00 | $1,208,940.00 |

It is noted that the reduction applied by Council to Account J130m is inappropriate to that specific allocation for printing and publication of materials, since the Board did not budget any money for that particular purpose. However, Council maintains that the reducion is still appropriate to the J130 Account as a whole and does not concede an error.

The hearing examiner has carefully reviewed all of the testimony of Council and of the Board and makes the following general observations:

1. The proposed reductions of Council would reduce the allocations for school purposes in Union Beach during the 1971-72 school year below those certified for the year 1970-71. The hearing examiner can find no justification for such a drastic reduction, since there is no evidence that prior spending has been extravagant and since the Board cannot be expected in school year 1971-72 to run its schools in a vacuum of isolation from rising costs common to the economy as a whole.

2. The two biggest reductions imposed by Council total $89,800, and the total is comprised of a sum of $44,800 taken from the teachers' salary account, and a further sum of $45,000 deducted from proposed Board appropriations for tuition. The first of these deductions, that taken from the teachers' salary account was made because, in Council's opinion, the Board frustrated the purpose and intent of the statute requiring their school budget to be passed upon by the citizens by adopting salary scales for its employees prior to the referendum of Februrary 1971.

The hearing examiner finds that such salary scales were in fact adopted prior to the referendum and that the Board's decision and judgment may not be abridged in this regard since *N.J.S.A.* 18A:29-4.1 provides, *inter alia:*

> "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 ***." (Emphasis supplied.)

Therefore, the hearing examiner finds that most of this sum of money must be restored since the Board's itemization has estabished the need, and there seems to be no major program expansion which would appear to flaunt the expressed will of the voters for economy in school operation. However, the examiner does believe that the contingency fund within the salary account may be safely reduced from $5,000 to $3,000, and he so recommends.

The second large reduction, that taken from the proposed appropriation for tuition payments to other districts, is defended by Council on the grounds that the receiving district for high school pupils has anticipated a sum which is approximately $50,000 smaller than the one budgeted by the Board. The Board, however, documents the expenditure in detail, and in the opinion of the hearing examiner has established the need for its appropriation in full.

Accordingly, the examiner recommends the full restoration of this appropriation.

3. Council offers no other testimony with regard to the reasonableness of its line-item deduction, but simply maintains that the Borough of Union Beach cannot maintain the school system as budgeted by petitioner. The Board, however, has documented its need in both written and oral form.

The hearing examiner has reviewed the total budget, and the proposed line-item testimony of the Board, and recommends that a total of $30,821 of the total reduction imposed by Council be sustained, but finds that $133,950 of the reduction is needed and necessary for a thorough and efficient school system in Union Beach in the school year 1971-72 and must be restored. The detailed recommendations are embodied in the listing below:

| Acct. No. | Item | Amount of Reduction | Amount Restored | Amount Not Restored |
|---|---|---|---|---|
| J110b | Sals.-Bd. of Ed. Off. | $ 1,850 | $ 1,850 | $ - 0 - |
| J110f | Sals.-Supt.'s Off. | 1,000 | 750 | 250 |
| J130a | Bd. Members' Exp. | 1,000 | 1,000 | - 0 - |
| J130b | Secy.'s Off. Exp. | 300 | 300 | - 0 - |
| J130f | Other Exp.-Admin. | 500 | 500 | - 0 - |
| J130m | Print. & Publish. | 300 | 300 | - 0 - |
| J130n | Misc. Exp.-Admin. | 300 | 300 | - 0 - |
| J211 | Sal.-Principal | 1,000 | 1,000 | - 0 - |
| J213 | Sals.-Teachers | 44,800 | 42,800 | 2,000 |
| J214a | Sal.-Librarian | 600 | 600 | - 0 - |
| J215c | Other Secy.Serv. | 650 | 650 | - 0 - |
| J216 | Other Sals.-Instr. | 2,200 | 2,200 | - 0 - |
| J216a | Sals.-Playground | 2,880 | 2,880 | - 0 - |
| J220 | Textbooks | 1,000 | - 0 - | 1,000 |
| J230a | Library Books | 3,000 | 1,000 | 2,000 |
| J230b | Periodicals & Newsp. | 1,000 | 415 | 585 |
| J230c | A.V. Materials | 5,000 | - 0 - | 5,000 |
| J240 | Supps.-Instr. | 7,000 | 964 | 6,036 |
| J250a | Misc. Supps.-Instr. | 500 | 500 | - 0 - |
| J250b | Travel Exp.-Instr. | 150 | 150 | - 0 - |
| J250c | Misc. Exp.-Instr. | 300 | 300 | - 0 - |
| J410a | Sals.-Nurses | 2,181 | 415 | 585 |
| J420a | Supps.-Health Serv. | 400 | 250 | 150 |
| J420b | Travel Exp.-Health Serv. | 30 | 30 | - 0 - |
| J510a | Sals.-Pupil Transp. | 4,300 | 4,300 | - 0 - |
| J520a | Contracted Serv. (to and from school) | 7,200 | 7,200 | - 0 - |
| J550 | Other Exp.-Transp. | 6,000 | 6,000 | - 0 - |
| J610a | Sals.-Operation | 5,980 | 5,980 | - 0 - |
| J620 | Contracted Services | 1,800 | 1,800 | - 0 - |
| J650 | Supplies | 1,000 | - 0 - | 1,000 |
| J710b | Sals.-Maint. | 6,550 | - 0 - | 6,550 |
| J720a | Contr. Serv.-Upkeep of Grounds | 2,000 | - 0 - | 2,000 |
| J720b | Contr. Serv.-Repair of Buildings | 900 | - 0 - | - 0 - |
| J720c | Contr. Serv.-Repair of Equip. | 500 | 500 | - 0 - |
| J730a | Repl. of Instr. Equip. | 750 | 500 | 250 |

| | | | | |
|---|---|---|---|---|
| J730b | Repl. of Non-Instr. Equip. | 500 | 500 | - 0 - |
| J740a | Other Exp.-Upkeep of Grounds | 2,000 | - 0 - | 2,000 |
| J740b | Other Exp.- Repair of Bldgs. | 1,850 | 1,000 | 850 |
| J870 | Tuition | 45,000 | 45,000 | - 0 - |
| J1030 | Student Body Activ. | 500 | 250 | 250 |
| | TOTALS | $164,771 | $133,950 | $30,821 |

While the hearing examiner noted, *supra*, that there was no major expansion of program reflected in the Board's budget for 1971-72, there were funds apportioned to employ a new maintenance employee. Since this position is a new one, the examiner holds that the need for it must be proved and finds that it is not. Therefore, the total amount of $6,550 has been deleted from J710b above.

* * * *

The Commissioner has reviewed the findings of the hearing examiner reported above and has carefully considered his conclusions and recommendations. In concurring therein, the Commissioner finds and determines that an amount of $133,950 must be added to the amount previously certified by Council to be raised for current expenses of the Union Beach School District in order to provide sufficient funds to maintain a thorough and efficient system of public schools in the district. He therefore directs the Union Beach Borough Council to add to the previous certification to the Monmouth County Board of Taxation of $763,924 for the current expenses of the school district, the amount of $133,950, so that the total amount of the tax levy for current expenses for 1971-72 shall be $897,874.

COMMISSIONER OF EDUCATION

August 3, 1971

**Board of Education of the Township of Washington,**

*Petitioner,*

**v.**

**Township Committee of the Township of Washington, Gloucester County,**

*Respondent.*

## COMMISSIONER OF EDUCATION

### Decision

For the Petitioner, Hyland, Davis & Reberkenny (Richard C. Schramm, Esq., of Counsel)

For the Respondent, Higgins and Trimble (John W. Trimble, Esq., of Counsel)

Petitioner, hereinafter "Board," appeals from the action of respondent, hereinafter "Committee," taken pursuant to *N.J.S.A.* 18A:22-37, certifying to the County Board of Taxation a lesser amount of appropriations for school purposes for the 1971-72 school year than the amount proposed by the Board in its budget which was rejected by the voters. The facts of the matter were educed at a hearing before a hearing examiner, appointed by the Commissioner of Education, on June 16, 1971, at the State Department of Education, Trenton. The report of the hearing examiner is as follows:

At the annual school election on February 9, 1971, the voters rejected the Board's proposals to raise $3,142,147 from local taxes for current expenses and $135,280 for capital expenditures. The budget was then sent to the Committee pursuant to *N.J.S.A.* 18A:22-37 for its determination of the amount of local tax funds required to maintain a thorough and efficient school system.

After consultation with the Board and a review of the budget, the Committee made its determination and certified to the Gloucester County Board of Taxation an amount which reduced the appropriations for current expenses by $469,200 and for capital outlay by $60,000, for a total reduction of $529,200. The Committee suggested line items of the budget in which it believed economies could be effected. These proposed reductions total $287,200. The Board subsequently determined that it would accept $19,200 of the Committee's proposed reductions from the current expense accounts and $28,000 of those from the capital outlay accounts. The proposed reductions and the reductions accepted by the Board are charted as follows:

## CURRENT EXPENSE

| ACCOUNT NO. | ITEM | BOARD'S BUDGET | COMMITTEE'S REDUCTION | REDUCTION ACCEPTED | REDUCTION APPEALED |
|---|---|---|---|---|---|
| J213.1 | Sal.-Tchrs. | $2,361,620 | $240,000 | $ - 0 - | $240,000 |
| J214A | Sal.-Libr. | 30,490 | 7,500 | 7,500 | - 0 - |
| J214D | Sal.-A.V. | 10,200 | 10,200 | 10,200 | - 0 - |
| J1111 | Commun. Recr. | 7,500 | 1,500 | 1,500 | - 0 - |
| | SUB-TOTALS | | $259,200 | $ 19,200 | $240,000 |

## CAPITAL OUTLAY

| | | | | | |
|---|---|---|---|---|---|
| L1220C | Site Improv. | $ 32,500 | $ 18,000 | $ 18,000 | $ - 0 - |
| L1240F | Plant Oper. Equip. | 16,800 | 10,000 | 10,000 | - 0 - |
| | | | **Committee's Reduction** | **Reduction Accepted** | **Reduction Appealed** |
| | SUB-TOTALS | | $ 28,000 | $ 28,000 | $ - 0 - |
| | GRAND TOTAL-REDUCTIONS | $287,200 | $ 47,200 | $240,000 | |

Since the Board has agreed to all of the reductions made from line-item accounts except for those made from Account 213A, these reductions totaling $47,200 must stand. The remaining reduction from Account 213A totals $240,000 and must be considered by the hearing examiner.

With regard to this one account, the Committee argues that the Board overbudgeted by $85,000 in the 1970-71 year and that expenditures for the 1971-72 year have been calculated with this built-in surplus as an incorporated part. Additionally, the Committee avers that the Board's unit cost per teacher, which served as a basis for the grand total of the acount, may be safely reduced from $9,922.77 per teacher employed to $9,271.51 per teacher and that such a reduction, if made applicable to the 238 projected personnel, would result in a saving of $155,000. This reduction when added to the $85,000 considered, *supra*, totals $240,000.

On the other hand, the Board Secretary testified at the hearing that his latest projection of expenditures from this account, including those for 225 teachers now under contract plus others yet to be employed, and substitutes, total $2,364,400, which total is more than $2,000 above the Board's original budgeted figure.

In the absence of argument by the Committee as to the merits of any of the Board's proposed expenditures for teaching personnel and in view of the Board's latest factual testimony as to the funding needed to support these personnel, the hearing examiner finds that all these funds are necessary for the maintenance of a thorough and efficient school system in Washington Township and must be restored.

| | |
|---|---|
| Summary – *Current Expense* | |
| Reduction of Committee | $259,200 |
| Reductions Restored | 240,000 |
| Reductions Not Restored | 19,200 |
| *Capital Outlay* | |
| Reductions of Committee | $ 28,000 |
| Reductions Restored | - 0 - |
| Reductions Not Restored | 28,000 |
| *Grand Total - Line Item Deductions* | |
| Reductions of Committee | $287,200 |
| Reductions Restored | 240,000 |
| Reductions Not Restored | 47,200 |

In addition to the line-item reductions considered, *supra*, the Committee determines that the Board could use unappropriated balances to further reduce the amount of money to be raised from local taxes. The amount of this reduction in the amount to be raised was $242,000, with $210,000 of this sum proposed to be apportioned from unappropriated balances for current expenses and $32,000 from balances in capital outlay. The Board states unequivocally that no such sums are available in these respective accounts, and an examination of the documentation and testimony must therefore be made.

In this regard, the Committee examined the budget statement of the Board, dated February 15, 1971, and determined from it that $386,759.49 remained in unencumbered balances. From those balances the Committee applied $242,000 to reduce the amount to be raised from local taxation in 1971-72. The Board argues that this was an attempt to preclude further expenditure, even for essential items, from a budget which was a legal entity and approved by the Commissioner. However, the Board did not curtail its expenditures during the 1970-71 school year for items it considered essential and necessary.

An examination of the record shows that the Board had, on June 30, 1970, the following unappropriated balances:

| | |
|---|---|
| Current Expense | $183,589.97 |
| Capital Outlay | 21,000.00 |

For the 1970-71 school year the Board appropriated $50,000 of the balances remaining in current expense and $15,000 of the balances remaining in capital outlay. In the budget, *sub judice*, that for 1971-72, the Board has appropriated another $80,000 from the balance of record. Thus, the balances of record may be shown as:

Available as of June 30, 1971:

| | |
|---|---|
| *Current Expense* | $183,589.97 |
| Appropriated 1970-71 | 50,000.00 |
| Appropriated 1971-72 | 80,000.00 |
| Current Balance of Record | 53,589.97 |
| *Capital Outlay* | $ 21,000.00 |
| Appropriated 1970-71 | 15,000.00 |
| Current Balance of Record | 6,000.00 |

Testimony at the hearing was a reaffirmation by the Committee of the position related, *supra.* The Board testified that its latest current projection of the expected accrual to current expense balances during the year 1970-71 is $43,429.34, and that the capital outlay account is now totally expended.

The amount of $43,429.34, expected to accrue during the 1970-71 school year in the current expense account, is a calculation based on a projection that expenditures for the year will be $129,412.34 below original projections, but that revenues will likewise be below expectations by a total of $85,983 ($17,865 in State Aid and $68,118 in Impacted Aid). Thus, a reasonable estimate at this juncture is that on June 30, 1971, the Board will have available to it total unappropriated current expense balances of:

| | |
|---|---|
| $53,000.97 | Balance of Record |
| 43,429.34 | Balances from 1970-71 Accrual |
| $96,430.31 | Total Available in Current Expense Expected on June 30, 1971 |

The hearing examiner believes that such a sum in current expense is not necessary and may be safely reduced without an impairment of the educational program of the district. Further, in view of the vote of the people and the action of the Committee, the examiner believes it should be reduced by a reasonable sum, and he therefore recommends that a total of $50,000 be so applied. This will still leave a sum of nearly $50,000 available for unexpected emergency appropriations that may be needed. This is a relatively small sum but a necessary one.

In view of the testimony that there are no balances expected in the capital outlay account and because the Committee offers no evidence that the appropriations for capital outlay are not needed and necessary, the examiner recommends that the $32,000 apportioned by the Committee from balances it maintained exist in the capital outlay account be restored in full.

Summary-to be appropriated from Balances:

| | |
|---|---|
| Determination of Committee – | |
| Current Expense | $210,000 |
| Amount Restored | 160,000 |
| Amount Not Restored | 50,000 |
| | |
| Determination of Committee – | |
| Capital Outlay | $ 32,000 |
| Amount Restored | 32,000 |
| Amount Not Restored | - 0 - |

Finally, it must be noted that subsequent to the hearing of June 16, 1971, the Board received impacted aid funds totaling $44,667 which were not anticipated and are not part of the documentation, *supra*. The hearing examiner recommends that these funds be added to the balance of record. He observes that if they are so added, at this time, they will be available for appropriation during the 1972-73 school year to offset the increased expenditures recommended herein during the year when these expenditures must now be funded.

* * * *

The Commissioner has reviewed the findings of the hearing examiner, *supra*, and has carefully considered his recommendations. In concurring therein, the Commissioner finds and determines that the sum of $400,000 must be added to the amount previously certified by the Washington Township Committee to be raised for the current expenses of the Washington Township School District in order to provide sufficient funds to maintain a thorough and efficient school system, and additionally that a further sum of $32,000 must be added to provide for necessary capital outlay expenditures. He therefore directs that the total sum of $432,000 be added to the previously-certified sum of $2,612,947 so that the total tax levy for these expenses shall be $3,044,947.

COMMISSIONER OF EDUCATION

August 3, 1971

**Board of Education of the Township of Cinnaminson,**

*Petitioner,*

**v.**

**Township Committee of the Township of Cinnaminson, Burlington County,**

*Respondent.*

## COMMISSIONER OF EDUCATION

### Decision

For the Petitioner, Brown, Connery, Kulp, Wille, Purnell & Greene (George Purnell, Esq., of Counsel)

For the Respondent, Farrell, Freeman, Eynon & Munyon (David Eynon, Esq., of Counsel)

Petitioner, hereinafter "Board," appeals from the action of respondent, hereinafter "Committee," taken pursuant to *N.J.S.A.* 18A:22-37 certifying to the County Board of Taxation a lesser amount of appropriations for school purposes for the 1971-72 school year than the amount proposed by the Board in its budget which was rejected by the voters. The facts of the matter were educed at a hearing before a hearing examiner appointed by the Commissioner on June 4, 1971, at the State Department of Education, Trenton. The report of the hearing examiner is as follows:

At the annual school election held on February 9, 1971, the voters rejected the Board's proposal to raise $3,419,396 by local taxes for current expenses and $68,625 for capital expenditures. The budget was then sent to the Committee, pursuant to *N.J.S.A.* 18A:22-37 for its determination of the amount of local tax funds required to maintain a thorough and efficient local school system.

After consultation with the Board and a review of the budget, the Committee made its determination, and certified to the Burlington County Board of Taxation an amount which reduced the appropriations for current expenses by $133,325 and for capital outlay by $11,200, for a total reduction of $144,525.

The Committee suggested line items of the budget in which it believed economies could be effected without harm to the educational program. The Board reviewed the Committee's suggestions, and determined at a conference prior to the hearing of June 4, 1971, that it could accept proposed reductions

totaling $53,000 of the funds budgeted for current expense. However, compromise efforts were not successful, and at the hearing the Board maintained it needs all but $12,300 of the total reduction made by the Committee, and buttressed these contentions by oral and written testimony.

The following table shows the amounts budgeted by the Board for various items, the economies recommended by the Committee, the reductions now deemed by the Board to be feasible, and those it contests and asks to be restored.

**CURRENT EXPENSE**

| Acct. No. | Item | Board's Budget | Comm.'s Reduct. | Reduct. Accept. | Reduct. Appeal. |
|---|---|---|---|---|---|
| J100&200 | Sal.-Admin. | | $ 4,000 | $ - 0 - | $ 4,000 |
| J110B | Expense-Bd. Secy. | 1,000 | 1,000 | - 0 - | 1,000 |
| J110F | Sal.-Supt. | 30,000 | 2,500 | 2,500 | - 0 - |
| J213 | Sal.-Teachers | 2,614,546 | 72,000 | - 0 - | 72,000 |
| J214B | Sal.-Guidance | 91,105 | 9,000 | - 0 - | 9,000 |
| J215A | Sal.-Clerical | 45,040 | 2,000 | - 0 - | 2,000 |
| J215C | Sal.-Other Instr. Staff | 54,750 | 4,500 | - 0 - | 4,500 |
| J216 | Other Sal.-Instr. | 44,875 | 1,875 | - 0 - | 1,875 |
| J240 | Supplies | 85,550 | 6,550 | - 0 - | 6,550 |
| J510B | Bus Drivers | 104,160 | 8,300 | 8,300 | - 0 - |
| J530 | Replacement Bus | 35,490 | 8,000 | - 0 - | 8,000 |
| J610A | Sal.-Custodians | 216,380 | 1,500 | 1,500 | - 0 - |
| J720A | Upkeep of Grounds | 8,200 | 6,200 | - 0 - | 6,200 |
| J870 | Tuition | 75,000 | 5,000 | - 0 - | 5,000 |
| J1010 | Student Activities | 21,250 | 900 | - 0 - | 900 |
| | Sub-Total - Current Expense | | $133,325 | $12,300 | $121,025 |
| **CAPITAL OUTLAY** | | | | | |
| L1240C | Equip.-Instr. | $41,200 | $11,200 | $ - 0 - | $ 11,200 |
| | Sub-Total - Capital Outlay | | $11,200 | $ - 0 - | $ 11,200 |
| | Grand Total | | $144,525 | $12,300 | $132,225 |

The hearing examiner has carefully reviewed the oral and written testimony and makes the following findings and recommendations with respect to the reductions of the Committee.

*J213 – Teachers' Salaries*

The Board had proposed the addition of twelve teachers for its staff in the 1971-72 school year. Specifically, the Board proposed to employ eight new teachers at the high school level, one special education teacher, one teacher of transitional first grade, one eighth grade teacher and one music teacher for work in the elementary schools. These twelve teachers are proposed in some instances for an improvement of an existing program (i.e. music), and in other instances to care for an expected increase of 178 students at the high school level.

The Committee proposed the elimination of eight of these twelve new positions and maintains that the increased student enrollment does not justify or warrant the increased staff that the Board maintains is needed.

The hearing examiner, after reviewing the Board's extensive testimony, has no doubt that the twelve new teaching positions proposed by the Board would be of great assistance to the educational program of this district, but he is not convinced that the elimination of some of these positions will in any way jeopardize the maintenance of a thorough and efficient school system. Therefore, he recommends that a total of eight new teaching positions be authorized for an increased enrollment of approximately 160-180 students, but that the determination of the Committee be sustained with respect to four other positions.

| *Summary* | | |
|---|---|---|
| | Proposed Reduction | $72,000 |
| | Amount Restored | 36,000 |
| | Amount Not Restored | 36,000 |

*J214B – Guidance Salaries Reduction - $9,000*

The Board maintains that a second guidance counselor is needed to properly provide service for the 1,200 students in its middle school and budgeted $9,000 to enable it to establish such a position. The Committee questions the need for two guidance counselors at the lower grade levels encompassed by the middle school.

The hearing examiner believes that the size of this school provides a substantiation for the Board's argument of need for a second person to assist the one male counselor now employed. He also opines that a female counselor at these grade levels is necessary to properly handle some of the problems brought before this Department. Therefore, the examiner recommends the restoration of $5,000 of this reduction to enable the Board to employ such a person half-time or to assign a present staff member to this work on a part-time basis.

| *Summary* | | |
|---|---|---|
| | Proposed Reduction | $9,000 |
| | Amount Restored | 5,000 |
| | Amount Not Restored | 4,000 |

*J215A, J215C – Other Instructional Staff Reduction - $6,500*

The Board proposed to provide two new positions with this money. One of these would be a position with three responsibilities as clerk to the reading supervisor and curriculum coordinator and to provide additional help in the high school office. The cost of this position was budgeted at $4,500. The other $2,000 was proposed to employ a clerk for a part-time position in the middle school. The Committee objects particularly to the first position described, *supra*, since part of the effort of this new employee would be in support of a curriculum coordinator, and since the Board established this new curriculum coordinator position despite a reduction determined by the Committee as applicable to the 1970-71 budget.

The hearing examiner believes that the Board's argument supports a contention that these positions would be desirable, but not that they would be

entirely essential for the operation of a thorough and efficient school system. It is true that a building such as the middle school, with 1,200 students, would probably be better served with three office secretaries rather than with the present two, but there is little expected enrollment increase in this building, and no evidence that the school has not been able to operate efficiently in the past with the present secretarial force.

The same basic reasoning can be offered to some degree with respect to the other secretarial position proposed to be established in support of three professional employees. In this regard, the Board testified that secretarial help was previously available to the reading supervisor, but that the person who gave that help is now to be assigned full time to the child study team. In effect, then, the judgment herein is whether or not the secretary now to be assigned to the child study team was assigned there of necessity. The hearing examiner holds that she was because of recent new mandates imposed by the rules of the State Board of Education with regard to special education. Therefore, the examiner recommends that half of the salary allocated for a full-time clerical employee to replace the employee now assigned to special services be restored in order to maintain an approximate *status quo*, but that in view of the vote of the people against the budget and the Committee's determination, the remainder of the reduction be sustained.

| | | |
|---|---|---|
| *Summary* | Proposed Reduction | $6,500 |
| | Amount Restored | 2,250 |
| | Amount Not Restored | 4,250 |

*J216 – Teachers' Aides Reduction - $1,875*

The Board proposes to increase the work-time of four teacher aides in the middle school in an effort to insure better preparation of instructional materials for the teachers to use.

The Committee simply states that this increase is not necessary for a thorough and efficient school.

The hearing examiner agrees with the Committee, and believes that the expansion of this service cannot be maintained in the light of the expressed will of the people and the Committee's determination.

| | | |
|---|---|---|
| *Summary* | Proposed Reduction | $1,875 |
| | Amount Rsstored | - 0 - |
| | Amount Not Restored | 1,875 |

*J240 – Teaching Supplies Reduction - $6,550*

The Board proposes to spend $85,550 for teaching supplies in the school year 1971-72. The budget for this account shows the following expenditures and proposals:

| | | |
|---|---|---|
| Actual Expenditures | 1969-70 | $66,537.55 |
| Appropriations | 1970-71 | 66,000.00 |
| Appropriations | 1971-72 | 85,550.00 |

It is the Board's testimony that the budgeted expenditure for the 1970-71 school year was not sufficient and that the account will be overdrawn. Part of this over-expenditure was evidently occasioned by the opening of a new school wing during the year.

The Committee avers that an increase of $19,000 or approximately 30% in one school year, is excessive, and it proposed to reduce this expenditure to a figure 10% larger than the appropriations budgeted for 1970-71. In rebuttal, the Board says that its increase is justified by expenses for an increased number of students, by cost increases, and by a clearer understanding of the needs of the middle school which was opened in 1970.

The hearing examiner believes that the sum of $80,000 is a reasonable estimate of the amount that is necessary to properly fund this account for the 1971-72 school year, and he opines that the increase of $14,000 herein provided for the new year should prove ample if careful allocations are made in accordance with sound budgetary procedures.

| | | |
|---|---|---|
| *Summary* | Proposed Reduction | $6,550 |
| | Amount Restored | 1,000 |
| | Amount Not Restored | 5,550 |

The hearing examiner recommends full restoration of the funds deleted by the Committee from the following accounts:

| Acct. No. | Item | Amount |
|---|---|---|
| J530 | Replacement Bus | $8,000 |
| J720A | Upkeep-Grounds | 6,200 |
| J870 | Tuition | 5,000 |
| J1010 | Student Activities | 900 |

The hearing examiner further recommends that a sum of $5,000 be restored to the J100 and J200 Accounts, and that this sum be held by the Board as a ready reserve, subject to expenditure at a later date as programmed herein by the Board or transferred to other accounts as emergency needs are shown.

There remains for consideration the capital outlay appropriation, and the use of some of the unappropriated balances that are available.

*L1240C – Equipment Instructional Reduction - $11,200*

The Board expended $27,679 for educational equipment in 1969-70, and appropriated $25,450 for these expenditures in 1970-71. However, capital expenditures for equipment were increased substantially by the Board in

appropriations for the 1971-72 budget to $41,200. The proposed increase in a one-year period is thus $15,750.

The Committee objects to this large increase over prior expenditures in a one-year period.

The hearing examiner observes that the Board's listing of items to be purchased would considerably enhance the educational program, but the question posed by this adjudication is not one of how to improve a program or programs, but of what is necessary to provide a thorough and efficient school system. No listing of the specific sums proposed by the Board to be spent for the various items is available to the hearing examiner, but he notes that the Board proposes to increase or expand purchases to improve its program in the following areas:

Use of Audio-Visual Equipment
Music Equipment
Physical Education Equipment
Wood Shop (Dust Collection System)
Miscellaneous -- Special clerks, more typewriters for use by teachers, language master duplicator

It appears from the listing of proposed purchases that there is an expansion of program contained herein that cannot be sustained, in view of the Committee's determination, as "essential" to the operation of a thorough and efficient school system. Therefore, because the hearing examiner believes that expenditures of this magnitude may and should be more strictly programmed over a two or three-year period; he recommends that the Committee's determination be sustained.

| *Summary* | | |
|---|---|---|
| | Proposed Reduction | $11,200 |
| | Amount Restored | - 0 - |
| | Amount Not Restored | 11,200 |

In summation, for the reasons stated, the hearing examiner finds that the amounts proposed by the Board in the following accounts are necessary in whole or in part for the maintenance of a thorough and efficient school system in Cinnaminson, and recommends restoration of part or all of the Committee's reductions, as shown in the following table:

## CURRENT EXPENSE

| Acct. No. | Item | Committee's Reduction | Amt. Restored | Amt. Not Restored |
|---|---|---|---|---|
| J100&200 | Sal.-Admin. | $ 4,000 | $ 4,000 | $ - 0 - |
| J110B | Espense-Bd. Secy. | 1,000 | 1,000 | - 0 - |
| J110F | Sal.-Supt. | 2,500 | - 0 - | 2,500 |
| J213 | Sal.-Tchrs. | 72,000 | 36,000 | 36,000 |
| J224B | Sal.-Guidance | 9,000 | 5,000 | 4,000 |
| J215A | Sal.-Clerical | 2,000 | - 0 - | 2,000 |
| J215C | Sal.-Other Instr. Staff | 4,500 | 2,250 | 2,250 |
| J216 | Other Sal.-Instr. | 1,875 | - 0 - | 1,875 |
| J240 | Supplies | 6,550 | 1,000 | 5,550 |
| J510B | Bus Drivers | 8,300 | 8,300 | - 0 - |
| J530 | Replacement Bus | 8,000 | 8,000 | - 0 - |
| J610A | Sal.-Custodians | 1,500 | - 0 - | 1,500 |
| J720 | Upkeep of Grounds | 6,200 | 6,200 | - 0 - |
| J870 | Tuition | 5,000 | 5,000 | - 0 - |
| J1010 | Student Activities | 900 | 900 | - 0 - |
| Sub-Total - Current Expense | | $133,325 | $77,650 | $55,675 |

## CAPITAL OUTLAY

| | | | | |
|---|---|---|---|---|
| L1240C | Equip.-Instr. | 11,200 | - 0 - | 11,200 |
| | Grand Total | $144,525 | $77,650 | $66,875 |

There remains a question as to how much, if any, of the amount proposed to be restored must be raised by taxation, and whether or not it would be reasonable to use unappropriated balances. In this regard the examiner notes that on June 30, 1970, the Board had a total of $206,360.78 available in appropriation balances in current expense and that $80,000 of that amount was appropriated for use in the 1970-71 budget, and another $40,000 has been appropriated for use in the 1971-72 year. Thus, the balance of record available in the current expense account now stands as $86,360.78. In addition, the testimony of the Board Secretary at the hearing was that a further sum, estimated by him to be approximately $10,000, might be expected as an accrual to these balances from the tabulations of expenditures and receipts for the 1970-71 year. The hearing examiner believes that this may well be a minimum estimate, but in any event it will still leave a sum of more than $96,000 available in balances in the current expense account on June 30, 1971. In view of this fact, and because there is no apparent need to keep such a sum in reserve, the hearing examiner recommends that $40,000 of this amount be appropriated and added to the $40,000 appropriated previously, so that the total appropriation from current expense balances shall be $80,000 for the school year 1971-72. This will still leave an actual balance of more than $56,000 available for emergency needs of the district and while this new appropriation will probably preclude further appropriation from balances in the 1972-73 school year, it is plainly consonant with the will of the people expressed at the referendum of February 9, 1971. In addition, the hearing examiner believes that since the tax

rate for the 1971-72 year has already been established, it is improvident to spend time and interest charges, to obtain a temporary loan of $40,000 against future local taxes, while at the same time such a sum lies idle and unused.

In summation, the hearing examiner recommends herein that $77,650 of the reductions determined by the Committee as necessary for the proper operation of a thorough and efficient school system in Cinnaminson Township be restored to the Board to be used for current expenses of its schools during the 1970-71 school year, but that an additional $40,000 of the unappropriated balances of record be apportioned to fund the major part of this restoration. It is also recommended that the Committee be required to certify the remaining sum of $37,650 to the County Board of Taxation as an additional levy to be raised in local taxes.

* * * *

The Commissioner has reviewed the findings of the hearing examiner reported above and has carefully considered the conclusions and recommendations. In concurring therein, the Commissioner finds and determines that an amount of $37,650 must be added to the amount previously certified by the Committee to be raised for the current expenses of the Cinnaminson School District in order to maintain a thorough and efficient system of public schools in the district. He therefore directs the Cinnaminson Township Committee to add to the previous certification to the Burlington County Board of Taxation of $3,286,071 for the current expenses of the School District the amount of $37,650 so that the total amount of the local tax levy for current expenses for 1971-72 shall be $3,323,721.

COMMISSIONER OF EDUCATION

August 4, 1971

**Board of Education of the Borough of Lawnside,**

*Petitioner,*

**v.**

**Board of Education of the Borough of Haddon Heights, Camden County,**

*Respondent.*

## COMMISSIONER OF EDUCATION

### Decision

For the Petitioner, Theodore Z. Davis, Esq.

For the Respondent, Paul Ireton, Esq.

The Lawnside Board of Education, hereinafter "petitioner," brings this action against the Haddon Heights Board of Education, hereinafter "respondent," on behalf of students residing in the Lawnside School District and in attendance in the Haddon Heights High School pursuant to a sending-receiving relationship. Specifically, petitioner alleges that respondent's measures of discipline invoked against some students were harsh and should be terminated forthwith. Respondent avers that petitioner has no standing in this adjudication, but, in any event, that the disciplinary penalties respondent imposed, in this instance, were a right and proper exercise of its authority.

A hearing on a motion for *pendente lite* relief and oral argument on some of the merits of the charges contained herein was conducted on June 11, 1971, 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:

Petitioner has maintained a long relationship as a sending district to the Haddon Heights High School, which is a school under the administrative control of respondent. In this school, on May 12, 1971, a fracas occurred between one student from Lawnside and one student from Haddon Heights, which precipitated a series of other fights and disturbances. After an investigation of all of these incidents, Haddon Heights school administrators determined that one of the involved students from Lawnside should be suspended, that notes of warning should be placed in the files of some of the other 31 students, that such notices were to be kept there until the students' graduation, and that warning letters should be sent to the homes of the students involved.

Petitioner was apprised of the disciplinary actions recited, *supra*, and takes exception to them on behalf of the students, although none of the students, or

their parents, are directly involved in the presentation of the allegations contained herein.

Petitioner maintains that, as the representative of a sending district, it is responsible for the education of these students and for their transportation to and from school, and that it stands in some respects in *loco parentis* in its relationship to the students herein involved. Therefore, petitioner's prayer is that the Commissioner (1) suspend the disciplinary measures involved, (2) grant all pupils a full hearing, and (3) restrain respondent from disciplining petitioner's pupils in the future, without the right of said petitioner to vote upon said action.

Respondent maintains that it has full power over its high school and all of its students and may invoke necessary discipline of all pupils who attend the school without interference by petitioner or any other board of education. Therefore, respondent seeks an order from the Commissioner in support of this position.

Additionally, respondent states that on two days subsequent to the altercations of May 1971, petitioner cancelled its buses to Haddon Heights High School, and respondent seeks an order directing petitioner to supply such bus transportation during all the hours and days that school is in session in the future.

The hearing examiner has reviewed the arguments of counsel embodied in the pleadings and stated at the hearing. He concludes that respondent, as a receiving district with respect to the high school-age students from the Borough of Lawnside, had full power to invoke the discipline it did invoke in this instance, and the examiner can find nothing to substantiate a charge that the disciplinary measures were either harsh or unusual under the circumstances.

The power given to school administrators to suspend students is clearly conferred by terms of the statutes. *N.J.S.A.* 18A:37-1 requires pupils in attendance in the public schools to "*** comply with the rules established *** for the government of such schools ***" and to "***submit to the authority of the teachers and others in authority over them." *N.J.S.A.* 18A:37-2 provides *inter alia*, that students who are in

> "*** continued and willful disobedience, or of open defiance of the authority *** shall be liable to punishment and to *suspension* or *expulsion* from school." *(Emphasis supplied.)*

In the instant matter this right to suspend was exercised in one instance, and the student involved and her mother both refused a further hearing to determine whether or not the suspension should be continued. Since the aggrieved party chose not to press a claim, the hearing examiner holds that petitioner cannot now interpose a claim to a right which the student and her legal guardian have refused to exercise.

The other punishment that was imposed – the insertion of warning letters in the files of students – is a relatively mild one, temporary in nature and of the type upheld by the Commissioner on prior occasions. *In the Matter of E.E. v. Board of Education of the Township of Ocean, Monmouth County*, decided by the Commissioner March 9, 1971, the Commissioner was asked to adjudicate the propriety of a permanent recording of disciplinary infractions on the records of students. While finding that a permanent record of such infractions could have a "deleterious effect" on the pupil's future and was an improper recording, the Commissioner also indicated that "that record of his offense that is necessary may be kept temporarily during his public school career." This is exactly what respondent proposes to do, and the hearing examiner opines that a hearing with regard to this punishment, if such it is, is not necessary in this instance, since the punishment invoked is transitory and impermanent.

The hearing examiner has proffered the conclusions, *supra*, with regard to the merits of the charges and allegations embodied in this petition, in order that the record might be complete, and in the absence of a prior determination as to whether or not this petitioner, or any similar petitioner, has standing to bring such charges as contained herein in the first instance. The examiner has searched the law and can find no similar cases. Therefore, if the Commissioner determines in this matter that the petition may not be considered on its merits, the conclusions of the hearing examiner contained herein may be regarded as preliminary in nature and subject to later revision, if a subsequent petition by aggrieved parties is brought directly to the Commissioner for adjudication.

The cross claim of respondent – that transportation was not provided in two instances – should not intrude as an issue herein to be adjudged on its merits, since the issue is moot in any event and there is no relief that the Commissioner can grant at this time. Additionally, there was no testimony on the merits of this cross claim at the hearing of June 11, 1971.

* * * *

The Commissioner has carefully reviewed the report of the hearing examiner, and observes that the primary issue of this case is whether or not the board of education of a sending district has any entitlement to exercise an independent appellate judgment on the propriety of the actions of another board of education to whose care it entrusts students pursuant to a contracted agreement. The Commissioner has searched the statutes and can find no right imbedded in law or in reason that would support such a finding.

To the contrary, the statute, *N.J.S.A.* 18A:11-1, provides that:

> "*The board* shall ***make ***rules for *** its own government and the transaction of its business and for the government and management of the public schools ***." *(Emphasis supplied.)*

Thus, it is clear only *one* board is entitled to make rules for the government of its schools, and the Commissioner opines that it is unreasonable to assume that two boards have the power to pass judgment in instances where alleged violations of the rules promulgated by the one board have been broken. Such an administrative requirement, in the Commissioner's judgment, would be unwieldy and cumbersome. Since such a requirement is not statutory and since the Commissioner opines that it is unreasonable, any claim to the right to exercise it is clearly *ultra vires.*

In the instant matter, petitioner has no specific private grievance against respondent, since respondent has accepted petitioner's students into its system, and the students so enrolled are clearly responsible only to respondent, are subject to the disciplinary control of respondent's school administrators, and are responsible to act in conformity with respondent's rules and regulations. When, in respondent's judgment, its rules have been broken by students in a manner that warrants the imposition of statutorily-permissive disciplinary control measures, and when such measures have been invoked against individual students, the appeal on the propriety of the measures may only be brought directly to the Commissioner in the statutorily-prescribed manner by the party or parties aggrieved and not by a third party in the manner evidenced herein.

Therefore, the Commissioner finds the instant petition to be without standing and the allegations that it presents are dismissed without prejudice.

COMMISSIONER OF EDUCATION

August 5, 1971

**Board of Education of the Borough of Mount Arlington,**

*Petitioner,*

**v.**

**Mayor and Council of the Borough of Mount Arlington, Morris County,**

*Respondent.*

## COMMISSIONER OF EDUCATION

### Decision

For the Petitioner, Maraziti, Maraziti and Sabbath (Joseph J. Maraziti, Esq., of Counsel)

Petitioner hereinafter "Board," appeals from an action of respondent, hereinafter "Council," pursuant to *N.J.S.A.* 18A:37-2, certifying to the Morris County Board of Taxation a lesser amount of appropriations for school purposes

for the 1971-72 school year than the amount proposed by the Board in its budget which was rejected by the voters. The facts of the matter were educed at a hearing before a hearing examiner appointed by the Commissioner on July 20, 1971, at the State Department of Education, Trenton. The report of the hearing examiner is as follows:

At the annual school election of February 9, 1971, the voters rejected the Board's proposal to raise $888,388.90 for school purposes. After receipt of the budget from the Board, Council met on March 1, 1971, and passed the following resolution:

> "Be It Resolved by the Mayor and Council of the Borough of Mt. Arlington to recommend to the Board of Education of Mt. Arlington that their 1971/72 School Budget be reduced in the following manner:
>
> | | | |
> |---|---|---|
> | Tuition | | $33,000 |
> | Salaries | (Administrative<br>(Instruction<br>(Health Services | 30,000 |
> | Transoportation and Misc. Items | | 15,000 |
> | | | $78,000 |
>
> I, Robert C. Rooney, hereby certify the above to be a true copy of a resolution adopted by the Mayor and Council on March 1, 1971."

The Board appealed Council's cuts. On May 14, 1971, the Commissioner's office notified Council by letter of its responsibility in a budget dispute. That letter reads in part as follows:

> "*** In accordance with the directive of the New Jersey Supreme Court in the case of *East Brunswick Board of Education v. East Brunswick Township Council*, 48 *N.J.* 94 (1966), you are directed to include in your Answer two copies of a detailed statement setting forth the governing body's underlying determinations and supporting reasons for its action to reduce the budget of the Board of Education. ***"

On June 2, 1971, the Commissioner's office received a letter from the Borough Clerk of Mt. Arlington, which reads in pertinent part as follows:

> "*** The Mayor and Council will not be present at the hearing June 11, 1971 nor will we be represented by Counsel, as we feel it would be a waste of tax monies and our own personal time.
>
> "We realize that the school board spent considerable time and effort to prepare their budget. We also recognize the handicaps that (sic) under which they must work, RIDICULOUS rules, regulations, and mandatory legislation. They did their job as best they could.

"The Mayor and Council, after considerable deliberation, did the job they must do in compliance with State Statutes and reduced the budget. We are unanimous in our feeling that the amount we reduced the budget is minimal. ***"

Despite the letter, *supra*, Council was invited to attend the hearing to defend its budget cuts, but Council did not attend.

Counsel for the Board made a Motion for Summary Judgment, alleging that the governing body gave no reasons for its suggested economies in their resolution, *supra*, and that their letter to the Commissioner's office (dated June 2, 1971) did not specify reasons for the cuts. The Board cites the New Jersey Supreme Court's decision in *East Brunswick*, *supra*, and alleges that Council failed to set "forth the governing body's underlying determinations and supporting reasons" for its cuts. (at page 106) The Board alleges finally that Council's cuts are, therefore, arbitrary and that they should be set aside.

* * * *

The Commissioner has read the report of the hearing examiner.

In the case of *East Brunswick*, *supra*, the Court laid down guiding principles for the review of rejected school budgets by the municipal governing body 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 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 page 105)

The Court also defined the function of the Commissioner when, after the governing body has made its determination, the Board appeals from such action:

"*** the Commissioner in deciding the budget dispute here before him, will be called upon to determine not only the strict issue of arbitrariness but also whether the State's educational policies are being properly fulfilled. Thus, if he finds that the budget fixed by the governing body is insufficient to enable compliance with mandatory legislative and administrative educational requirements or is insufficient to meet

> minimum educational standards for the mandated 'thorough and efficient' East Brunswick school system he will direct appropriate corrective action by the governing body or fix the budget on his own within the limits originally proposed by the board of education. On the other hand, if he finds that the governing body's budget is not so inadequate, even though significantly below what the Board of Education had fixed or what he would fix if he were acting as the original budget-making body under *R.S.* 18:7-83, then he will sustain it, absent any independent showing of procedural or substantive arbitrariness.***" (at page 107)

In this case the Commissioner finds that the reduction made by Council was arbitrary. Council's resolution passed on March 1, 1971, indicates only that an aggregate sum of $78,000 be reduced in three specified accounts. Nowhere in Council's resolution, or in any communication with this office, are any reasons advanced to explain their cuts. Nor does the record educed at the hearing indicate that the Board was given any reasons for Council's suggested economies. Finally, Council's action does not comport with the guidelines laid down by the Supreme Court in the *East Brunswick* case, *supra.*

The Commissioner determines, therefore, that Council's cut of $78,000 from the proposed budget of the Board was arbitrary and must be set aside. Council's Motion for Summary Judgment is granted. The Commissioner directs, therefore, that there be added to the certification previously made by the Mayor and Council of the Borough of Mount Arlington to the Morris County Board of Taxation the sum of $78,000, the total amount cut from the budget proposed by the Board.

COMMISSIONER OF EDUCATION

August 5, 1971

**Board of Education of Penns Grove-Upper Penns Neck Regional School District,**

*Petitioner,*

**v.**

**Mayor and Council of the Borough of Penns Grove and Township Committee of the Township of Upper Penns Neck, Salem County,**

*Respondent.*

## COMMISSIONER OF EDUCATION

### Decision

For the Petitioner, Gerard J. DiNicola, Esq.

For the Respondent Penns Grove Borough Council, Donald L. Masten, Esq.

For the Respondent Upper Penns Neck Township Committee, Wayland A. Lucas, Esq.

Petitioner, the Board of Education of Penns Grove-Upper Penns Neck Regional School District (hereinafter "Board") appeals from an action taken pursuant to *N.J.S.A.* 18A:13-19 by the municipal governing bodies of its constituent districts of the Borough of Penns Grove and the Township of Upper Penns Neck (hereinafter "Governing Bodies") certifying to the Salem County Board of Taxation a lesser appropriation for the school year 1971-72 than the amount proposed by the Board and rejected by the voters at the annual school district election.

The facts of this matter were educed at a hearing before the Assistant Commissioner of Education in charge of the Division of Controversies and Disputes on June 17 and July 6, 1971.

At the annual school election on March 30, 1971, the voters rejected the Board's proposal to raise $1,617,941 for current expenses. The budget was then submitted to the Governing Bodies pursuant to *N.J.S.A.* 18A:13-19 for determination of the funds required to maintain a thorough and efficient school system. At that time the Board submitted an interim financial report, which provided a detailed analysis of the operating budget for 1970-71 listing unexpended balances in each account as of January 31, 1971. (R-1) The Governing Bodies examined this document, made a detailed examination of the Board's rejected budget for 1971-72 and reviewed the Board's previous record with regard to unexpended balances. This action, in the opinion of the Governing Bodies, provided the rationale for reducing the Board's $1,617,941 appropriation request to $1,491,941, a net reduction of $126,000 for current

expenses. The Governing Bodies also reduced the Board's $30,500 capital outlay appropriation to $25,500, a net reduction of $5,000, which resulted in an apparent total budget reduction of $131,000.

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

| | Board's Proposal | Certified by Gov. Bodies | Amount Reduced |
|---|---|---|---|
| Current Expense | $1,617,941 | $1,491,941 | $126,000 |
| Capital Outlay | 30,500 | - 0 - | 5,000 |

The Board's proposal for capital outlay is totally funded from the anticipated 1970-71 appropriation balance and hence is not subject to reduction by the Governing Bodies pursuant to *N.J.S.A.* 18A:13-19. A check of the records available to the Commissioner reveals that this $5,000 reduction item was excluded from any official action and is, therefore, not relevant to the instant matter.

In making the reduction of $126,000 the Governing Bodies suggested reductions in the following current-expense items of the school budget:

| Act. No. | Item | Board's Budget | Gov. Bodies' Proposal | Amount Reduced |
|---|---|---|---|---|
| 1301 | Exp.-Bd. Members | $ 2,000 | $ 1,000 | $ 1,000 |
| 1305 | Off. Exp.-Admin. | 8,000 | 6,000 | 2,000 |
| 2130-42 | Salaries | 1,720,483 | 1,700,483 | 20,000 |
| 2200 | Textbooks | 35,000 | 25,000 | 10,000 |
| 2301 | Library Books | 20,000 | 15,000 | 5,000 |
| 2303-2400 | A-V Aids & Supplies | 67,200 | 57,200 | 10,000 |
| 4100 | Sal.-Medical Insp. | 5,750 | 2,750 | 3,000 |
| 4203 | Misc. Exp.-Health | 2,500 | 1,500 | 1,000 |
| 6300 | Fuel | 36,000 | 33,500 | 2,500 |
| 6401-6404 | Utilities | 75,500 | 70,500 | 5,000 |
| 6501 | Supplies-Custodial | 10,000 | 7,000 | 3,000 |
| 6604 | Misc. Exp.-Custod. | 6,000 | 4,500 | 1,500 |
| 7103* | Repair-Ed. Equip. | 6,000 | 5,500 | 500 |
| 7201 | Contr. Serv.-Grds. | 8,750 | 6,750 | 2,000 |
| 7202 | Contr. Serv.-Bldgs. | 45,000 | 35,000 | 10,000 |
| 7203 | Contr. Serv.-Ed. Equip. | 6,000 | 4,000 | 2,000 |
| 7301 | Replace.-Equip. (Instr.) | 8,000 | 6,500 | 1,500 |
| 7302 | Replace.-Equip. (Non-Instr.) | 6,000 | 2,000 | 4,000 |
| 7402 | Repair of Buildings | 13,000 | 10,000 | 3,000 |
| 7403 | Rep. & Repl.-Janito Equip. | 1,500 | 1,000 | 500 |
| 8700 | Tuition | 30,000 | 20,000 | 10,000 |
| 9100 | Salaries-Cafeteria | 11,770 | 10,770 | 1,000 |
| 10200 | School Athletics | 32,000 | 30,000 | 2,000 |
| 11,130 | Adult and Summer Schoo | 7,500 | 7,000 | 500 |
| | Sub-Total - Current Expense Reduction | | | $101,000 |
| | Increased Appropriation from Surplus | | | 25,000 |
| | TOTAL REDUCTION | | $126,000 | $126,000 |

*The Board's actual budget figure for item 7103 was $1,000.

The Board alleges that the actions of the Governing Bodies 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 Governing Bodies maintain that their action was a result of a joint determination made with full regard for the State's educational standards in the light of ability of citizens to pay the cost. They further aver that the underlying reason for each of the reductions recommended was their mutual 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.

It is clear from the testimony of municipal officials that their rationale for reducing the budget was not programmatic, rather it was based on the amount of surplus funds available in each affected account. The conclusion is clearly stated in the respondents' answer to the petition of appeal in the following language:

> "*** The underlying reason for the reductions made to the various line items of the said budget was a determination of respondents that in each instance past budget experience indicated that the Board's appropriations were in excess of the sums actually required and expended.***"

Since this is the main issue in the instant matter and since the establishment and continuation of programs in the Board's budget is not under question, the decision on this matter rests solely on the amount of surplus necessary in current expense for the proper administration of the 1971-72 budget.

Of assistance in this matter was the testimony of the school district's auditor who was called as a witness by respondents. This testimony revealed that the Board may anticipate a $257,996 free balance in current expense at the close of the 1970-71 fiscal year. The Board's auditor also provided the following guidance on the matter of surplus in response to a letter from the Superintendent of Schools:

> "*** In accordance with your request to determine the amount of surplus funds that the school district should maintain, I reviewed the monthly totals of cash receipts and disbursements for the fiscal year 1970-71 only. On this basis, my suggestion for a reasonable amount would be $150,000.00. However, the question of how much surplus funds to maintain is the responsibility of the school board members and could be influenced by such factors as any change in the pattern of receipts from your various revenue sources, etc."

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, can be counter-productive to the ideal of a healthy school budget fully-funded and supported by municipal officials. In the instant matter the Commissioner is convinced that both the Board of Education and the Governing Bodies were acting in a responsive manner in regard to the obligations they have undertaken. The school district auditor has made a sound recommendation regarding surplus. The Commissioner is constrained to comment that this figure is situationally applicable to this district and is probably slightly inflated due to the unanticipated costs incident to the first year of operation of a new high school.

**SUMMARY**

| | |
|---|---|
| Anticipated Current Expenses Free Balance | $257,996 |
| Balance Appropriated by the Board of Education | 50,000 |
| Remaining Free Balance | 207,996 |
| Auditor's Suggested Free Balance | 150,000 |
| Amount Reduced in Current Expense by Governing Bodies | 126,000 |
| Amount Available for Reduction Pursuant to Auditor's Suggestion | 57,996 |
| Amount Restored to Maintain $150,000 Surplus | 68,000 |

The Commissioner finds and determines that the amount of school appropriation certified by the Governing Bodies reducing the 1971-72 current expense budget by $126,000 is insufficient to provide a thorough and efficient school system. The Commissioner directs, therefore, that $68,000 be reinstated in and added to the appropriation for current expense for the 1971-72 school year.

COMMISSIONER OF EDUCATION

August 6, 1971

**Board of Education of the Borough of Manville,**

*Petitioner,*

**v.**

**Mayor and Council of the Borough of Manville and Somerset County Board of Taxation, Somerset County,**

*Respondent.*

## COMMISSIONER OF EDUCATION

### Decision

For the Petitioner, Raymond R. Trombadore, Esq.

For the Respondent, Chase and Clancy, (Donald C. Chase, Esq., of Counsel)

Petitioner, hereinafter "Board," appeals from an action of respondent, hereinafter "Council," pursuant to *N.J.S.A.* 18A:22-37 certifying to the Somerset County Board of Taxation a lesser amount of appropriation for the 1971-72 school year than the amount proposed by the Board in its budget which was defeated by the voters. The facts of the matter were presented to a hearing examiner appointed by the Commissioner on June 18, 1971, at the State Department of Education, Trenton. The report of the hearing examiner is as follows:

The Commissioner of Education recognizes that the Somerset County Board of Taxation is a nominal party only to this appeal and is not involved in the merits of the matter. The Commissioner finds no necessity, therefore, for the County Board of Taxation to enter this litigation or to be represented by counsel nor has the Board of Taxation expressed its desire to do so.

At the annual school election on February 9, 1971, the legal voters of the school district of Manville rejected the appropriations for school purposes proposed by the Board. The proposed appropriations presented to the legal voters were as follows:

| | |
|---|---|
| Current Expense | $2,184,761 |
| Capital Outlay | 20,792 |
| Total | $2,205,553 |

Within the time prescribed by law, the Council conferred with the Board and after discussion determined that the amounts to be raised by local taxation be reduced as follows:

| | From | To | Reduction |
|---|---|---|---|
| Current Expense | $2,184,761 | $2,152,761 | $32,000 |
| Capital Outlay | 20,792 | 12,792 | 8,000 |
| Total | $2,205,553 | $2,165,553 | $40,000 |

On March 24, 1971, Council petitioned the Commissioner of Education for an extension of the 30-day period of time within which it was authorized to act upon the budget pursuant to N.J.S.A. 18A:22-37. By letter of April 2, 1971, Council's request for the extension of time was denied by the Assistant Commissioner of Education in charge of Controversies and Disputes. That letter reads in pertinent part as follows:

> "*** Your request for an extension of time for certification and action on the 1971-72 budget of the Board of Education of the Borough of Manville cannot be granted.
>
> "The Commissioner has no authority to reach beyond the provisions of the governing statute *N.J.S.A.* 18A:22-37.
>
> "As you know, this statute requires that the municipal governing body act on the budget within 30 days of its receipt from the local board of education. ***
>
> "For the reasons stated herein, an extension of time for certification to the Somerset County Board of Taxation cannot be granted.
>
> Sincerely yours,
>
> William A. Shine
> Assistant Commissioner of Education ***"

With complete disregard for the Assistant Commissioner's letter, *supra*, Council submitted an amended certification to the Somerset County Board of Taxation dated March 30, 1971, which further reduced the Board's budget by an additional $27,000. The total cut made by Council was, therefore, $67,000, as follows:

| | From | To | Reduction |
|---|---|---|---|
| Current Expense | $2,184,761 | $2,125,761 | $59,000 |
| Capital Outlay | 20,792 | 12,792 | 8,000 |
| Total | $2,205,553 | $2,138,553 | $67,000 |

Council, thereafter, set out certain items which it suggested could be reduced. The sum of the suggested reductions amounts to the total reduction of $67,000, as follows:

## CURRENT EXPENSE ACCOUNT

| Item | | Budgeted by Board | Recommended by Council | Reduction |
|---|---|---|---|---|
| J-120-d | Program Scheduling | $ 9,550 | $ 5,150 | $ 4,400 |
| J-213.1 | Salaries-Teachers | 1,599,750 | 1,581,500 | 18,250 |
| J-220 | Textbooks | 25,025 | 20,025 | 5,000 |
| J-230-a | School Libraries | 5,350 | 4,500 | 850 |
| J-230-c | Audio-Visual Mater. | 10,940 | 5,940 | 5,000 |
| J-240 | Tching. Supplies | 59,980 | 53,980 | 6,000 |
| J-250-a | Misc. Supplies | 9,095 | 8,095 | 1,000 |
| J-550 | Operation & Maint. of Vehicles | 3,200 | 2,200 | 1,000 |
| J-620 | Operation of Plant | 1,825 | 1,325 | 500 |
| J-710-b | Salaries for Maint. | 28,420 | 26,420 | 2,000 |
| J-720-a | Upkeep of Grounds | 1,700 | 700 | 1,000 |
| J-720-b | Repair of Buildings | 21,460 | 16,460 | 5,000 |
| J-720-c | Equipment-Repair | 6,715 | 5,215 | 1,500 |
| J-730-a | Replacement of Equip. | 12,195 | 7,195 | 5,000 |
| J-730-b | Non-Instructional Equipment-Replacement | 2,615 | 1,115 | 1,500 |
| J-740-b | Maintenance of Plant | 4,925 | 2,925 | 2,000 |
| | TOTALS | $1,802,745 | $1,742,745 | $60,000 |

Although Council's suggested cuts in current expenses as certified in its resolution of March 29, 1971, totaled $59,000, the hearing examiner notes in the table, *supra*, that their recommended line-item cuts actually total $60,000.

## CAPITAL OUTLAY ACCOUNT

| Item | Budgeted by Board | Recommended by Council | Reduction |
|---|---|---|---|
| J-1220-c Site Improvement | $ 6,800 | $ - 0 - | $6,800 |
| J-1240-c Audio Visual | 5,675 | 5,475 | 200 |
| TOTALS | $12,475 | $5,475 | $7,000 |

## TOTAL BUDGET REDUCTION

| | |
|---|---|
| Current Expense | $60,000 |
| Capital Outlay | $ 7,000 |
| Total | $67,000 |

Council's recommended economies and the reasons therefore are as follows:

*J-120d Program Scheduling*

The Board agreed to accept this recommended cut by Council; therefore, the cut will go undisturbed.

*J-213.1 Teachers' Salaries*

Council's suggested economy in this account is $18,250. Council specifically recommends that the Board explore the possibility of (a) hiring only

one additional teacher and some less experienced teachers, which practice, it concludes, will call for smaller appropriations for teachers' salaries; or (b) hiring all three of the new teachers the Board needs so long as it hires teachers with lesser experience whenever possible; or (c) that the Board explore the possibility of increasing class sizes. Council contends that any of these methods, or a combination thereof, will in no way harm the quality of education and will provide for its recommended economy in this account while maintaining a thorough and efficient educational system.

The Board avers that it intends to economize so far as it is possible and that it will increase class size to absorb the sixty-four additional students expected in the fall. However, the Board further avers that it must hire a new instructor for the students classified as perceptually impaired and that this additional staff member will represent a considerable savings over the alternative method of paying tuition for their education in another district. Therefore, $9,000 has been set aside for this position.

The Board alleges that teachers' salaries in its district were 3% below the average teachers' salaries in Somerset County for the 1970-71 school year.

The Board contends that it has offered the Manville Education Association an 8.5% increase in teachers' salaries for the school year 1971-72. Such offer if accepted, it avers, is below the average salary increase in the other school districts which have already concluded negotiations and that the salaries will, therefore, drop further behind the County average for teachers' salaries.

The Superintendent of Schools testified that the Board must maintain its proposed budget and also effect a $5,000 savings in teacher-turnover, or it will be overcommitted in this account.

On the basis of the testimony and the record, the hearing examiner recommends that the $18,250 be restored. The guide offered by the Board is barely competitive in the County, and the Board avers that it intends to follow Council's recommendations to effectuate savings in this account.

*J-220 – Textbooks*

Council contends that new programs offered by the Board may delayed at least one more year, and that textbooks can be used for a lengthier period of time because of drastically-rising costs for these materials. Council suggests, therefore, that $5,000 be cut from this account and that the current educational program is sufficient for the Manville School District.

The Superintendent testified that curriculum revision is moving slowly at the rate of one subject per year because of restricted budgets. He avers that mathematics books in the K-6 program are eight years old and in need of replacement for the new mathematics program. He avers that replacement would be needed even if no new program were adopted because of the general poor condition of the books.

On the weight of the exhibits and the testimony of the Superintendent of Schools, the hearing examiner recommends that the $5,000 reduction be restored to this account. Curriculum revision is a function of the Board through the school administration, and the Board in its wisdom has determined that the new program and the new books are necessary for the coming school year.

*J-230a – School Libraries*

Council recommends that these books should be used for a lengthier period of time since the budget in this account is rising drastically.

The Superintendent testified that the budgeted amount for school library books is only $50.00 higher than the amount in last year's budget and $1,411.46 lower than the amount allocated in the 1969-70 budget for this purpose.

The hearing examiner notes that library books, unlike textbooks, are varied and new each year and do not lend themselves to usage for "a lengthier period of time" because of their special nature. The reduction in this account cannot be supported. It is recommended, therefore, that the $850 be restored.

*J-230c – Audio-Visual Materials*

Council avers that the cost of these materials is rising rapidly each year and that the materials desired should be placed in the special outlay account. Council recommends an economy, therefore, of $5,000 and suggests that current materials be used for a longer period of time.

The Board avers that many of its audio-visual materials are outdated and old and that under the law, they may not be purchased as capital items.

The hearing examiner recommends that one-half, or $2,500 of the $5,000 be restored. The Board's assertion is correct that these materials may be purchased only with current expense monies. However, the recommended restoration in this account, together with the balance not cut by Council, will allow the Board adequate funds for audio-visual materials for the school year 1971-72, and should not hamper its efforts to maintain a proper and thorough educational program.

*J-240 – Teaching Supplies*

Council states that the appropriations in this account are rising rapidly and that teachers should use supplies for a longer period of time. It recommends that many of the supplies should be purchased from capital monies.

The record shows a moderate increase in this account since the 1969-70 school year when the Board budgeted $49,661.34. In 1970-71, $54,100 was budgeted; the Board's proposal for 1971-72 is $59,980. The hearing examiner notes that the Board anticipates a 7% increase in supply costs, sixty-four additional pupils, and a new expenditure for consummable materials for a new

program – a combination of circumstances requiring a greater expenditure in this account. However, it is recommended that a cut of $2,550 can be absorbed by the Board without harm to the educational program and that $3,450 of Council's $6,000 recommended economy in this account be restored. Under the law, teaching supplies cannot be purchased with capital funds as Council suggests.

*J-250a – Miscellaneous Supplies; J-550 – Operation and Maintenance of Vehicles; J-660 – Operation of Plant*

Council recommended an economy of $2,500 in these accounts ($1,000 in the first two accounts, and $500 in the third, *supra*).

The record indicates that such suggested cuts are reasonable and can be absorbed without harm to the educational program of the school system. The hearing examiner recommends, therefore, that Council's cuts in these accounts be left undisturbed.

*J-710b – Salaries for Maintenance*

Council recommends that $2,000 be cut from this account by restricting the hiring of summer help and postponing some of the maintenance projects.

The Superintendent testified that the hiring of summer help for painting represents savings to the taxpayers. He avers that if such services were contracted, a greater expenditure would be required and that the maintenance is absolutely necessary to check deteriorating conditions.

On the basis of the Superintendent's testimony, the hearing examiner recommends that the $2,000 cut by Council be restored.

*J-720b – Repair of Buildings: J-720c – Repair of Equipment; J-730a – Replacement of Equipment; J-730b – Maintenance of Plant*

These accounts are all related to upkeep, repair, replacement and maintenance of grounds, buildings and equipment. The hearing examiner finds that Council's recommended economies are reasonable, and that the Board's budget is adequate for these accounts despite Council's cuts. He recommends, therefore, that Council's cuts in the accounts be left undisturbed.

*J-1220c – Site Improvement; J-1240c – Audio-Visual Equipment*

The Board agrees to Council's suggested cuts in these accounts; therefore, the hearing examiner recommends that these cuts remain undisturbed.

The hearing examiner notes that the Captial Outlay Account suggests cuts of only $7,000, although Council's resolution to the Tax Board required a cut of $8,000 in this account. It is recommended, therefore that $1,000 be restored in this account.

After having considered the facts, the exhibits and the testimony, the hearing examiner recommends that the following amounts be restored to the budget of the Manville Board of Education for the school year 1971-72, in order to provide a thorough and efficient system of education in the School District of Manville, as follows:

## CURRENT EXPENSE ACCOUNT

| Item | | Budgeted by Board | Recommended by Council | Restored |
|---|---|---|---|---|
| J-120-d | Program Schedule | $ 9,550 | $4,400 | $- 0 - |
| J-213.1 | Salaries-Tchrs. | 1,599,750 | 18,250 | 18,250 |
| J-220 | Textbooks | 25,025 | 5,000 | 5,000 |
| J-230-a | School Libraries | ,5,350 | 850 | 850 |
| J-230-c | Audio-Visual Mater. | 10,940 | 5,000 | 2,500 |
| J-240 | Teaching Supplies | 59,980 | 6,000 | 3,450 |
| J-250-a | Misc. Supplies | 9,095 | 1,000 | - 0 - |
| J-550 | Operation & Maint. of Vehicles | 3,200 | 1,000 | - 0 - |
| J-620 | Operation of Plant | $ 1,825 | $ 500 | $ - 0 - |
| J-710-b | Salaries for Maint. | 28,420 | , 2,000 | 2,000 |
| J-730-a | Upkeep of Grounds | 1,700 | 1,000 | - 0 - |
| J-720-b | Repair of Buildings | 21,460 | 5,000 | - 0 - |
| J-720-c | Equipment Repair | 6,715 | 1,500 | - 0 - |
| J-730-a | Replacement of Equip. | 12,195 | 5,000 | - 0 - |
| J-730-b | Non-Instructional Equipment-Replacement | 2,615 | ,1,500 | - 0 - |
| J-740-b | Maintenance of Plant | 4,925 | 2,000 | - 0 - |
| | TOTALS | $1,802,745 | $60,000 | $32,050 |

## CAPITAL OUTLAY ACCOUNT

| | | | | |
|---|---|---|---|---|
| J-1220-c | Site Improvement | $ 6,800 | $ 6,800 | $ - 0 - |
| J-1240-c | Audio-Visual From | 5,675 | 200 | - 0 - |
| | Capital Account but not specified by Council | - 0 - | 1,000 | 1,000 |
| | TOTALS | $ 12,475 | $ 8,000 | $33,050 |

* * * *

The Commissioner has examined the hearing officer's report and accepts his findings and recommendations on the amounts to be restored.

The Commissioner laments the fact that Council would not be guided by the directive of the Assistant Commissioner of Education, setting forth his denial of Council's request for a 30-day extension of the timer period authorized by statute, to certify the tax rate to the Somerset County Board of Taxation. Certainly Council understands, through the guidance of its counsel, that legal procedures were available that would grant them the relief they sought had they been improperly and illegally denied their requested 30-day extension of time. Council's deliberate flaunting of the Assistant Commissioner's ruling, without

explanation, can only be interpreted as an inexcusable action taken to circumvent the established procedures of the appeal process pursuant to the rules of the courts.

The legislative intent in setting a time limit for the governing body to certify monies for school purposes is to insure the orderly administration of the fiscal affairs of a school district once a budget has been defeated. School children of Manville must be protected from any delay which causes chaos in operating a school district; therefore, they have a right to expect that any controversy arising over a school budget will be resolved in accordance with the wishes of the Legislature as expressed in the statutes. Council's noncompliance with the relevant statute in the instant matter served only to delay final adjudication of the budget by the Commissioner and cause delay and confusion in the school system, when the paramount issue should have been the speedy resolve of the budget for the benefit of the school children.

The Commissioner's decision will be made, therefore, on the educational needs of the School District of Manville and not, in this case, on the highly objectionable and legally questionable method used by Council to achieve its desired budget cut.

**AMOUNT CERTIFIED BY COUNCIL TO THE SOMERSET COUNTY BOARD OF TAXATION**

| | |
|---|---|
| Current Expenses | $2,125,761 |
| Capital Outlay | 12,792 |
| TOTAL | $2,138,553 |

**AMOUNT RESTORED BY COMMISSIONER**

| | |
|---|---|
| Current Expenses | $32,050 |
| Capital Outlay | 1,000 |
| Total | $33,050 |

The Commissioner directs, therefore, that additional monies in the amount of $33,050 ($32,050 for current expenses and $1,000 for capital outlay) must be added to those funds already certified to the Somerset County Board of Taxation by the Mayor and Council of the Borough of Manville for the thorough and efficient operation of the Manville School System for the school year 1971-72.

COMMISSIONER OF EDUCATION

August 10, 1971

**William Potter,**

*Petitioner,*

**v.**

**Board of Education of the Township of Holmdel, Monmouth County,**

*Respondent.*

## COMMISSIONER OF EDUCATION

### Decision

For the Petitioner, Rosen & Kanov (Leon M. Rosen, Esq., of Counsel)

For the Respondent, Doremus, Russell, Fasano & Nicosia (William L. Russell, Jr., Esq., of Counsel)

William Potter, hereinafter "petitioner," avers that the high school tuition costs for the education of his youngest son should be borne by the Holmdel Township Board of Education, hereinafter "Holmdel Board," and he demands judgment for the total amount of such costs. The Holmdel Board denies responsibility for these payments under the circumstances cited herein.

A hearing in this matter was held at the office of the Monmouth County Superintendent of Schools, Freehold, on May 6, 1971, before a hearing examiner appointed by the Commissioner. Subsequent to the hearing, counsel filed memorandums of law. The report of the hearing examiner is as follows:

Petitioner has lived all of his life in Holmdel Township, and both he and his eldest son attended the public schools in the adjoining community of Middletown for all of their respective school careers. The complete tuition costs for the education of both were borne by Holmdel Township, even though Holmdel had its own elementary school during the period when the eldest son was enrolled in the Middletown Elementary School. This circumstance of school attendance in Middletown was occasioned by the fact that petitioner's home is remote from the school in Holmdel, and the arrangements for transportation were not thought to be practicable at the time.

Petitioner's youngest son also was enrolled in and attended the elementary school in Middletown. During the first five years of this son's attendance, his tuition was paid by the Holmdel Board. However, on August 8, 1962, the Secretary of the Holmdel Board sent the following letter (P-1) to the petitioner:

> "In reviewing its transportation routes for the year 1962-63, the Board of Education has found it necessary, in order to pick up new students, to travel up Red Hill Road.

> "Inasmuch as transportation is now available for your son Robert, it is requested that he make the necessary transfer from the Middletown Township Public Schools to the Holmdel Township Public Schools.
> "When this transfer has been made, will you please notify us so that we will be able to enroll him in the proper class."

It is noted here that this bus service was in fact inaugurated in September 1962, and evidently continues to this day to pass petitioner's house, to the elementary schools in Holmdel and to Holmdel's designated high school in Red Bank.

On August 13, 1962, the Secretary of the Holmdel Board sent the following letter to school officials in Middletown (R-2):

> "This is to inform you that the Holmdel Board of Education will no longer be responsible for the tuition of Robert Potter, Red Hill Road. Robert has been attending the Middletown School System for the past five years.
>
> "Arrangements have been made for him to be enrolled in the Holmdel School System. The parents, however, are not too happy about these arrangements, and may be in to see you. If they should visit you, will you please contact me."

There was no evidence that petitioner ever saw this letter prior to the hearing of May 6, 1971.

In any event, petitioner did not transfer his youngest son to the Holmdel Township Schools. Instead, he talked with the Secretary of the Middletown Board of Education, and told this official that he personally would pay the tuition costs for his son's attendance in Middletown. According to petitioner's testimony, he understood it was his obligation to pay tuition for grammar school, and he paid it. (Tr. 19) Thus, petitioner's youngest son continued his enrollment in the schools of Middletown, and seven years later, in 1969, graduated from the Middletown High School. Petitioner paid tuition costs for all those years. During that time, petitioner did not contact school officials in Holmdel again, and they did not contact him.

Petitioner's prayer at this juncture is that he be reimbursed a total of $2,927.79 for the four years his son spent in the Middletown High School during the period 1965-69. His contention that he is entitled to such reimbursement is grounded on the traditional pattern of school attendance which, following the enrollment of his youngest son, created a contractual relationship upon which petitioner relied. Petitioner further avers that reimbursement is now due since the Holmdel Board did not have secondary school facilities when his youngest son was ready to enter ninth grade in 1965, since the City of Red Bank had been designated as the receiving school for such students from Holmdel by a decision of the New Jersey Commissioner of Education dated December 20, 1961 (R-1), and since no notice of his son's eligibility to attend school in Red Bank was

afforded petitioner by the Holmdel Board. He further avers that his eldest son, in like manner, attended Middletown High School when the designated receiving schools were Red Bank and Keyport, and that the payment of tuition costs for that attendance in Middletown should be precedent enough in the present instance.

The Holmdel Board contends that its notice to petitioner of August 8, 1962, together with petitioner's subsequent decision to assume tuition costs for his youngest son's education in grammar school, removed all future liability for tuition costs incurred by petitioner as a result of his son's high school attendance. In any event, the Holmdel Board claims petitioner is estopped from asserting a claim at this juncture that he did not bring when the school attendance was active and continuing.

* * * *

The Commissioner has reviewed the report of the hearing examiner and makes the following observations:

1. The claim of petitioner is untimely. If petitioner believed he had a claim against the Holmdel Township Board for tuition costs for the high school attendance of his youngest son, he could have pressed this matter easily in September 1965. During the four years subsequent to that time, the Holmdel Board bus service passed petitioner's house each school day to the Red Bank High School, which was the only designated high school during all of those years, and petitioner was free during all of that period to choose to enroll his youngest son in Red Bank High School Petitioner chose instead to send him to Middletown High School and to pay his tuition.

2. Parents are free to make such a choice and to assume tuition costs for the attendance of their children at private schools if the schools are willing and able to accept them. However, parents are barred from demanding reimbursement for the costs incurred under such circumstances.

In a number of cases involving attendance of children in private schools, the Commissioner has made similar rulings. In *Malcolm Woodstein and Ina Woodstein v. Board of Education of the Township of Clark, Union County*, decided by the Commissioner July 17, 1970, the Commissioner was asked to decide that a public school placement was not "suitable." He said in part:

> "***While parents have a right to make a choice between private and public school placement, they do not have a right to require that public school districts pay tuition costs to private schools in the event that this is the parental choice. See *R. v. The Board of Education of the Town of West Orange*, 1966 *S.L.D.* 210 ***."

In the instant matter, the choice involved is not one between a public and a private school, but between two public schools. However, the Commissioner holds that the consequences are the same.

In the year 1962, it is clear that the Holmdel Board gave petitioner fair notice that a traditional attendance pattern was at an end (P-1). A new bus service was to be inaugurated. Petitioner's son was free to take it and to begin school attendance in a new system. Petitioner chose not to avail himself of this new service, but instead to continue his son's attendance in the Middletown School System at personal expense. The Commissioner holds that said parental choice of enrollment was determinative of the son's attendance unless and until petitioner chose, on his own volition, to change it. Since he did not, the Commissioner holds that petitioner is barred at this late date from the reimbursement for tuition funds which were disbursed by him by virtue of a decision voluntarily made to enroll his son in the Middletown School.

Accordingly, the petition is dismissed.

COMMISSIONER OF EDUCATION

Pending before State Board of Education
August 12, 1971

**In the Matter of the Tenure Hearing of Francis Bacon,
School District of the Township of Monroe, Gloucester County.**

**COMMISSIONER OF EDUCATION**

**Decision**

For the Complainant Board of Education, Caulfield & Zamal (Martin F. Caulfield, Esq., of Counsel)

For the Respondent Francis Bacon, James Logan, Jr., Esq.

The Board of Education of the Township of Monroe, Gloucester County, hereinafter "Board," has certified two allegations of unbecoming conduct by one of its teachers, Francis Bacon, hereinafter "respondent," to the Commissioner of Education for a hearing and decision pursuant to the mandate of the Tenure Employees Hearing Law embodied in *N.J.S.A.* 18A:6-10 *et seq.*

A hearing was conducted on May 20 and 21, 1971, by a hearing examiner appointed by the Commissioner, at the office of the Gloucester County Superintendent of Schools, Clayton. Seven documents were received into evidence at the hearing, and counsel submitted post-hearing briefs. Three motions for dismissal were offered by respondent at the conclusion of the Board's case, and are discussed in the report of the hearing examiner which is as follows:

Respondent has been a professional employee of the Board for a period of seven years. For the first two years of this period, he served as a teacher of remedial reading. During the last five years, he has worked as a learning disability

specialist, and in this position he has been a member of the district's Child Study Team. In fact he was the team's only full-time professional employee, and the complement of the team was otherwise composed of members who devoted themselves to the team's work in this district on a part-time basis. All members of the team, including respondent, were under the immediate supervision of the school district's elementary supervisor of instruction.

On November 18, 1970, an incident occurred in the office of the principal of the Whitehall-Cecil Elementary School, a school in the Board's district, which occasioned the first of the two charges certified to the Commissioner. The second incident occurred two days later on the parking lot outside this school. These two incidents are embodied in the charges by a resolution (P-1) adopted by the Board for certification to the Commissioner, by a vote of five to four on December 17, 1970. The resolution is attached to the minutes of the Board of Education meeting held by petitioner on that date, and the charges within that resolution are stated as follows:

> "Whereas, it appears from a written complaint signed by Max Bienstock, Principal of Whitehall-Cecil School, in this school system, that the said Francis Bacon, did on Wednesday, November 18th, 1970,
>
> "a. In the private office of the said Principal, use foul and abusive language directed to the said Principal and did challenge him to a fist fight outside said office; and
>
> "b. On Friday, November 20th, 1970, said Francis Bacon, in the parking area of said school, did accost the said Principal and again challenged him to engage in fist cuffs and did make threats of physical violence upon the person of said Principal ***"

The charges contained in this resolution are discussed separately as follows:

*Charge I (a)*

The hearing examiner finds to be true in fact the charge that respondent on November 18, 1970, did use foul and abusive language while engaged in a discussion with the said principal and did challenge him to fisticuffs. This finding is grounded on the testimony of the principal, and buttressed by that of a teacher's aide who, on November 18, 1970, was working in an adjacent office. It receives further corroboration from the testimony of respondent himself, who admits the alleged offenses, but in the context of a dispute, the hearing examiner characterizes them as jurisdictional in nature. However, a chronological recital of some of the events leading up to the specific incident is necessary for the proper evaluation of the dispute.

Respondent's testimony, not refuted, is that prior to the 1970-71 school year, he had often served as the member of the school district's Child Study

Team to whom children with educational problems were initially referred, and that following such referral he often began a testing or evaluation program on his own initiative. However, respondent contends that new changes in the rules of the State Board of Education pertaining to special education, promulgated in the summer of 1970, so increased his responsibilities that he could no longer meet the obligations, and continue to accept, and act upon, the kinds of initial referrals he had received previously. Instead, he testified, the team coordinator and members of the team decided that such referrals were to be made first to the coordinator, and that this official was then to schedule the evaluative program. Respondent maintains that the principal of the Whitehall School knew, or should have known, of this new arrangement, but that he still continued to refer children to respondent directly rather than to the team's coordinator. Additionally, respondent avers that the principal, prior to the time of the incidents at issue, had made disparaging remarks about his work and work habits while other teachers were present. Respondent also testified that the principal had continually "needled" him and called him "unorganized."

On the day of November 18, 1971, respondent avers that he was in the Whitehall School on instructions from his immediate superior, the child study team coordinator, to test a child, but that the principal had been having problems with two other children and thought that respondent should test or evaluate these children forthwith. When the two discussed their differences in this regard, the conversation became heated, and respondent finally challenged the principal to a fight outside, and said in a voice loud enough to be heard in the outer office of the suite:

"I'll punch you in the f----- button." (Tr. 42) However, no fight ensued, and respondent left the office.

The principal filed a report (P-4) of this incident with the coordinator of the Child Study Team. This report of the principal states his understanding of respondent's responsibility and details some of the elements of the problem. The principal also requests the coordinator to "speak to him [respondent] about his conduct and responsibilities as learning disabilities specialist." (Tr. 76-77)

The team coordinator did speak to respondent, and advised or instructed him to stay away from the Whitehall School until he, the coordinator, had had an opportunity to talk with the principal. (Tr. 150)

Despite this advice or instruction, respondent decided he had to try and "straighten this thing out" (Tr. 275), and so on Friday, November 20, he drove to the parking lot of the Whitehall School in the late afternoon, following dismissal of the students, and waited in his car for a period of approximately 10-20 minutes for the principal to emerge from the building and proceed to an adjacent vehicle. (Tr. 276)

*Charge II*

As the principal approached his vehicle, it was raining, but respondent got out of his car which was parked adjacent to the principal's and said, according to the principal, that they would "settle our differences like men." (Tr. 46) The principal also testified that respondent had his hands bandaged with handkerchiefs (Tr. 48) and that respondent physically barred passage to the principal's vehicle (Tr. 46) while at the same time challenging him to fisticuffs and demanding an apology for previous statements and actions. This confrontation evidently lasted for 15 or 20 minutes.

Sometime after it started, the school nurse walked through the parking lot and got in her car which was parked close to the cars of respondent and the principal, but upon observing the unusual nature of the confrontation between the two men nearby, she got out again and walked over to them. (Tr. 131) Her testimony was that she observed the handkerchief-wrapped fists of respondent (Tr. 132) and was "amazed" by them. (Tr. 134) She also heard respondent invite the principal to hit him (Tr. 134), and she testified that she saw respondent physically bar the principal from entering his vehicle. (Tr. 133) Eventually, the nurse told respondent that such arguments should not be settled by violence, and thereafter she left the scene intending to try to get the help of the Child Study Team coordinator.

Following this departure, the principal, under duress, apologized to respondent, in the principal's words to "placate him," and because "I was threatened," (Tr. 59) and respondent got into his car and left the scene. Respondent admits that he went to the parking lot, waited for the principal to emerge from the school, challenged him to a fight, barred his way to the entry of his automobile and demanded apologies. (Tr. 312-318)

The hearing examiner finds, therefore, that all of the available evidence indicates that the second of the two charges is also true in fact.

Following this second incident the Superintendent was apprised of it by the principal, and the Superintendent asked that all witnesses and parties to both incidents submit a report of the incidents in writing to him. This was done.

There followed a series of two meetings, both attended by respondent, between the Superintendent and members of his administrative organization to consider the written reports and decide on future course of action. It was eventually decided by the Superintendent to forward the principal's charges to the Board for a consideration by that body of referral of the charges to the Commissioner pursuant to the mandate of *N.J.S.A.* 18A:6-11. At this juncture, the Superintendent also suspended the respondent from further teaching duties without compensation. This suspension was continued by the Board as part of its determination of December 17, 1970, when the resolution *sub judice* was approved.

There are two other factual situations that are important to this adjudication; namely, that:

1. At the time of the incidents *sub judice*, respondent was engaged in a program of personal evaluation and treatment with a psychiatrist of his own choice. However, there was no evidence introduced at the hearing to indicate that in November of 1970 respondent was so mentally incompetent or emotionally unstable as to have warranted a suspension by the Board and subsequent referral for a psychiatric examination pursuant to *N.J.S.A.* 18A:16-2, rather than a referral of the matter to the Commissioner as a case involving unbecoming conduct of an employee.

2. At the time of these incidents there was a grievance-procedure policy in effect which had been adopted by the Board and advertised to its teaching staff. This policy provided at page 65, *inter alia*, that:

> "To maintain the best possible educational climate and staff morale, the Board believes that all staff members should have an opportunity to present grievances through recognized channels without fear of reprisal. For the purpose of this policy, a grievance is defined as 'a dissatisfaction expressed by an employee about policies, decisions affecting him, or about working conditions.'"

In the "Procedures" part of the policy that follows, the employees are told of the manner in which grievances may be presented and processed. Included is a procedure in which, under certain conditions, the grievance may be presented directly to the Superintendent. This official in turn may appoint a "Board of Review" to consider the grievance, and the decision of this Board may be appealed in turn to the whole Board of Education.

It is noted here that respondent chose to ignore the provisions of this policy and, by his action, attempted to settle his personal grievance in a way he thought appropriate.

Respondent moved, at the conclusion of petitioner's proofs for dismissal of the charges against him on three grounds; namely:

(a) That respondent has been subject to double jeopardy since he had previously met and talked with the Superintendent and other school officials, and they had made a judgment at that time that there was a presumption of the truth of the charges so strong as to warrant referral to the Board as to a future course of action.

The hearing examiner finds no merit in this motion, and adjudges the actions of school officials as preliminary in nature and clearly for the purpose of ascertaining whether or not the matter *sub judice* could be settled or should be advanced to a higher body for further determination.

No penalty was imposed by school administrators or paid by respondent that a later decision could not reverse. The hearing examiner recommends that this motion be rejected.

(b) That there was a defect in the certification of the charges to the Commissioner, since the minutes of the meeting of the Board, dated December 17, 1970, do not specifically contain the charges certified herein.

The hearing examiner finds this contention as true in fact. However, the minutes of the Board, dated December 17, 1970, do contain a reference to an attached resolution which contains the charges, *sub judice*, and there is a reasonable presumption that when the Board voted to continue respondent's suspension and refer the charges to the Commissioner for decision, it was acting with full knowledge of the attached resolution and the charges contained therein. For this reason the examiner recommends that the motion be rejected.

(c) That the Commissioner lacks jurisdiction to decide a case alleging unbecoming conduct since no code defining such conduct exists by which the allegations may be measured.

The hearing examiner opines that the issues, *sub judice*, have developed from a singularly uncomplicated allegation of unbecoming conduct which recently-mandated grievance procedures should have averted. The Commissioner can make a judgment on these charges. While it must be admitted that no statutory proscription defines a threat of physical violence as unbecoming conduct, employees of petitioner were bound by the terms of the officially-adopted grievance procedure to settle all such disputes by other means. The examiner recommends that this motion also be rejected.

* * * *

The Commissioner has reviewed the report of the hearing examiner and concurs with his findings that the charges contained herein must be considered on their merits, and that such consideration may not be precluded by any of the reasons advanced in the motions by counsel for petitioners. Accordingly the motions are rejected.

The Commissioner observes that the two charges against respondent have been found true in fact, and that finding is based on the oral testimony of witnesses confirmed by that of respondent himself. The questions that remain are whether the mitigating circumstances which surround the charges are of so compelling a nature as to offer a complete mitigation for the action, or whether either of the two penalties prescribed by statute should be imposed. In any event, the legislative history of the Tenure Employees Hearing Act confirms the legislative intent that the Commissioner shall decide the entire controversy, including the extent of the penalty. See *Hoek v. Board of Education of Asbury Park*, 75 *N.J. Super.* 182, 190 (*App. Div.* 1962)

The Commissioner notes a similarity with regard to the claims of mitigating circumstances between the matter *sub judice* and that of *In the Matter of the Tenure Hearing of Frank C. Marmo, School District of Newark, Essex County*, 1966 *S.L.D.* 112. In that decision, at page 142, there is a recital of respondent's charges that he was "harassed" and "persecuted" and driven to the retaliatory measure he finally employed. While finding in that case that respondent conducted himself with disregard for his professional responsibilities, the Commissioner repeated his position with respect to the protection of tenure which had been recently articulated in *In the Matter of the Tenure Hearing of Joseph A. Maratea, Township of Riverside, Burlington County*, 1966 *S.L.D.* 77 as follows:

> "*** The Commissioner is assiduous to protect school personnel in their employment when they are subjected to unfair or improper attacks or when they are unable to perform effectively because of conditions not of their own making or beyond their control. An employee is not entitled to tenure, however, when, by his own acts or failures, he creates conditions under which the proper operation of the schools is adversely affected. When the responsibility for the conditions unfavorable to the effective operation of the schools rests with the employee then, the Commissioner holds, the protection of tenure is forfeit. ***" (at p. 106)

In the instant matter, respondent also advances reasons for his actions or mitigation for them. He alleges harrassment by the principal of the school and cites his own emotional and mental trauma. However, respondents first allegation, *supra*, was subject to a defined channelization through the published and mandated grievance procedure, and the Commissioner holds that respondent's resort to the threat of force to solve a rather common jurisdictional dispute was both reprehensible and unprofessional. Nevertheless, the threats and abusive language that respondent used on November 18, 1970, would be small cause for his dismissal and little reason for the imposition of another severe penalty if these infractions stood alone in the context of a long period of service to the public schools. However, the Commissioner holds that these infractions are raised to a higher magnitude of seriousness by the events of November 20, 1970, and that the events of the two days must be joined for evaluative purposes. This is so because on this latter date respondent's actions were premeditated and planned. He went to the parking lot and waited. He deliberately and physically enjoined the school principal from entering his automobile. He demanded an apology and offered fisticuffs as an alternative. Physical violence was the profferred remedy of alleged wrong. It is the premeditation which causes the gravest concern and which, when combined with the nature of the threat, the Commissioner holds is grounds for dismissal.

A lack of a similar kind of premeditation caused the New Jersey Superior Court to lighten a penalty the Commissioner had imposed in *In the Matter of the Tenure Hearing of David Fulcomer, Holland Township, Hunterdon County*, 1966 *S.L.D.* 225. The Court noted, in the *per curiam* opinion at page 234:

> "*** Here, however, there is no indication in the record that the teacher's acts were premeditated, cruel or vicious, or done with intent to punish or to inflict corporal punishment.***"

While the Court remanded that decision to the Commissioner, and the penalty was later reduced, the principle involved was plainly apparent. Premeditation must be considered as a factor in cases that involve an act of conduct adjudged as unbecoming a professional school employee.

In the instant matter the threats, and a physical barring-of-the-way, were committed by respondent against a superior school official in a predetermined way and cannot be justified, in the Commissioner's view, by mitigating grievances which were subject to an adjudicatory process in a manner that was well defined. Neither, the Commissioner holds, can temporary or psychiatric instability be used as a mitigating circumstance to obviate the imposition of one of the prescribed penalties in the absence of compelling evidence that respondent's acts were caused by a remediable illness. No such evidence was forthcoming in this case.

Nor, in the Commissioner's view, can the fact that this one series of incidents stands alone be a bar to the imposition of the penalty of dismissal. The Court made this clear in *Redcay v. State Board of Education*, 130 *N.J.L.* 369, when the Court said, at page 371:

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

The Commissioner's holding herein is that the deliberate challenges to a school administrative official in the manner detailed herein is a demonstration of unprofessional conduct so gross as to warrant the forfeiture of tenure rights.

Accordingly, having found the charges of petitioner to be true in fact and having categorized these charges as being so serious as to warrant dismissal from his status as a professional employee of the Monroe Township School System, the Commissioner directs the Monroe Township Board of Education to dismiss respondent as of the date of his suspension.

COMMISSIONER OF EDUCATION

August 12, 1971

Pending before the State Board of Education.

**In the Matter of "C",**

*Petitioner,*

**v.**

**Board of Education of the City of East Orange, Essex County,**

*Respondent.*

## COMMISSIONER OF EDUCATION

### Decision on Motion

For the Petitioner, Judith A. Rosenstein, Esq.

For the Respondent, Edward Stanton, Esq.

Petitioner, hereinafter "C", eligible for admission to Kindergarten, by reason of age, has been denied free admission to the East Orange School System by the Board of Education, hereinafter "Board." His appeal is for interim relief and reinstatement in the East Orange Schools pending a full hearing on the merits of the instant matter.

Argument of counsel and the testimony of "C's" mother and aunt were presented on March 23, 1971, at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

"C" is five years old and allegedly lives with his maternal aunt in the City of East Orange. His mother lives in Newark.

On February 5, 1971, "C's" aunt filed an affidavit with the East Orange Board pursuant to *N.J.S.A.* 18A:38-1 (b), which reads as follows:

> "Public schools shall be free to the following persons over five and under 20 years of age:
>
> ***(b) Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the district, if so required by the board, a sworn statement that he is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child gratuitously for a longer time than merely through the school term ***."

The Board rejected petitioner's enrollment and determined through its own investigation that the affidavit filed with it is false. The Board avers that "affidavit" students in its school district apply in such large numbers that it screens all applicants before a determination is made to accept them.

Black's Law Dictionary defines *affidavit* as follows:

> "A written or printed declaration or statement of facts, made voluntarily, and *confirmed by the oath or affirmation of the party making it, taken before an officer having authority to administer such oath.* Cox v. Stern, 170 Ill. 442, 48 N.E. 906, 62 Am. St. Rep. 385; Hays v. Loomis, 84 Ill. 18. A statement or declaration reduced to writing, and *sworn to or affirmed before some officer who has authority to administer an oath* or affirmation. Shelton v. Barry, 19 Tex. 154, 70 Am. Dec. 326, and In re Breidt, 84 N.J. Eq. 222, 94 A. 214, 216." *(Emphasis supplied.)*

There is no question that the affidavit was properly filed with the Board; however, the adjudication of this matter turns on the validity of that document.

* * * *

The Commissioner has read the report of the hearing examiner.

The East Orange Board of Education's decision to examine and approve those affidavits it finds acceptable is *ultra vires* and cannot be condoned. Petitioner has followed the provisions under *N.J.S.A.* 18A:38-1 (b) by properly filing an affidavit with the Board to establish his domicile.

Absent any determination by the courts that render this instrument a false affidavit, respondent Board is constrained to accept petitioner in its schools. The courts alone have the authority to legally determine residence after an affidavit *is filed.* Such vital and personal questions used by the courts as the bases for such a determination lie in a domain which is outside the jurisdiction of the Commissioner of Education.

The prayer for interim relief is granted. The Commissioner ORDERS, therefore, that the East Orange Board of Education reinstate petitioner in its schools immediately.

COMMISSIONER OF EDUCATION

May 5, 1971

**Knowlton Township, a municipal corporation,**

*Petitioner,*

**v.**

**Board of Education of the North Warren Regional High School District, Warren County,**

*Respondent.*

## COMMISSIONER OF EDUCATION
### Decision

For the Petitioner, Hauck, McIntrye & Benbrook (Barrie McIntyre, Esq., of Counsel)

For the Respondent, Archie Roth, Esq.

The Knowlton Township Committee, hereinafter "Committee," has filed charges against the North Warren Regional Board of Education, Warren County, hereinafter "Board," alleging that plans and specifications for the new North Warren Regional High School were not fulfilled in a proper and workman-like manner. The Committee seeks an Order for immediate restraint applicable to further payments by the Board for services rendered by the contractors.

Oral argument was held with regard to petitioner's basic prayer for prior restraint on July 8, 1971, before a hearing examiner appointed by the Commissioner at the State Department of Education, Trenton. The report of the hearing examiner is as follows:

The Committee alleges several violations of the Board's plans, specifications and contracts for construction of the new high school building. The Committee further alleges that the work on the building was not performed in a proper and workman-like manner. There are other allegations which suggest possible conflict of interest by some members of the Board.

The Committee prays for a restraining Order by the Commissioner compelling the Board to withhold final payment to the contractors until such time as it (Committee) can have the building inspected by an independent engineering firm. The Committee prays, also, that the Commissioner compel the Board "to require the contractors to correct and complete any improper work, incomplete work or deviation from the contract prior to payment by said Board, and to institute whatever actions are necessary to recover from said contractors, damages for any breach of contract."

The Committee argues that this appeal for prior restraint is being brought on behalf of the taxpayers of Knowlton Township, who will experience irreparable harm unless such final payments to the contractors are withheld pending the independent inspection.

The Board opposes the appeal for restraint by the Commissioner and avers that the Committee's position is entirely conjectural. The Board avers further that the plans and specifications for the construction of the high school building were filed and later approved by the State Board of Education as required by statute (*N.J.S.A.* 18A:18-2) and State Board of Education Rules and Regulations (*N.J.A.C.* 6:22-5).

The hearing examiner has reviewed the records filed with the Department of Education in the instant matter and finds them in compliance with the procedures outlined in the State Board of Education Rules and Regulations, *supra*, as contained in the New Jersey Administrative Code (*N.J.A.C.* 6:22-1 *et seq.*) Appropriate excerpts from the Administrative Code are reproduced here as follows:

> "*** Administrative procedures are necessary for the efficient conduct of business in the Bureau of School Panning Services are herein provided as a convenient reference for persons engaged in the planning and construction of school buildings in New Jersey. ***" *N.J.A.C.* 6:22-1
>
> "*** The State Board of Education is authorized under 18A:4-15, *New Jersey Statutes Annotated*, to prescribe rules and regulations necessary to carry into effect the school laws of this State and under 18A:33-1 and 18A:20-36, *New Jersey Statutes Annotated*, to review and approve plans, inspect buildings, order alteration or abandonment of buildings, and under 18A:18-8 through 18A:18-17 to classify contractors. The authority for the regulations and standards set forth in this *Guide* are derived from the aforementioned Statutes." *N.J.A.C.* 6:22-5
>
> "*** This *Guide for Schoolhouse Planning and Construction* relates to all public school buildings occupied by pupils in the state.
>
> "It covers the construction of new buildings, or additions or remodeling of existing buildings, and the acquisition of buildings occupied or to be occupied by pupils. The approval of plans and specifications is limited to the specific regulations enumerated in the Guide and does not contemplate the endorsement of the materials, mechanical equipment, or other devices mentioned in the specifications or shown on the plans." *N.J.A.C.* 6:22-6
>
> "*** *The responsibility for the structural and mechanical design of a school building, and for its alteration or addition is that of the architect and/or engineer retained by the board of education.* ***" *N.J.A.C.* 6:22-8 (a) *(Emphasis supplied.)*
>
> "*** *It is the responsibility of the architect or engineer to make certain that his plans and specifications conform to the regulations and standards set forth in the Guide for Schoolhouse Planning and Construction.*" *N.J.A.C.* 6:22-8 (c) *(Emphasis supplied.)*

> "*** *No responsibility is assumed by the State Board of education for the structural features of the building, the efficiency of the mechanical system, the grade of materials, or the quality of fixtures installed.*" *N.J.A.C.* 6:22-8 (d) *(Emphasis supplied.)*

The question of whether municipal building inspectors and plumbing inspectors have the authority to inspect the work being performed in the construction of a schoolhouse was reviewed by the courts of this State in the case of *Kaveny et al. v. Board of Commissioners of the Town of Montclair et al.*, 69 *N.J. Super.* 94 (*Law Div.* 1961), 71 *N.J. Super.* 244 (*App. Div.* 1962). In this case, the defendants, the local Board of Education and the New Jersey State Board of Education, forthrightly took the position that the plaintiff was not entitled to require or compel the defendants to comply with the local building and plumbing ordinances, and that they therefore had no authority to inspect the work on a schoolhouse addition to determine whether it did or did not comply with the said ordinances.

The Law Division of the New Jersey Superior Court examined the pertinent Montclair ordinance and the corpus of education law relating to school planning and construction. The Court particularly noted *R.S.* 18:11-8 (now *N.J.S.A.* 18A:18-2) which provides as follows:

> "No contract for the erection of any public school building or any part thereof shall be made until and after plans and specifications therefor have been submitted to and approved by the state board of education: A copy of the plans and specifications as approved shall be filed forthwith with the state board. No change in the plans or specifications shall be legal unless the same have been submitted to and approved by the State board. A copy of all changes as approved shall be filed forthwith with the said board." *Kaveny*, *supra*, at pages 98-99

This statute is essentially unchanged except for editorial revision, and is now encompassed within *N.J.S.A.* 18A:18-2 (*L.* 1967, *c.* 271, effective January 11, 1968).

The Court also took particular notice of *R.S.* 18:11-11 (now *N.J.S.A.* 18A:18-25) which provides as follows:

> "No board of education of any school district nor any board of education of a county vocational school shall be required to secure the approval of its plans and specifications for the erection or alteration of any school building or vocational school building or any part thereof by the municipality therein; nor shall any board of education or any board of education of a county vocational school or any contractor doing work in connection with school buildings be required to secure a building permit from the municipality." *Kaveny*, *supra*, at p. 99

This statute is substantially unchanged as *N.J.S.A.* 18A:18-25 (*L.* 1967, *c.* 271, *supra*).

The Court also reviewed *R.S.* 18:2-4 (b) (now *N.J.S.A.* 18A:4-15), which gives the State Board of Education power to "prescribe and enforce rules and regulations necessary to carry into effect the school laws of this state," and sub-section (u) (now *N.J.S.A.* 18A:4-16) which states "The Board shall have all other powers requisite to the performance of its duties." *Ibid.*, p. 99 The Court also took notice of *R.S.* 18:3-2 (now *N.J.S.A.* 18A:4-34), which provides that one of the assistant commissioners of education has the supervision of business and finance matters; and that by reason of *R.S.* 18:3-3 (a) (now *N.J.S.A.* 18A:4-35), the Commissioner has the duty of inspection of buildings and of research, including research into types of buildings. Also, the Court took cognizance of *R.S.* 18:11-1 (now *N.J.S.A.* 18A:33-1), which places the duty upon each local school district to provide suitable school facilities and accommodations for all children and *R.S.* 18:11-7 (now *N.J.S.A.* 18A:18-3), which requires local boards of education to provide separate plans and specifications for various types of work.

The conclusion of Judge Waugh in *Kaveny*, *supra*, was stated as follows at pp. 99-100:

> "*** I conclude that it was the legislative intent to preempt the field of public school planning and specifications for public school building and to place that power in local boards of education subject only to the approval of the State Board of Education as provided in *R.S.* 18:11-8 (now *N.J.S.A.* 18A:18-2).
>
> "Just as clearly these statutes exclude control on the part of the municipal government.***"

In describing the relationship between local boards of education and municipalities, the Court in *Kaveny* stated the following at p. 101:

> "*** That local boards of education are a separate governmental agency in New Jersey is clear in *Botkin v. Westwood*, 52 *N.J. Super.* 416 (*App. Div.* 1958), appeal dismissed 28 *N.J.* 218 (1958). Justice Hall, then Judge Hall, speaking for the Appellate Division, said at page *425:*
>
> > 'In New Jersey school districts of whatever classification, though coterminous with municipal boundaries except in cases of consolidated or regional districts, are, and have been for more than half a century, local governmental units, governed by a board of education. *R.S.* 18:6-21 and 18:7-54. *George W. Shaner & Sons v. Board of Education of the City of Millville*, 6 *N.J. Misc.* 671, 673 (*Sup. Ct.* 1928). They are separate, distinct and free from the control of the municipal governing body except to the extent our education law provides.'"

Judge Waugh also called attention to *R.S.* 18:11-12 (now *N.J.S.A.* 18A:20-36), which reads in pertinent part as follows:

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

The Court stated further at pp. 102-103:

> "*** Could it be argued with any logic that before the commissioner of education may order the abandonment of any building he must go through the procedure outlined in *R.S.* 40:48-2.3 *et seq.* authorizing the exercise of police power by the municipality with respect to unfit buildings. *Taken as a whole the statutes evince a legislative intent to remove the whole matter of buildings and abandonment of school buildings from municipal control completely.* ***" *(Emphasis supplied.)*

The determination of the Law Division was appealed and the Appellate Division of the Superior Court affirmed the holding of the lower tribunal. 71 *N.J. Super.* 244 (*App. Div.* 1962), *supra*, Judge Freund, speaking for the Court, stated at pp. 246-247:

> "*** We agree with the trial judge that the Legislature has placed control of the construction of public schools under the combined authority of state and local boards of education, *implicitly excluding any* interference therewith by the municipality wherein the school is located. Local boards of education are free from the control of the municipal governing body except to the extent the education law otherwise provides. *Botkin v. Westwood*, 52 *N.J. Super.* 416, 425 *(App. Div.)*, appeal dismissed, 28 *N.J.* 218 (1958). The provisions of the education law do not contain any express or implied requirement that a school building conform to the particular standards of a local building or plumbing code. ***" *(Emphasis ours.)*

The Court also stated the following at p. 247:

> "*** There are persuasive reasons of public policy underlying this conclusion. There are presently 570 municipalities and 558 school districts (now 602) in New Jersey. The interests of these many local communities and their school children are most effectively and efficiently served, in health and safety, if the local school building conforms with the high, uniform standards prepared by the agency which is best equipped to advise on matters of school construction. ***"

Absent any finding that the North Warren Regional Board of Education is in violation of any of the statutes or rules, *supra*, the hearing examiner recommends, therefore, that the Committee's prayer for prior restraint be denied.

* * * *

The Commissioner has read the report of the hearing examiner and notes his findings and recommendation. There is no requirement that a local board of education withhold payment to its contractors pending a final approval of a school building by the State Department of Education. Such a determination is made pursuant to the discretionary authority of a local board of education.

The purpose of a building inspection by the State Department of Education is to insure compliance with the Building Guide, and such inspection is not intended to interfere with the discretionary power of a board to make payments to contractors in accordance with advice and recommendations of its architects.

Local school districts are independent governmental entities free from the control of municipal governing bodies except to the extent that the education law otherwise provides. Therefore, no authority exists for the inspection of school construction work by municipal or private inspectors.

Absent any showing that the North Warren Regional Board committed any procedural violations of the School Laws or the Rules and Regulations of the State Board of Education, *supra*, the Commissioner determines that the Knowlton Township Committee has not established any basis for a restraining Order withholding payment to the Board's contractors.

The Commissioner determines, therefore, that the petition be dismissed.

COMMISSIONER OF EDUCATION

August 19, 1971

**Robert B. Winters,**

*Petitioner,*

**v.**

**Board of Education of the Freehold Regional High School District, Monmouth County and the Division of Pensions, Department of Treasury, State of New Jersey,**

*Respondents.*

## COMMISSIONER OF EDUCATION

### Decision

For the Petitioner, Ambraoff, Apy and O'Hern (Daniel J. O'Hern, Esq., of Counsel)

Robert B. Winters, Jr., hereinafter "petitioner," is the son of a now-deceased teacher formerly employed by the Board of Education of the Freehold Regional High School District, Monmouth County, hereinafter "Board of Education." Petitioner brings an appeal against respondent Board of Education alleging that the Board made an improper determination that the decedent had abandoned his tenured employment. Also, petitioner alleges that the Board of Trustees of the Teachers' Pension and Annuity Fund, Department of the Treasury, hereinafter "TPAF," improperly denied the payment of an insurance death benefit to petitioner as the designated beneficiary. Respondent Board answers that it has no interest in this petition as an adverse party. Respondent TPAF replies that the determination of the Board of Trustees denying the payment to the beneficiary of a death benefit was based solely upon the information furnished by the Board of Education, and requests that petitioner seek clarification by the Commissioner of Education of the employment status of his father, hereinafter "teacher" or "decedent" at the time of his death.

Petitioner prays for relief in the form of a determination by the Commissioner of Education that Robert B. Winters, Sr. was a teacher with tenure status employed by respondent Board at the time of his death on October 23, 1969, and the decedent was entitled by reason of illness to leave of absence for the period beginning September 1, 1969, and ending October 23, 1969.

Many of the facts in this matter have been stipulated, and documents have been received and marked in evidence. The parties waived oral argument and hearing.

In the matter herein controverted before the Commissioner, all parties have requested that the Commissioner clarify and determine the employment status of the teacher at the time of *mors.* The Appellate Division of the New

Jersey Superior Court stated, in *Board of Trustees of the Teachers' Pension and Annuity Fund of the State of New Jersey v. Alex A. La Tronica et al.*, 81 *N.J. Super.* 461, 469, (*App. Div.* 1963), that since the enactment of *N.J.S.A.* 52:18A-95 *et seq.*:

> "*** the Board of Trustees is an administrative agency within the Department of the Treasury and a review of its decisions lies with the Appellate Division pursuant to *R.R.* 4:88-8.***"

The instant matter does not constitute an appeal of a decision by the Board of Trustees, and therefore is within the cognizance of the Commissioner as a matter arising under the school laws of this State.

The subject teacher was originally employed by the Board of Education on September 1, 1964, and continued in active employment for a period of five years ending during June of the 1968-69 school year. His employment status during the 1969-70 school year from September 1, 1969, until October 23, 1969, is the sole issue before the Commissioner. The fact is stipulated that this teacher had acquired a tenure status. Tenure of teaching staff members is defined by statute, and the pertinent stature, *N.J.S.A.* 18A:28-5, reads in part as follows:

> "The services of all teaching staff members including all teachers *** 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 *** /*N.J.S.A.* 18A:6-9 *et seq.*/ 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 ***."

In the instant matter many of the material facts have been educed from the documentary evidence. The Board of Education mailed a letter to the subject teacher, postmarked August 24, 1969, which contained information concerning the opening of school in September 1969. This letter was returned undelivered with the stampmark "moved," and the remainder of the following words are undecipherable. (Exhibit R-1) A communication under date of September 4, 1969, to the subject teacher by certified mail from the assistant superintendent of school was also returned undelivered.Post office stampings on the envelope show that notices were left at the teacher's local address on September 5 and 11, and the letter was marked for return to sender on September 21, 1969. (Exhibit R-2) This letter reminded the subject teacher that all instructional staff were requested to report to their respective school assignments on September 3, 1969, at 8:30 a.m. Regular classes began for students on September 4, 1969. The teacher failed to report on either day, and

did not communicate with any staff member regarding his absence. The letter also indicates that the school principal and the assistant superintendent of schools were unable to reach this teacher by telephone on either date. (Exhibit R-2, *supra*) On September 4, 1969, a telegram was sent to the teacher's local residence at approximately 10:30 a.m. with instructions for delivery within one-half hour. On Friday, September 5, 1969, the telegraph office reported to the school that the telegram was undelivered because there was no answer at the addressee's residence. (Exhibit R-3) The record maintained by the assistant superintendent (Exhibit R-3, *supra*) discloses that on September 4, 1969, a friend of the subject teacher called the school, and reported that the teacher was missing but was still somewhere in the local area. A similar report was received by the school from another friend of the teacher who reported that he was delayed en route from some location, but he would attempt to contact the school on the same date. In a communication under date of September 22, 1969, to the Commissioner of Education, the Superintendent of Schools reported that the teacher had not been seen nor heard from as of that date. (Exhibit R-10) This letter stated that the matter of the teacher's absence was being reported" *** in case the district may be forced to initiate formal charges against Mr. Winters." A reply was made by the Assistant Commissioner of Education under date of October 6, 1969, which states that "*** if the District does decide to initiate formal charges, they will be handled accordingly." (Exhibit R-11)

Petitioner alleges that the subject teacher was in a state of severe mental depression and was suffering from a condition of cirrhosis of the liver during the period preceding his demise. All of the facts educed concerning the subject teacher's illness are *ex una parte* and are uncontested.

The decedent visited his sister in Columbus, Ohio, for several days late in July 1969. The sister's affidavit (Exhibit P-2) states that he did not "***seem to be his usual self ***" at the time. Also, the witness states that she had a telephone conversation with the decedent early in September 1969. The pertinent statement is as follows:

> "*** I next had a telephone conversation with him in early September from which I gathered he was not well. I did ask him if he was teaching and he told me he was not but would be going back to school soon. I did not question him further. ***" (Exhibit P-2, *supra*)

An affidavit (Exhibit P-3) submitted by a long-standing personal friend of the decedent discloses that the decedent was present at two family weddings during July and August 1969. This witness states that the decedent telephoned her shortly before the opening of school in September 1969, and stated that he was traveling and had been taken ill. The decedent requested that she call the school and report this information, and also advise the school officials that they would hear from him. The witness stated that she did perform this task as requested by the decedent. The last occasion that the witness saw the decedent was on or about September 6, 1969, when he visited her. The pertinent testimony of the witness's conversation is as follows:

"***'Bob, be sure to call the school,' and he said 'I just don't feel right.'***" (Exhibit P-3, *supra*)

The testimony also states, *inter alia*, the following:

"***At that time I personally observed that he appeared to be a very sick man, his face and neck were swollen. *** I know that in the summer of 1969 for the first time in many years he had failed to attend a summer reserve training camp and it is my opinion that he learned through a medical examination that he had a serious physical condition. ***" (Exhibit P-3, *supra)*

The witness testified that, during the summer of 1969, the decedent was a very sick man, that his failure to communicate directly with his employer was caused solely by his physical condition, and that the worry, pain and suffering he was experiencing were the cause for his not reporting for work.

The decedent's physician, who was also his landlord, stated by affidavit (Exhibit P-4) that he had been treating the decedent for alcoholism and cirrhosis of the liver for several months prior to October 23, 1969. During the period from about September 4 to October 23, 1969, the physician personally observed that the decedent's condition appeared to worsen. During this period of time the physician saw the decedent on the average of two times per week, and his testimony states that during that time the decendent had delirium tremens as well as cirrhosis of the liver. The physician's testimony regarding the decedent's failure to report to work is as follows:

"*** In my opinion, the condition of his health and mental welfare between September 4 and October 23 1969 was so weakened that he was unable to make an informed decision with respect to abandonment or continuance of his employment." (Exhibit P-4, *supra)*

In the judgment of the Commissioner, the weight of the credible evidence preponderates to the proof that the decedent was in fact suffering from severe illness prior to and during the period from September 4, 1969, through October 23, 1969, the time of *mors*, and that the decedent did not absent himself from his duties wholly *ex voluntate*.

The next matter to be considered by the Commissioner is the employment status of decedent during the 1969-70 school year. As has been stated, the subject teacher had the status of tenure as defined by statute. (*N.J.S.A.* 18A:28-5, *supra*) The Legislature of the State of New Jersey has required that the dismissal of a person under tenure of office must be *ex statuto*. The pertinent statute, *N.J.S.A.* 18A:6-10, requires, *inter alia*, that:

"No person shall be dismissed or reduced in compensation, (a) if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state *** except for inefficiency, incapacity, unbecoming conduct, or other just cause, and

> then only after a hearing held pursuant to this subarticle, by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person ***."

In previous decisions the Commissioner has enunciated certain principles regarding tenure which are relevent here. Tenure of office of professional staff employees of boards of education is a legislative status provided as a public policy for the good order of the public school system and the welfare of its pupils. *Wall v. Jersey City Board of Education*, 1938 *S.L.D.* 614, 617, affirmed State Board of Education 618, 622, affirmed 119 *N.J.L.* 308 (*Sup. Ct.* 1938) Its protection is not a personal privilege which is subject to waiver, *Lange v. Audubon Park Board of Education*, 26 *N.J. Super.* 83, 88 (*App. Div.* 1953), or abuse. *Cook v. Plainfield Board of Education*, 1939-49 *S.L.D.* 177, affirmed State Board of Education 180; *In the Matter of the Tenure Hearing of Leo S. Haspel, Metuchen Board of Education*, 1964 *S.L.D.* 17, affirmed State Board of Education 171, affirmed by the New Jersey Superior Court, Appellate Division, June 10, 1965, certification denied by the New Jersey Supreme Court, May 12, 1965, certification denied U.S. Supreme Court, May 16, 1966, rehearing denied June 20, 1966. This wholesome policy has remained unchanged in the statutes and has been consistently upheld by the courts of this state.

It is significant that respondent Board of Education did not at any time prefer charges against the decedent. The Board's letter of September 22, 1969, to the Commissioner, *supra*, makes reference to the possibility of preferring charges, i.e. "*** the district may be forced to initiate formal charges *** "but this was not done.

The School laws of this State provide that a board of education "*** may require additional individual psychiatric or physical examinations of any employee, whenever, in the judgment of the board, an employee shows evidence of deviation from normal, physical or mental health. ***" *N.J.S.A.* 18A:16-2; also, *N.J.S.A.* 18A:16-4 provides that:

> "If the result of any such examination indicates mental abnormality or communicable disease, the employee shall be ineligible for further service until proff of recovery, satisfactory to the board, is furnished ***."

In a case where the employee is in a tenure status, this statute further provides that:

> "*** he may be granted sick leave with compensation as provided by law and shall, upon satisfactory recovery *** be reemployed with the same tenure as he possessed at the time his services were discontinued, if he has tenure, unless his absence shall exceed a period of two years."

The records of the Board of Education show that the subject teacher was absent for illness a total of forty-five days during the 1968-69 school year. (Exhibit R-4) In accordance with *N.J.S.A.* 18A:30-2, the Board of Education allowed decedent then school days of sick leave with full pay, which was the total number of allowable days, since no unused days had been accumulated from prior years. *N.J.S.A.* 18A:30-3 During the months of September and October of 1969, the decedent was absent a total of thirty-five school days, and was allowed ten days with full pay. For the 1969-70 school year, the Board had adopted a new policy for additional leave of absence for sickness, under the authority of *N.J.S.A.* 18A:30-6. This sick leave policy (Exhibit R-6) provides, *inter alia,* that:

> "***Tenure employees who have used all their sick leave will, in the event of an extended illness, be paid the difference between their salaries and the current daily substitute rate. Said payment to begin on the next school day following the expiration of sick leave time and to continue as shown in the following schedule. However, the last ten days of the extended sick leave period shall be without remuneration.
>
> | "Years of Service in District | Number of Days Extended Absence |
> |---|---|
> | 4-7 Years | .20 days |
> | 8-15 years | .30 days |
> | Over 15 years | .60 days" |

Absent any clarifying testimony, the above provision regarding "the last ten days of the extended sick leave" is somewhat uncertain of interpretation by the Commissioner.

In the letter to the Commissioner under date of September 22, 1969, (Exhibit R-10, *supra*) the Board of Education stated that "*** all evidence to date points to abandonment of job.***" On the contrary, the Commissioner finds this statement to be *simplex dictum.* The facts clearly disclose that the decedent was seriously ill during the aforementioned period of time. Also, the statutory tenure status of the decedent was undisturbed, and no charges had been brought against him, nor had he been suspended from duty. In such an instance, the Board of Education has a heavy duty to prove conclusively that an employee has abandoned his duties. The findings do not support such a conclusion here.

The Commissioner has reviewed the facts in the matter controverted herein, and has examined the pertinent statutes, decisions and rulings of the courts. Accordingly, the Commissioner finds and determines that the decedent was a tenured employee of the Freehold Regional High School Board of Education, and by reason of serious illness, the decendent was entitled to leave of absence.

The Commissioner orders the Freehold Regional High School Board of Education to determine the amount of remuneration due to the decedent in accordance with its policy for extended sick leave, and to pay over such amount of remuneration to the executor of the estate of the decedent.

COMMISSIONER OF EDUCATION

August 24, 1971

**Board of Education of the Township of Hillsborough**

*Petitioner,*

**v.**

**Township Committee of the Township of Hillsborough, Somerset County,**

*Respondent.*

## COMMISSIONER OF EDUCATION

## DECISION

For the Petitioner, Skillman and Koerner (Richard A. Koerner, Esq., of Counsel)

For the Respondent, Chase and Clancy (Donald C. Chase, Esq., of Counsel)

Petitioner, hereinafter "Board," appeals from the action of respondent, hereinafter "Board," appeals from the action of respondent, hereinafter "Committee," taken pursuant to *N.J.S.A.* 18A:22-37, certifying to the Somerset County Board of Taxation a lesser amount of appropriations for school purposes for the 1971-72 school year than the amount proposed by the Board in its budget which was rejected by the voters. The facts of the matter were educed at a hearing conducted on July 7, 1971, at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

At the annual school election held on February 9, 1971, the Board submitted to the electorate, proposals to raise $3,312,013 by local taxation for current expenses and $109,675 for capital outlay costs of the school district. These items were rejected by the voters on that date, 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 Hillsborough Township in the 1971-72 school year, pursuant to the mandatory obligation imposed on the Committee by *N.J.S.A.* 18A:22-37.

After consultation with the Board and a review of the budget, the Committee made its determination and certified to the Somerset County Board of Taxation an amount of $3,050,013 for current expenses and $79,675 for capital outlay. The pertinent amounts may be shown as follows:

| | Current Expense | Capital Outlay | Current Total |
|---|---|---|---|
| Board's Proposal | $3,312,013 | $109,675 | $3,421,688 |
| Committee's Certification | 3,050,013 | 79,675 | 3,129,688 |
| Reduction | $ 262,000 | $ 30,000 | $ 292,000 |

The Board contends that the Committee's action was arbitrary and capricious, and documents its contention with extensive written testimony and a further oral exposition at the time of the hearing. The Committee maintains that the present economic climate of the community is such as to demand an extreme economy in school operation, and that the items reduced by its action are only those which are not necessary for a thorough and efficient educational system. The Committee documents, also, its position with extensive written and oral testimony.

As part of its determination, the Committee suggested specific accounts of the budget in which it believed economies could be effected without harm to the educational program as follows:

**CURRENT EXPENSE**

| Acct. No. | Item | Budgeted by Board | Suggested by Comm. | Reduct. |
|---|---|---|---|---|
| J110B | Sal.-Bd. Secy's Off. | $ 58,168 | $ 48,168 | $ 10,000 |
| J110F | Sal.-Supt.'s Off. | 70,519 | 41,519 | 29,000 |
| J213 | Sal.-Teachers | 2,273,241 | 2,144,941 | 128,300 |
| J213B | Sal.-Spec. Tchrs. | 144,275 | 125,825 | 18,450 |
| J214C | Sal.-Psych. | 23,300 | 19,000 | 4,300 |
| J215A | Sal.-Secretaries | 37,849 | 34,129 | 3,720 |
| J220 | Textbooks | 40,000 | 37,000 | 3,000 |
| J310A | Sal.-Attend. Serv. | 26,500 | 15,500 | 11,000 |
| J410A | Sal.-Nurses | 68,575 | 64,575 | 4,000 |
| J520C | Trans.-Field Trips | 19,175 | 17,445 | 1,730 |
| J550 | Trans.-Other Exp. | 16,800 | 15,800 | 1,000 |
| J610A | Sal.-Cust. Serv. | 166,933 | 159,933 | 7,000 |
| J710A | Plant Maint. | 48,141 | 34,841 | 13,300 |
| J730A | Repl.-Instr. Equip. | 7,000 | 6,000 | 1,000 |
| J30B | Repl.-Non-Instr. Equip. | 9,000 | 3,000 | 6,000 |
| J830B | Rental-Bldgs. | 7,200 | - 0 - | 7,200 |
| J1010 | Sal.-Stud. Activs. | 20,076 | 18,076 | 2,000 |
| J1020 | Other Exp.-Stud. Activs. | 38,951 | 27,951 | 11,000 |
| | Sub-Total—Current Expense | $3,075,703 | $2,813,703 | $262,000 |

**CAPITAL OUTLAY**

| Acct. No. | Item | Budgeted by Board | Suggested by Comm. | Reduct. |
|---|---|---|---|---|
| L1220C | Site Improvement | $ 78,480 | $ 1,480 | $ 7,000 |
| L1230C | Bldgs.-Remodeling | 17,500 | 2,500 | 15,000 |
| L1240B | Equip.-Admin. | 4,000 | 1,500 | 2,500 |
| L1240C | Equip.-Instr. | 37,000 | 34,065 | 2,935 |
| L1240D | Equip.-Health | 600 | 110 | 490 |
| L1240F | Equip.-Plant | 1,500 | 550 | 950 |
| L1240G | Equip.-Maintenance | 2,500 | 1,375 | 1,125 |
| | Sub-Total–Capital Outlay | $ 71,580 | $ 41,580 | $ 30,000 |
| | Grand Totals - | $3,147,283 | $2,855,283 | $292,000 |

The hearing examiner proposes to discuss eighteen of these current expense line-item reductions in conjunction with a review of the bulky testimony, but believes that such discussion must be preceded by some factual data about this growing school system and its problems.

The growth of the school system in Hillsborough Township-in terms of the number of students - is easily documented, but of particular import to this adjudication is the fact that in recent years the growth rate has been rapid. Thus, in June of 1970, the school system was responsible for the education of 3,366 students enrolled in Grades Kindergarten through 10, but this number had increased by September of 1970 to 3,524 in Grades Kindergarten through 11. In September 1971, the Twelfth Grade will be added to complete the high school grade-level structure, and the total number of students expected within the total organization will climb to 3,735.

To accommodate this increased enrollment, the system must be expanded to embrace more classroom space, and the Board proposes, in this regard, to reactivate some very old buildings after a process of renovation and refurbishing. The Board also proposes to expand its teaching staff in a way it says is proportionate to the increase in student growth and commensurate with the need to establish a complete high school program for the newly-added Grade 12 students. In addition, the Board avers that supporting services and equipment must now be added if the school system is to remain one that is thorough and efficient.

A review of the budgetary structure shows that these increased accommodations and services must be funded from local taxes, since there are no significant extra balances available at this time, and it is clear that in at least one respect - the calculation of interest revenue - the money available for use in the school year 1971-72 will be less than that which was anticipated.

Thus, the question is posed - What are those provisions which are so needed and necessary as to be required to provide a thorough and efficient school system in Hillsborough Township in the 1971-72 school year? In answering the question, the hearing examiner has Considered the viewpoints of both parties to this dispute and finds as follows:

*J110B Salaries - Board Secretary's Office  Reduction-$10,000*

The Board maintains that school system growth of approximately 25% in a three-year period, without a commensurate expansion of personnel in the business office, together with increased demands for the time and energy of the business division's personnel, requires, at this juncture, that an assistant purchasing agent and another clerk-typist be added to the present staff. The Committee does not deny that the Board's proposals have merit, but maintains that the establishment of the positions may be deferred for one more year.

The hearing examiner observes that the arguments of both parties on this item are moot, in at least some degree, since the bulk of the purchasing for the 1971-72 school year will already be accomplished by the time this decision is published. However, the hearing examiner believes that both positions must be established at some point during the year preliminary to the implementation of the 1972-73 school budget, and he recommends that this implementation be made effective as of a date approximately coterminous with the date of a new budget adoption, or February 1, 1972, and further recommends that the sum of $5,500 be restored for a mid-year funding of these two positions.

| | | |
|---|---|---|
| Summary | Amount of Reduction | $10,000 |
| | Amount Restored | 5,500 |
| | Amount Not Restored | 4,500 |

*J110F Salaries - Superintendent's Office  Reduction-$29,000*

The Board proposes to hire an assistant superintendent of schools, and to charge him with the improvement and articulation of the program, Kindergarten through Grade 12. The need is documented in most precise fashion by one principal fact; namely, that this school system has grown from one employing seventy certificated employees to one with more than 240, with no parallel and accompanying professional-employee growth of any kind in the central school offices. The Committee does not dispute the need for an additional person to assist with this work, but again maintains that the need can and should be deferred to a succeeding year.

The hearing examiner observes that the Superintendent of Schools in this district is, in the words of the Committee, evidently a "capable and competent" man. It is hard to believe otherwise in view of the growth of the district and the concomitant demands for executive-administrative judgment, which have been exercised by him alone for a period of eleven years. However, it is impossible to believe that he can now continue alone, assisted only by principals and an elementary supervisor, to properly coordinate and supervise a school system which has now completed a grade-level structuring from Kindergarten through Grade 12 for almost 4,000 students.

Accordingly, the hearing examiner recommends that an assistant be employed to assist him forthwith, and that this position be funded on a *pro rata* basis, allowing time for recruitment, as of November 1, 1971. The amount

recommended for reinstatement is $16,750. The hearing examiner also recommends that the determination of the Committee be sustained with respect to the employment of an additional office secretary.

| | | |
|---|---|---|
| Summary | Amount of Reduction | $29,000 |
| | Amount Restored | 16,750 |
| | Amount Not Restored | 12,250 |

*J213 Salaries - Teachers Reduction-$128,300*

Threr are three basic arguments by the parties concerning proposed expenditures from this account. They may be categorized as arguments pertaining to:

1. Summer school expenditures.
2. Costs of a driver-training program to be implemented as a new offering.
3. The proposed expenditures for the employment of new teachers.

In addition, the Committee believes that the present pupil-teacher ratio can be raised without harm to the system.

The total budget of the J213 Account provides for salaries of staff members formerly employed, and for nineteen additional teachers for Grades 8-12, two elementary teachers, and three special teachers-for art, for older educable students and for a learning disabilities specialist. Thus, the total projected staff increase is twenty-four to provide for a new twelfth-grade program and a total student population increase of approximately 211 students at all grade levels.

The hearing examiner finds the testimony of the Board obscure with respect to the amount of money allocated to summer school and undocumented with respect to the need for an art teacher. In other respects, there is documentation of the need for approximately twelve teachers for Grade 12, two elementary teachers, four teachers in Grades 8 through 11 and for a special class teacher. The Board also maintains a need for an additional learning disabilities specialist.

The hearing examiner has examined the testimony in this regard and finds that there is not adequate substantiation for the need for an additional art teacher or another learning disabilities specialist. He recommends, therefore, that the sum of $18,450 for these two positions be sustained as a reduction determined by the Committee. He further recommends that the increase in staff for the elementary schools K-7 be limited to one teacher, rather than two, and that the projected starting salaries for the remaining new staff employees be reduced from $9,225 to $8,850. These savings total an additional $17,100 ($9,225 + $7,875.

In all other respects, the hearing examiner finds that the reduction imposed by the Committee must be restored if a thorough and efficient system of education is to be provided.

| | | |
|---|---|---|
| Summary | Amount of Reduction | $128,300 |
| | Amount Restored | 92,750 |
| | Amount Not Restored | 35,550 |

*J213B Salaries - Special Teachers Reduction-$18,450*

The Board proposes to employ two additional staff members for reading and for supplemental instruction. With regard to the reading program, its testimony is that the addition of new schools in 1971-72 will provide less instructional time unless the present staff of four is expanded, since there is a considerable loss of travel time between buildings. Additionally, the Board argues that a supplemental instructor is needed for Grades K-12 just to maintain a *status quo* position, since enrollment growth is at a high level.

The hearing examiner notes that the growth rate for the elementary grades K-5 is relatively small-approximately thirty pupils-and, accordingly, he recommends that the reduction determined by the Committee be sustained with respect to the employment of a fifth reading instructor to be assigned to these grade levels. However, he believes the need for another supplemental instructor is documented, and he recommends restoration of money to fund this position.

| | | |
|---|---|---|
| Summary | Amount of Reduction | $18,450 |
| | Amount Restored | 9,225 |
| | Amount Not Restored | 9,225 |

*J214C Salaries - Psychologists , Reduction-$4,300*

The Hillsborough Schools now employ a learning disabilities specialist, a social worker and a psychologist part-time. In Account 213B, the Board proposes to hire another learning specialist, and they propose the addition here of a full-time psychologist to join one now employed approximately four-fifths of the time.

However, there appears to be some misunderstanding of the Committee's action in this respect on the part of the Board, since the Board documents a reduction of $8,100, while the actual reduction is $4,300. The Committee does recognize an added need for another psychologist's services.

The hearing examiner recommends that the Committee's action be sustained as reasonable, since it will still provide for additional special help, but at a level somewhat below that programmed by the Board.

| | | |
|---|---|---|
| Summary | Amount of Reduction | $4,300 |
| | Amount Restored | - 0 - |
| | Amount Not Restored | 4,300 |

*J215A Salaries - Secretaries Reduction - $3,720*

The Board proposes to "round-out" the present employment of a half-time secretarial employee to improve its scheduling of all secretarial

employees and to insure coverage of office areas during more of the hours of primary and secondary need. In addition, the Board proposes to assign some of this employee's services on a proportionate basis to three professional employees. The Committee maintains that the present staff is adequate.

The hearing examiner believes that the need for an expansion has not been conclusively documented and recommends that the Committee's determination be sustained.

| | | |
|---|---|---|
| Summary | Amount of Reduction | $3,720 |
| | Amount Restored | - 0 - |
| | Amount Not Restored | 3,720 |

*J220 Textbooks Reduction - $3,000*

This account shows an increase of 25% in the period 1969-70 through 1971-72, with much of this growth attributed to the need to buy new texts for a whole new grade level in each of three school years. In addition, provision must be made for texts for other new students.

It is the Board's testimony that requests from school administrators total in excess of $45,000, and that even the budgeted amount of $40,000 is not commensurate with documented need.

The hearing examiner recommends restoration of $2,000 of the reduction determined by the Committee to provide the same sum in 1971-72 as was provided in the 1970-71 school year for textbook needs of the district. He believes that a two or three-year scheduling program can now be instituted for the school years 1972-75 to properly update and fund all remaining textbook needs of the district at a lower plateau level than the one experienced during the years 1969-71.

| | | |
|---|---|---|
| Summary | Amount of Reduction | $3,000 |
| | Amount Not Restored | 1,000 |
| | Amount Restored | 2,000 |

*J310A Social Worker Reduction-$11,000*

The hearing examiner observes that the Committee's judgment is that the child study team of the district should be expanded slightly in 1971-72, since some money was authorized for employment of an additional psychologist, or for one employed part-time, throughout the year, on a case-work or other basis. The Board, on the other hand, had proposed the creation of positions that, if authorized, would create a whole new team for special services.

The hearing examiner believes that, in this area, there must be a gradual expansion of staff, and that an additional position or positions should be funded in each of the next two or three years to properly meet the evident need.

However, in view of the defeat of the budget and the Committee's determination, the hearing examiner cannot find that a whole new team is necessary now for the operation of a thorough and efficient school system, and he recommends that the Committee's judgment be sustained.

| | | |
|---|---|---|
| Summary | Amount of Reduction | $11,000 |
| | Amount Restored | - 0 - |
| | Amount Not Restored | 11,000 |

*J410A Salaries - Nurses Reduction - $4,000*

The Committee has reduced the funding for nurses by an amount equivalent to that to be appropriated for a person employed half-time, and maintains that neither the renovated schools nor the drug-education program establish the need for a sixth nurse during the next school year.

The hearing examiner agrees with the Committee in this instance, although it must be recognized that there will be some dilution of services. However, the examiner recommends that the sum of $500 be restored for possible payment by the Board for services that one of its school-nurse employees may render as a coordinator of the nursing activities and the statistical and documentary work of the group. In these circumstances, this function will certainly take on a new importance.

*J610A Salaries - Custodial Services Reduction-$7,000*

The Board's proposed employment of two additional custodians during the school year 1971-72 is well documented and reasonable, and the hearing examiner recommends that both positions be restored; namely, one for assignment to the three renovated buildings and one to the high school which will be fully operational for the first time in the school year 1971-72.

| | | |
|---|---|---|
| Summary | Amount of Reduction | $7,000 |
| | Amount Restored | 7,000 |
| | Amount Not Restored | - 0 - |

*J710A Plant Maintenance Reduction-$13,300*

The Board proposes to hire one additional grounds-maintenance man at $6,032, and to spend other money from the account to pay other maintenance men for overtime hours. The Committee avers that two men are budgeted herein, but then maintains in sentence two of its written testimony that "the hiring of this man should be postponed for at least this school year." *(Emphasis supplied.)*

The hearing examiner finds neither testimony convincing or documented in full, but recommends, in view of the full restoration recommended, *supra*, with respect to Account J610A, which should have a corollary effect on this sub-account, that the reduction of $6,032 be sustained, but that the balance of the reduction be restored in its entirety.

| | | |
|---|---|---|
| Summary | Amount of Reduction | $13,300 |
| | Amount Restored | 7,268 |
| | Amount Not Restored | 6,032 |

*J730B Replacement–Non-Instructional Equipment Reduction - $6,000*

The Board's testimony with respect to this item is that its present accounting machine, which is eight years old, is not adequate for the needs of the district, and the evidence is quite convincing that the Board has properly considered all of the alternatives available to it to secure more efficient practices. The Committee argues that this machine, or its adequacy, has no direct bearing on school operation within the confines of the classroom, and that, in any event, machines of the type proposed here for purchase should be purchased through bonding authorization and not be purchase through the Replacement of Equipment Account.

The hearing examiner believes that the Hillsborough Schools have now outgrown their old accounting machine as surely, and in as many specific ways, as they have outgrown their present staffing procedures in the central-office structure, and that this machine must logically be replaced, if an efficient school system is to be assured for the immediate future. He finds the Committee's reasoning that since this expenditure is not directly related to the instructional process, it is not absolutely necessary to an efficient school system, to be both fallacious and shallow reasoning. School systems must of necessity be an integrated network of auxiliary and primary services, and an inefficient operation of one service, or component part, has an evident corollary effect on the operation of the whole.

| | | |
|---|---|---|
| Summary | Amount of Reduction | $6,000 |
| | Amount Restored | 6,000 |
| | Amount Not Restored | - 0 - |

*J830B Rental-Buildings Reduction-$7,200*

The Board proposes to realign its administrative offices and to rent facilities for its business officials at a cost of $600 per month. The Committee avers that this proposal is neither mandatory nor necessary.

The hearing examiner has found that the administrative staff of this district must be expanded if the district is to be efficiently administered and supervised, and he recommends funding of rental facilities, effective November 1, 1971, at the time when an assistant superintendent is to be employed.

| | | |
|---|---|---|
| Summary | Amount of Reduction | $7,200 |
| | Amount Restored | 4,800 |
| | Amount Not Restored | 2,400 |

*J1020 Other Expense - Student Activities Reduction-$11,000*

The Board proposes to purchase band uniforms - there are now - with this money. The Committee opposes the expenditure as one that is not essential.

The hearing examiner, with reluctance, must concur with the Committee's judgment in this matter.

| | | |
|---|---|---|
| Summary | Amount of Reduction | $11,000 |
| | Amount Restored | - 0 - |
| | Amount Not Restored | 11,000 |

In addition, the hearing examiner recommends the following restorations or determinations with respect to four other current expense accounts:

| Acct. No. | Item | Reduction | Amt. Restored | Amt. not Restored |
|---|---|---|---|---|
| J520C | Trans.-Field Trips | $1,730 | $ - 0 - | $1,730 |
| J550 | Trans.-Other Exp. | 1,000 | 1,000 | - 0 - |
| J730A | Repl.-Instr. Equip. | 1,000 | 700 | 300 |
| J1010 | Sal.-Stud. Activs. | 2,000 | 2,000 | - 0 - |
| | Sub-Total | $5,730 | $3,700 | $2,030 |

| | | |
|---|---|---|
| Summary | Amount of Reduction | $5,730 |
| | Amount Restored | 3,700 |
| | Amount Not Restored | 2,030 |

The items in dispute from sub-accounts for capital outlay are discussed here as follows:

*L1220C Improvement to Sites Reduction-$7,000*

The Board proposes to spend $4,000 of this sum for a half-acre by-pass and holding pond to make maximum use of water which is currently being wasted, and to spend $3,000 for a stoned parking area for school buses. The Committee classifies both proposals as desirable but not essential.

The hearing examiner must agree with the Committee.

| | | |
|---|---|---|
| Summary | Amount of Reduction | $7,000 |
| | Amount Restored | - 0 - |
| | Amount Not Restored | 7,000 |

*L1230C Buildings-Remodeling Reduction-$15,000*

The Board proposes to install an elevator for the total sum of this account to enable it to properly transport handicapped students to the second floor of its high school, and for other heavy-equipment transfer purposes. The Committee opposes the expenditure as nonessential, although desirable.

*Chapter* 269, *Laws* of 1971, approved July 27, 1971, requires that elevators must now be installed in all *new* two-story buildings, but that such installations are not mandatory for older buildings, such as the one considered herein.

Accordingly, the examiner recommends that the Committee's judgment be sustained.

| | | |
|---|---|---|
| Summary | Amount of Reduction | $15,000 |
| | Amount Restored | - 0 - |
| | Amount Not Restored | 15,000 |

*L124OB Equipment - Administrationration Reduction-$2,500*

The Board proposes to purchase a new calculator, office furniture and mimeograph machine with this money. The Committee does not propose to tell the Board it may or may not purchase these items, but maintains that the money is available, on a first-priority basis, if the Board proposes to spend it in the manner indicated herein.

The hearing examiner observes that the Board has documented proposed expenditures for audiovisual materials, musical instruments, and shop and business equipment totaling many thousands of dollars and that while some of these items have been eliminated by other Committee determinations, substantial sums remain that are not specifically detailed and may be used if the Board determines tha the expenditures herein proposed are vital. Specifically, the hearing examiner notes that a sum in excess of $13,000 has been allocated for shop equipment with no delineation at all. Since the shops are relatively new, and presumably equipped when opened, it would appear possible that their needs might be sublimated to some degree to the needs of this account. In any event, the examiner recommends that the Committee's determination be sustained.

| | | |
|---|---|---|
| Summary | Amount of Reduction | $2,500 |
| | Amount Restored | - 0 - |
| | Amount Not Restored | 2,500 |

Additionally, with respect to Accounts L124OC, D, F and G, the hearing examiner recommends the following determinations:

| Acct. No. | Item | Amt. of Reduction | Amt. Restored | Amt. Not Restored |
|---|---|---|---|---|
| L124OC | Equip.-Instr. | $2,935 | $- 0 - | $2,935 |
| L124OD | Equip.-Health | 490 | - 0 - | 490 |
| L124OF | Equip.-Plant | 950 | - 0 - | 950 |
| L124OG | Equip.-Maintenance | 1,125 | 325* | 800 |
| | Totals | $5,500 | $325 | $5,175 |

*Spare part for gang mower.

The reductions to be reinstated and those to remain as recommended by the Committee may be summarized as follows:

**CURRENT EXPENSE**

| Acct. No. | Item | Comm's. Reduction | Amount Restored | Amount Not Restored |
|---|---|---|---|---|
| J110B | Sal.-Bd. Secy's Off. | $10,000 | $ 5,500 | $ 4,500 |
| J110F | Sal.-Supt.'s Off. | 29,000 | 16,750 | 12,250 |
| J213 | Sal.-Tchrs. | 128,300 | 92,750 | 35,550 |
| J214C | Sal.-Spec. Tchrs. | $ 18,450 | 9,225 | 9,225 |
| J214C | Sal.-Psych. | 4,300 | - 0 - | 4,300 |
| J215A | Sal.-Secys. | 3,720 | - 0 - | 3,720 |
| J220 | Textbooks | 3,000 | 2,000 | 1,000 |
| J310A | Sal.-Attend. Serv. | 11,000 | - 0 - | 11,000 |
| J410A | Sal.-Nurses | 4,000 | 500 | 3,500 |
| J520C | Trans.-Field Trips | 1,730 | - 0 - | 1,730 |
| J550 | Trans.-Other Exp. | 1,000 | 1,000 | - 0 - |
| J610A | Sal.-Cust. Serv. | 7,000 | 7,000 | - 0 - |
| J710A | Plant Maint. | 13,300 | 7,268 | 6,032 |
| J730A | Repl.-Instr. Equip. | 1,000 | 700 | 300 |
| J730B | Repl.-Non-Instr. Equip. | 6,000 | 6,000 | - 0 - |
| J830B | Rental-Building | 7,200 | 4,800 | 2,400 |
| J1010 | Sal.-Stud. Activs. | 2,000 | 2,000 | - 0 - |
| J1020 | Other Exp.-Stud. Activities | 11,000 | - 0 - | 11,000 |
| | Sub-Total-Current Expense | $262,000 | $155,493 | $106,507 |

**CAPITAL OUTLAY**

| | | | | |
|---|---|---|---|---|
| L1220C | Site Improvement | $ 7,000 | $ - 0 - | $ 7,000 |
| L123OC | Bldgs.-Remodeling | 15,000 | - 0 - | 15,000 |
| L1240B | Equip.-Admin. | 2,500 | - 0 - | 2,500 |
| L1240C | Equip.-Instr. | 2,935 | - 0 - | 2,935 |
| L1240D | Equip.-Health | 490 | - 0 - | 490 |
| L124OF | Equip.-Plant | 950 | - 0 - | 950 |
| L1240G | Equip.-Maintenance | 1,125 | 325 | 800 |
| | Sub-Total-Capital Outlay | $ 30,000 | $ 325 | $29,675 |
| | Grand Totals | $292,000 | $155,818 | $136,182 |

The Commissioner has carefully reviewed and considered the report of the hearing examiner, *supra.* In concurring with the findings and determinations contained herein, the Commissioner wishes to add specific and positive affirmation of those parts of the report that deal with the necessity for the Hillsborough School System, at this juncture, to buttress its supervisory and administrative organizations to properly meet the increased demands made upon it by the recent years of great growth and development within the district. It is apparent that the recommended staff additions contained herein are needed and

necessary, if the Hillsborough School District is to be a thorough and efficient one as it enters a period when, for the first time, it must deal with a complete grade-level orientation for Grades K through 12.

Having concurred with the hearing examiner, the Commissioner directs the Hillsborough Township Committee to add to the previous certification to the Somerset County Board of Taxation the amounts of $155,493 for current expense costs and $325 for capital outlay expenditures, so that he new totals shall provide $3,205,506 for current expenses and $80,000 for capital outlay during the 19-72 school year.

COMMISSIONER OF EDUCATION

August 27, 1971

**BOARD OF EDUCATION OF THE CITY OF NEWARK,**

*Petitioner,*

**v.**

**BOARD OF SCHOOL ESTIMATE AND CITY COUNCIL OF THE CITY OF NEWARK, ESSEX COUNTY,**

*Respondents.*

**COMMISSIONER OF EDUCATION**

**Decision**

For the Petitioner, Victor A. DeFilippo, Esq.

For the Respondents, William H. Walls, Esq.

The facts underlying the controversy in this matter, in the form of oral and written testimony and documentary evidence were presented at a hearing before the Assistant Commissioner in charge of the Division of Controversies and Disputes at the State Department of Education, Trenton, on June 16, and July 12, 1971.

On February 1, 1971, petitioner adopted a resolution establishing a budget of $88,849,308 and certifying to the Board of School Estimate $54,042,755 as the amount necessary to be raised from local tax sources for school purposes for the school year 1971-72. The Board of School Estimate adopted a resolution directing the utilization of $1,000,000 in surplus funds from the 1969-70 budget to help fund the cost of the contract between the Newark Board of Education and the Newark Teachers Union. This action by the Board of School Estimate resulted in an increased appropriation request by petitioner totaling

$55,042,755. On February 10, 1971, the Board of School Estimate determined that the amount of local school appropriations be set at $50,000,000, a reduction of $5,042,755 from the amount requested by the Board of Education.

The amounts at issue are shown in the following table:

| | |
|---|---|
| Total School Budget for 1971-72 | $88,849,308 |
| Requested-Local Tax Sources | 55,042,755 |
| Determined by Board of School Estimate | 50,000,000 |
| Amount of Petitioner's Appeal | 5,042,755 |

Petitioner alleges that a thorough and efficient school system cannot be maintained with such reduced appropriations. Petitioner asks the Commissioner to review the action of respondents Board of School Estimate and City Council of the City of Newark and to find their action arbitrary, capricious and unreasonable, and, further, to order them to restore $5,042,755 in the form of additional appropriation to petitioner's budget for the 1971-72 school year.

Respondents contend that the reduced budget satisfies the constitutional obligation to effect a thorough and efficient school system for the residents of the City of Newark. They contend that petitioner has established a budget which has failed to demonstrate a correlation between expenditures and efficiency. They aver that the reading disability of Newark children has worsened while the Board of Education's budget has increased. They further contend that budgeted salary appropriations have gone unspent, while for the same period other expenses have exceeded their appropriations by approximately four to five million dollars. They contend that they have acted in a reasonable manner to provide the school district with funds which come from an increasingly restricted financial base and which must compete with the other essential services so costly in an inner city.

After an initial hearing, respondents agreed to provide an analysis of the 1971-72 budget, which analysis they contend provides a justification for the $5,042,755 reduction in petitioner's proposed budget. This analysis purports to demonstrate how $11,440,515 in economies could be effected in petitioner's 1971-72 budget. Petitioner contends that respondents' analysis is based on many faulty assumptions and indicates a lack of understanding of the complex operation of a city school system. A narrative description of the analysis and petitioner's response will provide the specific assertions and alletations made by the respective parties. This description will be coded by using the account numbers as they appear in the New Jersey State Department of Education's chart of accounts, combined with the item numbers listed in respondents' budget analysis.

*J100/14A Administration Reduction - $791,000*

Respondents suggest that petitioner's budget for the 1971-72 school year be limited to 125% of the national average cost for administration as reported in

the Cost of Education Index, hereinafter known as "CEI," published in the January 1971 issue of the publication *School Management.* Petitioner contends that rigid application of national financial norms is not fairly applied to the Newark Board of Education's situation because of the multiplicity of problems faced by its inner city school system. It is noted that respondents utilize average daily attendance, hereinafter known as "ADA," in computing the average per pupil cost for Newark, whereas *School Management* employs a measurement called "expenditure pupil units," hereinafter called "EPU's, which weights junior and senior high school at 1.3. Respondents fail to mention regional figures cited by the publication, *supra,* which reflect more favorably on the Newark Board of Education's per pupil costs for administration. The Commissioner finds that comparative data provide a useful guide for budget analysis when rigorously applied and factored with other criteria. However, in the instant matter respondents' contention lacks sufficient clarity and technical accuracy to be used as a rationale for the recommended reduction. The Commissioner finds that $791,000 should be restored to petitioner's 1971-72 budget for administration.

*J130F/25 Other Expenses for the Superintendent's Office Reduction – $3,000*

Respondents recommend that $3,000 of the $6,000 travel allowance for the deputy superintendent, assistant superintendents, directors and supervisors be deleted from the budget. Petitioner states that J130F provides the necessary funds for the senior staff to travel for purposes of keeping in contact with the educational practices of other cities through conferences and visitations. The Commissioner notes that the proposed reduction still leaves $3,000 for this purpose. While it is important to the continuing growth of a school district to have easy access to such information, it cannot be considered necessary that this item be restored. The reduction of $3,000 is sustained.

*J130F/26 Other Expenses for Superintendent's Office Reduction - $400*

Respondent recommends the elimination of $400 for honorariums and related expenses from the Superintendent of School's petty cash budget. Petitioner contends that this sum is intended to provide knowledgeable outside speakers to address the Superintendent's monthly conferences and other specified meetings on procedures and practices of value to the Newark School System. It is the Commissioner's opinion that continuous in-service training programs for school administrators are very important to the maintenance of a school system. The reduction is therefore restored.

*J130L/27 Other Expenses for the Personnel Office Reduction - $660*

Respondents recommend elimination of $660 for teacher orientation. Petitioner contends that the Newark Board of Education recruits approximately 450 teachers new to Newark annually. They aver that these funds are used for the necessary purpose of ensuring that teachers are properly oriented to the City and the school system. The Commissioner believes that the orientation of new teachers is a fundamental responsibility of school management and is a vital and necessary step in the continuous in-service program.

The reduction is restored.

*J130A/37 Board Members' Expenses Reduction - $15,000*

Respondents recommend a reduction of $15,000 from the allocated amount for board members' expenses. Respondents contend that the budgeted amount for this item reflects a 150% increase over the previous year. The Commissioner notes that the expenditures for this item for 1969-70 were $25,748, while the budget appropriation was merely $10,000. He also notes that the budget appropriation for 1970-71 was $26,000, $1,000 more than the current request. (R-4, p.1) The Commissioner believes that school board membership in an urban area is of such complexity that the amount of in-service training necessary for board members requires an appropriation of this significance. The reduction of $15,000 is restored.

*J100/14C Administration (Salaries) Reduction - $204,000*

Respondents recommend the elimination of eleven administrative vacancies, which they allege have remained unstaffed for two years. Petitioner cites recent litigation and the need to develop selection procedures consistent with its contract with the teachers union as reasons for the continuing vacancies. It avers that the present administrative staff is overburdened and that failure to budget for these positions would result in a lack of efficiency. While the Commissioner recongizes the administrative burden of managing an urban school program, he was impressed by the respondents' uncontradicted assertion of the existence of these vacancies and is of the opinion that, in this instance, the staffing of eleven administrative positions is not warranted by the growth of the system. The reduction of $204,000 is sustained.

*J211/9 Salaries of Principals Reduction - $45,000*

Respondents recommend the reduction of $45,000 by the elimination of three vice-principals in schools with enrollments of less than 400 students. Petitioner contends that there are no such positions in the Newark School System. It contends that only smaller schools which have annexes are so staffed. The Commissioner believes that each elementary school should have a full-time principal; consequently, the $45,000 is restored.

*J212/5 Salaries of Supervisors of Instruction Reduction - $45,000*

Respondents recommend the elimination of three supervisory assistants in areas such as art, music, industrial arts, home economics, physical education and health. Petitioner contends that supervisors in the aforementioned categories do not exist. The Commissioner notes that the proposed reduction would still permit an increase of three supervisory assistants for 1971-72. While the Commissioner is strongly of the opinion that instructional supervision of high quality is essential for the maintenance of a thorough and efficient school system, he believes it is reasonable to ask for a slower rate of progress in these areas. The Commissioner is constrained to comment that he hopes no inference was intended, regarding the establishment of a hierarchy of subject matter, by respondents' recommendation, for the Commissioner is of the opinion that

humane subjects, such as art and music should not be invidiously ranked with those of more apparent immediate commercial value. The reduction of $45,000 was sustained.

*J212/14B Salaries of Supervisors of Instruction Reduction - $74,000*

Respondents suggest the elimination of six administrative positions currently vacant in this account, for a total savings of $74,000. Petitioner contends that these curriculum specialists are desperately needed in order to assist in curriculum revision. The Commissioner is of the opinion that absent any specific project, curriculum revision is an on-going process for which these positions, however needed they may be, are not essential. The reduction of $74,000 is sustained.

*J213/1 Salaries of Teachers (Music) Reduction - $388,800*

Respondents recommend the reduction of $388,800 by eliminating thirty-six instrumental music teachers. They contend that the eighty-nine remaining music teachers can provide instrumental instruction as part of their program. Petitioner answers that the elimination of thirty-six instrumental teachers would not be compensated for by a change in teaching assignment of eighty-nine vocal teachers for the following reasons:

1. Vocal teachers are not sufficiently skilled in instrumental music to carry on the instrumental program.

2. The eighty-nine vocal teachers are fully scheduled, and even if instrumentally competent, could not absorb the added instrumental program. Petitioner further contends that such a curtailment would deprive the majority of Newark children, who are so inclined, of the opportunity to receive the benefits of an experience with a musical instrument. They point out that a majority of children currently participating in school orchestras and bands have never taken private lessons. The Commissioner is in full agreement with the contentions of petitioner in this matter and directs the restoration of $388,800.

*J213/2 Salaries of Teachers (Piano Accompanists) Reduction - $118,800*

Respondents recommend the reduction of $118,800 to be gained by the elimination of eleven piano accompanists. They contend that music teachers should be able to provide the necessary accompaniment, and that older students who have musical proficiency should be encouraged to volunteer when needed. Petitioner contends that there is a paucity of student accompanists, and that the use of a professional accompanist enhances the effectiveness of music instruction by enabling the teacher to maintain better visual observation, and hence discipline, during the instruction period. The Commissioner is certain that piano accompanists lend an important dimension to the music program; however, petitioner has failed to demonstrate the type of need necessary to consider their employment necessary for the maintenance of a thorough and efficient school

system. The Commissioner notes, however, that respondents' contention that the accompanists receive $10,800 is in error, and that the average salary for this position is $6,500; therefore, a reduction of $71,500 in this item is sustained.

*J213/3 Salaries of Teachers (Art) Reduction - $540,000*

Respondents recommend the reduction of $540,000 by the elimination of fifty art teachers. They recommend that elementary classroom teachers provide the art instruction. Respondents contend that the reading levels based on national norms have decreased during the past three-year period, that this poor reading performance indicates that additional effort must be placed in this area, and that art teachers, therefore, are not a priority item at this time. Petitioner contends that such a reduction would result in twenty-eight art teachers being left to service a total of seventy-four elementary and special schools. It contends that with few exceptions elementary teachers are ill-equipped to provide art instruction as it is understood in modern art education today. The Commissioner fails to see the correlation between poor reading and good art instruction. Every teacher in the Newark School System, regardless of his specialty, should be a reading teacher; every incidental opportunity to teach reading should be aggressively pursued in the context of every subject. It is indeed unfortunate that so many of Newark's children have such difficulty with reading. Respondents, however, fail to establish that art instruction does not enhance the students' receptivity to many of the skills so necessary in reading and writing. The Commissioner totally rejects the notion that educational thought or research has indicated that a direct approach to reading instruction, absent a wide range of curriculum experiences, enhances the reading process. However, the Commissioner recognizes respondents' contention that art instruction by a professional art educator is too costly a requirement, however beneficial, for the maintenance of a thorough and efficient school system. Consequently, the reduction in staff or ten art teachers with the resultant economy of $108,000 is sustained.

*J213/6 Salaries of Teachers (Small Classes) Reduction - $475,200*

Respondents recommend elimination of all classes except those for special education that have enrollments of less than fifteen students. They contend there are 220 classes so situated, the elimination of which will result in a reduction of forty-four teachers, resulting in a saving of $475,200. Petitioner contends that such reduction would eliminate such offerings as fifty remedial reading classes, English as a second language, and many highly-specialized courses which serve a limited number of students, but which are intended to provide enriched experiences in advanced courses for those who have indicated by election or performance their interest in academic excellence. The Commissioner notes that it is always a problem in school management to provide for the cost of offering a wide range of curriculum choices to encompass the abilities and needs of a diverse population. In the instant matter the Commissioner considers 220 such classes at the secondary level in a district the size of Newark to be a reasonable organizational pattern. To deny youngsters the fourth year of a language or advanced math or remedial reading after it had been promised would reflect unfavorably on the credibility of the system. The reduction of $475,200 is restored.

*J213/7 Salaries of Teachers (Typing) Reduction - $108,000*

Respondents suggest a saving of $108,000 by eliminating typing in the junior high school curriculum, with the resulting reduction of ten staff positions. Petitioner contends that the elimination of the typing program would not eliminate the need for staff positions because other subject would have to be substituted in the time period scheduled for typing. The Commissioner directs that the $108,000 be restored.

*J213/8 Salaries of Teachers (Substitutes) Reduction - $600,000*

Respondents recommend a reduction in the number of permanent substitute teachers, and recommend that the Board employ substitute teachers on an as-needed basis. The suggested reduction in this item is $600,000. Petitioner states that the Board-Union contract calls for 150 pool substitutes to be stationed at the schools on a permanent basis. Petitioner testifies that the daily absenteeism of teachers is in excess of 150. It contends that the use of these substitutes is not only necessary because of its legal obligation to honor a contractual agreement, but also that their presence contributes to the efficiency of the school sytem. The reduction of $600,000 is restored.

*J213/16 Salaries of Teachers (Vacant Positions) Reduction - $442,000*

Respondents contend that the average surplus in instructional salaries during the past five years was $442,000. They recommend a reduction of $442,000 in the Board's budget for this item. Petitioner maintains that prudent budgeting demands the anticipation that all vacancies will be filled. It further contends that "even if the $400,000 average figure is correct, it is a small percentage of the $65-70 million budget for salaries and should not be reduced." The Commissioner finds that respondents' action in this matter appears to be reasonable and that petitioner has failed to demonstrate how this economy can prevent the maintenance of a thorough and efficient program of instruction. The reduction of $442,000 is sustained.

*J213/18 Salaries of Teachers (Physical Education) Reduction - $237,600*

Respondents recommend increasing class size in physical education with the resulting staff reduction of twenty-two teachers at a saving of $237,600. Petitioner contends that effective teaching in this area can be assured only if class sizes are in the 30-35 range. It contends that the average load per teacher currently operative is 40, with a significant number exceeding 50. The Commissioner directs that the $237,600 be restored.

*J213/31 Salaries of Teachers (Driver Education) Reduction - $148,000*

Respondents recommend elimination of the driver-education program, with a resultant saving in salaries of $148,000. They contend that this is a low-priority item in terms of the needs of the students to acquire more basic academic skills. Petitioner avers that such a program is a necessity, and cites the insurance savings of those who have completed the program as proof of the value and importance placed on this program. The Commissioner is constrained to

comment that programs such as driver education are logically the first targets for the economy-minded. Perhaps there is a more economical way to ensure that young people are introduced properly to their profound responsibility of operating motor vehicles, but absent any evidence that this mission is being attempted elsewhere, he considers it to be an essential element in the schools' program of instruction. The reduction of $148,000 is restored.

*J213/33 Salaries of Teachers (Mini Courses) Reduction - $3,000*

Respondents suggest the elimination of $3,000 for the expenses of guest teachers lecturing in mini courses. Petitioner explains that mini courses are an innovative practice in American secondary education. The purpose of the $3,000 is to enable the Board to pay the expenses of individuals possession specialized knowledge who volunteer their services to make presentations to the students. The reduction of $3,000 is restored.

*J213/19 Salaries of Teachers (Staff Reduction) Reduction - $5,259,600*

This item is the major recommendation of respondents who suggest a $5,259,600 saving by a staff reduction of 487 teachers. The position of respondents and petitioner, as expressed in their written testimony, is as follows:

> "The number of students per classroom teacher as budgeted for 1971-72 is 14. This is based on Acct. No. J-213 which shows 4,041 classroom teachers for next year. The projected average daily attendance based on 72% of the estimated 1971-1972 enrollment (same ratio as in 1969-1970) is 56,876. By increasing the average number of students per teacher by (2) from 14 to 16, the elimination of 487 teachers could be made. See Exhibit No. 6 below: J213.
>
> *"EXHIBIT No. 5*
>
> *DEDUCTION IN NUMBER OF TEACHERS WITH AN INCREASE OF 2 STUDENTS PER TEACHER*
>
> | | |
> |---|---|
> | Number of Teachers Budgeted for 1971-72 (Acct. No. J-213) | 4,041 |
> | Estimated number of Teachers required by increasing (2) students per teacher | 3,554 |
> | Reduction in number of Teachers | 487 |
>
> $5,259,600" ***
>
> *"ANSWER TO ITEM NO. 19*
>
> "This item indicates that the number of students per classroom teachers (sic) as budgeted for 1971-72 is 14. Furthermore, it indicates that the project average daily attendance should be the basis for determining class

size. The number 14 is a false figure in terms of actual realities. The total number of teachers, as listed, does not reflect the actual class size story. It simply is a figure obtained by dividing 4,041 into the anticipated enrollment. In actual fact, the situation operates as follows:

"In the 4,041 projected number of teachers, are included a wide variety of auxiliary staff individuals including helping teachers, guidance counselors, librarians, art teachers, music teachers, and others. It also includes many special classes, which by law, must be kept quite small. It includes kindergartens which must be maintained at a maximum 25 youngsters per class.***

"Over and above this, to suggest that our class size be determined on the basis of average daily attendance is improper. It is our responsibility and job to have the children there every day in properly sized classes.

"It has been pointed out in answer to other questions, that the absenteeism rate, as shown in the City's figures, involves a period of 1969-70 when there was a 16 day striek which played havocon our average daily attendance figures."

The Commissioner finds that the analysis offered by respondents places identical positions open to review under separate categories. Art teachers, music teachers, physical education teachers and driver education teachers have all been previously considered and must be deleted from consideration under this item in order that the Board's budget be fairly evaluated. The following table indicates total staff reductions and dollar amounts previously-considered:

| | | Staff/Position | Reduction |
|---|---|---|---|
| J213/1 | Instrumental Music | 36 | $ 388,800 |
| J213/2 | Piano Accompanists | 11 | 118,800 |
| J213/3 | Art | 50 | 540,000 |
| J213/6 | Small Classes | 44 | 475,200 |
| J213/7 | Junior High School Typing | 10 | 108,000 |
| J213/8 | Pool Substitutes | 150 | 600,000 |
| J213/16 | Vacant Positions | 41 | 442,000 |
| J213/18 | Physical Education | 22 | 237,600 |
| J213/31 | Driver Education | 14 | 148,000 |
| | 378 | $3,058,400 | $3,058,400 |

Assuming, *arguendo*, that an increased pupil-teacher ratio would not materially affect the operation of a thorough and efficient school system, consideration should be limited in this item only to the positions not heretofore recommended for reduction. The amount now to be considered under this recommendation is $2,191,200, roughly equated to 200 teachers at an average salary of $10,800.

Respondents' recommendation is based on the use of ADA as the base on which fiscal planning should depend. They reason that only those who attend require the services of a teaching staff member and project the ADA at 72% of

the estimated 1971-72 enrollment. The Commissioner is reluctant to place reliance upon such reasoning as the basis for the development of a staffing pattern which could result in chaos should the district's enrollment potential be reached. It is assumed that the goal of petitioner and respondents is to work diligently toward the goal of 90% attendance. Consequently, to introduce a staffing plan predicate;upon 72% enrollment could contribute to the inability to meet that goal by not having staff members available to meet the needs of youngsters who are the most difficult to hold. The reduction of $3,058,200 is restored.

*J216/4 Other Salaries for Instruction Reduction - $15,000*

Respondents recommend elimination of the position of coordinator of volunteer programs with the resulting budget reduction of $15,000. They contend that this position represents a duplication of effort and that its responsibilities are vague and can be performed by existing personnel. Petitioner contends that continuation of this position is vital to the continuation and growth of a program started in 1967 to provide individual tutoring to underachieving young people. Petitioner indicates that 2,800 volunteers have been recruited and placed in the schools by the Department of Volunteer Services. The reduction of $15,000 is restored.

*J240/11 Teaching Supplies Reduction - $10,000*

Respondents recommend reduction of $10,000 in this item by requiring students in industrial arts and homemaking to pay the full costs of materials over and above the standard allowance required to meet the objectives of the course. Petitioner contends that it has been the established policy in Newark for over fifty years to provide materials for home economics and industrial arts students on the following basis:

A. Students are provided with standard supplies for which there is no charge.

B. If students use materials above the standard supplies, they pay about 50% of the costs.

C. Special items such as hinges, drawer pulls, zippers, patterns, sockets, etc. are not provided. Students must provide these themselves.

D. Such charges to students occur only when students take their work home.

As long as the students are not limited in any way in their progress in either of these subjects due to their inability to purchase materials they manufacture, the Commissioner considers the Board of Education's policy in this matter to comport with the school law decision, *Melvin C. Willett v. Board of Education of the Township of Colts Neck, Monmouth County*, 1966 *S.L.D.* 202, affirmed by State Board of Education, 1968 *S.L.D.* 276. Restored $10,000.

*J240/15 Teaching Supplies Reduction – $100,000*

Respondents recommend the reduction of $100,000 through elimination of the emergency fund of the Superintendent of Schools. They contend that the Board should request emergency appropriations in accordance with procedures in effect prior to 1969-70. Petitioner contends that it is anticipated that this fund will be fully allocated during the 1971-72 budget year, and therefore does not fit the statutory requirement as outlined in *N.J.S.A.* 18A:22-21, *et seq.* for emergency appropriations. The Commissioner notes that this fund is in reality a contingency supply appropriation to be used at the discretion of the Superintendent, in accordance with Board of Education procedures to meet unanticipated supply requirements of the various schools in the district on an as-needed basis. The Commissioner considers it prudent for the Board of Education to retain some discretion over supply allocations; however, he considers the name of the fund misleading and recmmends that the fund be considered as part of the supply budget. The Commissioner is constrained to comment, however, that it is most appropriate for the Superintendent to have a major voice in the allocation of the district's resources. The reduction of $100,000 is restored.

*J250B/10 Travel Expenses for Instruction Reduction - $9,000*

Respondents recommend a reduction of $9,000, a 50% reduction, in the budgeted amount for conferences. Petitioner contends that it is important for personnel of the school district to attend conferences. It contends that a lack of Newark representation has been noted at regional and national meetings involving major educational problems. It is noted that the appropriated increase in this budget item is $6,460. A $6,000 reduction in this item is sustained. $3,000 is to be restored.

*J250B/32 Travel Expenses for Instruction Reduction - $10,000*

Respondents recommend reduction of $10,000 through the elimination of the Professional Improvement Fund. They contend that professional improvement is the responsibility of each professional staff member. Petitioner contends that the results of experiences gained through this fund contributed greatly to the professional growth and development of the teaching staff. It is noted that this item has been previously discussed and that the Commissioner has reduced it to its 1970-71 level. The reduction of $10,000 is restored.

*J250C/34 Miscellaneous Expenses for Instruction Reduction - $28,200*

Respondents recommend elimination of student identification cards at a savings of $28,200. They contend that this service can be provided through existing facilities. Petitioner states that it knows of no such facilities and that the need for these cards to help prevent school intruders from disrupting the educational process is real and urgent. The reduction of $28,200 is restored.

*J220-250C/20 Textbooks, Library Books, Audiovisual Materials, Teaching Supplies Reduction - $245,800*

Respondents suggest reduction of $245,800 by limiting these items to a 5% increase in per pupil cost over the 1970-71 budget. Petitioner contends that per capita costs for budgetary purposes are based on the estimated pupil enrollment for October 30 of the budget year, and are not based on ADA. It avers that instructional materials must be provided for the number of pupils who are enrolled, rather than the number who, on the average, will attend. They contend that a 5% increase based on the cost of living for the past year is not adequate. Petitioner was advised by its budget analyst to budget increases from 10% to 20% in order to keep pace with current costs.

It is noted that there is a redundancy in respondents' analysis of this item. Recommendations have already been considered for Items 10, 11, 15, 32 and 34, *ante*, and will not be considered again in the Commissioner's analysis of this item's reduction. The Commissioner is concerned with the projected ADA utilized by respondents and is constrained to comment that he is hopeful that the City government and the Board will make a concerted effort to demonstrate that respondents' projection is not prophetic. While dismissing the use of ADA as it appears in respondents' analysis, the Commissioner supports the contention that an austerity budget in this area can be administered to provide a thorough and efficient program of instruction at a lesser amount than the budget appropriation. A 6% increase over the 1970-71 budget appropriation would indicate an increase in exces of $100,000 as the amount necessary in the contested item. The reduction of $135,800 is sustained; $110,000 is restored.

*J410A3/12 Salaries of School Nurses Reduction - $50,000*

Respondents suggest a saving of $50,000 by the Board of Education's employing nurses on the basis of RN training without degree requirements. Petitioner contends that a degree nurse with full certification is better trained to function within a school situation. This background, it avers, enables the nurse to function as an educator with medical training so that she may serve as a catalyst for health education. The Commissioner supports the Board of Education's position in this instance and believes that trained health educators should have a high staffing priority for all districts. The reduction of $50,000 is restored.

*J610A/13 Salaries for Custodial Services Reduction - $250,000*

Respondents suggest the assignment of custodial personnel based on nationally-accepted standards of 15,000 square feet of building area per man. Petitioner contends that the age of its buildings, plus extensive use for after-school activities and unusually heavy cafeteria utilization, makes such a norm inapplicable to the Newark situation. The $250,000 reduction is restored.

*J640D/21 Telephone and Telegraph Reduction - $20,000*

Respondents suggest reduction in telephone expenses by removing

low-priority equipment and establishing control over long distrance telephone usage. Petitioner maintains that this account is merely a reflection of historical costs. Its department of business management has recommended that controls be placed on long distance telephone usage and the removal of low-priority equipment. The reduction of $20,000 is sustained.

*J720C/22 Contracted Services for the Repair of Equipment Reduction - $10,000*

Respondents recommend reduction of $10,000 in this item through establishment of a preventive maintenance program for instructional equipment with a resultant reduction in repairs. Petitioner contends that the effect of respondents' proposal cannot be ascertained in the absence of historical data. It is noted that the proposed increase in these items exceeds the recommended cut. The reduction of $10,000 is sustained.

*J730A/29 Replacement of Instructional Equipment Reduction - $10,300*

Respondents recommend that $10,300 be reduced from this account by the elimination of the purchase of new audiovisual equipment through the redistribution of existing equipment. Petitioner responds that only replacement equipment is purchased with these funds and that transfer of audiovisual equipment from the Title I Program to Non-Title I Schools is not legally permissible. The reduction of $10,300 is restored.

*J730A/30 Replacement of Instructional Equipment Reduction - $22,500*

Respondents recommend the reduction of $22,500 through elimination of the replacement of band and orchestra instruments and pianos. Petitioner contends that fifty percent of the musical instruments used by students are fifteen to twenty years old. It avers that the older instruments malfunction - a condition which take a great deal of satisfaction from the learner and results in a loss of motivation. Petitioner further contends that it would substantially impair the music program if the pianos listed for purchase were eliminated from the 1971-72 budget. It is noted that the increased budget appropriations for Item J730A is $197,829. The Commissioner sustains this reduction of $22,500 with the understanding that musical instruments may still be purchased through a reordering of priorities within this account.

*J1010/23 Student Body Activities Reduction - $75,000*

Respondents suggest a savings of $75,000 by reducing salaries for student body activities through a reorganization of the program and establishment of priorities. Petitioner replies that faculty salaries for this activity are determined by agreement between the Board of Education and the Newark Teachers Union. It further contends that the importance of cocurricular activities in the educational process is such that any significant reduction thereof could result in a loss of the high school's accreditation. The Commissioner supports the contention that cocurricular activities are necessary; however, he notes that petitioner's budget appropriation for this item represents an increase which indicates more than just a maintenance of effort. The $50,000 reduction is sustained.

*J1111/17 Salaries for Community Recreational Activities (Summer)*
*Reduction - $100,000*

Respondents suggest a savings of $100,000 by combining the Board of Education's summer recreation program with that of the City. Petitioner contends that it has been servicing the City's recreational needs since 1902 and that the City's recreational program has "tapped" the Board's personnel for "know how" in this area. The Commissioner notes that the date of the hearing in this matter (July 16, 1971) precludes the prospect of an orderly transition for the management of the recreational program. Although a summer recreation program is a legitimate and often highly desirable use of a Board's facilities and personnel, it may be considered legitimately by some to be a function of city government. The Commissioner suggests that a full study be undertaken to determine the best use of Newark's resources with regard to the management of a recreation program. The reduction of $100,000 is restored.

*J1111/24 Salaries for Community Recreational Activities*
*Reduction - $100,000*

Respondents suggest a reduction of $100,000 for the reorganization of programs for civic activities. Petitioner contends that a reduction of this magnitude would seriously impair the Board's ability to provide a recreation program for the community. Although the Commissioner recognizes the importance of a recreation program, it cannot be considered as necessary to maintain a thorough and efficient program. Therefore, this reduction is sustained with the clear admonition to the respondents that the mission of providing recreation activities to Newark residents has been historically assigned to the Newark Board of Education. Any substantial change in this regard should be clarified so that the public does not hold the Board responsible for a program that is no longer funded. The reduction of $100,000 is sustained.

*7A/36 (Board's Account Number) Previously Federally-Funded Programs*
*Reduction - $474,570*

Respondents suggest a saving of *$474,570* through the elimination of ESEA Title III Programs that were previously funded by the federal government but which are scheduled to be funded in full from 1971-72 Board of Education funds. They contend that the effectiveness of these programs in meeting their objectives has not been demonstrated nor have they been appropriately evaluated. Petitioner contends that each of these programs is necessary for the maintenance of a thorough and efficient program of instruction. The programs are:

1. *Drug Abuse Prevention Program - $39,695*
   This program is adequately described by its name. The reduction is restored.
2. *Early Childhood Education - $229,685*
   The Commissioner can think of no higher priority for the Newark School System than an emphasis on early childhood education. The reduction is restored.

3. *Paleontology in the elementary schools - $19,922*
This program, designed to acquaint all 5th grade pupils in Newark with a scientific experience, has reached 36,000 children in the past three years. It is a well-conceived, tightly-constructed curriculum enterprise, which demonstrates how a city school system can properly utilize the resources of the community such as the Newark museum. the reduction is restored.

4. *School Within a School - $39,309*
This program is intended to serve the needs of 300 young people, who will attend school on an eleven-months' basis. The purpose of this program is to bring together a group of highly-motivated students, who form the basis of a leadership pool of college-bound students. The Board states that this is not a Title III Program, but merely the recipient of a one-year grant from the Office of Economic Opportunity. Although the Commissioner supports the concept and encourages the Board of Education to endeavor to find some means to continue this program with existing resources, he can find no basis to state that the program is necessary for the maintenance of a thorough and efficient school system. The reduction of $39,309 is sustained.

5. *Project WHO - $145,959*
Petitioner submitted evidence to show that this is a promising project, which has already helped eighth grade younsters whose prognosis for success was considered poor, enter high school and succeed. It is noted however that the program serves 110 students annually at a cost of $145,959. This cost is presumably over and above Newark's standard tuition figure. Although the Commissioner would like to see the project continue, he cannot disagree with respondents that this is a responsible reduction which will not result in the failure to provide a thorough and efficien program of instruction. The reduction of $145,959 is sustained.

*CAPITAL OUTLAY*

*L1240B/28 Equipment for Administration Reduction - $85*

Respondents recommend elimination of a portable telephone for the assistant superintendent of curriculum services with the resultant saving of $85. Petitioner contends that there is no portable telephone plan. The item in question refers to a television used to monitor educational programs. The reduction is restored.

*L1240H/35 Equipment for Food Services Reduction - $411,000*

Respondents recommend reduction of $411,000 by eliminating the cost of food-service equipment from the budget and financing such equipment through capital bonds. Peitioner contends that the life expectance of much of this

equipment does not make it appropriate for twenty-year financing. Petitioner further contends that all of its borrowing power will be required to finance the construction of new schools and to rehabilitate deteriorating facilities. The reduction is restored.

*SUMMARY*

A summary of the Commissioner's action on the various line items appear in the following consolidated table:

| Acct. No. | Proposed Budget | Reduction | Amount Restored | Amount Not Restored |
|---|---|---|---|---|
| J100 | $ 2,830,598 | $ 1,442,260 | $ 807,060 | $ 207,000 |
| J211 | 3,003,783 | 45,000 | 45,000 | - 0 - |
| J212 | 1,363,518 | 119,000 | - 0 - | 119,000 |
| J213 | 46,301,418 | 8,321,000 | 7,699,500 | 621,500 |
| J216 | 764,700 | 15,000 | 15,000 | - 0 - |
| J220-250C | 2,033,558 | 403,000 | 261,200 | 141,800 |
| 410A3 | 927,720 | 50,000 | 50,000 | - 0 - |
| 610A | 3,953,955 | 250,000 | 250,000 | - 0 - |
| 640D | 175,300 | 20,000 | - 0 - | 20,000 |
| 720C | 75,550 | 10,000 | - 0 - | 10,000 |
| 730A | 445,824 | 32,800 | 10,300 | 22,500 |
| 1010 | 244,950 | 75,000 | 25,000 | 50,000 |
| 1111 | 2,172,774 | 200,000 | 100,000 | 100,000 |
| 1122/7A | 474,570 | 474,570 | 289,302 | 185,268 |
| L1240B | 36,391 | 85 | 85 | - 0 - |
| L1240H | 410,877 | 411,000 | 411,000 | - 0 - |
| | TOTAL | $11,440,515 | $9,963,447 | $1,477,068 |

It is to be observed that respondents' suggested reductions are far in excess of the amount at issue. It is clear that this redundancy was the result of reducing elements of each major account separately and then in some instances, such as J213 and J110, failing to consider those reductions when making an across-the-board recommendation for a percentage reduction in the major accounts. In the instant matter the Commissioner has considered petitioner's appeal of $5,042,755 because the resolution of the Board of School Estimate directing the utilization of $1,000,000 is considered conjoined with the Board of Education's original request of $54,042,755. The Commissioner finds that respondents acted in a reasonable manner and consequently their actions reducing their appropriation cannot be considered arbitrary or capricious. It is noted, however, that their budget analysis calls for reductions, which, in the Commissioner's judgement, would seriously impair the educational effectiveness of the Newark School System. In determinining this budget dispute, it is well to keep in mind the language of the New Jersey Supreme Court, which set the guidelines for such matters in *Board of Education of East Brunswick v. Township Council of East Brunswick*, 48 *N.J.* 94 (1966) at p. 107:

> " ***if he finds that the budget fixed by the governing body is insufficient to enable compliance with mandatory legislative and administrative educational requirements or is insufficient to meet minimum educational standards for the mandated thorough and efficient East Brunswick school

system, he will direct appropriate action by the governing body or fix the budget on his own within the limits originally proposed by the Board of Education. On the other hand, if he finds that the *governing body's budget is not so inadequate, even though significantly below what the Board of Education had fixed or what he would fix if he were acting as the original budget making body under R.S. 18:7-83* then he will sustain it, absent any independent showing of procedural or substantive arbitrariness.***"

In the instant matter the Commissioner has noted his reluctance to sustain many of the reductions recommended by respondents. He is for instance eager to see programs such as *Project WHO* develop. If he were free to exercise his independent judgment, the Newark Board of Education's budget would be restored almost in its entirety. He must, however, be guided by the language of the Court and by the facts as they were expressed during the hearing on this matter.

The Commissioner is constrained to comment that this decision appears shortly after the President of the United States' promulgation of wage and price guidelines and as nearly as possible reflects the economics that it implies. The Commissioner notices that as the result of the Executive Order, certain sums of moneys may accumulate from unpaid contractual salaries and wages during the duration of the wage-price "freeze." Accordingly, the Commissioner directs the Board of Education to retain these sums *in toto* within the respective budgetary salary accounts until the expiration of the federal controls or until the close of the 1971-72 fiscal year, whichever shall come first.

The Commissioner determines that a thorough and efficient system of public schools, as mandated by the New Jersey Constitution and school laws, cannot be maintained for the 1971-72 school year by the Newark City Council. He directs, therefore, that the sum of $3,565,687 be added to the sums already certified to the Essex County Board of Taxation for the current expenses of the School District of the City of Newark.

COMMISSIONER OF EDUCATION

September 8, 1971

Pending before State Board of Education

**DEBORAH JEAN CAPEN, a minor by her parent and guardian ad litem, James F. Capen; MICHAEL VOLPE, a minor by his parent and guardian ad litem, Dorothy Volpe; SUSAN E. LAENG, a minor by her parent and guardian ad litem, William R. Laeng; MARGOT HOWELL, a minor by her parent and guardian ad litem, Carolyn C. Howell; JERRY WHELESS, a minor by his parent and guardian ad litem, Curtis Wheless; DAVID B. NOLLE, a minor by his parent and guardian ad litem, Glenna G. Nolle,**

*Petitioners,*

**v.**

**Board of Education of the Town of Montclair, Essex County,**

*Respondent.*

## COMMISSIONER OF EDUCATION

### Decision on Motion

For the Petitioners, Connell & Connell (Raymond R. Connell, Esq., of Counsel)

For the Respondent, Charles R. L. Hemmersley, Esq.

Petitioners have filed a motion seeking to have the Commissioner of Education reconsider his decision of July 1, 1971, refusing to impose restraints upon the Board of Education of Montclair, hereinafter "Board," with respect to its preparations to implement its "Interim Plan" to further correct racial imbalance in the Montclair School System. Arguments were heard at the Department of Education, Trenton, on August 18, 1971, by a hearing officer appointed by the Commissioner. The report of the hearing officer follows:

Petitioners assert that information gathered through depositions taken in this matter since the July 1, 1971, decision of the Commissioner has led them to the belief that the "Interim Plan" that the Board intends to put into effect at the start of the coming school year is not the identical plan that was actually submitted to the Commissioner and that received his approval.

Further, without actually charging that the Commissioner cannot hear the case fairly, petitioners complain that a letter written by the Comissioner on June 10, 1971, in response to a letter of the Superintendent of Schools for Montclair indicates a prejudicial prejudgment of the ultimate issues of the case.

Petitioners repeated their former allegations as to the inadequacy of the "Interim Plan" and further charged that certain students would suffer irreparable harm should the allegedly ill-considered "Interim Plan" be permitted to go into effect. It should be noted, however, that, although the opportunity has been provided, no evidence was presented at the hearing – nor has any

evidence been presented to date – in support of these allegations of inadequacy of the Plan or harm potentially resulting from it. At the hearing, petitioners chose not to proceed with the presentation of their case pending the completing of their discovery and/or the issuance of the decision on their motion. The desired further discovery, however, seems directed toward the aspect of their case dealing with the mechanics of consideration of the Plan by the Commissioner and not toward the garnering of any further information concerning the merits or demerits of the "Interim Plan" itself.

Respondent Board reasserts the propriety and necessity of the "Interim Plan" and maintains that the intended Plan did in fact receive the approval of the Commissioner. The Board asserts further that, preparations for implementation of the Plan having proceeded so far, it would be impossible to open school on time if plans were seriously changed at this point.

The main thrust of petitioners' argument for purposes of this motion is that the "Interim Plan" as announced by the Board to the public at its January 11, 1971, meeting was not the same Plan that was submitted to and received the approval of the Commissioner of Education. They state that this assertion is based on what was learned from depositions taken from school officials and from Mrs. Nida Thomas, Director of the Office of Equal Educational Opportunity within the Department of Education. These depositions led them to believe that no significant communication was received by the Department to augment or amend what had been submitted on December 18, 1970, and that that submission did not represent the real "Interim Plan."

The December 18, 1970, submission is R-4 in evidence entitled, "Directions for Montclair School Integration - December 18, 1970." It explains that plans for the following school year must take several factors into account:

"1. Provide for a greater degree of integration of the student body (Total integration in grades 5-12).

"2. Move ahead in middle school development by bringing all grades 5-6-7-8 together in an integrated middle school program (only half of the 1200 students in grades 5-6 are now in integrated settings).

"3. Anticipate the fact that major renovation will necessitate vacating one of our largest buildings and require double sessions in another.

"4. Recognize that if the above occurs, we will not have the room (for one year) to move K-4 students from Glenfield as indicated in the Alternate and Preferred Plans. *** "

R-4 goes on to examine the difficulties with both the Preferred and Alternate Plans for desegregation that had already received the Commissioner's approval, and, apparently speaking through the Superintendent, concluded:

" *** Acknowledging these very real conditions, the Board and I feel that we must stage our plans just a bit differently by integrating totally grades 5-8 effective September 1971 and engaging in the widest possible community dialogue on K-4 integration during the one-year period when renovation is taking place. I am convinced that the net result will be not only a greater degree of integration but a greater degree of acceptance of that which does occur."

Although R-4 provides the general concept and outline for the "Interim Plan," it does not spell out the details of the Plan itself. If this were all that the Department of Education had to work with, it might not have provided an adequate basis for specific approval of the "Interim Plan". But it is apparent that the Department did, in fact, have more information. There has been continuous communication between the Board and the Department of Education. In November of 1970, for example, immediately following the defeat of a referendum that would have made the Preferred Plan possible, the Superintendent of Schools wrote to Mrs. Thomas, referring to an earlier conference with her and outlining the chronology of steps taken to correct racial imbalance. (R-1) In particular the letter indicated that the most likely objective in light of the referendum's defeat would be the complete integration of the 5th and 6th grades.

Besides written communication there have been less formal contacts with the Department. The Superintendent's letter to Mrs. Thomas of January 13, 1971, (R-5) indicates that there had been some prior communication with respect to a plan, and the context indicates communication beyond the contents of the December 18, 1970, document (R-4 *supra*). The Superintendent, in R-5, asked for formal approval of a plan that had apparently already been approved verbally.

But even if prior submissions and conversations omitted the requisite detail, that detail was supplied along with the January 13, 1971, letter, *supra.* Enclosed were materials used in presenting the "Interim Plan" to the staff and the public. Among these materials was a document entitled, "Statement of the Montclair Board of Education Presented at the Public Meeting, January 11, 1971," which said in part:

" *** Conscious of all of these pressures as well as the continuing mandate that action must be forthcoming, we proposed to the Commissioner of Education what we believe to be a more satisfactory plan which will show progress in education as well as integration, a plan which will provide for the housing of all students in the district while necessary Mt. Hebron renovations are undertaken, and a plan which will permit much wider community dialogue on the sensitive issue of K-4 integration. The plan which was presented and approved is as follows:

"1. All 6th Grade students are to be housed in Mt. Hebron or Hillside along with 7th and 8th Grades following existing feeder patterns.

"2. All 5th Grade students are to be housed in two locations – Glenfield and Nishuane – with Glenfield serving as a Mt. Hebron Fifth Grade Feeder School and Nishuane serving as a Hillside Feeder School.

"3. K-4 Primary Grades in Hillside will be housed in the Rand Building with appropriate arrangements for transportation where required.

"4. K-4 Primary Grades from Mt. Hebron will be divided between Bradford and Northeast with appropriate arrangements for transportation where required.

"5. Upon approval of funding for renovation of Mt. Hebron, Grades 6-7-8 from Mt. Hebron and Hillside will be on double session in the Hillside Building. *** "

Also included with the materials enclosed in the January 13th letter, *supra*, was a document entitled "Questions and Answers Relating to the Board of Education's Interim Plan for September 1971." It consists of six pages of information as to the details of the Plan and the reasons for it. The first question and answer divulged the basic pattern of the Plan:

"Q. What is the Interim Plan?

"A. The Interim Plan is another step toward Montclair's achieving the maximum possible dispersal of its black student population in an educationally sound manner.

"This correction of racial imbalance in our schools has been mandated by the Commissioner of Education and affirmed by the State Board of Education. The Interim Plan calls for establishing sending-receiving patterns for the district. In pattern No. 1, children in Bradford, Northeast, Grove and Glenfield attend the school nearest their home for grades K-4. (Mt. Hebron K-4 students will be divided between Bradford and Northeast based on residential patterns.) For fifth grade all pupils from these schools will attend Glenfield School and proceed as a group for 6th, 7th and 8th grade to Mt. Hebron.

"In pattern No. 2, children from the Southwest, Nishuane, Hillside, Edgemont and Rand-Watchung elementary districts attend their present K-4 schools. They will come together for fifth grade at Nishuane and then proceed as a group for their 6th, 7th and 8th grade educational experiences at Hillside. Hillside's K-4 elementary school will be housed as a group in the Rand School Buidling for one year. *** "

The January 11, 1971, Statement of the Montclair Board of Education, *supra*, says flatly that the Plan was presented to the Commissioner and received his approval. Although no written approval appears until the letter of Mrs. Thomas dated January 27, 1971, (R-6), the approval referred to by the Board might well

have been the verbal or informal one mentioned, or at least indicated, in the Superintendent's January 13th letter, *supra:*

> " *** I regret any inconvenience I may have caused your staff members in getting a prompt decision from the Commissioner on our plans. We had everything so closely timed in terms of announcements to staff and public and discussions with the Town Commissioners who will have to come up with the money that we simply could not delay. *Mr. Lake indicated to me that we would be receiving a letter expressing the Commissioner's tentative approval of our plans.* I would appreciate it if we could receive this within the next ten days. *** " (*Emphasis added.*)

It seems reasonably safe to conclude that there had been informal approval through the offices of the Department of Education prior to the Superintendent's letter of January 13, 1971, *supra.*

But even if there had been no such approval, the details of the "Interim Plan" as announced on January 11, 1971, were submitted to Mrs. Thomas with the Superintendent's January 13th letter and preceded the formal letter of the approval written by Mrs. Thomas on January 27, 1971. It was apparently in response to the letter of the 13th that she wrote back to the Superintendent thanking him for the "Interim Plan for racial balance submitted for implementation in the Public Schools of Montclair, effective September 1971," she continued:

> " *** This is to inform you that the Interim Plan has been found acceptable as the next step toward a total plan for achieving racial balance in the district's schools. The district will remain in the 'Staged Implementation' category.
>
> "We are encouraged to know that plans are being made for effective implementation of the Interim Plan as well as engaging the community in discussion concerning long-range organization.*** "

The hearing officer is therefore convinced that the "Interim Plan" as announced by the Board on January 11, 1971, did in fact receive the formal approval of the Director of the Office of Equal Educational Opportunity by means of her January 27, 1971, letter. Her approval is viewed by the Commissioner as his approval, as is indicated below.

The question remains as to whether the "Interim Plan" that did receive this approval is the plan that the Board intends to implement at the beginning of this school year. Inquiry made at the hearing revealed that it is, with but three insiginificant exceptions: (1) The contemplated renovation of Mt. Hebron School will not take place within the next six months so that the contingency plan whereby 6th, 7th and 8th graders would have to be on double sessions will not go into effect for some time; (2) The Hillside K-4 students will not be going

to the Rand building, but will go to the Hillside Annex building instead; the administrative staff that had occupied the Annex building is being transferred to the Rand building; and (3) The Kindergarten will remain at the Mt. Hebron School.

The hearing officer finds that the approved "Interim Plan" is substantially the one that the Board intends to put into effect for this school year.

With respect to petitioners' objection that the Commissioner indicated a prejudicial prejudgment in his response (P-2) to the June 1, 1971, letter of the Superintendent (P-1) it should be noted that the Commissioner merely stated what was implicit in his earlier decisions in *Rice, et al. v. Board of Education of the Town of Montclair*, 1967 *S.L.D.* 312 and 1968 *S.L.D.* 192, that there was a continuing obligation on the part of the Board to take further steps toward the alleviation of racial imbalancein the Montclair School System, and he made clear that approval of a plan by his office represented approval by him subject to the right of any interested party to challenge the propriety of both the Board's action and the action of his own office. Given the responsibility of the Commissioner to superintend education throughout the State, *N.J.S.A.* 18A:4-23, and his particular obligations with respect to the area of racial balance in the schools, *Booker v. Board of Education*, 45 *N.J.* 161 (1965), the hearing officer cannot find any impropriety in the Commissioner's responding in the way he did to the urgent request for clarification from the Board (see P-1).

* * * *

The Commissioner has reviewed the report of the hearing officer and the record in this matter and concurs in the finding that the "Interim Plan" that the Board intends to put into effect with the start of this school year has in fact received the approval of the Director of the Office of Equal Educational Opportunity and the Commissioner. In order to eliminate doubt, the Commissioner herein states that he has knowledge of the situation at Montclair with respect to the question of racial imbalance in the system and, after a review of the "Interim Plan" and the record before him, hereby approves of the complete and immediate implementation of the "Interim Plan."

The Plan has the virtue of totally integrating the 5th and 6th grades, thereby achieving complete integration of the Montclair School System from the 5th through the 12th grades. A step toward integration of the entire system is better than no step at this point, and, under the cirucmstances, the extra time provded for community participation in the working out of the important and delicate details of arriving at an acceptable plan to integrate grades K-4 is warranted and can be put to good use. The Commissioner is satisfied that the Board is meeting its responsibility under the *Rice* directives to work toward racial balance by the adoption of the "Interim Plan."

The Commissioner repeats his willingness and responsibility under *N.J.S.A.* 18A:6-9 to hear and review the propriety of the actions of the Montclair Board of Education and of his own offices. Having decided that the herein described "Interim Plan" did in fact receive his official approval, and absent any proof at this time that this Plan is inadequate or in some vital way unsound, the Commissioner will not interfere with the implementation of the Montclair Board of Education's "Interim Plan." Accordingly, the motion of petitioner requesting that the Board be restrained from implementing its "Interim Plan" is hereby denied.

COMMISSIONER OF EDUCATION

September 8, 1971
Pending before State Board of Education

**Board of Education of the Town of Boonton,**

*Petitioner,*

**v.**

**Mayor and Board of Aldermen of the Town of Boonton, Morris County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**Decision**

For the Petitioner, Maraziti, Maraziti & Sabbath (Joseph Maraziti, Esq., of Counsel)

For the Respondent, Bertram J. Latzer, Esq.

Petitioner, hereinafter "Board," appeals from the action of respondent, hereinafter "Aldermen," taken pursuant to *N.J.S.A.* 18A:22-37, certifying to the Morris County Board of Taxation a lesser amount of appropriations for school purposes for the 1971-72 school year than the amount proposed by the Board in its budget which was rejected by the voters. The facts of the matter were educed at a hearing, before a hearing examiner appointed by the Commissioner, which was held on August 4, 1971, at the State Department of Education, Trenton. The report of the hearing examiner is as follows:

At the annual school election on February 9, 1971, the voters rejected the Board's proposal to raise $1,511,164 by local taxes for current expenses and $33,100 for capital expenditures. The budget was then sent to the Aldermen pursuant to *N.J.S.A.* 18A:22-37 for their determination of the amount of local tax funds required to maintain a thorough and efficient district school system.

After consultation with the Board and a review of the budget, the Aldermen made their determination and sent to the Morris County Board of Taxation an amount which reduced the appropriations for current expenses by $60,600 and for capital outlay by $10,800 for a total reduction of $71,400. The amounts may be shown by the following table:

| | Board's Proposal | Aldermen's Determination | Amount of Reduction |
|---|---|---|---|
| Current Expenses | $1,511,164 | $1,450,564 | $60,600 |
| Capital Outlay | $ 33,100 | $ 22,300 | $10,800 |

The Aldermen suggested line items of the current expense and capital outlay budgets in which it believed economies could be effected without harm to the educational program, and their suggestions, documented in written form, appear to the hearing examiner to be moderate and restrained in almost all respects. However, the Board contests all items and prays for the full restoration of funds despite the fact that adequate funding appears to be available and usable from unappropriated balances or from other projected under-expenditure of certain accounts during the 1971-72 school year.

Specifically, it appears probably that the Board will under-expend its tuition-payable account (J870) by a sum in excess of $15,000, since it appears that two classrooms of children enrolled in special education programs were provided for in two different budgeted ways; namely, (1) by a provision for tuition payment for their education in schools *outside* the Boonton School District and (2) by a duplicate provision for them in rented rooms or prefabricated classrooms *within* the Boonton District.

It now appears likely that the children will be housed within the district, and tuition costs estimated at $25,000 will not be necessary although an amount of approximately $7,000-$10,000 may be anticipated as transfer expense to establish the new Boonton facilities. In any event, this net $15,000 provides some of the funding for the sums in contention herein.

Additionally, however, the testimony at the hearing by the Board Secretary was that the Board had available to it on June 30, 1971, as an unappropriated current expense balance, the sum of $118,855.32. This sum may be compared to the official balance of record listed for June 30, 1970, which was $155,677.69. When so compared, it is evident that there was a sizeable attrition from the balances during the school year 1970-71, but not so great an attrition as to preclude further reliance on such funds, if necessary, during the 1971-72 school year.

Thus, in summation, the Board has at least the following funding available to it for the current expense reductions totaling $60,000 imposed by the Aldermen:

| | |
|---|---|
| Unappropriated Balances – | $118,855.32 |
| J870 Tution (Approximate) – | 15,000.00 |
| Total Available | $133,855.32 |

Since it is evident that the Board already has available for expenditures more than twice the total amount of the current-expense reductions imposed by the Aldermen, the hearing examiner finds, after due reflection, that no determinations on the merits of the Aldermen's reductions from current expense or the Board's proposals are necessary or advisable, since it is clear that additional funding could not be adjudged as necessary, even if the hearing examiner found the Board's arguments persuasive in whole or in part.

While it is clear that there are sufficient unappropriated balances available for use from the current expense account, it is equally clear that such balances are not available to completely fund the reductions imposed by the Aldermen from proposed Board expenditures for capital outlay purposes. Specifically, the Aldermen have imposed reductions herein totaling $10,800 for the school year 1971-72, while the Board's capital outlay balance of record, that of June 30, 1972 was $8,205.38. Therefore, an examination of the Aldermen's reductions from this account must be made and these reductions, and the Board's proposals, must be adjudged on their respective merits.

In this regard the Board proposed to spend $38,100 for capital outlay purposes during the 1971-72 school year. Of this total $1,000 was allocated for sites, $15,000 for buildings and $22,100 for regular equipment. The Board has documented these proposed expenditures in itemized form in its written testimony and has buttressed the itemization to some extent with an argument of need. Specifically, the Board proposes to: (1) develop a new facility as a steno lab, (2) buy 25 desks and chairs for additional pupils, (3) add 9 filmstrip projectors, (4) purchase some additional physical education equipment, and (5) secure some violins to establish a new instructional program in stringed instrumental music. The Aldermen aver that $10,800 may be reduced from these allocations without harm to the educational system by paring $10,000 from proposed expenditures for educational equipment and $800 from proposed expenditures for plant operation.

The hearing examiner has carefully examined the Board's proposals and the Aldermen's suggestions in this regard and observes that the Board proposes to increase its capital outlay budget in school year 1971-72 by more than $12,000 when compared with the budgeted amount for the 1970-71 school year. The question posed is whether or not all, or even a major part, of this budgeted increase is essential for the operation of a thorough and efficient school system or whether the increased appropriation herein is for desirable items which would improve the existing program of instruction but could not be classified as essential.

In this regard the hearing examiner believes that the Board has demonstrated need for some items of student and teacher furniture, but that even with the reductions imposed by the Aldermen, there are ample budgeted funds to purchase these essentials. A large part of the remaining list of items is for items of educational equipment which would add to present stocks or be used for new or improved offerings. The examiner finds these proposed expenditures to be worthy of praise and clearly in the interests of an improvement of the educational offerings of the school district. Accordingly, he believes that the Board and its administrators should be commended for the initiative they have shown and for the new educational opportunities which they proposed to make available.

However, while the examiner believes that a majority of these items must be classified as desirable, he does not find them so essential or required as to constitute sufficient reason to reverse the Aldermen's determination contained herein. Therefore, he recommends that the determination of the Aldermen be allowed to stand.

In conclusion, the examiner also observes that significant funding totaling more than $8,000 still remains as an unappropriated balance in the Board's capital outlay account and may be apportioned at the Board's discretion on a priority-of-need basis, if in the Board's judgment such apportionment is appropriate and necessary.

* * * *

The Commissioner has reviewed the report of the hearing examiner and concurs with the findings contained therein. He holds that additional funding is not justified in this instance and that, accordingly, the determination of the Aldermen must be allowed to stand.

The Petition is dismissed.

COMMISSIONER OF EDUCATION

September 16, 1971

**Victor Catano,**

*Petitioner,*

**v.**

**Board of Education of the Township of Woodbridge, Middlesex County,**

*Respondent.*

## COMMISSIONER OF EDUCATION

### Decision

For the Petitioner, Coleman, Lichtenstein, Levy & Segal (Stephen Lichtenstein, Esq., of Counsel)

For the Respondent, Hutt & Berkow (Stewart M. Hutt, Esq., of Counsel)

Petitioner, a foreman of janitors employed by the Board of Education of the Township of Woodbridge, hereinafter "Board," asserts that the action taken by the Board in abolishing his position was an improper and unlawful violation of his tenure rights. The Board denies that its action was improper or unlawful, and answers that the position of foreman of janitors was abolished in good faith, in the interest of efficiency and for reasons of economy.

Testimony and documentary evidence were produced at a hearing conducted on January 11 and 12, 1971, at the office of the Woodbridge Board of Education, Woodbridge, by a hearing officer appointed by the Commissioner of Education. The report of the hearing examiner is as follows:

Both parties are in substantial agreement regarding the material facts of this controversy. Petitioner has been continuously employed by the Board for a period slightly in excess of twenty years in the positions of janitor, head janitor of a school, and foreman of janitors. Petitioner was appointed by the Board as foreman of janitors beginning July 1, 1964, (Exhibit P-4) and retained that position for a period of six years, until June 30, 1970, the effective date that the position was abolished by action of the Board, (Exhibit P-3)

Petitioner testified that he met with the Superintendent of Schools, two assistant superintendents and the superintendent of buildings and grounds on September 10, 1969, and he was informed by the Superintendent of Schools at that time that he was going to be replaced. (Tr. 1-10) Petitioner averred that he was called into the Superintendent's office on January 29, 1970, and was informed that the Board intended to establish a central supply warehouse to which he would be assigned as foreman with an increase in salary of $700. (Tr. I-11,14) Petitioner further testified that the Superintendent of Schools told him that his duties as foreman of janitors would be assigned to the assistant superintendent of buildings and grounds. (Tr. I-12,14)

During June 1970, according to petitioner, he heard rumors that his position was to be abolished by the Board (Tr. I-13,25) In reaction to these rumors, petitioner telephoned the Board member, who was chairman of the Board committee on buildings and grounds, and requested clarification of the rumors. The Board member advised petitioner to appear at the caucus meeting of the Board on Wednesday, June 24, 1970. At the informal caucus meeting, petitioner states that he was informed by the President of the Board that the Board had decided to abolish his position, but the President did not inform him of the reasons for this decision. (Tr. I-25,26)

The minutes of the adjourned meeting of the Board held June 30, 1970, (Exhibit P-3) disclose that the Board voted "That the position of Foreman of Janitors be abolished for reasons of efficiency and economy." The vote on this item was seven ayes and two nayes. These minutes also disclose the adoption of a motion "That Mr. Victor Catano be reappointed as a Head Custodian in the Woodbridge Township Schools for the school year 1970-71 at the annual rate of $7,607." The vote on this item was six ayes and three nayes. The minutes, *supra*, also indicate that the revised 1970-71 school budget was adopted at this meeting.

Petitioner contends that the abolition of the position of foreman of janitors was not *bona fide* because the position was abolished in name only, and that the position still exists under a changed job title.

Testimony provided by the Superintendent of Schools disclosed that the preparation of the proposed school budget for 1970-71 began during October 1969. The Superintendent recommended to the Board that a central supply warehouse be established for 1970-71 and that the new position of foreman of central supply be included in the 1970-71 budget with a salary appropriation of $10,000. (Tr. I-64,65,120) Also, the Superintendent recommended that the position of foreman of janitors be eliminated from the proposed 1970-71 school budget. (Tr. I-120) The salary for the foreman of janitors during 1969-70 was $9,300. The net effect of this recommendation was to provide a reduction of $9,300 from the buildings and grounds portion of the proposed 1970-71 budget and to add a new salary of $10,000 for the position of foreman of central supply under the purchase and property portion of the proposed 1970-71 school budget. (Tr. I-65, 261) The proposed 1970-71 school budget was defeated by the voters in the annual school election in February 1970, and was subsequently reduced in the amount of $700,000 by action of the Mayor and Council of the Township of Woodbridge. The Superintendent testified that the new position of foreman of central supply was still included in the 1970-71 school budget following the reduction made by the Mayor and Council, but during June 1970, the Board decided not to officially create the position because the Board could not provide a suitable warehouse facility in time for the commencement of the 1970-71 fiscal year. (Tr. I-147, 148) As of the time of the hearings in this matter, the Board had not as yet established a central warehouse, although the Superintendent testified that he was still pursuing the possibility because of the definite economies which would accrue from a centralized purchasing and supplying procedure. (Tr. I-83, 99)

The Superintendent of Schools was directed by the Board in January 1970, to inform petitioner that the salary allocation for his position as foreman of janitors was deleted from the proposed 1970-71 school budget, and that the new position of foreman of central supply had been added at a salary of $10,000. The Superintendent told petitioner that he had recommended to the Board that petitioner be assigned to this proposed new position. (Tr. I-77, 93, 105, 154) Also, the Superintendent notified petitioner that the duties of foreman of janitors would be asisgned to the assistant superintendent of buildings and grounds. (Tr. I-14)

During the 1969-70 school year, the department of Buildings and Grounds consisted of the superintendent of buildings and grounds, the assistant superintendent of buildings and grounds, and the foreman of janitors. The position of foreman of janitors had existed prior to petitioner's appointment to that position beginning July 1, 1969, and was, in fact, one of long standing. Testimony disclosed that during 1969-70 there were approximately 140 janitors and 58 matrons employed by the Board. (Tr. I-25) Petitioner testified that the duties of the foreman of janitors consisted of the following:

1. To make daily work assignments of roving janitors and truck drivers.

2. To make assignments of janitors and to cover vacancies in various schools when required.

3. To prepare specifications for janitorial supplies.

4. To prepare specifications for janitorial equipment such as vacuum cleaners, scrubbing machines, lawn mowers and small tractors.

5. To prepare requisitions for equipment and supplies not on the annual supply list, as required.

6. To oversee receiving and delivering of janitorial supplies.

7. To schedule and coordinate distribution of material and supplies for all departments and schools.

8. To supervise snow removal from Board of Education property.

9. To supervise the pruning and removal of trees from the Board of Education property.

10. To provide tires and inspection of vehicles, excluding school buses.

11. To make routine inspections of all schools and handle daily complaints regarding plant operations.

12. To maintain lists of janitorial personnel, including locations, seniority, tenure, pay scale, overtime rate and other vital statistics.

13. To file monthly overtime and absentee reports with the payroll department.

14. To investigate complaints regarding janitorial personnel and recommend course of action. (Tr. I-19, 20; Exhibit P-10)

Pertinent testimony was educed concerning the history of the establishment and job description of the position of assistant superintendent of buildings and grounds. The minutes of the Board of Education meeting held April 17, 1963, (Exhibit P-4) include the following resolution which was adopted by a unanimous vote:

"*** 2. WHEREAS, the Board has adopted a resolution designating Vincent W. McDonnell as 'Construction Supervisor' in connection with the school building program being undertaken by the Board; and

"WHEREAS, Mr. McDonnell will need the assistance of qualified personnel to assist in the accomplishment of his functions as Construction Supervisor; and

"WHEREAS, the Board has undertaken investigation to determine a suitable person to assist Vinvent (sic) W. McDonnell as Construction Supervisor; and

"WHEREAS, Donald H. Aaroe, 427 Elmwood Avenue, Woodbridge, N.J. has over 20 years experience in construction and has completed courses in architectural designing and has vast experience in the construction field; and

"WHEREAS, the appointment of Donald H. Aaroe as Assistant Construction Supervisor is in the best interest of the Board; now therefore be it

"RESOLVED: That Donald H. Aaroe is appointed as Assistant to Vincent W. McDonnell to perform the work and services as assigned by Mr. McDonnell in the resolution appointing him as Construction Supervisor; and be it further

"RESOLVED: That this appointment shall take effect on April 16, 1963 and shall run for the period of construction as determined by the Board and he shall be compensated at the rate of $8,500.00 per annum, payable bimonthly at the same time and in the same manner as other employees of the Board.

"On motion of Mr. Mullin, seconded by Mr. Felz, all voting in the affirmative, the foregoing resolution was adopted.***"

The minutes of the Board of Education meeting held December 15, 1965, (Exhibit P-4) disclose the adoption of the following resolution:

"***12. WHEREAS, the expansion of the school system and physical plant requires that the buildings and grounds functions be implemented from a personnel standpoint, and

"WHEREAS, it is deemed necessary that the position and office of Assistant Superintendent of Buildings and Grounds be created with the holder of said employment to assist the Superintendent of Buildings and Grounds in all his functions as established by the Board:

"NOW THEREFORE BE IT RESOLVED:

"A. The position and office of Assistant Superintendent of Buildings and Grounds is hereby established and the person holding said position shall be an assistant to the Superintendent of Buildings and Grounds in all his functions and shall act in his place and stead during such periods as he may be absent,

"B. The annual salary of the person holding the job and position of Assistant Superintendent of Buidlings and Grounds is $9,000.00 per annum, (*amended, see below), on a twelve month basis, in accordance with the prevailing practice of the office of the Secretary of the Board of Education.

"C. The Secretary is directed to charge said salary against the bond issue approved by the electorate for the Colonia Senior High School at Colonia, until such time as the project is completed, at which time, the said salary shall be paid from the budgeted accounts.* (See below, amended.)

"13. WHEREAS, Donald Aaroe has been performing valuable services for the Board of Education in connection with the construction of new schools, and

"WHEREAS, he is uniquely qualified for the position of Assistant Superintendent of Buildings and Grounds ***

"NOW THEREFORE BE IT RESOLVED AS FOLLOWS: that Donald Aaroe is appointed Assistant Superintendent of Buildings and Gronds, effective immediately, at an annual salary of $9,000.00.

"A. The Secretary is directed to charge said salary against the bond issue approved by the electorate for the Colonia Senior High School at Colonia, until such time as the project is completed, at which time the said salary shall be paid from the budgeted accounts.

"On motion of Mr. Casey, seconded by Mr. Brenner, all voting in the affirmative with the exception of Mr. Mundy who voted "NO" on Item No. 7 only, the foregoing were adopted as amended.*** "

The sources of funds used for the payment of the salary for this position from April 1963, and including the 1970-71 school year, are as follows (Exhibit P-8):

| | |
|---|---|
| April 16 - June 30, 1963 | $4.5 Million Bldg. Program |
| 1963-64 | $4.5 Million Bldg. Program |
| 1964-65 | $4.5 Million Bldg. Program |
| 1965-66 | $3.8 Million Bldg. Program |
| 1966-67 | School Budget |
| 1967-68 | School Budget |
| 1968-69 | School Budget |
| 1969-70 | $3.7 Million Bldg. Program |
| 1970-71 | School Budget |

Testimony presented by the Superintendent of Schools, five members of the Board, the superintendent of buildings and grounds, the assistant superintendent of buildings and grounds and petitioner establishes the fact that the duties of the assistant superintendent of buildings and grounds were primarily to supervise capital construction and also included the supervision of some maintenance projects. The Board employs eleven maintenance personnel, consisting of three carpenters, five painters and three plumbers, and each of these groups has its own foreman. (Tr. II-19; Tr. I-152) It is clear from the testimony of all the witnesses that the duties of the assistant superintendent of buildings and grounds had been substantially reduced because of the completion of capital construction projects. (Tr. I-79, 144, 150-161, 175, 204, 227; Tr. II-7, 34, 38, 54) The testimony of the Superintendent of Schools is most descriptive on this point as follows:

"Q. [The] duties as Construction Supervisor were generally lessening, weren't they?

"A. They were reduced to nothing, except for minor things that might take two per cent of his time.

"Q. So that he had almost all of his time to devote to the work that had been done by the Foreman of Janitors, is that correct?

"A. Almost all of it ***." (Tr. I-155, 156)

The Superintendent further testified that the reduction in the amount of funds for maintenance materials caused a reduction in the amount of maintenance work performed by the Board's maintenance staff, which consequently reduced the amount of supervision necessary by the assistant superintendent of buildings and grounds. (Tr. I-151, 152)

Testimony provided by the assistant superintendent of buildings and grounds discloses that he was assigned the duties of foreman of janitors beginning July 1, 1970, for the 1970-71 school year. The testimony of this witness is clear on this point as follows:

> "Q. I would be correct in saying it [duties of foreman of janitors] takes up the vast bulk of your time?
>
> "A. That is correct." (Tr. II-18)

A member of the Board of Education testified that he voted against the abolition of the position of foreman of janitors because he "*** felt that the job was one that was being abolished in name only; that the functions would essentially continue." (Tr. I-196, 202, 203, 206) This witness also testified that he had proposed at a caucus meeting of the Board during July 1970, that the assistant superintendent of buildings and grounds be offered a vacant position as an industrial arts teacher within the school district, but a majority of the Board members did not support this proposal. (Tr. I-198, 199) This member of the Board also testified that in his judgment there was antagonism toward the foreman of janitors from some members of the Board, and that he considered the withholding of a salary increase for petitioner for 1969-70 to be an example of this antagonism. (Tr. I-197) Two other Board members testified that although they had no personal knowledge of antagonism between Board members and petitioner, they had heard rumors that such antagonism existed. (Tr. I-192, 193, 222)

The superintendent of buildings and grounds testified that he had told the members of the Board on June 24, 1970, that he was opposed to the reduction of his staff. This witness testified regarding the efficiency of his department of buildings and grounds as follows:

> "Q. *** can I assume correctly that the department would be operated more efficiently if you still had Mr. Catano in the position of Foreman of Janitors?***
>
> "A. *** much of our plant and equipment is deteriorating, the amount of data and processing that data for repairs and replacements and maintenance is mounting, we need that service, it is not being done at the present time to the degree that it should be done and the man that I would rely (sic) for assistance in that is now performing the function of head janitor.***" (Tr. II-27, 28)

It is clear from testimony of the Superintendent of Schools and two of the members of the Board of Education that the Board intendended to abolish the position of foreman of janitors, transfer the duties of that position to the assistant superintendent of buildings and grounds, and transfer petitioner to a new position of foreman of central supply. (Tr. I-76, 79, 80, 83, 94, 95, 194.

199) The decision not to create the position of foreman of central supply was made at the June 30, 1970, meeting of the Board, at which time the revised 1970-71 school budget was approved. (Exhibit P-3)

Testimony of the chairman of the Board's committee on personnel indicated that during the past year and a half the school district had been reorganized, and the four positions of assistant superintendent for personnel, school business administrator, purchasing agent, and accountant had been added to the central administrative staff. (Tr. II-58, 59, 60) The only existing positon, other than petitioner's, abolished by the Board for 1970-71 wa that of a secretary in the office of the Superintendent of Schools. The individual who had occupied this position had retired and was not replaced. (Tr. I-106)

* * * *

The Commissioner has reviewed the report of the hearing examiner and the record in the instant matter. This controversy arises under the authority of *N.J.S.A.* 18A:17-3 and 18A:17-4. *N.J.S.A.* 18A:17-3 reads as follows:

> "*Every public school janitor* of a school district *shall*, unless he is appointed for a fixed term, *hold his office, position or employment under tenure during good behavior and efficiency* and shall not be dismissed or suspended or reduced in compensation, *except as the result of the reduction of the number of janitors in the district made in accordance with the provisions of this title* or except for neglect, misbehavior or other offense and only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title." (*Emphasis ours.*)

*N.J.S.A.* 18A:17-4 reads as follows:

> "No board of education shall reduce the number of janitors, janitor engineers, custodians, or janitorial employees in any district by reason of residence, age, sex, race, religion or political affiliation and *when any* janitor, janitor engineer, custodian or *janitorial employee under tenure is dismissed by reason of reduction in the number of such employees, the one having the least number of years to his credit shall be dismissed in preference to any other having a longer term of service* and the person so dismissed shall be and remain upon a preferred eligibility list, in the order of years of service, for reemployment whenever vacancies occur and shall be reemployed by the board in such order and upon reemployment shall be given full recognition for previous years of service in his respective positions and employments." (*Emphasis ours.*)

There is no issue regarding the tenure status of petitioner in the instant matter. The position of foreman of janitors which petitioner held from July 1, 1964, until June 30, 1970, is clearly within the meaning and intent of the tenure provisions for "janitors, janitor engineers, custodians or janitorial employees."

*N.J.S.A.* 18A:17-3, *supra;* Carmine Giannino v. Board of Education of the City of Paterson, Passaic County, *1968 S.L.D.* 160, 163; *Brunner v. Board of Education of Camden,* 1959-60 *S.L.D.* 155, 157. In *Barnes et al. v. Board of Education of Jersey City,* 1961-62 *S.L.D.* 122, reversed in part State Board of Education, 1963 *S.L.D.* 240, affirmed 85 *N.J. Super.* 42 (*App. Div.* 1964), cert. denied 43 *N.J.* 450 (1964), the Superior Court held at p. 45 that:

> "*** [S]ince tenure statutes are intended to secure efficient public service by protecting public employees in their employment, 'the widest range should be given to the applicability of the law.' *Sullivan v. McOsker,* 84 *N.J.L.* 380, 385 (*E.* & *A.* 1913).***"

The Court further stated at p. 46 that:

> " *** Our consideration of the statutes in the light of the principle of liberal construction satisfies us that the Legislature used the terms janitor, custodian, etc., in a generic sense with the intent to include all janitorial and custodial employees.***"

From a review of the record, the Commissioner concludes that the position of foreman of janitors denotes a special assignment within the general classification of janitorial services and, therefore, it comes within the general scope of the tenure statute.

The facts are clear in the instant matter that the Board acted upon the recommendation of the Superintendent of Schools to abolish the position of foreman of janitors and assign those duties to the assistant superintendent of buildings and grounds. The proposed budget for 1970-71 did not include an allocation of funds for the position of foreman of janitors, and the testimony of both parties discloses that the Board intended to transfer petitioner to a new position of foreman of central supply. At the eleventh hour, the Board was faced with complications concerning the availability of a site for a central warehouse facility, and decided, therefore, during June 1970, to refrain from creating both the central warehouse and the new position of foreman of central supply. Immediately thereafter, during July 1970, petitioner was assigned to the position of headjanitor of School No. 3 at the highest current salary figure for his previously-held tenured position of head janitor at School No. 11. This salary is lower than that which petitioner received as foreman of janitors.

The philosophy and purposes of the statutes permitting reductions of staff in public employment have been enunciated in decisions of the courts upon numerous occasions over a long period of years. In *George F. Sutherland v. The Board of Street and Water Commissioners of Jersey City,* 61 *N.J.L.* 436 (1897), the relator requested the New Jersey Supreme Court for *mandamus,* directing the defendant Board to rescind a resolution which abolished his municipal office of assistant assessment clerk and transferred the duties thereof to the assessment clerk. The relator argued that he was an honorably discharged Union soldier, and the act of March 31, 1897, forbade the abolition of an office held by such

person "for the purpose of effecting his dismissal," and entitled him to *mandamus* for righting the wrong. The Supreme Court held at p. 437 that:

> "*** [I]t is settled that statutes of this nature are not designed to prevent the abolition of an office and the transfer of its duties to another official, when such a course is taken *bona fide* for economical reasons or for the promotion of greater efficiency in the public service. *Evans v. Freeholders of Hudson*, 24 *Vroom* 585; *Newark v. Lyon, Id.* 632; *Boylan v. Newark*, 29 *Id.* 133.
>
> "According to its terms the resolution now before us was taken 'for the purpose of economizing,' and the evidence does not lead us to the conclusion that the board was actuated by an ulterior motive such as this statute condemns.***"

The Appellate Division of the New Jersey Superior Court held in *James Chirichello v. Department of Civil Service of the State of New Jersey and City of Hoboken*, 31 *N.J. Super.* 404, 410, (1954) that:

> "*** it has always been the settled rule of law that the governing body of a municipality may, by appropriate action, dispense with and abolish positions of public employment *the need for which no longer exists;* and that the abolishment of *needless positions* and to effect economy is in the public interest. *Hunziker v. Kent*, 111 *N.J.L.* 656 (*Sup. Ct.* 1933), cited in 172 *A.L.R.* 1371; *Kessler v. Civil Service Commission, supra; Sieper v. Department of Civil Service, Passaic*, 21 *N.J. Super.* 583 *(App. Div.* 1952); *Schnipper v. Township of North Bergen, supra* ***" (*Emphasis ours.*)

The record in the instant matter is conclusive that an economy was, in fact, realized as the result of the abolishment of the position of foreman of janitors for 1970-71. The circumstances which caused this economy can be presumed to have resulted by happenstance rather than by a preconceived plan. The record provides a preponderance of evidence that the Board intended to transfer petitioner to a new position of foreman of central supply, but was prevented from creating this new position by a problem of securing a physical facility for a central warehouse. The record bespeaks the Board's clear intention to attempt to secure economy through a system of centralized purchasing and supply, but the record is barren of any intention to eliminate the position of foreman of janitors purely to effectuate the saving of a salary.

In regard to any improved efficiency resulting from this abolishment, the testimony of the superintendent of buildings and grounds is most explicit. This witness stated that there is a great need for the compilation of data concerning the repair and replacement of school plants, and this service is not being done to the necessary degree because the assistant superintendent of buildings and grounds, upon whom he relies for assistance with this function, is presently performing the function of foreman of janitors. (Tr. II-27, 28) This testimony is generally corroborated by that of the Board members.

The next item to be considered is petitioner's assertion that the abolition of the position of foreman of janitors was not *bona fide* because the abolition was done in name only, and the position still exists.

The testimony of every witness *ex utraque parte* corroborates the fact that the duties of the assistant superintendent of buildings and grounds, which were primarily to supervise new construction and secondarily to oversee some building mainteancne, had come to an end as the result of the completion of new construction and the lack of budgetary funds for maintenance. The testimony of the Superintendent of Schools is most explicit on this point when he states that the duties of the assistant superintendent of buildings and grounds " *** were reduced to nothing, except for minor things that might take two per cent of his time." (Tr. I-156) The assistant superintendent of buildings and grounds provided direct testimony that the duties of the foreman of janitors were assigned to him by the Board beginning July 1, 1970, and that these duties consume the "vast bulk" of his time. (Tr. II-18)

The evidence is abundantly clear that the action of the Board did not, in fact, eliminate the position of foreman of janitors, but merely transferred those duties *in toto* to the assistant superintendent of buildings and grounds, whose duties had virtually terminated as has been shown. The Commissioner looks to the substance rather than the form of this matter, and, in substance, the position of foreman of janitors was continued but transferred to the aforementioned title. The fact that the majority of the Board desired to retain the employment of the assistant superintendent of buildings and grounds because of his competencies in the area of school construction has no relevancy or materiality to the issue before the Commissioner.

Respondent Board relies on *Viemeister v. Board of Education of Prospect Park*, 5 *N.J. Super.* 215 (*App. Div.* 1949) to support its action. In the judgment of the Commissioner, the holding of that decision is to the contrary. As the Court stated at p. 218:

> "*** The tenure provisions in our school laws were designed to aid in the establishment of a competent and efficient school system by affording to *** [employees] a measure of security in the ranks they hold after years of service. They represent important expressions of legislative policy which should be given liberal support, consistent, however, with legitimate demands for governmental economy. See *Downs v. Board of Education, Hoboken*, 13 *N.J. Misc.* 853 (*Sup. Ct.* 1935).***"

The acion of the Board in the instant matter does not meet the test set forth by the statutes and the courts of this State. The Board did not abolish a position of public employment "*** the need for which no longer exists ***." *Viemeister, supra* Instead, the Board transferred the essential duties of petitioner to another position, the need for which had virtually expired. It is not the intendment of the tenure provisions of the school laws that the measure of security afforded by those laws should thus be stripped away. The words of the Appellate Division of the Superior Court in *Viemeister, supra*, at p. 219, bear particularly upon this point in the instant matter as follows:

> "*** if the procedure it [the Board] adopted were to be sustained the tenure of *** [employees] generally would rest on frail reeds; nothing would remain as a barrier to the removal of *** [an employee], no matter how long and efficient his service, by the simple expedient of transferring his duties ***."

The applicable rule of law places the burden of proof of dismissal in bad faith upon the petitioner in the instant matter. The Commissioner is constrained to hold that petitioner has more than sustained the heavy weight of proof required of him.

Accordingly, from the uncontradicted evidence adduced, the Commissioner finds and determines that the abolishment of the position of foreman of janitors by the Board was not properly undertaken *ex statuto* and constitutes a violation of petitioner's tenure status.

The Commissioner hereby orders the Board of Education of the School District of the Township of Woodbridge to reinstate petitioner *ex directo* to the position of foreman of janitors at his former salary, and further orders the Board to reimburse petitioner for his pecuniary loss in the amount equivalent to the difference between his former salary and that which he has received since July 1, 1970.

COMMISSIONER OF EDUCATION

September 27, 1971

Pending before the State Board of Education.

**Jan Braverman,**

*Petitioner,*

**v.**

**Board of Eduation of the Township of Franklin,
Somerset County,**

*Respondent.*

## COMMISSIONER OF EDUCATION

### Decision

For the Petitioner, Rosenhouse, Cutler and Zuckerman (Edward K. Zuckerman, Esq. of Counsel)

For the Respondent, Leonard N. Arnold, Esq.

Petitioner, a teacher employed by respondent Franklin Township Board of Education, hereinafter "Board," avers that he had acquired tenure, pursuant to *N.J.S.A.* 18A:28-5 (c), prior to the action of the Board of December 21, 1970, which terminated his employment.

The parties agreed to have the matter decided on Briefs of counsel. The report of the hearing examiner is as follows:

Petitioner was initially employed by the Board as a home and school counselor in January 1968. His contractual employment record is reproduced here as follows:

| | | | |
|---|---|---|---|
| a. | January 22, 1968 | to | June 30, 1968 |
| b. | August 1, 1968 | to | August 31, 1968 |
| c. | September 1, 1968 | to | June 30, 1969 |
| d. | July 1, 1969 | to | August 30, 1969 |
| e. | September 1, 1969 | to | June 30, 1970 |
| f. | August 1, 1970 | to | August 31, 1970 |
| g. | September 1, 1970 | to | June 30, 1971 |

On December 21, 1970, the Board adopted a resolution terminating petitioner's contract, effective December 21, 1970. The resolution further provided for payment of salary to petitioner through February 21, 1971. Petitioner alleges that he fully performed all services required of him under the contracts labeled (a) through (f), *supra*, and further alleges that the termination of his final contract, (g), *supra*, was in violation of rights acquired by him as a tenured teacher and was without legal justification. Petitioner therefore prays for reinstatement, pursuant to the terms of his contract.

The Board admits entering into all of the contractual relationships detailed by petitioner, *supra*. It further admits that petitioner fully performed all services required of him under those contracts, and that it paid petitioner through February 21, 1971 – sixty days subsequent to adoption of the resolution, *supra*, on December 21, 1970.

The Board denies, however, that petitioner has acquired tenure under the provisions of *N.J.S.A.* 18A:28-5 (c), and avers that petitioner's employment was terminated by the Board at a public meeting on December 21, 1970, which was attended by petitioner's representative, who protested the termination of petitioner's employment. Petitioner reported for work for two more days, December 22 and 23 (prior to the beginning of Christmas vacation), and received written notice of the termination of his employment by the Board on December 28, 1970.

The facts in the matter are not in dispute. The only determination to be made is an interpretation of *N.J.S.A.* 18A:28-5 (c), which provides for the accrual of tenure after employment for " *** the equivalent of more than three academic years within a period of any four consecutive academic years ***."

Petitioner purportedly claims acquisition of tenure by adding to the following academic-year contracts:

| | | |
|---|---|---|
| January 22, 1968 | to | June 30, 1968 |
| September 1, 1968 | to | June 30, 1969 |
| September 1, 1969 | to | June 30, 1970 |
| September 1, 1970 | to | June 30, 1971 (Terminated on December 21, 1970) |

the time he served under contracts in the following three summer sessions:

| | | |
|---|---|---|
| August 1, 1968 | to | August 31, 1968 |
| July 1, 1969 | to | August 30, 1969 |
| August 1, 1970 | to | August 31, 1970 |

Petitioner reasons that this total of four months' summer service, added to his academic-years' service of twenty-nine months, ten days, is more than enough to satisfy the tenure requirement of employment for the equivalent of more than three academic years within a period of any four consecutive academic years.

The parties stipulated a letter from the Superintendent of Schools as follows:

> "1. Mr. Braverman was employed during August of 1968, August of 1961, and August of 1970, as a School Social Worker.

"2. It is my considered opinion that the work performed was essentially the same as that done during the regular school year. The differences noted in Mr. Wilson's letter of May 7, 1971, are peripheral in nature. Mr. Braverman performed basically the same functions as during the regular school year. It is obvious that in the absence of school being in session there were minor differences.

"It is my considered opinion after discussing this with staff that his professional responsibilities were those of a School Social Worker and the duties assigned during the summer differed only in degree."

* * * *

The Commissioner has read the report of the hearing examiner and determines that petitioner has not satisfied the statutory requirement for achieving tenure status.

The *minimum* amount of time for acquiring tenure by a teacher has always been interpreted by the Commissioner and by the courts as "*** three consecutive academic years, together with employment at the beginning of the next succeeding academic year ***." *N.J.S.A.* 18A:28-5(b); *Clara E. Ahrensfield v. State Board of Education*, 126 *N.J.L.* 543 (1941); *Elizabeth A. Carroll v. State Board of Education*, 8 *N.J.* 859 (1930); *Gladys M. Canfield v. Board of Education of Borough of Pine Hill*, 51 *N.J.* 400, 241 *A.* 2*d* 233 (1968)

*N.J.S.A.* 18A:101 defines "academic year" as follows:

" 'Academic year' means the period between the time school opens in any school district or under any board of education after the general summer vacation until the next succeeding summer vacation***."

It is not logically possible, therefore, for a person employed on an academic-year basis to serve more than three academic years in a period of time shorter than three calendar years. To hold that petitioner served the equivalent of more than three academic years within a period of thirty-five months would suggest an anomaly. Such is not the legislative intent of the statute. The Commissioner held in *Lawrence M. Davidson v. Newark State College and Eugene C. Wilkens*, 1968 *S.L.D.* 12, that:

"*** A statute will not be construed to reach an absurd or anomalous result. *Robson v. Rodriquez*, 26 *N.J.* 517 (1958); *Slocum v. Krupy*, 11 *N.J. Super.* 81 (*App. Div.* 1951) See also *Schumacher v. Board of Education of Manchester Township, 1961-62 S.L.D.* 175, affirmed as *Board of Education of Manchester Township v. Raubinger*, 78 *N.J. Super*, 90 (*App. Div.* 1963). In the Commissioner's judgment, petitioner's argument enlarges the statute far beyond any intent of the Legislature and would produce untenable and unreasonable results.***" (at p. 16)

The Commissioner and the courts have ruled in prior cases that until a teacher acquires tenure, he may be dismissed pursuant to the discretionary authority of a local board of education. *George A. Ruch v. Board of Education of the Greater Egg Harbor Regional High School District*, 1968 *S.L.D.* 7, dismissed State Board of Education May 1, 1968, affirmed New Jersey Superior Court, Appellate Division, March 24, 1969. In *Ruch* the Commissioner held that:

> "*** 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).***"

In *Zimmerman*, *supra*, at p.70, the Court said that the "historically prevalent view" is expressed by *People ex rel v. Chicago*, 278 *Ill.* 160 *L.A.A.* 1917 *E* 1069 (*Sup. Ct.* 1917) as follows:

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

Absent a finding, therefore, that petitioner has served the equivalent of more than three academic years in any period of four consecutive academic years, according to the requirement of *N.J.S.A.* 18A:28-5 (c), *supra*, the Commissioner determines that the Franklin Township Board of Education acted legally, within the terms of its contract with petitioner, in terminating petitioner's employment.

The Petition is dismissed.

COMMISSIONER OF EDUCATION

October 6, 1971

**Board of Education of the Township of Evesham,**

*Petitioner,*

**v.**

**Township Committee of the Township of Evesham, Burlington County,**

*Respondent.*

## COMMISSIONER OF EDUCATION

### Decision

For the Petitioner, Mathews and Sitzler (John O. Sitzler, Jr., Esq., of Counsel)

For the Respondent, Moss and Powell (William R. Powers, Jr. Esq. of Counsel)

Petitioner, hereinafter "Board," appeals from the action of respondent, hereinafter "Committee," taken pursuant to *N.J.S.A.* 18A:22-37 and certifying to the Burlington County Board of Taxation a lesser amount of appropriations for school purposes for the 1971-72 school year than the amount proposed by the Board in its budget which was rejected by the voters. The facts of the matter were educed at a hearing before a hearing examiner appointed by the Commissioner on September 1, 1971, at the State Department of Education, Trenton. The report of the hearing examiner is as follows:

At the annual school election held on February 9, 1971, the voters rejected the Board's proposal toraise $1,330,874 by local taxes for current expenses and $84,923 for capital expenditures. The budget was then sent to the Committee, pursuant to *N.J.S.A.* 18A:22-37, for its determination of the amount of local tax funds required to maintain a thorough and efficient local school system.

After consultation with the Board and a review of the budget, the Committee made its determination and certified to the Burlington County Board of Taxation an amount which reduced the appropriations for current expenses by $61,975 and for capital outlay by $18,000, for a total reduction of $79,975.

The Committee suggested line items of the budget in which it believed economies could be effected without harm to the educational program. The following table shows the amounts budgeted by the Board for various items, and the proposed economies or reductions determined by the Committee to be appropriate.

**CURRENT EXPENSE**

| Acct. No. | Item | Board's Proposal | Committee's Determination | Amount Reduced |
|---|---|---|---|---|
| J110A | Sal.-Bd. Secy. | $ 2,000 | $ 1,000 | $ 1,000 |
| J110B | Sal.-Clerk | 5,500 | 5,000 | 500 |
| J110F | Sal.-Supt. | 22,000 | 21,000 | 1,000 |
| J110G | Sal.-Supt.'s Secy. | 7,600 | 7,100 | 500 |
| J1101 | Sal.-Admin. Asst. | 12,000 | 11,500 | 500 |
| J130B | Exp.-Bd. Secy-'s Off. | 800 | 500 | 300 |
| J130D | Exp.-Supt.'s Off. | 700 | 500 | 200 |
| J130E | Exp.-Supt. | 800 | 500 | 300 |
| J130F | Exp.-Bd. Secy. | 150 | 75 | 375 |
| J130G | Exp.-Misc. | 500 | 300 | 200 |
| J211B | Sal.-Elem. Prins. | 47,500 | 45,500 | 2,000 |
| J212A | Sal.-Special Serv. | 15,000 | 14,500 | 500 |
| J212B | Sal.-Curr. Coord. | 15,500 | 15,000 | 500 |
| J212C | Sal.-Supervisor | 14,000 | 13,400 | 600 |
| J213 | Sal.-Teachers | 1,153,072 | 1,138,072 | 15,000 |
| J215A | Sal.-Clerical | 23,600 | 20,600 | 3,000 |
| J230C | A.V.A. Supply | 43,952 | 2,952 | 1,000 |
| J240 | Supplies | 43,279 | 38,279 | 5,000 |
| J250 | Exp.-Instr. | 4,797 | 1,797 | 3,000 |
| J410B | Psych. Services | 14,000 | 9,000 | 5,000 |
| J410C | Sal.-Nurses | 27,300 | 26,800 | 500 |
| J730 | Equip.-Replacement | 11,740 | 6,740 | 5,000 |
| J820H | Income Protection | 7,800 | - 0 - | 7,800 |
| J910 | Sal.-Cafet. Supervisor | 8,500 | - 0 - | 8,500 |
| | Sub-Total | $1,442,090 | $1,380,115 | $61,975 |

**CAPITAL OUTLAY**

| | | | | |
|---|---|---|---|---|
| L1220C | Site Improvement | $ 3,000 | $ - 0 - | $ 3,000 |
| L1230 | Building Improvement | 15,000 | - 0 - | 15,000 |
| | Sub-Total | $ 18,000 | $ - 0 - | $18,000 |

Prior to the hearing on September 1, 1971, referred to, *supra*, the Board submitted written testimony to buttress its contention that all of the funds eliminated by the Committee's determination were needed and necessary for the operation of a thorough and efficient school system in Evesham Township in the 1971-72 school year. This testimony of the Board received some further elaboration in oral form at the hearing of September 1.

The Committee, on the other hand, submitted no substantial testimony in written form prior to the hearing and was represented at the hearing by its counsel alone. The Committee's counsel observed that since the time of the Committee's budget determination, which is herein under consideration, the membership of the Committee has been substantially altered, and that it was difficult, at this lae juncture, to substantiate the reasons for the various line-item reductions which were made. However, he did present a one-page document in support of the Committee's judgments in the matter. The sole reasons given in this document by the Committee, in explanation of its reductions, are as outlined below:

"J-130 Boards (sic) Secretary same as Supt. (sic) Secretary (110G)
J-130 Minor expense cuts
J211b Raises too much; cuts leave sufficient increases"

[Reasoning also listed as the same for Accounts J221A, J212B, J212C, J213, J215A, J2430C, J240, J410C, J410B, J720] (Examiner's note.)

"J-820H Not Needed
J-910 Nutritionist not needed
L-1220C $12,100 not necessary
1230 New Building (Office) Fund - no add (sic) this year present quarters satisfactory" (Committee's Written Testimony)

The hearing examiner has examined these reasons together with the testimony of the Board, and reports the following specific observations and recommendations pertinent to certain of the accounts which are herein in controversy.

*J213 - Teachers' Salaries Reduction - $15,000*

It is the Board's testimony that its budget proposal for this account was founded on an anticipated enrollment of 2,628 children, an increase of approximately 150 children over the 1970-71 enrollment. Its proposed expenditures were meant to provide for 4.5 new teachers to handle this increased enrollment, and provide, in addition, for salary increments for other personnel, which were negotiated and approved prior to the February 1971 budget referendum. The Committee's testimony recited, *supra*, is merely that the "raises" are "too much" but that, in any event, the cuts leave sufficient increases.

The hearing examiner has reviewed this account and observes that the Board's provision for only 4.5 teachers for a projected enrollment increase of 150 students would appear to be a minimum but reasonable provision, which will probably result in a small increase in class sizes within the district as a whole, even if the planned expenditure for these teachers is fully funded. However, the hearing examiner has determined that there is a sum of money in excess of $18,000, which has lately appeared as an unanticipated accrual to the Board because of the difference between the salary of new employees and the budgeted salaries of those teachers who have left the district since the budget was formulated in January 1971. The hearing examiner recommends that the Board use $13,000 of this sum to fund the Committee's reduction, while implementing its planned program to the full extent, and that $2,000 of the Committee's reduction be restored to provide a total contingency fund of $5,000 within this large account.

| | | |
|---|---|---|
| Summary | Amount of Reduction | $15,000 |
| | Amount Restored | 2,000 |
| | Amount Not Restored | 13,000 |

*J240 – Teaching Supplies Reduction - $5,000*

The Board budgeted $35,000 in this account for use during the 1970-71 school year, and proposed to increase this to $43,279 during the 1971-72 school year. It is noted here that this proposed amount is almost $12,000 more than the $31,350.14 actually spent in the most recent year of record – that of 1969-70. The Board's testimony is that these increases are justified on the basis of increased enrollment and rising costs in an inflationary economy.

The hearing examiner observes that the total of the Board's budgeted amount for supplies represents an increase in excess of 23% in a one-year period, and it is her belief that an increase of this size cannot be sustained in view of the Committee's determination and the vote of the people. Additionally, the hearing examiner observes that the Committee's reduction will still leave a total sum almost 10% greater than that budgeted for the 1970-71 school year and approxiamtely 21% more than that actually expended in the most recent year of record.

Accordingly, the hearing examiner recommends that the total reduction determined by the Committee herein be allowed to stand.

| | | |
|---|---|---|
| Summary | Amount of Reduction | $5,000 |
| | Amount Restored | - 0 - |
| | Amount Not Restored | 5,000 |

*J820H – Income Protection Reduction - $7,800*

The Committee avers that this amount of money is "not needed." The Board maintains that it is essential and needed to fund an obligation that it incurred, pursuant to the necessity to negotiate the "terms and conditions" of employment, in accordance with the mandate imposed by *Chapter* 303, *Laws* of 1968, since one of the "terms and conditions" proposed herein is a Board agreement to pay 50% of the costs involved in an "income protection plan."

The hearing examiner believes that the full-budgeted amount for this contractual obligation is needed, and he recommends full restoration.

| | | |
|---|---|---|
| Summary | Amount of Reduction | $7,800 |
| | Amount Restored | 7,800 |
| | Amount Not Restored | - 0 - |

*J910 – Supervisor Reduction - $8,500*

While the Committee says that this sum of money is "not needed," the Board avers that it is needed to comply with a strong recommendation contained in a letter from a State Department of Education food service consultant. This letter (P-1) makes it clearly apparent, in the judgment of the hearing examiner, that the expenditure proposed herein for a director of food services is a necessary expenditure to provide a well-managed, properly-directed food services program.

Specifically, in this regard, the recommendation of the State Department consultant is:

> "*** 4. That a director of food services be considered as soon as possible to direct and supervise the present four school program and to assist in the layout and planning of the two proposed schools, to prevent the errors experienced in the two most recent school plants.***"

In addition, the letter details a number of organizational deficiencies in the past organization of the Evesham Township school cafeterias, which must be corrected to comply with State and Federal standards.

Accordingly, the hearing examiner recommends full restoration of the funding proposed by the Board for this account.

| | | |
|---|---|---|
| Summary | Amount of Reduction | $8,500 |
| | Amount Restored | 8,500 |
| | Amount Not Restored | - 0 - |

Finally, the hearing examiner has reviewed each of the other Board accounts for which funding has been altered by Committee action, and he observes that the problem is one of total budget planning to provide for a thorough and efficient school system. Accordingly, he makes the following consolidated recommendations with respect to these remaining current expense and capital outlay accounts.

*J100 – Administration: Salaries and Expense Reduction - $4,575*

The ten sub-accounts contained herein, consolidated for discussion purposes, provide money for salaries and expenses of the Superintendent, the Board Secretary and clerks and secretaries. The Board has documented its need for this money to properly fund its negotiated salary programs and to provide miscellaneous expense money for these positions. The hearing examiner recommends full restoration.

| | | |
|---|---|---|
| Summary | Amount of Reduction | $4,575 |
| | Amount Restored | 4,575 |
| | Amount Not Restored | - 0 - |

*J200 – Instruction: Salaries and Expense Reduction - $10,600*

The seven sub-accounts contained herein provide for negotiated salary increases for the elementary principals, other coordinators and supervisors and clerical employees, and the hearing examiner recommends the full restoration of these sums. The J200 Account also contains an increased appropriation for audiovisual supplies and materials from the budgeted sum of $1,280 in the 1970-71 school year to the sum of $3,952 in the 1971-72 school year. While the Board maintains a "need for more materials," the hearing examiner believes that this need can be more precisely budgeted in a span of years to obviate the large one-year increase which the Board proposed. Therefore, he recommends that the $1,000 reduction made by the Committee in this instance be allowed to stand.

| | | |
|---|---|---|
| Summary | Amount of Reduction | $10,600 |
| | Amount Restored | 9,600 |
| | Amount Not Restored | 1,000 |

*J400 – Health Services Reduction - $5,500*

The money deleted by the Committee's action herein would prevent the Board from employing a social worker on a full-time, rather than a half-time, basis. Since the district has experienced rather rapid growth, it would appear that the Board's proposal in this regard does not represent an expansion of program, but simply an attempt to maintain the effectiveness of its psychological services team. The hearing examiner recommends full restoration of this amount of money.

| | | |
|---|---|---|
| Summary | Amount of Reduction | $5,500 |
| | Amount Restored | 5,500 |
| | Amount Not Restored | - 0 - |

*L1200 – Capital Outlay Reduction $18,000*

It is the Board's testimony that it has been attempting to establish a fund to be used at some future time for a building to house school administration offices. Specifically, the Board set aside $15,000 for its proposal this year. In addition, the Board increased its proposed budget for site work and blacktopping at other present school locations. The total proposed capital outlay expenditure was set by the Board at $94,923 – an increase of more than $23,000 from the $71,000 amount approved for expenditure in 1970-71.

The hearing examiner believes that the reductions of the Committee in the capital outlay account are reasonable in the circumstances of a referendum defeat and that they should be sustained. He so recommends.

| | | |
|---|---|---|
| Summary | Amount of Reduction | $18,000 |
| | Amount Restored | - 0 - |
| | Amount Not Restored | 18,000 |

In summation, for the reasons stated, the hearing examiner finds that the amounts proposed by the Board in the following accounts are necessary in whole or in part for the maintenance of a thorough and efficient school system in Evesham, and he recommends restoration of part or all of the Committee's reductions, as shown in the following table:

**CURRENT EXPENSE**

| Acct. No. | Item | Amount of Reduction | Amount Restored | Amount Not Restored |
|---|---|---|---|---|
| J110A | Sal.-Bd. Secy. | $ 1,000 | $ 1,000 | $ - 0 - |
| J110B | Sal.-Clerk | 500 | 500 | - 0 - |
| J110F | Sal.-Supt. | 1,000 | 1,000 | - 0 - |
| J110G | Sal.-Supt.'s Secy. | 500 | 500 | - 0 - |
| J110I | Sal.-Admin. Asst. | 500 | 500 | - 0 - |
| J130B | Exp.-Bd.Secy.'s Off. | 300 | 300 | - 0 - |
| J130D | Exp.-Supt.'s Off. | 200 | 200 | - 0 - |
| J130E | Exp.-Supt. | 300 | 300 | - 0 - |
| J130F | Exp.-Bd. Secy. | 75 | 75 | - 0 - |
| J130G | Exp.-Misc. | 200 | 200 | - 0 - |
| J211B | Sal.-Elem. Princs. | 2,000 | 2,000 | - 0 - |
| J212A | Sal.-Special Servs. | 500 | 500 | - 0 - |
| J212B | Sal.-Curr. Coord. | 500 | 500 | - 0 - |
| J212C | Sal.-Supervisor | 600 | 600 | - 0 - |
| J213 | Sal.-Teachers | 15,000 | 2,000 | 13,000 |
| J215A | Sal.-Clerical | 3,000 | 3,000 | - 0 - |
| J230C | A.V.A. Supply | 1,000 | - 0 - | 1,000 |
| J240 | Supplies | 5,000 | - 0 - | 5,000 |
| J250 | Exp.-Instr. | 3,000 | 3,000 | - 0 - |
| J410B | Psych. Services | 5,000 | 5,000 | - 0 - |
| J440C | Sal.-Nurses | 500 | 500 | - 0 - |
| J730 | Equip.-Replacement | 5,000 | - 0 - | 5,000 |
| J820H | Income Protection | 7,800 | 7,800 | - 0 - |
| J910 | Sal.-Cafet.-Supervisor | 8,500 | 8,500 | - 0 - |
| | Sub-Total | $61,975 | $37,975 | $24,000 |

**CAPITAL OUTLAY**

| | | | | |
|---|---|---|---|---|
| L1220C | Site Improvement | $ 3,000 | $ - 0 - | $ 3,000 |
| L1230 | Building Improvement | 15,000 | - 0 - | 15,000 |
| | Sub-Total | $18,000 | $ - 0 - | $18,000 |
| | Grand Total | $79,975 | $37,975 | $42,000 |

* * * *

The Commissioner has reviewed the findings and recommendations of the hearing examiner as set forth above and concurs therein. He therefore directs the Evesham Township Committee to certify an additional sum of $37,975 to the Burlington County Board of Taxation for current expenses of the Evesham School District for the school year 1971-72, so that the new total of these current expense appropriations for school purposes during the year shall be $1,306,874.

COMMISSIONER OF EDUCATION

October 14, 1971

**Board of Education of the City of Wildwood,**

*Petitioner,*

**v.**

**Board of Commissioners of the City of Wildwood, Cape May County,**

*Respondent.*

## COMMISSIONER OF EDUCATION

### Decision

For the Petitioner, Charles Henry James, Esq.

For the Respondent, Edwin W. Bradway, Esq.

Petitioner, hereinafter "Board," appeals from an action of the Mayor and Commissioners of the City of Wildwood, hereinafter "COmmissioners," certifying to the Cape May County Board of Taxation a lesser amount of appropriations for the current expense and capital outlay purposes of the school district for the 1971-72 school year than proposed by the Board in its budget.

The facts underlying the controversy, in the form of testimony and documentary evidence, were presented at a hearing conducted by a hearing examiner appointed by the Commissioner at the State Department of Education, Trenton, on July 14, 1971. Briefs and supplementary material were filed by both parties subsequent to the hearing, and case submission was completed by August 11, 1971. The report of the hearing examiner is as follows:

On February 11, 1971, the Board conducted a public hearing on its budget proposals and subsequently submitted these proposals totaling $1,193,448 to the Board of School Estimate of the City of Wildwood. The Board of School Estimate thereafter approved a reduced budget allocation for school purposes in the aggregate sum of $1,052,306 and certified to the Commissioners the amounts to be raised from local taxation – $532,655 for current expenses and $19,694 for capital outlay expenditures. The Board's proposals and the Commissioners' ultimate certification to the County Tax Board may be shown as follows:

*Amounts to be Raised – Local Taxation*

| | | |
|---|---|---|
| Current Expenses – | Board's Proposals | $660,197 |
| | Commissioners' Determination | 532,655 |
| | Reduction | 127,542 |
| Capital Outlay – | Board's Proposals | 33,294 |
| | Commissioners' Determination | 19,694 |
| | Reduction | 13,600 |

Total Reduction $141,142

The Commissioners subsequently detailed the reductions determined by them to be appropriate. These specific itemized reductions are listed as follows:

**CURRENT EXPENSES**

| Acct. No. | Item | Budgeted by Board | Suggested by Commissioners | Amount of Reduction |
|---|---|---|---|---|
| J110F | Sal.-Supt.'s Off. | $ 30,000 | $ 28,000 | $ 2,000 |
| J130M | Printing | 500 | - 0 - | 500 |
| J213.1 | Sal-Teachers | 610,300 | 555,050 | 55,250 |
| J214A | Sal.-Librarian | 16,332 | 13,000 | 3,332 |
| J215 | Sal.-Secretaries | 29,800 | 25,000 | 4,800 |
| J216 | Sal.-Tchrs. Aides | 5,000 | 2,000 | 3,000 |
| J220 | Textbooks | 13,780 | 10,000 | 3,780 |
| J230A | Library Books | 6,390 | 4,000 | 2,390 |
| J230C | Audiovisual Materials | 2,200 | 1,500 | 700 |
| J230E | Library Supplies | 450 | 300 | 150 |
| J240 | Teachg. Supplies | 24,490 | 18,000 | 6,490 |
| J250A | Misc. Supplies-Instr. | 6,000 | 2,400 | 3,600 |
| J250B | Travel Exp.-Instr. | 1,900 | 800 | 1,100 |
| J250C | Misc. Exp.-Instr. | 11,400 | 5,000 | 6,400 |
| J520A | Pupil Transportation | 12,000 | 10,000 | 2,000 |
| J610A | Sal.-Custodial | 53,800 | 48,000 | 5,800 |
| J650B | Supplies-Vehicle | 250 | - 0 - | 250 |
| J720A | Upkeep of Grounds | 2,850 | 50 | 2,800 |
| J720B | Repair of Buildings | 11,000 | 8,000 | 3,000 |
| J720C | Repair of Equipment | 5,000 | 4,000 | 1,000 |
| J730A | Replace. of Equip. | 12,000 | 6,000 | 6,000 |
| J740B | Repair of Buildings | 1,000 | 600 | 400 |
| J740C | Repair & Replace of Equipment | 250 | 150 | 100 |
| J830A | Rental of Buildings | 7,500 | - 0 - | 7,500 |
| J870 | Tuition | 12,000 | 6,800 | 5,200 |
| | Sub-Total Current Expenses | $876,192 | $748,650 | $127,542 |

**CAPITAL OUTLAY**

| | | | | |
|---|---|---|---|---|
| L1230C | Remodeling | $ 12,000 | $ 7,000 | $ 5,000 |
| L1240B | Equip.-Admin. | 600 | - 0 - | 600 |
| L1240C | Equip.-Instruction | 15,000 | 7,000 | 8,000 |
| | Sub-Total Capital Outlay | $ 27,600 | $ 14,000 | $ 13,600 |
| | GRAND TOTAL | $903,792 | $762,650 | $141,142 |

Each of the reductions itemized, *ante*, is the subject herein of an individua appeal by the Board, and the Board's supporting reasons given in explanation of each of its proposals, together with the supporting explanations of the Commissioners, comprise extensive written testimony and argument. The hearing examiner finds no need to discuss each of the smaller accounts in detail, but does propose to review the claims and counter claims made with respect to eleven of the specific accounts and to recommend a disposition of the remainder in chart form. However, some discussion of the Wildwood School System and its general problems is necessary as a prelimary to provide a proper perspective and to establish specific account discussions in a pertinent context.

One preimary fact of importance to this budget consideration is that the school population of the Wildwood School District has been growing – from 890 pupils in 1969-70 to 1,023 in 1970-71, and to a projected total of 1,124 in 1971-72. Thus, the total projected increase over a period comprising three school years is estimated in excess of 230 students – a percentage growth rate of more than 25%. While the district growth rate has been large, the greatest part of the increase has been at the high school level. Part of this high school increase, according to testimony, is due to new admission of some 9th graders to Wildwood Schools, who would formerly have been retained and educated by a sending district, and part of it is attributable to admission of students to Wildwood Schools, who were formerly in attendance in parochial schools. Nevertheless, the students have been enrolled, and their needs for an education must be met.

In this regard, it is interesting to note that in the three-year period under consideration, the Board has added a total of only five teachers to instruct these 230 new students. The ratio of one teacher to forty-five new students is certainly a conservative, not profligate, provision. If anything it would seem to indicate that the Wildwood School District has been falling behind in maintaining a staffing position commensurate with its new, increased responsibilities. The four new positions requested by the Board herein would help to remedy this situation.

It is also worthy of note that these many new students of high school age must be housed in a building more than fifty years old, which, despite recent renovations and noteworthy attempts at improvement, continues to need repairs of varying kinds and to demand constant attention. Some of the students of elementary age in Wildwood will be provided for in the 1971-72 school year, as planned for the first time, in rented facilities outside the confines of the regular school buidlings. The enrollment figures pertinent to these proposed relocations, together with the need to establish another special class facility, provide justification, in the hearing examiner's opinion, which is sufficient to mandate approval of the proposals.

With respect to some other items, however, the hearing examiner believes that the Board may have proceeded too quickly to remedy shortages and obvious deficiencies of the past. He believes that the efforts are commendable, but that the implementation of these Board requests must be tempered by the determinations of the Commissioners and adjudged on a more strict criterion of necessity. Specifically, the hearing examiner notes the Board's greatly-increased budgeted allocations for the following accounts:

| | *1970-71 Budget* | *1971-72 Budget* |
|---|---|---|
| Textbooks | $ 7,338 | $13,780 |
| Libraries & Audiovisual | 2,550 | 10,100 |
| Teaching Supplies | 12,787 | 24,490 |
| Replacement of Equip. | 11,500 | 20,900 |
| Capital Outlay Equip. | 1,000 | 21,294 |
| TOTALS | $35,175 | $90,564 |

While it is true that the Board has logically defended the extent of these increases, the hearing examiner believes that in some instances a more conservative budgetary control must be exercised to provide for increased expenditures in many instances, but in a programmed way and over a period of years, rather than in a one-year period.

The hearing examiner will now proceed to a discussion of the eleven accounts where reductions are of major importance to this adjudication, or where a direct dichotomy of opinion exists.

*J110F Salaries-Superintendent's Office Reduction - $2,000*

The Board recently employed a secretary to assist in this office and determined that it should credit her for years of prior service. This secretary is now placed on Step 8 of the secretarial salary guide. The Commissioners maintain that she can and should be placed on Step 2 of the guide at this juncture.

The hearing examiner believes that *N.J.S.A.* 18A:16-1 makes it clear that absent proof that the staff position discussed herein is not needed and necessary, it is the Board, and the Board alone, which may make a judgment on the proper compensatory provision for this employment. This statute provides in pertinent part:

> "Each *board of education* *** may employ and dismiss *** such principals, teachers, janitors and other officers and *employees*, as it shall determine, and *fix and alter their compensation* and the length of their terms of employment." (*Emphasis supplied.*)

Accordingly, the hearing examiner believes that the full funding of the Board's determination in this regard is proper and necessary.

There are two other funding proposals within this account; namely, the proposed salary of the Superintendent of Schools ($23,150) and the sum of $850 for extra secretarial assistance during peak-load periods.

The hearing examiner recommends that this latter sum be deleted in the absence of conclusive proof of need, but that the balance of the reduction be restored.

| | | |
|---|---|---|
| Summary | Amount of Reduction | $2,000 |
| | Amount Restored | 1,150 |
| | Amount Not Restored | 850 |

*J215 Salaries-Teachers Reduction - $55,250*

Counsel have submitted Briefs pertinent to the sum in contention herein. On the one hand, the Commissioners argue that their determination of the amount of money needed for teachers' salaries in the 1971-72 school year in

Wildwood must be regarded as determinative in the light of the decision rendered by the Supreme Court of New Jersey in the case of *Newark Teachers Association v. The Board of Education of Newark*, 57 *N.J.* 100 (1970), since the Board has not finally approved a binding salary schedule for the 1971-72 school year prior to the Board of School Estimate's decision or the certification of the Commissioners to the County Tax Board. On the other hand, the Board argues that the circumstances herein are different from those that prevailed in the *Newark* case since, in *Newark*, the Board, after negotiation and entry into a formal agreement, adopted the attitude that the new salary scale set up under the contract was a prospective one, to become effective one year after its ratification. In the instant matter, the Board maintains, both parties to the contract contemplated that upon completion of negotiation, the new salary scale would apply for the *ensuing* year.

In any event, the Board avers, the appropriation *sub judice* was not a "supplemental" appropriation, but a part of its original budget proposal to fund what it regarded as its prospective salary obligation.

The hearing examiner finds that the pertinent facts of this controverted budget account are as follows:

1. The Board originally proposed, in its budget for the 1971-72 school year, to expend $610,300 for teachers' salaries.

2. At the time of the Board's budget submission to the Board of School Estimate, its salary negotiations were not completed. The total request was therefore, an estimate of need.

3. The Board of School Estimate, on February 11, 1971, determined that $555,250 was an adequate and sufficient funding of the Board's commitments at that juncture, and subsequently, the Board of School Estimate certified this incorporated sum with the whole budget to the Commissioners. The Commissioners complied with this certification by their own certification to the County Tax Board.

4. In the weeks subsequent to February 11, 1971, the Board continued negotiations with its teaching and other staff personnel.

5. On April 16, 1971, the Board formally approved the terms of the teachers' contract for the school year 1971-72. The salary scale provides starting salaries of $7,500 and $8,100 for holders of Bachelor and Master Degrees. Top steps are listed respectively as $11,725 and $12,750. The Board maintains that its budget correctly programmed the funds it would need for proposed new increases and that its judgment was borne out by the final agreement.

At the hearing of July 1971, the hearing examiner was cognizant of the probability that staff resignations and salary costs for new employees might considerably alter the need for funds that the Board thought it necessary to

program five months previously in February 1971. Accordingly, the hearing examiner requested and has received an up-dated estimate that the sum of $577,150 now comprises the most precise estimate of need to fund the salary commitments, which were formally made by the Board on April 16, 1971, for the salaries of fifty-eight teaching staff employees – including that of one new teacher of a special class.

Absent any proof that the Board's proposals with regard to teacher need are superfluous, and because of the reasons outlined by the hearing examiner, *ante*, that indicate that staffing growth has not been commensurate with the increase of students, particularly at the high school level, the hearing examiner recommends that the sum of $577,150 for the salaries of teachers presently employed, plus a sum of $16,000 for the employment of two new teachers at the high school level, be provided to the Board, if the Commissioner of Education determines that the total sum in contention herein is not a "supplemental" appropriation of the type that the Court said could not be immediately funded. *Newark Teachers Association v. the Board of Education of Newark, supra* (1970).

| | | |
|---|---|---|
| Summary | Amount of Reduction | $55,250 |
| | Amount Restored (Recommended Conditionally) | 38,125 |
| | Amount Not Restored (Conditionally) | 17,125 |

*J215 Salaries-Secretaries Reduction - $4,800*

The Commissioners maintain that the present secretarial staff is completely adequate, and they therefore reduced this allocation providing for an additional clerk. The Board offers no testimony either in written or oral form to counter the claim of the Commissioners.

Accordingly, the hearing examiner recommends that the judgment of the Commissioners be sustained.

| | | |
|---|---|---|
| Summary | Amount of Reduction | $4,800 |
| | Amount Restored | - 0 - |
| | Amount Not Restored | 4,800 |

*J240 Teaching Supplies Reduction - $6,490*

The Board maintains that this money must be restored to provide an allocation of $22.00 per pupil and to enable the Board to replenish seriously-depleted stocks. The Commissioners aver that the figure of $22.00 cannot be supported as reasonable, and that even with the reduction imposed herein, the supply allocation is greater by 50%, than that provided in the 1970-71 school year.

The record for supply expenditures in prior years shows that $6,791.84 was actually spent in the school year 1969-70, that $12,787 was budgeted for the school year 1970-71 and that the Board proposed to spend $24,490 in 1971-72. Under the circumstances and for reasons outlined by the hearing examiner prior to specific item discussions, the hearing examiner recommends that the Commissioner's determination be allowed to stand.

| | | |
|---|---|---|
| Summary | Amount of Reduction | $6,490 |
| | Amount Restored | - 0 - |
| | Amount Not Restored | 6,490 |

*J250C Instruction-Miscellaneous Expense Reduction - $6,400*

The Board has estimated expenditures of $3 per pupil for field trips ($3,000), $1,000 for graduation expense, $1,500 for assembly programs, $3,000 for data processing, $1,500 for the student yearbook, paper and handbook, and $1,300 for consultant services. The Commissioners term this request as one for luxury items, but characterize their own allotment as liberal in any event since in one year's time, the allocation herein provided has risen from $3,000 to $5,000.

A review of the advertised budget shows that the expenditures for miscellaneous instructional expenses totaled $7,176 in the most recent year of record – 1969-70, and decreased to a budgeted figure of $5,992 in the 1970-71 school year. The Board's proposal to expend $19,300 in 1971-72 would have more than tripled the larger account of which J250C is a part.

The hearing examiner believes that the determination of the Commissioners must be allowed to stand since it provides in one segment of the J250 account almost as much money as was provided in the whole account in the 1970-71 school year, and since most of the Board's planned expenditure can be classed as desirable but not as an absolute necessity to insure a thorough and efficient school system.

| | | |
|---|---|---|
| Summary | Amount of Reduction | $6,400 |
| | Amount Restored | - 0 - |
| | Amount Not Restored | 6,400 |

*J610A Salaries - Custodial Reduction - $5,800*

The Board states that negotiated salaries for its custodial staff exceed the allocation of the Commissioners by $700, but that $5,000 of miscellaneous expense for emergency maintenance, weekend checks, after-school building use, etc. has not been funded and is necessary. The Commissioners maintain that their appropriation represents a budgeted increase of 7% and is reasonable.

A review of past expenditures from this account shows that $34,901.51 was actually spent in 1969-70 and that the budgeted amount for 1970-71 increased by almost $10,000, or approximately 30% to $44,700. In 1971-72, the Board proposed to expend an additional $9,000 for a total of $53,800.

The hearing examiner opines that the proofs evidenced herein favor the Board. Its negotiated salary figure for nine custodians is reasonable, and the $5,000 for expenses that cannot be precisely budgeted also appears to be moderate. Therefore, the hearing examiner recommends full restoration of this sum except for $100, which, by the Board's own approximation, is not deemed necessary.

| | | |
|---|---|---|
| Summary | Amount of Reduction | $5,800 |
| | Amount Restored | 5,700 |
| | Amount Not Restored | 100 |

*J730A Replacement of Equipment Reduction - $6,000*

The Board has supplied a list of equipment it proposed to purchase from this account at a total cost of $12,000. The Commissioners maintain that their determination will provide 20% more than the $5,000 budgeted and expended in the school year 1970-71 and is sufficient.

The hearing examiner has reviewed the Board's proposals, but finds little testimony to establish the need for such a large increase in appropriation for a one-year period. Nevertheless, he opines that many of the Board's proposals herein simply represent an effort to compensate for obsolescence in an orderly way. (i.e. typewriter, furniture for classrooms, A.V.A. equipment, etc.) and to provide for remedy of deficiencies in this regard inherited from former budgets. Therefore, the hearing examiner recommends that funds for the following items be deleted, but that the balance of the reduction suggested by the Commissioner be restored:

| | | |
|---|---|---|
| | Copier – | $ 945 |
| | Tympani – | 450 |
| | 1 Set Net Standards – | 201 |
| | Total Deletions | $1,596 |

| | | |
|---|---|---|
| Summary | Amount of Reduction | $6,000 |
| | Amount Restored | 4,404 |
| | Amount Not Restored | 1,596 |

*J830A Rental of Buildings Reduction - $7,500*

A review of the Board's testimony herein indicates that while the increase in student population at the elementary school level in Wildwood has been moderate, it has been sufficient to mandate that additional school-room facilities be established in each of the two elementary buildings. In the Glenwood School, this space has been obtained through conversion of an all purpose room, which limits the physical education program and precludes use of the room for lunch. In Elementary School No. 1, there has been a need to establish a special education facility, but there are already eleven classes assigned to the building with only ten standard classrooms available. The Board's solution to these problems at the present juncture is to rent space. The Commissioners maintain that space is available in public buildings free of charge.

The hearing examiner believes that the present crowded conditions in the Wildwood Schools must be alleviated and that additional suitable facilities must be provided. He further opines that if an expenditure of $7,500 can provide this relief and insure satisfactory physical placement of three classrooms of children, all of the hudreds of other elementary children will also benefit.

Therefore, the hearing examiner recommends restoration of this reduction to be used at the Board's discretion if, in its judgment, such facilities as may be available in existing public buildings are not suitable and rental facilities should be used instead.

| | | |
|---|---|---|
| Summary | Amount of Reduction | $7,500 |
| | Amount Restored | 7,500 |
| | Amount Not Restored | - 0 - |

*J870 Tuition Reduction - $5,200*

The Board's estimate of cost herein is for tuition for ten children, who are or may be in need of special education not available within the district. The Board avers that it actually spent more than $9,000 from this account in 1970-71 and had budgeted $13,200 for 1971-72. Thus, the Commissioners' determination would provide less money for such tuition in 1971-72 than was actually expended in the year immediately preceding it.

The hearing examiner recommends that the Board's best estimate be accepted and that this reduction be restored in full.

| | | |
|---|---|---|
| Summary | Amount of Reduction | $5,200 |
| | Amount Restored | 5,200 |
| | Amount Not Restored | - 0 - |

*L1230 Remodeling Reduction - $5,000*

Some of the work proposed to be accomplished with funds from this account is made necessary by the fact of student and staff growth (i.e. use of elementary storage rooms for staff and office purposes), but also by other proposals which would modernize and up-date existing facilities. There were no expenditures for this purpose in 1970-71, and the budgt of $12,000 proposed by the Board for 1971-72 is, in the opinion of the Commissioners, too great a budget increase within the budget year.

The hearing examiner believes that the Commissioners' view must be sustained and that the Board, following expenditure of the $7,000 allowed by the Commissioners herein, can budget such regular amounts in future years so as to insure a more uniform expenditure, while at the same time insuring that all necessary work is accomplished in an orderly fashion.

| | | |
|---|---|---|
| Summary | Amount of Reduction | $5,000 |
| | Amount Restored | - 0 - |
| | Amount Not Restored | 5,000 |

*L1240C Equipment - Instruction Reduction - $8,000*

The hearing examiner notes that $5,000 of the Board's proposed $15,000 expenditure for educational equipment was for a video tape recorder and that a sum of more than $7,500 was proposed for expenditure for other audiovisual aid materials. Thus, a sum greater than $12,000 was proposed for these auxiliary aids to education. The Commissioners aver that their determination that $7,000 is adequate will still provide a 600% increase over the budgeted amount provided in 1970-71 which was $1,000.

The hearing examiner, for reasons stated with regard to many other accounts, *ante*, must again agree with the Commissioners and again recommend a more systematic and even appropriation to erase past deficits in supplies and equipment.

| | | |
|---|---|---|
| Summary | Amount of Reduction | $8,000 |
| | Amount Restored | - 0 - |
| | Amount Not Restored | 8,000 |

The total recommendation with respect to the eleven specific line items is summarized as follows:

**CURRENT EXPENSES**

| Acct. No. | Item | Amount of Reduction | Amount Restored | Amount Not Restored |
|---|---|---|---|---|
| J110F | Sals.-Supt.'s Off. | $ 2,000 | $ 1,150 | $ 850 |
| J215 | Sals.-Tchrs.* | 55,250 | 38,125 | 17,125 |
| J215 | Sals.-Secretaries | 4,800 | - 0 - | 4,800 |
| J240 | Teaching Supplies | 6,490 | - 0 - | 6,490 |
| J250C | Misc. Exp.-Instr. | 6,400 | - 0 - | 6,400 |
| J610A | Sals.-Custodial | 5,800 | 5,700 | 100 |
| J730A | Replace of Equipment | 6,000 | 4,404 | 1,596 |
| J830A | Rental of Bldgs. | 7,500 | 7,500 | - 0 - |
| J870 | Tuition | 5,200 | 5,200 | - 0 - |
| | Sub-Total Current Expenses | $99,440 | $62,079 | $37,361 |

**CAPITAL OUTLAY**

| | | | | |
|---|---|---|---|---|
| L1230 | Remodeling | $ 5,000 | $ - 0 - | $ 5,000 |
| L1240C | Equip.-Instruction | 8,000 | - 0 - | 8,000 |
| | Sub-Total Capital Outlay | $13,000 | $ - 0 - | $13,000 |
| | Totals | $112,440 | $62,079 | $50,361 |

**Conditional*

In addition to the eleven specific recommendations, *supra*, the hearing examiner also recommends the following disposition of other smaller controverted accounts:

**CURRENT EXPENSES**

| Acct. No. | Item | Amount of Reduction | Amount Restored | Amount Not Restored |
|---|---|---|---|---|
| J130M | Printing | $ 500 | $ 400 | $ 100 |
| J214A | Sal.-Librarian | 3,332 | 3,332 | - 0 - |
| J216 | Sal.-Tchrs.Aides | 3,000 | 2,500 | 500 |
| J220 | Textbooks* | 3,780 | - 0 - | 3,780 |
| J230A | Library Books* | 2,390 | - 0 - | 2,390 |
| J230C | A.V. Materials* | 700 | - 0 - | 700 |
| J230E | Library Supplies* | 150 | - 0 - | 150 |
| J250A | Misc.-Supp.-Instr.* | 3,600 | 2,600 | 1,000 |
| J250B | Travel Expense** | 1,100 | 400 | 700 |
| J520A | Pupil Transportation | 2,000 | 2,000 | - 0 - |
| J650B | Supplies - Vehicle | 250 | 250 | - 0 - |
| J720A | Upkeep of Grounds*** | 2,800 | - 0 - | 2,800 |
| J720B | Repair of Buildings | 3,000 | 3,000 | - 0 - |
| J720C | Repair of Equipment | 1,000 | 1,000 | - 0 - |
| J740B | Repair of Buildings | 400 | 200 | 200 |
| J740C | Rep. & Repl. of Equip. | 100 | 100 | - 0 - |
| | Sub-Total Current Expenses | $28,102 | $15,782 | $12,320 |
| **CAPITAL OUTLAY** | | | | |
| L1240B | Equip.-Admin. | $ 600 | $ 600 | $ - 0 - |
| | Totals | $28,702 | $16,382 | $12,320 |

* Money available in these accounts will still provide for significant new purchases over and above the budgeted expenditures for the school year 1970-71.

** The Board's testimony lists this reduction as $800. The examiner believes the correct reduction is the $1,100 noted here.

*** The Board proposed to spend this money to upgrade field facilities it does not own. The Commissioners maintain such an expenditure is illegal, and the examiner must agree although the need for such upgrading is not in doubt.

The grand totals of the recommendations, *ante*, are listed as follows:

| | Amount of Reduction | Amount Restored | Amount Not Restored |
|---|---|---|---|
| Current Expenses | $ 99,440 (Item List) | $62,079 | $37,361 |
| | 28,102 (Chart) | 15,782 | 12,320 |
| Sub-Total | $127,542 | $77,861 | $49,681 |
| Capital Outlay | $ 13,000 (Item List) | $ - 0 - | $13,000 |
| | 600 (Chart) | 600 | - 0 - |
| Sub-Total | $ 13,600 | $ 600 | $13,000 |
| Grand Total | $141,142 | $78,461 | $62,681 |

Accordingly, the hearing examiner recommends that:

(a) $77,861 be restored for current expenses fo the Wildwood School District for use in the 1971-72 school year, and that

(b) $600 be restored for capital outlay expenditures.

* * * *

The Commissioner of Education has carefully reviewed the report of the hearing examiner and considered the matter of jurisdiction over that phase of this budget dispute which is particularly concerned with compensation for the teaching staff of the Wildwood Schools. In this regard the Commissioner of Education notes that the allocation for teachers' salaries, which is herein in dispute, is not a supplementary allocation proposed by the Board, but is one it submitted to the Board of School Estimate in February 1971. At the time of this submission, there had been no salary-scale adoption, so that there can be no binding commitment to implement the scale to which the Board later agreed. Such a binding obligation is only assumed when all conditions of the statute's provisions have been met. The applicable statute, *N.J.S.A.* 18A:29-4.1, provides:

> "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 policy 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.*" (*Emphasis supplied.*)

Since, in the instant matter, a "salary policy" or "salary schedules" had not been adopted at the time of the Board's budget adoption, there can be no "binding" commitment to "fully implement such policy and schedules for that budget year," (In this case, the budget year of 1971-72). Therefore, the Commissioners were free, in this instance, to make an independent determination.

Nevertheless, while the Commissioner of Education holds that the Board's salary-scale adoption of April 1971 is not "binding," he also holds that, the Board's original budgetary provision for teachers' salaries in the 1971-72 school year is a proper matter to consider in this adjudication, since this provision was a part of the Board's February certification. It was not an appropriation such as that in the case of *Newark Teachers' Association v. Newark Board of Education*, 57 *N.J.* 100 (1970), which appropriation for teachers' salary increases would have necessitated funding in *excess of* that proposed by the Board in its February certification.

In a later case than *Newark, supra*, that of the *Board of Education of the City of Newark v. City Council and the Board of School Estimate of the City of Newark, Essex County*, decided by the Commissioner July 16, 1970, the Commissioner of Education dealt again with regularly certified appropriations and supplementary proposals made thereafter. Again the Commissioner of Education stated that "supplemental appropriations" are "beyond the scope of

his determination." However, he also reiterated the view that all regularly-certified budget allocations could be considered by him. Specifically, he said:

> "***In the instant matter petitioner prepared and submitted its estimate of funds needed for the 1970-71 school year in the form of its annual budget. That budget was reduced by the Board of School Estimate and Municipal Governing Body by an amount of $16,909,038 and *such reduction is a proper subject for the appeal herein.****" *(Emphasis supplied.)*

It is noted here that the most significant of all restorations as a result of this record of the *Newark* decisions was that made for teachers' salaries.

Similarly, in the instant matter, the regularly-certified allocation for teachers' salaries must also be adjudged by the Commissioner of Education in terms of the necessity to insure the operation of a "thorough and efficient" school system in Wildwood in 1971-72, and in accordance with the principles and limitations by which the Commissioner of Education is to be guided in the application of his expertise in such matters. *East Brunswick Board of Education v. East Brunswick Township Committee*, 48 *N.J.* 94 (1966) The Commissioner of Education has made this judgment and determines that he is in full concurrence with the report of the hearing examiner with specific respect to his recommendations for the restoration of funds to account J213 and to the other budgeted accounts which are controverted herein.

Accordingly, the Commissioner of Education directs the Wildwood City Board of Commissioners to certify to the Cape May County Tax Board the additional sums of $77,861 for current expenses, and $600 for capital expenditures, of the Wildwood School District for the 1971-72 school year so that the total of such certification shall be $610,516 for current expenses and $20,294 for capital outlay.

COMMISSIONER OF EDUCATION

October 21, 1971

**Charles Lewis,**

*Petitioner,*

**v.**

**Board of Education of**
**The Borough of Wanaque,**
**Passaic County,**

*Respondent.*

## COMMISSIONER OF EDUCATION

### Decision

For the Petitioner, Saul R. Alexander, Esq.

For the Respondent, Grabow, Verp & Rosenfelt (Martin Verp. Esq., of Counsel)

Petitioner, a tenure teacher in the School District of Wanque, avers that he was improperly denied a salary increment during the 1971-72 school year and demands judgment at this juncture that he is entitled to receive it by the stated terms of a negotiated salary agreement. Respondent, the Board of Education of the Borough of Wanaque, hereinafter "Board," maintains that the salary increment *sub judice* could be, and was, properly withyeld in this instance and that its salary schedule is a guide only and not a mandatory contract.

An oral argument on the Motion for summary judgment was conducted by a hearing examiner appointed by the Commissioner on September 2, 1971, at the State Department of Education, Trenton. The case is otherwise submitted on the pleadings and one piece of documentary evidence. The report of the hearing examiner is as follows:

Petitioner is a teacher who has acquired a full tenure status and possesses a master of arts degree. During the 1970-71 school year, his salary of $12,450 was that payable to a teacher on the highest, or 14th, step of the appropriate column which was applicable to holders of such a degree.

However, on May 14, 1971, petitioner was informed that he would be denied an increment of $800 for the ensuing school year, and was told instead that his salary would be the same ($12,450), which he had received during 1970-71.

Petitioner herein contests that denial and maintains that the salary scale contained in the "Agreement between the Wanaque Borough Board of Education and the Wanaque Teachers' Association," (P-1), which was executed originally on June 15, 1970 and modified in 1971, has no corollary attachments

or provisions which modify, or make conditional, the stated terms of the schedule itself. The hearing examiner does find that a second "Agreement," the one to be effective during the school year 1971-72, which is in part attached to the Motion considered herein, contains these provisions:

> "***A. The Salary Guide attached hereto and made part hereof shall be adopted by the Board of Education and accepted by the Teachers' Association.
>
> "B. It is agreed that the negotiated salary schedule for 1971-72 shall contain steps numbered consecutively 1-14.
>
> "C. All teachers having 20 years of teaching service in the Wanaque Public School District shall receive an additional increment of $250.***"

It is noted here that sections (B) and (C), *ante*, were not contained in the "Agreement" (P-1) in effect for the 1970-71 school year. There are no other corollary conditions or provisions contained in the 1971 "Agreement," which modify the stated terms of the salary schedule it contains.

While this is so and not denied by the Board, the Board maintains that its procedures for evaluation as outlined in the teachers' manual published by the Board would be rendered useless and adjudged of no effect, if there was no inherent implication contained therein that quality teaching service was a prerequisite to progressive movement on the salary guide. Specifically, the Board relies on this page from its policy manual:

> "The Board of Education shall adopt guides for the setting of professional staff salaries. Those guides shall be arrived at after appropriate investigation and deliberation by the Board assisted by representatives of the various categories of the professional staff.
>
> "Salary guides so designed and adopted shall have several purposes:
>
> "1. To provide a fair and equitable basis for remunerating teachers, administrators, and other classes of professional employees.
>
> "2. To stimulate the professional advancement of the staff by placing special emphasis upon additional study and other in-service growth activities.
>
> "3. To attract and retain highly competent teachers in our schools.
>
> "4. To offer the Board of Education greater assurance that salary increments will be based upon and result in improved quality of instruction by basing such increments upon training, study, experience, and proficiency."

Additionally, it is the Board's position that the following sentence found in Article X, Section C, of the 1971-72 negotiated Agreement (P-1) was a protection of the Board's right to take such an action as it took herein on the basis of evaluative reports and other data. This sentence is quoted as follows:

> "*** All teachers shall have an opportunity to have a conference, within three (3) school days of receipt of said evaluation, at their request, concerning such report *prior to any action* by the administrator and/or the board.***" (*Emphasis supplied.*)

However, it is noted here that this sentence was in Article X, which is entitled "Teacher Evaluation" and not in Article XI, which, in both the 1970-71 and 1971-72 "Agreements," is labeled simply "Salary." The only provisions directly included in the "Salary" section, which contains the Salary Schedule, have already been noted.

The issue posed is thus an uncomplicated one and may be simply stated as follows: Does the salary schedule adopted by the Wanaque Board of Education to be effective for its teaching staff during the 1971-72 school year stand as a contract modified only by the three auxiliary provisions, which are directly attached and made a direct part of it, or are the stated terms of the schedule subject to other conditions which otherwise affect and change its meaning?

* * * *

The Commissioner has carefully reviewed the report of the hearing examiner and notes many similarities between the issues raised in the matter *sub judice* and those considered in *Norman A. Ross. v. Board of Education of the City of Rahway, Union County*, 1968 *S.L.D.* 26, affirmed by the State Board of Education, October 9, 1968; *Doris Van Etten and Elizabeth Struble v. The Board of Education of the Township of Frankford, Sussex County*, decided by the Commissioner March 17, 1971; and *Charles Brasher v. Board of Education of the Township of Bernards et al., Somerset County*, decided by the Commissioner March 19, 1971. Each of these three cases dealt with the right of a board of education to withhold salary increments in the absence of provisions clearly stating that such increments could be withheld for cause, and in each case the Commissioner determined that the "Salary Guides" in question were contractual in nature.

Thus, in *Ross v. Rahway, supra*, the Commissioner said, at page 29:

> "***The Commissioner finds respondent's assertion that its "Salary Guide" is not contractual to be inconsistent with the clear intent of *Chapter* 236, *Laws* of 1965. It is true, as respondent points out, that many decisions of the Commissioner, the State Board of Education, and the Courts prior to *Chapter* 236 had held that salary schedules are not contractual. See, for example, *Greenway v. Board of Education of*

*Camden*, 129 *N.J.L.* 461 (*E. & A.* 1943); *Belli v. Board of Education of Clifton*, 1963 *S.L.D.* 95; *Massaro v. Board of Education of Bergenfield*, 1965 *S.L.D* 84, affirmed State Board of Education, 1966 *S.L.D.* 243, affirmed Superior Court, Appellate Division, September 23, 1966. But the enactment of *Chapter* 236 *clearly established the contractual nature of salary policies, including salary schedules*, adopted by boards under the authority of that *Chapter*. In addition to authorizing the adoption of such policies, the act further provides:

> "'*** 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 ***.'
>
> "Thus, the holding of the Court of Errors and Appeals in *Greenway*, *supra*, that a local salary schedule did not bind succeeding boards is now specifically altered by legislative enactment. A statement by the adopting board, as here, that its salary guide 'is not to be considered as a contract between the teacher, administrator, or supervisor and the Board of Education' (Exhibit R-1) should not, in the Commissioner's judgment, change the clear prescription of the statute. A *local board of education rule may not be inconsistent with the statutes. N.J.S.A.* 18A:11-1c *(Emphasis supplied.)*

In *Van Etten and Strubel v. Frankford*, *supra*, the Commissioner reinforced the opinion that salary schedules were binding commitments according to their stated terms when he said:

> "***Since the adoption of *Chapter* 236, the Legislature has also adopted *Chapter* 303, *Laws* of 1968, now embodied in *N.J.S.A.* 34: 13A-1 *et seq.*, imposing on boards of education and other public employers the obligation to negotiate the 'terms and conditions of employment.' While there has as yet been no precise definition of that mandate, as regards peripheral meanings of the phrases, there is no argument that a salary schedule for teachers, and the directly associated provisions that affect compensation, are not within the purview of the legislation. Presumably, these statutes (*N.J.S.A.* 34:13A-1 *et seq.*, *supra*,) were enacted to reduce the number of disputes between public employees and governing bodies and to insure that machinery is available to process the disputes when they do arise. However, if, following negotiations pursuant to the mandate imposed by *Chapter* 303, the resulting 'agreements' are not committed to writing but are left to vague 'understandings' or the habits derived from custom, the Commissioner holds that the resultant 'agreement' is *no agreement at all except in so far as it is precisely stated.* In the instant matter the Commissioner believes the Board made a contract with its teaching staff for the 1970-71 school year, and that the *terms of this contract are those committed to writing and contained in the terms of the salary guide* (P-2).***" *(Emphasis supplied.)*

The *Brasher v. Bernards Township* case, *supra*, stated again that *N.J.S.A.* 18A:29-14 has no application to litigation involving the withholding of salary increments, but that its applicability is "limited to the stated terms of the minimum salary law found in *N.J.S.A.* 18A:29-6 *et seq.*"

Thus, the basic issues raised herein have been rendered *res judicata* by these three decisions. The Wanaque Board's salary schedule, with no directly affixed corollary provisions for the 1970-71 school year and with only the three stated ones for 1971-72, is a contract to provide levels of compensation for its teaching staff by its stated terms. Since there is no provision directly attached that reserves to the Board the right to withhold for cause the salary stated in the schedule of increments, the Commissioner holds that the schedule must be implemented according to the only stated terms that can be found, and that petitioner must receive the salary that the schedule states will be provided for all holders of a master's degree with at least 13 years of credited prior-teaching service.

Accordingly, the Commissioner directs the Wanaque Board of Education to readjust petitioner's salary to the applicable correct amount whenever, and to the extent, the present wage-price freeze will allow it to be so adjusted.

COMMISSIONER OF EDUCATION

October 21, 1971

**BLANCHE BEISSWENGER, RUTH HAYFORD and ELIZABETH DALE, individually and in behalf of others similarly situated as a class,**

*Petitioners,*

**v.**

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

*Respondent.*

## COMMISSIONER OF EDUCATION

### Decision

For the Petitioners, Theodore M. Simon, Esq.

For the Respondent, Sidney Dincin, Esq.

Petitioners, all teachers in the school system of respondent Board of Education of the City of Englewood, hereinafter "Board," appeal to the Commissioner of Education for a determination of their grievances.

The matter is submitted on the exhibits, pleadings, and Briefs of counsel to a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

Petitioners allege that the Board has not paid them their proper salaries for the school year 1970-71, to which they claim they are entitled by the terms of the 1969-71 Agreement, hereinafter "Agreement," negotiated by the Board and the Englewood Teachers Association, hereinafter "Association." Although the amount of compensation in each case is different because of each teacher's placement on the salary guide, the problem herein is the same for each and will be treated therefore as an individual issue for the Commissioner's determination.

Each petitioner has been transferred from her former position in the school system to a new position of resource center teacher. Petitioners' compensation, for the school year 1970-71, was established by the Board to be the same as that received for the school year 1969-70, and petitioners accepted their new assignments at the salaries paid to them for the school year 1969-70.

The Agreement then in affect, at p. 2, contained, *inter alia*, a grievance procedure which provided a method for resolving appeals from interpretations, applications or violations of policies, agreements and administrative decisions affecting the teachers.

Reproduced here are pertinent portions of Agreement that add to the setting of the instant dispute:

"*** B. Purpose

"1. The purpose of this procedure is to secure at the lowest possible level equitable solutions to the problems which may from time to time arise affecting teachers as a result of the interpretation, application or violation of policies, agreements or administrative decisions.***"

Time, also is of great essence according to the terms of the Agreement. In the Agreement under "procedure", the following paragraph is especially pertinent:

"*** C. Procedure

"1. Since it is important that grievances be processed as *rapidly as possible* the number of days indicated at each level *should be considered as maximum* and every effort should be made to expedite the process. The time limits may be extended however by mutual agreements. ***" *(Emphasis supplied.)*

The varied steps of the grievance procedure provide for the possibility of informal settlement between the aggrieved teacher and her supervisors: (a) at level one; (b) three other formal levels for settlement; and (c) finally, for advisory arbitration between the parties. The total process, even exhausting the maximum time limits set for settlement at each level, should not exceed four months.

The Petition herein was received by the Commissioner on May 5, 1971. The exhibits show that petitioners were notified in May of 1970, a year earlier, of their new assignments and their salaries for the school year 1970-71. Nowhere is there any indication that petitioners took advantage of the grievance procedure as outlined in the Agreement. One of the petitioners wrote to the Superintendent of Schools informing him that she was "enthusiastic about [her] new assignment," and that she did not intend to bring the matter to "the attention of the grievance committee."

The Board alleges that petitioners are guilty of laches, and that their Amended Petition should, therefore, be dismissed.

In *Flammia v. Maller*, 66 *N.J. Super.* 440, the Court said at page 453:

"*** The rationale of the doctrine of laches is said to be the policy which requires, for the peace of society, the discouragement of stale demands, 19 *Am Jur., Equity*, § 492, p. 340 (1939). It is the equitable conterpart of statutes of limitation. 'The adjudicated cases proceed on the assumption that the party to whom laches is s, imputed has knowledge of his rights,

and an ample opportunity to establish them in the proper forum; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless or have been abandoned; and that, because of the change in condition or relations during this period of delay, it would be an injustice to the latter to permit him now to assert them.' *Galliher v. Cadwell*, 145 U.S. 368 372, 12 *S. Ct.* 873, 36 *L. Ed.* 738 (1891).

"We had occasion to discuss the doctrine of laches in *Auciello v. Stauffer*, 58 *N.J. Super.* 522, 529 (*App. Div.* 1959), where we quoted from *Bookman v. R. J. Reynolds Tobacco Co.*, 130 *N.J. Eq.* 312, 406 (*Ch.* 1946):

"'It is the rule that the defense of laches depends upon the circumstances of each particular case. Where it would be unfair to permit a stale claim to be asserted, the doctrine applies. ***'

"Laches can be a defense only where there is a delay, unexplained and inexcusable, in enforcing a known right and prejudice has resulted to the other party because of such delay. *Mitchell v. Alfred Hofmann, Inc.*, 48 *N.J. Super.* 396, 403, (*App. Div.* 1958), certification denied 26 *N.J.* 303 (1958). ***"

In *Dorothy L. Elowitch v. Bayonne Board of Education*, 1967 *S.L.D.* 78, affirmed by State Board of Education 86, the Commissioner in considering the question of laches wrote:

"*** Justice Heher said in the case of *Marjon v. Altman*, 120 *N.J. L.* 16, at page 18:

"'While laches, in its legal signification, ordinarily connotes delay that works detriment to another, the public interest requires that the protection accorded by statutes of this class be invoked with reasonable promptitude. Inexcusable delay operates as an estoppel against the assertion of the right. It justifies the conclusion of acquiescence in the challenged action. *Taylor v. Bayonne*, 57 *N.J.L.* 376; *Glori v. Board of Police Commissioners*, 72 *Id.* 131; *Drill v. Bowden*, 4 *N.J. Misc.* 326; *Oliver v. New Jersey State Highway Commissioner*, 9 *Id.* 186; *McMichael v. South Amboy*, 14 *Id.* 183. ***'"

* * * *

The Commissioner has read the report of the hearing examiner.

Teachers in this State have the statutory right to negotiate the terms and conditions of their employment, pursuant to the provisions of *Chapter* 303, *Laws* of 1968. It is, therefore, the responsibility of each teacher to understand, abide by and use to his personal advantage all of the provisions of those

agreements to which he is entitled. In the instant matter, petitioners accepted employment and compensation for a year without once using the grievance procedure outlined in their Agreement with the Board.

It would be a disservice to the fiscal planning required of the local board of education to allow for a review of these stale demands. Boards must prepare for an annual audit, and they are entitled to close the books on a particular year at some reasonable time.

As a policy, a delay in asserting a claim in such a matter would be harmful to local boards of education since they are not in positions to set aside funds for unanticipated contingencies such as the matter herein contested.

To hold now that the Commissioner of Education should interfere, roll back the calendar, and entertain a hearing on alleged improper compensation to petitioners would open the flood gates for all parties who would determine that in some past year they were not properly paid.

This matter is out of time and petitioners are guilty of laches. In *Elowitch, supra*, at p. 86, the State Board of Education said:

> "*** Implicit in the doctrine of laches is the inaction of a party with respect to a known right for an unreasonable period of time coupled with detriment to the opposing party. *Pomeroy, Equity Jurisprudence, V 11, Sec. 419, p. 171-2; 27 Am. Jur. 2nd Sec. 162, p. 701; Atlantic City v. Civil Service Commission*, 3 *N.J. Super.* 57 (*App. Div.* 1949); *Park Ridge v. Salimone*, 36 *N.J. Superr* 485 (*App. Div.* 1955), aff'd 21 *N.J.* 28 (*Sup. Ct.* 1956) Respondent, on June 10, 1965, 11 months after terminating petitioner, contracted to fill the vacancy created, prior to receiving any notice that petitioner contested the propriety of its action. Under all the circumstances, respondent's action constituted a sufficient detriment, in the face of petitioner's implied acquiescence, to invoke the bar of laches. ***"

Furthermore, it is clear from the hearing examiner's report that petitioners had an avenue of relief by following the procedures outlined in the Agreement between the Board and the Association. However, for reasons not explained in the exhibits and Briefs which were submitted, petitioners elected not to pursue the negotiated grievance procedure contained in the Agreement.

Therefore, for the reasons set forth herein, this Amended Petition is dismissed.

COMMISSIONER OF EDUCATION

October 21, 1971

**Joseph G. and Irene R. Hudak,**

*Petitioners,*

v.

**Board of Education of the Township of East Brunswick, Middlesex County,**

*Respondent.*

## COMMISSIONER OF EDUCATION

### Decision

For the Petitioners, Karcher, Reavey & Karcher (Alan J. Karcher, Esq., of Counsel)

For the Respondent, Cohen, Hoagland, Cohen & Keefe (Richard S. Cohen, Esq., of Counsel)

For the Intervenor, Mandon and Reenstra (Martin Mandon, Esq., of Counsel)

Petitioners are Joseph G. Hudak, an elected member of the Board of Education of the Township of East Brunswick, and his wife, Irene R. Hudak. Petitioners allege that the action of the Board of Education authorizing a transaction for an exchange of certain lands was arbitrary, capricious, unreasonable and an abuse of discretion. The Board of Education of the Township of East Brunswick, hereinafter "respondent or Board," denies the allegations and answers that the transaction for the exchange of lands is in all respects lawful and reasonable. Cranbury Gardens, a New Jersey Corporation, hereinafter "Intervenor," is a party to the transaction for the exchange of lands, and is, therefore, permitted to intervene as an indispensible third party possessing a direct and immediate interest in these proceedings.

Petitioners pray for relief in the form of an Order by the Commissioner of Education setting aside the transaction for the exchange of lands between the Board of Education and the intervenor, Cranbury Gardens.

Testimony and documentary evidence were educed at a hearing conducted on June 9, 10 and 22, 1971, at the municipal offices of East Brunswick Township, before a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner is as follows:

All of the parcels of land which are hereinafter described are located on the easterly side of Cranbury Road, in Block 88, as shown on Sheet No. 31 of the tax assessor's map, in the Township of East Brunswick, County of Middlesex. (Exhibit P-1)

Cranbury Gardens owns four rectangularly-shaped lots in block 88; namely, lot nos. 19C, 19D, 19E, and 19F, which are approximately 200 feet in depth and border on Cranbury Road. All four of these lots also border lot 19B which is the 58.05-acre site of the East Brunswick High School. These four lots screen the High School site from Cranbury Road, which is a county highway. The Board owns three narrow access strips between lots 19C and 19D, lots 19D and 19E, and between lots 19E and 19F. The widest access strip lies between lots 19E and 19F, and is used as an entrance driveway to the High School buildings. (Exhibit P-1)

Two parcels of land comprise the total 4.022-acre tract, hereinafter "Board Tract," exchanged by the Board. The largest is a 4.0-acre parcel located in the northwest corner of the High School site, which abuts lot 19C owned by Cranbury Gardens. The remainder is a strip of land of .022 acres located along Cranbury Road between lots 19C and 19D.

Three parcels of land comprise the 7.374-acre tract hereinafter, "Cranbury Tract," exchanged by Cranbury Gardens. These are lot 19E, which is 2.75 acres; lot 19F, which is 4.6 acres; and a small strip of lot 19D, which is .024 acres. All three of these parcels border on Cranbury Road.

The zoning of the various parcels of land which comprise these two tracts is a significant factor of this disputed exchange transaction.

The three parcels comprising the Cranbury Tract; namely, lots nos. 19E, 19F, and part of 19D are zoned C-1, which is a professional and office district. The zoning ordinance of East Brunswick Township (Exhibit P-6) defines this zoning, in pertinent part, on page 8, as follows:

> "*** 1. All uses and buildings permitted in the R-3 district ***. [single family residential]
>
> 2. Professional occupations ***.
>
> 3. The studio of a teacher of music, dancing or art.
>
> 4. The studio of a photographer.
>
> 5. The Office of an insurance agent, real estate broker, accountant, or bookkeeper.
>
> 6. Undertaking establishment.
>
> 7. Any other use similar to above ***."

The two parcels comprising the Board Tract; namely, the 4.0=acre parcel and the access strip along Cranbury Road, both of which are part of lot 19B, are zoned O-1, which is an office, professional and apartment district. (Exhibit R-6) The permitted uses of this O-1 district are almost identical to those of a C-1 district (Exhibit P-6, *supra*), the only difference being that multiple-dwelling groups or garden apartment developments are additional permitted uses in the O-I district, subject to certain conditions. (Exhibit R-6) This O-1 district was created in December 1965, by an amendment (Exhibit R-6) to the original zoning ordinance of 1959, as amended. (Exhibit P-6) The 1965 amendment actually zoned seven acres of the total 58.05 acres of lot 19B, the High School site, as an O-1 district permitting garden apartments. This 1965 amendment also changed the zoning of Intervenor's plots known as lots 19C and 19D, from a C-1, professional and office district to an O-1 district permitting garden apartments. These two plots are not involved in the exchange transaction, but lie along the easterly side of Cranbury Road and separate the High School site, which is lot 19B, from Cranbury Road. (Exhibit P-1) Since the Board's tract of 4.0 acres abuts the westerly border of intervenor's lot 19C, the acquisition of this Board Tract by intervenor, Cranbury Gardens, provides a larger, contiguous area upon which garden apartments could be erected by Cranbury Gardens.

Testimony of the Board's witnesses disclosed that the Board of Education, the Planning Board and other municipal officials shared some concern over the fact that the Board did not own lots 19C, 19D, 19E and 19F, which separate the High School site, lot 19B, from Cranbury Road. This concern was of long standing, reaching back to 1965, and was based upon the fact that any owner of these four lots could develop this vacant, wooded land by building within the permitted uses of its C-1 zoning.

The former Mayor of East Brunswick testified that he had served on the Board of Education for approximately ten years, from 1954 through 1964, and that he was elected and served as mayor for the four-year period from 1965 through 1968. This witness testified that as mayor he was an official member of the Planning Board in 1965, and he participated in the preparation and adoption of the 1965 amendment to the zoning ordinance which created the O-1 district and zoned, *inter alia*, the seven-acre tract of the High School site as well as lots 19C and 19D for garden apartments. (Tr. II-365) (Exhibit R-6) At the time that this 1965 amendment was being prepared, the Mayor discussed the proposed zoning change with the then President of the Board and a member of the Board, who was also a member of the Planning Board. According to this witness, both the Board of Education and the Planning Board understood that the known purpose of the proposed 1965 zoning amendment was to generate a higher value for the Board's seven-acre tract of property, thereby enabling the Board of Education to exchange this O-1 zoned tract for the tract of land in front of the High School site along Cranbury Road. (Tr. II-366, 367) This witness testified further that when he was a member of the Board of Education and Board President, the Board had desired to secure that privately-owned tract which separated the High School site from Cranbury Road. For many years the Board

has objected strenously to any attempt by the owner to develop the tract in front of the High School. (Tr. II-367) This witness stated that, in his opinion, any building along Cranbury Road in front of the High School would detract from the aesthetic beauty of the school site. He further stated that the other members of the Board feared that commercial establishments might be built in front of the High School which would become "hang outs" for pupils. (Tr. II-369) According to this witness, the pupil enrollment of the school district increased from approximately 1,000 in 1954 to approximately 9,000 in 1964, and during that time the Board had erected six new schools, including the High School, and also added three additions to existing schoolhouses. During his term as mayor, two more new schools were built by the Board. (Tr. II-370)

Counsel for petitioners raised the question whether the Mayor and Council could legally zone lands owned by the Board and used for school purposes into a garden apartment zone. For the record, the hearing examiner stated that the Commissioner of Education would not rule on this question, because such a determination would not be within the Commissioner's jurisdiction and purview.

The current President of the Board testified that since he became a Board member in October 1966, the matter of a possible exchange of Board-owned land for land being in front of the High School was periodically considered by the Board. (Tr. II-47) The Board was concerned that the aesthetic quality of the High School site might be destroyed if commercial buildings were erected along Cranbury Road, and also that commercial development might create "attractive nuisances." (Tr. III-41)

During the latter part of 1966 or early in 1967, the Board considered exchanging its seven acres zoned for garden apartments for the seven acres of privately-owned property plus the sum of $50,000. A resolution of the Board of Education authorizing this proposed exchange was defeated either in December 1967 or January 1968. (Tr. III-44, 45) The President stated that, in his opinion, the resolution was defeated because the Board's attorney advised that the transaction would be improper, and also because the owner of lots 19E and 19F was not preparing to develop his land. In addition, the Board had received information that the County might widen Cranbury Road by acquiring property along both sides of this road. The Board believed that the possible widening of Cranbury Road by the County could reduce the depth of lots 19E and 19F to a point which would preclude the development of these lots by the owner. (Tr. III-45) The President stated that the Board also had received a report from the science department of the High School which disclosed that the Board's seven acres was being used for educational purposes. (Tr. III-46) (Exhibit P-5) In the opinion of the President, all of these factors taken together persuaded the Board to defeat the original exchange resolution in December 1967 or January 1968. (Tr. III-46) The President testified further that the Board secured an appraisal of the values of the properties in question on April 18, 1969, from William F. Cox. (Exhibit R-9) This appraisal was ordered by the Board because the owner of lots 19E and 19F was again proposing an exchange of seven acres of his property for seven acres of Board property. The President stated that the Cox appraisal (Exhibit R-9) indicated that the proposed exchange of seven acres for seven acres was not proper. (Tr. III-48)

In June 1970, Cranbury Gardens purchased lots 19C, 19D, 19E and 19F for the sum of $150,000. (Tr. I-91) This new owner, Cranbury Gardens, also proposed an exchange of seven acres for seven acres to the Board of Education during the summer of 1970. According to the President, the Board discussed the possibility of purchasing the 7.35 acres from Cranbury Gardens, but decided not to include a sum of $100,000 for this purpose in the proposed 1971-72 school budget when budget discussions took place during December of 1970.

A letter under date of December 18, 1971, was addressed to the Board of Education by Mr. Martin S. Mandon, a principal in Cranbury Gardens. Mr. Mandon also represents Cranbury Gardens as legal counsel in these proceedings. This letter reads as follows:

> "Will you kindly advise us on what date your Board can meet with the undersigned with reference to the possible exchange of our commercially zoned parcel, on Cranbury Road, with the apartment zoned parcel of the school in back of our apartment site. *The Planning Board is holding up our site approval on our garden apartment parcel until they hear from you.* As you know, we have received County approval on the alignment of Cranbury Road's information on which (sic) we have already forwarded to you. We have been confronted with a severe economic hardship in the delay of our site approval for the garden apartment portion, and you can appreciate that time is of the utmost importance to us. For this reason, it is requested that you arrange for the meeting as soon as possible, and we will do our very best to cooperate fully in any reasonable disposition of the matter." (*Emphasis ours.*) (Tr. II-261, 262)

Testimony produced by a member of the Board and the Superintendent of Schools disclosed that Mr. Mandon did confer with the Board at a caucus meeting in January 1971. The Board informed Mr. Mandon that it was not interested in an exchange of land, and requested Mr. Mandon to submit a purchase price to the Board for the 7.35-acre parcel comprised of lots 19E and 19F. The Superintendent testified that the Board began to discuss an exchange of land immediately after Mr. Mandon left the conference meeting in January 1971. During that same conference the Superintendent and a member of the Board were designated as a negotiating team by the Board, and were assigned the task of contracting Mr. Mandon to discuss a possible land exchange. (Tr. III-76A, 169) The Superintendent testified that the former Board President provided a guideline to be used in the negotiations. This guideline set a ratio of 1.8 for the Board's property as against 1.0 for the Cranbury Gardens property. (Tr. III-83) This ratio was derived from the appraisal report sumitted to the Board on April 18, 1969, by William F. Cox, which placed a value of $10,000 per acre on the 7.35-acre tract and $18,000 per acre on the Board's seven-acre tract which was zoned for garden apartments. (Exhibit R-9) (Tr. III-52,53) According to the Superintendent, this 1969 appraisal was "the most recent available evidence which the Board had in hand." (Tr. III-76B)

In reply to the Board's request for a purchase price for Cranbury Gardens' 7.35-acre tract, Mr. Mandon addressed a communication to the Board under date of January 26, 1971. (Exhibit P-3) This letter is quoted in its entirety as follows:

> "At your last Board of Education meeting which I attended, the Board indicated it was not interested in effecting any exchange of property but was interested in purchasing our frontage in front of the school. You requested a price which I agreed to furnish after conferring with my associates.
>
> "I am pleased to advise that we would be interested in an offer of $20,000.00 per acre for the portion of the property zoned commercial and lying in front of the school on Cranbury Road and which consists of approximately 7 acres more or less.
>
> "If the Board were to change its stand and agree to an exchange, we feel that the value of the *two properties are about equal* and that an exchange of the commercial property for the garden apartment property should be accomplished on an even basis.
>
> "Will you be good enough to advise whether the Board is interested in exchanging or purchasing on the above basis.
>
> "I do not understand the letter of the Planning Department referring to a possible exchange because when I left your meeting you had indicated to me that you were not interested in giving up any of your property but were only interested in a possible purchase. In any event we would be pleased to work out an arrangement either way if the Board is interested."

Copies of this letter were sent to the Mayor, the Township Engineer, the Board of Education member on the Planning Board and the East Brunswick Planning Board.

The Superintendent of Schools testified that he and a Board member conferred with Mr. Mandon on February 1, 1971, regarding the possible exchange of land. This witness stated that Mr. Mandon was agreeable to an exchange of the 7.35-acre tract consisting of lots 19E and 19F, owned by Cranbury Gardens, for a 4.0-acre tract in lot 19B, owned by the Board and zoned for garden apartments. At that time no commitment was made to Cranbury Gardens by this negotiating team. (Tr. III-76B)

The Superintendent testified that he read the report of the former Superintendent and the chairman of the High School science department, dated October 30, 1967, which concerned the possible exchange of land. (Exhibit P-5) (Tr. III-84) The report of the former Superintendent to the Board of Education is as follows:

"After having discussed this matter with the High School Principal, I do not recommend that the Board of Education approve the exchange of land [seven acres for seven acres] with Mr. Molner [the previous owner] for the following reasons:

"1. At the present time we have sufficient access from the high school property to Cranbury Road to take care of us now and in the future.

"2. Because of the uncertainty regarding the future plans for increased high school enrollment it is not recommended that this property be taken out of the Board of Education (sic) control.

"3. Assuming permission could be given for construction on the property bordering Cranbury Road, there is no reason to believe that this would in any way adversely affect the operation of the high school.

"4. Perhaps, the most important reason for not turning this property over to Mr. Molnar is that it is currently extensively used by the high school science department. I have attached a report as prepared by Mr. Moyer, Chairman of the high school science department, and this report includes plans for future use of the property by the Science Department."

Additional testimony by the Superintendent disclosed that, since he assumed this new position during August 1970, he had read past Board minutes and newspaper accounts of Board meetings in order to acquaint himself with the Background of school problems and the community in general. As a result, he was aware of the fact that this matter of a possible land exchange was long standing. The Superintendent also testified that between February 17 and 24, 1971, he asked the High School principal to determine whether there were any negative factors in the proposed land exchanged – 4.0 acres for 7.35 acres, and he was informed by the principal that there were none. (Tr. III-78, 869) The Superintendent was asked for a recommendation by the Board, and he subsequently offered his opinion that the exchange of 4.0 acres for 7.35 acres would be advisable. (Tr. III-78, 92-96, 103, 108)

A teacher of biology in the East Brunswick High School testified that he and other teachers use a portion of the seven-acre tract in the course of their field studies with pupils. This witness testified that in his judgment, the exchange of land would not interfere with the pupils' field studies, if the Board acquired lots 19E and 19F and kept them in a natural state, and provided that the remaining wooded areas were not developed. (Tr. III-154, 157) This teacher stated that the teachers in the science department were not aware of the land exchange until they had read newspaper accounts of it after the Board acted on February 24, 1971. (Tr. III-158-160) Following the newspaper announcement, the Superintendent and the High School principal met with the teachers of the science department and assured them that the frontage area, lots 19E and 19F,

and the remaining woods would not be developed. (Tr. III-162) According to this witness, the principal had not been aware of the fact that the science department was using these seven acres for nature study, and both the principal and Superintendent apologized for not discussing this matter with the teachers before the exchange. (Tr. III-160)

One of the members of the Board of Education testifying for petitioner, stated that on February 19, 1971, the Board members received copies of a resolution of the Township Planning Board adopted on February 16, 1971. This resolution, which specifically pertains to the proposed land exchange, reads as follows:

*"PLANNING BOARD*
*TOWNSHIP OF EAST BRUNSWICK*
*RESOLUTION*

"WHEREAS, the Planning Board of the Township of East Brunswick is a duly constituted body as authorized by statute with the responsibility to supervise and be concerned with the orderly development and planning of the Township as authorized by the statutes and ordinances made and provided; and

"WHEREAS, there has been an application for a certain site plan known as Cranbury Gardens, being a garden apartment project adjacent to the lands held by the Board of Education of this Township; and

"WHEREAS, it is in the best interests of both the developer and the Township that its unique relationship at the site of the high school be explored; and

"WHEREAS, tentative negotiations have been entered into regarding a possible exchange or purchase of land by the parties which would require reexamination of a site plan before sale or exchange is consummated and further benefiting the Board of Education's possible program for high school expansion and

"WHEREAS, the Planning Board of the Township of East Brunswick is desirous of resolving the matter before acting upon the site plan.

"NOW, THEREFORE, BE IT RESOLVED, by the Planning Board of the Township of East Brunswick that the above application for site plan approval shall be and hereby is adjourned one month to be heard the first public meeting in March and the Board further by this Resolution urges both the applicant and the Board of Education to make diligent effort to resolve the negotiations by the next meeting at which time this Board will take action on the site plan application as it then exists." (Tr. II-194-195)

The record in the instant matter is replete with reference to the role played by the Township Planning Board in the land exchange between the Board of Education and Cranbury Gardens. These references are found on forty-three separate pages of the transcripts of these proceedings.

Mr. Martin S. Mandon, a principal in Cranbury Gardens, the Intervenor, represented that Corporation as counsel in these proceedings. Mr. Mandon was called as a witness for both petitioner and the Board, and testified at length regarding Cranbury Gardens' dealings with the Board of Education and the Planning Board. The following testimony by Mr. Mandon is pertinent to the circumstances surrounding the land exchange:

At Tr. I-106, testifying for petitioner, Mr. Mandon states:

"A. *** for your information, I would have been happy if the [Planning] Board had approved the *** two parcels [Lots 19E and 19D] that were zoned for garden apartments, but they wouldn't give me site approval unless I bought my piece (sic) with the Board of Education, as it reflected in all the correspondence that I have with the various bodies. ***"

During re-crossexamination by counsel for the Board, the following testimony was given by Mr. Mandon at Tr. I-114:

"Q. Whose idea was it to exchange; yours, or somebody else's?

"A. The Planning Department, and the Board of Education.

"A. *** How was this made known to you?

"A. When I applied for site approval, on our old property [Lots 19C and 19D], it was held up by the Planning Board, which (sic) a member of the Board of Education on it, and vice-versa, and the information I obtained, by letter, and otherwise, was that I would not get site approval till (sic) some arrangement had been made with the Board of Education. As a result of that, I appeared, several times, before the Board [of Education]. I wrote them several letters, and I asked them, and I requested in them, to please release me. If they want to buy, buy, if they want to exchange, exchange, or give me some kind of letter to take to the Planning Board, so that they will know the school is not objecting to my proceeding on my own property. That, in turn, resulted in the exchange.***"

When questioned as to whether he was ever anxious to make a land exchange with the Board of Education, Mr. Mandon answered, "*** I wouldn't instigate it.***" When asked to explain how the Planning Board was preventing him from developing his property, Mr. Mandon testified that he could not secure site plan approval for his garden apartment development on lots 19C and 19D "*** unless and until the Board of Education either notified the Planning Board they were not interested in buying, or exchanging, or the deal had been made.***" (Tr. I-115)

The following exchange regarding the possibility of Cranbury Gardens' securing a remedy to the problem of obtaining the site plan approval is noteworthy:

"Q. **** Aren't there other remedies for you, if they *Planning Board* don't put you on the agenda; if they don't give you site approval, after you are qualified for it?

"A. Well, you can get the remedy in court, and then lose your investment.***" (Tr. I-116)

At the conclusion of the hearing, after a Board of Education member had testified that he believed that Cranbury Gardens had received site plan approval and could begin to erect the seventy-four garden apartments on lots 19C and 19D, Mr. Mandon was recalled to the witness stand by the Board's counsel. Under direct examination, Mr. Mandon testified as follows:

"Q. ***Do you have site approval from the planning board of East Brunswick Township for a garden apartment development including the *** seventy-two units on the front?

"A. No, I do not. The plans were approved but the site approval was withheld until the negotiations with the Board of Education were concluded either way.***" (Tr. III-207, 208)

One of the members of the Board of Education is also a member of the Planning Board of East Brunswick. This witness became a member of the Board of Education in February 1970, and shortly thereafter he was appointed to the Planning Board. Testimony of this witness disclosed that several months after he joined the Planning Board, several members of that body discussed the possible land exchange with him and gave him a map indicating the tracts which would be involved. Also, these Planning Board members suggested that it was very much in the interests of the Township to bring about this exchange, and that the area had been re-zoned several years earlier specifically for that purpose. In addition, this witness stated that the Planning Board "*** asked me to apply pressure to the Board of Education to get with it. ***" (Tr. III-164) Accordingly, this witness did discuss the land exchange with the President of the Board. (Tr. III-165) Shortly thereafter, Cranbury Gardens purchased the four parcels and submitted plans to the Planning Board for the erection of seventy-two garden apartment units on lots 19C and 19D. This witness corroborated Mr. Mandon's testimony regarding site plan approval (Tr. III-168) as follows:

"Q. *** What happened when Mr. Mandon appeared before the planning board?

"A. *** The planning board asked him to get together with the Board of Education and talk about a swap of properties and informed him that it would be best to delay any further action *** on his application until such time as that could be resolved.

"Q. And did he agree to do that?

"A. Yes, he did. ***"

Further testimony from this Board member corroborated the testimony of other witnesses regarding Mr. Mandon's meeting with the Board of Education, in January 1971, the Board's request for a purchase price for lots 19E and 19F, and the subsequent discussion of an exchange and the appointment of a negotiating team. (Tr. III-168, 169) When questioned regarding any other events which transpired between the conference with Mr. Mandon in January 1971, and the Board's reorganization meeting on February 17, 1971, this witness testified as follows:

"Q. ***Was there anything that went on between those two meetings that you knew of?

"A. Only additional pressure from the planning board.

"Q. On whom?

"A. On me to get this thing going.***" (Tr. III-169, 170)

Both this witness and the President of the Board testified that the Board discussed the land exchange with Mr. Mandon on February 17, 1971, immediately after the negotiating team had rendered their verbal report. These two witnesses stated that the Board agreed to an exchange of its 4.0 acres for Cranbury Gardens' 7.35 acres at this conference immediately after the reorganization meeting. (Tr. III-62, 171) The Board member on the Planning Board was questioned concerning the April 18, 1969, appraisal made by William F. Cox for the Board. (Exhibit R-9) When asked if he was aware of the date of this appraisal, he stated that "*** It was not a particularly important consideration as to when, as far as I was concerned." The following exchange appears at Tr. III-173, 174:

"Q. Why is that?

"A. Well, in making the judgment as to whether to swap or not it seemed to me that it was important to judge the entire chain of events and not just what was specifically in evidence at that particular point in time. The chain of events that I was aware of was that a piece of property on the school property had been rezoned specifically for the purpose of giving a value so that we could swap. And, in my view this was simply a continuation of that action by the township. The fact that the appraisal was made gave me some feel for what would be an equal value, 1.8 to one. I wasn't concerned with specific dollars at that point in time.***"

The President of the Board testified that, to his knowledge, no member of the Board had requested, during February 1971, that the 1969 appraisal be up-dated. (Tr. III-124)

Testimony of the Board President disclosed several reasons for the Board's decision on February 17, 1971, to make the exchange of land with Cranbury Gardens. According to this witness, the Board discussed the possibility of a public referendum to acquire the 7.35 acres, but abandoned that alternative because of the possibility of a defeat. Also, the Board was aware that the Planning Board was delaying Cranbury Gardens' site plan approval and had passed a resolution requesting the Board to resolve the situation. The Board believed that, if Cranbury Gardens proceeded to build garden apartments on lots 19C and 19D, the Corporation would no longer be interested in a land exchange. (Tr. 56-58)

The appraisal dated April 18, 1969, (Exhibit R-9) compared the value of the Board's total seven-acres tract zoned for garden apartments and the 7.35-acre tract, consisting of lots 19E and 19F, which abuts Cranbury Road. This appraisal lists the value of the Board's seven acres at $18,000 per acre for a total of $126,000. The privately-owned 7.35-acre tract is valued at $10,000 per acre for a total of $73,500. On page three of this report, the appraiser stated that if the Board of Education's seven-acre tract were valued collectively with the privately-owned parcel known as lot 19C, the total value would be increased. The report states as follows:

> "***It is my opinion; that, collectively, (East Brunswick Board of Education 7 Acres and Dayton Park, Inc. 3.75 Acres) this land would be valued as follows: 10.75 ACRES @ $20,000. PER ACRE .... $215,000.00."

Testimony of the Superintendent of Schools, the Board President, the Board member on the Planning Board and two other Board members testifying for petitioner disclosed that not one of these individuals had personally examined the 1969 appraisal (Exhibit R-9) prior to the conference with Mr. Mandon on February 17, 1971, when the decision to exchange was made. (Tr. III-84, 125, 200) (Tr. II-200, 289, 290) Petitioner testified that he did not see the 1969 appraisal until after the February 17, 1971, conference. (Tr. II-289) Another Board member stated that he requested a copy of the 1969 appraisal during the week following the aforementioned conference. (Tr. II-200) This witness further testified that the only information he received from Board members and school officials regarding this exchange was the number of acres involved. (Tr. II-236) He was not aware that Mr. Mandon was coming to the reorganization meeting on February 17, 1971, to discuss a land exchange. (Tr. II-196) After Mr. Mandon talked with the Board, the negotiating team made a verbal report and entertained questions. This Board member testified that "*** We didn't know what to ask, because we weren't familiar with the history of the property.***" (Tr. II-198) According to this witness, three members of the Board had voted on a somewhat similar land exchange proposal several years in the past. (Tr. II-198, 199) Petitioner testified that prior to the regular meeting of February 24, 1971, when the land-exchange resolution was adopted, he did not

receive any information regarding the Board's projected use of this land for educational purposes or the former Superintendent's report. (Exhibit P-5) (Tr. II-289, 290, 294, 295) The Board of Education's representative on the Planning Board testified that a school-facility study is in process to determine future school-building needs, but this study was not available to the Board members in February 1971, when the land-exchange decision was made. This witness stated that the Board members are aware of the growth in the Township and the need for additional school facilities. (Tr. III-203) Both this witness and the President testified that the Board of Education had never requested the Planning Board and the Township Committee to change the zoning of the 7.35-acre tract, lots 19E and 19F, in order to prevent the commercial development permitted under its C-1 zoning. (Tr. III-130, 186)

The land exchange was discussed at some length at the Board's agenda conference on February 22, 1971. At the regular meeting held February 24, 1971, the Board adopted a resolution authorizing the exchange of a tract of approximately 4.0 acres zoned for garden apartments for the 7.35-acre tract, lots 19E and 19F, owned by Cranbury Gardens. (Exhibit R-7) An agreement between the Board of Education and Cranbury Gardens for this land exchange was executed on March 12, 1971. (Exhibit R-8)

Each of the three parties in this dispute presented a real estate appraiser as an expert witness, and each appraiser provided testimony and documentary evidence with respect to the tracts of land exchanged by the Board of Education and Cranbury Gardens. All three appraisals are *ex post facto* the Board's action authorizing the exchange on February 24, 1971. (Exhibits P-2, R-1, R-10) The three appraisals are summarized as follows:

| **Appraisals** | **Board Tract 4.0 Acres** | **Cranbury Gardens Tract 7.35 Acres** |
|---|---|---|
| Petitioner (P-2) June 2, 1971 | $107,600 | $86,600 |
| Board (R-10) May 28, 1971 | 78,000 | 73,500 |
| Cranbury Gardens (R-1) May 6, 1971 | 72,250 | 88,450 |

The Board's appraisal of May 28, 1971, (Exhibit R-10) was performed by Mr. William F. Cox, the appraiser who had also performed the April 18, 1969, appraisal (Exhibit R-9) for the Board of Education. This witness testified that in his recent appraisal of May 28, 1971, he did not investigate the combined per-acre value of the Board's 4.0-acre tract and Cranbury Gardens' 3.7-acre parcel, lot 19C, as was done in his 1969 appraisal. (Tr. III-38, 39)

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and the record of the instant matter.

In the matter herein controverted, petitioner attacks the action of the Board of Education authorizing the described transaction of an exchange of certain lands. This transaction was performed under the authority of *N.J.S.A.* 18A:20-8, which reads as follows:

> "The board of education of any school district, by a recorded roll call majority vote of its full membership, may exchange any lands owned by it and *not needed for school purposes* for lands located in the school district and *at least* equal in value to the lands conveyed by the board in such exchange." (*Emphasis ours.*)

The fact is certain that the action taken at the regular meeting held February 24, 1971, which authorized the land transaction by a vote of five ayes and four nayes, did comply with the requirement of *N.J.S.A.* 18A:20-8, *supra*, for a recorded roll call majority vote of the full membership. (Exhibit R-7) The lands to be received by the Board are located within the School District of East Brunswick Township, which is also a requirement of the statute. *N.J.S.A.* 18A:20-8, *supra.*

The pivotal question here is whether the transaction meets the remaining requirements of the statute; namely, that the Board's land is not needed for school purposes, and that the lands received are at least equal in value to the lands conveyed by the Board.

An examination of the tax map (Exhibit P-1) shows that the Board's High School site, lot 19B, is screened from the county highway, Cranbury Road, by the four parcels of land identified as lots 19C, 19D, 19E, and 19F. The zoning ordinance of 1959 (Exhibit P-6) shows these four, privately-owned lots zoned as C-1, which is a professional and office district. The permitted uses in a C-1 zone are set forth in the hearing examiner's report and require no repetition. It is clear from the record that for many years the Board of Education was concerned, for several reasons, about the possible development of these four parcels of land. It is also clear that the Board did not propose a public referendum for the purchase or condemnation of these four parcels.

In 1965, the Mayor, who was a former member and President of the Board of Education, participated in amending the zoning ordinance by creating an 0-1 district indluding, *inter alia*, a seven-acre tract of the High School site and lots 19C and 19D. This new district permitted existing C-1 uses and added multiple dwellings and garden apartments. (Exhibit R-6) The Mayor's uncontradicted testimony discloses that the known purpose of this 1965 zoning amendment was to enable the Board of Education to exchange the newly-zoned garden apartment tract for lots 19E and 19F. The Board of Education did not make such a land exchange between December 27, 1965, the date of the zoning amendment, and February 24, 1971.

The intervenor, Cranbury Gardens, purchased the four parcels, lots 19C, 19D, 19E and 19F, in June 1970, and shortly thereafter submitted plans to the Township Planning Board for the erection of seventy-two garden apartments on lots 19C and 19D. The uncontradicted testimony of the intervenor, Mr. Martin S. Mandon of Cranbury Gardens, states that he was not interested in proposing a land exchange with the Board of Education. The intervenor's testimony is that he could not obtain final site plan approval for the Cranbury Gardens project from the Township Planning Board "*** unless and until the Board of Education either notified the Planning Board they were not interested in buying, or exchanging, or the deal had been made.***" (Tr. I-115) Accordingly, the intervenor approached the Board of Education in order to secure an answer, which would enable him to obtain the site plan approval from the Planning Board.

The Planning Board's interest in a land exchange between the Board and Cranbury Gardens is shown by the Planning Board's resolution adopted February 16, 1971. (Exhibit P-4) The Board of Education member who is also on the Planning Board corroborates the intervenor's testimony regarding the Planning Board's role in this land exchange. In addition, this witness testified that the other Planning Board members had asked him to "apply pressure" to the Board of Education in this matter.

During January 1971, the Board of Education informed the intervenor that it desired him to furnish a sale price for lots 19E and 19F. Immediately thereafter, the Board decided to negotiate an exchange of lands with the intervenor. On February 17, 1971, at least one member of the Board heard for the first time the tentative results of these negotiations; namely, an exchange of 4.0 acres of Board lands for the 7.35-acre tract of lots 19E and 19F. One week later, on February 24, 1971, the Board passed a resolution, by a five-to-four vote, authorizing the exchange.

In the judgment of the Commissioner, the question whether or not the land conveyed by the Board is not needed for school purposes was not clearly determined by the Board at the time the authorizing resolution was adopted. The record of the instant matter discloses confusion and a lack of facts regarding the utilization of the Board's four-acre tract at the time of the transaction. On its face, it would appear that the acquisition of a contigous tract of 7.35 acres, in exchange for a tract of 4.0 acres, would be educationally advantageous. But this determination must rest on the facts concerning present utilization and future needs. The record shows that a study of school-facility needs was in progress, but the results of this study were not available to the Board at the time of the transaction and were not made a part of the record of these proceedings.

The statute, *N.J.S.A.* 18A:20-8, *supra*, requires that the lands received by the Board must be at least equal in value to the lands conveyed by the Board. It is clear that the Board relied exclusively upon a land appraisal secured on April 18, 1969, in making its determination of the value of the respective tracts of land. Uncontradicted testimony discloses that the Board did not consider

securing a current appraisal in February 1971, before authorizing the transaction. Also, at least four members of the Board did not examine the 1969 appraisal, including two who voted in favor of the exchange, and did not take notice of the significant statement on page three of this report which placed a value of $20,000 per acre on the combined Board tract and lot 19C.

Three *ex post facto* appraisals of the exchanged lands are included in the record of the instant matter. Of these, the appraisals presented by both petitioner and the Board disclose that the Board did not, in fact, receive lands at least equal in value to those conveyed as required *ex statuto*. In the judgment of the Commissioner, the weight of the evidence preponderates to the logical conclusion that the action of the Board in authorizing the exchange of lands was hasty, improvident and imprudent. The Board failed in its duty and obligation to meet the requirements of the statute, *N.J.S.A.* 18A:20-8, *supra*, and to guard the public purse.

Accordingly, for the reasons stated, the Commissioner finds and determines that the action of the Board of Education of the School District of East Brunswick authorizing an exchange of lands on February 24, 1971, is *ultra vires*, and is hereby set aside.

COMMISSIONER OF EDUCATION

October 26, 1971

**In the Matter of "D," by her parent,**

*Petitioner,*

**v.**

**Board of Education of the Borough of Scotch Plains-Fanwood and Fred Laberge, Superintendent of Schools, Union County,**

*Respondents.*

## COMMISSIONER OF EDUCATION

## DECISION

For the Petitioner, Israel Gazek, Esq.

For the Respondents, Beard and McGall (Emma C. McGall, Esq., of Counsel)

Petitioner is the parent of a child, hereinafter "D," who is assigned to a special class in the Scotch Plains-Fanwood School System. He alleges that "D's" assignment is unsuitable and ought to be altered to provide a program more consistent with "D's" individual needs. The Scotch Plains-Fanwood Board of Education, hereinafter "Board," maintains that its classification and assignment of "D" is proper in all respects and refuses to make any basic alteration in "D's" program.

A hearing in this matter was conducted at the office of the Union County Superintendent of Schools in Westfield on September 27, 1971, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

"D" is a young lady of nine years of age, who, until November 1970, was actively enrolled in and attended a special class for primary-age children in the Scotch Plains-Fanwood School System. This class of six enrollees was for pupils classified as educable, and was the only class for primary-age children so classified, in the school system. It is an established fact that "D" had the highest-rated capacity for learning within the group, and that other children enrolled with her had intelligence quotients in the range 50-70.

At the end of November 1970, "D" was withdrawn from attendance in this class by petitioner, who now alleges that "D" was not learning, and that other children in the class provided her with no challenge. To the contrary, petitioner alleges, the low ability of the rest of the class to achieve academically was a hindrance to "D," and the occasional incontinence of some children and noisy behavior of others did not constitute a proper atmosphere to insure "D's" own development.

For the balance of the 1970-71 school year, "D" was provided with home instruction by a tutor engaged by petitioner. (P-1) In the spring of 1971, "D" was assigned by the Board to another educable class for the 1971-72 school year - a class for a more intermediate age grouping providing for children of ages 8-12. However, petitioner has continued his refusal of such a placement, and "D" has remained at home during the early weeks of the 1971-72 school year.

While there is consistency in the reports of the Board that "D" had an intelligence rating on the Wechsler Scale of approximately 72 (P-3), which appears to justify the "educable" classification, there is another report from a psychologist employed by the Archdiocese of Newark, which establishes the rating on the same scale as 81. This would generally be considered to be a borderline or dull-normal classification that could, or could not, require special class placement, in the opinion of the psychologist for the Board. In any event the two test measurements are not significantly different, and the issue posed by this adjudication could not be resolved by a simple finding that one had more validity than the other. Regardless of which one is correct, petitioner maintains that "D" was not properly placed when she was grouped with "severely retarded" children.

Petitioner also avers that when they removed "D" from school in November 1970, and secured a tutor to help her, she did achieve at a better rate (P-1), and can now read and do other things that she was incapable of doing while in the public school. In support of this avowal, "D" was asked to read, at the hearing held on September 27, 1971, and did read rather fluently from a pre-primer of a standard reading series.

The Board's testimony concerning this child's placement was given by the Board's psychologist; by the teacher that "D" had during the fall months of 1970; by the assistant superintendent of pupil services in the Scotch Plains-Fanwood District; by the learning disabilities specialist, who has observed "D," and by the teacher to whose class "D" had been assigned for 1971-72. All of these witnesses were called by the petitioner.

The psychologist and learning disability specialist, who are members of a full team employed by the Board, maintain that the 1971-72 assignment of "D" was a proper and suitable one for her to achieve a proportionate measure of learning in a regular school program. The psychologist also indicates that "D" was, to some extent, socially and emotionally immature.

The two teachers called to testify described in some detail the programs that the school had afforded in 1970 and that were proposed for "D" for the 1971-72 school year. In addition the teacher, who had instructed "D" in 1970, offered a report (P-4) of an evaluative nature, which she had compiled following "D's" removal from the Board's school. The teacher to whom "D" was assigned for the school year 1971-72 described his class—individual by individual—in some detail and established the fact that there are at present seven children, with I.Q. ratings from 50 to 75, assigned to him, and that they are all within the age

grouping nine through twelve years. At least one of these children has an intelligence potential rated higher than that of "D," which is contrary to the instance in 1970, and there are at least two other girls in the group. He avers that all of his children have individually-tailored tasks, which are assigned each day, that they participate with children outside the special class in programs in other subject areas, and that they eat with other children in the lunch room of the school. This teacher possesses a master's degree and is fully certified to instruct the class. The teacher that "D" had during 1970 is also fully certified as a special education teacher.

The hearing examiner can find no basis for a judgment that the assigned placement of "D" for the 1970-71 or 1971-72 school year was, or is, in any way improper or unsuitable. The classification seems to have been properly made. There was a team effort involved in placement and in follow-up procedures, and the children assigned to these classes were grouped within proper limits with respect to age and rated intelligence. The two teachers, who testified at the hearing, were, in the opinion of the hearing examiner, professional in every sense of that word, and they appear well versed in those methods appropriate for children so assigned. Against the weight of this combined testimony, there is only petitioner's judgment that the school's proposed placement is not a suitable one for "D," and this judgment, with respect to "D's" placement for the school year 1971-72, is made without even a trial to determine the merits of the school's proposed program.

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

* * * *

The Commissioner has carefully reviewed the report of the hearing examiner and concurs with the findings expressed therein. He observes that there is no factual evidence to support the claim that the school's proposed program for "D" in the school year 1971-72 is not suitable or proper, and there can hardly be a claim that the program is not effective because it has not been given an opportunity to be tested and tried. Accordingly, the Commissioner holds that the judgment of the child study team of the Scotch Plains-Fanwood School District must be found to be valid and of legal effect.

Personnel of such child study teams are specifically empowered to make just such judgments as that made herein. Admittedly, it is a difficult task, but as the Commissioner observed in *The Parents of K.K. v. Board of Education of the Town of Westfield, Union County*, decided by the Commissioner June 1, 1971:

> "*** the State Board of Education has required each district to employ highly-qualified personnel representing many disciplines. The certification standards for these team members are high. When, as in this instance, such a team makes a judgment it is qualified and mandated to make *** *that judgment will not be determined to be faulty* or incorrect by the

Commissioner; *absent* a clear showing of procedural fault or an arbitrary exercise of discretion without proper diagnostic information." (*Emphasis supplied.*)

In the instant matter, "D" was properly classified, by a full child study team, and assigned to a class which must be judged to be one that conforms to standards established by the State Board of Education. Accordingly, the classification and assignment may not be upset by petitioner's mere allegations that the placement is not suitable; particularly, when these allegations are accompanied, as in this instance, by a direct refusal to try a proposed program, which is new and different from the one in which "D" was enrolled in the previous year.

Accordingly, having found that the Scotch Plains-Fanwood Board made a judgment it was empowered to make, and that such judgment was made after a proper and careful determination, the Commissioner finds the Petition herein to be without merit. It is therefore dismissed.

COMMISSIONER OF EDUCATION

November 4, 1971

**Marjorie B. Hutchenson,**

*Petitioner,*

**v.**

**Board of Education of the Borough of Totowa, Passaic County,**

*Respondent.*

## COMMISSIONER OF EDUCATION

## DECISION

For the Petitioner, Saul R. Alexander, Esq.

For the Respondent, Corrado & Corcoran (Robert E. Corrado, Esq. and Thomas P. Cook, Esq., of Counsel)

Petitioner, a tenure teacher in the employ of the Borough of Totowa Board of Education, hereinafter "Board," demands judgment that she is entitled to full payment for accumulated sick leave days and other sick leave benefits, and contends that the leave of absence without compensation, which the Board granted her, is *ultra vires.* The Board denies that the stated provisions of its sick leave policy are applicable in this instance and avers that its actions were proper.

Oral argument in this matter was held on June 14, 1971, at the office of the Passaic County Superintendent of Schools, Paterson, before a hearing examiner appointed by the Commissioner. At that time five documents were received into evidence. Briefs have also been filed. The report of the hearing examiner is as follows:

Petitioner suffered an illness, which might commonly be referred to as a heart attack in May 1970, and was so disabled that she was not able to resume her teaching duties for the remaining part of that school year. However, she did receive compensation for each of the days she was absent in May and June 1970, since her sick leave entitlement provided ample coverage, and her illness was recognized by the Board as such. On June 30, 1970, the end of the 1970-71 school year, petitioner still had 49½ accumulated sick leave days remaining to her credit.

On July 15, 1970, petitioner addressed the following letter (R-1B) to school officials:

> "Since my health will not permit me to return in September, 1970, I am asking the Board of Education to *grant me sick leave* for the school year 1970-71. The enclosed medical certificate is self-explanatory." (*Emphasis supplied.*)

Petitioner enclosed a statement from her physician saying that he had advised her to seek a "leave of absence" from her duties. However, despite this advice, it is noted here that petitioner, in the letter quoted, *supra*, has requested a "sick leave." (R-1B)

In any event, in response to petitioner's request for "sick leave," the Superintendent of Schools indicated by answering letter (PR-C) that he would present a request for a "leave of absence" to the Board of Education at its August 1970 meeting. There was no reply from petitioner at that time. Subsequently, the Superintendent made his recommendation, with the terms as stated, and the Board at its regular meeting on August 26, 1970, did grant petitioner a "one year leave of absence for the 1970-71 school year." (PR-D) This leave was to be without compensation of any kind, and the Superintendent of Schools made it clear in a letter dated August 27, 1970, (PR-D) that there was no recognition of a sick leave entitlement.

On September 14, 1970, petitioner addressed another letter to the Superintendent of Schools (PR-E) as follows:

> "In reply to your letter dated August 27, 1970, please be advised that *I did not ask for a leave of absence.* I had requested *sick leave* for the school year 1970-71. Since there is a difference between these, will you please present my request, as stated to the members of the Board of Education. I would like them to reconsider my original letter, granting me *sick leave* for the year 1970-71." (*Emphasis supplied.*)

There followed another exchange of letters between petitioner and the Superintendent of Schools, which made it clear to the Superintendent that petitioner was seeking to exercise the provisions of the "sick leave policy," which was attached to, and made part of, a negotiated agreement which the Board had executed and made effective for the school year 1970-71.

This agreement (P-1) has the following applicable provisions embodied in "Schedule B" with respect to employee sick leave:

> "***(a) He shall be granted 10 days cumulative sick leave in accordance with state law.***
>
> "(f) Full salary shall be paid for absence due to illness until such accumulated leave is used up, after which, the full time employee shall receive the difference between the contract salary and the substitute's pay for the duration of the *contract period.* ***" (*Emphasis supplied.*)

However, the Board refused to agree to petitioner's request for "sick leave," pursuant to the stated terms of this policy, and the Superintendent of Schools addressed a letter to petitioner dated October 15, 1970, (PR-H) reiterating the decision that "a leave of absence" was the "appropriate course of action" and maintaining:

> "***The board of education believes that the purpose of sick leave would be abused to extend its benefits in the manner you so requested."

Thus, the issues are joined and may be simply stated as follows:

> 1. May petitioner claim sick leave benefits for the 1970-71 "contract period" even though her illness was incurred during the preceding school year of 1969-70?
>
> 2. If she may, is she entitled to: a. compensation for her accumulated days of sick leave entitlement remaining and credited to her as of the time of the initial onset of illness? b. an extended sick leave under the Board's sick leave policy, even though the projected sick leave was for a period comprising an entire school year?
>
> 3. Was the Board justified in granting an extended "leave of absence," rather than the "sick leave" that petitioner requested?

Petitioner contends that she did not lose her status as a teacher during the summer months of 1970 by virtue of the fact that she had applied for recognition of a sick leave entitlement, for the succeeding academic year, according to the terms of the Board's policy. (PR-1) In petitioner's view, her accumulated days of sick leave maintained intact, to September 1970, that status as an employed teacher. Petitioner avers that she was entitled also to all of the extended sick leave benefits to the end of the 1970-71 "contract period" on June 30, 1971.

The Board does not deny at this juncture that petitioner is entitled to compensation for her 49½ accumulated days of sick leave entitlement, but does maintain that mere payment of compensation for these days would not create an obligation to pay for extended sick leave thereafter, since, by the Board's interpretation, the "contract period" specified in the sick leave policy was the "contract period" effectively in operation when petitioner became ill. In this view, since petitioner became ill in May 1970, the contract period applicable with respect to an extended benefit was the contract period which ended on June 30, 1970. To hold otherwise, the Board contends, would entail the payment of large sums of money for a period of an entire year without adequate justification in a manner at variance with the public interest.

The hearing examiner also notes that the Board maintains that the Petition contained herein is untimely and that petitioner is barred on equitable grounds of laches from securing the extended sick leave here sought. This contention is grounded on the fact that petitioner did not immediately reply either when the Superintendent informed her on July 23 (PR-C) that he would persent her request for a "leave of absence" to the Board of Education at the August 1970 meeting, or after notification that the "leave" had been granted. This latter notification was dated August 27, 1970. Petitioner's reply (PR-E), refusing a "leave of absence," was dated September 14, 1970.

In this respect, petitioner states that she was recuperating away from home during the period July - September 1970, and infers that this may have occasioned some of the delay in reply. In any event, petitioner maintains that the Board was not harmed by the delay and that the hiatus in time was in reality a short one.

Finally, there is no question at this juncture that petitioner's illness in May 1970 was a legitimate reason for her initial and subsequent absences from her tenured teaching position, although the Board did initially question the documentation of this illness at the time of the conference of counsel. Additionally, there is now no question of petitioner's employment status during the 1971-72 school year, since her resignation from her former tenured position has now been tendered and accepted.

* * * *

The Commissioner has carefully reviewed the report of the hearing examiner and noted the issues posed for consideration. Particularly, the Commissioner observes that petitioner's prayer is for those rights to sick leave entitlement which she maintains were available, or should have been made available, to her as a teacher during the 1970-71 school year in the Borough of Totowa School System and that her actions to secure these entitlements were timely and should not be barred by laches at this juncture. The question is then raised - What are these lawful entitlements?

The school laws contain four basic provisions pertinent to the instant adjudication that govern the sick leave entitlement that must, or may, be given to persons regularly employed. The first of these, *N.J.S.A.* 18A:30-2, makes it mandatory that:

> "All persons holding any office, position, or employment in all local school districts, regional school districts or county vocational schools of the state who are steadily employed by the board of education *** *shall be allowed* sick leave with full pay for a minimum of 10 school days in any school year." (*Emphasis supplied.*)

It is noted that the word *shall*, contained in the statute, *supra*, makes the allowance of "10 school days" in any school year a mandatory provision. The Totowa Board's sick leave policy conforms to this mandated minimum provision.

However, there are additional statutes which make it possible for boards of education to grant sick leave over and above the minimum mandated by *N.J.S.A.* 18A:30-2, *supra.* These statutes are found in *N.J.S.A.* 18A:30-2.1 *et seq.*, and the two most pertinent to the matter *sub judice* are *N.J.S.A.* 18A:30-6 and 30-7.

*N.J.S.A.* 18A:30-7, makes particular reference to *N.J.S.A.* 18A:30-2, *supra*, and allows the board of education to grant a sick leave entitlement over and above the mandated ten-days minimum. In this respect, the statute confers a discretionary power on the board. However, this power of the board, while broader in some respects, is restricted by the statement:

> "*** that *no person shall be allowed* to irease his total accumulation by more than 15 days in any one year." (*Emphasis supplied.*)

This statute is not directly applicable herein since the Totowa Board has chosen in its "Sick Leave" policy (PR-B) to limit sick leave rights to the mandated minimum of "10 days in any school year" provided by the terms of *N.J.S.A.* 18A:30-2, *supra,* and to limit accrual rights for unused sick leave to those mandated by *N.J.S.A.* 18A:30-3, which provides:

> "If any such person requires in any school year less than the specified number of days of sick leave with pay allowed, all days of such *minimum* sick leave not utilized that year *shall be accumulative* to be used for additional sick leave as needed in subsequent years." *(Emphasis supplied.)*

However, these statutes and *N.J.S.A.* 18A:30-2, *supra*, hold a joint relationship to the fourth statute, which the Commissioner holds is a further liberalization of the three statutes discussed, *supra*, pertinent to sick leave entitlement.

This fourth statute, *N.J.S.A.* 18A:30-6, is quoted in its entirety as follows:

> "When absence, under the circumstances described in section 18A:30-1 of this article, *exceeds* the *annual sick leave* and the *accumulated sick leave*, the board of education *may pay* any such person each day's salary less the pay of a substitute, if a substitute is employed or the estimated cost of the employment of a substitute if none is employed, for such length of time as may be determined by the board of education in *each individual case*. A day's salary is defined as 1/200 of the annual salary." (*Emphasis supplied.*)

The Commissioner holds that the provisions of this permissive statute may be exercised by a board of education at its discretion whenever a board determines that it is right and proper to do so as an expansion of the minimum sick leave entitlement made mandatory by the provisions of *N.J.S.A.* 18A:30-2, *supra*, and 30-3, *supra*, or the more liberal provisions provided in 18A:30-7, *supra*. However, the Commissioner also holds that the provisions of this statute may not be embodied as a statement of policy equally applicable as a *blanket* provision for all members of a staff, but may only be made applicable after scrutiny by the board of "each individual case," as specifically required by the statute.

In the instant matter, therefore, the Commissioner holds that the Board's policy provision found in Exhibit P-1. which states that after accumulative sick leave has been used up, "*** the full time employee shall receive the difference between the contract salary and the substitute's pay for the *duration of the contract period*" is *ultra vires* in its present form by reason of the fact that it does not require an individual scrutiny of each case.

This position with regard to this statute has been a recognized precept of case law since the decision of the Commissioner in *Mabel Marriott v. Board of Education of the Township of* Hamilton, Mercer County, 1949-50 *S.L.D.* 69, affirmed State Board of Education, 1950-51 *S.L.D.* 69. In that decision, the Commissioner dealt with a set of facts which were essentially similar to those contained herein, and held that the then current applicable statute, *R.S.* 18:13-23, basically unchanged to the present day but now notated as *N.J.S.A.* 18A:30-6, *supra,* precluded an automatic, blanket coverage and required an individual consideration of each request. Specifically, the Commissioner said at page 60:

> "***It will be noted that the board must consider *each individual case.* Therefore, a blanket rule of a board of education to pay for a certain number of days the difference between a teacher's salary and her substitute's without considering the individual cases is inconsistent with law. Accordingly, such a *blanket rule* must be considered only as a general statement of policy, not binding upon the board or any of its members in an individual case. *The board members are free, and, indeed, it is their duty, to decide each individual case on its merits. ***" (Emphasis supplied.)*

In the instant matter, the Board's Sick Leave policy, contained in Exhibit P-1, gives away that freedom "to decide each individual case," and it is this provision which the Commissioner holds is inconsistent with the statute, *N.J.S.A.* 18A:11-1, which prohibits such inconsistency and which reads in part as follows:

> "The board *shall* *** 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 management of the public schools *** and for the *employment,* regulation of conduct and discharge of its employees.***" (*Emphasis supplied.*)

Having found the basic statutes pertinent to this adjudication and having found the Totowa Board's policy on extended sick leave entitlement to be faulty in part, the Commissioner will now discuss the issues posed by the hearing examiner relevant to petitioner's specific entitlement.

*I.*

It is clear that petitioner had not, in July 1970, requested a leave of absence from her employment as a teacher in the Totowa Board's schools: her request was for a sick leave. Since this was so, the Commissioner holds that petitioner was entitled initially, in September of 1970, to a complete reimbursement, if absent from school, for 49½ days of sick leave, which she had accumulated in previous years, plus ten days which accrued to her credit on September 1, 1970. As of that date, she had not abandoned her "post of duty."

In the *Mariott* decision, *supra*, the Commissioner said in this regard at page 59:

> "*** It is the opinion of the Commissioner that a teacher who is unable, because of illness, to report for duty the first day of school is just as much absent from her post of duty as if she were absent any other day of the year. The statute does not provide that a teacher must report for duty on the first school day of September in order to qualify for sick leave. The Commissioner cannot read into the law a provision which is not included.***"

Further, on page 59, the Commissioner said:

> "*** Not having relinquished her position, pursuant to this statute, she held a position the first day of school, not being able to report, she was absent from her post of duty the first day of school, and being from her post of duty, she became entitled to sick leave pursuant to Chapter 143, of the Laws of 1942.***"

Further, also on page 59, he said:

> "***it is just as important for the welfare of the teacher and the school for her to be able to remain away from school at the beginning of the school term and receive pay as at any other time of the year.***"

In the instant matter, the Commissioner holds that petitioner's entitlement to accumulated sick leave time is no less clear, and to deny it to her on the basis that one academic year had ended is to deny the right of tenure teachers to a continuing contract with all of the benefits thereof. It is clear that if petitioner had suffered a heart attack in January 1970, her entitlement to sick leave to the limit of accumulation would have gone unchallenged. Her entitlement to it in the circumstances described herein is no less clear, absent proof that she had resigned or abandoned her position in the meantime.

Therefore, the Commissioner directs that petitioner be compensated forthwith for 59½ days of sick leave entitlement, which was not paid to her subsequent to her absences from school during the 1970-71 school year, and that other benefits that were due her during that 59½-day period be afforded her now retroactively.

II.

The second issue raised herein has already been answered by the Commissioner in the discussion of the statutes pertinent to sick leave, *supra.*

The policy provision contained in Exhibit PR-1 with respect to extended sick leave coverage is clearly illegal. However, under the stated provisions of *N.J.S.A.* 18A:30-6, *supra*, the Board "may" act to pay some or all of the difference between the costs incurred in securing a substitute for petitioner for the 1970-71 school year and petitioner's contracted salary. Although the Commissioner finds no compulsion for the Totowa Board to take such action, he remands this matter to the Board for its deliberation and for reconsideration of its position.

III.

The third issur posed by the hearing examiner has been substantially answered, *supra*; namely, that the Board's action in granting a leave of absence under the circumstances was clearly faulty in part. The Commissioner holds that a sick leave should have been granted for a period of 59½ days, and subsequent determination made prior to the expiration of that period as to whether or not an individual consideration warranted the payment of the difference between the salary of a substitute and the contracted salary of petitioner. Under such circumstances, petitioner could have intelligently decided whether to maintain tenure rights by requesting a leave of absence pursuant to the statute, *N.J.S.A.* 18A:11-1, or abandon her position by virtue of her physical inability to fill it. In any event, this fact of the dispute is now rendered moot, since petitioner has resigned her position as of June 30, 1971.

In summary, the Commissioner directs the Totowa Board of Education to compensate petitioner for 59½ days of sick leave entitlement retroactive to September 1, 1970; to grant her other benefits for which she may have been eligible during that period; and to consider on an individual basis whether or not it chooses to award other sick leave benefits in the manner prescribed by law.

COMMISIONER OF EDUCATION

Pending before State Board of Education

November 9, 1971

**In The Matter of The Tenure Hearing of Paul W. Jones, School District of the Borough of North Arlington, Bergen County.**

**COMMISSIONER OF EDUCATION**

**Decision**

For the Complainant Board of Education, George E. Davey, Esq.

For the Respondent Paul W. Jones, Jack Mandell, Esq.

The North Arlington Board of Education, hereinafter "Board," has certified a series of eight charges against its Superintendent of Schools alleging actions which, if found true in fact, would constitute (a) conduct unbecoming a school administrator, (b) inefficiency, and (c) dereliction in the performance of duty. The Superintendent denies all charges.

A hearing in this matter began on March 22, 1971, and was continued on eight other days - March 23 and 24, April 5, May 3 and 4, and June 1, 3 and 7, 1971 - before a hearing examiner appointed by the Commissioner at the office of the Bergen County Superintendent of Schools, Wood-Ridge. Briefs of counsel were subsequently filed. The report of the hearing examiner is as follows:

While the Board's certification contains a total of only eight charges, there was a total of ten originally proffered by a member of the North Arlington Board of Education. The eight charges, which were certified by resolution of the Board, specifically say that the Superintendent did certain things improperly or contain other allegations against him. The exact wording of the charges - all of them pertinent to and against the Superintendent - are contained in the letter of the Board member referred to, *supra.* This letter addressed to the Board Secretary is as follows:

" *** AS A MEMBER OF THE NORTH ARLINGTON BOARD OF EDUCATION, AND PURSUANT TO N.J.S. 18A:6-10 ET SEQ., I HEREBY SUBMIT THE FOLLOWING CHARGES AGAINST THE ABOVE ENTITLED INDIVIDUAL.

"1–DID FAIL TO CARRY OUT BOARD DIRECTIVES VOTED ON UNANIMOUSLY BY THE BOARD AT THE MEETING OF APRIL 14, 1969.

"2–ALLOWING A COURSE OF STUDY CONTRARY TO N.J.S.A. 18A:35-4.

"3–DID FRAUDULENTLY ALLOW THE DISMISSAL OF THE JUNIOR AND SENIOR HIGH SCHOOLS ON APRIL 23, 1970.

"4–DID USE UNPROFESSIONAL ETHICS IN DISCUSSING CONTENTS OF BOARD OF EDUCATION CONFERENCE MEETINGS HELD ON APRIL 13 AND 14, 1970 WITH CERTAIN TEACHERS.

"5–DID SUSPEND AND DISCIPLINE A STUDENT, CONTRARY TO N.J.S.A. 18A:37-4 AS AMENDED BY L. 1968 EFF. SEPT. 9, 1968.

"6–[Not certified]

"7–DID REFUSE TO TAKE ANY ACTION AGAINST EMPLOYEES OF THE BOARD OF EDUCATION IN REGARDS TO AN ALLEGED ASSAULT ON A STUDENT ON MAY 26, 1970.

"8–[Not certified]

"9–DID PRESENT A FALSE RECOMMENDATION TO BOARD IN REGARDS TO REHIRING A TEACHER.

"10–INEFFICIENCY IN THE COMPLETE MISHANDLING OF AN INVESTIGATION CONCERNING A TEACHER."

The hearing examiner proposes to consider each of these charges *seriatim* and in the detail necessary for an understanding of the facts pertinent to each. This consideration and the findings with respect thereto are as follows:

*CHARGE NO. 1*

"Did fail to carry out Board directives voted on unanimously by the Board at the meeting of April 14, 1969."

Specifically, the Superintendent is charged herein with failing to file a report containing a "complete study of a program on narcotics best suited for the students in our school system." These words in quotations are taken from the minutes of the North Arlington Board of Education, dated April 14, 1969, and introduced in evidence as P-1, which also indicates that the program was to be "instituted" in the 1969-70 school year. The text of the motion in its entirety is of some importance and is as follows:

> "At the suggestion of Mr. Skolski, the Board of Education Superintendent of Schools will make a complete study of a program on narcotics best suited for the students in our school system. This program to be instituted in the beginning of the 1969-70 school year, on Motion by Mr. Rosell, Mr. Skolski."

All five members of the Board were present on that evening of April 14, 1970, and voted affirmatively when the motion was brought to a vote.

The hearing examiner has reviewed all of the pertinent testimony and exhibits with regard to this resolution and from this review he has educed the following pertinent chronicle from which certain conclusions and deductions may be reached:

The North Arlington School System had had a course in "drug abuse" for many years – the testimony of the district's senior health teacher was to the effect that there had been such a course since 1958. However, the course, as such, was in reality a unit of work embedded in an overall curriculum in "Physical Education, Health, Home Nursing," applicable to the program for all students in grades 7-12. This course of study (R-5) is well-developed by grade level, multi-faceted and quite complete. It was evidently revised in 1963, according to its frontispiece, and there is some reason to suppose that in that year it received a kind of informal approval by the Board at the time of the North Arlington High School's evaluation by the Middle States Association of Colleges and Secondary Schools. However, no such approval is recorded in the minutes of that year, and the origin of this course of study, probably predating the employment of the Superintendent of Schools in 1961, is nowhere in evidence. The important fact here is that this course existed on April 14, 1969, and it contains many references to drugs and drug abuse.

According to the senior health teacher, a teacher of health for many years, drug abuse and information on drugs had long comprised a part of the total program, and she offers notebooks and exhibits to prove this point. (R-9, R-10) Nevertheless, the Board's resolution of April 14, 1970, was moved by a newly-elected member of the Board, seconded by another new member and passed unanimously. Their testimony at the hearing was that on April 14, 1969, they were not cognizant of the fact that a unit of a course of study on drug abuse had been taught for many years in grades 7-12, but neither were they told this by the Superintendent of Schools.

In May 1969, subsequent to the resolution of the Board quoted, *supra*, the Superintendent appointed a chairman of a committee to study the narcotics or drug problem and its place in the school system's curriculum, and five other persons were subsequently named to serve with her. This chairman testified that it was so late in the year that no attempt was made to actively organize the committee's work that spring, but that work did commence in the fall of 1969, and culminated in meetings between the committee appointed by the Superintendent and members of the Board in December 1969 and January 1970. At the December meeting in that year, the Superintendent and the committee evidently gave the Board members present a proposed course of study in drug abuse for grades 4, 5, and 6, (P-4) according to the testimony of the Board member who preferred the charges herein. (Tr. 51) Subsequently, in further meetings in January and in the spring of 1970, further discussions were held with regard to this program for grades 4, 5 and 6, but the Board has made no formal adoption of this program to date.

It is not directly pertinent to the charge under consideration, but it develops that members of the Board 1 have felt this submission (P-4) was taken directly from a course of study developed by another school system nearby. The hearing exminer finds that this sub-charge is not substantiated to any degree, although a page entitled "Objectives" is essentially the same as a similar page so designated in a guide developed and published by the Ramsey, New Jersey, Schools. As far as the examiner can determine, however, this is the only identical material, and in no way can this one duplication be held as evidential against the good name of the Superintendent of Schools or as a reason for censure of the committee. There is no reason to question the committee's sincerity in believing that the objectives were fitting and proper guides in the local situation.

In August 1970, the Superintendent gave the members of the Board an

> "Outline of The Course of Study on Alcohol, Tobacco and Drugs Updated, school year 1969-70 from Revised Course of Study Dtd. 1963 Per 18A:35-4" (P-3)

This is a seven-page document pertinent, according to page titles, for grades 7, 8, 9, 10 and 12. There is no mention in it of grade 11, and it must be presumed that there was no proposed course of study at this grade level during the 1969-70 school year.

At the time the document (P-3) was given to members of the Board in August 1970, some of the Board members were evidently still not aware that the program in drug abuse had been taught during the previous year (Tr. 89) in the modified or revised form outlined in the document. In any event, they had never approved, or been asked to approve, the revision.

The questions demanding a finding of fact are contained within the contect of the recital, *supra*, and are directly related to the charge. The questions and findings are as follows:

1. Was the direction of the Board, contained in the resolution of April 14, 1969, that a "program on narcotics" be "instituted" a proper one, and was it implemented by the Superintendent?

The hearing examiner finds that the motion of April 14, 1969, was faulty in part when it proposed to "institute" a course, since the course, as designated, was already embedded in the curriculum for grades 7-12, and the motion was thus superfluous. The hearing examiner regards the changes that were evidently made in the curriculum for grades 7-12, pertinent to the 1969-70 school year, as revisions which were not unlike revisions that teachers of all subjects customarily made to update presentations and revitalize course content, and not of so sweeping a nature as to require prior Board approval. While it would certainly have been in order for the Superintendent to have told the Board of the prior background of this drug abuse course in April or May 1969 and to have kept the Board better informated of the changes, which were made in it subsequent to that date, there is no reason to believe that such recitals had been expected of him in the past or were going to be required of him in the future.

In any event, he moved promptly to set up a study committee, and the committee reported the results of its study with regard to what was a new course "initiation" for grades 4-6 in December 1969.

While this "initiation" was tardy for these grade levels, the hearing examiner holds that the tardiness was understandable in the circumstances as recited, *supra*, and no cause for censure, since the Board's resolution of April 14, 1969, with respect to the initiation of a course of study in narcotics for grades 4-6, was, in the view of the hearing examiner, unreasonable. With respect to the time allowance for implementation, large school systems with full-time curriculum coordinators are able to react quickly to any request for course initiation or revision. Small systems, such as theone herein, depend on after-school work from regular members of a teaching staff, and the cooperative effort, which was displayed here, often moves more slowly to concrete accomplishment.

In consideration of all the circumstances recited, *ante*, the hearing examiner recommends that this charge be dismissed.

*CHARGE NO. 2*

"Allowing a course of study contrary to *N.J.S.A.* 18A:35-4."

This charge against the Superintendent is that he instituted a course on narcotics without discussing same with the Board and getting its approval of same contrary to New Jersey Law. The specific statue which is applicable is *N.J.S.A.* 18A:33-1, which provides, *inter alia*, that:

"*** no course of study shall be *adopted* or *altered* except by the

recorded roll call majority vote of the full membership of the board of education of the district." (*Emphasis supplied.*)

The primary issue herein is whether or not a course of study, or a unit of a broad course of study, which was introduced into evidence as P-3 (originally identified as R-1) was of so novel or original a character as to have required approval by the Board of Education, pursuant to the mandate of the statute, *supra*, prior to the time the course or unit was implemented in the fall of 1969. The document (P-3) bears this title:

"OUTLINE OF THE COURSE OF STUDY ON ALCOHOL, TOBACCO, AND DRUGS UPDATED, SCHOOL YEAR 1969-70 FROM REVISED COURSE OF STUDY DTD. [DATED] 1963 PER 18A:35-4" (*Brackets supplied.*)

The hearing examiner has carefully reviewed the evidence in this regard and factually details it as follows:

1. The revision, *supra*, was implemented in 1969-70 without Board approval, but there is no finding embodied in this statement that approval was required. The statement is one of fact.

2. This document must be compared with previous courses of study in health and physical education to determine if the changes embodied in it (P-3) were of so major a nature as to have constituted a new "adoption" in 1968, or an "alteration," of such magnitude as to trigger the mandate of the statute, *supra.*

The hearing examiner has examined the prior pertinent documents submitted in evidence related to "drugs" or "narcotics," and cites the following excerpts as proof that a course, or units of a course, had been taught in this field for many years:

*From Exhibit R-8* – A "Curriculum for Health Education," dated August 13, 1956, Grades 7 & 8 - Personal Hygiene:

" *** Some time will be devoted to a unit on the danger and effects of *drugs, liquor* and tobacco.***" (*Emphasis supplied.*)

*From Exhibit R-5* – This is a course of study in "Physical Education-Health Home Nursing" and at the bottom of the title page is the notation "Revised 1963." This document contains an "Introduction to Course of Study for Boys Health Education." and the following specific sentence:

"***Certain phases of the Course of Study, in particular the unit on Tobacco, *Alcohol and Drugs*, will be presented *each year* in a degree and thoroughness compatible with the grade level.***" (*Emphasis supplied.*)

There was no evidence that this course of study (R-5), as revised, was ever officially adopted by the Board, but there is definite documented evidence that a unit devoted in part to drugs or narcotics was taught at most of the grade levels (7-12) prior to the 1969-70 school year. This evidence was that introduced in conjunction with the testimony of the veteran teacher referred to in the discussion of *Charge I,* and is contained in *Exhibits* R-9 and R-10. R-9 is a students' notebook labeled "Narcotic Addiction," and contains a pciture of a needle about to be inserted in a bare arm. This notebook was submitted to the teacher, *ante*, on April 10, 1968. The second exhibit is a notebook labelled "Health," which has a date notation "April 1966" on page five and contains four pages of what appear to be class notes on "Narcotics."

In addition to this documentation, it was the testimony of this veteran teacher that the course of study or unit embodied in P-3 and taught in 1969-70 was the same as the one she had taught for years. She stated she could attest to this statement because she had reviewed the lesson plans of the new teacher who had been assigned to the subject and had observed her teaching on a number of occasions. The veteran teacher did say that some enrichment through the use of audiovisual materials had been added in 1969-70, and that, in other past years, as knowledge of drugs and their use increased, this knowledge had gradually been incorporated in new component segments into the course of study.

The testimony of the veteran teacher was corroborated by that of the High School Principal, who also stated that a unit on drugs and narcotics had been taught in prior years.

The Superintendent testified that the document, P-3, or the curriculum content that it contained, did not "alter" a course of study, but that it represented a modification of an existing program which was so minor in nature that no prior adoption by the Board wa needed or necessary and that the statute, *N.J.S.A.* 18A:33-1, was not triggered.

The hearing examiner finds this charge, and *Charge I,* to be founded on misunderstanding and nurtured by poor reporting procedures. The misunderstanding prompted the Board to adopt a resolution to "institute" a narcotics program in the school year 1969-70, when one in fact already existed. The poor reporting procedures occasioned a later reaction by some Board members that they should have been told, in view of the Board's resolution of April 1969, prior to the adoption by the school of the program embodied in P-3 in September 1969. In determining that the charges were based on misunderstanding and nurtured by poor reporting procedures, the hearing examiner finds both parties to this dispute have blame to share.

On the one hand, at the meeting of April 14, 1969, a member who was new to the Board - he had been elected in February of 1969 - moved a resolution to *institute* a "program of narcotics best suited for the students in our school system." This resolution, by the witness's own testimony, was moved in a

"vacuum" of knowledge (Tr. 80, 81) of the work the schools were already doing in this field and in the face of a suggestion, from a veteran member of the Board, that a study should be made first and reported back to the Board for "implementation." (P-1) Having moved precipitously in this manner and having rejected a "study" prior to the motion to "institute" a program, the hearing examiner holds that this Board member and the Board generally cannot hold the Superintendent or other school administrators fully responsible for a report of the *status quo* relevant to a course of study in drug abuse or narcotics, and have no entitlement to plead suprise because they learned in August 1970 that small revisions in an existing course of study were made in 1969.

On the other hand, the hearing examiner holds that the Superintendent should have reported to the Board either on April 14, 1969, or in subsequent months, on the current status of the drug-abuse curriculum in the schools. Hindsight would certainly mandate such an approach. However, while saying this, it must also be said that specific details of course offerings and of the innovations constantly woven into the fabric of curriculum content are not solely the responsibility of superintendents of schools in districts of this size but of principals, department heads and teachers. It is not inconceivable but probable, the hearing examiner believes, that on April 14, 1969, the Superintendent did not know the current statue of "drug abuse," as a unit of work in his schools. There is no rational expectation that he should have. However, it is clearly apparent, in retrospect, that a personal study by him and a report to the Board would have been both warranted and advisable at the time.

In summary, the hearing examiner finds that the charge contained herein against respondent is not true in fact, since no "new" course or an "alteration" so significant as to require prior Board approval was instituted in the fall of 1969, but the hearing examiner also finds that there were some elements of blame attributable to both parties, which occasioned the charge. The hearing examiner recommends that both parties now be directed to:

1. exercise caution in moving future new programs until all facets of proposed courses of action have been explored.

2. develop rules and jointly-accepted principles, which will guide future reporting procedures required of the Superintendent of Schools.

However, the hearing examiner believes the charge as specified is not substantiated by the weight of credible evidence and he recommends that it be dismissed.

*CHARGE NO. 3*

"Did fraudulently allow the dismissal of Junior and Senior High Schools on April 23, 1970."

The details and specifications of this charge, certified by the North Arlington Board of Education and made part of the pleadings, are as follows:

> "On the above date a telephone call was received at the school system switchboard wherein it was claimed a bomb was placed in the high school and it was due to go off at 12:29 P.M. on that day, two hours subsequent to the time of the call. The police were immediately notified. The Superintendent notified the police department not to do any thing until he, the superintendent calls them. The police were never called in and the building was not searched. At approximately 12:15 P.M., the Superintendent dismissed the students for the day and closed the school. Subsequently, the Superintendent admitted to the Board members that the students threatened to walk out of school that afternoon and he used the bomb scare as an excuse to close the school prior to the student walkout."

The charge herein was set in a context of great student unrest precipitated in large measure by a prior decision of the Board to permit the contract of a nontenure teacher to expire by its terms but, also, according to some testimony, because of student dissatisfaction with the school cafeteria food and cafeteria operation. On the early morning of April 23, 1970, this student unrest was the cause of a meeting attended by the High School principal, the Superintendent of Schools, and student leaders so that the unrest could be discussed and evaluated. During the course of the meeting, or shortly thereafter, school administrators learned of the possibility that some students would stage a "walk-out" from school at approximately 12:30 p.m. on that day.

Later that morning, at approximately 10 a.m. or a short time thereafter, a call was received by one of the school secretaries. The caller stated that a bomb was to go off in the High School building at 12:29 p.m. While there had been such threats on prior occasions, there is no record that school had ever been dismissed early as a result of them. However, this particular threat was evidently viewed more seriously because of the general unrest within the building.

At any rate, within the course of the next hour and a half, following receipt of the threat, the Superintendent of Schools had discussed the threat by phone with the Board President, conferred separately with the High School principal, and met in an informal meeting with the Deputy Chief of Police, another police officer, who was also a Board member, and the principal to determine a course of action. At this meeting, held on the parking lot of the school, the Superintendent evidently decided that the school should be closed and students dismissed at 12:15 p.m. or approximately fifteen minutes before the announced time of the bomb detonation. According to the High School principal, at the time the Superintendent made this decision to close the school, the group present agreed with the decision. The High School was subsequently closed at 12:15 p.m. There was no bomb explosion.

There is no question that the Superintendent of Schools had the authority to close the school on the given day. This authority was expressly conferred on him by the rules of the Board (R-11), particularly Rule 2:3-2, which provides that the Superintendent:

> "***may suspend any or all of the schools or classes for part or whole of day in cases of stormy weather *or in cases of emergency.*" (*Emphasis supplied.*)

The questions are whether or not on April 23, 1971, the Superintendent properly directed a search of the building, whether or not he falsely stated that a search had been made, and whether his announced decision to close the school at 12:15 p.m. that day was, or was not, a fraudulent misrepresentation of another and more subtle reason – the threat of a student walkout.

The testimony with respect to whether or not a search had been made for a bomb on April 23, 1970, was contradictory and inconclusive, but it seems clar that on the morning there were contrasting ideas as to who should be responsible for search procedures in such a situation. The President of the Board testified that he directed the Superintendent to make a proper search and that the police should also search. The High School principal said that on similar occasions, prior to this, he had been charged with the responsibility for search procedures. The Superintendent stated it had been customary in the past for janitors to conduct the search since they were so familiar with the building. In this specific instance, however, there was testimony from the High School principal that he had conducted a search himself and that, additionally, the janitor had also conducted a search of an informal nature. However, while the hearing examiner believes that this is the truth of the matter, and that such a search was conducted by the High School principal, there is no need for a formal finding on this question, since it is not formally emplaced in the charges.

The only substantial question before the Commissioner herein is whether or not the Superintendent of Schools "fraudulently" allowed a dismissal of North Arlington High School on April 23, 1970. In this regard, the root word, fraud, is interpreted by Webster's Dictionary to mean "deliberate deceit," and deceit is in turn defined as an "effort or willingness to deceive; misrepresentation; falsehood." In discussing such a charge of fraud, the Court of Appeals of Maryland, in the case of *Harry T. Lackey et ux v. Robert E. Bullard, et al.*, 227 *A. 2d.* 593 (1971), also discussed the burden of proof such a charge requires. At page 596, the Court said:

> "***That burden [of proving fraud] is a heavy one. More than a preponderance of evidence must be produced. Fraud can be established only by clear and convincing proof.***"

The hearing examiner finds, as a result of a review of the testimony pertinent to this charge, that the burden of convincting proof necessary to establish this charge as fact has not been presented.

On the one hand, there was testimony by one Board member, Mr. John Roselle, that on April 24, 1970, during the course of a meeting of the Board, the Superintendent of Schools stated that the students were dismissed early on April 23 because of the threat of a student walkout and not because of the bomb

scare. However, this testimony received no other corroboration from any other member of the Board. To the contrary, both Mr. Black and Mr. Cobb, also members of the Board, stated that they had never heard such a statement. Mr. Fertal, the Board President at the time of the incident, stated that he "thought" the rumored student walkout was an excuse for the early school dismissal, but he did not attribute his belief to a statement of the Superintendent. (Tr. 174, 180, 188) Mr. Skolski, the fifth Board member, gave testimony wich is replete with conclusions and opinions (Tr. 161-162), but offers no conclusive factual proof to support the charges, in the opinion of the hearing examiner. His testimony, on cross-examination, ended with these apparently conflicting judgments in summation of his own position in opposition to what the Superintendent did on April 23, 1970: (Tr. 165-166)

"Q. I am trying to understand from you, Mr. Skolski, whether – you see, there are two possibilities, if the Superintendent of Schools failed to dismiss school then he was wrong because the children were in danger; or he dismissed school and then he was wrong because he gave into (sic) student pressure and it seems to be a situation where he's damned if he does and damned if he doesn't.

"Mr. Davey: Is this a question?

"Mr. Mandell: Yes it is.

"Q. And I don't quite understand from you which one of the positions you've taken because you appear to be taking both positions, am I wrong?

"A. No, I take both positions."

The Superintendent emphatically denies that he used the bomb threat as an excuse to close the school, although he does state that he said in an aside to the Board that he thought the early closing meant that two birds had been killed with one stone.

The hearing examiner can find no "clear and convincing" proof in such testimony from six such actual or potential witnesses that the Superintendent fraudulently or deceitfully said or implied that he closed the High School at 12:15 p.m. on April 23, 1970, when in reality he had another motive. To the contrary, in the climate of that day and in the circumstances under which the threat of a bomb explosion was received, the hearing examiner believes that there is logical reason to think that the Superintendent believed the threat was the final precipitate act which justified the early closing, and that this was in fact the prime reason. While it is probably true that each of two principal threats existent on that date lent cogent implications to the other, the evidence implies, in the hearing examiner's view, that the decision the Superintendent of Schools was empowered to make, and did make, at the morning parking-lot conference of April 23rd, was made because of this culminating threat of violence.

Therefore, he recommends that this charge be dismissed.

*CHARGE NO. 4*

"Did use unprofessional eithics in discussing contents of Board of Education conference meetings held on April 13 and 14, 1970, with certain teachers."

This charge is founded on an allegation that the Superintendent ignored a directive of the Board to maintain a confidence with respect to a Board decision not to rehire two nontenure teachers. The charge is directly related to Charges 9A and 9B on a factual basis.

The facts pertinent to this matter are that on April 6, 1970, the Superintendent presented to the Board a list of teachers proposed for employment during school year 1970-71. This was a conference meeting of the Board, and the list was the subject of preliminary discussion on that date. On April 13th the Board met again - first in conference, then in a regular public meeting, and then again in conference. No formal action to hire any of the teachers whose names were on the list was taken; however, the Board agreed to discuss the list in more detail on the next evening, April 14th, at a fourth conference meeting. The Board did so on the evening of April 14th, and agreed to take formal action to approval the employment of all but two of the teachers whose names were on the Superintendent's recommend list at a special meeting to be called for April 18, 1970. Following the meeting of April 14, 1970, the Superintendent caused notice to be given to, or notified, two teachers that their contracts would not be renewed for the succeeding year. On April 18th, the Board did meet and approve for reemployment all but two of the teachers whose names were contained in the list which was originally given to it on the evening of April 6, 1970, by the Superintendent. The two teachers not re-hired were the same two that the Superintendent had notified after the meeting of April 14.

The controversy involved herein is centered around what instructions the Board gave the Superintendent regarding the confidentiality of their discussion and/or decisions on April 13 and 14, 1970. On the one hand, three members of the Board and the Board Secretary, including the member of the Board who was then President, testified that the Superintendent had been directed to maintain confidence, with respect to the substantive matters pertaining to the employment of teacher personnel, by the Board's President at the meeting of April 13, 1970. On the other hand, two Board members remembered no such directive, and the Superintendent, while not denying that a discussion or directive with respect to confidentiality took place or was given, avers that his understanding of the matter was that he was not precluded from disclosing the end result – the decision not to re-hire two teachers – to the teachers themselves, but that the restrictions applied only to the background discussion which occurred. He avers that the Board's decision on April 14th, was a final one – even if not one of legal effect – and that he felt obligated to notify the two

teachers in order to give them an opportunity to resign prior to the time of formal decision, if they wished to do so. The Board maintains that such an action by its Superintendent, in the face of the discussion or directive on confidentiality, was presumptuous, irresponsible, premature and insubordinate.

The hearing examiner observes that there is little doubt that a discussion occurred and that a directive of sorts was given, with respect to confidentiality, at the meeting of the Board on April 13, 1970. There *is* doubt that it was a "Board" directive, vis-a-vis a directive of the Board President, and there is great doubt that it was spelled out in detail or as precisely as the Board now seems to maintain was the case. In any event, there is no evidence that the Superintendent divulged any information to anyone on April 13th, the date of the discussion and/or directive on confidentiality, and there is likewise no evidence that the discussion or directive on confidentiality was repeated on April 14th. It was following this meeting that the Superintendent informed the two teachers that they would not be re-hired.

The hearing examiner calls the Commissioner's attention to the fact that this is another occasion when the Board President, or a group of the Board members, without formal vote, allegedly gave the Superintendent a "directive." On one other occasion (*Charge 3*), the Board President had directed the Superintendent to do certain things with respect to the bomb-scare incident. On another occasion, with respect ot *Charge 10*, the Superintendent is likewise directed by the Vice-President of the Board to take certain actions, and these directions, too, are herein the subject of charges.

With respect to *Charge 4* and also *Charge 10*, however, the questions posed are broader than merely: (1) Was the Superintendent given a legal directive by the Board of Education? and (2) If he was, did he carry out the directive? Such a simplistic view of the issue with respect to *Charge 4* cannot be countenanced, since even if the directive at issue herein was a legal directive adopted by the Board-and the hearing examiner can find no reason to believe that it was-and even if the directive involved in *Charge 10* had been given by the whole Board instead of by one individual, there would seem to be professional and ethical reasons why this Superintendent, or any superintendent, should refuse to comply in each of the instances.

In the instant matter, the careers of two teachers, whom the Superintendent believed should have been re-hired, were at stake. Under the circumstances, and regardless of whether or not the alleged directive of the Board President was legal or illegal, the hearing examiner opines that the Superintendent did nothing improper when he gave those two individuals a chance to salvage their personal reputations when the Board's decision had been clearly determined on April 14, 1970, and awaited only formal ratification on April 18th.

Accordingly, the hearing examiner recommends dismissal of this charge on two grounds:

(a) There is no evidence that the directive allegedly given to the Superintendent of Schools on April 13, 1970, was so precise as to constitute a bar to a factual statement by the Superintendent to two teachers on April 14, 1970, that they would not be reemployed in the succeeding school year.

(b) Even if the statement had been precise and issued by the whole Board, there were good reasons for the Superintendent to ignore it as improper and an infringement of those administrative prerogatives which the Superintendent possessed.

*CHARGE NO. 5*

"Did suspend and discipline a student, contrary to N.J.S.A. 18A:37-4 as amended by L. 1968 eff. Sept. 9, 1968."

This charge also contains, in the elaboration of the charge certified to the Commissioner, an allegation that the Superintendent told the Board an untruth and that he failed to inform the Board about a transfer of a student to another school system. There was extensive testimony concerning this charge. A recital of some of the facts of pertinence herein is in order intially; they are as follows:

The student, whose school attendance and placement are at issue herein, was a seventh grade boy during the 1969-70 school year, and his problems were caused and constantly aggravated by a broken and disruptive family life. While he was technically a ward of his mother, by court order, his actual place of residence, or domicile, was, on some occasions at least, that of the father.

In December of 1969, after a number of incidences of tardiness, the boy was given office detention as punishment. In January he was suspended again and on or about January 19, 1970, the boy was transferred out of the North Arlington School District where he had been living with his mother to the neighboring district where, according to the testimony, he was apparently then living with his father.

On or about February 2, 1970, the boy re-enrolled in the North Arlington Schools, but was suspended subsequently on February 4, February 10 and March 6, 1970 – this latter suspension was directed by the Superintendent of Schools. (P-7) In the middle of this series of suspensions, on February 28, 1970, the boy had been tested by the school psychologist. The psychologist's report and the reports of other members of the child study team were considered and reported at a meeting of the team held on March 16, 1970. The team said in this report (R-15) that the boy was "socially maladjusted" and indicated that the Bureau of Children's Services would be asked to assist with residential placement.

During the period March 6 to April 13, 1970, the child was continued on suspension. On April 13th, the Board of Education met, considered the report, *supra*, and a recommendation of the Superintendent, and authorized placement of the boy in a residential school, with tuition to be paid by the Board. (R-14)

This authorized placement was never made because none could be found, but home instruction was commenced May 4, 1970. During all of the time in the period December 1969 through May 1970, no names of students on suspension were given to the Board. This according to the Board Secretary, was in accord with custom. However, the Superintendent did give the monthly total of students who were on suspension as reported to him by the school system's attendance officer, and did provide information, if asked, concerning individuals involved. During this five-months' period, sixty suspensions were so recorded.

The charges against the Superintendent are that:

1. He incorrectly and falsely reported the boy's detention of December 1969 as a suspension. The Superintendent maintains that he simply passed on to the Board the information he had received from the High School office.

The principal of the school testified concerning this sub-charge and said that the boy had been suspended during December, but that the suspension had been chaged to office detention. The principal did not know why the change had occurred. The vice-principal said that the boy was not suspended because the boy's mother could not be contacted.

The hearing examiner finds no cause for complaint in the Superintendent's statement in this instance, since he had no reason to be, and he was not, directly involved with the incident in question, and the truth of the matter is that a suspension was given but changed.

2. He failed to inform the Board about a transfer of a student to another school system.

The hearing examiner holds that, on its face, this sub-charge is true, but he fails to see any fault or negligence in the fact. Children in every system are transferred in and out almost daily in most schools. The matters are routine and do not usually come to the attention of the Superintendent, let alone to the attention of the Board.

In this instance there were three witnesses who gave testimony concerning the boy's legal domicile - the attendance officer, the vice-principal, and the principal. The attendance officer had visited the mother's home and had been told by an older sister that the boy was living with his father. The vice-principal was told this by the boy's father. The principal had information directly from a guidance counsellor, who saw the boy in question almost every day. It was the principal who authorized the transfer at issue herein.

While it is true that the boy was a ward of his mother, under the circumstances which were clear, he was in domicile with the father at the time of transfer, and his school attendance area was thus the district where his father lived absent legal enforcement procedures with regard to domicile, which the mother apparently did not choose to exercise.

3. He did discipline a student contrary to law.

After a series of suspensions, the Superintendent did suspend this boy personally on March 6, 1969 (P-7); requested an evaluation from the child study team, which was rendered in late March; reported this to the Board in April; and secured a home instructor for the boy in May, when a recommended residential placement could not be achieved.

The hearing examiner holds that this treatment of the case was as expeditious as could be afforded and constituted no infringement of the statute, *N.J.S.A.* 18A:37-4, which provides, *inter alia,* that the Superintendent may:

> "***reinstate the pupil prior to the *second regular meeting* of the board of education of the district held after such suspension otherwise such superintendent***shall report the suspension to the board at such meeting ***." (See also R-12) (*Emphasis supplied.*)

In the instant matter, the "second regular meeting" after the boy's suspension on March 6, 1969, was held on April 13, 1969. On that date the Superintendent did report to the Board, and the Board did act. In the circumstances, and considering the troublesome and disruptive behavior of this boy, the hearing examiner finds that the Superintendent's actions at question herein were both proper and correct. Accordingly, he recommends dismissal of this charge.

The hearing examiner observes, in conclusion, that the reporting procedures of the North Arlington Board with respect to student suspensions were, during all of the five-months' period considered herein, sketchy and incomplete, but that the Board, by its silence, gave no directions that mandated a change. Having failed at the time to request change or complain about then current procedures, it is hindsight to allege now that the Superintendent's reporting should have been more detailed.

*CHARGE NO. 7*

> "Did refuse to take any action against employees of the Board of Education in regards to an alleged assault on a student on May 26, 1970."

This charge records, as outlined in specifications attached to the charge, that "the Superintendent was directed to report to the Board *** and recommend action to be taken against the teacher and the school principal." It is further specified that the "Superintendent took no action."

The testimony concerning this charge developed the following facts:

1. On June 1, 1970, at a meeting of the Board of Education, Board member Roselle reported an alleged assault by a teacher in the North Arlington Schools on one of her pupils. At that time he displayed two pictures of the child that purported to show bruise marks inflicted as a result of the assault. (P-9)

2. The Superintendent disclaimed knowledge of the matter at the time but agreed to investigate the allegation. There is no evidence that either at this meeting, or at later meetings, he was ever directed to "take action" by an official directive or resolution of the Board. In any event he did agree to investigate.

3. The Superintendent contacted the principal of the school wherein the alleged assault took place, and in response to a query as to why he, the Superintendent of Schools, had not been notified, he determined that the teacher involved had been absent from school and that a report was delayed until she had been questioned.

4. When the teacher returned to school, the Superintendent interviewed her and asked for a written report of the alleged incident. This was received. (R-18) The Superintendent made this report available to the Board on June 8, 1970.

5. At various times during the period June 3-7, 1970, the teacher and the Superintendent called the mother of the child who was alleged to have been injured. The incident *sub judice* was discussed in detail. On June 8, 1970, the mother signed the following letter (R-16), which, according to her testimony, she had typed on her own office stationery:

"June 8, 1970

"Board of Ed (sic)
Ridge Road
North Arlington, N.J.

"Gentlemen:

"On May 26, 1970, Mrs. Saker, a teacher in 3rd grade at Jefferson School had a (sic) incident with my daughter, Robin Caldara. Robin came home from school and had several marks and bruises on both her shoulders. She told me that Mrs. Saker had taken her out in the hall and grabbed her by the shoulders and shook her.

"On May 27th, I went to the school to talk to Mrs. Saker, but she was out ill on that day. I spoke with Mr. Klein, the principal, and showed him the bruises. He told me that when Mrs. Saker came back to school he would talk to her about the incident. Mrs. Saker did not return to school until the following Monday, which was June 1st.

"Mrs. Saker called me on Monday, (June 1st) and asked me what the problem was and said she could not understand how she could have done this to Robin. She also spoke to Robin. We spoke for a while and she apologized for doing this to Robin and did not mean to do it as a means of punishment, but a means of affection. Robin had told Mrs. Saker the truth and Mrs. Saker said that was (sic) was so proud of Robin that she had grabbed her by the shoulders and was shaking her, not realizing that she had grabbed her too hard.

"This letter is to advise that I would like the matter dropped. Mrs. Saker and I have come to an understanding and I think the best thing for Robin and Mrs. Saker is to drop the matter.

"It is to be understood that Mrs. Saker had asked me to write this letter so that the Board of Education would have it in writing that she did apologize to me and Robin and that there would be no re-occurrence of the matter.

"Sincerely,

Mrs. Ellen Nolan
(Mother for Robin Caldara)"

The Superintendent also presented this document to the Board of Education on June 8, 1971.

The Superintendent requested and received a report from the school principal in writing. This third document was also received and made available to the Board of Education on June 8, 1970. (R-17)

7. At the meeting of June 8th, the Superintendent indicated he felt no further action was required or necessary since:

(a) the teacher involved had, previous to this incident, submitted her resignation to be effective a few days thereafter;

(b) he had taken measures to correct the principal's tardy report;

(c) the mother of the child and teacher wanted the matter dropped;

(d) he was convinced that the teacher had not acted out of malice.

At this juncture some members of the Board evidently felt they needed, and should have had, a further recommendation from the Superintendent, which would have in effect pressed charges against the teacher and the principal. The Superintendent's recommendation that the matter be dropped was not satisfactory to them.

The testimony at the hearing from the mother of the allegedly-abused child was, in some respects, a retraction of the statements she had written in the letter. (R-16) Specifically, she stated that the letter was written under the duress of numerous phone calls by the teacher to her office requesting it, and that she did not really want the matter dropped although she had stated that she did. She said she had later been sorry that she had written and submitted it.

The hearing examiner observes that the mother of the allegedly-abused child had every reason to feel aggrieved under the circumstances since there

appeared to be concrete evidence that some kind of corporal punishment had been administered, and that the school's response to her request for an explanation was both tardy and inexcusable. When the explanation did come from the teacher, it did not constitute an actual denial that the alleged injury could have resulted from what the teacher did. Instead, the teacher maintained that her hands were on the child's shoulders, but that they had been placed there as an "act of affection." (R-18) The hearing examiner opines that the explanation, in the circumstances, strains credulity, although it cannot be labelled as patently false or impossible without more evidence than has been presented. In any event the mother of the child agreed, on the second day following the day the teacher first called, that she would write the letter that she did eventually write and submit it to the Superintendent of Schools.

This has been a recital of what various persons, and the Board, did with relationship to the incident *sub judice*. However, it is necessary, also, to observe that the following things are true:

1. The alleged injury pertinent to this case, if true in fact, was, in the eyes of the law at least, a misdemeanor. However, no charges were ever filed by the family of the child or by the police officer who was first apprised of the evidence.

2. The Board of Education apprised by Mr. Roselle of the allegation on June 2, took no action either formal or informal to suspend the teacher or the school principal pending an explanation.

3. Neither did the Board take any action after the Superintendent submitted the three documents discussed, *supra*, to them on June 8, 1970, and recommended orally that the matter be dropped. While it is clear that a majority of the Board did not like the Superintendent's recommendation to take no further action, the Board took no action of its own, which it was clearly empowered to take as the policy-making body. Such action was not conditional on the Superintedent's recommendation. (*N.J.S.A.* 18A:11-1, 18A:16-1) The Board itself has statutory authority to take such action under *N.J.S.A.* 18A:11-1 and 18A:16-1.

*N.J.S.A.* 18A:16-1 provides in part:

> "Each board of education *** shall employ and may dismiss *** principals, teachers, janitors and other officers and employees ***."

*N.J.S.A.* 18A:11-1 provides in pertinent part:

> "The board shall ***
>
> "(c) Make, amend and repeal rules *** for its own government and the transaction of its business and for the government and management of the public schools *** and for the employment, *regulation of conduct* and *discharge of its employees* ***." (*Emphasis supplied.*)

It is noted here that a board "may" employ and dismiss, but that it *shall* be charged with the "regulation of conduct." The obligation for policy to regulate is thus clearly the board's.

Since, in the instant matter, the Board took no affirmative action to dismiss employees or to regulate their conduct, it cannot expect the Superintendent, an administrative official, to take such action or to impose an obligation to make a recommendation that the Board wants to hear. The Board brought the matter to the Superintendent's attention. His duties from that point on were to do as the statue, *N.J.S.A.* 18A:17-20, provides; namely, to:

> " ****perform such other duties as may be prescribed by the board or boards employing him.*****"

In the instant matter, the evidence is nowhere conclusive that the Superintendent "refused to take action," as the charge states, but that he did what he was asked and agreed to do - to investigate a situation and to report back to the Board. Accordingly, the hearing examiner recommends that this charge be dismissed as one totally unsupported by the credible evidence.

*CHARGE NO. 9*

> "Did present a false recommendation to Board in regards to rehiring a teacher."

The charge contained herein is written as though there is only a single recommendation to consider. However, on ths one hand, (a) there is a recommendation that the Superintendent made to rehire a teacher; on the other hand, (b) the Superintendent is charged with changing his position and his recommendation with respect to the employment of a second teacher. The sub-charges and the proofs will be considered separately.

(a) In the month preceding the Board conference meeting of April 6, 1970, the Superintendent had evidently indicated to one Board member that he would not recommend hiring a certain elementary teacher, and he gave some reasons for his tentative decision. At the meeting, however, the name of this teacher was on his list of those recommended for reemployment.

The charge here is that the Superintendent made this recommendation without an accompanying adverse report, stating that this teacher should not be re-hired, which he knew had been written by an elementary supervisor. This report (R-19) contains the following comments about the teacher:

> "Need for better organization and control. Poor work habits are evident in children which, if improved, should create better discipline. Care should be taken to be sure what you ask of pupils is possible. (Dictionary Work)"

Other reports, by the school principal, (R-20a, b, c) had notations of "satisfactory" accomplishment (forty-three of these), and five checks indicated "commendable" ratings. There were no checks to indicate that the column marked "Improvement Needed" was appropriate.

While the allegation herein is that the Superintendent did not advise the Board of the report of the supervisor, which reportedly stated that this teacher should not be re-hired, the hearing examiner can find no such statement in the full text of the supervisor's report, *supra.* It is apparent, to the contrary, that immediately prior to the time the Superintendent made this recommendation for reemployment, he had the concurrence of the elementary principal and the supervisor with this recommendation. The supervisor testified that this was so, and her concurrence was not tarnished in measureable degree by the fact that the principal of the school had, on a prior occasion, conferred with the teacher in question and indicated that the teacher would be reemployed, thereby rendering a contrary decision difficult. It is clear, from all the reports, that this recommendation of the Superintendent was one of the kind that is most difficult to make.

On the one hand, in such instances, the Superintendent must keep paramount in his mind the welfare of students, but it is also true that most first-year teachers-the case herein- need careful evaluation and require time to develop teaching techniques. Hasty and arbitrary decisions, which serve to deny such teachers a further chance to develop on the basis of a few remarks of a supervisor, which indicate the need for improvement, cannot be considered as mandatory or warranted.

In summation, it is clear, with respect to this sub-charge, that the Superintendent's recommendation to this teacher was made not only after much prior thought, but with the concurrence of the group who knew the teacher best. The hearing examiner holds that it is immaterial that some members of the Board thought that those statements of the supervisor quoted, *supra*, to the effect that teacher improvement was required in some instances, should have been adjudged determinative of the teacher's status and so deleterious as to constitute reason to require a negative recommendation by the Superintendent. The Superintendent did not agree, but his judgment cannot be held to be faulty, or false, because he weighed the matter on balance, mixing those affirmative ratings and opinions noted, *supra*, with the ones of a contrary nature.

(b) In this second of the sub-charges listed herein, the Superintendent is accused of withholding a favorable recommendation for a secondary teacher which, the Board charges, was entirely warranted by the record of the teacher. The pertinent exhibits (R-21 a, b) do establish the fact that the teacher had received consistently favorable ratings. In one comment (R-21b) there was a notation of "excellent," although deleterious comments were not absent from all reports. For instance, the following diverse comments appear, *inter alia*, on page 3 of the supervisor's report (R-21a):

"Outstanding rapport with most students. Prepares well-knows subject matter. Methods, ability-to present information-outstanding." [Favorable]

"Has the ability, knowledge, to be an outstanding classroom teacher-does not however, perform at this level. Very emotional-too quick to form opinions and express them-Hesitates to become involved in school activitieis-Rapport with certain factions or groups within faculty is poor.***" [Unfavorable]

Despite the generally good ratings quoted in part, *ante*, the Superintendent did not recommend this teacher for reemployment because, according to his testimony, it was quite evident that the Board did not want her, and he thought at the time that his recommendation would be futile. In restrospect, he now admits that he should have pressed ahead with a firm and positive recommendation in this respect, as he did in the instance reported above (9-a), and left the final determination to the Board.

Ultimately, the Superintendent, under the prodding of community pressure and other circumstances, did reverse himself in this instance, and on the basis of a prior understanding with the Board, publicly admitted to his own error in omitting the teacher's name from the employment list. The Board subsequently reemployed her.

The hearing examiner finds that there was error, if such it can be called, on the part of the Superintendent of Schools in this instance, but that it was an error of omission rather than commission. If the Superintendent sincerely believed that the teacher should have been reemployed, and the record would seem to buttress the correctness of such a belief, he should have recommended her reemployment.

However, there was some mitigation for the Superintendent's action in the circumstances of the climate of distrust and recrimination between the Board and the Superintendent, which were developing in the month of April 1970, in this distirct, and it is clear that at the time, with respect to these two incidents, the Superintendent was criticized when he did recommend and criticized again when he didn't. Such a situation can be adjudged regrettable, but small reason to recommend that the Superintendent alone be chastised, since there was blame to be shared by both sides in such circumstances as those prevailing herein.

*CHARGE NO. 10*

"Inefficiency in the complete mishandling of an investigation concerning a teacher."

The charge herein, while on its face one of inefficiency, is accompanied by charges that the Superintendent breached confidence and that he bungled and mishandled an investigation. Specifically, during the course of the school year 1970-71, one Board member, specifically Mr. Roselle, alleged that there was

reason to believe that one North Arlington teacher had been using LSD and marijuana. He communicated this allegation to two other Board members but not to the whole Board. These three Borad members directed the Superintendent informally to investigate the charges in a manner proposed by Mr. Roselle; i.e., to give physical examinations to certain teachers, including the one under suspicion, with the hope of obtaining factual evidence. There was no formal Board direction for the Superintendent to do this, and he did not do it, since he thought, after reflection, that there were other and better ways to get the truth.

Instead, the Superintendent apprised two members of his staff of the allegation and told them to "keep their eyes" on the suspected person, and these two and the Superintendent did observe the teacher informally throughout the year.

There was never any factual evidence developed that supported the allegation against the teacher, and the accused teacher was never convicted of the crime in a court of law. Accordingly, the Superintendent recommended her for reemployment in the spring of 1970. The Board refused the recommendation, and the teacher's contract was not renewed.

The questions posed are as follows:

(a) Was the investigation proposed by the one Board member supportable and credible?

(b) If it was, did the Superintendent have an obligation to carry it out?

In this regard, the hearing examiner notes much of interest in the decision of a Pennsylvania Court which discussed such speculative investigation. This Court, in *Commonwealth v. McCloskey, Pa.*, 277 *A.* 2*d* 764, was involved in setting guidelines for investigative work of Grand Juries in Pennsylvania. In so doing, the Court cited *McNair's Petition*, 324 *Pa.* 48 56*n.* 1,187 *A.* 498, 502*n.* 1 (1936) to buttress an argument that such investigative assignments should be limited to cases involving broad areas of public concern and welfare; i.e., riots, insurrections. At page 774, the Court quoted *McNair* as follows:

> "*** *Investigations* for purely speculative purposes are *odious and oppressive* and should not be tolerated by law *** The grand jury must know what crimes it is to investigate. The Court of quarter sessions has no power to set such an inquiry in motion unless it has reasonable cause to believe that an investigation will disclose some criminal misconduct *which is within its jurisdiction to punish.* (*Emphasis supplied.*)

In the instant matter there were allegations that a teacher was using LSD and marijuana. There was no testimony that she had ever been convicted of using these or any other narcotic. The hearing examiner concludes, therefore, that the investigation proposed by the Board member to the Superintendent in this instance was for "purely speculative purposes," and was as "odious and oppressive" as the kind condemned by the Court in *McNair* as the type that "should not be tolerated." A superintendent of schools is not a trained criminal investigator, and in the hearing examiner's judgment, he has no obligation, moral or otherwise, to a school system or to its board of education, to stalk school employees by stealth or indirection to obtain proofs, which a police department or its investigative branch have never achieved in a direct manner. Since New Jersey or the United States are not police states, the methods of its lawful school and municipal officials cannot be those that a police state employs. In the hearing examiner's judgment, the imposition of such a requirement on a superintendent of schools is clearly *ultra vires* when the circumstances are such as those related herein.

Therefore, the hearing examiner recommends to the Commissioner that this charge be dismissed for the following reasons:

(a) There was no obligation for the Superintendent to take any action in the circumstances, since there was no official Board direction, but only an informal order by one of the Board members.

(b) The investigation proposed was not a proper one for a superintendent to conduct.

*SUMMARY*

This completes a review of the charges and of the principal testimony and exhibits pertinent thereto. However, the hearing examiner opines that the following facts and observations have pertinence to the matters controverted herein:

1. Respondent has not been suspended from his employment pending adjudication of this case.

2. The testimony of the witnesses for the Board was, as the Board's counsel maintains in summation, "direct, honest, clear and straight-forward," and the hearing examiner believes the Board members to be honorable men who, in sponsoring these charges, believed without question that the Superintendent of Schools had occasionally acted improperly or had refused to act on other occasions when he should have. Likewise, the hearing examiner believes the Superintendent ot be an honorable man, steadfast in his convictions and convinced that in respect to these charges he had acted properly, and in conformity to policy and custom as he understood the requirements to be.

Where, then, does the truth lie between the two sides? What engendered the bitterness and recrimination which are here in evidence?

The hearing examiner attributes the conditions which led to the charges herein to certain factual conditions, namely:

1. The fact that two men of action, but completely inexperienced in school affairs, were thrust into the maelstrom of Board activity in February 1969, with little preparation for the work, little knowledge of the sensitive nature of the problems to be faced, and with, what the hearing examiner believes, were views that were, in some respects, naive and simplistic with regard to the complicated matters that were to come before them. When, after an initial period devoted to budget preparation, they finally had an opportunity to make a contribution with regard to drug abuse, they proceeded without due regard to the past accomplishments in the field and their directions could not be followed. This circumstance led to one recrimination after another. There was a fault to find in every administrative move and behind every action of the Superintendent of Schools.

2. The fact that the Superintendent did not assess in time the demand of a new Board majority in the spring of 1969 for an increasingly-large amount of detailed reporting and their need for an increased amount of communicatory information on drug abuse, on teacher employment, and on student discipline.

3. The fact that individuals, or a group of Board members, by-passed action by the Board as a whole and felt free to "direct" the Superintendent-sometimes when no direction was needed (e.g., the bomb scare), and at other times in ways that he could not countenance (e.g., the proposed surreptitious physical examinations).

Under such circumstances, it is not surprising that the charges contained herein developed, since harmony and constructive change in school affairs cannot emerge from such a background.

In conclusion, and in summary, the hearing examiner finds that the gravemen of these charges alleging conduct unbecoming a school administrator, improper conduct, and inefficiency have not been proved. He recommends, therefore, that they be dismissed forthwith by the Commissioner.

* * * *

The Commissioner has read the report of the hearing examiner and concurs with the principal findings and recommendations contained therein. The Commissioner is also constrained to observe that the instant matter is proof of the need, in these times of increasing stress for a clear distinction between (a) the responsibility to establish policy to guide school operation, which is a board's preogative and obligation and (b) the responsibility to administer those polices, which the board, not individuals of the board, have established. This responsibility for administration of the policy determinations of the whole board is clearly delegated to the superintendent of schools in school systems such as this one.

Specifically, in the instant matter, (1) The Board can determine after study that a drug-abuse information program should be broadened and strengthened. The details and time schedule of the program change can be delegated to the Superintendent of Schools; (2) The Board can determine what its "bomb scare" policy should be and trust its Superintendent to use his best judgment, when the time for implementation arrives; (3) The Board can determine that in order to be better informed, it will require a copy of each letter concerning student suspensions to be on the table at each regular meeting of the Board. The Superintendent should then see that each report is so placed.

If these important roles of a board of education and its school administrators are determined beforehand, and if the established rules and understandings are thoroughly documented, the result may not be a school system without discord, but it will be one where discord is held to a minimum and where mutual respect is the ultimate achievement and goal.

The Commissioner observes, with specific reference to Charge 10, that if the North Arlington Board, or any board of education, has good and reasonable cause to suspect that any of its employees are users of drugs, there is statutory power available to the Board that permits suspension of the person so suspected. The pertinent statute is *N.J.S.A.* 18A:16-2 which is quoted as follows:

> "Every board of education shall require all of its employees, and may require any candidate for employment, to undergo a physical examination, the scope whereof shall be determined under rules of the state board, at least once in every year and may require additional individual *psychiatric* or physical examinations of any employee, whenever, in the judgment of the board, an *employee shows evidence* of *deviation* from normal, physical or *mental health.*
>
> "Any such examination may, if the board so requires, include laboratory tests or fluoroscopic or X-ray procedures for the obtaining of additional diagnostic data." (*Emphasis supplied.*)

The Commissioner holds that an appropriate examination in such circumstances would be one to determine whether, in fact, the employee did show a deviation from the mental health which is a prerequisite for all persons employed to work with children. Such an examination might have been warranted under the circumstances recited herein.

The Commissioner believes that in the instant matter, further partisan findings on his part with respect to the charges *sub judice* would serve no purpose. He does find that the necessary prerequisites for a reversal of the pattern of recrimination which has been evidenced herein are ones of education and substantial discussion. Accordingly, he recommends that the North Arlington Board of Education, together with its Superintendent:

(a) initiate plans to attend workshops and informative educational meetings devoted to matters similar to those which have been responsible for the conflicts, which have so divided the parties in the past; (b) consider employment of educational consultants to acquire the professional help that persons versed in such policy matters can give; (c) develop a new and broader Board policy handbook, which will delineate more precisely those responsibilities which are assumed or assigned by the Board, in conformity with the best thought and advice it can receive.

The charges herein are dismissed.

COMMISSIONER OF EDUCATION

November 10, 1971

**Barbara Kelleher,**

*Petitioner,*

**v.**

**Board of Education of the Borough of Northvale, Bergen County,**

*Respondent.*

## COMMISSIONER OF EDUCATION

### Decision

For the Petitioner, Calissi, Gelman, Cuccio, Klinger and Baldino (Emil Cuccio, Esq., of Counsel)

For the Respondent, Fornabai and Hogger (James J. Hogger, Esq., of Counsel)

Petitioner seeks entrance to Kindergarten for her son in the school system of the Borough of Northvale Board of Education, hereinafter "Board." Petitioner alleges that the Board's policy denying admittance to her son is arbitrary, capricious, discriminatory and unconstitutional. There are no facts in dispute, and counsel agree that the determination of the Commissioner will be made on the issue of law.

The matter is submitted to the Commissioner on the pleadings, exhibits and Briefs of counsel. The report of the hearing examiner is as follows:

The Board adopted, on or about April 19, 1971, a policy which set the cut-off date for kindergarten entrance as October 1 of each school year. That policy also provided in part for the admission to kindergarten of children moving into Northvale, who had been enrolled in approved public school kindergartens in other school districts, even though under age with respect to Northvale's policy for children in its own community. That policy reads in pertinent part as follows:

"Be it resolved that this resolution supersedes all previous resolutions concerning age of initial entrance into the Northvale School Systems. (sic)

"AGE OF INITIAL ENTRANCE INTO THE
NORTHVALE SCHOOL SYSTEM - POLICY NO. 5111

"(1) Except as noted in Item No. 2, a child will be accepted for kindergarten only if his fifth birthday falls on or before October 1 of the school year for which entrance is requested.

"(2) A child who does not meet the above age requirement, and for whom application for admission to kindergarten is made by reason of his family moving into Northvale from another community, will be accepted provided that at the time of such moving he is attending an approved public school kindergarten program.

"(3) Except as noted in Item No. 4, a child will be accepted for first grade only if his sixth birthday falls on or before October 1 of the school year for which entrance is requested, or if he had successfully completed an approved kindergarten program and if his birthday is no later than December 31 of the school year. The district reserves the right to screen entrants to provide for their appropriate placement into kindergarten or first grade.

"(4) A child who does not meet the above age requirement, and for whom application for admission to first grade is made by reason of his family moving into Northvale from another community will be accepted provided that at the time of such moving he is attending an approved first grade or has successfully completed an approved kindergarten program. The district reserves the right to screen entrants to provide for their appropriate placement into kindergarten or first grade. ***

"(6) This policy shall become effective immediately."

Petitioner states that prior to the adoption of the policy, *ante*, she had already applied for admittance of her son to kindergarten, and that his fifth birthday on November 23 caused him to be eligible for admittance pursuant to the Board's prior cut-off date of December 31.

Petitioner further alleges that the Board's policy discriminates against private and parochial kindergarten pupils because the only exception to the cited cut-off date pertains to children who have been previously enrolled in public school kindergartens.

The Board denies that its actions are in any way arbitrary, capricious, discriminatory or unconstitutional. The Board avers that it acted pursuant to the statute, *N.J.S.A.* 18A:38-5, which reads as follows:

"No child under the age of five years shall be admitted to any public school, except such as may be provided pursuant to law for children of his age.

"No board of education shall be required to accept by transfer from public or private school any pupil who was not eligible by reason of age for admission on October 1 of that school year, but the board may in its discretion admit any such pupil if he or she meets such entrance requirements as may be established by rules or regulations of the board."

* * * *

The Commissioner has read the report of the hearing examiner and notes that the matter *sub judice* is *res judicata.*

The most recent decision on kindergarten entrance age was *Davidson v. Board of Education of the Borough of Glen Rock,* decided by the Commissioner, September 11, 1970, which reads in part as follows:

"*** The Commissioner determines that the statutes are clear and that petitioners unfortunately have no claim for early admission that can be supported by law. *N.J.S.A.* 18A: 38-5 reads in part as follows:

> "'No child under the age of five years *shall* be admitted to any public school, except such as may be provided pursuant to law for children of his age.***but the board *may* in its discretion admit any such pupil ***' (*Emphasis supplied.*)

"The legislative intent here of the words 'shall' and 'may' is definitive. This provision makes early kindergarten entrance permissive, and the Commissioner cannot construe the statute, *supra,* otherwise.***"

There is no issue of constitutionality in this matter applicable to petitioner's appeal. Petitioner's son does not meet the minimum statutory age requirement under *N.J.S.A.* 18A: 38-5, *supra,* nor is there a showing that any of the other provisions of the Board's admission policy apply to petitioner.

For the reasons set forth herein, the Petition is dismissed.'

COMMISSIONER OF EDUCATION

November 10, 1971

**Donald E. Tepper,**

*Petitioner,*

**v.**

**Board of Education of the Township of Hackensack, Bergen County**

*Respondent.*

## COMMISSIONER OF EDUCATION

### Decision

For the Petitioner, Donald E. Tepper, *Pro Se*

For the Respondent, John F. Butler, Esq.

Petitioner, is the parent of a child who was denied entrance to the kindergarten program in Hackensack by virtue of the fact that her fifth birthday anniversary occurred subsequent to the local board's cut-off date which establishes eligibility for such entrance. He demands judgment that the child is entitled to a free public school education as of the date when said fifth birthday anniversary occurred. Respondent, the Hackensack Board of Education, hereinafter "Board," avers that its cut-off date, establishing an age factor to determine eligibility for such entrance, is a date that it has legal discretion to establish and to enforce.

This matter is submitted on Briefs by Petitioner acting, *pro se*, and by counsel for the Board. There is no dispute on the basic facts pertinent to the adjudication.

Petitioner's daughter was born on October 16, 1966; her fifth birthday anniversary occurred on October 16, 1971. She is eligible, except for age, to be admitted to the school program in Hackensack.

However, the Board has established the date of October 1 as the cut-off date which determines eligibility for enrollment. It barred petitioner's child from its kindergarten program in September 1971 because she would not have attained the age of five years on or before October 1. The Board also refused to admit her on or subsequent to her fifth birthday.

Petitioner avers that the Board could not legally bar his daughter from entrance to school on the date of her fifth birthday anniversary since the statute, *N.J.S.A.* 18A:44-2, provides in pertinent part:

> "The board of education of any district may establish a kindergarten school or kindergarten department *** and *shall admit* to such kindergarten school or department *any child over the age of five****." (*Emphasis supplied.*)

Petitioner also cites *N.J.S.A.* 18A:38-1 to support his contention that his child has a legal entitlement to a public school education at the time she attains the age of five years. This statute provides in part:

> "Public schools shall be free to *** persons *over five* and under 20 years of age:***" (*Emphasis supplied.*)

The Board maintains that its cut-off date of October 1 is a date it is lawfully authorized to establish for kindergarten eligibility and that children who reach five years of age after that date need not be admitted to its kindergarten program during the school year in which the birthday occurs. The Board has offered petitioner's child enrollment in a pre-kindergarten program, and offers some hope that if the child shows exceptional progress and attainments, a transfer to a kindergarten program may be arranged at a later date.

* * * *

The Commissioner has reviewed the report of the hearing examiner and notes that petitioner demands judgment that two statutes, *N.J.S.A.* 18A:38-1 and 18A:44-2, of the four that are primarily concerned with entrance-age requirements for children of kindergarten age, should be interpreted to mean that school attendance "shall be free to any person over five" at the immediate time when a child reaches his fifth birthday. However, the Commissioner also notes that petitioner fails to read those statutes in *pari materia* with other explicit laws that are of equal importance in relationship to this matter.

Specifically, the Commissioner observes that the statutes, *N.J.S.A.* 18A:38-5 and 18A:38-6, temper the mandate imposed by the statutes upon which petitioner relies. The second of these statutes, *N.J.S.A.* 18A:38-6, provides that:

> "Pupils who have never attended any public or private school *may be admitted* to a public school on or before October 1 following the opening of the school for the fall term, and *at no other time* except by a majority vote of all the members of the board of education of the district in which the school is situated." (*Emphasis supplied.*)

The Commissioner opines that the word "may" contained within the statute, *supra*, has the meaning and compulsion of the word "shall," and this opinion is founded on the definition of "may" found in *Black's Law Dictionary*, West Publishing Co., p. 1131, which states, *inter alia:*

> "*** courts not infrequently construe 'may' as 'shall' or 'must' to the end that justice may not be the slave of grammar."

Thus, a child who has attained his fifth birthday on or before October 1 has a

clear and legal right to a "free" public education guaranteed by the statute, 18A:38-1, even though he has "never attended any public or private school" before. However, it is equally clear from a reading of the two statutes upon which petitioner relies and also *N.J.S.A.* 18A:38-6, *supra*, that children who reach their fifth birthday *after* that date of October 1 are barred from an automatic entitlement to such education by virtue of that fact, but "may" be admitted if a "majority of all the members" of the board of education wish to adopt a date other than October 1 as the cut-off date for children who have never attended school before.

This finding of the relationship between the two statutes is buttressed by a reading of *N.J.S.A.* 18A:38-5, which was promulgated by the New Jersey Legislature in 1967. This statute bars an automatic transfer of children from a public or private school to another public school unless the child is eligible in the first instance, by reason of age, for enrollment upon such transfer. *N.J.S.A.* 18A:38-5 provides, in pertinent part:

> "***No board* of education *shall be required* to accept by transfer from public or private school any pupil who was not eligible by reason of age for admission on *October 1 of that school year,* but the board *may* in its discretion admit any such pupil if he or she meets such entrance requirements as *may be* established by *rules* or regulations *of the board.*" (*Emphasis supplied.*)

Thus, the Commissioner holds that, pursuant to this statutory provision, a local board of education is not required to admit any transfer students, who do not meet the board's own entrance-age requirements, and children not eligible by "reason of age" for enrollment in a district's public schools may not gain eligibility by reason of prior enrollment elsewhere.

Finally, the Commissioner notes a similarity between the Petition herein and that of the case, *Robert Davidson, an infant, by his parents, Stephen J. and Sandra F. Davidson,* decided by the Commissioner September 11, 1970. In discussing the statute, *N.J.S.A.* 18A:38-5 *supra,* and its applicability to the case of a handicapped child, the Commissioner said:

> "***all children must first qualify for school admission pursuant to the provisions of *N.J.S.A.* 18A:38-5.***"

The Commissioner had previously observed that this statute "makes early kindergarten entrance permissive," but that local boards of education are not required to accept children who were not locally eligible for kindergarten attendance by reason of age. See slso *Boulogne v. Board of Education of City of Jamesburg,* 1964 *S.L.D.* 107.

Therefore, for the reasons given, *supra,* it is clear that statutory limitations

clearly preclude granting petitioner's prayer, which demands judgment that his child is eligible for attendance in the kindergarten program of the Hackensack Public Schools'

Accordingly, the Petition is dismissed.

COMMISSIONER OF EDUCATION

November 12, 1971

**Mary Dawson,**

*Petitioner,*

**v.**

**Board of Education of the Township of Ocean, Monmouth County, and Board of Education of Berkeley Township, Ocean County,**

*Respondents.*

## COMMISSIONER OF EDUCATION

### Decision

For the Petitioner, Parsons, Canzona, Blair and Warren (Edmund J. Canzona, Esq., of Counsel)

For the Respondent Township of Ocean Board of Education, Peter Shebell, Esq.

For the Respondent Berkeley Township Board of Education, Wilbert J. Martin, Esq.

Petitioner, was a teacher-librarian in the school system of respondent Berkeley Township Board of Education, hereinafter "Berkeley Township Board," during the school year of 1969-70. She held a similar position in the school system of respondent Ocean Township Board of Education, hereinafter "Ocean Township Board," during the school year 1967-68. During the course of her employment with the Berkeley Township Board, she was hospitalized for surgery for an injury she received in the course of her employment with the Ocean Township Board approximately eighteen months, three weeks earlier.

Petitioner claims that either the Ocean Township or the Berkeley Township Board is obligated to pay her salary for the period of her absence from her work, less the amount she was awarded under the workmen's compensation law. She claims that she is entitled to have her regular contribution to the Teachers' Pension and Annuity Fund, hereinafter "TPAF," paid by one of these Boards for the period of her absence from work because of her disability. She demands that back salary and the contributions to the TPAF be awarded her together with interest and costs.

The matter is submitted to the Commissioner of Education on Briefs of counsel, pleadings, and exhibits. The report of the hearing examiner is as follows:

A signed *Statement of Facts* was submitted by counsel for petitioner and counsel for the Ocean Township and Berkeley Township Boards as follows:

"On May 22, 1968 the petitioner, Mary Dawson, was employed as School Librarian by the Ocean Township Board of Education in Monmouth County, New Jersey, and sustained an accidental injury arising out of and during the course of her employment.

"As a result of the said accident petitioner instituted an action in the Workmen's Compensation Court and received an award of compensation for temporary disability of 15-1/7 weeks, and was paid compensation at the rate of $83.00 a week. The said award of temporary compensation was in addition to an award for permanent disability of 7-1/2% of the left hand.

"At the rate of $83.00 a week, petitioner received for total temporary disability for the 15-1/7 weeks the amount of $1,256.76. (See copy of Judgment attached.)

"On December 17, 1969 because of continuing symptoms of petitioner's injury she was admitted to the Hackensack Hospital in Hackensack, New Jersey, and was operated upon by Dr. S. T. Snedecor. The said doctor was authorized by the insurance carrier for the Township of Ocean Board of Education to perform the surgery and the said insurance carrier paid all of the hospital and medical expenses.

"At the time petitioner was admitted to the hospital she was under the employ of the Berkeley Township Board of Education as School Librarian at a yearly salary of $9,600.00, under a contract of employment commencing on September 1, 1969 and running to June 30, 1970. (See Exhibit A attached hereto).

"Under the terms of the said employment contract petitioner was entitled to 10 days sick leave. She was absent on September 15, October 2 and 3, November 3 and 21, and December 2, 3, 4, and 5, 1969, thus using 9 days' sick leave and 1 personal day.

"On December 18, 1969, after admission to the Hackensack Hospital, petitioner was operated upon and received full pay through the month of December 1969. (See Exhibit B attached hereto).

"Pursuant to petitioner's request, dated January 6, 1970, the Berkeley Township Board of Education granted her a 6 to 8 weeks' leave of absence without pay and on January 27, 1970 pursuant to a further request, petitioner was granted an additional 10 days sick leave for which she received partial pay. She received her salary minus the pay for her substitute of $20.00 per day.

"Petitioner returned to her employment on May 4, 1970 and on May 5, 1970 submitted her resignation (See Exhibit C attached hereto. The resignation was accepted by the Board of Education on May 26, 1970.)

"We consent to the above Statement of Facts."

No attachments were submitted with this Statement as indicated, *supra.*

Nowhere in the Petition, answers, Briefs or exhibits is there any explanation of petitioner's employment status between the dates of September 1, 1968, and June 30, 1969. For the purpose only of acknowledging this hiatus in the factual sequence of events as stipulated, the hearing examiner notes that petitioner was not employed during the school year 1968-69, by any board of education. The facts indicate that petitioner's employment with the Ocean Township Board ended on June 30, 1968, and began with the Berkeley Township Board on September 1, 1969.

Petitioner argues that the relief she seeks may be granted pursuant to an interpretation of the provisions of *N.J.S.A.* 18A:30-2.1, which reads as follows:

> "Whenever any employee, entitled to sick leave under this chapter, is absent from his post of duty as a result of a personal injury caused by an accident arising out of and in the course of his employment his employer shall pay to such employee the full salary or wages for the period of such absence for up to one calendar year without having such absence charged to the annual sick leave or the accumulated sick leave provided in sections 18A:30-2 and 18A:30-3. Salary or wage payments provided in this section shall be made for absence during the waiting period and during the period the employee received or was eligible to receive a temporary disability benefit under Chapter 15 of Title 34, Labor and Workmen's Compensation, of the Revised Statutes. Any amount of salary or wages paid or payable to the employee pursuant to this section shall be reduced by the amount of any workmen's compensation award made for temporary disability."

Petitioner was employed by the Ocean Township Board for a one-year period commencing September 1, 1967, and terminating June 30, 1968, at a salary of $9,000. Up to the date her employment with that Board terminated on June 30, 1968, "petitioner lost no compensable time from work *** nor was she paid any temporary disability benefits or any sick leave benefits" by the Ocean Township Board. (Respondent's Brief, at p. 1) At the time of her surgery and absence from work some eighteen months, three weeks later, petitioner was employed by the Berkeley Township Board.

The Ocean Township Board relies on the history of *N.J.S.A.* 18A:30-2.1 and its current interpretation with respect to its several revisions.

Prior to 1959 no provisions were made for the effect of a compensable accident upon a teacher's sick leave in the Education Law. Thereafter, on November 30, 1959, the Legislature enacted *N.J.S.A.* 18:13-23.17 which provided as follows:

"Whenever any employee, included in the act of which this act is a supplement, is absent from his post of duty as a result of a personal injury, caused by an accident arising out of and in the course of his employment, his employer *may* pay to such employee up to the full salary or wages for the period of such absence for up to one calendar year without having such absence charged to the annual sick leave or the accumulated sick leave provided in Section 1 of the act of which this act is supplemented. Salary or wage payment provided in this Section shall be made for absence during the waiting period, and during the period the employee received or was eligible to receive a temporary disability benefit under Chapter 15, Title 34 of the Revised Statutes. Any amount of salary or wages paid or payable to the employee pursuant to this Section shall be reduced by the amount of any Workmen's Compensation award made for temporary disability." (*Emphasis supplied.*)

A legislative statement of the purpose of the bill was attached when it was introduced in the Assembly. The statement read as follows:

"The purpose of this bill is to clarify the sick leave law applying to teachers and certain other employees of boards of education in the event of an injury arising out of and in the course of employment. It provides that the employer may pay up to full salary for a period of absence caused

by such on-the-job injury for up to one calendar year without having such leave charged to the annual sick leave or the accumulated sick leave of the employee. Any amount of salary payable to the employee pursuant to this supplement shall be reduced by the amount of Workmen's Compensation award for temporary disability."

On July 25, 1967, the aforesaid Act was amended by *Chapter* 168, *Laws* of *1967, to provide that the employer* shall pay the employee his full wages during the said period. The amendment now no longer permitted it to be discretionary with the employing board of education, but instead made his compensation mandatory. The Act read as follows:

"Whenever any employee, included in the act of which this act is a supplement, is absent from his post of duty as a result of a personal injury caused by an accident arising out of or in the course of his employment, his employer *shall* pay to such employee the full salary or wages for the period of such absence for up to one calendar year without having such absence charged to the annual sick leave or the accumulated sick leave provided in Section 1 of the act on which this act is a supplement. Salary or wage payments provided in this Section shall be made for absence during the waiting period and during the period the employee received or was eligible to receive a temporary disability benefit under Chapter 15 of Title 34 of the Revised Statutes. Any amount of salary or wages paid or payable to the employee pursuant to this Section shall be reduced by the amount of any Workmen's Compensation award for temporary disability." (*Emphasis supplied.*)

The Act was also amended by *Chapter* 58, *Laws of* 1956 *(N.J.S.A.* 18A:30-2.1, *supra*). The Legislature specifically provided in this current form of the sick leave statute that its provisions are meant for those employees "entitled to sick leave under this Chapter." *N.J.S.A.* 18A:30-2.1, *supra* Those so "entitled" are detailed in *N.J.S.A.* 18A:30-2, which reads in part as follows:

> "All persons holding any office, position or employment in all local school districts, regional school districts or county vocational schools of the state *who are steadily employed by the board of education* or who are protected by tenure in their office, position, or employment under the provisions of this or any other law, except persons in the classified service of the civil service under Title 11, Civil Service, of the Revised Statutes, shall be allowed sick leave with full pay for a minimum of 10 school days in any school year. (*Emphasis supplied.*)

Clearly then, the hearing officer opines that petitioner was not entitled to any sick leave from the Ocean Township Board *while in the employ of the Berkeley Township Board.* Therefore, the hearing examiner concludes that petitioner is not eligible for payment by the Ocean Township Board of any difference in compensation between her salary and the amount she received from a workmen's compensation award. Petitioner received her full compensation, and her full contributions were paid to the Teachers' Pension and Annuity Fund during her one-year's employment with the Ocean Township Board. To hold now that the Ocean Township Board should further compensate petitioner would suggest the absurd result that petitioner would receive from that Board of Education her full compensation *plus* an additional amount for her leave of absence while employed by the Berkeley Township Board of Education. Nor is there any statutory provision that a former employer may contribute to the Pension Fund when a teacher is on leave of absence without pay and is subsequently employed by another board of education.

The Berkeley Township Board granted petitioner a leave of absence without pay during the period of her illness. In the hearing examiner's judgment, there is no question that a board of education has the right to make rules for granting leaves of absence under its rule-making powers pursuant to *N.J.S.A.* 18A:11-1. *Charlene Feaster v. Board of Education of the Township of Lacey, Ocean County,* 1965 *S.L.D.* 78 Having granted petitioner her requested leave of absence, the Berkeley Township Board had no further obligation to petitioner. Except for the period of her requested leave, which was granted, petitioner received her salary and other compensation and had contributions deducted for TPAF, according to the terms of her contract with the Berkeley Township Board. Therefore, the hearing examiner opines that petitioner is not entitled to 15 1/7 weeks pay from the Berkeley Township Board less the difference in her salary for that period for which she received workmen's compensation. Nor is there any statutory provision for mandatory payment of salary by the Berkeley Township Board to petitioner, since she was not absent from her "***post of duty as a result of a personal injury caused by an accident arising out of and in the course of [her] employment. ***" *N.J.S.A.* 18A:30-2.1, *supra.* Her absence

was not a "service connected disability" arising out of and in the course of her employment with the Berkeley Township Board.

* * * *

The Commissioner has read the report of the hearing examiner and accepts his findings and conclusions.

It is clear from a careful reading of the sick leave statutes that the provisions therein are formulated for those employees eligible by virtue of their current service with their current employer. Nowhere is there any suggestion that a prior employer is responsible for sick leave benefits to a former employee. Nor can it be construed that a current employer is obligated to pay petitioner pursuant to *N.J.S.A.* 18A: 30-2.1 for injuries sustained in an accident while in the employ of a former board of education. Such an interpretation is erroneous, and it is clearly not the legislative intent of the statute providing for absence "*** from his post of duty as a result of a personal injury *caused by an accident arising out of and in the course of his employment* ***" *N.J.S.A.* 18A:30-2.1, *supra. (Emphasis supplied.)*

Having determined, therefore, that petitioner is not entitled to further compensation by either the Ocean Township Board of Education or the Berkeley Township Board of Education, it follows logically that no further contribution by either Board to the Teachers' Pension and Annuity Fund is in order.

The Petition is dismissed.

COMMISSIONER OF EDUCATION

November 17, 1971

Pending before State Board of Education

**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, George E. Davey, Esq.

For the Respondent, Charles J. Harrington, Jr., Esq.

Petitioner, the Board of Education of the Borough of North Arlington, hereinafter "Board," appeals from an action of respondent, the Mayor and Council of the Borough of North Arlington, hereinafter "Council," certifying to the Bergen County Board of Taxation a lesser amount of appropriations for the 1971-72 school year than the amount proposed by the Board in its budget which was rejected by the voters. The facts of the matter were educed at a hearing conducted on September 16, 1971, at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

At the annual school election on February 9, 1971, the voters rejected the Board's proposals to raise $1,862,839 for current expenses and $69,500 for capital outlay. The budget was then sent to Council pursuant to *N.J.S.A.* 18A:22-37 for its determination of the amount of funds required to maintain a thorough and efficient local school system.

After consultation with the Board and a review of the budget, Council made its determination and certified to the Bergen County Budget of Taxation an amount of $1,800,537 for current expenses and $48,000 for capital outlay.

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

| Board's | Board's Proposal | Council's Certification | Reduction |
|---|---|---|---|
| Current Expenses | $1,862,839 | $1,800,537 | $62,302 |
| Capital Outlay | 69,500 | 48,000 | 21,500 |

The Board contends that the amount certified by Council is insufficient to provide an adequate system of education for the pupils of the school district and appeals to the Commissioner to restore the deleted funds.

In making its reduction of $62,302 in current expenses and $21,500 in capital outlay, Council suggested that economies could be effected in the following items of the school budget:

| Acct. No. | Item | Budgeted by Board | Proposed by Council | Amt. of Reduction |
|---|---|---|---|---|
| **CURRENT EXPENSE** | | | | |
| J110.0 | Sal.-Secy.-Bus. Admin. ( | ( | | |
| J110.1 | Sal.-Clerks Classification ( | $ 3,668 | $ 1,500 | $ 2,168 |
| J110.4 | Sal.-Secy.-Superintendent ( | | | |
| J110.5 | Sal.-Custod. of Sch. Monies | 1,700 | 1,500 | 200 |
| J121.0 | Sal.-Legal Expenses | 5,000 | 2,500 | 2,500 |
| J132.0 | Office Exp.-Secy.-Bus. Admin. | 1,500 | 1,000 | 500 |
| J132.1-26 | Other Exp.-Secy.-Bus. Admin. | 1,325 | 1,000 | 325 |
| J132.1-47 | Other Exp.-Secy.-Supt. | 1,325 | 1,000 | 325 |
| J134.0 | Office Exp.-Supt. | 1,000 | 700 | 300 |
| J135.6 | IBM and Accounting | 3,900 | 2,500 | 1,400 |
| J135.7 | Miscellaneous, Various | 2,575 | 2,000 | 575 |
| Unspecified | ------- | 12,149 | 4,800 | 7,349 |
| J213.3.1,2 | Sal.-New Teachers | 26,000 | 16,000 | 10,000 |
| J213.3,4 | Sal.-Substitute Teachers | 16,500 | 14,500 | 2,000 |
| J213.7 | Sal.-Summer Driver Ed. | 4,000 | 1,000 | 3,000 |
| J250.2-J255.0 | Other Expenses | 20,110 | 10,450 | 9,660 |
| J402.0 | Sal.-Nurse | 5,000 | 4,000 | 1,000 |
| J522.0 | Atypical Pupils-Trans. | 10,000 | 6,000 | 4,000 |
| J612.0 | Sal.-Summer, Extra | 8,000 | 5,000 | 3,000 |
| J650.0 | Supplies | 22,000 | 18,000 | 4,000 |
| J730.1,2 | Instr. & Non-Instr. Equip | 30,000 | 23,000 | 7,000 |
| J740 | Other Expense | 9,000 | 7,000 | 2,000 |
| J1020.2 | Athletics (other than sal.) | 17,000 | 16,000 | 1,000 |
| | Sub-Totals | $201,752 | $139,450 | $62,302 |
| **CAPITAL OUTLAY** | | | | |
| L1220.2-3 | Improvements | $35,000 | $30,000 | $ 5,000 |
| L1240 | Administrative Equip. | 2,000 | 1,000 | 1,000 |
| L1250 | Instructional Equip. | 27,500 | 15,500 | 12,000 |
| L1260 | Operation Equip. | 4,000 | 2,000 | 2,000 |
| L1270 | Maintenance Equip. | 4,000 | 2,500 | 1,500 |
| | Sub-Totals | $72,500 | $51,000 | $21,500 |
| Sub-Totals Current Expense | | $201,752 | $139,450 | $62,302 |
| Sub-Totals Capital Outlay | | 72,500 | 51,000 | 21,500 |
| | TOTALS | $274,252 | $190,450 | $83,802 |

**CURRENT EXPENSE**

**SALARIES**

| | |
|---|---|
| J110.0 | Secretary, Business Administrator |
| J110.4 | Superintendent |
| J110.1 | Clerks Classification |
| J110.5 | Custodian of School Monies |

The Board avers that its proposed increases in these accounts are consistent with its adopted salary policy, and that they must be maintained with respect to the differential between administrative and nonadministrative salaries. The Board further avers that the proposed amounts are consistent with the salary increases granted for these positions in the area and that North Arlington administrative salaries are below the average salary for the area.

Council avers that the increases are out of proportion with increases received by other employees of the Board.

The hearing examiner recommends that the $2,368 cut from these accounts be restored on the basis of the written testimony.

J121.0 Legal Expenses

The Board's testimony shows an expenditure of $6,040 in this account for the 1970-71 school year for its negotiator and its counsel. The Board anticipates a greater expenditure in 1971-72 because of its prior experience in negotiating and because it is embroiled in a lengthy personnel hearing before the Commissioner of Education which will require a greater expenditure for legal fees. However, the Board budgeted only $5,000 for the 1971-72 school year.

Council contends that a full explanation was not given for the proposed amount and that the amount is based only on anticipated contract problems. Council believes, therefore, that $2,500 is adequate for legal expenses.

On the basis of the written testimony, the hearing examiner recommends the restoration of $2,500 in this account.

J132.0-J134.0 Office Expense

Based on its prior expenditures, the Board budgeted $1,500 and $1,000, respectively, in these accounts. The record shows even greater expenditures for the 1970-71 school year than the amounts budgeted for these accounts for 1971-72.

Council's explanation is that it felt the proposed amounts were excessive; therefore, it cut $800 from the accounts.

The hearing examiner recommends that the $800 cut be restored.

J132.1-26 and J134.1-47 Other Expenses

The Board budgeted $1,325 in each of these accounts for dues in County, State and National Associations. Included, also, is the cost of attending various professional meetings and meetings of committees on which the administrators are actively engaged. The Board testified to the gradual increase in dues and costs for these meetings.

Council's testimony indicates only that it feels the amounts are excessive and that there is insufficient justification for the proposed amounts. Council cut $650.00.

The hearing examiner notes that similar amounts were expended for the school year 1970-71, and that Council's reasons for cutting this line item are inadequate and cannot be sustained. He recommends that the $650 be restored.

J135.6 and J135.7 Other Expense

The Board budgeted $3,900 for IBM and Accounting, and $2,575 in Miscellaneous - Various Accounts.

The Board avers that its budget in the IBM and Accounting Account is the same as last year and that it cannot absorb any reduction therein, without a deleterious decrease in the efficiency of the accounting system that will affect the thorough and efficient system of public education. The Board avers that its Miscellaneous-Various Account covers many necessary items that cannot be budgeted in other areas, such as: signs for Board and staff, disposal of discarded books and equipment, copies of blue prints and drawings and feasibility studies.

Council recommends a cut of $1,400 in the IBM Account and $525.00 in the Miscellaneous Account, reasoning that $2,500 and $2,000 respectively in these accounts is adequate. Council avers that the proposed IBM Account amount is partially duplicated elsewhere in the budget and that the Miscellaneous Account was not thoroughly defined or explained.

The hearing examiner recommends that Council's cuts of $1,400 and $575 in these accounts be sustained on the strength of the written testimony and the record of the prior school year's expenditures.

Instruction-

Council listed a cut of $7,349 in an unspecified account and gave no explanation for that recommended economy. The *Mayor's Statement* indicated that the Board budgeted $12,149 in this account, and Council's recommendation was that $4,800 would be adequate. However, the hearing examiner recommends that $7,349 be restored because of Council's lack of identification of the account and reason for the cut.

J213.1-J213.2 New Teachers - Salaries

The Board budgeted $26,000 in this account for three new teachers. It expresses a need for one additional reading specialist, recognizing the fact that there is a continuing increase in non-English-speaking students. Increased enrollment in general is responsible for the increase in this budgeted item. The Board also expresses the need for one additional teacher in the high school and one in the elementary school.

Council's testimony is that there have been teacher increases in the past years and that student enrollment has not increased proportionately.

The hearing examiner recommends that the $10,000 cut by Council be restored. The Board's testimony clearly points out a real need for these additional staff members.

J213.3-J213.4 Substitutes - Salaries

The Board budgeted $16,500 for substitute teachers. Council recommends a cut of $2,000 in this account. The Board asserts that it had already voluntarily cut $2,000 and that the quantity and quality of substitutes required can be maintained only by the restoration of Council's cut.

The hearing examiner notes that a lesser amount was budgeted in this account for the 1970-71 school year and that the actual expenditure by the Board will approximate the amount budgeting for the 1971-72 school year. He recommends, therefore, that the $2,000 cut by Council be restored.

J213.7 Summer Driver Education

The Board budgeted $4,000 in this account as a new program designed to effect a $6,000 savings for the Board. The Board contends that the summer offering of driver education will make its currently involved staff available for classroom reassignment, thus negating a further need for additional classroom teachers.

Council states only that it feels that driver education can be accomplished during the regular school year.

The hearing examiner recommends that the $3,000 cut suggested by Council be restored.

J250.2-J255.0 Other Expense

The Board budgeted $20,110 in eight separate accounts under other expense. Included are monies for the high school office, elementary office, guidance office, high school principal's expense, elementary supervisor's expense, curriculum development, miscellaneous and IBM-related expenses.

Council recommends a cut of $9,660 in this aggregate account noting some overlapping in other accounts and an inability by the Board to adequately explain its entire recommended expenditure.

The hearing examiner agrees with Council's analysis and recommends that $7,400 of the cut be sustained and that $2,260 be restored.

J402.0 Nurse Expense

The Board expended approximately $3,600 per year for the last two school years from this account, but budgeted $5,000 for the 1971-72 school year to increase nurse service in the high school.

Council recommends a $1,000 cut, testifying that the agreed-upon amount for this service between the Board and the Board of Health was $4,000.

The hearing examiner recommends that this $1,000 cut be sustained.

J522.0 Transportation (Atypical Pupils)

Council suggests a $4,000 cut in this account reasoning that the Board could not explain its proposal to budget $10,000 for atypical pupils.

The Board admits its inability to budget precisely in this account.

The hearing examiner recommends that the $4,000 cut be sustained on the bases of Council's reason and the Board's expenditures from the above-mentioned account for the last three years.

J612.0 and J650.0 Plant Operation

The Board budgeted $30,000 in these accounts for the 1971-72 school year. It's proposal is $1,000 higher than that of the previous year when the account was over-expended by more than $4,000.

Council contends that there is some overlapping in these accounts with the maintenance appropriation and avers that the Board cannot substantiate its figures.

The hearing examiner determines that the overexpenditure alone testifies to the dire need for these funds and recommends that Council's $7,000 cut be restored.

J730.1, J730.2 and J740.0 Maintenance

The aggregate amount budgeted in these accounts by the Board is $39,000, exactly the same as that budgeted for the 1970-71 school year. The Board's expenditure for 1970-71 was more than $50,000 in these accounts.

Council's contention of overlapping with other accounts in capital outlay cannot be upheld. The hearing examiner recommends, therefore, that Council's reduction of $9,000 be restored.

J1020.2 Athletics (Other Than Salaries)

Council recommended a $1,000 cut in the Board's $17,000 proposal for this account.

On the basis of prior expenditures, the hearing examiner recommends that the $1,000 cut be sustained.

## CAPITAL OUTLAY

L1220, L1230, L1240, L1250, L1260, L1270-
Administrative, Instructional, Operational and Maintenance Equipment

Council recommends a $21,500 cut in the Board's proposed $72,500 expenditure. The Board itemized those pieces of equipment, replacements and repairs it would undertake to provide with the restoration of all the monies.

The hearing examiner notes in the Board's written testimony that $46,440 was budgeted in this account for the 1970-71 school year, and that even with Council's cut, the account will be increased by $4,600 over the amount budgeted last year.

On the basis of Council's recommendation, the hearing examiner recommends that the cut be sustained.

* * * *

The Commissioner has examined the report of the hearing examiner and accepts his recommendations and conclusions.

In order to provide a thorough and efficient system of education in the School District of North Arlington, it is necessary that the following amounts be restored to the Board's budget:

| Acct. No. | Item | Budgeted by Board | Proposed by Council | Amount Restored |
|---|---|---|---|---|
| **CURRENT EXPENSE** | | | | |
| J110.0 | Sal.-Secy.-Bus. Admin. | ( | ( | ( |
| J110.1 | Sal.-Clerks Classification | ($3,668 | ($1,500 | ($2,168 |
| J110.4 | Sal.-Secy.-Supt. | ( | ( | ( |
| J110.5 | Sal.-Custod. of Sch. Mon. | 1,700 | 1,500 | 200 |
| J121.0 | Sal.-Legal Expenses | 5,000 | 2,500 | 2,500 |
| J132.0 | Office Exp.-Secy.-Bus. Admin. | 1,500 | 1,000 | 500 |
| J132.1-26 | Other Exp.-Secy. Bus. Admin. | 1,325 | 1,000 | 325 |
| J132.1-47 | Other Exp.-Secy.-Supt. | 1,325 | 1,000 | 325 |
| J134.0 | Office Exp.-Supt. | 1,000 | 700 | 300 |
| J135.6 | IBM-Accounting | 3,900 | 2,500 | - 0 - |
| J135.7 | Miscellaneous, Various | 2,575 | 2,000 | - 0 - |
| Unspecified | -------- | 12,149 | 4,800 | 7,349 |
| J213. 1&2 | Sal.-New Teachers | 26,000 | 16,000 | 10,000 |
| J213. 3&4 | Sal.-Substitute Teachers | 16,500 | 14,500 | 2,000 |
| J213.7 | Sal.-Summer Driver Ed. | 4,000 | 1,000 | 3,000 |
| J250.2-J255.0 | Other Expenses | 20,110 | 10,450 | 2,260 |
| J402.0 | Sal.-Nurse | 5,000 | 4,000 | - 0 - |
| J522.0 | Atypical Pupils-Trans. | 10,000 | 6,000 | - 0 - |
| J612.0 | Sal.-Summer,Extra | 8,000 | 5,000 | 3,000 |
| J650.0 | Supplies | 22,000 | 18,000 | 4,000 |
| J730.1&2 | Instr. & Non-Instr. Equip. | 30,000 | 23,000 | 7,000 |
| J740 | Other Expense | 9,000 | 7,000 | 2,000 |
| J1020.2 | Athletics (other than sal.) | 17,000 | 16,000 | - 0 - |
| | Sub-Totals | $201,752 | $139,450 | $46,927 |

**CAPITAL OUTLAY**

| | | | | |
|---|---|---|---|---|
| L1220.0-3 | Improvements | $35,000 | $30,000 | $- 0 - |
| L1240 | Administrative Equip. | 2,000 | 1,000 | - 0 - |
| L1250 | Instructional Equip. | 27,500 | 15,500 | - 0 - |
| L1260 | Operation Equip. | 4,000 | 2,000 | - 0 - |
| L1270 | Maintenance Equip. | 4,000 | 2,500 | - 0 - |
| | Sub-Totals | $72,500 | $51,000 | $- 0 - |

The Commissioner therefore directs that there be added to the certification previously made by Council to the Bergen County Board of Taxation the amount of $46,927 for current expenses for the 1971-72 school year.

COMMISSIONER OF EDUCATION

November 17, 1971

**In the Matter of the Tenure Hearing of Emma Matecki, School District of New Brunswick, Middlesex County.**

## COMMISSIONER OF EDUCATION

### Decision

For the Complainant Board of Education, Brenner and Monyek (Terrill M. Brenner, Esq., of Counsel)

For the Respondent Emma Matecki, Rothbard, Harris and Oxfeld (Sidney Birnbaum, Esq., of Counsel)

Respondent is a teacher who has acquired a tenure status under the provisions of *N.J.S.A.* 18A:28-5 in the School District of the City of New Brunswick, Middlesex County. Complainant Board of Education, hereinafter "Board," received a written charge of conduct unbecoming a teacher against respondent, which was made by the principal of the Board's Roosevelt Intermediate School. The Board determined that the charge would be sufficient, if true in fact, to warrant dismissal or reduction in salary, and thereupon certified said charge to the Commissioner of Education on May 18, 1971, by a majority vote of the full membership of the Board.

The Board alleges that a serious incident occurred on Friday, January 22, 1971, in a classroom in the Roosevelt Intermediate School which involved respondent and her pupils. The Board prays for judgment by the Commissioner of Education, following full and formal hearing, that respondent be dismissed as a teacher in the School District of the City of New Brunswick, and that she receive no monetary compensation from and after January 22, 1971.

Respondent denies the allegations of the charges, and answers that the penalty sought by the Board is too severe and that its penalty of suspension is excessive. Respondent alleges further that her conduct was not premeditated, cruel or vicious, but represented a statement made in a hasty and misguided effort to maintain discipline. Respondent seeks dismissal of the charge by the Commissioner of Education, pursuant to *N.J.S.A.* 18A:6-16, on the dual grounds that said charge is not sufficient to warrant dismissal, and further that the Board failed to comply with the precise requirements of *N.J.S.A.* 18A:25-6, which 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 teaching staff member, 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." Amended by L. 1968, c. 295, s12, eff. Sept. 9, 1968.

Testimony and documentary evidence were educed at a hearing conducted on July 29, 1971, at the office of the Middlesex County Superintendent of Schools, New Brunswick, before a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

> The charge alleges the following:
>
> "***on January 22, 1971 Emma Matecki was guilty of conduct unbecoming a teacher, with particularity: (a) On said date Miss Matecki's students were told by her that it would be necessary for them to straighten up their books and clean up the room before they would be dismissed. No one made a move to clean up until Nick Patakos [N.P.] got up to fix the books. Miss Mateck then told Nick to sit down and not do 'nigger work.' ***."

Eight pupil witnesses testified regarding the alleged incident of Friday, January 22, 1971. The testimony of each pupil witness corroborated the testimony of the other pupils with only minor variations. It was established by the testimony that pupils are in the seventh grade of the Roosevelt Intermediate School, and that respondent is one of their teachers. On Friday, January 22, 1971, at approximately 4:05 p.m., which is the end of the last class period, respondent told the pupils to put away their books and straighten up the room. The pupils left the books in disarray at the rear of the classroom and lined up by the door. The teacher told the pupils to sit down in their seats. She told them to straighten up the books which were kept in piles on the floor and to clean up the room. One boy, N.P., left his desk to straighten up the books, and the teacher then allegedly uttered the remark, *supra*. The testimony of each pupil regarding the teacher's remark is quoted in pertinent part as follows:

N.P. - "*** she said no, Nick, why should you do the niggers work*** ". (Tr. 24, 31)

F.J. - "*** she said why should Nick do the niggers work ***." (Tr. 33)

D.J. - "***she said why should Nick do the niggers work.***" (Tr. 39)

J.W. - "*** she said no, Nick, don't do the niggers work ***." (Tr. 42)

W.M. - "*** she told him don't do the niggers work ***." (Tr. 49, 52)

B.J. - "*** she told him to sit down, and let the niggers do the work.***" (Tr. 55)

R.B. - "*** she said no. Why should Nickolas do the niggers work.***" (Tr. 57)

S.M. - "*** she said why should Nick do the niggers work.***" (Tr. 62)

The pupils testified further that after the teacher made this remark, one pupil asked her whether she had said what he thought he heard, and she admitted making the remark. (Tr. 29, 33, 39, 40, 47, 52, 57, 62) Four of the pupils averred that one pupil then stated to the teacher that they are not slaves any more. (Tr. 42, 47-48, 56, 57, 62) The pupils testified that they then stood up and walked out of the classroom.

On Monday, January 25, 1971, the pupils reported to their homeroom in the school auditorium at approximately 10:30 a.m. Two of the pupil witnesses testified that they, together with other pupils, approached respondent during the homeroom period and asked her again whether she had made the remark. According to these witnesses, she denied that she had called the pupils "niggers." (Tr. 30-33, 45, 46) One pupil witness testified that some boys cursed at respondent in the auditorium and that the pupils were going to start a disturbance on Monday, but did not because respondent left the school during the course of the day. (Tr. 45-46) Seven of these pupil witnesses stated that there will be trouble both in the school and in respondent's classroom if she returns to the school. (Tr. 27, 34, 36-38, 40-42, 44-46, 51, 57-59, 63) Five of the pupils asserted that they believe respondent is prejudiced against black children. (Tr. 41, 44, 53, 58, 61, 63) One pupil testified that, on another occasion, she walked up to the respondent teacher's desk to ask a question while the pupils were working at their seats and the teacher was marking papers at her desk. According to the pupil, the teacher remarked that there was a shadow standing beside her, and she did not know what it was. (Tr. 44) The testimony of two other pupils corroborated this incident. (Tr. 53-55, 58-59) The testimony of the pupil witnesses indicates that most of them have siblings, who attend other schools within the district.

The principal and vice-principal of the Roosevelt Intermediate School testified regarding the events which transpired on Monday, January 25, 1971, and thereafter in relation to the formal charge. The principal stated that a security guard advised him on Monday morning of a possibility of a school disruption as the result of some incident which had taken place in respondent's classroom on Friday, January 21, 1971. The principal asked the vice-principal and two administrative assistants whether they had any knowledge of the incident, and he was informed by all three administrators that they had not heard about it. At approximately twelve o'clock, the vice-principal was called by a shop teacher, who had overheard the respondent's pupils planning a disruption of her class later in the day. (Tr. 66, 114) The vice-principal told these pupils that he and the principal would look into the problem immediately, and the pupils then assured him that they would not start trouble. (Tr. 66, 115) The principal called respondent teacher to his office and discussed the problem with her in the presence of the vice-principal, and the vice-principal testified that the teacher admitted to them that she had made the racial remark in her classroom on the previous Friday. (Tr. 67, 71, 80, 81, 115) When the principal asked respondent for a written statement describing the classroom incident, she retired to the teachers' rest room and immediately wrote such a statement. She did not sign the statement, and she omitted the alleged remark from her statement. (Exhibit R-1) The principal then ordered her to leave the school and go home, and she complied. (Tr. 68, 117) Both of these administrators testified that, in their judgment, a serious disturbance would have occurred on Monday, January 25, 1971, if they had not acted immediately by removing respondent from the school. (Tr. 68, 116, 117) The principal informed the assistant superintendent and the President of the Board of Education of this incident by telephone on Monday, January 25, 1971. (Tr. 107) Written statements concerning the Friday incident in respondent's classroom were secured from thirteen of the pupils by the administrators on Monday, January 25, 1971. (Exhibit P-4) The written statements substantially support the oral testimony provided by the pupils. On Tuesday, January 26, 1971, the principal and vice-principal questioned each of respondent's pupils concerning the classroom incident of Friday. (Exhibit P-2) A written report dated January 26, 1971, was submitted by the principal to the assistant superintendent. (Exhibit P-2) This report described the classroom incident and events subsequent to that date.

On Wednesday, January 27, 1971, the principal and vice-principal conferred with respondent for approximately two hours. (Tr. 72, 93-95) (Exhibit P-3) During this conference the principal suggested to respondent that she resign because, in his judgment, she had compromised her position to an extent that she could not effectively teach in the Roosevelt Intermediate School or any other school within the district. (Tr. 69, 70, 72, 94) (Exhibit P-3) The principal stated that he believed that the safety and welfare of both respondent and the pupils in the school would be jeopardized if respondent returned to the schools of New Brunswick. (Tr. 71) On Thursday, January 28, 1971, respondent telephoned the principal and inquired whether he had additional information for her. In his report of January 29, 1971, (Exhibit P-3) the principal stated that he notified respondent of the letter of suspension which had been mailed to her.

A communication dated January 27, 1971, was addressed to respondent by the Superintendent of Schools. This letter (Exhibit P-1) informed her in pertinent part as follows:

> "The Board of Education at its conference meeting last evening directed me to inform you that you are suspended without pay from your teaching position at the Roosevelt Intermediate School effective Monday, January 25, 1971.***"

Respondent did not return to her teaching position for the remainder of the 1970-71 school year. Counsel for the Board informed the hearing examiner by letter dated July 30, 1971, that respondent was not paid for the months of February, March, April, May and June 1971.

The assistant superintendent of schools testified that seventy-five percent of the elementary school enrollment in grades kindergarten through four consists of black pupils. In Grades five through seven, the percentage of black pupils is approximately sixty, and the percentage in the high school, grades nine through twelve, is between fifteen and eighteen percent. (Tr. 126) This witness stated that he had been involved in three major school disruptions, which he characterized as riots, and he opined that a major school disruption would occur if respondent continued to teach in the school district. (Tr. 126)

Respondent's testimony regarding the incident on Friday, January 22, 1971, essentially corroborated the testimony of the pupils with only minor variations. Under both direct and cross-examination, she admitted saying "*** okay, let Nicholas do the nigger work. ***" (Tr. 131, 142, 167) She stated that the remark was "thoughtless," but was not intended to be derogatory or malicious. (Tr. 132, 133, 135) She recalled that a pupil asked her about the remark, but could not recall answering him. (Tr. 135) She denied any recollection of the prior incident when she allegedly referred to a pupil as a "shadow." (Tr. 136) On Monday, January 25, 1971, she stated that a group of pupils approached her during the homeroom period in the auditorium and asked "*** is it true you called us niggers?" She replied "*** no, I did not call you niggers.***" (Tr. 137, 138) During her first class period on Monday, another pupil asked her whether she had called her pupils "niggers." She told this class that she did not, and made an explanation of the incident. According to respondent, this explanation resolved the problem with this class of pupils. (Tr. 139-141)

Respondent testified that she did admit to the principal that she had made the remark. (Tr. 142) She informed the principal that she would not write the remark in her report of the incident because she desired to consult with her attorney. (Tr. 142, 143) She told her attorney she had admitted making the remark. (Tr. 143) She asked the principal if she could be transferred to another school, but the principal did not agree and told her the school district is too

small for that to be a solution to the problem. (Tr. 145) Respondent did tell the principal that she would resign if she could secure another teaching position. According to respondent, she went to the office of the Middlesex County Superintendent to secure a list of the superintendents of all the schools in Middlesex County. She telephoned all superintendents on the list in order to locate teaching vacancies, and continued her efforts to secure another position during subsequent weeks. (Tr. 146, 147) On February 17, 1971, according to respondent, she and her attorney conferred with the Board's attorney and the assistant superintendent, the principal and the vice-principal in the office of the Board's attorney. At this conference, respondent avers that she was told her suspension was not in the minutes of the Board of Education, and that if she resigned, the record of the suspension could be erased, and her record would be unblemished. Respondent replied that she would resign the following day if she could secure another position. (Tr. 149, 157) The principal's testimony regarding this conference was that a common understanding was reached that respondent would resign, that the Board would take no action which might jeopardize her efforts to secure other employment, and that nothing would appear on her record. (Tr. 71, 72) Respondent testified that she could not recall whether her former attorney made this request at this conference. (Tr. 157) The principal further testified that he signed the formal charge against respondent when he was informed that she had changed attorneys and desired a hearing. (Tr. 73)

Respondent testified that, in her opinion, the term nigger is a colloquial expression, which is not derogatory unless used in a deprecating manner. (Tr. 132, 155) She repeatedly stated that her utterance of this remark was thoughtless and the result of ignorance on her part. (Tr. 155)

Counsel for respondent argued, both in the pleadings and in his opening statement at the hearing, that the charge should be dismissed, based upon the fact that respondent was suspended effective January 25, 1971, and that the charge was not filed until May 5, 1971.

Counsel for the Board argued that the charge was not filed immediately because an agreement was reached with respondent's former counsel at the February 17, 1971, conference to the effect that respondent would resign without the necessity of a formal hearing before the Board if she were given the opportunity of obtaining other employment. The Board's counsel argued further that he was notified by letter dated March 22, 1971, that respondent's counsel would no longer represent her. In addition, the Board's counsel stated that he was informed on April 27, 1971, by a representative of the New Jersey Education Association that this organization now represented respondent and that she was unwilling to resign.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the findings of fact as set forth in the report of the hearing examiner and the record in the instant matter.

In the first instance, the Commissioner will consider respondent's plea that the action of the Board of Education was *ultra vires* in that the Board failed to comply with the precise requirements of *N.J.S.A.* 18A:25-6, which provides that:

> "The superintendent of schools may, with the approval of the president *** of the board *** suspend any *** teaching-staff member, and shall report such a suspension to the board *** *forthwith*. The board *** by a 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." (*Emphasis ours.*)

The facts are clear that the suspension of respondent was by an action of the Board at a conference meeting on January 26, 1971, as stated in the letter to her under date of January 27, 1971. (Exhibit P-1) Therefore, *N.J.S.A.* 18A:25-6, *supra*, is only applicable in that the Board is required to take such action, by a roll call majority vote of its membership, for the restoration or removal of such person, as it shall deem proper.

*N.J.S.A.* 18:A6-11, which reads as follows, is also applicable to the instant matter:

> "If written charge is made against any employee of a board of education under tenure during good behavior and efficiency, it shall be filed with the secretary of the board and 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 written charge was filed with the Secretary of the Board of Education on May 5, 1971, by the principal of the Roosevelt Intermediate School, and the Board certified said charge on May 18, 1971, in accordance with the provisions of *N.J.S.A.* 18A:6-11, *supra.* If the Board had not acted upon the charge within 45 days after receipt thereof, the charge would "have been deemed to be dismissed." *N.J.S.A.* 18A:6-13

The provisions of *N.J.S.A.* 18A:6-14 are also applicable here. This statute reads as follows:

> "*Upon certification of any charge to the commissioner, the board may suspend the person against whom such charge is made, with or without pay*, pending final determination of the same, and if the charge is dismissed, the person shall be reinstated immediately with full pay as of the time of such suspension." (*Emphasis ours.*)

The Appellate Division of the Superior Court of New Jersey has made a thorough examination of the legislative history of the Tenure Employees Hearing Act, *N.J.S.A.* 18A:6-10 *et seq.*, and has provided a clear interpretation of the intent of this Act. Judge Carton expressed the opinion of the Court in the case, *In The Matter of the Tenure Hearing of David Fulcomer, Holland Township, Hunterdon County*, 1966 *SLD* 225, affirmed State Board of Education March 2, 1966, 93 s,N.J. Super. 404 (*App. Div.* 1967). At p. 412 Judge Carton stated that:

> "*** A strict and precise timetable for the disposition of each stage of the proceeding represents legislative recognition of the importance of a prompt resolution of such disputes.***"

The facts are clear that an extensive period of time elapsed between January 25, 1971, when the Board effectively suspended respondent, the filing of the formal charge on May 5, 1971, and the subsequent certification of the charge by the Board on May 18, 1971. This fact, standing alone, would be clearly indicative of the Board's failure to promptly resolve the dispute as required by the Legislature and the Courts of this State. The Board argues that the delay was caused by its acceding to representations made by respondent's former counsel, and that the delay was solely in the interest of respondent. This argument, and the attendant facts relating to the delay, are not seriously contradicted by respondent. Instead, respondent relies on the material fact of the lapse of time in her pleading that the procedure was defective and should therefore be set aside.

In the judgment of the Commissioner, respondent cannot now claim a defect in a procedure which was adopted by the Board in response to a request made by her counsel at the time. Counsel for respondent could have allowed the procedure required by the statutes to proceed as a matter of ordinary course. The fact that respondent is now represented by different counsel does not invalidate actions taken on her behalf by her previous counsel. The Commissioner is aware that counsel for both parties, in matters controverted before him, frequently make informal agreements, which are honored and which do not appear on the record. The allegation by respondent that the fact of the lapse of time is sufficient cause to invalidate the action of the Board is groundless, and her prayer for a dismissal of the charge because the Board did not obtain a formal waiver from her is without merit. In the judgment of the Commissioner, the facts support the Board's contention that the agreement reached between counsel for both parties on February 17, 1971, did constitute an informal waiver from petitioner.

The Commissioner takes notice of the fact that during the period of suspension beginning January 25, 1971, respondent received pay only until January 31, 1971. A local board of education has authority to suspend a tenured employee, without pay, only upon the certification of a formal charge to the Commissioner of Education. *N.J.S.A.* 18:6-14, *supra* Respondent's suspension without pay prior to the certification of the charge on May 18, 1971, was

improper. The Commissioner therefore orders the Board of Education of the City of New Brunswick to restore in full to respondent the amount of salary withheld from February 1, 1971, through May 18, 1971.

The Commissioner finds that the formal charge against respondent is in fact true. This finding is based upon the oral testimony of witnesses confirmed by the admission of respondent. In numerous previous decisions, the Commissioner has expressed the opinion that the testimony of school children must be used with caution, most particularly in matters where the final adjudication rests primarily on the basis of such testimony. *In the Matter of the Tenure Hearing of Mary Louise Connolly, School District of the Borough of Glen Rock, Bergen County*, decided by the Commissioner of Education July 2, 1971 (and cases cited). However, in the instant matter the Commissioner notices that the testimony of the pupils was relatively similar, and that the testimony of respondent offered only minor variations from that of the pupils.

The Commissioner is required, in these matters arising under the Tenure Employees Hearing Act, to decide the controversy is entirety, including the determination of the penalty. *In re Fulcomer, supra* In the instant matter respondent's only defense of her action was that it was thoughtless and the result of ignorance on her part in a hasty and misguided effort to maintain discipline. It is clear from the record that some of the pupils believed that their teacher meant to hurt them. The uncontradicted testimony of the school administrators asserted that a major school disruption was imminent on the following Monday because the pupils were planning, as stated in their language, to "Turn out" respondent's classroom. The Commissioner agrees that the expeditious action of the administrators on Monday, January 25, 1971, averted a planned disturbance by the pupils. The racial composition of the New Brunswick School District indicates a large percentage of black pupils. The Roosevelt Intermediate School's enrollment also follows this pattern. It is logical that the teacher's remark was reprehensible to these minority group pupils, and that they would consider this utterance as the language of prejudice. In the Commissioner's judgment, a major responsibility of members of the teaching profession is to demonstrate self-control and discipline. The behavior of the children in respondent's classroom was typical of thirteen and fourteen year-old pupils. In a school district which has experienced several school disruptions by pupils in recent years, it is reasonable to expect that teachers would possess a sensitivity to incidents which could produce a recurrence of such problems.

The Commissioner considers this incident to be grounds for dismissal. The fact that this is a single incident does not bar the imposition of the penalty of dismissal.

As the Court stated in *In Re Fulcomer, supra*, at p. 421:

> "***Nor have we any doubt that unfitness to remain a teacher may be demonstrated by a single incident if sufficiently flagrant. See *Redcay v. State Board of Education*, 130 *N.J.L.* 369 (*Sup. Ct.* 1943), affirmed *o.b.* 131 *N.J.L.* 326 (*E&A* 1944).***"

The Commissioner holds that the conduct of the teacher in the matter heretofore detailed was a demonstration of unprofessional conduct so gross, and so fraught with peril to the continued safety and well-being of both the teacher and the pupils, as to warrant the forfeiture of tenure rights.

Accordingly, having found the charge to be true, in fact, and of a nature sufficiently serious to warrant respondent's dismissal from her position as a teacher in the School District of the City of New Brunswick, the Commissioner directs the New Brunswick Board of Education to dismiss respondent as of the date of May 18, 1971.

COMMISSIONER OF EDUCATION

November 18, 1971

Pending before the State Board of Education

**Rebecca Mayes,**

*Petitioner,*

**v.**

**Board of Education of the City of Bridgeton, Cumberland County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**Decision**

For the Petitioner, Ballen, Batoff and Laskin (Arthur E. Ballen, Esq., of Counsel)

For the Respondent, Samuel Serata, Esq.

Petitioner, a pupil enrolled in the junior class of Bridgeton High School, hereinafter "High School," was expelled from school on April 7, 1971, by formal action of the City of Bridgeton Board of Education, hereinafter "Board." Petitioner sought and was granted an Order from the Chancery Division of the New Jersey Superior Court temporarily restraining the execution of the expulsion action. The Court also directed that any application for the continuance of the restraining Order was to be made to the Commissioner of Education. Petitioner returned to school on April 30, 1971. Following oral argument on an application for *pendete lite* relief, the Commissioner temporarily and conditionally reinstated petitioner in the High School until June 23, 1971, thereby enabling her to complete successfully her junior year.

A hearing on petitioner's appeal for full and complete reinstatement in the High School was conducted on June 29, 1971, at the office of the Cumberland County Superintendent of Schools, Bridgeton, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

Petitioner was suspended from school on March 11, 1971, by the Superintendent of Schools as the result of an incident which took place on that date at the High School.

A hearing on charges against petitioner was conducted by the Board on April 6, 1971. A transcript of the proceedings before the Board has been included in this record. The essential facts educed in the Board's hearing are not contradicted by the testimony provided by both parties in these proceedings.

On March 11, 1971, a major disruption of the High School program, involving hundreds of pupils, took place. Testimony of the school administrators discloses that there was an atmosphere of extreme tension within the High School as follows:

A fire was set in one of the lavatories at approximately one o'clock, and the fire alarm was sounded. The Superintendent attempted to move a group of forty or fifty pupils outside of the building. These pupils had refused to move from the hallway and to follow the exit procedures for a fire alarm. Petitioner was one of this group. Four times the Superintendent asked petitioner to move outside of the building, and each time she refused and defied the Superintendent by moving to a different location in the hallway. When the Superintendent finally threatened to have this pupil removed, she then complied and moved outside of the building. The Superintendent also stated to petitioner that she was being suspended immediately. Upon returning to the building, petitioner walked down the hallway screaming. The Superintendent followed her to the cafeteria and asked her at least four times to report to the office because he was suspending her. Each time petitioner refused and ignored the instructions of the Superintendent. A short time later a group of approximately four hundred pupils moved from the cafeteria down a hallway and attacked a group of police officers who were trying to restore order. Several students were injured at this time, and shortly thereafter the High School building was cleared of all pupils and was closed for the remainder of the day. The Superintendent testified that he was informed later the same day that fires had been set in the cafeteria as well as in the lavatory, but he did not personnally witness the cafeteria fires.

Petitioner has a long history of disciplinary problems which range from simple tardiness to insubordination, using foul language, cutting class and fighting. (Exhibit R-1, R-3) Her academic record discloses that she has above average intelligence, but her performance has not been consistent. (Exhibit R-2)

The hearing examiner has read the transcript of the hearing conducted by the Board of Education for petitioner on April 6, 1971, (Exhibit R-4) and finds that: (a) petitioner was advised of the charges against her, (b) petitioner was represented by counsel, (c) petitioner had the opportunity to testify regarding

her version of the incident which caused the suspension, (d) petitioner had knowledge of who her accusers were, and (e) petitioner had the opportunity to refute the testimony of the witnesses who testified against her and also to cross-examine the witnesses who provided oral testimony.

On the following day, April 7, 1971, the board adopted a resolution finding petitioner guilty of continued and willful disobedience and defiance of a person having authority over her, and accordingly expelled petitioner from the High School.

* * * *

The Commissioner has reviewed the report of the hearing examiner and the record in the instant matter. The Commissioner has stated in previous decisions that the 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. *John Scher v. Board of Education of the Borough of West Orange, Essex County*, 1968 *S.L.D.* 92, 96 The school law of this State (*N.J.S.A.* 18A:37-5) clearly authorizes boards of education to impose this penalty, and the Commissioner is reluctant to intervene in such an action unless it can be clearly demonstrated that a board's decision was palpably in error. In the instant matter the record fails to disclose any fatal error in the procedural action of the Board, nor does there appear any evidence of arbitrariness on the part of the Board.

The hearing afforded to petitioner essentially comported with the statement of a pupil's right to procedural due process as set forth in *Scher, supra.* In that case the Commissioner cited the following guidelines laid down by the Court in *State ex rel. Sherman v. Hyman*, 180 *Tenn.* 99, 171 *S.W.* 2*d* 822 (1942), *cert. den.* 319 *N.S.* 748 (1943):

> " *** We think the student should be informed as to the nature of the charges as well as the names of at least the principal witnesses against him when requested, and given a fair opportunity to make his defense. *** The testimony against him may be oral or written, not necessarily under oath, but he should be advised as to its nature, as well as the persons who have accused him.*** "

In *R.R. v. Board of Education of Shore Regional High School District*, 109 *N.J. Super.* 337, 347 (*Ch. Div.* 1970), the Court stated that *N.J.S.A.* 18A:37-2, 37-4 and 37-5 must be construed to require public school officials to afford pupils facing disciplinary action, involving the possible imposition of serious sanctions such as expulsion, the procedural due process guaranteed by the United States Constitution. The Court quoted *Dixon v. Alabama State Board of Education*, 294 *F.* 2*d* 150 (5th *Cir.*, 1961), which opinion elaborated upon the guidelines as enunciated, *ante*, and quotes the Circuit Court's conclusion that "*** If these rudimentary elements of fair play are followed in a case of misconduct of this particular type, we feel that the requirements of due process

of law will have been fulfilled." In the instant matter the local Board granted a broader and more adversary type hearing than that described by the Commissioner of Education in *Scher, supra*, or by the Circuit Court in *Dixon, supra.* The Board's decision was based on uncontradicted evidence, and the action taken by the Board was clearly within the authority bestowed by the Legislature in *N.J.S.A.* 18A:37-2 and 37-5. The Board's -action is entitled to a presumption of correctness, and the Commissioner will not overturn its decision unless there is an affirmative showing that the decision was unreasonable or arbitrary. *Thomas v. Board of Education of Morris Township,* 89 *N.J. Super.* 327 (*App. Div.* 1965)

A high school is a controlled institution composed of adolescent pupils. As such, it requires compliance with reasonable rules and regulations for deportment and conduct in order to function efficiently. It is clear that the actions of petitioner were that of willfull disobedience. These repeated acts of defiance of the Superintendent of Schools were most serious on their face. When viewed against the threatening atmosphere of disruption, fires being set, and the impending near-riot condition, which immediately followed, it can only be concluded that such action further imperils the safety and welfare of the school population, and therefore cannot be tolerated.

Having considered the foregoing facts, the Commissioner finds and determines that the appeal of petitioner is without merit. Accordingly, the Petition is dismissed.

COMMISSIONER OF EDUCATION

November 30, 1971

**Henry R. Boney,**

*Petitioner,*

**v.**

**Board of Education of the City of Pleasantville and Robert F. Wendland, Superintendent of Schools, Atlantic County,**

*Respondents.*

**COMMISSIONER OF EDUCATION**

**Decision**

For the Petitioner, Patrick T. McGahn, Jr., Esq.

For the Respondent, Champion and Champion (Louis D. Champion, Esq., of Counsel)

Petitioner, a teacher in the Pleasantville High School, hereinafter "High School," disputes the procedural action taken by the Board of Education of the School District of the City of Pleasantville, hereinafter "Board," in declining to appoint him as chairman of the physical education department for the 1970-71 school year. Petitioner also alleges that the Board's action in denying him a full hearing of a grievance filed on his behalf by a third party, and terminated because of an error on the part of the third party, is fundamentally unfair.

The Board denies that its action in declining to reappoint petitioner as chairman of the physical education department was improper, and avers that its action was entirely within its statutory and discretionary authority.

Petitioner prays for relief in the form of an Order by the Commissioner of Education directing the Board to reopen a grievance proceeding so that his cause may be fully heard.

This matter is submitted on a Stipulation of Facts for Summary Judgment by the Commissioner.

Petitioner is a teacher with a tenure status in the Pleasantville Public Schools. On November 2, 1965, he was assigned the extra-classroom duty of chairman of the physical education department for the 1965-66 school year by the Board upon the recommendation of the Superintendent of Schools. Petitioner and all other department chairmen each received an honorarium in the amount of three hundred dollars. (Exhibit R-1) The Board assigned petitioner to the same duty for the school year 1966-67 and 1967-68 at the same honorarium of three hundred dollars. (Exhibits R-2, R-3) The identical assignment was made to petitioner for the school years 1968-69 and 1969-70, but the honorarium for

each department chairman was increased to four hundred dollars for these two school years. (Exhibits R-4, R-5) For each of the five years from 1965-66 through 1969-70, petitioner signed a contract with the Board for this extra duty. (Exhibit R-8) These contracts are identical with the exception of the school years stated, and the aforementioned change in the amount of the honoraria for the 1968-69 and 1969-70 school years. The contracts specifically state that the term of each appointment "*** shall extend only for the term set forth herein***." (Exhibit R-8, *supra)*

A memorandum under date of November 13, 1970, from the principal of the High School to the staff members of the physical education department, states that effective November 16, 1970, another teacher would serve as chairman of that department for the 1970-71 school year. (Exhibit P-1)

The minutes of the Board of Education meeting held December 1, 1970, disclose that petitioner was not included on the list of teachers, to receive honoraria for extra classroom assignments for the 1970-71 school year, as adopted by the Board upon the recommendation of the Superintendent of Schools. (Exhibit R-6)

By affidavit, a third party, who is also a teacher employed by the Board, and president of the local education association, states that he filed a grievance on behalf of petitioner with the principal of the High School. (Exhibit P-3) This grievance was filed on November 24, 1970. (Exhibit R-15) The principal rendered his decision on the grievance in writing and placed copies in the mailboxes of petitioner and the third party on December 2, 1970. (Exhibits P-3 and R-15) A letter dated December 11, 1970, was addressed to the Superintendent of Schools by the president of the local education association, stating that by this letter the grievance was being placed at Level 2 because the association was not satisfied with the decision made by the principal. (Exhibit R-17) Level 2 of the grievance procedure provides, in part, that:

> "The employer grievant, no later than five (5) school days after receipt of the decision of his principal may appeal the decision to the Superintendent of Schools. The appeal to the Superintendent must be made in writing ***." (Exhibit R-14, p. 4)

The Superintendent of Schools replied to petitioner's representative by letter dated December 22, 1970, wherein he stated that the time interval to appeal a grievance to him had been exceeded, and therefore the principal's decision on the first level was deemed to have been accepted. (Exhibit R-10)

Counsel for petitioner addressed a communication to the Superintendent under date of December 28, 1970, requesting that the Superintendent grant a second level hearing regarding petitioner's grievance. The affidavit (Exhibit P-3) of the third party was enclosed with this letter. (Exhibit R-11) Petitioner's counsel stated in the letter that if petitioner's request were denied, petitioner would either have to appear at a public meeting of the Board and request a *de*

*novo* hearing on this matter, or file an Order to Show Cause in the Superior Court of this State. (Exhibit R-11) The affidavit (Exhibit P-3) of the third party states that petitioner's grievance was terminated after Level 1 "*** as the result of the grievance not being filed timely by me within the required period of time.*** "

In a letter of reply dated January 7, 1971, (Exhibit P-14) the Board's counsel reviewed the incidents which had taken place with respect to petitioner's grievance and quoted an excerpt from *Article* III, *Section* B-1, *Page* 4 of the grievance procedure as follows:

> "***Failure at any step of this procedure to appeal a grievance to the next step within the specified time limits shall be deemed to be waiver of further appeal of the decision.***"

In reply, petitioner wrote to the Superintendent under date of January 18, 1971, requesting a hearing with the Superintendent and the Board prior to January 29, 1971. (Exhibit R-12) This letter also stated, in part, the following:

> "***This request is based upon the technical failure of the Pleasantville Teachers' Association in filing the grievance earlier. A hearing before the board of education prior to January 29 is essential if the hearing in the Superior Court is to be avoided on the same question."

The Superintendent answered petitioner by letter dated January 25, 1971, where he stated that he could not comply with petitioner's request because the matter was then in litigation. (Exhibit R-13)

On January 11, 1971, petitioner filed an action In Lieu of Prerogative Writ in the Superior Court of New Jersey, Law Division. (Exhibit P-5) The Board filed a Motion to Strike the Complaint, accompanied by an affidavit in support thereof, on the grounds that petitioner had not exhausted his administrative remedies. (Exhibit P-6) Petitioner filed counter affidavit to the Motion to Strike the Complaint on January 28, 1971. (Exhibit P-7) Both parties stipulate that on January 29, 1971, the Superior Court, Law Division, dismissed the Complaint, being of the opinion that petitioner had not exhausted the administrative remedies available to him. Petitioner states in his pleadings that he does not choose to appeal the ruling of the Superior Court, Law Division, to the Appellate Division at this time.

The Board argues that petitioner's appeal should be dismissed on the grounds that since petitioner originally selected the remedy of an action In Lieu of Prerogative Writ in the Superior Court, his remedy at this instance is an appeal of that decision to the Appellate Division.

The Commissioner does not agree. In view of the fact that petitioner has elected to follow the directive of the Superior Court and has filed his appeal to the Commissioner, it is the proper function of the Commissioner to hear and decide this case. *N.J.S.A.* 18A:6-9

It is well established in this State that the obligation of public school teachers to perform extra-classroom duties is mandatory. In a previous decision, *Clinton F. Smith et al. v. the Board of Education of the Borough of Paramus, et al.* 1968 *S.L.D.* 62, affirmed State Board of Education without written opinion, February 5, 1969, appeal dismissed Appellate Division, New Jersey Superior Court, September 8, 1969, the Commissioner stated the following pertinent conclusion at p. 69:

> "*** the teacher's day is comprised of the minimum hours set by the employing board of education plus the amount of time required for discharge of such duties and services as may be reasonably expected and required of a member of the professional staff of a public school***."

It is clear that petitioner holds an appropriate certificate to teach in the public schools (Exhibit R-9), and that he is employed and has acquired a tenure status in the Pleasantville School District. It is also clear that in certain years, namely, 1965-66 through 1969-70, petitioner has been assigned the extra-classroom duty of chairman of the physical education department in addition to his regular classroom-teaching assignment. The evidence discloses that this extra-classroom assignment was made annually by the Board, and that each year petitioner was paid a sum as an honorarium in addition to his regular salary as a teacher.

Petitioner possesses no special status or tenure as chairman of the physical education department. He has a tenure status in his certified position as a teacher from which he cannot be dismissed or suffer a reduction in salary except for proper cause determined by a full and formal hearing. *N.J.S.A.* 18A:6-10, 18A:28-5 In the instant matter petitioner is threatened by neither of these misfortunes. His only loss is that of an honorarium he has received for his services as department chairman in addition to his teacher's salary.

It is clear that a local board of education has the right to assign and transfer or reassign teachers in its employ. *N.J.S.A.* 18A:27-4 states the following:

> "Each board of education may make rules, not inconsistent with the provisions of this title, governing the employment, terms and tenure of employment, promotion and dismissal, and salaries and time and mode of payment thereof of teaching staff members for the district, and may from time to time change, amend or repeal the same, and the employment of any person in any such capacity and his rights and duties with respect to such employment shall be dependent upon and governed by the rules in force with reference thereto."

See also N.J.S.A. 18A:11-1, 18A:16-1 and 18A:25-1. A transfer is not a demotion. *Lascari v. Lodi Board of Education*, 36 *N.J. Super.* 426 (*App. Div.* 1955) In the instant matter, petitioner was relieved of an extra-classroom duty

which had been assigned to him each year for a certain number of years. The Board was not obligated to continue to make this assignment for each succeeding year. The duties of petitioner as a department chairman were not permanently engrafted on his duties as a teacher, either by rule or by the terms of his employment. The contracts of employment for petitioner's extra duty specifically provided each year that:

> "*** this contract is for extra services and separate and apart and in no way connected with the employment of *** [petitioner] as a teacher in said school system, and that the employment herein set forth shall in no way conflict therewith. ***" (Exhibit R-8)

The Board is without authority to make such an assignment for more than one year under the well-established principle that a board of education is a non-continuous body, which cannot bind its successors except in matters specifically permitted by statute. *Skladzien v. Bayonne*, 1938 *S.L.D.* 120, affirmed State Board of Education 123, affirmed 12 *N.J. Misc.* 602 (*Sup. Ct.* 1934), affirmed 115 *N.J.L.* 203 (*E. & A.* 1935)

Teachers in the public schools direct and supervise a variety of activities, and perform many duties and services, all of which are part of the total school program, but which are not necessarily related to their individual teaching assignments. The Commissioner can find no basis for differentiating between petitioner's extra-duty assignment as a department chairman and the many various other kinds of assignments which teachers perform. *Smith et al. v. Board of Education of the Borough of Paramus et al., supra* A logical conclusion would therefore be that if a tenure status accrues to petitioner's assignment, the same status must apply to all other extra-classroom or extra duty assignments. Such a resulting circumstance would seriously interfere with and impair the sound administration of the public schools, and would place unreasonable and insurmountable obstacles in the way of the development of a thorough and efficient educational program.

Issues similar to the instant matter were raised in the cases of *Nello Dallolio v. Board of Education of the City of Vineland, Cumberland County*, 1965 *S.L.D.* 18 and *Joseph J. Dignan v. Board of Education of the Rumson-Fair Haven Regional High School, Monmouth County*, decided by the Commissioner of Education July 29, 1971. In the *Dallolio* case, a teacher appealed the Board's failure to reassign him as a coach of football on the grounds that he had acquired a tenure status. The Commissioner stated the following pertinent conclusion at p. 21:

> " *** The Teachers Tenure Act was not enacted for such a purpose as petitioner contends, nor was it intended to fix school personnel practices in as rigid and inflexible a structure as would be the case if petitioner's argument was upheld. The Teachers Tenure Act is the enunciation by the Legislature of a public policy with regard to the employment and dismissal of teachers for the primary purpose of insuring the educational welfare of

children and only secondarily as a protection of teachers. *Wall v. Jersey City Board of Education*, 1938 *S.L.D.* 614, affirmed State Board of Education 618, affirmed 119 *N.J.L.* 308 (*Sup. Ct.* 1938) The over-protection claimed by petitioner would be a disservice to the schools, in the Commissioner's judgment, and is not in contemplation of the statute. Indeed, strong argument could be made in favor of changing the assignments of teachers from time to time. 'Transfers are often advisable in the administration of schools for many reasons.' *Cheeseman v. Gloucester City Board of Education*, 1 *N.J. Misc.* 318 (*Sup. Ct.* 1923) Repetition of the same duties may increase competency and efficiency in a particular area but it can also act to stultify both the teacher and the program. There is a middle ground in this respect, and the school administration's hand should be kept free to make those assignments which will most effectively perform the schools' function.***"

The following statement was made by the Commissioner in *Dignan, supra:*

"*** It is clear that the extra compensation ceases when the extra-classroom assignment is no longer performed. *Reed and Hills v. Trenton* Board of Education, *1938 S.L.D.* 437, affirmed State Board of Education 44 Also, see *Dallolio v. Board of Education City of Vineland, Cumberland County, supra.****"

In the judgment of the Commissioner, this statement is precisely applicable to the matter herein controverted.

In the *Dignan* case, a teacher appealed the failure of the Board to reassign him as a faculty advisor to the High School newspaper. The Commissioner held that a board of education has the authority to assign and reassign teachers to extra duties in addition to their regularly-scheduled classroom assignment and to pay such additional remuneration as it deems reasonable and appropriate therefore and that absent a requirement for a certificate other than that of a teacher, no tenure status accrues to such assignments, which can be renewed or discontinued at the discretion of the board. *Dignan v. Board of Education of the Rumson-Fair Haven Regional High School, supra* In the judgment of the Commissioner, this issue of whether a tenure status accrues for extra-classroom duties and assignments is *res judicata.* the facts relative to petitioner's status are not in contention and establish no cause for action on which relief can be granted. The Commissioner takes notice of the words of Judge Lewis of the Appellate Division of the New Jersey Superior Court in the case of *Victor Porcelli et al. v. Franklyn Titus, Superintendent and the Newark Board of Education*, 108 *N.J. Super.* 301 (*App. Div.* 1969), *cert. den.* 55 *N.J.* 310 (1970), which bear directly upon the matter controverted herein. The Court stated at p. 312:

"***We endorse the principle, as did the court in *Kempt v. Beasley*, 389 *F.* 2d 178, 189 (8 Cir. 1968), that 'faculty selection must remain for the broad and sensitive expertise of the School Board and its officials,'***."

In the instant matter a formal grievance was filed on behalf of petitioner under the established local grievance policy because of the Board's failure to reassign him as chairman of the physical education department for the 1970-71 school year. The principal responded to the grievance in writing. The filer of the grievance admits that he did not submit the matter to the Superintendent of Schools within the time limits specified in the Board's grievance policy. The terms of the grievance policy are clear that failure to meet the time limitations at any step "***shall be deemed to be a waiver of further appeal of the decision.***" *Article* III, *Section* B-1, *p.* 4, *supra* This would be dispositive of the issue if the grievance policy were the controlling authority in this matter. The Commissioner holds that both petitioner and the Board misunderstand the proper use of the grievance policy in this matter as well as the applicable rule of law.

As has been stated, no tenure status accrues to extra-classroom assignments such as that performed by petitioner, and they are renewed or discontinued at the discretion of the Board. Since no tenure status can accrue in this instance, petitioner possesses only the rights provided by the terms of his contract for extra remuneration for these duties. There is no allegation that his contracted rights were infringed upon or that a reassignment was denied to him for statutorily proscribed, discriminatory practices, i.e. race, color, religion, etc. The Board simply took no action to reassign petitioner as chairman of the physical education department for 1970-71, and instead assigned another faculty member ot this duty. Petitioner's assignment in the capacity of department chairman expired by its terms on June 30, 1970.

Under these circumstances, the Board had no obligation to give reasons for not reassigning petitioner or in fact to grant petitioner a hearing. In *Zimmerman v. Board of Education of Newark*, 38 *N.J.* 65 (1962) at p. 70, the Court reaffirmed the long-established precedent of prior decisions in New Jersey involving nontenure employment as follows:

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

In this instance, the Commissioner finds that the Board merely exercised its right to decline to reassign a teacher to a nontenured duty, and, in exercising this discretion, it had no obligation to defend its action or to afford a hearing. The applicable statute, *N.J.S.A.* 18A:6-10, requires reasons or charges and a hearing only for teachers who have acquired a tenure status. As was previously stated, petitioner's tenure status as a teacher was not threatened by the Board's action. It is clear that teachers in a nontenure status do not possess such rights

statutorily, and the Commissioner holds that they may not acquire them by indirection through grievance procedures or negotiated agreements. The Board's action in relieving petitioner of an extra-classroom duty, which had been assigned to him on an annual basis for several years, is not a grievable issue. The existence of a formal grievance policy is not to be construed as a means to circumvent the intent of the Legislature as expressed in the school laws. The Appellate Division of the Superior Court of New Jersey thoroughly reviewed and clarified the Tenure Employees Hearing Act in the case of *In the Matter of the Tenure Hearing of David Fulcomer, Holland Township, Hunterdon County*, 93 *N.J. Super.* 404 (*App. Div.* 1965). Judge Carton, writing for the Court, stated that:

"*** The Legislative intent that the Commissioner shall hear and decide the entire controversy clearly appears from a brief review of its provisions and an examination of its historical background.*** (at p. 410)

"***The Tenure Employees Hearing Act *** establishes an entirely new and comprehensive procedure for the resolution of all controversies involving charges against *all* tenure employees not subject to Civil Service under Title 18.*** (*Ibid.* at p. 411)

"*** Formerly all phases of the hearing and decision making function were performed by the local boards. The Commissioner reviewed such determinations on appeal pursuant to the general power conferred upon him to 'decide***all controversies and disputes arising under the school laws.' (*R.S.* 18:3-14) [now *N.J.S.A.* 18A:6-9] (*Ibid.* at p. 411)

"Now the Commissioner conducts the initial hearing and makes the decision.*** (at p. 411)

"There is nothing in the new act which suggests the local boards were intended to retain any part of the Jurisdiction which they formerly exercised in such controversies other than preliminary review of the charge and the required certification to the Commissioner. Their participation in such proceedings is specifically confined to the limited function. Thus the Legislature has transferred from the local boards to the Commissioner, the duty of conducting the hearing and rendering a decision on the charge in the first instance. His jurisdiction in all such cases is no longer appellate but primary.***" (*Ibid.* at p. 412)

Judge Carton also stated the purpose of this legislation as follows:

"*** The main purposes of that law [*L.* 1960, c. 136] were two-fold. The first was to eliminate the vice which inhered in the former practice of the board's being at one and the same time investigator, prosecutor and judge.*** (at p. 413)

> "***The second and no less important purpose was to remove the trial of such cases from the publicity attendant on the local hearing which 'tears the community apart' and 'disrupts the orderly conduct of local school affairs.'***" (*Ibid.* at p. 414)

The Court also clarified the status of *R.S.* 18:6-20 and *R.S.* 18:7-58 [now *N.J.S.A.* 18A:25-1, 27-1, 33-1, 34-1]. The Court stated the following:

> "***These companion sections of *** the School Law provide that no principal or teacher shall be appointed, transferred or dismissed, no policy fixed, and no course of study shall be adopted or altered, nor textbook selected except by a majority vote of the whole board. (*Ibid.* at p. 416)

> "***These provisions still have efficacy insofar as teachers under contract or nontenure are concerned. Authority for the dismissal of these teachers, as well as for the performance of the other acts listed therein, must still be sought under these general provisions of the School Law.***" (*Ibid.* at p. 416)

In the judgment of the Commissioner, the utilization of a grievance policy for adjudication of the action taken by this local board under statutory authority creates two evils. In the first instance, this procedure would create an instant tenure status not intended by the Legislature. Next, the resort to a hearing before the local board on such a matter would recreate the vice of having a local hearing, which the Legislature sought to eliminate in controversies involving employees whose tenure status is threatened. In the matter of *In Re Fulcomer*,*supra*, as was stated, *ante*, the Commissioner holds that such rights are not granted by statute and cannot be acquired by indirection through grievance procedures or agreements. If, as in the matter *sub judice*, an individual attacks an exercise of a board of education's discretion on the grounds that it is arbitrary, capricious or unreasonable, then the proper appeal is to the Commissioner of Education. *Ruth Ann Singer, by her parent and guardian ad litem, Nathan Singer v. the Board of Education of the Borough of Collingswood, et al., Camden County*, decision of the Commissioner of Education on Motion, March 24, 1971

In *Clinton F. Smith, et al. v. the Board of Education of Paramus, et al., supra*, the Commissioner stated the following at p. 69:

> "***It is to be recognized that it is an administrative responsibility to see that assignments to extracurricular responsibilities are reasonably and equitably distributed among faculty members. *** the Commissioner points out that where instances of inequities are believed to exist, teachers have recourse to grievance procedures established by the local school district to effect a satisfactory resolution of the problem.***"

In *Dignan, supra*, the Commissioner reiterated the above statement in relation to the equitable distribution of extra-classroom duty assignments among the faculty members of a school. Such a contested matter is the proper subject

of a grievance procedure within the local school district. The issue here, as in *Dignan* is clearly distinguishable, and is not embraced in the Commissioner's decision in *Smith v. Paramus, supra.*

It is not a proper function of the Commissioner to question the wisdom of the Pleasantville Board of Education's decision to assign the duties of a department chairman to another teacher. The Board has the statutory right to assign teachers as it sees fit, subject of course, to the limitations of certification and reasonableness. *Tensby v. Lodi Board of Education,* 1938 *S.L.D.* 505; *Greenway v. Camden Board of Education,* 1939 *S.L.D.* 151, affirmed State Board of Education 155, affirmed 129 *N.J.L.* 46 (*Sup. Ct.* 1942), affirmed 129 *N.J.L.* 461 (*E. & A.* 1943); *Cheeseman v. Gloucester City Board of Education,* 1938 *S.L.D.* 498, affirmed State Board of Education 500, affirmed 1 *N.J. Misc.* 318; *Downs v. Hoboken Board of Education,* 12 *N.J. Misc.* 345 (*Sup. Ct.* 1934), affirmed 113 *N.J.L.* 401 (*E. & A.* 1934); *Dallolio v. Vineland Board of Education, supra; Joseph J. Dignan v. Rumson-Fair Haven Regional Board of Education, supra.*

As the Commissioner stated in *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), 136 *N.J.L.* 521 (*E. & A.* 1948), at p. 13:

> "***boards of education are responsibile not to the Commissioner but to their constitutents for the wisdom of their actions.***"

The words of the Appellate Division of the New Jersey Superior Court in *Thomas v. Morris Township Board of Education,* 89 *N.J. Super.* 327, 332 (*App. Div.* 1965) bear directly to the point of the instant matter as follows:

> "***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.*** *Quinlan v. Board of Education of North Bergen,* 73 *N.J. Super.* 40 (*App. Div.* 1962)***."

The Commissioner finds and determines, for the reasons stated, that the Pleasantville Board of Education acted within its discretionary authority in relieving petitioner of his extra-classroom duty and assigning that responsibility and extra remuneration to another member of the faculty. Accordingly, the Petition is dismissed.

COMMISSIONER OF EDUCATION

November 30, 1971

**Robert C. Van Allen,**

*Petitioner,*

**v.**

**Board of Education of the Borough of Metuchen, Middlesex County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**Decision**

For the Petitioner, George G. Gussis, Esq.

For the Respondent, Apruzzese & McDermott (Richard F. Powell, Jr., Esq., of Counsel)

Petitioner, a tenured principal in the employ of the Board of Education of the Borough of Metuchen, hereinafter "Board," avers that he was improperly denied salary increments for the school years 1970-71 and 1971-72 and demands judgment to this effect at the present juncture. The Board maintains that it had and has policies which make such increment denials legally correct, and avers that its actions in these instances were proper discretionary ones under the circumstances.

A hearing in this matter was conducted on October 18, 1971, at the Middlesex County Vocational School, East Brunswick, by a hearing examiner appointed by the Commissioner. At the conclusion of the hearing, counsel summarized their respective positions in oral form, and petitioner has also submitted a Memorandum. The report of the hearing examiner is as follows:

Petitioner is the principal of Metuchen High School and is under tenure in that position. Prior to the school year 1970-71, he had been given an annual salary increment each year, and beginning in January 1968, future increments were to be determined by a ratio formula. This formula was contained in an "Administrative Salary Guide" (P-1) reporduced in its entirety below:

"1. The following ratios have been adopted:

| | |
|---|---|
| High School Principal | 1.50-1.70 |
| Intermediate School Principal | 1.40-1.60 |
| Elementary School Principal | 1.35-1.55 |
| High School Vice Principal | 1.25-1.45 |
| Intermediate School Vice Principal | 1.20-1.40 |
| Guidance Director | 1.15-1.35 |
| Psychologist | 1.10-1.30 |
| | (10 mos.) |

| | |
|---|---|
| Social Worker | 1.05------ (10 mos.) |
| School Business Administrator | 1.40-1.60 |
| Superintendent | 1.90-2.10 |

"2. The maximum in the Masters category is to be the base for all positions except that of the Psychologist and the Social Worker in which case their respective training and experience will determine the base.

"3. Each year of approved administrative experience will advance the ratio .01 toward the maximum.

"4. All are 12 months positions except where noted.

"1/3/68"

However, petitioner was denied increments pursuant to the stated ratio formula during school year 1970-71 and again in school year 1971-72.

A guide similar to P-1, but with slightly higher ratios, was adopted by the Board in January 1971. (P-2) Both guides indicated that the ratios as itemized were to be applied to the "Masters" salary "guide," or "category," which was in force or current effect for teachers of the system.

Additionally, the Board had other salary policies in its "Board Policy Manual" which contained, *inter alia*, specific reference to "Professional personnel" and "annual increment," which are of pertinence to this adjudication. These policies were in force and effect during the period *sub judice*, since they were approved by the Board each year in a general motion of adoption (R-2) applicable to all such policies. The salary policies with specific pertinence to this adjudication were as follows:

"***h. *Credit for Experience obtained in Metuchen*
"1. Professional personnel hired during the school year and with less than one semester working experience in Metuchen, shall remain at their current salary guide step for the new contract year.***"

"j. *Increments not Automatic*
"1. To be eligible for annual increment, the teacher shall have performed satisfactory service and shall have been recommended by the Administration.

"2. A teacher under tenure denied the increment has the right to appeal his case to the Board provided it is made in *writing* to the Superintendent through proper channels, who will, in turn, submit the *written* appeal to the Board.***"

Another section of the Board's Policy Manual (P-4) contained the following paragraph with regard to "Evaluation" of "Professional" personnel:

> "***Principals shall evaluate all employees under their jurisdiction. The evaluations shall be reviewed with the employee by the principal and submitted to the Superintendent. In cases where teachers are doing unsatisfactory work, such teachers shall be notified in writing by the principal and Superintendent."

This page also contained a statement delegating to the administrative staff the responsibility to "recruit, select, and recommend the best qualified people for professional positions."

The only other specific policies of the Board with respect to "principals" were those found on another page of the Policy Manual. (R-5) These policies made it mandatory that principals should act as the "chief administrative officers" of their own buildings and that they should "keep the Superintendent" informed of activities within their schools. In addition, paragraph two of this section applicable to "Principals" provided:

> "***The Superintendent shall recommend principals for appointment. The Board shall appoint principals."

For purposes of this adjudication, the Board also thinks it pertinent to observe that another page from its Policy Manual (R-1) is an index page, and that there are only two categories of policies-those applicable to professional personnel and those applicable only to nonprofessionals.

At the hearing of October 18, 1971, there was no testimony offered by petitioner. He rests his case on the documentary evidence submitted in support of his claim, on oral argument, and on the written memorandum. The Board elicited oral testimony only from its Superintendent of Schools.

The Superintendent testified that salary increments have not been automatic for teachers in the past and that, in fact, such increments have been denied on occasion. In this regard, he offered a memo from petitioner (R-3) addressed to "Mr. K. Smida," the Superintendent, which details petitioner's role in a previous incident in which petitioner had recommended that a salary increment for a teacher be paid only in part. (See also R-4) The Superintendent also stated that he had evaluated principals in his district annually and that, in his judgment, the term "teacher" as used in the salary increment withholding policy (P-3) embraced, and was applicable to, all certificated personnel.

In petitioner's view, the Board never adopted a specific policy that reserved to the Board the right to withhold scheduled ratio-salary increments for cause from *principals* in its employ. He opines, therefore, that the increments

must be granted automatically as scheduled. He cites previous decisions of the Commissioner to support this view. *Doris Van Etten and Elizabeth Struble v. Board of Education of the Township of Frankford, Sussex County*, decided by the Commissioner March 17, 1971; *Charles C. Brasher v. Board of Education of the Township of Bernards, et al., Somerset County*, decided by the Commissioner March 19, 1971; and *Norman Ross v. Board of Education of Rahway, Union County*, 1968 *S.L.D.* 26, affirmed State Board of Education October 9, 1968. Petitioner further avers that Exhibit P-4 clearly states that "Principals shall evaluate all employees under their jurisdiction," but that there is no similar statement indicating that principals are to be evaluated in a similar manner by anyone.

Additionally, in petitioner's view, all the Board's rules and policies indicate that principals are part of the Board's administrative apparatus in the schools, and that they are not considered as "teachers" to whom the salary increment withholding policy (P-3) has application. Petitioner argues that if the Board meant such policies to apply to school administrators, it could have clearly said so, but since it did not, it is now barred from invoking this policy against a principal.

On the other hand, respondent avers that all of its policies, and precedent, indicate that principals are grouped with teachers as members of its professional staff, and that the policies on withholding of increments contained in P-3 apply equally to all such members. It buttresses this contention by citing *N.J.S.A.* 18A:1-1, which provides the following definition of "teaching staff member":

> "Teaching staff member means a member of the professional staff of any district ***holding office *** of such character that the qualifications; for such office, requires him to hold a valid and effective *** certificate, appropriate to his office ***."

If such policies as P-3 do not apply to all teaching staff members, the Board maintains, principals would be in favored position – one free of any stricture of evaluation – when contrasted with all its other professional employees. Additionally, the Board disputes the basic findings of the decisions of the Commissioner cited by petitioner. In the Board's view, *Chapter* 236, *Laws* of 1965 (*N.J.S.A.* 18A:29-4.1) does not say that a salary guide is a contract, and it avers that even without corollary conditions attached to such guides, a board may withhold salary increments for cause. To support this position, the Board cites *Board of Education of the City of Newark v. Board of School Estimate and City Council of the City of Newark, Essex County*, 108 *N.J. Super.* 36, *and observes that a New Jersey Court has not been called upon to date to affirm the Commissioner's decision in this regard.*

*The hearing examiner observes that Ross v. Rahway, supra,* was affirmed by the State Board of Education, and that the views it expressed with respect to the contractual nature of salary policies must be given a presumption of correctness at this juncture. Therefore, the issues of the instant adjudication are two in number and are posed by the hearing examiner as follows:

1. Are the Board's "Administrative Salary Guides" (P-1) applicable in an embracing way to all the salary guides and corollary conditions in effect with respect to salary scales for teachers of the Metuchen System?

2. If they are, is the corollary condition with respect to salary increments (P-3) sufficiently clear to permit the withholding of the two increments *sub judice?*

* * * *

The Commissioner has reviewed the report of the hearing examiner and has considered the issues posed. He observes that the parties to this dispute have been calculating administrative salaries by the terms of the "Administrative Salary Guide" (P-1, 2) for at least a three-year period, and that the Guide is specifically related to the salary schedule promulgated by the Board for teachers of the district. The relationship is derived from the application of a fixed set of ratios for administrators to the Master's degree schedule for teachers. The Commissioner further observes that the Board has also tempered the stated terms of the teachers' salary schedule by corollary conditions similar to those contained in the statute, *N.J.S.A.* 18A:29-14, with respect to the Minimum Salary Schedule promulgated by the Legislature (*N.J.S.A.* 18A:29-7)

The Commissioner has held in the past that boards of education can act to set such corollary conditions that temper the stated terms of a salary guide. *Van Etten and Struble, supra* The power to act in this manner is stated clearly in *N.J.S.A.* 18A:11-1, wich reads in part as follows:

> "The board shall ***
> c. *Make,* amend and repeal *rules,* not inconsistent with this title or with the rules of the state board, for its own government *** and *for the government* and management of the public schools *** *and* for the *employment* *** *of its employees* ***." (*Emphasis supplied.*)

In addition, *N.J.S.A.* 18A:16-1, 18A:29-13, and 18A:29-15 confer additional powers on the board to establish salary schedules and to "fix and alter" (18A:16-1) compensation and the length of terms of employment for teaching staff members.

Therefore, there can be no doubt that, in the instant matter, the Board had authority to make rules applicable to its salary schedule for teachers and that the policy with respect to salary increments (P-3) is a logical exercise of that authority.

The Commissioner also holds that because the "Administrators Salary Guide" is directly tied to, and dependent upon, the terms of the teachers' salary schedule, all corollary conditions applicable to that schedule are of equal pertinence - including the policies on increments contained in Exhibit P-3. To hold otherwise in the Commissioner's view, would confer salary benefits that the

teachers' schedule contains and, in a discriminatory manner, remove the corollary limitations which tempers the schedule's stated terms. The salary schedule for administrators, in this instance, is clearly related to the schedules for teachers, and the two may not be related in part and separate in part.

Finally, the Commissioner finds that salary increments are not automatic in this instance, as petitioner contends, because there are clear corollary conditions that make the receipt of an increment conditional on evaluation of performance and that the Board's decision to withhold the increments of petitioner in 1970 and again in 1971 was proper and must be given legal effect.

Accordingly, the Petition is dismissed.

COMMISSIONER OF EDUCATION

November 30, 1971
Pending before the State Board of Education

**Ruth Ann Singer, by her parent and guardian ad litem, Nathan A. Singer,**

*Petitioner,*

**v.**

**Edward Sandall, Walter C. Ande, Frank T. Law, Jr., and The Board of Education of the Borough of Collingswood, Camden County,**

*Respondents.*

**COMMISSIONER OF EDUCATION**

**Decision**

For the Petitioner, Supnick & Mitnick (Maury K. Cutler, Esq., of Counsel)

For the Respondents, Brown, Connery, Kulp, Wille, Purnell & Greene (George Purnell, Esq., of Counsel)

Petitioner is an eleventh grade student attending Collingswood High School, hereinafter "High School." On a named day, petitioner violated the "dress code" enacted by respondent Board of Education of the School District of Collingswood, hereinafter "Board." Petitioner was suspended from classes without credit by the principal of the High School, although she was not physically restricted from school and was allowed to "attend" classes regularly.

At a given time, a mutal agreement was reached whereby petitioner was permitted to make up any and all past classwork missed, including examinations, pending the resolution of this matter by a decision of the Commissioner of Education.

Respondents were granted leave to amend their Answer to the Petition of Appeal to include a Motion to Dismiss on the grounds that the Commissioner of Education has no jurisdiction in this proceeding. Counsel filed briefs addressed to this question and waived oral argument on the Motion. Both petitioner and respondents filed a Motion for Summary Judgment by the Commissioner.

In a decision rendered March 24, 1971, the Commissioner denied the Motion to Dismiss the Petition of Appeal and the Motion for Summary Judgment filed by both parties.

Petitioner attacks the "dress code" regulation enacted by the Board on the grounds that it is unreasonable, arbitrary, capricious and therefore in violation of *N.J.S.A.* 18A:11-1, which requires that rules and regulations enacted by local boards of education must be reasonable and in conformity with the laws of the State of New Jersey.

The Board denies the allegations of petitioner and avers that the only issue before the Commissioner is the legality of that portion of the Board's regulation which declares that slacks are not appropriate school attire.

Petitioner prays for relief in the form of an Order by the Commissioner of Education declaring the aforesaid "dress code" regulation invalid, declaring the aforementioned suspension of petitioner invalid and expunging all reference from petitioner's school records, to said suspension.

Testimony and documentary evidence were educed at a hearing conducted on June 24, 1971, at the office of the Camden County Superintendent of Schools, Pennsauken, by a hearing examiner appointed by the Commissioner of Education. Following the hearing, both parties filed original and reply Briefs. The report of the hearing examiner is as follows:

Petitioner testified that on October 23, 1970, she wore purple wool slacks, a white blouse and a vest to school. As a result, she was told by the principal of the High School that she was being suspended for violating the school's dress code regulations, and she was asked to leave the school building. Petitioner replied to the principal that she would not leave because she had been ordered not to by her father.

Petitioner offered into evidence two notes, both dated October 23, 1970, written by her parent, Nathan A. Singer, and addressed to a teacher and the principal respectively. (Exhibit R-1) The note addressed to the teacher reads in part as follows:

> "I have instructed my daughter, Ruth Ann Singer, to wear slacks to school today. I have also instructed her to attend all of her classes and to follow her regular schedule.

"She is not to be sent out of the classroom for wearing slacks, and I have instructed her to disobey any order from any faculty or administration member to do so. I have informed her it is my wish that the only way she is to vary her schedule is if she is arrested by a uniformed police officer with a signed complaint.***"

The second note addressed to the principal contains basically the same statement. (Exhibit R-1)

Petitioner testified that, in her opinion, the fact that she wore slacks to school for approximately five days caused no problems of discipline, distraction, disruption or any health or safety hazard. (Tr. 12-14) Petitioner testified further that she wears slacks because they are comfortable, they are much less expenseive than dresses and they are generally-accepted attire. (Tr. 15)

Petitioner stated that, among her personal friends, the wearing of dungarees and bleached clothing is not unusual after school hours. (Tr. 21)

Petitioner's father testified that on the date of October 23, 1970, he discussed the dress code regulations with the principal and the Superintendent of Schools. Both of these school administrators indicated to him that they would be willing to organize a committee to consider a revision of the regulations, and they requested that he serve on such a committee. Mr. Singer declined this invitation because he was opposed to any such code regulating pupil dress, and because he was also opposed to the suggestion that the President of the Board of Education serve as chairman of a committee to study this matter. (Tr. 38-42) Petitioner's father also testified that he would not object ot his daughter's wearing slacks to school, but he would object to his to her wearing dungarees because he does not care to see young ladies wearing dungarees. (Tr. 39)

A teacher in art in the High School testified on behalf of petitioner that, in her judgment, the wearing of slacks by petitioner in her art class caused no disciplinary problems or disorder. (Tr. 44,45) A student teacher, who was present in the art class during the time of the incident, offered testimony substantially the same as that provided by the art teacher. (Tr. 50-51) Two pupil witnesses also provided testimony that they had observed petitioner wearing slacks in school, and did not see any evidence of disorder or disciplinary problems resulting therefrom (Tr. 52-60, 71-72) A teacher employed in a neighboring school district testified that his school has virtually no regulations at present concerning pupil attire, and that in his opinion, he has not observed any disciplinary problems or disruptive behavior as a result of the elimination of such regulations. (Tr. 60-64) Each of these witnesses testified that he believed that slacks are less distracting than mini-length skirts.

Both parties stipulated a letter under date of June 2, 1971, addressed to counsel for petitioner by a superintendent of schools of a regional high school district located in central New Jersey. (Exhibit R-2) The parties also stipulate a

newspaper quotation attributed to the same superintendent in a daily newspaper article published on January 6, 1971. (Exhibit P-2) This superintendent is quoted in pertinent part from said newspaper article as follows:

> "***Four years ago I would have told you that there's some connection between the way students dress and how they product*** Today, I see no such connection. *** I was quite surprised to learn that I was wrong. ***"

In the letter to petitioner's counsel dated June 2, 1971, the same school administrator stated the following in response to a letter (R-2) from petitioner's counsel dated May 26, 1971:

> "In reply to your letter of May 26, please be advised that we do have a dress code, although slacks and dungarees were removed from the prohibitive list last year (1969-70) and hot pants this year.
>
> "Although I can present no positive proof or documentation to support my belief, I have found during the past three or four years - since our dress code and hair style regulations were removed one by one (each time our commissioner made another ruling) - that there has been a corresponding increase in (a) absenteeism (b) tardiness (c) truancy (d) disrespect (e) lack of incentive and motivation (f) cutting classes and (g) a 'don't tell me what to do' attitude. I believe that the deterioration in the schools of our state is due in large measure to the too rapid removal of restraints in areas of control which have been in effect for a hundred years without any apparent harm to the civil rights of our youth, who now have been given the advantages and privileges of the adult, but none of the legal responsibilities that go with them." (Exhibit R-2)

The principal of the High School testified that during May 1970, he conducted a survey of the parents of pupils enrolled in the High School with respect to the Board's dress code regulation. Questionnaires dated May 8, 1970, were mailed to the parents of all pupils in grades ten, eleven and twelve, and approximately 600 were returned to the High School. This questionnaire (Exhibit R-3) was comprised of a letter to parents which expressed the concern of the school administration about the matter of pupil attire, and concluded by requesting each parent to indicate his opinion and return the form to the principal. Two boxes appear at the bottom of this questionnaire followed by these statements:

> "I am in favor of keeping the standards of dress that are now followed in our High School."
>
> "I am in favor of abolishing the dress code that is now in effect."

These two choices are followed by a space preceded by the word "Comment."

According to the principal, 578 of the parents indicated that they favored retaining the regulations, and 28 were opposed to them. A careful scrutiny of the results of the survey (Exhibit R-3) by the hearing examiner discloses that on 576 of the forms, the box was marked, which indicates that the parent favored retaining the regulations regarding pupil attire. Of these 576, a total of 321 had no comments written by parents, and 255 had comments varying from several words to lengthy letters covering the entire back of the surve sheet. A careful reading of the comments furnished by these parents discloses that they vigorously supported the Board's regulations concerning pupil dress. A count of the survey forms upon which the second box, favoring abolition of the dress code, was marked, resulted in a total of 24. Of these 24, 12 parents indicated that they desired a modification of the dress regulation to permit slacks or pant suits. Ten parents favored the complete abolition of the regulation; one form substituted the word "revising" for abolishing, with no comment; and one survey form suggested a modification regarding shirts worn by boys.

The principal presented testimony in the form of a prepared statement (Exhibit R-4), which re read into the record of these proceedings. In essence, the principal stated that everything that pupils do in school is basically for an educational purpose, whether it be in a classroom, assembly program, school dance or on the athletic field. Rules and guidelines have been promulgated through the years, as deemed necessary, in order to provide the bset possible educational program for the pupils. While granting that rules should be periodically evaluated and changed when a beneficial purpose will be served, the principal opines that change should not be based upon a whim or a simple desire on the part of pupils. He stated that, in his professional judgment, the matter of pupil dress does have an effect on the total operation of the school program, particularly in regard to the manner in which pupils conduct themselves both in the classroom and in other school activities. The principal further testified that some pupils of high school age need guidance in relation to personal appearance, cleanliness and good taste. He averred that dressing and behaving in an informal manner require little effort, but maintaining high standards of learning and behavior demands much time and effort. The principal stated that good grooming and personal appearance cannot be separated from high standards of learning and behavior because these factors are part of character development. The principal further averred that if a school is to assume the responsibility of teaching pupils self-respect and proper behavior, then it must have the authority to require a standard of dress that is consistent with its total philosophy. He asserted that a neat and dignified appearance tends to result in corresponding behavior. (Tr. 80-89) (Exhibit R-4)

The principal testified that in his opinion, slack suits would be appropriate attire for high school pupils (Tr. 92) as was stated in the letter to parents. (Exhibit R-3) Under cross-examination, this witness described at length what, in his judgment, would be considered inappropriate, extreme, revealing or immodest pupil attire.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the findings of fact as set forth in the report of the hearing examiner and the record in the instant matter.

As was previously stated, petitioner attacks the regulation regarding school attire enacted by the Board of Education on the grounds that said regulation is unreasonable, arbitrary and capricious. The Commissioner has stated that when called upon, he must examine the actions of local boards of education and determine whether such actions were taken in good faith and not irresponsibly, and to further examine the application of any and all regulations, rules and policies deriving therefrom. *Singer v. Collingswood Board of Education, supra,* and cases cited therein.

Respondents have adopted the regulations regarding student attire pursuant to the authority of *N.J.S.A.* 18A:11-1. This statute, which iterates the primary enabling authority conferred by the Legislature upon local boards of education, 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 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 *** and

d. *Perform all acts and do all things, consistent with law* and the rules of the state board, *necessary for the lawful proper conduct, equipment and maintenance of the public schools of the district."* *(Emphasis ours.)*

In the first instance, the Commissioner will consider the arguments set forth by both parties in regard to the burden of proof in the instant matter. Petitioner opines that the burden of proof for upholding the reasonableness of a regulation concerning pupil attire rests upon the Board. Petitioner cites numerous Federal District Court and several Federal Circuit Court of Appeal decisions which have in some instances upheld, and in other instances overturned, various regulations concerning hair length, appearance and other aspects of student behavior in colleges, junior colleges and secondary schools. Petitioner also cites the case of *Tinker v. Des Moines Independent Community School District,* 393 *U.S.* 503, 89 *S. Ct.* 733, 21 *L. Ed.* 2*d* 731 (1969) in support of the argument that the burden of justification must be borne by the local board, as an agency of the state, at least where a question of the constitutional right of a pupil is concerned.

The Board's contention is that *Tinker, supra,* is not applicable to the matter controverted before the Commissioner and that the problem presented in *Tinker* was whether the public school might forbid the wearing of black arm bands by students as an expression of protest against United States participation in the Vietnam War. The Board provides an interpretation of the Supreme Court's decision in *Tinker* by quoting Chief Judge Wilson in *David Brownlee v. Bradley County, Tennessee Board of Education et al.*, 311 *F.. Supp.* 1360, *U.S.D.C.C. (E.D. Tenn.* 1970) as follows at p. 1364:

> "*** The Court held that under the circumstances of the case the wearing of the black arm bands was so closely akin to 'pure speech' as to fall within the protection of the First Amendment and that this mode of expression accordingly could not be forbidden by public school authorities in the absence of a showing of actual or potentially disruptive conduct arising therefrom. In rendering its decision the Court expressly excluded from the ambit of the decision the matter of the adoption of dress and hair codes by school authorities doing so in the following language: '*The problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style, or deportment. ****" *(Emphasis ours.)*

Compare *Ferrell v. Dallas Independent School District,* 392 *F.* 2*d* 697 (5 *Cir.* 1968), *cert.* denied 393 *U.S.* 507-508, 89 *S. Ct.* 737; *Pugsley v. Sellmeyer,* 158 *S.W.* 538 (1923).

It is clear from the record in the instant matter that petitioner did not wear slacks to school as a symbolic expression of a thought or belief on her part. In fact, the record shows that petitioner was instructed by her father to wear slacks to school, as is stated in the notes addressed to the principal and a teacher. (Exhibit R-1) Petitioner's testimony regarding the wearing of slacks was that she wears them because they are comfortable, they are less expensive than dresses and they are generally accepted attire. (Tr. 15) These are simply reasons of personal choice.

The Board relies on several New Jersey Court decisions in dealing with the question of the burden of proof as applying to rules and regulations of administrative agencies. It cites *Thomas v. Morris Township Board of Education,* 89 *N.J. Super.* 327, 332 (*App. Div.* 1965) as follows:

> "*** 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 Board also cites the following from *Quinlan v. Board of Education of North Bergen Township,* 73 *N.J. Super* 40, 49 (*App. Div.* 1962):

> "*** The rule applicable required the plaintiff to carry the burden of proof of such facts as were necessary to entitle her to the relief prayed for.
>
> *Kopera v. West Orange Board of Education*, 60 *N.J. Super.* 288, 297 (*App. Div.* 1960); 42 *Am. Jur., Public Administrative Law*, 131, *p.* 466 (1942); *cf. Chirichella v. Dept. of Civil Service*, 31 *N.J. Super.* 404, 409-410 (*App. Div.* 1954). This duty of persuasion upon the whole case never shifts, *Hughes v. Atlantic City & S.R.R.. Co..*, 85 *N.J.L.* 212, 216 (*E. & & A.* 1914), although in another sense the duty of going forward with evidence may shift as one side or the other satisfies the judge that the evidence suffices to make out a *prima facie* case in his favor. *Id.*; 9 *Wigmore, Evidence* (3*dd. ed.* 1940), 2487, *p.* 278; 20 *Am. Jur., Evidence*, 133, *p.* 136 (1939).***"

The Board also quotes from *Cole National Corporation v. State Board of Examiners*, 57 *N.J.* 227 (1970) at p. 231:

> "*** administrative rules have in their support the rebuttable presumption of validity if they come within the ambit of delegated authority. Unless clearly *ultra vires* on their face, the person attacking them has the burden of proving otherwise. *In re Weston*, 36 *N.J.* 258 (1961), *cert. denied*, 369 *U.S.* 864, 82 *S.Ct.* 1029, 8 *L. Ed.* 2*d* 84 (1962); *Consolidated Coal Co., et al, v. Kandle, et al*, 105 *N.J. Super.* 104 (*App. Div.* 1969) affirmed 54 *N.J.* 11 (1969). ***"

Reference is made by the Board to four Federal Court of Appeals decisions and nine additional published opinions by Federal District Courts dealing with similar issues. The Commissioner will make no attempt to analyze all of the respective cases cited. The Commissioner takes notice of the fact that because of somewhat differing factual situations involved and substantially different assumptions regarding the nature of the rights involved; and the burden of proof resting upon the respective parties, the courts have arrived at differing conclusions.

In her Brief, petitioner refers to the action of the Board in adopting the dress code regulations as a decision reached at the whim of its members, without public hearings and the presentation of empirical evidence. The Commissioner is constrained to take notice of the fact that the adoption of policies by a local board of education must take place at a public meeting and must be accomplished by a public vote of the members present. *Cullum v. Board of Education of North Bergen*, 15 *N.J.* 285, 294 (1954); *Tolliver et al. v. Board of Education of Metuchen*, decided by the Commissioner of Education, December 3, 1970.

That the Board's regulation regarding pupil attire is supported by approximately 576 of the parents of pupils enrolled in the school is clear from the evidence. (Exhibit R-3) The opinions and comments of parents of all pupils in grades ten, eleven and twelve were solicited in order to provide the school

authorities with some direction concerning the future of the dress code. In the judgment of the Commissioner, the evidence supports the presumption that the Board was giving reasonable consideration to some change in the existing regulations.

In his testimony, the principal stated his judgment regarding the reasoning which underlies the Board's dress code. One of the factors he described is that these regulations serve the purpose of maintaining a decorum and deportment which is conductive to the educational process. The principal states further that the regulations also serve the purpose of imparting guidance for neat personal appearance and cleanliness. In the principal's judgment, the school is attempting to teach people self-respect and proper behavior, including good grooming and high standards of personal appearance. According to the principal, in order to successfully impart this type of education to pupils, the school must require standards of attire that are consistent with the educational philosophy espoused.

As the Commissioner has stated previously, a public high school is controlled institution comprised of adolescent, minor pupils, and as such requires conformance with reasonable rules and regulations in order to provide the best possible educational program. *Mayes v. Board of Education of the City of Bridgeton*, decision of the Commissioner of Education on Motion, June 4, 1971.

The school laws of this State require instruction in health, safety and physical education. *N.J.S.A.* 18A:35-5 states in pertinent part that:

> "Each board of education shall conduct as a part of the instruction in the public schools courses in *health*, safety and physical education, which courses shall be adapted to the ages and capabilities of the pupils in the several grades and departments. ***" (*Emphasis ours.*)

This requirement is of long-standing See *L.* 1917, *c.* 107, *1*, *p. 221 [1924 Suppl.* 185-328], *suppl.* to *L.* 1903 (*2d. Sp. Sess.*), *c.* 1, *p.* 5; see also *N.J.S.A.* 18A:35-6,7,8,9.

The Commissioner is constrained to state that the teaching of proper hygiene, good grooming and neatness of personal appearance is a wholesome policy, which has been part of the historic mission of the public schools of this State. The Commissioner does not question that this policy has a salutory influence on the goal of teaching self-pride and self-respect.

From the testimony of the principal, the Commissioner notices that this witness does not consider the regulations to be an attempt to promote a uniformity of appearance. The following dialogue is specifically to this point:

> "Q. Are you attempting then to promote some kind of uniformity of appearance?

"A. No, definitely not, I think our dress code is broad enough so that young people can have a diversity of styles and so forth." (Tr. 116)

Petitioner states in her Brief that she is not seeking a ruling prohibiting all or any dress codes, and admits that some regulation of student attire is necessary. (Petitioner's Brief, at p. 4)

In *Pelletreau v. Boar; of Education of the Borough of New Milford*, 1967 *S.L.D.* 35, 45, the Commissioner determined that the local board of education had the authority to adopt reasonable rules and regulations for acceptable pupil behavior with respect to dress and appearance. The State Board of Education, in its decision in *Pelletreau, supra*, stated, at p. 48, that a regulation forbidding long hair, in effect, regulates outside of school conduct, since it is not possible to have short hair in school and revert to long hair at home. In regard to dress, the State Board stated the following at p. 48:

"*** A regulation relating to dress does not have this effect. A student may well comply with regulations as to what may or may not be worn during school hours and dress as he or his parents see fit during his non-school hours. ***"

The State Board further stated the following, also at p. 48:

"*** Of course, the reasonable rules and regulations of local boards of education shall be enforced. We stress the limits of this decision and caution any ingenious and provocative New Jersey public school students that our concern for freedom of expression is tempered by our determination that the proper course of the educational process not be impeded and that the high standards of our schools be maintained. ***"

The Commissioner will now consider whether the prohibition against the wearing of slacks, the precise issue in the instant matter, is a reasonable regulation. In the judgment of the Commissioner, the Collingswood Board of Education's regulations regarding pupil attire are reasonable, with the exception of the proscription of wearing slacks. The Commissioner notices that the adult females of this State do commonly wear pant suits and tailored slacks in all business and social activities, including occasions where semi-formal and formal attire are expected. Without iterating the titles of the many fashion magazines which are published and which somewhat govern, or at least influence, the social modes of dress of our ladies, the Commissioner notices an acceptability of tailored pant suits for the most formal of occasions. Also, the Commissioner notices from the record in the instant matter that the principal of the High School expressed the opinion that pant suits would be an appropriate type of dress for school pupils.

Accordingly, for the reasons stated, the Commissioner finds and determines that the rule of the Collingswood Board of Education, generally prohibiting the wearing of slacks by female pupils, is unreasonable in that it prohibits a form of attire generally acceptable for adult wear in almost all social and business functions. The Commissioner remands this regulation to the Collingswood Board of Education for revision and modification of this broad and unreasonable prohibition.

The Commissioner orders that all mention of the suspension of petitioner as a student in the High School for the afore-stated violation of the pertinent proscription of the dress code by wearing slacks to school be expunged from all of her school records.

COMMISSIONER OF EDUCATION

December 1, 1971

**Samuel Crisafulli,**

*Petitioner,*

**v.**

**Board of Education of the Township of Florence, Burlington County,**

*Respondent.*

## COMMISSIONER OF EDUCATION

### Decision

For the Petitioner, Pellettieri and Rabstein (J. Stewart Grad, Esq., of Counsel)

For the Respondent, Powell, Davis, Dietz and Colsey (John A. Sweeney, Esq., of Counsel)

Petitioner served as assistant principal and principal of Florence Township High School, hereinafter "High School," in the employ of the Florence Township Board of Education, hereinafter "Board." Petitioner alleges that the Board's refusal to reemploy him for the year beginning July 1, 1971, is illegal because he has tenure as the High School principal. The Board denies that petitioner has tenure, and further denies that its decision not to reemploy petitioner is unlawful.

The matter is submitted to the Commissioner on exhibits, affidavits and briefs of counsel. Counsel also filed cross Motions for Summary Judgment. The report of the hearing examiner is as follows:

The facts setting forth petitioner's service under contract with the Board are not in dispute and are detailed as follows:

> September 1, 1968 - June 30, 1969 Ass't. Principal-H.S. July 1, 1969 - June 30, 1970 High School Principal July 1, 1970 - June 30, 1971 High School Principal

Petitioner was employed initially for the 1968-69 *academic year* as assistant principal of the High School, and thereafter as principal of the High School for the *calendar years* 1969-70 and 1970-71. The sole issue to be decided herein is whether or not petitioner has tenure as the High School principal.

Petitioner argues that he has tenure by virtue of the Board's action at its regular meeting held on April 12, 1971, when the following motion was passed:

> "Motion by Martin seconded by Rainier to approve granting Tenure to Samuel Crisafulli as High School Principal. Roll call vote YES Votes from : Garbely, Coates, Rainier, Tapper, Wilson, Sturak, and Nagy. NO Votes from Martin and Patriarca. Motion Carried." (Petitioner's Brief, Exhibit E)

The identical motion was again introduced and carried by the same seven-to-two vote at the Board's regular meeting of May 10, 1971; however, this time the motion was seconded by Sturak, but all Board members voted as they did at the April 12, 1971, meeting.

Petitioner relies further on *N.J.S.A.* 18A:28-5, which reads in part as follows:

> "The services of all teaching staff members including *** principals *** serving in any school district or under any board of education *** shall be under tenure during good behavior and efficiency and they shall not be dismissed *** 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 ***."

The action of the Board on April 12, 1971, he avers, thus shortened the statutory period required for achieving tenure and conferred tenure on him.

Petitioner relies also on *N.J.S.A.* 18A:28-6, which grants tenure in case of transfer or promotion after the expiration of two calendar years 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 ***."

Petitioner avers that he served the two calendar years as High School principal after his transfer from assistant High School principal.

The Board denies that petitioner has tenure; it further denies that it was the Board's intent to grant him tenure pursuant to its motion passed at their April 12, 1971, regular meeting. It avers that its motion with respect to petitioner at that meeting and eight other similar motions granting reemployment to teachers then in their third year, indicated only the Board's intent to award the fourth or tenure contract and that tenure in each case would accrue only after employment at the beginning of the fourth consecutive academic year.

The Board further denies that petitioner has met the statutory requirements of either *N.J.S.A.* 18A:28-5 or 18A:28-6, *supra.* It avers that petitioner has not served "*** three consecutive calendar years, or any shorter period *** fixed by the *** board ***" and further denies that *N.J.S.A.* 18A:28-6, *supra*, can be applied in the instant matter to confer tenure on petitioner.

The hearing examiner notes that three Board members filed affidavits indicating that it was their intent to grant early tenure to petitioner; however, five other Board members filed affidavits declaring that they did not understand early tenure was possible for anyone. Their sole reason for voting for petitioner's tenure, they aver, was to indicate their intent at that time to award him a new contract beginning July 1, 1971, and that that contract would automatically place petitioner under tenure if he began his employment on July 1, 1971. They further explain that their intent is clear by a reading of the minutes of the April 12, 1971, meeting wherein it is shown that identical motions were made for eight third-year teachers. The majority members explain that their intent was clearly not to grant early tenure to the teachers, but to indicate only their intent, at the time, to offer the fourth contract, which would place the teachers under tenure when they began their service under the fourth contract.

* * * *

The Commissioner has read the report of the hearing examiner. Teacher tenure is a status conferred by the Legislature, pursuant to *N.J.S.A.* 18A:28-5 or 18A:28-6, *supra.* The status of tenure is earned by those categories of teaching staff personnel named in *N.J.S.A.* 18A:28-5, after serving the precise time set forth by the statutes unless a shorter period for the *category* is established by the Board.

In the instant matter petitioner has not served the requisite time, pursuant to *N.J.S.A.* 18A:28-5, *supra,* in any of its qualifying sections – (a), (b) or (c). With reference specifically to section (a) of the statute, which provides for the fixing by a board of a shorter period of time to acquire tenure, the majority of the Board did not intend to confer immediate tenure, but meant only to indicate their intent at the time to offer another contract to petitioner as they intended to do for the eight teachers who were also "granted tenure" by motion of the Board at the April 12, 1971, meeting.

Even if the Board intended to grant tenure immediately to petitioner, it could only have done so by shortening the period of time to acquire tenure for all teaching staff members *in the same category* as petitioner. This was not done, and the Board's action would have the effect of conferring tenure on petitioner as an individual. The matter herein in *res judicata. Marie Rinaldi v. Board of Education of the Township of North Bergen, Hudson County,* 1959-60 *S.L.D.* 109; *Clifford L. Rall v. Board of Education of the City of Bayonne, Hudson County, and the State Board of Education, State of New Jersey,* 54 *N.J.* 373; *George I. Thomas v. Board of Education of the Township of Morris, Morris County,* 89 *N.J. Super.* 327, affirmed 46 *N.J.* 581; *Angelo Spadoro v. Robert A. Coyle and Board of Education of the City of Jersey City, Hudson County,* 1965 *S.L.D.* 134; *Charles Knipple v. Board of Education of the Township of Egg Harbor, Atlantic County,* decided by the Commissioner May 3, 1971; *Gerard E. Murphy v. the Board of Education of the Borough of Cliffside Park, Bergen County,* decided by the Commissioner, July 19, 1971. In *Rinaldi, supra,* the Commissioner held that:

> "***A vice of the resolution of October 10, 1957, is that it confers tenure upon an individual. The public policy of the State is not served when a board of education may arbitrarily and capriciously select an individual to be given tenure. It is the opinion of the Commissioner that it was the intention of the Legislature to delegate to boards of education the power to shorten the period for acquisition of tenure for school employees according to classification properly established.***"

In, *Spadoro, supra,* the Commissioner held:

> "***that the granting of outright tenure to petitioner contravenes the intent of the Legislature as expressed in *R.S.* 18:13-16 [now *N.J.S.A.* 18A:28-5] by conferring upon petitioner a personal benefit not available to others in his employment category.***" (at p. 138)

Tenure is obtained only when the precise conditions of the statutes are met. *Ahrensfeld v. State Board of Education,* 126 *N.J.L.* 543 (1941) *"Eligible to obtain tenure" (N.J.S.A.* 18A:28-6, *supra)* can only mean that the person must first hold an appropriate certificate issued by the State Board of Examiners.

Petitioner is not the only principal in the Florence Township School System. No consideration was given by the Board at any time to shorten the period required for the acquisition of tenure for the entire category of principals.

In *Rall, supra,* the N. J. Supreme Court held that the Board, in awarding early tenure to Superintendent Rall, shortened the period for such acquisition of tenure for the *category* of superintendents, and that such action was therefore valid. The Court ruled in that matter that the category of superintendents included only one person and that to rule against tenure for Superintendent Rall because of the singularity of his position would have the untenable effect of "exalting form over substance."

The motion for tenure for petitioner at the April 12, 1971, meeting had the effect, therefore, of conferring tenure as a personal benefit to an individual, which action cannot be upheld.

For the reasons set forth herein, the Petition is dismissed.

COMMISSIONER OF EDUCATION

December 2, 1971
Pending before the State Board of Education

**Board of Education of the Township of Parsippany-Troy Hills,**

*Petitioner,*

**v.**

**Township Committee of the Township of Parsippany-Troy Hills, Morris County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**Decision**

For the Petitioner, Schank, Price, Smith and King (Alten W. Read, Esq., of Counsel)

For the Respondent, Ryan, Foster, and Garofalo (Robert C. Garofalo, Esq., of Counsel)

Petitioner, the Board of Education of the School District of the Township of Parsippany-Troy Hills, hereinafter "Board," appeals from an action of respondent Township Committee of the Township of Parsippany-Troy Hills, hereinafter "Committee," certifying to the Morris County Board of Taxation an

amount of appropriations for school purposes for the 1971-72 school year $418,750 less than the amount proposed by the Board in its tentative budget which was rejected by the voters.

The Board alleges that it is impossible to maintain the thorough and efficient system of public schools mandated by the *New Jersey Constitution*, or to provide suitable educational facilities and programs as required by law (*N.J.S.A.* 18A:33-1) within the limit of appropriations certified by the Committee. The Board prays for relief in the form of an Order by the Commissioner of Education:

> (1) determining that the resolution of certification adopted by the Committee is arbitrary, capricious and unreasonable, and
>
> (2) declaring the amount of monies so certified by the Committee to be insufficient and ordering the restoration thereof in full.

The Committee answers that it held numerous conferences for the purpose of discussing the Board's 1971-72 school budget, and also conferred on four separate occasions with representatives of the Board concerning the various aspects of the defeated budget. Also, the Committee states that it has sought to effect savings, which would not impair the quality of education, and has made independent determinations properly related to educational considerations, with full regard for its obligation to fix a sum sufficient to provide a system of public schools, which is thorough and efficient in view of the makeup of the community. The Committee further states that the Board failed to offer any suggestions or advice regarding budget items, which could be reduced or modified and therefore violated *N.J.S.A.* 18A:22-37, which requires consultation and which reads in part as follows:

> "If the voters reject any of the items submitted at the annual school election, the governing body of the municipality *** shall, *after consultation with the Board*, certify to the county board of taxation the amounts which said body *** determined to be necessary to be appropriated *** to provide a thorough and efficient system of schools in the district ***." (*Emphasis ours.*)

A hearing on the petition of appeal was conducted on June 11 and June 25, 1971, at the New Jersey Department of Education Building, Trenton, by a hearing examiner appointed by the Commissioner of Education. Exhibits were received in evidence at the request of the hearing examiner. The Committee requested by letter dated June 30, 1971, that the hearing be reopened. The request was denied. Final documentary evidence was received on October 5, 1971, in the form of audit reports for the fiscal years 1969-70 and 1970-71.

The report of the hearing examiner is as follows:

Parsippany-Troy Hills is a Type II school district having an elected board of education. At the annual school election held February 9, 1971, the legal voters of the school district rejected proposals by the Board to raise by local taxation a sum of $9,881,430 for current expenses for the 1971-72 school year and an amount of $466,305 for capital outlay purposes. In accordance with *N.J.S.A.* 18A:22-37, *supra*, the proposed 1971-72 school budget was delivered to the Committee. Subsequently, the Committee conferred with representatives of the Board on four separate dates, and on March 9, 1971, the Committee certified to the Morris County Board of Taxation the sum of $9,479,680 for current expenses and $449,305 for capital outlay. The amounts in issue are shown as follows:

| | Proposed by Board | Certified by Committee | Reduction |
|---|---|---|---|
| Current Expenses | $ 9,881,430 | $9,479,680 | $401,750 |
| Capital Outlay | 466,305 | 449,305 | 17,000 |
| Totals | $10,347,735 | $9,928,985 | $418,750 |

**CURRENT EXPENSES**

| Acct. No. | Item | Budgeted by Board | Recommended Reduction by Committee |
|---|---|---|---|
| J110-b | Sals.-Bd. Secy.'s Off.-Sub. | $ 95,105.00 | $ 1,000.00 |
| J110-f | Sals.-Supt.'s Off. | 79,180.00 | 1,500.00 |
| J120-a | Public Sch. Acct.'s Fee | 7,000.00 | 1,000.00 |
| J130-b | Other Exp.-Bd. Secy.'s Off.-Supplies | 8,300.00 | 1,000.00 |
| J130-f | Other Exp.-Supt.'s Off. | 6,500.00 | 500.00 |
| J130-m | Printing & Publicity | 12,000.00 | 8,000.00 |
| J130-n | Other Exp.-Admin. | 11,000.00 | 1,000.00 |
| J211 | Sals.-Principals | 391,138.00 | 2,800.00 |
| | Sals.-Teaching Assts. | | 1,500.00 |
| J212 | Sals.-Supervs. of Instr. | 98,479.00 | 1,000.00 |
| J213 | Sals.-Teachers | 6,365,757.00 | |
| J213.1 | Anticipated Upgrading | | 5,000.00 |
| J213.1 | Additional Teachers (10) | | 92,000.00 |
| J213.1 | Substitutes Pay | | 12,500.00 |
| J213.1 | Stipends-Extra Services | | 5,000.00 |
| J213.1 | New Tchr. Orient. Prog. | 3,000.00 | |
| J213.3 | Sals.-Tchrs. of Individ. Suppl. Instr. | $170,121.00 | 10,000.00 |
| J214-a | Sals.-School Librs. | 148,103.00 | 9,500.00 |
| J214-a | Summer Stipend | | 1,000.00 |
| J214-b | Sals.-Guidance Person. (4½ New Counselors) | 265,236.00 | 54,000.00 |
| J214-c | Sals.-Psychol. Pers. (New Psychol.) | 69,024.00 | 15,000.00 |
| J215-a | Sals.-Secy.'s & Clerical Assts. to Princs. (5 New) | 306,247.00 | 26,250.00 |
| J220 | Textbooks | 124,138.00 | 15,000.00 |
| J230-a-1 | Refer. Books for Pupils | 27,562.00 | 5,000.00 |
| J230-c | Audiovisual Mater. | 31,916.00 | 6,000.00 |
| J240 | Teaching Supplies | 170,610.00 | 12,000.00 |
| J250-a | Misc. Supps.-Instr. | 39,400.00 | 3,000.00 |
| J250-b | Travel Exp.-Instr. | 11,900.00 | 1,000.00 |

| | | | |
|---|---|---|---|
| J250-c | Misc. Exp.-Instr. | 67,747.00 | |
| J250-c | In-Serv. Educa. | | 12,000.00 |
| J250-c | Data Process. Equip. Rental | | 25,000.00 |
| J250-c | Audiovisual Assess. | | 3,000.00 |
| J310-a | Sals.-Attend. Servs. | | |
| | Attend. Worker (New) | 53,224.00 | 7,000.00 |
| J410-a-1 | Sals.-Sch. Physicians | 21,902.00 | 3,000.00 |
| J520-c | Trips Other than to and from School | 28,678.00 | 5,000.00 |
| J610-a | Sals.-Custod. Servs. | 495,819.00 | |
| J610-a | Rented Facilities | | 1,000.00 |
| J610-a | Public Meets.-Overtime, Subs., Wkend Stipends | | 5,000.00 |
| J610-a | Vacation Relief | | 3,000.00 |
| J710-a | Sals.-Upkeep of Grds. | 68,788.00 | 8,000.00 |
| J710-b | Sals.-Repair of Bldgs. | 161,245.00 | |
| | Lead Man (New) | | 8,000.00 |
| J720-c | Contr. Servs.-Repair of Equipment | 36,010.00 | |
| | Curtain & Rug Clean. | | 3,000.00 |
| J730-a-b | Replace. of Equip. | 35,105.00 | 3,500.00 |
| J820-b | Employee Insur.- Hospitaliz.- Maj. Med. (New Empl.) | | 15,000.00 |
| J-5 | Summer School | 5,700.00 | 5,700.00 |
| | Sub-Total – Current Expenses | | $401,750.00 |
| **CAPITAL OUTLAY** | | | |
| L1220-c | Improve. to Sites | $304,426.00 | $ 2,500.00 |
| L1230-c | Buildings-Remodel. | 16,410.00 | 2,000.00 |
| L1240 | Equipment | 145,469.00 | 12,500.00 |
| | Sub-Total – Capital Outlay | | $ 17,000.00 |
| | GRAND TOTAL – Reductions | | $418,750 |

The hearing examiner's findings and recommendations in regard to the various categories of the proposed reductions are as follows:

*J-100 Administration*

Under Accounts J110b and J110f, a total of $2,500 is recommended for reduction. The hearing examiner reaches the following conclusions:

The amount of $1,000 for clerical substitutes' salaries is required in view of the fact that $975 is budgeted for this purpose and the experience of 1969-70 indicates actual expenditures of $2,780. The remaining $1,500 is required to provide for contractual salary increases. The proposed reduction of $1,000 in J120a cannot be sustained because of necessary increases in the accountant's fees. The total proposed reduction of $1,500 in the office supply accounts is unrealistic when viewed against the fact that the combined budget appropriations of $14,800 for 1971-72 are considerably less than the $17,607.31 expended for this purpose in 1969-70. The proposed economy of $8,000 in the J130m Printing Account is unsupportable, for such a drastic reduction would virtually eliminate the important service of providing

information to parents and taxpayers regarding school operations and functions. The $1,000 decrease proposed in Account J130n cannot be sustained in view of increases in rates for postage and inflated supply costs. The hearing examiner notices that the audit reports for 1969-70 and 1970-71 (Exhibits P-10 and P-29) disclose that the toal expenditures for the J100 Administration Accounts have exceeded appropriations both years. The hearing examiner recommends, therefore, that a total of $14,000 be restored to these accounts.

*J-200 Instruction*

Proposed reductions totaling $5,300 are recommended in Accounts J211 and J212. The hearing examiner finds that these salaries are contractual and necessary; therefore, he recommends that they be restored. In Account J213, teachers' salaries, the proposed reduction totals $127,500. The evidence discloses that there is a genuine need for the major portion of these funds. The requirements for increments, substitute pay, honoraria for extra-classroom duties and for learning-disability teachers is clear. The need for $3,000 for teacher orientation is desirable but not necessary. The proposed budget for additional teachers contemplates the number of thirty-one and one-half. Of this number, the proposed reduction is for ten, totaling $92,000.

The hearing examiner recommends the restoration of five additional teachers in the total amount of $46,000. In the hearing examiner's judgment, the total of twenty-six and one-half additional teachers will adequately accommodate the proposed increase of 537 additional pupils, plus the expansion of special instructional services. In summary, the hearing examiner recommends the restoration of $78,500 to Account J213.

The need for one additional librarian in Account J214a has been established by the evidence educed; therefore, the restoration of $9,500 for this purpose is recommended. The proposed reduction of four and one-half additional guidance personnel in the amount of $54,000 cannot be entirely supported in view of the increased pupil enrollments for 1971-72. The hearing examiner recommends that two and one-half additional guidance personnel be restored to Account J214b in the total amount of $30,000. The necessity for the restoration of $15,000 to Account J214c for one additional psychologist is clear. Also, the need for two additional clerks in J215a in the amount of $10,500 is clear from the evidence. The need for restoration of $1,000 in Account J214a has not been established. Of the total proposed reductions of $105,750 from Accounts J214 and J215, the amount recommended to be restored is $65,000.

Reductions totaling $82,000 are proposed for Accounts J220, J230, J240 and J250. The clear necessity for a large portion of these funds has been established from the documentary evidence. The need for the following amounts has not been adequately met: J250a, $3,000; J250b, $1,000; J250c, $4,000. These items represent miscellaneous supplies for instruction, travel expense for instruction and one-third of the reduction of $12,000 for in-service education. The hearing examiner recommends that the original proposed reduction of $82,000 in these accounts, $74,000 be restored.

In summary, the hearing examiner recommends that the Commissioner restore $222,800 of the total proposed reduction of $320,550 in J200-Instruction as necessary to maintain a thorough and efficient system of public schools.

*J-300 Attendance Services*

A reduction of $7,000 is proposed in Account J310a for one additional attendance officer. The Board's evidence is confusing since it does not clearly show any expenditure for an attendance officer for 1969-70 or 1970-71. The staff listing (Exhibit P-3) indicates three school social workers, but no attendance officer. The documentary justification of need (Exhibit P-1) refers to the provision of an attendance officer to relieve school social workers of this task. Certainly, the performance of routine duties of attendance reporting is not the proper function of certified school social workers. The hearing examiner recommends, therefore, the restoration of $7,000 to provide for an attendance officer in order to relive specialized school workers of this duty. In his judgment, this will clearly improve efficiency by freeing the time of social workers for their more complex functions.

*J-400 Health Services*

The proposed reduction of $3,000 from salaries of school medical examiners, Account J410al, cannot be sustained in view of the fact that the Board presently engages two medical examiners for an approximate enrollment of 11,400 pupils. The hearing examiner recommends the restoration of $3,000 as a necessary requirement for an efficient program of pupil health services.

*J-500 Pupil Transportation*

The amount of $5,000 is proposed as a reduction from Account J520c, the allocation for transportation other than to and from school. The hearing examiner notices that the local Board is attempting to effecutate the policy to discontinue the requirement that parents pay for school trips which are planned as an integral part of the instructional program of the schools. If school trips are vital learning experiences planned as an integral part of the instructional program, the Board must financially support them. The hearing examiner recommends, therefore, the restoration of $5,000 to Account J520c.

*J-600 Operation of Plant*

Reductions totaling $9,000 are proposed in Account J610a for custodial salaries for rented facilities, overtime, substitute pay and vacation relief. The aduit reports for 1969-70 and 1970-71 (Exhibits P-10 and P-29) disclose sizeable deficits in expenditures for all custodial salaries for these two fiscal years. In the judgment of the hearing examiner, the Board can redistribute custodial assignments to adequately provide for the rented facilities. The hearing examiner recommends, therefore, the restoration of $8,000 to Account J610a to provide for overtime payments, substitute pay and vacation substitutes.

*J-700 Maintenance of Plant*

A reduction is proposed in Account J710a in the amount of $8,000 for an additional groundskeeper. The Board should be able to allocate some duties of caring for grounds to custodial building personnel. It is recommended, therefore, that this reduction be sustained. The necessity for one additional foreman for the maintenance of buildings and grounds is also not proved by evidence educed. This reduction should, therefore, be sustained. The necessity for the restoration of $3,000 to Account J720c for rug cleaning is not established by the record. The hearing officer believes that this maintenance function could be performed by the present staff. Also the record does not support the necessity to restore $3,500 reduced from Account J730a & b for replacement of equipment.

It is the recommendation of the hearing examiner that the reductions from this maintenance account in the total amount of $22,500 be sustained.

*J-800 Fixed Charges*

The reduction of $15,000 is proposed from Account J820b-employee insurance. This reduction is unrealistic in view of the fact that the amount of $11,090.50 is required for the proposed twenty-five and one-half additional employees. The recommendations set forth in this report sustain the reduction of twelve of these additional positions. The requirement for this employee benefit is contractual and cannot be set aside. The necessity for the restoration of part of these funds is therefore clearly established. The hearing examiner recommends, therefore, that $11,000 be restored to Account J820b to meet the contractual obligation of providing the insurance benefit for employees.

*J-5 Summer School*

It is noted that the $5,700 budgeted for the summer school program is used to supplement a student tuition fee. This program is not part of the full-tax-supported school program and cannot be considered necessary for the maintenance of a thorough and efficient educational system. The reduction is therefore sustained.

*L-1200 Capital Outlay*

A total reduction of $17,000 is proposed from this series of accounts. Of this total, $2,500 is reduced from L-1220c - improvements to sites; $2,000 is eliminated from L1230c-remodeling of buildings; and $12,500 is removed from L1240-equipment. The Board has not demonstrated the necessity for the restoration of any part of these funds. Therefore, the hearing examiner recommends that this total reduction of $17,000 be sustained.

*Budgetary Accounting*

The hearing examiner notes the fact that the organization of the audit reports for 1969-70 (Exhibit P-10) and 1970-71 (Exhibit P-29) differs in both instances from the format of the proposed budget for 1971-72. (Exhibit P-14) In particular, the schedule of expenditures, Section A-4, of the 1970-71 audit

(Exhibit P-29), is not arranged so that expenditures for specific line items in the proposed budget can be identified. For example, the 1971-72 proposed budget reflects numerous sub-categories for Line Item J213-teachers' salaries, but the audit reports for the two preceeding years report expenditures in one lump sum fo;this account. Since the Board's budget breaks down budgetary line items into sub-categories, it is logical to assume that the bookkeeping system records expenditures in a like manner. This is a most useful and commendable practice for careful budgeting and spending. In order to present the expenditure schedule by general budget line items, the sub-categories must be totaled. This practice is unncessary for it results in a loss of specific information, and ameks impossible a detailed comparison between the proposed budget allocations and the expenditures of a prior year. The hearing examiner recommends that the annual audit report for each future year, including that for the current fiscal year, reflect actual expenditures for each budgetary line item, in the exact manner that the Board's budget is organized with every sub-category reported. This will provide an excellent means for the comparison of planned appropriations with actual prior-year expenditures.

In summary, the recommendations of the hearing examiner with respect to the total budget reductions are listed in the following table:

| Acct. No. | Title | Recommended Reduction | Amount Restored | Amount not Restored |
|---|---|---|---|---|
| **CURRENT EXPENSES** | | | | |
| J110-b | Sals.-Bd. Secy.'s. Off.-Substitutes | $ 1,000.00 | $ 1,000.00 | $ - 0 - |
| J110-f | Sals.-Supt.'s Off. | 1,500.00 | 1,500.00 | - 0 - |
| J120-a | Pub. Sch. Acct.'s Fee | 1,000.00 | 1,000.00 | - 0 - |
| J130-b | Other Exp.-Bd. Secy.'s Off.-Supps. | 1,000.00 | 1,000.00 | - 0 - |
| J130-f | Other Exp.-Supt.'s Off. | 500.00 | 500.00 | - 0 - |
| J130-m | Printing & Publicity | 8,000.00 | 8,000.00 | - 0 - |
| J130-n | Other Exp.-Admin. | 1,000.00 | 1,000.00 | - 0 - |
| J211 | Sals.-Principals | 2,800.00 | 2,800.00 | - 0 - |
| | Sals.-Teaching Assts. | 1,500.00 | 1,500.00 | - 0 - |
| J212 | Sals.-Supervs. of Instr. | 1,000.00 | 1,000.00 | - 0 - |
| J213 | Sals.-Teachers | | | |
| J213.1 | Anticipated Upgrad. | 5,000.00 | 5,000.00 | - 0 - |
| J213.1 | Addit. Tchrs. (10) | 92,000.00 | 46,000.00 | 46,000 |
| J213.1 | Substitute Pay | 12,500.00 | 12,500.00 | - 0 - |
| J213.1 | Stipends-Extra Serv. | 5,000.00 | 5,000.00 | - 0 - |
| J213.1 | New Tchr. Orient. Prog. | 3,000.00 | - 0 - | 3,000.00 |
| J213.3 | Sals.-Tchrs. of Individ. Suppl. Instr. | 10,00.00 | 10,000.00 | - 0 - |
| J214-a | Sals.-Sch. Librs. (New) | 9,500.00 | 9,500.00 | - 0 - |
| J214-b | Summer Stipend | 1,000.00 | - 0 - | 1,000.00 |
| J214-b | Sals. of Guid. Pers. (4½ New Counselors) | 54,000.00 | 30,000.00 | 24,000.00 |
| J214-c | Sals.-Psychol. Pers. (New Psychol.) | 15,000.00 | 15,000.00 | - 0 - |
| J215-a | Sals.-Secy's. & Cler. Assts. to Prins. (5 New) | 26,250.00 | 10,500.00 | 15,750.00 |
| J220 | Textbooks | 15,000.00 | 15,000.00 | - 0 - |

| | | | | |
|---|---|---|---|---|
| J230-a-1 | Refer. Books for Pupils | 5,000.00 | 5,000.00 | - 0 - |
| J230-c | Audiovisual Mater. | 6,000.00 | 6,000.00 | - 0 - |
| J240 | Teaching Supplies | 12,000.00 | 12,000.00 | - 0 - |
| J250-a | Misc. Supps.-Instrc. | 3,000.00 | - 0 - | 3,000.00 |
| J250-b | Travel Exp.-Instruc. | 1,000.00 | - 0 - | 1,000.00 |
| J250-c | Misc. Exp.-Instruc. | | | |
| J250-c | In-Serv. Educa. | 12,000.00 | 8,000.00 | 4,000.00 |
| J250-c | Data Proc. Equip. Rental | 25,000.00 | 25,000.00 | - 0 - |
| J250-c | Audiovisual Assess. | 3,000.00 | 3,000.00 | - 0 - |
| J310-a | Sals.-Attend. Servs. | | | |
| | Attend. Worker (New) | 7,000.00 | 7,000.00 | - 0 - |
| J410-a-1 | Sals.-Sch. Physicians | 3,000.00 | 3,000.00 | - 0 - |
| J520-c | Trips other than to & | | | |
| | from School | 5,000.00 | 5,000.00 | - 0 - |
| J610-a | Sals.-Custodial Servs. | | | |
| J610-a | Rented Facilities | 1,000.00 | - 0 - | 1,000.00 |
| J610-a | Public Meetings-Overtime, | | | |
| | Subs., Weekend Stipend | 5,000.00 | 5,000.00 | - 0 - |
| J610-a | Vacation Relief | 3,000.00 | 3,000.00 | - 0 - |
| J710-a | Sals.-Upkeep of Grds. | 8,000.00 | - 0 - | 8,000.00 |
| J710-b | Sals.-Repair of Bldgs. | | | |
| | (Lead Man) (New) | 8,000.00 | - 0 - | 8,000.00 |
| J720-c | Contr. Servs.-Repr. of | | | |
| | Equip.-Curtain - Rug Clean. | 3,000.00 | - 0 - | 3,000.00 |
| J730-a-b | Replace. of Equip. | 3,500.00 | - 0 - | 3,500.00 |
| J820-b | Empl. Insur. Hospitaliz. | | | |
| | Major Med. (New Employ.) | 15,000.00 | 11,000.00 | 4,000.00 |
| J-5 | Summer School | 5,700.00 | - 0 - | 5,700.00 |
| Sub-Totals – Current Expenses | | $401,750.00 | $270,800.00 | $130,950.00 |
| **CAPITAL OUTLAY** | | | | |
| 1220-c | Improvements to Sites | $ 2,500.00 | $ - 0 - | $ 2,500.00 |
| 1230-c | Buildings-Remodeling | 2,000.00 | - 0 - | 2,000.00 |
| 1240 | Equipment | 12,500.00 | - 0 - | 12,500.00 |
| Sub-Totals – Capital Outlay | | $ 17,000.00 | $ - 0 - | $ 17,000.00 |
| GRAND TOTALS | | $418,750.00 | $270,800.00 | $147,950.00 |

* * * *

The Commissioner has reviewed the findings of fact and the recommendations of the hearing examiner herein set forth. The Commissioner is aware of the efforts of the Parsippany-Troy Hills Board of Education to comply with the mandate set forth in the organic law of this State, supported by legislative enactments and administrative requirements "*** for the maintenance and support of a thorough and efficient system of free public schools ***." *New Jersey Constitution, Art.* 8, § 4, *par.* 1 At the same time, the Commissioner takes cognizance of the Committee's efforts to effect savings which will not impair the educational process. In the judgment of the Commissioner, both parties have acted conscientiously, reasonably and with a sincere regard for the State policy to provide a system of local schools, which may fairly be considered thorough and efficient.

The jurisdiction of the Commissioner in this case is limited to determining the sum of monies necessary for the maintenance and operation of a thorough and efficient system of public schools in the School District of Parsippany-Troy Hills for the 1971-72 school year. Having examined the report of the hearing examiner and the record of the instant matter, the Commissioner concurs in the hearing examiner's recommendations as supported by the findings of fact.

The Commissioner is constrained to comment that this decision appears at the beginning of Phase II of the wage and price guidelines promulgated by the President of the United States. The Commissioner notices that as the result of the Executive Order, certain sums of monies may accumulate from unpaid contractual salaries and wages through the duration of the period of economic controls. Accordingly, the Commissioner directs the Board of Education to retain these sums *in toto* within the respective budgetary salary accounts until the expiration of the Federal controls or until the close of the 1971-72 fiscal year, whichever shall come first.

The Commissioner directs that the Township Committee of the Township of Parsippany-Troy Hills certify to the Morris County Board of Taxation an additional sum of $270,800 to the raised by taxation for current expenses for the public schools of the district in the 1971-72 school year.

COMMISSIONER OF EDUCATION

December 8, 1971
Pending before the State Board of Education

**Board of Education of the Borough of Lincoln Park,**

*Petitioner,*

**v.**

**Borough Council of the Borough of Lincoln Park, Morris County,**

*Respondent*

## COMMISSIONER OF EDUCATION

### Decision

For the Petitioner, Hoffman and Humphreys (John Fiorello, Esq., of Counsel)

For the Respondent, Frank Scangarella, Esq. (John F. Feeney, Esq., of Counsel)

Petitioner, hereinafter "Board," appeals from an action of respondent, hereinafter "Council," pursuant to *N.J.S.A.* 18A:32-37 certifying to the Morris County Board of Taxation a lesser amount of appropriations for the 1971-72 school year than the amount proposed by the Board in its budget which was rejected by the voters. The facts of the matter were educed through written and oral testimony at hearings on June 24, 1971, and October 19, 1971, at the State Department of Education, Trenton, before a hearing examiner appointed by the Commwssioner. The report of the hearing examiner is as follows:

At the annual school election on February 9, 1971, the voters rejected the Board's proposals to raise $1,687,702 for current expenses and $19,693 for capital outlay. The budget was then sent to Council, pursuant to *N.J.S.A.* 18A:22-37, for its determination of the amount of funds required to maintain a thorough and efficient local school system.

After consultation with the Board and a review of the budget, Council made its determination and certified to the Morris County Board of Taxation amounts of $1,647,702 for current expenses and $9,693 for capital outlay.

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

| | Board's Proposal | Council's Certification | Reduction |
|---|---|---|---|
| Current Expenses | $1,687,702 | $1,647,702 | $40,000 |
| Capital Outlay | 19,693 | 9,693 | 10,000 |
| TOTALS | $1,707,395 | $1,657,395 | $50,000 |

The Board determined that Counsil's action in deleting funds from its proposed budget was improper, arbitrary, capricious, and unreasonable, and contends that the amounts it certified are insufficient to provide an adequate system of education for the pupils of the school district. The Board appeals to the Commissioner to restore the funds deleted by Council.

In the case of *Board of Education of East Brunswick v. Township Council of East Brunswick*, 48 *N.J.* 94 (1966), the Court laid down guiding principles for the review of rejected school budgets by the municipal governing body 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 page 105)

The Court also defined the function of the Commissioner when, after the governing body has made its determinations, the Board appeals from such action:

> "*** The Commissioner in deciding the budget dispute here before him, will be called upon to determine not only the strict issue of arbitrariness but also whether the State's educational policies are being properly fulfilled. Thus, if he finds that the budget fixed by the governing body is insufficient to enable compliance with mandatory legislative and administrative educational requirements or is insufficient to meet minimum educational standards for the mandated 'thorough and efficient' East Brunswick school system, he will direct appropriate corrective action by the governing body or fix the budget on his own within the limits originally proposed by the board of education. On the other hand, if he finds that the governing body's budget is not so inadequate, even though significantly below that the Board of Education had fixed or what he would fix if he were acting as the original budget-making body under *R.S.* 18:7-83, [now s,N.J.S.A. 18A:22-38] then he will sustain it, absent any independent showing of procedural or substantive arbitrariness." (at page 107)

Council set forth the items of the budget in which it believed economies could be effected and its reasons therefore in communications to the Board dated June 7, 1971, and July 14, 1971.

Council suggested line-item cut totaling more than $120,000, whereas its reduction was only $50,000. The Board moved at the June 24, 1971, hearing that Council should specify exactly those line items where a total of $50,000 in economies should be made. The hearing examiner so directed Council, and line-item cuts, with supporting reasons, were presented at the second hearing on October 19, 1971. A table of those line-item cuts provides the following information:

**CURRENT EXPENSES**

| Acct. No. | Item | Board's Proposal | Council's Suggested Reduction |
|---|---|---|---|
| J120d | Other Contracted Serv. | $ 5,000 | $ 3,000 |
| J212 | Sals. of Supervisors | 19,000 | 16,000 |
| J230a | School Library Books | 10,750 | 1,500 |
| J230c | Audiovisual Materials | 5,410 | 1,000 |
| J250b | Travel Expenses | 1,000 | 1,000 |
| J720a | Upkeep of Grounds | 2,300 | 1,300 |
| J730a | Instructional Equipment | 3,537 | 2,000 |
| J870 | Tuition | 793,250 | 10,000 |
| J910 | Salaries-Food Serv. | 5,300 | 4,200 |
| | Sub-Totals | $845,547 | $40,000 |

**CAPITAL OUTLAY**

| | | | |
|---|---|---|---|
| L1240c | Instructional Equip. | $ 19,693 | $ 9,425 |
| L1240e | Station Wagon with Lift | 575 | 575 |
| | Sub-Totals | $ 20,268 | $10,000 |
| | TOTALS | $865,815 | $50,000 |

*J120d Other Contracted Services*

Council reduced this account by $3,000, indicating that the Board could use its own administrators to develop written Board policy. Council also challenges the necessity of retaining consultants for a building program which is no longer active. The Board, however, gives supporting reasons for its proposal of $5,000 in this account, saying that the expenditure is required to develop written Board policy and to retain consultants to consider modifications and alterations of previously-submitted junior-senior high school construction plans.

The criteria used for any restoration of funds by Council is based on necessity and not desirability. The hearing examiner finds no necessity for this expenditure to provide for the maintenance of a thorough and efficient system of the local schools and recommends that Council's cut be sustained.

*J212 Salaries of Supervisors*

Council recommends a $16,000 cut in this account.

The Board's testimony is that the services of a director of instruction, at a salary of $19,000, is necessary to update and refine its curriculum and to coordinate its educational program with that of Boonton High School, which is the receiving district for Lincoln Park students.

Council does not aver that the position of director of instruction is unnecessary, but does aver that the position can be covered by the same person who now holds the position of principal of an elementary school in the Board's school system, and further avers that said person handled both jobs during the 1970-71 school year.

The hearing examiner recommends that the Board's appointment of the director of instruction be sustained as being necessary to provide a thorough and efficient system of the public schools in the district.

The five following accounts will be considered as a whole for the reasons expressed below:

| | | Reduction |
|---|---|---|
| J230 | School Library Books | $1,500 |
| J230c | Audiovisual Materials | 1,000 |
| J250b | Travel Expenses | 1,000 |
| J720a | Upkeep of Grouns | 1,300 |
| J730a | Instructional Equipment | 2,000 |
| | Total | $6,800 |

The Board gave reasons for its proposals in each of the accounts, *supra*, and Council suggested that economies, as outlined, could be made. The hearing examiner recommends that Council's cuts be sustained in each of the above accounts. Although it would be desirable to effect the proposed expenditures, the Board did not show that these expenditures were necessary to provide a thorough and efficient system of local schools.

*J870 Tuition*

Council recommended a cut of $10,000 in this account and testified that in its opinion the Board did not have to pay tuition for 615 students at the rate of $1,240 per student as the Board contends. The record shows that only 576 students are in attendance at Boonton High School on a tuition basis; therefore, the hearing examiner recommends that Council's cut in this account be sustained.

*J910 Salaries for Food Services*

Council's recommended reduction of $4,200 is based on its premise that the salary of the school lunchroom supervisor should be borne as a cost of the operation of the lunchroom program.

The Board testified that the lunchroom supervisor is a Board employee and has always been paid as such.

The hearing examiner recommends that Council's cut in this account be restored.

*L1240c Instructional Equipment*

The Board's proposal in this account has been reduced by $9,425. Council avers that this new equipment is not necessary for the maintenance of a thorough and efficient school system.

The hearing officer opines that the equipment is desirable, but not necessary, and recommends that Council's cut be sustained.

*L1240e Station Wagon with Lift*

The Board testified that it needs this item for a handicapped wheelchair student, who is presently being hand-carried in and out of a vehicle.

Council testified that the item could wait another year, and averred further that the proposal was exorbitant, if required at all.

The hearing examiner recommends that the $575 cut in this account be restored.

The reductions to be reinstated may be summarized as follows:

CURRENT EXPENSES

| Acct. No. | Item | Council's Suggested Beduction | Amount Restored |
|---|---|---|---|
| J120d | Other Contracted Serv. | $ 3,000 | $ - 0 - |
| J212 | Sals. of Supervisors | 16,000 | 16,000 |
| J230a | School Library Books | 1,500 | - 0 - |
| J230c | Audiovisual Materials | 1,000 | - 0 - |
| J250b | Travel Expenses | 1,000 | - 0 - |
| J720a | Upkeep of Grounds | 1,300 | - 0 - |
| J730a | Instructional Equipment | 2,000 | - 0 - |
| J870 | Tuition | 10,000 | - 0 - |
| J910 | Sals.-Food Serv. | 4,200 | 4,200 |
| | Sub-Totals-Current Expenses | $40,000 | $20,200 |

CAPITAL OUTLAY

| | | | |
|---|---|---|---|
| L1240c | Instructional Equip. | $ 9,425 | $ - 0 - |
| L1240e | Station Wagon with Lift | 575 | 575 |
| | Sub-Totals-Capital Outlay | $10,000 | $ 575 |
| | GRAND TOTAL | $50,000 | $20,775 |

* * * *

The Commissioner has read the report of the hearing examiner and agrees with his findings and recommendations. He therefore directs the Mayor and Council to certify to the Morris County Board of Taxation, in addition to the amounts previously certified for the 1971-72 school year, the amount of $20,775 ($20,200 for current expenses and $575 for capital outlay) to be raised by taxation for expenses of the Lincoln Park School District for the 1971-72 school year.

COMMISSIONER OF EDUCATION

December 14, 1971

**In the matter of the Tenure Hearing of John H. Stokes, School District of the City of Rahway, Union County.**

## COMMISSIONER OF EDUCATION

### Decision

For the Complainant Board of Education, Magner, Abraham, Orlando & Kahn (Leo Kahn, Esq., of Counsel)

For the Respondent John H. Stokes, James Meyerson, Esq.

Petitioner, the Rahway Board of Education, hereinafter "Board," has certified a total of fifteen charges against respondent, a tenure teacher in its employ. These charges contain allegations which, if proved true in fact, would constitute insubordination or conduct unbecoming a professional employee of the school system. Respondent has denied all charges contained in the pleadings, although with respect to Charge Number Two, he has offered no defense, and his position, in this regard, rests solely on the denial that the pleading contains.

The hearing in this matter, conducted by a hearing examiner appointed by the Commissioner, was inordinately delayed and protracted. While it started on June 1, 1970, it did not finally conclude until October 22, 1971. Within this period, separate hearing sessions were set down for the following dates:

| | |
|---|---|
| During 1970, | June 1, 3 and 9<br>July 9 |
| During 1971 | May 18<br>August 5, 6, 24 and 25<br>October 22 - Oral Summation |

In addition, a hearing on a Motion to suppress all defenses was held on March 31, 1971. The Motion was denied without written opinion since it was based on respondent's failure to proceed, and since shortly after argument on the Motion was heard, respondent did proceed again with his defense.

All of the hearings referred to, *supra*, were conducted by a hearing examiner appointed by the Commissioner. A brief has been filed by petitioner. The report of the hearing examiner is as follows:

Respondent is a teacher who, until his suspension on February 18, 1970, had been employed by the Board for a total period of ten years as a teacher of social studies, and most recently as a teacher of United States history. However, on February 18, 1970, the Board suspended respondent without pay pending a determination by the Commissioner of the truth of the fifteen charges brought against him by the Rahway Superintendent of Schools. A copy of the charges was served on respondent immediately thereafter, and the charges were also forwarded to the Commissioner pursuant to the procedure outlined in the statutes (*N.J.S.A.* 18A:6-10 *et seq.*)

The charges were received in the Division of Controversies and Disputes on February 20, 1970, and respondent was apprised of the requirement to file an answer thereto within ten days. On March 4, 1970, respondent did indicate he wished to defend himself against the charges, but a long delay ensued while he sought, and finally secured, the services of counsel. The attorney of record was Raymond Brown, Esq., although subsequent representation was provided by Thomas Ashley, Esq., of that office.

A conference of counsel followed on May 7, 1970, and the matter proceeded to the first hearing on June 1, 1970. Two subsequent days of hearing were held shortly thereafter - on June 3 and 9, 1970 - but a fourth hearing scheduled for July 9, 1970, was aborted because of the absence of respondent's counsel. This attorney subsequently withdrew from the case, and respondent indicated he would secure alternate representation.

However, respondent did not secure alternate counsel until May of 1971. In that month, apprised of the fact that respondent had secured counsel again, a hearing was scheduled for May 18th, at which time James Meyerson, Esq., an attorney for the National Association for the Advancement of Colored People Headquarters in New York City, appeared with a letter of introduction and sponsorship from Mr. Ashley.

This letter of sponsorship was recognized by the hearing examiner, and Mr. Meyerson, an attorney admitted to the Bar of the State of New York, thereafter represented respondent after another delay of some weeks during which time Mr. Meyerson familiarized himself with the transcripts of prior proceedings. Said transcripts were furnished to him without charge because of the long delay and peculiar circumstances of this matter and after presentation of a four-page affidavit by respondent that certified his status as a pauper. The hearings were then concluded in August 1971 with an oral summation scheduled for October 22, 1971. The case submission was complete as of that date.

The hearing examiner notes, at this juncture, that he was always ready to conclude the hearing during all of the period from July 1970 to August 1971, when the hearing actually resumed, and he notes, also, that the Board repeatedly urged resumption. However, the delay of respondent was not without reason.

On the one hand, respondent made several attempts during this period to secure the help of other counsel. Additionally, he was faced with the necessity to defend a criminal action brought against him in Superior Court, Union County, and that matter was not concluded until February 1971.

Before a discussion of the charges, and the evidence pertinent thereto, the hearing examiner believes it is necessary to place the charges in a factual recital and context if they are to be understood. The context herein is one of racial turmoil and conflict in the schools of Rahway.

In the days immediately prior to February 1970, events in Rahway appeared to portend a racial confrontation between groups in conflict. The unrest was apparent and found its flash point in school affairs. Black students, as of that month, had already drawn up a set of grievances against the Rahway Schools, but these were not formally considered by the Board, which was evidently pressed by each of two contending groups to take action against the other.

The school confrontation actually began an activist phase when black students staged a walkout from Rahway Senior High School, hereinafter "High School," on February 4, 1970, and were immediately suspended by the school administrators. These administrators then announced that a meeting with parents of suspended students was to be scheduled for the evening of February 5, 1970. Respondent attended this meeting, and his alleged words and actions there on that date constitute the basis for Charge No. 1.

The charges will be considered *seriatim:*

*CHARGE NO. 1*

"The said John H. Stokes on or about February 5, 1970 attending a meeting of parents and students at the high school auditorium together with a group of children not allowed in said meeting with the adults, came running down the aisle in a tirade, exciting the group present along racial lines, inciting the audience to be hostile. Said meeting had occurred as the result of a mass suspension of black students for leaving the building during class and said meeting had been arranged to advise parents on the procedures of readmittance. At that time Stokes created a dangerous situation in which the principal, Roy Valentine, and some of his staff who tried to walk out of said building, were surrounded on a stairway by some of said group charging harassment. Stokes in this noisy and dangerous situation and in conduct unbecoming a member of the faculty pointed to

the principal in front of students and parents and stated, 'I'll get rid of you before spring . . . . you won't finish the spring out.' Stokes further called the principal a racist and other similar derogatory names. The Superintendent, also in the hall, was surrounded by a similar group and it is further charged that his actions aided in the incitement of this dangerous situation, which was one of a series of potentially dangerous racial incidents.

"1a. The said John H. Stokes at the meeting referred to in No. 1 above, subsequently went into the cafeteria in which Mr. Warren Hanson had been assigned for meetings with parents and students who had been suspended to have them sign their children back into school. Warren Hanson is assigned to administrative duties, which places him in a supervisory position as to said duties. The said Stokes said to those present 'do you realize this school system is brutalizing your school children . . . . . and this is the man that is doing it.' After Hanson denied this charge Stokes, in a wild and noisy display, in the presence of students and parents, grabbed a table and raised it, legs out, and started toward Hanson as if to assault him. As he approached Hanson was ready to defend himself and Stokes put the table down and came up to him and pointing his finger under Hanson's nose in a manner that could have been a threat of a striking or a battery to go with the assault."

As a result of the suspension of students reported, *supra*, the Rahway School Administrators had thought it advisable to call the meeting of parents of suspended students to discuss readmittance of the black students to the High School. The school officials had previously indicatedthat school students could also attend the meeting if they were with their parents, but that other students not so accompanied would be barred.

On the night of the meeting, it was testified, there were instructions to a guard at the door to keep students, who were not accompanied by parents, from entering the auditorium. The meeting itself, according to the reported plan for it, was to be strictly structured to include talks to the group assembled by the principal of the High School and by the Superintendent of Schools, and the meeting was then to adjourn to individual consultative meetings between school administrators and parents for the purpose of securing readmittance of the students to school.

The meeting opened as planned, but at the conclusion of talks by the school officials the evident previously-planned structuring was upset. In the opinion of school officials, as the charges attest, respondent was the leader of those responsible for the disruption that followed. In respondent's opinion, he did nothing more than represent the people who were present, in their view that group discussions were in order to ascertain the causes of the student walkout, not merely to get the students back in school, and to attempt to remedy conditions which allegedly caused the turmoil in the first place.

The testimony on this charge was the most extensive of any at the hearing, and the three witnesses, who testified for the Board against respondent, were categorically contradicted by witnesses for respondent (parents who were present at the meeting) in their recital of the events that occurred in the auditorium. On the one hand, the testimony of the three school administrators certainly supports the charge as stated, *supra.* On the other hand, the parents, also credible witnesses, stated that respondent did nothing more than represent their views in a reasonable manner when he, like other persons present, got up to speak to the assembled group.

The hearing examiner has examined all of the conflicting testimony in this regard and cannot find that a preponderance of the credible evidence supports the charge that respondent "came running down the aisle in a tirade, exciting the group present along racial lines, inciting the audiance to be hostile."

There can be no doubt that, contrary to the plan of the evening as envisioned by school administrators, respondent did go to the front of the auditorium, and he did speak to the group, by his own admission (Tr. IX-3), concerning a list of black student grievances which he held in his hand. There can be no doubt either that respondent's son passed out copies of this list of grievances at the time his father spoke. (Tr. IX-3)

However, in the circumstances of that meeting as recited, *supra*, there is good reason to opine that respondent, as a parent as well as a teacher, had a right to express himself, as other parents present evidently did, and that his expression echoed the sentiments of the group present. While respondent's sentiments were contrary to those of the school administrators, the evidence that his expression of them constituted conduct unbecoming a teacher or insubordination, cannot , in the judgment of the hearing examiner, be held to be so conclusive as to substantiate this portion of the charge.

Two other parts of Charge No. 1 (that respondent's action aided in the incitement of dangerous situations in the hall outside the auditorium and that he said he would "get rid" of the High School principal by spring) are also not supported by the weight of the credible evidence, in the opinion of the hearing examiner.

The principal did give credible testimony that respondent said what he is charged with saying and that he said it while the principal was with a rather large group of students and parents in the hall. However, respondent denies this charge, and there is no support for it in testimony from any of the persons who were in the group present around the principal. None of these persons were subpoenaed by petitioner, and none voluntarily agreed to appear.

There is even less support for the charge that respondent's actions in the hall were an "incitement" of others. To the contrary, the principal himself testified on cross-examination that while he regarded respondent's alleged threat as one of substance to him personally (Tr. III-85), he did not regard himself as threatened by the parents and students who were with him, and that respondent did not direct the members of the group to surround him or instruct or incite them in other ways. (Tr. III - 91)

For the reasons stated, the hearing examiner recommends that Charge No. 1 be dismissed since, in his judgment, it has not been sustained by the preponderant weight of credible evidence elicited at the hearing.

*CHARGE NO. 2*

"The said John H. Stokes was on February 12, 1970, stopped for speeding by Patrolman Louis Garay. The said Stokes when asked for his license and registration beckoned to a group of six to ten boys of high school age to come to the location where he and the officer were standing and as they arrived, in their presence, he ripped the license out of the hands of the officer and then with both hands shoved the officer backwards. He also urged the boys to 'get him' and grabbed one boy and shoved him at the officer. He was told he was under arrest and after much difficulty Stokes swung and hit the officer on the body and had to be subdued by other officers, at which time his son and other students were hollering and interfering with the police and had to be restrained."

There were three witnesses who testified to the truth of this charge – the police officer, who was allegedly physically assaulted by respondent, and two other policemen. Respondent offered no defense.

The specific testimony of the allegedly-assaulted police officer, Officer Garay, with respect to the most serious part of this charge, as it is recorded on pages 24 and 25 of the transcript of June 1, 1970 (Tr. I), is as follows:

"*** I told Mr. Stokes to go to headquarters in the unmarked car. He refused. He went to get into his own car and I stopped him *** He went back to his house to the front door of the house and I grabbed Mr. Stokes by the arm. I told him he had to come with us. He swung around, hit me in the jaw –

"Q. What side of the jaw?

"A. It was on the left side.

"Q. Did he use a closed fist or an open hand?

"A. He used a closed fist." ***

"Q. ***Now what happened after he struck you on the jaw?

"A. Well I tried to grab him *** so we could bring him into headquarters.

"Q. Were you wearing any glasses at the time?

"A. Yes, I had a pair of sun glasses on, which are glass. When he struck me, he knocked them from my face. He pulled on my helmet and broke the strap off the helmet.***

"Q. Were you caused any injuries?

"A. Yes, I had to go to the hospital and in the meantime, I think a few of the high school boys were on the back of me, trying to stop me from arresting him ***."

The altercation reported, *supra*, had occurred at a time immediately subsequent to the time when Police Officer Garay had stopped respondent to ask for his driver's license and was processing what he regarded as a traffic violation allegedly committed by respondent. The testimony of Officer Garay received substantial corroboration from that of Detective John De Stefano (Tr. I-138, 145), and from Police Officer John Stefanick (Tr. I-104), who were present with Officer Garay at the time of the alleged incident.

The same charges as those contained herein were the subject of an indictment against respondent, which resulted in a trial by a jury of his peers. The verdict of this jury was that John Stokes was guilty as charged. (See Exhibit p-4, a docket of Proceedings, *State of New Jersey v. John Stokes*) As a result of this conviction, respondent was sentenced to be imprisoned in New Jersey State Prison for a minimum of one year and a maximum term of two years and fined $1,000. The prison term sentence was suspended. It is the understanding of the hearing examiner that this Court proceeding and verdict are now on appeal.

Since no defense to the charges contained herein was offered, the charges as stated must be adjudged to be supported by the weight of all the available evidence introduced at the hearing before the hearing examiner and to be true in fact.

*CHARGE NO. 5*

"The said John H. Stokes on February 13, 1970, at approximately 7:30 a.m., in front of another staff member threatened a teaching staff member Wilbur Hooper, Sr., putting his hands in Hooper's face and stating that Hooper was an 'Uncle Tom' trying to get him and if anything happened to Stokes he would make sure Hooper would be taken care of."

*CHARGE No. 3*

"The said John H. Stokes on February 13, 1970, at the door to principal Roy Valentine's office, in a belligerent manner, declared that he was the leader of the black community and that the principal had to sit down with him and immediately iron out problems or that they would knock heads."

*CHARGE No. 6*

"The said John H. Stokes at approximately 8:15 a.m. on February 13, 1970, at the faculty cafeteria threatened the said Wilbur Hooper, Sr. with the same threats in the presence of another faculty member."

It is noted that Charges 4 and 7, of the original fifteen certified by the Rahway Board of Education to the Commissioner, were withdrawn by action of counsel for the Board at the hearing of June 9, 1970 (Charge 4) and at the hearing of June 3, 1970 (Charge 7).

These three Charges Numbers 5, 3 and 6 are considered out of numerical context because of their relationship, in a progressive time sequence, to each other. All three charges developed from incidents, allegedly involving respondent, which occurred on the morning of February 13, 1970.

Re Charge No. 5: At approximately 7:30 a.m. on that morning, respondent entered the Rahway Senior High School building and approached a fellow staff member, William Hooper. Respondent maintains that he was with Samuel Taylor, director of the local chapter of the "National Association for the Advancement of Colored People," as he reached and entered the building that morning (Tr. 28, 48), but the Board avers that this was not the fact, and that these two men had reached the building in separate cars and probably entered it separately. (Tr. X-45-47)

In any event respondent maintains that as he approached Mr. Hooper, he bowed to him (Tr. X-30) and kept on going. He denies putting his hand in Mr. Hooper's face as charged or saying anything at all to him.

Mr. Taylor's testimony in support of respondent was that he could not recall any threats or finger waving that morning (Tr. VII-140, 141) at the time respondent approached Mr. Hooper.

Mr. Hooper testified that respondent "appeared and in a very erratic manner he waved his finger in my face and called me an Uncle Tom and stated that (sic) anything happened to his job that I would be taken care of or words to that effect." (Tr. II-137) Mr. Hooper further testified that Mr. Taylor then appeared and the two men, respondent and Mr. Taylor, "went upstairs." (Tr. II-139)

Robert Berger, also a teacher in the Rahway Schools, supported the testimony of Mr. Hooper in part. He stated that he was on hall duty on the morning of February 13, 1970, and that he was standing nearby as respondent

approached Mr. Hooper. His testimony was that respondent called Mr. Hooper a "f– Uncle Tom" and "he continued on down the hall." (tr. II-5) Mr. Berger did not support the allegations made by Mr. Hooper that there was "a finger in my face" or that respondent otherwise threatened Mr. Hooper.

The hearing examiner has examined all of the evidence with relationship to this charge and concludes that respondent did precede Mr. Taylor into the building separately on the morning of February 13, 1970, and that Mr. Taylor entered shortly thereafter. (See Tr. II-9) He also believes that respondent did insult Mr. Hooper by calling him an "Uncle Tom" by a remark made in a "normal voice" (Tr. II-5) However, the hearing examiner cannot find conclusive evidence that respondent "threatened" Mr. Hooper as charged in this instance. To the contrary, Mr. Berger testified that he was close to the two men, that he recalls no such threat and that he saw no menacing gestures. (Tr. II-12) The hearing examiner believes Mr. Berger's testimony is credible in all of the circumstances contained herein.

Finally, the hearing examiner notes that Mr. Hooper preferred charges similar to those in the instant matter against respondent in Rahway Municipal Court, and that respondent was found guilty of threatening Mr. Hooper on two counts and fined $25.00 for each offense.

In summary, the hearing examiner finds that respondent insulted a fellow teacher by use of the phrase as charged on February 13, 1970, at approximately 7:30 a.m. However, the hearing examiner recommends that the remaining part of this charge be dismissed, since it has not been supported at this hearing by the weight of credible evidence.

*Re CHARGE No. 3:*

Following the first confrontation with Mr. Hooper, *supra,* on the morning of February 13, 1970, respondent is alleged to have proceeded to the office of the High School and, in effect, threatened the principal. The hearing examiner believes that Samuel Taylor was with him for this second alleged confrontation of the morning.

The principal of the High School did testify that respondent said the things he is charged herein with saying (Tr. III-112), and that he, as principal, considered respondent's words and manner as "belligerent."

Respondent testified in the following words concerning this charge (Tr. IX - 32):

> "A. I checked my mailbox and then I said to him, [Mr. Valentine-Principal] I said, 'The young folks have some respect for me and, 'I said, 'Let's sit down and see if we can resolve this problem.'"

Respondent denies (Tr. IX-34) that he referred to "knocking heads," or that he said they should "sit down immediately" to "iron out problems." (Tr. IX-33) He is supported in this testimony by Mr. Taylor, who was there, and there is no other evidence to the contrary to support the specific words that Mr. Valentine alleges were spoken by respondent.

The hearing examiner believes that respondent had already acted in a belligerent manner that morning toward Mr. Hooper, and that there is every reason to assume that the words that he now admits he said to the school principal were said belligerently. However, the charge as stated, in the opinion of the hearing examiner, cannot be sustained on the weight of credible evidence. He believes that if respondent did in fact mention something about "knocking heads," it was an idle expression which he did not take seriously or which Mr. Valentine, an ex-football player and evidently a strong man, did not regard with much trepidation either.

In summary, the hearing examiner finds that the weight of credible evidence supports the charge that respondent did act belligerently toward his school principal on the morning of February 13, 1970, but he cannot find with certainty that the belligerence encompassed the exact phraseology with which he is here charged.

*Re CHARGE No. 6:*

After respondent left the office of the principal on the morning of February 13, 1970, he went to the cafeteria of the High School, where he met Mr. Hooper for the second time that day. It is again Mr. Hooper's testimony which supports the body of this charge.

Specifically, Mr. Hooper avers that respondent, on this occasion, again called him an "Uncle Tom" (Tr. II-169) and threatened him with words such as "*** if anything happens to me you're going to be taken care of." (Tr. II-170) Additionally, Mr. Hooper charges that, during a five-minute period on this occasion, respondent displayed "erratic manners" (Tr. II-178), and that he (Mr. Hooper) "had some fear of what he was going to do." (Tr. II-175)

There was an additional witness, Mr. John Keefe, another school teacher, who offered corroborative testimony with respect to the allegations made by Mr. Hooper, which occasioned this specific charge. Mr. Keefe testified (Tr. III-61, 62)

"Q. Did you hear Mr. Stokes say anything?

"A. Yes.

"Q. What did you hear him say?"***

"A. I heard Mr. Stokes call Mr. Hooper 'Uncle Tom.' And also he said to Mr. Hooper that if anything happened to him, he would take care of Mr. Hooper."

However, Mr. Keefe testified he did not see respondent wave his "hands in an erratic manner" (Tr. III - 68) or put his finger in Mr. Hooper's face.

Respondent maintains that he simply asked Mr. Hooper a question on this occasion; namely:

> "*** what did he mean by stating *** that he would have me run out of town and have me fired from my job. And, as soon as I said that to him he looked around to Keefe, he said, 'Did you hear that man threaten me?' Then he rushed upstairs, I think he went to the principal's office." (Tr. IX-35)

However, respondent maintains that he never threatened Mr. Hooper as charged herein. (Tr. IX-63)

The hearing examiner concludes that there is credible and corroborated testimony in this instance that respondent spoke the words as reported by Mr. Hooper and that the words did constitute a veiled threat of reprisal against Mr. Hooper. He also concludes that, for the second time that morning, respondent spoke the phrase "Uncle Tom" in an insulting manner. These two conclusions are founded principally on the support given Mr. Hooper's testimony by Mr. Keefe, and the hearing examiner holds that the testimony of these two persons in this instance is sufficient to find that Charge No. 6 is supported by the preponderant weight of credible evidence and is true in fact.

*CHARGE No. 8*

> "The said John H. Stokes on February 16, 1970 brushed up against Officer Louis Garay, an officer of the Rahway Police Department who was assigned to duty in the high school at the cafeteria door and also pushed against the officer's night stick. He then said 'you assaulted me with that stick.' He also called said officer 'Gestapo,' said 'Heil Hitler,' threw a Nazi salute at said officer, and also made a number of other comments including 'you need a psychiatrist; you don't belong in this building; we don't want you here.'"

The charge herein is also set in an atmosphere of racial tension within the Rahway community and in the High School. The student disorders that had first erupted in early February 1970 had continued, and the Board had finally decided that it was necessary to provide police protection within the High School.

Subsequent to this decision, Officer Louis Garay was on duty and in uniform and stationed at the entrance to the High School on the morning of February 16, 1970, when he was approached by respondent. The officer charges that respondent walked "closely" by him and that he "brushed the night stick" that was stuck into his (the officer's) belt and walked a "few paces away." (Tr. I-14) Then, the officer charges, respondent "raised his right hand" and went into a "Gestapo or Nazi salute and called me Gestapo and a few other names which I don't remember." (Tr. I-14)

The testimony of Officer Garay is corroborated in part by Mr. Charles Spiewak, an observer of the incident and a teacher in the Rahway Schools, who states that respondent did raise his hand while standing close to the officer and said "Heil Hitler" and "Gestapo," (Tr. II-21) in an "angry tone," (Tr. II-23) but that these were the only comments that he heard respondent make. (Tr. II-47)

Mr. Donald Samis, another teacher, testified that respondent spoke the words "You need a psychiatrist. We don't want you in this building. You don't belong here." (Tr. II-71)

Respondent denies speaking any of the words or phrases attributed to him, *herein*, on this occasion, but does admit that as he approached Officer Garay he "threw up my hand" and said "Let me pass" (Tr. IX-67) He also admits that he may have made a comment to himself as he was leaving the area that "police presence in the building would only serve to make conditions worse." (Tr. IX-68)

The hearing examiner concludes that the preponderant weight of the evidence produced with respect to this charge indicates that respondent brushed against Officer Garay's nightstick as he passed him in the doorway, but that he did not otherwise touch him, (Tr. II-52, 72) and that he then stopped, threw up his hand and repeated the words "Nazi" and "Gestapo." This conclusion is founded on the testimony of the officer, which was corraborated in almost exact detail by the testimony of Mr. Spiewak reported, *supra.*

However, the hearing examiner observes that Officer Garay himself—the one directly confronted on this occasion—has no recollection of the other phrases attributed to respondent herein, and the hearing examiner finds that the additional elements of the charge have not been sustained.

The conclusion that respondent brushed against Officer Garay's nightstick is not accompanied by a firm opinion that the brushing was intentional. The doorway was a restricted channel for passage, and the nightstick evidently offered some impediment by its protrusion.

*CHARGE No. 9*

> "The said John H. Stokes on February 16, 1970 in violation of directives and basic safety procedures led a group of black students out of Classroom 113 during a period of tension and crisis in the school and took them toward the new building when last seen."

Respondent is accused by the charge herein of violating specific instructions given to all teachers with regard to procedures that "shall be followed" in the "event of a school disorder." These procedures, found in Exhibit P-1, were developed and subsequently published and distributed to all teachers by action of the Board on February 4, 1970. The following specific instructions given to teachers are of pertinence in the instant matter and are found in the document, *inter alia:*

"A. Some Responsibilities ***

"5. Teachers on time for assignment; remain full time at assignment; stand at door during student passing time.***

"D. In the event of a school disorder the following procedures shall be followed:

"1. After school has started:

(a) All classroom teachers shall attempt to retain the students in their classrooms without regard to change of period-passing-time or bell. Classroom doors should be locked and entry restricted.***"

Factual testimony at the hearing concerning this charge was offered by the same two teachers, Mr. Spiewak and Mr. Samis, who testified with respect to the allegations contained in Charge No. 8. Mr. Samis stated that students from Room 113 were called from their classroom by respondent immediately prior to the incident with Officer Garay reported, *supra*. (*Tr.* II-72) Mr. Spiewak, on the other hand, indicated (Tr. II-55) that it was *following* the incident with Officer Garay that respondent motioned the "students to come toward him."

In the hearing examiner's opinion, the discrepancy noted, *supra*, is immaterial and of no importance. Both men indicated that respondent had said "Come to me" (Tr. II-72) or "Come with me" (Tr. II-55), and that subsequently the students did join respondent, and he and the students passed down the hall together.

Mr. Samis also testified (Tr. II-74) that in the period immediately prior to the incident under consideration herein, there had been a "brawl" in the cafeteria, and that it had taken quite a long period of time to get students back in their scheduled classrooms and "everything quieted down." (Tr. II-75) He also said that at the time this incident took place, "the hallway was clear from one end to the other with police on duty," but that students came to the door of room 113 and "called to respondent." (Tr. II-84)

Mr. Spiewak testified that the students were already "outside of room 113" at the time respondent is alleged to have motioned them to him (Tr. II-56), and that, pursuant to directives, he (Mr. Spiewak) had stayed "with my class" (Tr. II-65) during all of the time the disorder was occurring in the cafeteria.

The hearing examiner observes that the charge as stated herein is not completely expository with regard to the alleged offense, because implicit in the allegation against respondent are the implications: (1) that he left his own room on the third floor of the building unattended on this occasion and (2) that he "led a group of students" out of another room. The proofs offered by the testimony of Mr. Spiewak and Mr. Samis are specifically related only to the second of these implications.

Respondent avers that he had often been asked to give "assistance" in fight situations in the past (Tr. IX-65), and that on this occasion he was asked to go to the cafeteria by a fellow teacher to "break up" a fight there. (Tr. IX-65) He also maintains that he asked this teacher to "take over my class," (Tr. IX-66) and that he then went to the cafeteria. It was subsequent to the incident with Officer Garay, according to respondent, that he was approached by "three students" and that he said (Tr. IX-67)

> "*** 'Let's get out of this hall, come on upstairs and sit in my classroom.' So, I took them upstairs in my classroom.***"

The hearing examiner observes that the basic parts of the allegations made in Charge No. 6 are admitted by respondent. He agrees, in effect, that he "took" the students upstairs. However, there is no finding herein that he "led a group of black students out of a classroom" as charged. The hearing examiner believes they were already out, or partly out, of the room, and he finds no convincing evidence to dispute respondent's contention that he proceeded to counsel with them in his room. (Tr. IX-75)

In summation, with respect to this charge, the hearing examiner concludes that respondent did, in fact, urge students to leave the classroom area to whcih they were assigned, as charged, contrary to directives of school officials, and he concludes that such an action was probably inadvisable. However, the hearing examiner believes that the charge herein is a lesser charge, although adjudged true in fact, and no reason, if it stood alone, for either dismissal or a reduction in salary as specified in the statutes. While respondent's action was probably in error, the error was tempered by a stated motivation which, if true in fact, would not be without merit.

The hearing examiner also concludes that respondent was probably absent from his assigned post of duty, contrary to school regulations, on this occasion, but gives credence—in the absence of evidence to the contrary—to respondent's statement that another teacher was acting in his stead in this instance.

### *CHARGE No. 10*

> "The said John H. Stokes on February 16, 1970 at approximately 2:30 p.m. on the school grounds during a period when students were leaving the building and there was great turmoil, fights and a turbulent condition in and out of the school, threatened Lt. William Francis Davis of the Rahway Police Department, stating 'I'll get you.' When Davis responded that Stokes knew where he was Stokes stated 'I'll meet you in the gym at 7:00 o'clock (sic) tonight,' pointed to the building and then moved on, Stokes at that time being on duty as a faculty member of the high school."

Incidental to the charge herein, and an expansion of the stated terms of the charge, is an allegation that on this occasion, respondent was on the school grounds at 2:30 p.m. on February 16, 1970, contrary to school rules and regulations embodied in P-1 in evidence quoted in part, *supra*, and that he had not properly been relieved of the obligation to remain with his class during a regular period of instruction. The hearing examiner concludes from a review of the testimony that this is true; that at 2:30 on February 16, 1970, respondent was on the school grounds rather than at his assigned post of duty, and that he left this assigned post without permission of school administrators and without the assignment of a substitute teacher or proctor to act in his stead.

This conclusion is founded on respondent's statement that he had asked Mr. Philip Bruno, a fellow teacher with administrative duties, to take his class on that afternoon (Tr. IX-99), and Mr. Bruno's firm and unequivocal avowal (Tr. X-5) that he was not asked to cover respondent's classroom that afternoon and that he did not in fact cover it (Tr. X-6). Mr. Bruno's statement in this latter regard is quoted as follows: (Tr. X-6)

"Q. Are you absolutely clear that you never covered for Mr. Stokes' class?

"A. I never covered for Mr. Stokes' class, never stepped into his room."

Respondent admits he did not otherwise contact the office before he left his class assignment on that afternoon. (Tr.IX-113)

Accordingly, the hearing examiner concludes that respondent was on the grounds of the school at 2:30 p.m. on February 16, 1970, and that he had left his class unattended and without prior permission of school administrators.

The body of the charge, as stated, must also be adjudged as true in fact, in the opinion of the hearing examiner. This opinion is founded on the clear and precise testimony of Lieutenant William Davis of the Rahway Police Department (Tr. I-150), supported by that of another police officer, Sergeant Warren Argentierre. (Tr. I-170) The exact words of Lieutenant Davis, in this regard, are as follows: (Tr. I-150)

"A. ***As we were approaching one of the hallway doors on the outside of the building, John Stokes, a teacher, approached me and stated to me that he was going to get me and pointing his finger directly at me.

"Q. ***what was your response?

"A. I told him I'm here. I'm right here. You're there. I'm here.

"Q. What did Stokes say to that?

"A. He walked down further toward the auditorium entrance and he said I'll meet you tonight at seven o'clock in the gym."

This testimony was supported by Sergeant Argentierre as reported, *supra*, and except for the exact wording of the dialogue, parts of it were not refuted, in the opinion of the hearing examiner of respondent himself.

However, respondent avers that he had been insulted on a previous occasion by Lieutenant Davis (Tr. IX-104) and that: (Tr. IX-105)

> "A. I told him, but without an official capacity, without hiding behind the badge, if his attitude toward my son and I was personal then we would settle whatever problem we had in the gymnasium."

Respondent denies that he said he would "get him." (the Lieutenant) (Tr. IX-105)

In summation, the hearing examiner concludes that the weight of credible evidence supports the charge as stated, and in addition that respondent was present on the grounds of the High School at 2:30 p.m. on February 16, 1970, and thus absent from his assigned post of duty within the school.

Charges Nos. 11, 12, and 13 are combined and intermingled in testimony and are treated as one charge with component parts in the recital below:

*CHARGE No. 11*

> "The said John H. Stokes on the morning of February 17, 1970 was advised by the principal, Roy Valentine, that the previous evening the Rahway Board of Education had transferred Stokes to the middle school, effective February 17, 1970. Mr. Valentine advised Mr. Stokes to pick up his things and report directly to the middle school and specifically directed him not to attend a high school faculty meeting since he no longer was a member of the faculty. In direct insubordination and defiance of that order he went to the meeting."

*CHARGE No. 12*

> "The said John H. Stokes at the meeting referred to immediately above, tried to break the meeting up and seize the floor and called the teachers racists and tried to incite the group."

*CHARGE No. 13*

> "The said John H. Stokes at said meeting refused to accept a letter from the principal, Roy Valentine, presented to him by a fellow staff member."

With respect to Charge No. 11, the gravamen of the charge is that respondent was insubordinate to the principal of the school on this occasion. The hearing examiner holds that the charge has not been proven true in fact. The principal testified that he had told respondent orally that he was to be transferred to another building within the Rahway School System, but that he

did not tell respondent directly that he was not to attend the faculty meeting that morning. (Tr. X-63) The principal's later qualifications in this respect do not dull his first testimony on direct examination, in the opinion of the hearing examiner.

Neither can it be assumed that the mere fact of transfer to a different school precluded respondent's attendance at the meeting in question, since the hearing examiner has determined that there were teachers other than High School teachers present in the meeting (Tr. X-79, 82), and that the meeting was, thus, not in fact merely a meeting of the High School segment of the Rahway Teachers Association.

Charge No. 12, like Charge No. 1, cannot in the opinion of the hearing examiner, be said to be proven by the preponderant weight of evidence when the evidence is as contradictory as is herein the case. On the one hand, Mr. Edwin Dykes, by his testimony, states that respondent interrupted the meeting, that he called out the phrases "Rascist pig," "Fascist pig," and "Tool of the White Power Structure" (Tr. III-8, 15) On the other hand, Mrs. Barbara Black, a staff member, who was present at the meeting, alleged that respondent was "abruptly cut-off," prevented from speaking, by the chairman of the meeting (Tr. VIII-39) she implies that respondent had been publicly maligned and that his words were simply responsive. Further, in answer to direct questions, Mrs. Black said:

> "Q. Would you in your opinion say that Mr. Stokes tried to break up the meeting and seize the floor?
>
> "A. Oh, heavens, no."

And later, at page 45:

> "Q. Do you recall if Mr. Stokes made any derogatory remarks?
>
> "A. He did not."

The hearing examiner notes that there were many persons present in the meeting of February 17, 1970, but the evidence against respondent is solely contained in the testimony of one witness, and that this testimony is contradicted by respondent and by Mrs. Black. It seems evident that a large potential body of witnesses held the key to a broader assessment of the charge, but they were not called. In this fact, and under these circumstances, the hearing examiner recommends that this charge be dismissed.

Charge No. 13, in the hearing examiner's opinion, is a trivial charge on its face that was supported by little testimony and ought to be dismissed. The letter in question contained written affirmation of something respondent already knew—that he had been transferred—and his acceptance or rejection of it could not change that fact nor alter, at that juncture, respondent's decision to attend the meeting. He was already there.

*CHARGE No. 14*

"The said John H. Stokes on February 18, 1970 at 6:10 A.M. called Edwin Dykes, a faculty member of Rahway High School and President of the Rahway Education Association, identifying himself and threatened the well-being of Mr. Dykes, stating that if 'we get him' the black kids informed him that they would get Mr. Dykes and Mr. Hooper."

There can be no question that Mr. Dykes was called by respondent on the morning of February 18, 1970, since respondent now admits that this is so (Tr. IX-176), although in the Answer to the Petition, the charge, in its entirety, is simply denied. The dispute herein centers around what was said in the course of the conversation.

According to the testimony of Mr. Dykes: (Tr. III-43)

"*** he said he wanted to tell me that if anything happened to him, John Stokes, the black students would get me. At that point, he hung up."

Respondent, on the other hand, avers that "he never threatened him" (Tr. IX-177), although on cross-examination with respect to this charge, he qualified this denial with the words:

"*** It depends on what you call a threat." (Tr. IX-180)

The hearing examiner finds that it is not possible, in a precise manner, to find that on February 18, 1970, respondent threatened Mr. Dykes in any meaningful way. The hearing examiner does believe that respondent was angry on that occasion, because his transfer as a teacher had been approved by the Board on the previous evening, and that probably he did speak to Mr. Dykes in a belligerent tone of voice. Mr. Dykes was President of the Teachers' Association, and respondent evidently believed his efforts, as the holder of that office, had not been forceful enough on respondent's behalf.

However, the hearing examiner cannot conclude there is a cause for censure in such a limited finding, and he recommends that this charge be dismissed.

*CHARGE No. 15*

"The Board contends that through the actions of Mr. Stokes, he has incited incidents and difficulties to the point of at least aggravating, if not creating them, and that this situation has existed for sometime."

The principal of the High School testified that prior to the time of the incidents considered in Charges Nos. 1 through 14, *supra*, respondent had posed some problems of a minor nature to the Rahway school administrators, and that some of these were personality problems. There were no other witnesses to the truth of this charge.

Counsel for the Board states that this charge is "really a summation of the contentions concerning the actions of Mr. Stokes" (Tr. III-126), and that the charge was not meant to be considered or subject to separate proof. (Tr. III-127)

Considering the detailed findings with respect to each of the numbered charges, the hearing examiner recommends that this charge, *per se*, be dismissed.

In summary, the hearing examiner finds the following charges or parts of charges are supported by the weight of the credible evidence elicited at this hearing, and that respondent did in fact:

*CHARGE*

(2) assault Police Officer Garay on February 12, 1970;

(5) call Wilbur Hooper an "Uncle Tom" on February 13, 1970;

(6) threaten Wilbur Hooper and repeat the phrase contained in the allegation of Charge 5 on the same date;

(8) call Police Officer Garay a "Nazi" and "Gestapo" when he saluted him on February 16, 1970;

(9) led a group of students away from their scheduled classroom area on February 16, 1970; (A finding limited as noted, *supra*)

(10) threaten Lieutenant Francis Davis of the Rahway Police Department on February 16, 1970, as charged and was absent from his post of duty at the time.

The hearing examiner finds the following charges are not sustained by the preponderant weight of the credible evidence and should be dismissed—Charges Nos. 1, 3, 11, 12, 13, 14. It has been noted, *ante*, that Charges Nos. 4 and 7 were previously dropped, and that no specific proofs were offered with respect to Charge No. 15.

Finally, the hearing examiner offers the following observations and comments:

1. Counsel for respondent, in his summary argument, alleges that racism in many forms is responsible in large degree for respondent's troubles, and that it occasioned the charges herein. As *prima facie* evidence of this, respondent offers the fact that Rahway has no school administrators who are black, and that the Board refused to consider the grievances of black students in early February 1970.

Petitioner does not deny that Rahway has no school administrators who are black, but avers that the Board's record with regard to integration of its schools is a good one, and observes that major testimony against respondent was offered by another teacher, also black. It denies other allegations in this regard.

These allegations were not subject to proof, and they stand unsupported.

2. All of those findings of the hearing examiner, *ante*, in which charges against respondent are found to be proven true in fact are founded on original testimony of a witness for petitioner, which was corroborated by testimony of at least one additional witness.

* * * *

The Commissioner has carefully reviewed the report of the hearing examiner, and notes that in each of the findings, *ante*, the charge is true in fact, is based on well-corroborated testimony. Therefore, there can be no doubt that respondent did, in February 1970:

(a) physically assault a police officer.

(b) threaten and verbally abuse other police officers engaged in the performance of their duty in a racially-tense situation.

(c) threaten and verbally abuse a fellow staff member.

(d) absent himself from his assigned post of teaching duty on two occasions.

The Commissioner holds that such conduct is unprofessional and unbecoming of a teacher in the public schools, and that respondent has, therefore, by his own action, forfeited the tenure protection that the statutes afford teaching staff members who have complied with their minimum requirements.

Such a conclusion is consistent with many previous decisions of the Commissioner. *In the Matter of the Tenure Hearing of Emma Matecki, School District of New Brunswick, Middlesex County*, decided by the Commissioner November 1971; *In the Matter of the Tenure Hearing of Herman B. Nash, School District of the Township of Teaneck, Bergen County*, decided by the Commissioner June 22, 197n; *In the Matter of the Tenure Hearing of Francis Bacon, School District of the Township of Monroe, Gloucester County* decided by the Commissioner August 12, 1971; *In the Matter of the Tenure Hearing of Joseph Maratea, Township of Riverside, Burlington County*, 1966 *S.L.D.* 77, affirmed State Board of Education, affirmed New Jersey Superior Court, December 1, 1967.

In two of the cases, *ante*, those of *Emma Matecki* and *Francis Bacon*, the Commissioner found that even one incident of unprofessional conduct might be sufficient to warrant a judgment that the teachers had demonstrated unfitness for the positions they held, and in *Bacon* the Commissioner quoted *Redcay v. State Board of Education*, 130 *N.J.L.* 369, 371 (1943), affirmed 131 *N.J.L.* 326 (*E. & A.* 1944) to buttress this position. The Court in that decision said:

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

In the instant matter the Commissioner holds that even the one incident, in which respondent assaulted a police officer, may be sufficient to justify a finding of conduct unbecoming a school teacher and to warrant his dismissal from his tenured post. However, the proven charges herein, in the Commissioner's judgment, are "*the series of incidents*" referred to in *Redcay*, representing the "best evidence" that respondent should be dismissed.

The Commissioner is not unmindful of the mitigating factors, which should temper such a judgment, and in the instant matter respondent may have believed his actions were justified by events. It is indeed all too true that injustice seems at times a hallmark of our society, and it may be present in our schools in numerous and often insidious ways. The Commissioner believes such injustice should be fought and eliminated. He believes, additionally, that teachers as professional persons have an obligation in this regard to help to eliminate such injustices when they are found and to aid in the effort to insure that all children receive that thorough and efficient kind of public school education which is their birthright.

However, the Commissioner cannot agree that a teacher may be categorized as a professional person if he substitutes violent physical reaction for the application of that kind of reasoned action, which should be the hallmark of the person certified to mold young and immature minds, or if he resorts to hastily-flung epithets–the flaming oral badges of intolerance–as a reply in kind to the intolerance he so rightly condemns. To the contrary, when, as herein, the evidence is conclusive that a teacher has displayed a pattern of such reaction, resorted to such expressions and exhibited such conduct, that person must be adjudged as one who is unprofessional and unworthy of the protection, which the tenure law affords.

In such instances, dismissal from a tenured post cannot cure the wrong, but it can prevent the exhibition of a subsequent repeat performance, and it must be adjudged to be a proper and positive step.

Accordingly, having found that respondent did act unprofessionally in a series of actions in February 1970, and that no mitigating circumstances could excuse such flagrant displays, the Commissioner directs that respondent be dismissed from his tenured post as of the date of his suspension by the Rahway Board of Education on February 19, 1970.

COMMISSIONER OF EDUCATION

December 20, 1971

**Citizens for Better Education, Marilyn Whitham, Jerrothia Riggs, Barbara Brown, Dr. John W. Robinson, Joyce Carter, Sandra Armstrong, Vera Benjamin, Jacqueline Harper, Edith Curly, Alma G. Peterson, and Deloris Moye,**

*Petitioners,*

**v.**

**Board of Education of the City of Camden and Dr. Charles Smerin, Superintendent of Schools, CAMDEN COUNTY,**

*Respondents.*

## COMMISSIONER OF EDUCATION

### Decision

For the Petitioners, Carl S. Bisgaier, Esg.

For the Respondents, Leonard A. Spector, Esq.

Petitioners are residents of the City of Camden, Camden County, who bring this Petition of appeal as individuals together with a group comprising an unincorporated association known as *Citizens for Better Education.* Petitioners allege that the failure of the Board of Education of the School District of the City of Camden, hereinafter "Board," to make public the results of standarized achievement tests administered in the public schools, in a form which provides the mean or median for each grade in the elementary schools, and the national norms, is improper and a violation of law. Petitioners aver that the school law of this State empowers and obligates the Commissioner of Education to order respondents to provide petitioners and the general public the test score data, which petitioners have requested and which is a matter of public interest and concern. Petitioners assert that this information is necessary for their purpose of participating in school matters in a manner which will be effective and responsible. Respondents answer that they have printed and made available to the public an extensive report of the testing program conducted during the 1968-69 and 1969-70 school years, and that this report indicates increments of growth and broad performance data for four separate regions as well as the entire school district. Respondents also assert that the individual pupil test data is available to each parent of each child enrolled in the school district. Respondents deny all of the allegations of petitioners, and aver that the school law of this State does not require any local board of education to conduct a testing program such as respondents' and that there is, therefore, no requirement, statutory or otherwise, with respect to the manner in which such a

program should be utilized for educational purposes. Therefore, respondents aver, the utilization of a testing program is entirely within the discretionary authority of the Board and, in this instance, is both proper and lawful. Petitioners pray for relief in the form of an Order by the Commissioner directing the Board to make available to the public the results of standardized achievement tests in a form which provides the mean or median for each grade in each elementary school, together with the national norms for each grade, to facilitate comparisons between individual schools and between each individual school and national norms.

Testimony and documentary evidence were presented at a hearing conducted on June 1, 1971, in the office of the Camden County Superintendent of Schools, Pennsauken, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

Seven citizens testified on behalf of petitioners. All of these witnesses are members of various organizations, which have an interest in the progress of the public schools. Each of these witnesses testified that he believes that the acquisition of the contested specific test-score information would better enable him and his organization to become involved in educational matters in an effective and responsible manner. One witness testified that he desires this information to enable him to compare the achievement of the classes his children attend to that of other classes of the same grade in other schools, and to enable him to make a comparison of each grade's achievement with the published national norms. (Tr. 58, 59) Another witness testified that she had been involved in a school-related project and experienced difficulty in securing parental involvement. In the opinion of this witness, she could perform her function as a member of the citizens' advisory committee for the *Title I, E.S.E.A.* project for the 1971-72 school year more capably if she had access to the achievement test results in the form requested by petitioners. (Tr. 123) A third witness expressed the point of view that the information requested by petitioners would be helpful to his organization because it would enable a comparison to be made regarding the standing of ethnic groups within the public schools. (Tr. 134) Two of the citizen witnesses testified that they had read the Board of Education's published report entitled "*Summary Results of Comprehensive Test of Basic Skills-Form Q for Grades 4 to 8.*" *(Exhibit R-1) (Tr. 71, 109) Two other witnesses for petitioners stated that they had not read this report. (Tr. 66-68, 129, 131) The opinion was expressed by two witnesses* that the achievement test results sought by petitioners should be accompanied by additional explanatory and supportive data. (Tr. 73, 74, 109-111) Two witnesses testified that in their judgment the basic data in the form requested by petitioners would serve some useful purpose, and supportive data would not be absolutely necessary for this utilization. (Tr. 59, 111) The interest of these witnesses centered more upon the results of achievement tests in reading rather than the various other areas included in the comprehensive testing program.

An educational consultant in the field of reading testified on behalf of petitioners. He stated that, from his experience of assisting in the establishment of reading programs in six cities, he believes it is essential to have community

and parental involvement in order to improve school programs in the teaching of reading. (Tr. 34-36) He stated, also, that his experience has convinced him that the publishing of reading achievement test results stimulates public interest and involvement in the school reading program. (Tr. 36) In the opinion of this witness, the publication of pupil achievement test results would assist in identifying specific instructional problems, and also hhelp to bring community resources to bear to secure solutions to these problems. (Tr. 41) Under cross-examination, he averred that he has never conducted any testing program in reading, and that his experience in school administration consists of a period when he was the director of the adult school in a New Jersey community. (Tr. 45, 46) This witness averred that he had not read the achievement test summary report published by the Board. (Tr. 46)

The Dean of the Graduate School of Education of Rutgers University testified on behalf of petitioners, particularly in regard to the need for increased accountability on the part of public schools. The Dean referred to the fact that his special area of scholarship is the study of the capacity of human beings to learn, and that his major publication on this subject is a book entitled "Who Can Be Educated." This witness is also a professor of education at the State University and a psychologist. He stated that responsible school officials must take appropriate steps to inform the community of the quality of performance within the schools, and also make the people of the community aware of the procedures and plans which are being implemented to improve the quality of pupil performance. This approach to the problem of improving the educational program, he said, will encourage greater community participation, thereby resulting in more democratic representation of the total community population. (Tr. 8-11)

The Dean testified that, in his judgment, the publication of achievement test results as requested by petitioners would be helpful in furthering the goals of educational accountability which he had described, particularly if the test results were accompanied by explanatory and supportive data, which would make the test results meaningful to the average citizen and prevent misinterpretations of the facts.

The Dean stated, further, that such a report should be accompanied by a description of the plans and procedures being implemented by the schools to improve the quality of pupil performance. (Tr. 11-13) He also testified at length regarding the purposes of achievement testing programs, the various factors which influence pupil achievement, and the procedures by which school officials can improve the community's understanding of educational problems and encourage community participation in improving the quality of educational programs. (Tr. 12-32)

The Superintendent of Schools testified that the purpose of the Board's comprehensive testing program is diagnostic. These tests are used, he said, to identify the achievement and weaknesses of each pupil in the various areas of

basic skills in order to improve his individual instructional program. (Tr. 136, 137) The Superintendent stated his judgment that the statistical results of this comprehensive testing program, standing alone, do not provide adequate information concerning the many factors which influence each pupil's performance. In his judgment, the interpretation of these statistics by persons, who do not possess all of the necessary supportive information, would tend to be misleading. (Tr. 137, 138) The Superintendent described the Board's report of comparative test results as designed to indicate increments of growth. He opined that the publication of test results in the form requested by petitioners would result in odious comparisons which would be detrimental to groups of children in that their performance would be unfairly and improperly stigmatized in a pernicious manner. (Tr. 139) As an illustration, the Superintendent explained that a test report, which indicates an average 3.8 reading comprehension score for the Fourth Grades of a school could be indicative of a range of scores from 2.3 to 4.7. These average scores, he opined, do not actually provide any significant information regarding any individual pupil. Many pupils, he testified, could, therefore, be presumed to have attained very low achievement scores, when the exact opposite could be the true situation. (Tr. 140) The Superintendent also stressed that the public schools of the district encourage parents to visit the schools and to discuss their children's performance and achievement test scores. In this way, he said, the parent can learn his child's strengths and weaknesses, determine what the school is doing to improve the pupil's educational progress, and, also, the parent can be made aware of how he can assist the school in this function. (Tr. 141, 142) When questioned regarding the possible value of releasing information to the public regarding teacher absenteeism, pupil absenteeism, the certification of teachers and the expenditures for individual schools, the Superintendent stated that he would not be willing to make recommendations to the Board without taking sufficient time to study the possible value of such a course of action. (Tr. 152, 154) The hearing examiner noted for the record that much of this information is a matter of public record, since it is customarily reported at meetings of local boards of education, and is included in reports sucmitted to the Commissioner of Education through the County Superintendents of Schools. (Tr. 153, 154)

The testimony of the assistant superintendent for curriculum and instruction generally corroborated that of the Superintendent. This witness testified that he knows of no requirement of the Department of Education, or of any other source, for the utilization of a comprehensive, standarized testing program of basic skills by a local board of education. He also stated that the Board of Education is not required to report the results of this testing program to the Department of Education. (Tr. 161, 162) The assistant superintendent explained that the policy of the schools is to use these test results both as a diagnostic tool and for the purpose of ascertaining the increment of growth for each individual pupil. This policy, he said, is part of the school district's commitment to a program of individualized instruction designed to develop the maximum learning potential of each pupil. (Tr. 164) In the judgment of this witness, the information requested by petitioners would serve to confuse the

public rather than enable them to better judge the performance of a particular school. (Tr. 166) The assistant superintendent stated, also, that the school district does receive reports in the form of averages by grades for individual schools, but to his knowledge, no use is made of this information. He testified that the schools subscribe to a package of scoring services, and this information is included in the total scoring service. (Tr. 169, 170) He differentiated between the types of test scores, which the schools could make public simply because the scores are available, and the kinds of information, which would be useful and effective in serving the interests of the community and the schools. (Tr. 172-174) The assistant superintendent testified further that when the Board made available the summary report (Exhibit R-1) at a public meeting, a filmstrip was shown and extensive explanations of the report were made by him and two other members of the professional staff, and that at the conclusion of the meeting, some of the citizens in attendance stated that the explanation of the testing program results was inadequate. Therefore, he stated that he could not provide a written narrative, which would satisfactorily explain the significance of the summary report. (Tr. 177)

The guidelines adopted by the Board for the information of the citizens' advisory committee for each school and for the school district were received in evidence. (Exhibit P-6)

Four publications of achievement test scores from school districts in New York, Pennsylvania and Ohio were identified as Exhibits P-2, P-3, P-4, and P-5. While these documents are not evidential, they are called to the attention of the Commissioner by the hearing examiner as part of the argument advanced by petitioners.

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.

The Commissioner notices that this record consists almost entirely of expressions of differing points of view of educational philosophy and both personal and professional judgments, regarding the role of the public schools with respect to community interests generally, and certain specific concerns of a diverse group of citizens.

In the judgment of the Commissioner, the precise issue in the instant matter is whether the Board of Education is required to make public the results of its comprehensive battery of achievement tests in the form requested by petitioners. The material facts relevant to this issue are not in dispute.

Local school districts governed by boards of education are agencies of the State, created by the Legislature to implement the State educational policy enunciated in the organic law of this State. *New Jersey Constitution, Article VIII, Section IV, Paragraph 1* Since the school districts of New Jersey are under the control and jurisdiction of the State and its executive officers, their authority must be conferred by enactments of Legislature. The primary enabling authority conferred upon these local agencies is set forth in *N.J.S.A.* 18A:11-1, which states, *inter alia*, the following:

> "The board shall - ***
>
> "c. *Make, amend and repeal rules* *** for its own government and the transaction of its business and *for the government and management of the public schools* ***
>
> "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* *** and maintenance *of the public schools of the district*." (*Emphasis ours.*)

Local boards of education are not required to administer comprehensive achievement tests of basic skills. Nor are boards required to adopt or administer any standarized testing programs in the public schools within their charge. The decision whether or not to utilize any standardized test or any comprehensive battery of tests, and to what degree they should be utilized, lies entirely within the discretion of each local board, and this decision should be made purely on the basis of the value of such a testing program within the parameters of the total instructional plan for the public schools of the district. The Commissioner is aware of the fact that the practices of local boards of education with respect to conducting such testing programs vary to a considerable degree in this State. Also, the Commissioner is constrained to notice that the comprehensive standardized achievement test batteries, referred to in the instant matter, are not *criteria* tests but are *normative* tests. An examination of the summary report (Exhibit R-1) published by the Board discloses the fact that the results for grades 3 through grades 8 are arithmeric means reported as grade equivalent scores in decimal percentages. These results do indicate increments of growth between different groups of pupils enrolled on the same grade level in two succeeding years, however, these arithmetic means are not amenable to study and manipulation by statistical procedures, since the calculated intervals of grade equivalents are not uniform. For example, no standard deviation could be calculated for these simple means, nor could any statistical procedure for validity or error of measurement be applied to this data. For statistical study, these results would require a complete conversion to percentile or stanine rankings. The data furnished by the Board can best be utilized to explain to parents the achievement of individual pupils, but could not be accurately employed in a scientific study of groups of children.

The achievement test scores of individual pupils are in no different category than the grades attained through classroom performance, subject examinations or scholastic aptitude test scores. As records of individual pupil performance, these various achievement data are recorded on the pupil's permanent record card.

The rules of the State Board of Education relating to the inspection of school records provide, *inter alia*, the following, at *N.J.A.C.* 6:3-4:

> "***(b) Pupil records may be open to inspection by persons who, in the judgment of the board of education or any officer or employee of the board designated by the board, have a legitimate interest in the records for purposes of systematic education research, guidance and social service.
>
> "(c) Items of information contained in the records of a given pupil shall be made available, upon request, for inspection by a parent, guardian or other person having custody and control of the child, or authorized representative of the same; provided, that after the pupil has attained the age of twenty-one years, the items of information shall be made available for inspection by the pupil or his authorized representative, and not to the parent or guardian.
>
> "(e) Nothing in these rules and regulations contained shall be construed to prohibit the board of education, or any officer or employee of the board designated by the board, to withhold items of information which, in the judgment of the said board, or its designated officer or employee, are of a confidential nature or in which the applicant for such information has no legitimate interest."

From the evidence before the Commissioner in the instant matter, it is clear that the Board's policy regarding the inspection or disclosure of pupil records is not repugnant to the rules of the State Board of Education, *supra.*

It is well established that boards of education may exercise their discretion in the conduct and management of the public schools:

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

and further:

> "*** 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.***" Boult and Harris v. Board of Educationn *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).

In their original petition of appeal, petitioners argue that their right to have school performance data made available to them in the form heretofore described is protected by *N.J.S.A.* 47:1A-1 *et seq.*, which is frequently referred to as the "right-to-know law," but is more correctly entitled "Examination and Copies of Public Records."

*N.J.S.A.* 47:1A-2 defines public records as follows:

> "Except as otherwise provided in this act or by any other statute, resolution of either or both houses of the Legislature, executive order of the Governor, rule of court, any Federal law, regulation or order, or by any regulation promulgated under the authority of any statute or executive order of the Governor, *all records which are required by law to be made, maintained or kept on file* by any board, body, agency, department, commission or official of the State or of any political subdivisions thereof or by any public board, body, and commission or authority created pursuant to law by the State or any of its political subdivisions, or by any official acting for or on behalf thereof (each of which is hereinafter referred to as the 'custodian' thereof) *shall, for the purposes of this act, be deemed to be public records.* ***" (*Emphasis ours.*)

Since local boards of education are not required by law to administer comprehensive achievement tests of basic skills, the test-result data sought by petitioners do not constitute a public record, and the Commissioner so holds.

By amendment to their Petition of appeal, petitioners opine that *N.J.S.A.* 18A:4-24 empowers and obligates the Commissioner of Education to order the Board to provide petitioners and the public the data on school performance in the form sought by petitioners. This statute states, *inter alia*, the following:

> "The commissioner shall, by direction or with the approval of the state board, whenever it is deemed to be advisable so to do *** ascertain the thoroughness and efficiency of operation of any of the schools of the public school system of the state and of any grades therein by such means, tests and examinations as to him seem proper, and he shall report to the state board the results of such inquiries ***."

As has been stated, the utilization of a standardized testing program by the Board in this particular instance was a matter entirely within the discretionary authority of the local board and does not, therefore, come within the authority of *N.J.S.A.* 18A:4-24, *supra.* In the judgment of the Commissioner, petitioners' reliance on *N.J.S.A.* 47:1A-1 *et seq.*, *supra*, and *N.J.S.A.* 18A:4-24, *supra*, is in error.

In the instant matter the Commissioner finds no merit in petitioners' plea that they have a right to require the Board to furnish school performance data in the form requested. The fact that the Board's decision to publish certain test results in the form set forth in the summary report (Exhibit R-1) ran counter to the wishes and opinions of petitioners does not establish the Board's action as arbitrary or in bad faith. As has been stated, absent a clear showing that a board of education has acted unreasonably and beyond the scope of its discretionary authority, in bad faith or in violation of the law, the Commissioner will not intervene. The Board's decision regarding the utilization of a standardized testing program is clearly an exercise of the discretionary authority vested in boards of education by the Legislature. See *Boult and Harris v. Board of Education of Passaic, supra.* As the Court stated in *Thomas v. Morris Township Board of Education*, 89 *N.J. Super.* 327, 332 (*App. Div.* 1965):

> "***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 evidence does not support any conclusion that the Board's action was capricious or taken for vague or fanciful reasons. On the contrary, both the publication and explanation of the summary report of school performance (Exhibit R-1), and the recently-adopted Board of Education policy concerning the formation of advisory committees of citizens for individual schools and for the school district (Exhibit P-6), is proof of a commendable effort by the Board to make parents and other citizens partners in the process of planning the best possible instructional programs for the benefit of the pupils, and their parents, and the resulting benefit to the entire community. Accordingly, the Commissioner finds that the record supports the conclusion that the Board's action did not constitute an abuse of discretion. It is clear that the Board gave serious consideration to this matter of publishing test data, and that the Board had substantial reasons for its course of action.

The Commissioner is constrained to state that he is wholly in sympathy with the sincere desire of parents and citizens, who wish to express their concerns regarding public education by offering their time and effort to assist and promote the educational programs of the public schools. The Commissioner notices that the philosophy stated by the expert witness for petitioners regarding the responsibilities for quality performance of the public schools is closely akin to his own.

The Commissioner notices that the issue in the matter herein controverted has arisen in part due to a lack of a clearly defined Board of Education policy regarding the pupil testing program. In the judgment of the Commissioner, the development of a publicly stated policy is necessary for the Board to discharge its responsibility to be accountable to its constituents regarding the testing program. As has been stated, the Board did publish the summary report of school performance (Exhibit R-1), but the record discloses confusion and misunderstanding among some of the citizens regarding the entire testing program. Therefore, the Commissioner directs the Camden Board of Education to formally adopt a policy setting forth at least the following in regard to the testing program: (a) the nature and purpose of the program, (b) the scope of the program, (c) the utilization of the results of the program, and (d) the form and manner in which the results will be made public.

The Commissioner will retain jurisdiction in this matter only with regard to his review and approval of the aforementioned policy.

The Commissioner finds and determines that the actions of the Board of Education of the City of Camden concerning the publication of comprehensive achievement test results of pupil performance are proper and within the Board's discretionary authority. Accordingly, the Petition of appeal is dismissed.

COMMISSIONER OF EDUCATION

Pending before the State Board of Education

December 20, 1971

**Thomas R. Durkin, Mary E. Krafft, Leslie M. Young, Robert Gollob, and La Vera Wendt, Arthur Jackowski,**

*Petitioners,*

**v.**

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

*Respondent.*

**Commissioner of Education**

**Decision**

For the Petitioners, Saul R. Alexander, Esq.

For the Respondent, Sidney Dincin, Esq.

Petitioners, six tenure teachers in the School District of Englewood, Bergen County, aver that they were improperly and illegally denied salary increments during the 1971-72 school year and demand judgment at this juncture that they are entitled to receive them. Respondent, the Board of Education of the City of Englewood, hereinafter "Board," maintains that the increments were withheld legally according to the terms of its stated policy in this regard.

A hearing in this matter was conducted on October 12, 13, and 26, 1971, at the office of the Bergen County Superintendent of Schools, Wood-Ridge, by a hearing examiner appointed by the Commissioner. Twenty-five documents were submitted in evidence, and there was an oral summation. The report of the hearing examiner is as follows:

These six cases are consolidated as one for purposes of this adjudication, although at the hearing each of the petitioners testified in his own behalf, and the six Petitions were, in some respects at least, the subject of individual proofs. However, there is no necessity at this juncture to consider the matters separately in great detail since the important facts, upon which the consolidated case must be decided, may be applied equally to all Petitions. These facts are summarized as follows:

1. During the school year 1970-71, four of the petitioners had received copies of at least one written supervisory report each from the principal or assistant principal of their respective school buildings. (P-3, P-4, P-5, R-6, R-9, R-11, R-12, R-13, R-15, R-16) Two of the petitioners had received no such reports and were not "observed" in the formal sense during the year despite the direction of the Superintendent of Schools, which required at least one such report a year for each tenure teacher.

2. All teachers were observed informally during the course of the year.

3. In April 1971, as the result of the formal and informal observations of the school administrators, it was determined that the six increments *sub judice* should be withheld during the school year 1971-72, and in five of the cases, this information was communicated to the teacher concerned. In the sixth case, that of Miss Leslie Young, the principal thought an observation report (P-3) was sufficient indication that her work was not adjudged to be satisfactory.

4. The school administrators forwarded their recommendations to withhold increments in each of the respective cases to the Superintendent of Schools in oral form in early April 1971.

5. The Superintendent of Schools referred these recommendations to the Board in a regular work-session meeting.

6. The Board asked for more information regarding each of the recommendations, and received it in the form of the written reports referred to, *ante*, and in special memorandums written by the principals to the Superintendent on April 29, 1971. (R-8, R-10, R-14, R-17)

7. After consideration of the merits of each recommendation, the Board duly approved a motion (PR-2) on May 10, 1971, that:

> "*** the annual salary increments of the individuals named on the attached list be withheld for the school year 1971-72 as set forth in schedule G."

8. The Board too, this action pursuant to the provisions of an Agreement, which had been negotiated with the Englewood Teachers' Association for the two-year period, September 1969 through June 1971. (PR-1) These provisions with respect to "Teachers' Compensation" as set forth in the "Teachers Salary Guide" (PR-1) stated, at page 11:

> "***1. Such schedules do not guarantee an automatic salary increase but merely indicate the agreed upon value for basic services rendered by the individual whose performance and professional record meet the standards expected by the Board for the position held."

9. Following the action by the Board to withhold the increments herein considered, the Superintendent of Schools wrote to each of the six petitioners on May 12, 1971, informing them of this decision. (PR-4) In the last paragraph of the letter he said:

> "***Please be advised that you have all of the rights under the contract between the Englewood Board of Education and the Englewood Teachers' Association relative to the filing of a grievance. In fact it is my personal belief that you have a right to make a direct appeal to the Commissioner of Education."

None of the petitioners ever filed a formal grievance with the Board or requested a hearing.

At this juncture, the hearing examiner sees no need to detail minutely the reasons on which each of the decisions of the Board to withhold the increments *sub judice* was based, since the hearing of October 1971 was not a *de novo* hearing in this regard, but a review of the actions and policies of the Board.

However, in four instances the decisions of the Board were based on findings that the teachers had failed to properly manage and control their classes. In one other instance, the Board determined that a teacher had failed to provide proper assistance to a substitute during a lengthy period of absence, and in the sixth instance, the Board based its decision on a finding that the tardiness of a teacher in reporting for school duties was excessive.

Members of the Board offered testimony that all decisions were based on detailed scrutiny of the allegations, and that initially all allegations were referred back to the Superintendent of Schools for more detailed reporting. The evidence shows that the allegations were directly refuted in written form in only one instance, by Mr. Durkin, in a letter to the Superintendent of Schools (P-2), although one other petitioner indicated she had also sent a letter of refutation.

It is noted here that petitioners maintain that the Board's procedure detailed, *supra*, was not in conformity with a more detailed procedure contained in an Agreement on "Compensation" that the Board was negotiating with its teaching staff at the time of the decision *sub judice*. This Agreement was subsequently embodied in a new document (PR-3), which became effective in September 1971.

The hearing examiner concludes that counsel for petitioners is correct in this regard, but can find no error in the fact of his correctness, since the document (PR-1), previously excerpted, was the "Agreement" in force and effect at the times the decisions of the Board herein controverted were made.

Petitioners further argue that the Board set no "standards" for performance of its teaching staff members, and is therefore precluded from making judgments in a vacuum. However, in this regard, the Board offers R-1 in evidence. This document is entitled "Duties and Responsibilities of Classroom Teachers," and it contains twenty specific responsibilities of classroom teachers by which, in the Board's opinion, performance may be evaluated.

Thus, the issue posed by the recital is clear and may be simply stated as follows: Did the Board act properly and legally in the context of prior decisions of the Commissioner when, in May 1971, it moved to withhold the six increments from petitioners for the 1971-72 school year?

*  *  *  *

The Commissioner has carefully reviewed the report of the hearing examiner, and notes that this Petition is similar in many respects to others recently submitted, and that the principal question herein involves an interpretation of a board's salary-increment policy. In previous matters with similar questions, the Commissioner has held that salary guides are contractual in nature according to their stated terms, and that in the absence of corollary conditions, the guide itself must be implemented. *Doris Van Etten & Elizabeth Strubble v. Board of Education of the Township of Frankford, Sussex County,* decided by the Commissioner March 17, 1970; *Charles Brasher v. Board of Education of the Township of Bernards et al., Somerset County,* decided by the Commissioner March 19, 1971 These decisions were based on the decision of the Commissioner in *Norman A. Ross v. Board of Education of the City of Rahway, Union County,* 1968 *S.L.D.* 26, affirmed by the State Board of Education October 9, 1968.

In *Van Etten and Struble v. Frankford, supra,* the Commissioner made it clear that salary guides, and the increment policies associated with them, must stand on their own terms as they are clearly and precisely stated. He also said that local boards could attach "additional provisions" as corollary conditions to such guides and that these provisions could then be used to temper full salary guide implementation. Subsequent to this decision and the others mentioned previously, the Commissioner decided in the case of *Charles Lewis v. Board of Education of the Borough of Wanaque, Passaic County,* decided by the Commissioner on October 21, 1971, that the Board in that instance also had no corollary conditions stated in a contract or in explicit written policy that tempered the stated terms of a salary guide and that the guide, therefore, should be implemented according to its terms.

Additionally, most recently in the case of *Robert Van Allen v. Board of Education of the Borough of Metuchen, Middlesex County,* decided by the Commissioner November 30, 1971, the Commissioner found that the salary of a school principal, when directly related to the salary scales of teachers by the employment of a ratio principle, could be modified by a corollary clause, precisely stated, which the teachers' salary guide contained.

Similarly, in the instant matter the Commissioner holds that the Englewood Board of Education and the Englewood Teachers' Association agreed, in the explicit terms contained in PR-1, that salary increments were not to be considered automatic, but that they were dependent upon a judgment by the Board that the teacher's "performance" and "professional record" met the "standards expected by the Board." Since, in this instance, the Board decided in May 1971 that the six petitioners did not meet these standards, the Commissioner holds that it was free to withhold the increments at the juncture in its planning for the next succeeding school year.

In reaching this decision, the Commissioner holds that it is immaterial that the Board had no set of clearly-labeled "standards," since the Agreement (PR-1) clearly indicated that the Board was free to make a unilateral determination in this regard, and since, in any event, there was already a written listing of "duties and responsibilities" of teachers (R-1), which was an adequate yardstick for the measurement evidenced herein.

Finally, the Commissioner observes that he is not called upon here to scrutinize in detail the merits of the allegations made by school administrators against petitioners. In the absence of clear and convincing proof, therefore, that the Board acted unreasonably and in a cursory manner, the Commissioner will not substitute his own judgment for the discretion of the Board in matters such as this. The salaries of petitioners have not been decreased, and the Board's decision not to increase them is one that the Commissioner holds, in the circumstances, *supra*, it was empowered to make.

Accordingly, the consolidated Petition herein is dismissed.

COMMISSIONER OF EDUCATION

December 27, 1971

Pending before State Board of Education

**In the Matter of the Application
Of the Board of Education of the Borough
of South River for the Termination of
the Sending-Receiving relationship with
the School District of Spotswood,
Middlesex County.**

**Decided by the Commissioner of Education, December 14, 1970.**

**State Board of Education**

**Decision**

For the Petitioner, Karl R. Meyertons, Esq.

For the Respondent, Abraham J. Zager, Esq.

The Board of Education of the Borough of South River, a receiving district for pupils of the School District of Spotswood, sought to terminate the sending-receiving relationship between the two. The Commissioner of Education of the State of New Jersey by his decision of December 14, 1970, terminated that relationship upon terms. Spotswood appeals that determination.

Our review of the record indicates that for a period of time prior to the filing of South River's Petition to terminate, both school districts had been in frequent communication with each other with a view toward reaching some satisfactory arrangement. In these communications, regionalization and other alternatives were considered but not fully explored by the parties. At the time of the Commissioner's decision it was thought to be the law of this State that the Commissioner could neither compel the parties to negotiate with a view toward regionalization nor order regionalization or some other alternative. However, subsequent thereto the Supreme Court of New Jersey in *Jenkins et al. v. Township of Morris School District and Board of Education*, 58 *N.J.* 483 (*Sup. Ct.* 1971) held that the supervisory and administrative powers of the Commissioner and the State Board under the Constitution and laws of New Jersey were coextensive with the obligations fixed upon them to carry out the State's educational goals and policies. The Commissioner's determination might well have been otherwise had *Jenkins* predated his opinion.

For this reason, we remand the matter to the Commissioner for further consideration and action.

September 8, 1971

**Herbert J. Buehler,**

*Petitioner-Appellant,*

**v.**

**Board of Education of the Township of Ocean, Monmouth County,**

*Respondent-Appellee.*

**Decided by the Commissioner of Education, December 17, 1970.**

**STATE BOARD OF EDUCATION**

**Decision**

For the Petitioner-Appellant, Peter B. Shaw, Esq.

For the Respondent-Appellee, Abramoff, Apy & O'Hern (Daniel J. O'Hern, Esq., of Counsel)

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

June 2, 1971

Pending before Superior Court, Appellate Division.

**David Harris,**

*Petitioner-Appellant,*

**v.**

**Board of Education of the Township of Teaneck et al., Bergen County,**

*Respondent-Appellee.*

**Decided by the Commissioner of Education, September 30, 1970**

**STATE BOARD OF EDUCATION**

**Decision**

For the Petitioner-Appellant, Michael Gross, Esq.

For the Respondent-Appellee, Parisi, Evers & Greenfield (Irving C. Evers, Esq., of Counsel)

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

April 7, 1971

**William T. Burke et al.,**

*Petitioners-Appellants,*

**v.**

**Board of Education of the Township of Livingston, Essex County,**

*Respondent-Appellee.*

**Decided by the Commissioner of Education, November 4, 1970.**

STATE BOARD OF EDUCATION

**Decision**

For the Petitioners-Appellants, Annamay T. Sheppard, Esq.

For the Respondent-Appellee, Riker, Danzig, Scherer & Brown (Peter N. Perretti, Jr. Esq., of Counsel)

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

March 3, 1971

**Ruth Burstein et al.,**

*Petitioners-Appellants*

**v.**

**Board of Education of the Borough of Englewood Cliffs, Bergen County,**

*Respondent-Appellee.*

**Decision on Motion to Dismiss by the Commissioner of Education, September 23, 1970.**

STATE BOARD OF EDUCATION

**Decision**

For the Petitioners-Appellants, Francis X. Hayes, Esq.

For the Respondent-Appellee, Shenier, Gilady & Harwood (Daniel Gilady, Esq., of Counsel)

The Decision of the Commissioner of Education granting the Motion to dismiss is affirmed.

March 3, 1971.

**Randolph Bramwell et al.,**

*Petitioners-Appellants,*

**v.**

**Board of Education of the Township of Franklin, Somerset County,**

*Respondent-Appellee.*

**Decided by the Commissioner of Education, November 10, 1970**

STATE BOARD OF EDUCATION

**Decision**

For the Petitioners-Appellants, Mandel, Wysoker, Sherman, Glassner, Weingartner & Feingold (Jack Wysoker, Esq., of Counsel)

For the Respondent-Appellee, Leonard N. Arnold, Esq.

For Intervenors, Rosenhouse, Cutler & Zuckerman (Nathan Rosenhouse, Esq., of Counsel)

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

March 3, 1971

**Malcolm and Ina Woodstein,**

*Petitioner-Appellants,*

**v.**

**Board of Education of the Township of Clark, Union County,**

*Respondent-Appellee.*

**Decided by the Commissioner of Education, July 17, 1970.**

STATE BOARD OF EDUCATION

**Decision**

For the Petitioners-Appellants, Morey Udine, Esq.

For the Respondent-Appellee, Morris Barnett, Esq.

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

February 8, 1971.

**Samuel A. Christiano,** *Petitioner-Appellant,*

**v.**

**Board of Education Employees Pension Fund of Essex County,**

*Respondent-Appellee.*

**Decided by the Commissioner of Education, February 6, 1970.**

**STATE BOARD OF EDUCATION**

**Decision**

For the Petitioner-Appellant, Samuel A. Christiano, Esq.

For the Respondent-Appellee, Richard H. Cashion, Esq.

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

January 6, 1971.

**Juanita Zielenski,**

*Petitioner-Appellant,*

v.

**Board of Education of the Town of Guttenberg, Hudson County,**

*Respondent-Appellee.*

**Decided by the Commissioner of Education, July 16, 1970**

**STATE BOARD OF EDUCATION**

**Decision**

For Petitioner-Appellant, Moser, Roveto & McGough (George P. Moser, Esq., of Counsel)

For Respondent-Appellee, John Tomasin, Esq.

Petitioner, Juanita Zielenski, claims tenure. She was a duly certified teacher as of December, 1965, and served as a day-by-day substitute in respondent's school district for one day during that month and on January 31, 1966. From February 1 to June 30, 1966, she taught continuously in the district without a written contract. Thereafter, she received written contracts for the academic years 1966-67, 1967-68 and 1968-69. In May of 1969 she received a form of contract for the academic year 1969-70, executed and returned it, but did not receive a copy in return executed by the Board.[1] The ultimate question is whether the five-month period of her service (February 1 to June 30, 1966) can be counted for purposes of tenure. Her claim rests on *N.J.S.A.* 18A:28-5 which, in pertinent part, recites that:

> "The services of all teaching staff members including all teachers *** 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 *** shall be under tenure *** after employment in such district or by such board for ***
>
> (c) the equivalent of more than three academic years within a period of any four consecutive academic years ***."

The first question arising is whether petitioner met the definition of "teaching staff member" as contemplated by the statute, setting aside for the moment the question of whether in fact she was a substitute or regular teacher. *N.J.S.A.* 18A:1-1 defines a teaching staff member as:

> "*** a member of the professional staff of any district or regional board of education *** holding office, position or employment of such character that the qualifications, for such office, position or employment, require him to hold a valid and effective standard, provisional or emergency certificate, appropriate to his office, position or employment, issued by the state board of examiners ***."

*N.J.S.A.* 18A:26-2 prohibits the employment in the public schools of any teaching staff member "unless he is the holder of a valid certificate to teach." It is not disputed that petitioner's employment was of such character as to require a certificate and that she in fact was the holder of such a certificate. However, *Schultz 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.

The arrangement for that employment, according to the Superintendent of respondent's schools, took place on January 31, 1966:

> "Q. Tell us what you said to her and what she said to you.
> "A. Well, the general essence of the conversation was that I needed a substitute teacher to cover the second grade and would she be interested in it, give it a try and see how it would work out."

Petitioner's testimony as to the conference, which she claims took place when she applied for a "teaching job," was:

> "Q. What was that conversation with Dr. Hartman?
> "A. When I told him I was in for a teaching job, he said they had an opening in the second grade."
>
> "Q. When did you next hear from him?
> "A. It was in December I got called twice to go there to substitute and at some time when I went there he said that the Board had approved the application for the job and that I would have a job starting February 1."

On cross-examination, she stated:

> "Q. When he discussed this position with you, are you sure that he said that this position for teacher in the second grade was open to you as a regular permanent teacher or did he say substitute?
> "A. As a regular teacher."

Respondent contends (1) that the questioned employment was not instituted by act of the Board, but by the Superintendent whose employment authority was limited to substitutes, and that employment by the Board is the prerequisite to a valid appointment as a regular teacher, and (2) that the employment was required to be under written contract. All parties agree that the petitioner, with the Board's full knowledge, performed the duties of a regular teacher during the period in question and received all the benefits of a regular teacher including sick leave, paid holidays, paid vacation periods, paid absences for teachers' conventions, and that she was paid the starting salary for regular teachers of $490 per month (based on an annual starting salary for regular teachers of $4,900 per year) rather than the substitute pay rate then in effect of $16 per day. In all significant particulars, the incidents of petitioner's employment were identical to those of a regular teacher. It is on this basis, together with her understanding of the initial employment conference, that she advances her claim.

Respondent's position, however, is that these benefits were not given to petitioner alone but to all substitutes who took assignments for "a lengthy period of time" (a month or more) because such assignments, according to the Superintendent, entailed additional work.[2] Of special significance to us is the fact that petitioner was paid the starting salary rate for regular teachers. At all times pertinent to this inquiry, there was in effect a salary guide by which the salaries of regular teachers was determined.[3] We assume that this salary guide was framed within the purview of *N.J.S.A.* 18A:29-1 *et seq.* *N.J.S.A.* 18A:29-4.1 states that:

> "A board of education of any district may adopt a salary policy, including salary schedules for all full-time teaching staff members ***."

*N.J.S.A.* 18A:29-6 defines members, as used in the statute, as:

> "*** a full-time teaching staff member as defined in this title /*N.J.S.A.* 18A:1-1/ except one who is the holder of an emergency certificate ***."

The minimum salary schedule set forth in *N.J.S.A.* 18A:29-7, when compared with petitioner's salary reflects the following:

| | Statutory Schedule | | Petitioner's Salary | |
|---|---|---|---|---|
| Years of Employment | Salary (Class C) | Employment Increment | | |
| | | | (2/1/66 to 6/30/66) | $4,900 |
| 1 | $4,700 | $ -- | 1966-67 | 4,900 |
| 2 | 4,950 | 250 | 1967-68 | 5,300 |
| 3 | 5,200 | 250 | 1968-69 | 6,100 |
| 4 | 5,450 | 250 | | |

The testimony indicated that petitioner's first increase in salary did not occur until completion of a full academic year (1966-67) of teaching. This appears to be consistent with the statutory definition of "increment", in terms of entitlement, as set forth in *N.J.S.A.* 18A:29-6:

> " 'Year of employment' shall mean employment by a member for one academic year ***."
>
> " 'Employment increment' shall mean an annual increase of $250 granted to a member for one 'year of employment.' "

We also take note of *N.J.S.A.* 18A:29-16:

> "The provisions of this subarticle B /which includes *N.J.S.A.* 18A:29-6 and 7/ shall not apply *** to any person employed as a substitute on a day-by-day basis."

We find it difficult, in evaluating the actions of the Board in so tender and sensitive an area as expenditure of public funds entrusted to it for the administration of public schools, to accept the argument that such pay and other benefits as were given to petitioner during the five-month period were more a mark of beneficence than the recognition of a status.

Other statutes citied by the Commissioner in his decision denying tenure raise two further questions as to petitioner's status during the five-month period.

First, he held that the employment on February 1, 1966, was not entered into under authority of *N.J.S.A.* 18A:27-4 (permitting a local board to make its own rules and regulations regarding employments) or, in the alternative, by *N.J.S.A.* 18A:27-5, 6 and 8 (requiring execution and filing with the State Department of Education of written contracts where rules and regulations under *N.J.S.A.* 18A:27-4 have not been made). As indicated, there was testimony as to the existence of rules and regulations relating to employments made by respondent Board. Such a board is not subject to the provisions of *N.J.S.A.* 18A:27-5, 6 and 8, requiring written contracts, but only *N.J.S.A.* 18A:27-4; and there is nothing in *N.J.S.A.* 18A:27-4 that requires a board which has rules and

regulations relating to employments to execute written contracts of employment or prohibits it from so doing. It would hardly square with logic to hold that tenure could not be acquired by a teacher because the particular employing board elected to control its employments through statutorily authorized rules and regulations as a lawful alternative to statutorily mandated written contracts. We do not find the absence of a written contract for the five-month period to be dispositive of the ultimate issue in this case.

Second, the Commissioner also held that the petitioner's employment did not come about by "a recorded roll call majority vote of the full membership of the board" as prescribed in *N.J.S.A.* 18A:27-1. Since the tenure statute, in describing the periods of service for purposes of tenure, uses the phrase, "*** after employment *in such district or by such board*," one must conclude that the Legislature recognized a difference between an employment in a district as distinguished from an employment by a board. An almost identical distinction is recited in *N.J.S.A.* 18A:28-4:

> "No teaching staff member shall acquire tenure in any position in the public schools in any school district or under any board of education, who is not the holder of an appropriate certificate for such position ***."

These statutes lead us to conclude that it was not intended to deny tenure to a teacher, otherwise eligible, who taught continuously and performed all the duties of a regular teacher because the formality of a roll call vote may not have been undertaken where, as here, the Board had full knowledge of the details of petitioner's employment, assignment and benefits, and where the actions of its Superintendent were ratified and concurred in by the Board. We find support for this position in *Board of Education of Jersey City v. Wall, supra.* There, the teacher was employed by the local board as a "so-called substitute" and was paid on a per diem basis. She was assigned to a regular position in the same manner as teachers having tenure and taught continuously from 1931 to 1936. In holding that tenure was acquired, the Court stated:

> "The device adopted cannot defeat the purpose of the act, which was designed to give a measure of security to those who served as teachers three consecutive academic years. A mere occasional absence of a teacher by reason of illness or excuse could not disturb this right, and the local board of education cannot evade the statute, notwithstanding the alleged employment by the day if a teacher actually serves for the requisite period of years.***
>
> "Had the proofs not shown continuous employment for the statutory period, the result would have been otherwise." (196 *A.* at p. 664)

We see no material difference between petitioner's situation and *Wall* merely because *Wall* was employed by the Board rather than by the Superintendent acting under authority of the Board. The decisions in *Schultz v. State Board of Education, supra,* and *Gordon v. State Board of Education,* 132 *N.J.L.* 356 (*E. & A.* 1945) are distinguishable on facts. In *Schultz* the petitioner did not meet the certification requirements necessary for tenure. Further, as to certain periods of her service on which she relied, she specifically and expressly applied for substitute employment, received substitute employment and was given the pay of a substitute. In *Gordon,* petitioner in each year of her employment specifically and expressly requested substitute work and was given substitute work and pay. The facts there also showed that she was not continuously employed during the periods relied upon.

For the foregoing reasons we reverse the Commissioner's decision of July 16, 1970, and hold that petitioner acquired tenure.

February 8, 1971

[1]The evidence affirmatively indicates that petitioner's performance of her duties was satisfactory.

[2]The Superintendent testified, "They have always been paid. For example, if they are working for the month of December, they get the basic pay for the month. Same thing regardless of what month Easter falls in or other legal holidays, Columbus Day or Lincoln's and Washington's birthday, election day, teachers' conventions, so forth and so on. Our point has always been that a teacher who is there for a month has more responsibilities such as planning, daily planning, grading of papers, making out report cards, dealing with parents; whereas a teacher who comes in for one or two or three days, the plans are already written up for them. They do not have these other responsibilities."

[3]Curiously, while both parties introduced evidence as to the existence and partial content of the salary guide, neither party introduced in evidence either a copy of the salary guide or a copy of the rules and regulations of the Board regarding salary and employments.

**"TT", an infant, by her guardians,**

*Petitioner,*

**v.**

**Board of Education of the Township of Franklin, Somerset County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**Decision on Motion**

For the Petitioner, James B. Ventantonio, Esq.

For the Respondent, Leonard Arnold, Esq.

"TT" and six other students, all girls, attending Franklin High School, Franklin Township, Somerset County, were suspended from school for assaulting several other students. "TT" was expelled from Franklin High School on November 9, 1970, by respondent Board of Education, hereinafter "Board." The six other girls, still on suspension, are waiting for Board action, which will determine whether or not they will be reinstated or expelled from the High School.

Petitioner argues that, although she was given a preliminary hearing prior to her suspension and a full hearing before her expulsion, she was denied the right to face her accusers who aver that they witnessed the assaults. Petitioner avers that she was denied the right to learn the names of the witnesses against her and to cross-examine them to determine what, if anything, they actually saw. Petitioner alleges that two Board members made public judgments against her prior to the Board's hearing in the instant matter.

The Board has delayed further action with respect to the six suspended girls on petitioner's request, pursuant to the filing of a Motion that *pendente lite* relief be granted by the Commissioner. Petitioner prays that her expulsion be set aside and that all of the girls concerned be readmitted to school pending a new hearing in which witnesses can be named and cross-examined.

Argument of counsel and the testimony of the High School principal were presented at the State Department of Education, Trenton, on November 20, 1970, before a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

Counsel stipulate that "TT" and the six other girls were given a preliminary hearing and notified of their rights prior to their suspension from school. Counsel further stipulate that a later full hearing was given "TT" and that she was subsequently expelled from the High School by the Board.

Counsel agree, therefore, that the only issue of essence is whether or not the student witnesses should be named and cross-examined before the Board takes any action against petitioner.

Respondent Board avers that an early decision was made to offer the names of the witnesses to the petitioners, and that this offer was withdrawn subsequent to the threats made against one witness.

The principal testified that the witnesses were "terrified" when told that their names would be used. He further testified that an adult had threatened the life of one of the student witnesses over the telephone. The principal's concern was so great, according to his testimony, that he called the police so that they could provide the necessary surveillance on the threatened student's home and activities.

The Board denies that two of its members made judgments against "TT" prior to her expulsion hearing. Counsel avers that the two Board members in question were asked, "Will you judge 'TT' on the basis of testimony educed at the hearing?" Both Board members replied affirmatively.

Respondent avers that the resultant seven votes for the expulsion of "TT", one for her continued suspension and the abstention vote of one of the Board members clearly demonstrate the position of the entire Board. The one abstention was caused, it avers, because the abstaining Board member was called out of the meeting and missed much of the testimony.

The Board alleges that cross-examination of student witnesses is not a necessary prerequisite to due process. It states that the Board's decision not to release the names of student witnesses was made because the students were threatened with physical harm. The names were withheld, it avers, for the safety and protection of all student witnesses.

Respondent Board avers, therefore, that "TT" has been afforded due process, and the Board's decision not to release the names of witnesses is entirely justified in the instant matter.

* * * *

The Commissioner has read the report of the hearing examiner.

He notes that the parties agree on the basic facts in the instant matter. He observes that petitioner charges that the Board has denied her due process by not giving her the names of her accusers and the right to cross-examine them. It

is clear from the stipulation of facts that the Board met the requirements for due process. However, counsel disagree on the requirement to release student witnesses' names.

The guidelines for due process, a full hearing and the form such hearing should take are expressed in *R.R., a minor, by his guardian ad litem, M.R., Plaintiffs v. the Board of Education of the Shore Regional High School District, Defendant,* 109 *N.J. Super.* 337, 348 where the Court held that:

> "The nature of the full hearing clearly depends upon the circumstances of the particular case."

and in *Dixon v. Alabama State Board of Education,* 294 *F. 2d* 150 (*5th* Cir. 1961), the Court set forth the following standards:

> "*** In such circumstances, a hearing which gives the Board *** an opportunity to hear both sides in considerable detail is best suited to protect the rights of all involved. This is not to imply that a full-dress judicial hearing, with the right to cross-examine witnesses, is required. *** He should also be given the opportunity to present to the Board, or at least to an administrative official of the college, his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf. *** If these rudimentary elements of fair play are followed in a case of misconduct of this particular type, we feel that the requirements of due process of law will have been fulfilled."

In the instant matter, the Commissioner determines that the Board has met the guidelines of the Courts as outlined, *supra,* and had good and substantial reason for not releasing the names of student witnesses against petitioner. The Commissioner is satisfied by the testimony of the High School principal that school officials had sufficient cause for concern regarding the safety of potential student witnesses.

The Commissioner further determines that the Board acted properly in protecting the threatened students by withholding their names. Having established this need for protection, no legitimate purpose could be achieved by releasing witnesses' names. Therefore, the Commissioner does not construe the Board's decision to withhold the names, made in good faith with the sole purpose being to protect the student witnesses, as a denial of due process.

The Board has acted properly under its statutory authority to suspend or expel a student, and neither that authority nor the Board's resultant action will be questioned here.

For the reasons outlined, *supra,* petitioner's Motion for *pendente lite* relief is denied.

COMMISSIONER OF EDUCATION

December 1, 1970

**TANYA TIBBS, Infant, by her guardians, Mr. & Mrs. Harold Diggs; NELLIE HARRELL, Infant, by her guardians, Mr. & Mrs. Samuel Spurgeon; GENSEY LAWRENCE, Infant, by her guardians, Mr. & Mrs. Norris Lawrence; DENISE AVERETTE, Infant, by her guardians, Mr. & Mrs. Willie Averette, and others similarly affected,**

*Appellants,*

v.

**Board of Education of the Township of Franklin, Somerset County,**

*Respondent.*

## DECISION OF THE SUPERIOR COURT of NEW JERSEY APPELLATE DIVISION

**Decided on Motion by the Commissioner of Education, December 1, 1970**

Argued February 16, 1971 – Decided March 30, 1971

Before Judges Conford, Kolovsky and Carton.

On appeal from Commissioner of Education.

Mr. James B. Ventantonio (Director, Somerset County Legal Services) argued the cause for appellants (Messrs. Michael D. Lang and William J. Zaino on the brief).

Mr. Leonard N. Arnold argued the cause for respondent.

**PER CURIAM.**

The expulsions of appellants are reversed and set aside for failure to producethe accusing witnesses for testimony and cross-examination.

The matters are remanded to the Commissioner of Education for rehearing *de novo* of the charges on which appellants were expelled should the local school authorities choose to prosecute them. No costs.

**CONFORD, P.J.A.D. (concurring).**

The Per Curiam opinion of the court represents what all the members of the court can agree upon. I herewith supplement that determination with my own reasons for joining therein and my own more specific views as to what the Commissioner of Education should do and the local school authorities may do at this juncture.

We granted leave to appeal an interlocutory decision of the State Commissioner of Education, but denied appellants' request for *ad interim* readmission to classes at Franklin High School from which they had theretofore been expelled or suspended for an alleged physical assault upon other students said to have occurred October 7, 1970. (All were ultimately expelled.) The Supreme Court on motion thereafter directed the appellants to be readmitted to school, subject to good behavior, pending determination of this appeal.

The sole issue presented is whether a high school student may be expelled from school on the charge of physical assault upon another student where the hearing conducted by the local board of education on the charge is not preceded by identification to the accused of the accusing student witnesses whose *ex parte* statements the school administration has relied on in bringing the disciplinary proceedings and where such witnesses do not appear to testify at the hearing. My view, and I believe that of the Court, is that this procedure denies due process to the student so expelled, and this notwithstanding a determination by the local board, held warranted by the State Commissioner, that the student witnesses were afraid to testify because of fear of physical reprisal and should not be compelled to do so against their will.

On October 7, 1970, according to hearsay testimony adduced before the local board and the Commissioner, two students at the school, sisters, were assaulted by a group of others, all or mostly girls, while all were walking home after classes, a short distance from the school exits. They were struck with a stick; pushed to the ground and jumped upon or kicked; and some of their possessions were taken from them and purloined or scattered. One of them sustained the destruction of her eyeglasses. Both had minor injuries. They ran, crying, back to the guidance office at the school. It appears that neither could, or were willing to, identify any of their attackers. But a number of student witnesses volunteered statements to the school authorities identifying appellants and others (about ten in all) as involved in the episode. They were apparently assured, upon request, that they would not be identified to the accused students because of fear of physical retaliation.

The alleged assailants were, so far as available, called in for interviews, and generally denied complicity. But some stated they were in the vicinity and had seen part of the events. In the case of appellant Tanya Tibbs, statements of other students supporting her defense that she had seen but not participated in the occurrence were proffered to the school authorities by her parents, but investigation thereof failed to satisfy the authorities that the *prima facie* case against her had been impaired. We are informed that initial suspensions were imposed upon a total of ten students. After informal hearings the suspensions were lifted as to five of the accused, but the other five, including the four present appellants, were expelled by the board of education after hearings substantially of the kind afforded Tanya, and described hereafter.

Tanya was originally notified of a suspension to begin October 13, 1970 and to terminate November 16. (She remained out of school until the Supreme Court order of January 25, 1971.) Tanya's parents were given notice October 27, 1970 by the superintendent of schools that the board of education would meet November 2, 1970 for a full hearing to consider the recommendation of the school principal and himself that the girl be expelled from school for "assault upon a student of Franklin High School"; that they could be represented by an attorney; that the vice-principal and principal would testify and be subject to cross-examination; and that signed statements of student witnesses would be presented but that such students would not appear at the hearing. The accused pupil would have the right to present testimony of witnesses or a signed statement by any witness not desiring or able to attend.

The hearing was postponed to November 9, 1970 at the request of Tanya's attorney but the latter was informed that the statements of the student witnesses to be provided would not be signed or identified.

At the hearing before the board the principal and vice-principal of the high school testified concerning their investigation and the informal hearings they conducted as to the incident, resulting in findings and conclusions by them substantially to the effect indicated above, including that of Tanya's guilt. The principal also testified that he had received a telephone call from the mother of one of the accused students threatening the life of one of the prospective student witnesses. There was testimony that the student witnesses were in terror of retaliation if their identity was revealed to the accused students. The principal explained that the problem he faced in deciding whether to produce the children to testify was "a two-fold one: What happens within the confines of a racially tense school; and my own concern for the continued safety of the students involved." (It seems agreed there has been a history of racial conflicts at the school.) The board voted to acdept into evidence unsigned and unidentified statements by student witnesses, and three such were read into the record. In each such statement Tanya was identified as one of those "doing the hitting". A statement by the victims, identified as the Cornwell sisters, was also read. This described the occurrence but omitted identification of any assailant.

The attorney for Tanya objected throughout the hearing to the failure to identify and produce and subject to cross-examination any of the accusing witnesses whose statements were read. On the basis of that deficiency he refused to adduce defensive testimony by or on behalf of his client. He had also at the outset of the hearing moved that two members of the board disqualify themselves as prejudiced because of public statements previously made by them concerning the incident and alleged antecedent related occurrences. The motion was denied.

The board of education thereupon voted Tanya guilty and then took testimony concerning her prior disciplinary record in school. This was generally poor. After argument by counsel against expulsion the board voted that determination.

Tanya filed an appeal against the expulsion with the Commissioner of Education and petitioned him for *ad interim* relief of admission to classes pending adjudication. A hearing on the petition was conducted November 20, 1970 before the Division of Controversies and Disputes at which the school principal testified to the substance of what had been adduced before the local board. On December 1, 1970 the Commissioner of Education denied *ad interim* relief. He expressly decided that the procedure used by the local board comported with due process and that he was satisfied by the testimony of the principal "that school officials had sufficient cause for concern regarding the safety of potential student witnesses" so as to justify not "releasing the students' names" or permitting their cross-examination.

It is not necessary here to pursue in detail the long and uneven development of the law over the past century concerning appropriate procedures in school and college student disciplinary proceedings. See *Annot.*, 58 *A.L.R.* 2d 903 (1958); *A.L.R.* 2d Later Case Service (56-63 *A.L.R.*2d) at 219; the extensive survey of authorities and literature in *R.R. v. Bd. of Ed., Shore Reg. H.S.*, 109 *N.J. Super.* 337 (Ch. Div. 1970); Note, 41 *Temple Law Quarterly* 349 (1968); Abbott, "Due Process and Secondary School Dismissals," 20 *Case Western Reserve Law Review* 378 (1969).

To summarize briefly, the early cases, particularly in relation to proceedings below the college leve, generally did not recognize due process concepts as appropriate to the exercise of discipline of students, even in the case of expulsion. The idea of the school administrators being *in loco parentis* to students of secondary and primary grade level held some sway. In the course of time, however, when the sanction applied for misconduct was expulsion or suspension of severe duration, especially in college-level cases, the decisions began to speak in terms of hearing requirements of due process. But a variety of expressions can be found in the cases as to the specifics of fair hearings or due process, particularly in relation to such claimed incidents as the right of counsel, personal appearances of accusing witnesses and the right of cross-examination of such witnesses by the defense. The variations are probably explainable on the basis of the diversity of attendant circumstances in different cases – nature of the offense; nature of the prosecuting and adjudicating entities; ages of the accused students and of witnesses; stage of the proceedings in the entirety of the process of investigation, punishment-treatment and review; and effect of statutory provisions, *e.g.*, as to right to subpoena witnesses or to counsel, or the absence thereof, etc. See *Madera v. Board of Education of City of New York*, 386 *F.* 2d 778 (2 Cir. 1967), *cert.* den. 390 *U.S.* 1028 (1968); *Schwartz v. Schuker*, 298 *F. Supp.* 238 (E.D.N.Y. 1969).

Our own statutes are rudimentary. *N.J.S.A.* 18A:37-2 provides that certain types of pupil misbehavior, including "Physical assault upon another pupil *** "may be attended by "suspension or expulsion from school". (d.) A principal may suspend any pupil "for good cause" but must report it forthwith to the superintendent of schools. The superintendent must report the susepnsion to the board of education at its next regular meeting. Either the principal or

superintendent may reinstate the pupil prior to the second regular meeting of the board thereafter unless the board does so at its first meeting. *N.J.S.A.* 18A:37-4. No suspension may continue beyond the second regular meeting of the board after the suspension unless the board continues it, "and the power to reinstate, continue any suspension reported to it or expel a pupil shall be vested in each board." *N.J.S.A.* 18A:37-5. No hearing procedures attendant upon suspensions or expulsions are specified.

The leading decision of the modern era relating to fair procedures in college expulsion cases is *Dixon v. Alabama State Board of Education*, 294 *F.* 2d 150 (5 Cir. 1961), *cert.* den. 368 *U.S.* 930 (1961). The guidelines there stated were quoted in full in *R.R. v. Bd. of Ed., Shore Reg. H.S., supra*, (109 *N.J. Super.*, at 349) and need not be repeated here. Basically similar standards were declared in *State ex rel. Sherman v. Hyman*, 180 *Tenn.* 99, 171 *S.W.* 2d 822, 826 (1942) *cert.* den. 319 *U.S.* 748 (1943). In contrast with the particular procedures followed here, the *Dixon* guidelines require affording the accused student in advance the names of the witnesses against him and a report of the facts they attest to. Cross-examination of witnesses and a "full-dress judicial hearing" is said not to be necessary. (294 *F.* 2d, at 159). Some cases, however, seem to suggest the desirability of production of the accusatory witnesses at the heraing and allowance of their cross-examination. *Esteban v. Central Missouri State College*, 277 *F. Supp.* 649, 651-2 (W.D.Mo. 1967), approved in the appeal of a later phase of the case, 415 *F.* 2d 1077, 1089 (8 Cir. 1969) (*per* Blackmun, Circuit Judge); (*semble)Marzette v. McPhee*, 294 *F. Supp.* 562, 567 (W.D. Wis. 1968) and *Buttny v. Smiley*, 281 *F. Supp.* 280 (D. Colo. 1968).

Opposing mandatory production at the hearing of prosecution witnesses and cross-examination of them, in addition to the *Dixon* and *Hyman* cases, *supra*, are *State ex rel. Ingersoll v. Clapp*, 81 *Mont.* 200, 263 *P.* 433 (1928), *cert.* den. 277 *U.S.* 591 (1928), error dism. 278 *U.S.* 661 (1928); *People v. Board of Trustees of University of Illinois*, 10 *Ill. App.* 2d 207, 134 *N.E.* 2d 634, 58 *A.L.R.* 2d 899 (App. Ct. 1956); (*semble) Scoggin v. Lincoln University*, 291 *F. Supp.* 161 (W.D. Mo. 1968); *Wasson v. Trowbridge*, 382 *F.* 2d 807 (2 Cir. 1967).

A modern public-school case in which the right of the accused student to hear and cross examine witnesses against him was sustained, *Geiger et al. v. Milford School District*, 51 *Pa. D. & C.* 647 (C.Pl.Ct. 1944) stands in contrast with a later decision of a Pennsylvania court of equal standing denying the right to a hearing of that kind as apt to "undermine entire disciplinary machinery of the school system". *Mando, etc. v. Wesleyville School District*, 81 *Pa. D & C.* 125(C.Pl.Ct. 1952).

In *R.R. v. Bd. of Ed., Shore Reg. H.S., supra*, our Chancery Division held a *Dixon*-type hearing mandatory as a condition for suspension of indefinite duration of a high school student charged with an assault on another child (off school premises). The New Jersey State Department of Education has heretofore recognized the general requirements of procedural due process in relation to school students facing severe disciplinary sanctions. *Scher v. Board of Education of West Orange*, 1968 School Law Decisions, 92, 95.

There is no issue in the present case as to the necessity for a "fair hearing procedure" antecedent to imposition by a local board of education of the sanction of expulsion of a student for misconduct. Both sides agree on it. The issue is whether student witnesses against the accused must be identified to the accused and be produced and e subject to cross-examination, either (a) generally, or (b) under the circumstances of this case.

It is apparent from the decided cases that due process in the school or college context does not, by the weight of authority, require the production in person and right of cross-examination of adverse witnesses. It does call for identification of such witnesses and for supplying the accused with statements or affidavits by them verifying the charges in advance of the hearing. That much is minimally essential, in an issue over controverted objective conduct, as here, to give the accused a fair opportunity to meet and refute possibly mistaken or unfounded assertions of fact. If, despite the witnesses' fears, their identity must be revealed as a matter of minimum due process to the accused, there would seem little point in precluding the availability of the substantially more revealing personal testimony of the witnesses for the benefit both of the triers of the fact and the defense of the accused children in the search for the truth of the matter. Common experience, moreover, establishes that the right of cross-examination is almost always essential for assurance of an enlightened determination of a contested issue of fact. I therefore conclude that in the context of such a case as this not only should the accusing witnesses be identified in advance but also, as a general matter and absent the most compelling circumstances bespeaking a different course, be produced to testify and to be cross-examined.[1]

Cross-examination of school children witnesses in proceedings like these should, however, be carefully controlled by the hearing officer or body, limited to the material essentials of the direct testimony and not be unduly protracted. Such a proceeding is decidedly not in the nature of a criminal trial nor to be encrusted with all the ordinary procedural and evidential concomitants of such a trial.

It remains to consider the particular objections raised by respondents to identification and examination at the hearing of the accusatory witnesses. I have no inclination to gainsay the determination of the local and state educational officials that these children were in a genuine state of fear over having their identity revealed. Whether the procedural policy adopted and approved at the administrative level for the handling of this matter would be justified, in the attendant circumstances, were the ultimate sanctions imposed substantially less

[1]One need not determine whether the Administrative Procedure Act's mandate for cross-examination in contested cases, *N.J.S.A.* 52:14B-10(a), is without application here because the local board is not a State agency or is an agency whose primary responsibility is the management of an educational program and the dispute relates to the "internal affairs' of that program. N.J.S.A. 52:14B-2(a).

than that of expulsion of the accused, is not the immediate issue here. I discuss that particular contingency later herein. We here confront a decision for expulsion – action which constitute deprivation of a most drastic and potentially irreparable kind. In that setting compromise with punctilious procedural fairness becomes inacceptable. As was recently stated by a writer on the subject:

> "The problem can be put in greater perspective by considering the importance of fair procedure to the student involved. He may have as much to fear from the arbitrary use of power at the secondary level as at the college or university level. This is particularly true where the misconduct may result in an expulsion or a lengthy suspension. The stigma of compulsory withdrawal may follow even a high school student for many years after the institution has considered the incident closed. Expulsion or suspension always involves a permanent notation on the student's record which may have long term effects on his ability to ac hieve entry into college or the job market. Moreover, if the child is unable to return to school, the economics of a premature withdrawal are startling and more tangible evidence of the burden that he must shoulder."
>
> Abbott, op. cit., *supra*, 20 *Case Western Reserve Law Review*, at 382.

At oral argument respondent conceded there was no assurance of early or favorable action on any application for reinstatement after expulsion which might be made by the appellants, and it is apparent that admission to schools in other districts, if obtainable at all, would entail payment of a substantial non-resident fee these students could probably ill afford.

As against the interests of the pupils here accused in remaining in school, the school community must be content to deal with threats or intimidation of the kind allegedly encountered by invoking the jurisdiction of the law enforcement authorities who must be presumed equal to their responsibilities.

So much decided, the question arises as to the next step in the matter. Both sides have expressed a preference for a remand to the local board of education should the action of the Commissioner not be sustained by the Court. But the Court has concluded that the remand should be to the Commissioner of Education. My own reasons for joining in that direction are the following.

Although, technically speaking, the appeal before us is from the interlocutory decision of the Commissioner, our determination has been to reverse and set aside the expulsions. The initiative for further action in respect of the accused pupils rests with the local school authorities. Three electives are apparent: (a) to have the appellants retried, producing the accusing witnesses for testimony and cross-examination; (b) to abandon the objective of expulsion or suspension for a substantial term, and to deal with the allegedly offending children with lesser discipline-treatment measures not requiring a formal hearing with "due-process" trappings; (c) drop the matter entirely.

If the decision is to present the case for expulsion anew I believe the wisest course in this particular exigency is to have the rehearing conducted by the Commissioner *de novo* pursuant to his authority under *N.J.S.A.* 18A:6-9. The local board has by now been embroiled in the matter to the point where a desirable appearance of impartiality on its part would be difficult to project. Moreover rehearing by the Commissioner would accelerate a final resolution of the matter.

If, however, the decision of the local authorities, whether in order to relieve the student witnesses of the mental trauma of revealing their identity or for any other reason, is to forego further efforts to effect expulsion or severe terms of suspension, and to deal with the allegedly offending children in other appropriate ways, the matter, in my view, should be returned by the Commissioner to the local school authorities for suitable action in the first instance (the Commissioner of course always retains statutory review jurisdiction in respect of any action taken locally). I think it appropriate for the Court to express its views on this contingency in light of the fact that at oral argument respondents indicated a probable decision not to produce the student witnesses against their will.

I do not presume to suggest specific suitable alternative action by the local authorities, or whether, indeed, any further action would be indicated at all. That decision is for the local school people. One can conceive the possibility that the local authorities will not decide on further action until after consultation with the guidance and psychological staffs of the school. Such consultations might lead to decisions for temporary home instructions, psychological treatment, the application of moderate disciplinary measures (detention, reprimand, etc.) or any combination of the foregoing and other measures as appropriate ways of handling these cases in the interests of the pupils themselves and the school community at large.[2]

What I feel impelled to say for myself in relation to the legalities is that in the area of handling, disciplining or treating problem pupils at the high school level, generally speaking (the records of at least several of the appellants here involved show they were problem pupils), the concept of formal "due process" hearing as a prerequisite for administrative action short of expulsion or severe suspension is most inappropriate, and, if imported into that sphere would in my view be inimical to the welfare, educational and otherwise, not only of the children requiring such handling but of the particular school community as a whole. *Cf. Madera v. Board of Education of City of New York, supra.*

[2]Consider the broad authority vested in the principal alone to suspend under *N.J.S.A.* 18A:37-4 and the liability of misbehaving pupils to "punishment", apart from suspension and expulsion, under *N.J.S.A.* 18A:37-2.

And it is the local school administration, which lives with such problems, rather than the Commissioner, which should in the first instance exercise the judgment and assume the responsibilities required in these complex and sensitive concerns. Decisions like *Goldberg v. Kelly*, 397 *U.S.* 254 (1970) involve adverse government action against persons who are *sui juris* and not immature members of a controlled high school community in the course of a process of disciplined education. Such decisions are therefore not apposite in the immediate context. "Constitutional rights" are not involved.

At the oral argument appellants expressly conceded they would have no objection to local board action short of expulsion or extended suspension on procedures such as were employed in this case.

It is thus my opinion that if the local authorities inform the Commissioner that they elect to proceed along the lines of alternative (b), *supra*, they should be permitted to do so by completing their investigation of the matter, giving the accused pupils another opportunity to explain their position in relation to the assault incident (first informing them that expulsion, etc. is not an objective of the investigation), and then dealing with the matter in such manner as in their best judgment may be appropriate.

**CARTON, J. A.D. (concurring):**

The hearing on the remand to the Commissioner should be in accordance with the legislative mandate that the Commissioner shall "hear and determine all disputes and controversies arising out of the school law." *N.J.S.A.* 18A:6-9. The statute contemplates a full review of the evidence and an independent determination of all issues including determination of guilt and assessment of penalties. See *In re Masiello*, 25 *N.J.* 590 (1958), and *In re Fulcomer*, 93 *N.J. Super.* 404 (App. Div. 1967). This "judicial type" hearing requires that witnesses against the accused students be produced and be subjected to cross-examination. The accused students should, of course, have the right to testify and produce witnesses on their behalf.

No useful purpose would be served, and much harm may unnecessarily result, if upon the remand, the Commissioner is required again to refer any part of this controversy to, and await action by, the local board. Such a piecemeal approach would serve only to prolong an already overly lengthy proceeding. More important, under the circumstances present in this case, it could hardly fail to revive the community strife which commonly accompanies such controversies. *Cf. In re Fulcomer, supra.*

I concur generally with the view expressed by Judge Kolovsky that in a disciplinary proceeding such as this which may result in expulsion, due process requires that the accused student be afforded an opportunity to confront and cross-examine adverse witnesses. However, I am concerned that our recognition

of that right may be construed to mean that such a full-dress hearing is a necessary ingredient of procedural due process at the *local board level* or that our decision be interpreted to lay down the requirements of all such proceedings conducted at that level.

I would hold only that any procedures conducted by the local board must comply with the minimum requirements set forth in *Dixon v. Alabama State Board of Education*, 294 *F. 2d* 150 (5 Cir. 1961), *cert.* den. 368 *U.S.* 930 (1961). The board should not be compelled, and due process does not require, the in-person production of adverse witnesses and the right of cross-examination at the local board hearing. Although cross-examination is a valuable method of developing the entire factual situation in a given case, it must be borne in mind that the proceeding is an administrative one conducted and controlled by the boards of nine lay citizens ordinarily unfamiliar with legal procedures.

The courts cannot envision the whole range of situations which might arise in this administrative area. On the other hand, the Commissioner has an expertise in this field and by reason thereof is in an excellent position to develop and formulate workable and comprehensive procedures. Consequently, we should leave to his office the responsibility of determining the specific format of the hearings and the safeguards required at the board level in cases of this kind, subject of course to the fundamental requirements set forth in *Dixon*.

It may be pointed out that the Commissioner, in the exercise of his broad supervisory powers, may, where it appears desirable, grant preliminary or injunctive relief to preserve the rights of any party pending a decision by the local board. Furthermore, in the event either party feels aggrieved by the outcome of the hearing at the local level, the exercise of his right to appeal automatically brings the matter before the Commissioner for an independent hearing and determination by him. Compliance with every fundamental requirement of due process can thus be assured without loss of efficiency – the goal which the administrative process in the educational system seeks to attain – and without unnecessary disruption in the operation of that system.

**KOLOVSKY, J.A.D. (concurring):**

The State Commissioner of Education has heretofore recognized that in proceedings before a local board of education which may lead to the expulsion or suspension of a public school student for alleged misconduct – as contrasted with scholastic failure – due process requires, among other things, that the accused student be given at least the names of the witnesses against him and copies of the statements and affidavits of those witnesses. *Scher v. Board of Education of West Orange*, 1968 School Law Decisions, 92, 95.

In my view, due process also requires that there be added to these minimal rights, the right to demand that any such witness appear in person to answer questions. If the witness does not do so, his statement should not and may not be considered or relied on by the board.

By his decision of December 1, 1970, the State Commissioner ruled, despite his previous holding in *Scher*, that in this case the local board did not have to identify the witnesses against the accused students and could act on the basis of unsigned statements obtained from the witnesses. Justification therefor was found in the determination by the local board, based on the testimony of its investigatory staff, that the witnesses were afraid to testify for fear of physical reprisal.

In my opinion such fears afford no justification in any case for depriving the accused students of their constitutional right to be confronted by and to examine the witnesses against them. An ordered society cannot accept the view that the police and prosecuting authorities will be impotent to prevent and punish unlawful conduct of the kind which the witnesses allegedly fear and on that basis deny the accused students their constitutional right to demand confrontation by the witnesses against them.

Such right is a fundamental aspect of due process, whatever other variant in the form of the hearing may be permitted where a public school student is charged with misconduct. *Cf. Dixon v. Alabama State Board of Education*, 294 *F.* 2d 150 (5 Cir. 1961), *cert.* den. 368 *U.S.* 930, 82 *S.Ct.* 368 (1961).

It must be borne in mind that the action sought to be reviewed here is administrative action by a governmental agency, an agency which has the power to compel the attendance of witnesses. See *N.J.S.A.* 18A:6-20. Cases upholding expulsions or suspensions from schools or colleges that are not governmental agencies and whose administrators lack such power (see *State ex rel. Ingersoll v. Clapp*, 81 *Mont.* 200, 215, 263 *P.* 433 (Sup. Ct. 1928); *People v. Board of Trustees of University of Illinois*, 10 *Ill. App.* 2d 207, 134 *N.E.* 2d 635 (App. Ct. 1956) are therefore of no precedential significance.

Rather, what is of controlling significance is the constitutional rule which mandates that a respondent charged with misconduct in a hearing before a governmental agency be given the opportunity to confront and cross-examine adverse witnesses where the decision of the governmental agency will turn on questions of fact. *Goldberg v. Kelly*, 397 *U.S.* 254, 269-270, 90 *S.Ct.* 1011, 1021 (1970); *Greene v. McElroy*, 360 *U.S.* 474, 496-497, 79 *S.Ct.* 1400, 1413 (1959)

As the United States Supreme Court recently said in applying the rule to the case of a welfare recipient whom the governmental agency had ruled ineligible for further welfare assistance:

> "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. E. g., ICC v. Louisville & N.R. Co., 227 U.S. 88, 93-94, 33 S.Ct. 185, 187-188, 57 L.Ed. 431 (1913); Willner v. Committee on Character & Fitness, 373 U.S. 96, 103-104, 83 S. Ct. 1175, 1180-1181, 10

L.Ed. 2d 224 (1963). What we said in Greene v. McElroy, 360 U.S. 474, 496-497, 79 S.Ct. 1400, 1413, 3 L.Ed.2d 1377 (1959), is particularly pertinent here:

> 'Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment ***. This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, ** *but also in all types of cases where administrative *** actions were under scrutiny.*'

Welfare recipients must therefore be given an opportunity to confront and cross-examine the witnesses relied on by the department." *(Emphasis added). (Goldberg b. Kelly, supra,* 397 *U.S.* at 269-70, 90 *S.Ct. at 1021).*

My brother Conford suggests that such right of confrontation does not exist if the local board should decide that the penalty to be imposed on the accused students for the assaults and batteries with which they are charged is less than "expulsion or severe term of suspension."

I cannot agree. The constitutional rights of the accused students may not be dissipated by a decision by the local board in advance of a hearing that the penalty will not be "espulsion or a severe term of suspension." Moreover, it is evident that any suspension beyond the preliminary period of suspension which, under *n.J.S.A.* 18A:37-4, a principal may lawfully impose without a hearing is a "severe term of suspension."

Further, I see no justification for the suggestion that the State Commissioner may, instead of hearing and deciding the charges himself, return the matter "to the local school authorities for suitable action in the first instance"

> "[i]f, ***, the decision of the local authorities, whether in order to relieve the student witnesses of the mental trauma of revealing their identity or for any other reason, is to forego further efforts to effect expulsion or severe terms of suspension, and to deal with the alleged offending children in other appropriate ways ***."

The suggestion envisions that the only evidence to be offered is that heretofore offered to establish that the accused students had committed assaults and batteries, the written statements of unidentified student witnesses. Those statements are hearsay.

Under settled rules of administrative law, such hearsay standing alone and absent other legally competent evidence would afford no legal basis for a finding or determination by either the local board or the State Commissioner that the students had committed the acts with which they are charged -- and this irrespective of the penalty to be imposed if the misconduct charged is proven. *Gilligan v. International Paper Co.*, 24 *N.J.* 230, 236 (1957); *Mazza v. Cavicchia*, 15 *N.J.* 498, 509 (1954); *Andricsak v. National Fireproofing Corp.*, 3 *N.J.* 466, 471 (1950); *D'Amico v. Blanck*, 85 *N.J. Super.* 297, 303 (App. Div. 1964), certif. denied 43 *N.J.* 448 (1964); *Friese v. Nagle Packing Co.*, 110 *N.J.L.* 588, 589 (E. & A. 1933); *Helminsky v. Ford Motor Co.*, 111 *N.J.L.* 369, 373 (E. & A. 1933); Annotation, "Administrative Law - Hearsay Evidence," 36 *A.L.R.* 3d 12, 43 (1971).

The Commissioner's decision of December 1, 1970 (which had approved the procedures adopted by the local board) is the only decision from which the appeal before us was taken -- a decision which we now reverse.

Appeals from the orders entered by the local board, after separate hearings, expelling the appellants from school are pending undetermined before the Commissioner. The Commissioner is now in a position to and should proceed to hear and determine those appeals under the power grant by *N.J.S.A.* 18A:6-9. Such determinations will embrace all issues, including that of the alleged guilt of the students and the penalties to be imposed if they are found guilty.

The history of this litigation, the controversy which it has engendered at the local level and the desirability of a speedy resolution of the charges and issues presented all militate against our granting the request made by the parties hereto that, in the event we did not affirm the Commissioner's decision of December 1, 1970, we remand the cases to the local board of education for further proceedings rather than call on the Commissioner to proceed with the appeals.

Now that the Commissioner has our ruling as to the basic issue presented, he should proceed to hear and determine the appeals promptly.

**Board of Education of the City of Passaic,**

*Petitioner-Respondent,*

**v.**

**Municipal Council of the City of Passaic,**

*Respondent-Appellant.*

**Decided by the Commissioner of Education November 16, 1970**

**Superior Court of New Jersey**
**Appellate Division**

Argued May 3, 1971; Decided May 6, 1971

Before Judges Conford, Kolovsky and Carton.

On appeal from the Commissioner of Education.

Mr. Otto F. Blazsek, Assistant City Counsel, argued the cause for appellant.

Mr. Louis Marton, Jr. argued the cause for respondent, Passaic Board of Education.

Mr. George F. Kugler, Jr., Attorney General, filed a Statement in Lieu of Brief (Mr. Gordon J. Golum, Deputy Attorney General, of counsel).

**PER CURIAM**

The Municipal Council of the City of Passaic appeals from the decision, dated November 16, 1970, of the State Commissioner of Education in which he found and determined that

> "amounts of $177,635 for current expenses and $4,700 for capital outlay for a total of $182,335 must be added to the amounts previously certified by the Mayor and Council to be raised for expenses of the Passaic School District in order to provide sufficient funds to maintain a thorough and efficient school system,"

and directed

> "the Council of the City of Passaic to add to the previous certification of $5,968,803.60 for the current expenses of said school district the sum of $177,635 so that the total amount of the local tax levy for current expenses shall be $6,146,438.60 . . . [and] that the Council add to the previous certification of $14,395.50 for capital outlay the sum of $4,700 so that the total amount of the local tax levy for capital outlay shall be $19,095.50."

The Commissioner acted within the scope of his statutory power. See *Bd. of Ed., E. Brunswick Twp. v. Twp. Council, E. Brunswick*, 48 *N.J.* 94 (1966) and *Bd. of Ed. of Elizabeth v. City Coun. of Elizabeth*, 55 *N.J.* 501 (1970).

Further we are satisfied, particularly in view of the Commissioner's expertise, that his findings and determinations were not arbitrary and could reasonably have been reached on the evidence present in the record. *Cf. Bd. of Ed. of Elizabeth v. City Coun. of Elizabeth, supra* at 507-508.

The decision of the Commissioner of Education is affirmed.

**Board of Education of the Township of Woodbridge,**

*Respondent,*

v.

Township Council of the Township of Woodbridge,
Middlesex County,

*Appellant.*

**Decided by the State Board of Education, October 7, 1970**

**SUPERIOR COURT OF NEW JERSEY**
**APPELLATE DIVISION**

Argued October 6, 1971; Decided October 15, 1971

Before Judges Lewis, Kolovsky and Halpern.

On appeal from State Board of Education.

Mr. Isadore Rosenbloom argued the cause for appellant.

Mr. Stewart M. Hutt argued the cause for respondent.

Mr. George F. Kugler, Jr., Attorney General of New Jersey, filed a statement in lieu of brief; Mr. Gordon J. Golum, Deputy Attorney General, of counsel.

**PER CURIAM**

The narrow issue presented on this appeal is whether the State Commissioner of Education and the State Board of Education have the authority to review the action of the Township Council of Woodbridge Township in reducing the school budget twice submitted by the Township Board of Education to the electorate and rejected by them.

Without attacking the merits of the determination by the State Board of Education, the appellant argues that "a fair and impartial hearing cannot be afforded by the Commissioner of Education or by the State Board of Education," and that "it is unjust and unfair to permit the Commissioner of Education to override the decision of the electorate and thereby increase the burden of the taxpayer." We find this appeal to be frivolous in view of the recent decisions by the Supreme Court which hold directly to the contrary. *Board of Education of the Township of East Brunswick v. Township Council of Township of East Brunswick*, 48 *N.J.* 94 (1966); *Board of Education of City of Elizabeth v. City Council of the City of Elizabeth*, 55 *N.J.* 501 (1970).

Affirmed.

**Beatrice M. Jenkins, et al.,**

*Petitioners,*

**v.**

**The Township of Morris School District Board of Education, et al., Morris County,**

*Respondents.*

**Decided by the Commissioner of Education, November 30, 1970.**

## STATE BOARD OF EDUCATION

### Decision

**APPEARANCES:**

For Petitioners, MacKenzie and Harding (Frank F. Harding, Esq., of Counsel)

For Respondent and Cross-Petitioner Morristown Board of Education, Meyner and Wiley (Stephen B. Wiley, Esq., of Counsel)

For Respondent Township of Morris School District Board of Education, Victor H. Miles, Esq.

For Respondent Morris Plains Board of Education, Paul Bangiola, Esq.

On November 30, 1970, the Commissioner of Education of the State of New Jersey decided a controversy between the parties involving his constitutional and statutory authority to merge or consolidate school districts, and the extent of his control over the termination and establishment of sending-receiving relationships between school districts in dealing with racial imbalance in the public schools pursuant to applicable judicial decisions under the Constitutions of the United States and the State of New Jersey.

On December 29, 1970, a notice of appeal to the State Board of Education from the Commissioner's decision was filed which included an application to toll the time for perfecting the appeal pending the outcome of a Petition for Certification of the cause to the Supreme Court of New Jersey. The petition was filed the same day.

Because the petition appears to raise valid questions of public importance as well as questions of constitutional and statutory interpretations which have not been heretofore judicially enunciated, and because our preliminary review of the prior proceedings indicates that the Supreme Court might probably entertain jurisdiction under Rules 1:1-2, 2:12-1 and 2:12-4, the application to toll the time to perfect proceedings before the State Board of Education is granted as of December 29, 1970, until such time as a determination is made on the Petition for Certification. In view of the provisions of R.2:9-1 (a) relating to supervision of proceedings on certification, we express no objection to the petition.

January 6, 1971

**Beatrice M. Jenkins, et al.,**

*Petitioners-Appellants,*

**v.**

**The Township of Morris School District and Board of Education,**

*Defendant-Respondent,*

**and**

**The Town of Morristown School District and Board of Education,**

*Defendant and Cross-Petitioner-Appellant,*

**and**

**The Borough of Morris Plains Board of Education,**

*Defendant.*

**Decided by the Commissioner of Education, November 30, 1970**

**Decision of the Supreme Court of New Jersey**
**September Term 1970**

Argued April 6 and 26, 1971. Decided June 25, 1971.

On certification to the Appellate Division.

*Mr. Frank F. Harding* and *Mr. Stephen B. Wiley* argued the cause for the appellants (*Messrs. MacKenzie & Harding*, attorneys for the appellants Beatrice M. Jenkins, et al.; *Mr. Stephen B. Wiley*, attorney for the appellant Morristown Board of Education; *Mr. Donald M. Malehorn Mr. Frank F. Harding*, on the brief).

*Mr. Victor H. Miles* argued the cause for the respondent.

*Mr. Paul Bangiola* argued the cause for the defendant Borough of Morris Plains Board of Education.

The opinion of the Court was delivered by

JACOBS, J.

The appellants sought to have the Commissioner of Education take suitable steps towards preventing Morris Township from withdrawing its students from Morristown High School and towards effectuating a merger of the Morris Township and Morristown school systems. The Commissioner was of the opinion that, even though such steps were highly desirable from an educational standpoint and to avoid racial imbalance, he lacked legal authority to take them and accordingly he dismissed the individual appellants' petition and the appellant Morristown's cross-petition. The appellants filed notice of appeal to the Appellate Division and we certified before argument there. 58*N.J.* 1 (1971).

Prior to 1865 Morristown and Morris Township were a single municipal unit. In that year Morristown received permission to incorporate as a separate entity and arbitrary boundary lines were drawn between the Township (Morris) and the Town (Morristown). Despite their official separation, the Town and the Township have remained so interrelated that they may realistically be viewed as a single community, probably a unique one in our State. The Town is a compact urban municipality of 2.9 square miles and is completely encircled by the Township of 15.7 square miles. The boundary lines between the Town and the Township do not adhere to any natural or physical features but cut indiscriminately across streets and neighborhoods. All of the main roads radiate into the Township from the Green located in the center of the Town and it is impracticable to go from most Township areas to other Township areas without going through the Town itself.

The Town is the social and commercial center of the community whereas the Township is primarily residential with considerable undeveloped area for further residential development. The Town has many retail stores and other commercial establishments surrounding its Green while the Township has only a few retail outlets located on its main roads. The Township has no business center or so-called "downtown" area but the Town's substantial shopping center serves in that aspect for both the Township and the Town. Most of the associations, clubs, social services and welfare organizations serving the residents of both the Town and the Township are located within the Town and, as members of the aforementioned organizations, the Town and Township residents are routinely

together at both work and play. The Morristown Green is a common meeting place for young people from botht the Town and Township; day care centers and park and playground facilities in the Town are used by the residents of both the Town and the Township; and little leagues and the like generally involve Town and Township teammates who play on both Town and Township fields.

There is also considerable interdependency in municipal public services. Thus the Town's Water Department supplies water to most of the Township residents; sewer service is rendered by the Town to some parts of the Township; Town and Township Fire and Police Departments regularly assist each other; and the Town and Township jointly operate the Public Library located within the Town. There are socio-economic and population differences between the Town and the Township but despite these differences the record before us clearly establishes that, as set forth in the Candeub report, the Town and Township "are integrally and uniquely related to one another" and "constitute a single community." The Candeub report was prepared for the Town by an established consulting community planning firm. The hearing examiner, whose findings were adopted and incorporated by the Commissioner of Education in his decision, found that the Morristown-Morris Community was essentially as described in the Candeub report; he noted further that the Township did "not dispute the interrelatedness between itself and the Town" though it contended that statutorily and technically the Town and Township are "separate entities for school purposes."

The Township has a population of about 20,000 including less than 5% blacks. The Town has a population of almost 18,000 including about 25% blacks. There was testimony that within this decade the Town's population of blacks would probably increase to between 44% and 48%. Because of employment considerations and other economic factors, black families generally locate in the Town rather than the Township. Town sales of single family homes average between $22,000 and $24,000 whereas the homes in the Township average between $40,000 and $60,000. Though the Town's school population is leveling off, its black school population is increasing steadily. As of 1969 when the hearings were held below, the Town's school enrollment was 2,823 and is not expected to exceed 3,200 by 1980 though its black school population is expected to increase from 39% to over 65% by that time. Its elementary schools are 43% black but are expected to be 70% black by 1980. On the other hand, the Township's public school enrollment of 4,172 will probably reach 6,700 by 1980 and is expected to remain overwhelmingly white. About 5% of the Township students are black and there was testimony that this percentage is likely to decrease rather than increase by 1980.

Most of the Town and Township schools are located near the Town boundary line and the hearing examiner made pointed references and findings to heir gross disparities in racial composition. Thus he noted that the Town's Thomas Jefferson School with its 48% black enrollment was "very close to the Township's Woodland School with zero percent black enrollment"; that geographic proximity" also invited attention to George Washington School

(Town, 45%) and Normandy Park School (Township, 9%) and to Lafayette Junior High School (Town, 42%) and Alfred Vail School (Township, 10%); and he pointed out that the Alexander Hamilton School (Town, 35%) was "equidistant" between Sussex Avenue School (Township, 5%) and Hillcrest School (Township, less than 1%).

So far as Morristown High School is concerned, the present black student population is about 14%. But its student body now includes residents of Morris Township and the neighboring municipalities, Borough of Morris Plains and Harding Township. The projections introduced by the Town indicate that if the Morris Township students are withdrawn, the percentage of blacks in Morristown High School will double immediately, and will probably reach 35% by 1980; they indicate further that if the Morris Plains and Harding students are also withdrawn the black enrollment at Morristown High School will probably reach 56% by 1980. The hearing exainer accepted the Town's projections since they appeared to him "essentially reasonable" and no "real projections in contradiction" had been offered.

For over a hundred years the Town and Township have had a sending-receiving relationship under which the Township sends Township students to Morristown High School. There was a short interruption which continued only through 1958 and 1959. As of 1962 the Town and Township executed a formal 10-year sending-receiving contract and the Township has since been regularly sending its 10th, 11th, and 12th grade students to Morristown High School. The contract contains a provision to the effect that after the ten-year term the parties shall be free to make whatever arrangements they mutually agree upon "subject to the provisions of law and the approval of the Commissioner of Education." Incidentally, the residents of Morris Plains and Harding now at Morristown High School include grade 9 through 12 students who attend under designation without formal contract.*

Morristown High School is an excellent educational institution and offers diversified and comprehensive courses of instruction including seven full vocational programs and an equal number of advanced college placement courses in English, social studies, science and language. It has a total of 150 courses in contrast to the State median of 80-89 courses. It operates with an eight-period day, staggering arrival and departure times. It accommodates 1950 students and by using a nine-period day can accommodate 2450 students; it is anticiapted that the High School population will not reach this latter figure until 1974. If the Township is permitted to withdraw its students, Morristown High School

*Harding Township was originally a party to the proceedings but was permitted to withdraw by consent. Before the Commissioner, the Borough of Morris Plains sought a regionalization of schools at the high school level and joined in the request to prevent the withdrawal of Morris Township students from Morristown High School. The Borough took no appeal from the Commissioner's determination and before us its counsel simply filed a statement in lieu of brief which joined in the relief sought by the appellants "except that his demands for regionalization would be that of a limited public regional high school for grades nine through twelve."

will have remaining about 1300 students as of 1974 and if, in addition, Morris Plains and Harding are permitted to change their designation, the High School will then have only about 800 students. The hearing examiner found that "to be left with only Harding and Morris Plains – and especially to be left alone – would impose the following disadvantages:

"1. By dint of reduced size alone Morristown High School could not continue to provide the same scope and variety of courses.

2. Withdrawal of Township students would mean withdrawal of a significant number of educationally highly-motivated, capable students, and this is likely to have an adverse effect upon the performance and motivation of the remaining Town students.

3. The remaining students would be, as a group, from lower socio-economic backgrounds and be less oriented toward academic achievement, with the result that the program structure will have to be drastically re-oriented.

4. The percentage of black students in the High School will be approximately as stated above: with Harding and Morris Plains, 27% in 1974 and 35% in 1980; without Harding and Morris Plains, 44% in 1974 and 56% in 1980.

5. Morristown High School will not be able to maintain its place in the scale of excellence in terms of breadth and quality of program.

6. It is probable that, as a consequence, it will have more difficulty in keeping and attracting the same high quality faculty.

7. With the change in program and reputation and the loss in tuition revenue, it is possible that the Town will not be as able or as willing to support financially its school system as it currently is.

8. The Township students will be denied the privilege of an integrated education.

9. The sudden alteration in the racial composition of the High School might aggravate the tendency of potential white buyers to avoid purchasing houses in Morristown."

On the issue of total K-12 merger between the Town and Township, the examiner received considerable testimony during the hearings before him. In the main it most persuasively supported the high educational desirability and economic feasibility of such a merger. The examiner, after pointing to the sharp contrast between the Town's K-12 black enrollment of 39% (projected to over 65% by 1980) and the Township's white enrollment of 95%, stressed that "the close proximity of the Town and Township elementary schools makes the

disparity easily visible to and easily felt by the students of the two districts" and that "the community with which Morristown residents, including students, identify extends beyond the bounds of the Town and encompasses the Township." He firmly set forth his view that if there is a failure to merge "the black student population of Morristown – particularly at the elementary school level – will suffer the same harmful effects that the Commissioner of Education has worked so hard to eliminate within single school districts throughout the State." And though he did not deal with it in explicit terms there is little doubt that he subscribed to the Town's testimony as to the advantages of total merger, set forth as follows in the report submitted to the Town by the Engelhardt educational consulting firm and introduced in evidence at the hearings below:

> "The advantages to both Morristown and to Morris Township of a K-12 merger may be summarized this way:
>
> 1. Establishment of a racial balance which represents the racial composition of the community. Bi-racial experience will be available in the early grades where it has important benefits for both white and Negro students in terms of interracial attitudes and preferences and at the later years where it appears to have important benefits to members of minority groups.
>
> 2. Representation of the socio-economic spectrum of the community at all levels of schooling.
>
> 3. Equal educational opportunity available to all students without regard to background, race, or residence.
>
> 4. Avoidance of invidious comparison between the Morristown High School and a Township School, a comparison ultimately based on race.
>
> 5. Avoidance of the deterioration and pejoration of Morristown High School because of racial concentration, loss of reputation, curtailment of program, and ultimate reduction in per-pupil expenditure.
>
> 6. Development of a district which represents a natural community and avoidance of the creation and perpetuation of racial imbalance.
>
> 7. Development of a climate of education which represents the society in which the students lives.
>
> 8. Development of a school district and a high school large enough to allow the maximum return on the funds invested and to permit a program broad enough to meet a wide range of pupil needs.
>
> 9. Development of an educational pattern related to and serving th single Morristown-Township community.

10. Reduction in the number of school districts in the area from four to three.

11. Development of greater vertical coordination of program and greater flexibility in facilities, curriculum, and organization."

In January 1968 the Township Board of Education conducted a non-binding referendum among the Morris Township residents. The voters were asked whether they favored a separate K-12 school system for Morris Township or a K-12 merger with Morristown. The vote was 2164 to 1899 in favor of a separate K-12 system. The examiner found that prior to the vote six of the eight members of the Township Board of Education had been on record in favor of some sort of merger; that Board members agreed beforehand to be bound by the results of the referendum; that since the referendum the Board has conducted itslef as it the decision were irrevocably made to have a separate school system including a separate high school; and that the Board declined to participate "in a study of regionalization with the other school districts upon the invitation of the County Superintendent of Schools in accordance with the Commissioner's urgent recommendation."

Following the referendum the Township Board of Education set upon a program for the construction of a separate Township High School for Township residents in lieu of the Morristown High School. A bond referendum in connection with the proposed construction was scheduled but was restrained, originally by the Commissioner of Education and later by this Court. In this proceeding the Township Board has pressed for vacation of the restraint and has apparently concentrated all of its efforts towards the building of a new high school in pursuance of the vote at the non-binding referendum. In his decision the Commissioner was highly critical of that referendum and the Board's conduct in connection therewith. Citing *Hackensack Bd. of Education v. Hackensack*, 63 *N.J. Super.* 560 (*App. Div.* 1960), and *Botkin v. Westwood*, 52 *N.J. Super.* 416 (*App. Div.*), *Appeal dismissed*, 28 *N.J.* 218 (1958), he described the non-binding referendum as "illegal and an improper abdication of the Township Board's responsibility to perform its function." And he flatly condemned the pre-vote "pledge of all but one" of the Board members to abide by the results of the non-binding referendum, noting that it "improperly delegates the responsibility for ultimate decision."

The Commissioner was also critical of the Township Board's refusal, since the vote, to consider any alternative to a new high school and its failure to participate in the regionalization study which he had urgently recommended. He expressed his particular concern with "the adverse educational impact of the proposed withdrawal of the Morris Township students from Morristown High School" and with "the long-range harmful effects to the two school systems" in the light of "the growing racial imbalance between the entire student populations of the Town and the Township." And he further expressed his desire to act, within his powers, "so as to forestall the development of what may

be another urban-suburban split between black and white students." But having pointedly made that clear, he then proceeded to determine that he had no power, either to prohibit the withdrawal of Township students from Morristown High School, or to direct any steps on the part of the respective Boards towards merger of their school systems, or to grant any other relief towards avoidance of the baneful effects he so soundly envisions. Accordingly he lifted the restraint he had originally granted and dismissed the petition and cross-petition which had been duly filed by the appellants now before us.

The Commissioner's flat disavowal of power despite the compelling circumstances may be sharply contrasted with the sweep of our pertinent constitutional and statutory provisions and the tenor of our earlier judicial holdings. *See N.J. Const.*, art. 1, para. 5; art. 8, sec. 4, para. 1 (1947); *N.J.S.A.* 18A:4-23, 24; *N.J.S.A.* 18A:6-9; *Bd. of Ed. of Elizabeth v. City Coun. of Elizabeth*, 55 *N.J.* 501 (1970); *Bd. of Ed., E. Brunswick Tp. v. Tp. Council, E. Brunswick*, 48 *N.J.* 94 (1966); *Booker v. Board of Education, Plainfield*, 45 *N.J.* 161 (1965); *Morean v. Bd. of Ed. of Montclair*, 42 *N.J.* 237 (1964); *See also In re Masiello*, 25 *N.J.* 590(1958); *Laba v. Newark Board of Education*, 23 *N.J.* 364 (1957); *Schults v. Bd. of Ed. of Teaneck*, 86 *N.J. Super.* 29 (*App.Div.* 1964), *Aff'd*, 45 *N.J.* 2 (1965).

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 schol laws or under the rules of the State Board or the Commissioner. *N.J.S.A.* 18A:6-9.

We have from time to time been called upon to reaffirm the breadth of the Commissioner's powers under the State Constitution and the implementing legislation. Thus in *Laba*, *supra*, 23 *N.J.* 364, we held that the Commissioner's "primary responsibility is to make certain that the terms and policies of the School Laws are being faithfully effectuated" (23 *N.J.* at 382) and he is empowered to remand controversies and disputes "for further inquiry" at the local board level when such course appears appropriate. 23 *N.J.* at 383. In *Masiello*, *supra*, 25 *N.J.* 590, we rejected a narrow interpretation by the

Commissioner as to his powers on review of determinations by the State Board of Examiners and held that his responsibilities entailed independent factual findings andindependent interpretations of State Board rules. 25 *N.J.* at 606-07.

In *East Brunswick, supra*, 48 *N.J.* 94, the voters twice rejected the Township Board of Education's school budget and the Township Council thereupon cut the budget. The Board filed a petition with the Commissioner of Education and we were asked to decide whether the Commissioner had power to determine the controversy between the Board and the Council and power to order restoration of the cut in the budget. We found that he did, pointing out that since as early as 1846 the Legislature had charged the State Commissioner with the duty of obtaining faithful execution of the school laws and that at no time had his "comprehensive statutory responsibility" for deciding all controversies or disputes under the school laws or the State Board's regulations ever been "withdrawn or narrowed." 48 *N.J.* at 101. Referring to the constitutional mandate for the maintenance and support of a throough and efficient school system (art. 8, sec. 4, para. 1), we noted that the Legislature had directed the local school districts to provide "suitable school facilities and accommodations" (*R.S.* 18:11-1; *N.J.S.A.* 18A:33-1, 2) and had vested the State supervisory agencies "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." 48 *N.J.* at 103-04. We held that where the Commissioner finds that the budget fixed by the local governing body is insufficient to satisfy educational requirements and standards he should direct local corrective action or fix the budget "on his own." 48 *N.J.* at 107. *See also Bd. of Ed. of Elizabeth v. City Coun. of Elizabeth, supra*, 55 *N.J.* 501.

The history and vigor of our State's policy in favor of a through and efficient public school system are matched in its policy against racial discrimination and segregation in the public schools. Since 1881 there has been explicit legislation declaring it unlawful to exclude a child from any public school because of his race (*L.* 1881, *c.* 149; *N.J.S.A.* 18A:38-5.1), and indirect as well as direct efforts to circumvent the legislation have been stricken judicially. See *Pierce v. Union District School Trustees*, 46 *N.J.L.* 76 (*Sup.Ct.* 1884), *Aff'd*, 47 *N.J.L.* 348 (*E. & A.* 1885); *Raison v. Bd. of Education, Berkeley*, 103 *N.J.L.* 547 (*Sup.Ct.* 1927); *Patterson v. Board of Education*, 11 *N.J.Misc.* 179 (*Sup.Ct.* 1933), *aff'd*, 112 *N.J.L.* 99 (*E. & A.* 1934); *Hedgepeth v. Board of Education of Trenton*, 131 *N.J.L.* 153 (*Sup. Ct.* 1944). In 1947 the delegates to the Constitutional Convention took pains to provide, not only in general terms that no person shall be denied any civil right, but also in specific terms that no person shall be segregated in the public schools because of his "religious principles, race, color, ancestry or national origin." Art. 1, para. 5. Implementing legislation now provides that persons shall have the opportunity to obtain "all the accommodations, advantages, facilities, and privileges of any place of public accommodation," including any public school, "without discrimination because of race, creed, color, national origin, ancestry" etc. *N.J.S.A.s, 10:5-4, 5(1); see Blumrosen*, "Antidiscrimination Laws in Action in New Jersey: A Law-Sociology Study," *19 Rutgers L.Rev.* 189, 257-258 (1965).

In *Booker v. Board of Education, Plainfield, supra*, 45 *N.J.* 161, we sympathetically applied our constitutional and statutory policies towards the elimination of racial segregation or imbalance. Although there was no official policy of segregation there was a concentration of black students in particular schools as the result of what the Commissioner described as " 'a constellation of socio-economic factors.' " 45s, N.J. *at 166.* The Commissioner found that this racial concentration or imbalance was educationally undesirable and upheld a corrective plan which satisfied his then stated requirement for the elimination of schools which were " 'completely or almost entirely Negro.' " We held that the Commissioner's requirement was insufficient and that his proper goal was the broader one of "a reasonable plan" for the entire school system "achieving the greatest dispersal consistent with sound educational values and procedures." 45 *N.J.* at 180.

When the Supreme Court in *Brown v. Board of Education of Topeka*, 374 *U.S.* 483, 98 *L.Ed.* 873 (1954), 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. However, as we said in *Booker*, while such feeling and denial may appear in intensified form when segregation represents official policy, "they also appear when segregation in fact, though not official policy, results from long standing housing and economic discrimination and the rigid application of neighborhood school districting." 45 *N.J.* at 168. *Brown* itself did not deal with the latter or *de facto* type of segregation and the very recent Supreme Court decisions in sweeping furtherance of *Brown* may fiarly be viewed as confined to situations where there had been *de jure* segregation through dual public school systems. *See Swann v. Charlotte-Mecklenburg Bd. of Ed.*, ---- *U.S.*---, 28 *L.Ed.2d* 554 (1971); *Davis v. Board of School Commrs.*, ---- *U.S.*----, 28 *L.Ed.* 2*d* 577 (1971); *McDaniel v. Barresi*, ---- *U.S.*----, 28 *L.Ed.2d* 582 (1971); *North Carolina Bd. of Ed. v. Swann*, ---- *U.S.*----, 28 *L.Ed.2d* 586 (1971). But in *Booker* we did cite several lower federal court decisions which had taken the position that in the circumstances presented to them the continuance of *de facto* segregation in the local public schools would violate the federal constitution. 45 *N.J.* at 169-70. *See United States v. Jefferson County Board of Education*, 372 *F.2d* 836, 873-76 (5 *Cir.* 1966), *s.c.*, 380 *F.2d* 385 (5 *Cir.*). *cert. denied*, 389 *U.S.* 840, 19 *L.Ed.2d* 108 (1967); *Hobson v. Hansen*, 269 *F.Supp.* 401, 503-511 (*D.D.C.* 1967), *aff'd*, 408 *F.2d* 175 (*D.C.Cir.* 1969); *cf. Davis v. School District of Pontiac, Inc.*, 309 *F.Supp.* 734(*E.D. Mich.* 1970), *aff'd*, ---- *F. 2d* ---- (6 *Cir.* 1971).

In *Lee v. Nyquist*, 318 *F. Supp.* 710 (*W.D. N.Y.* 1970), the New York Commissioner of Education had undertaken broad steps towards elimination of *de facto* segregation in the public schools. The New York Legislature sought to curb these by enacting a statute which prohibited the implementation of plans designed to alleviate racial imbalance in the schools except with the approval of "a local elected board." 318 *F.Supp.* at 718. The three-judge district court struck this statute as invidious and unconstitutional discrimination. In the course

of his opinion, Judge Hays pointed out that although there may be no general duty under the federal constitution to undo *de facto* segregation, "it is by now well documented and widely recognized by educational authorities that the elimination of racial isolation in the schools promotes the attainment of equal educational opportunity and is beneficial to all students, both black and white" (318 F.Supp. at 714); and he approvingly quoted the following from a recent policy statement by the Regents of the University of the State of New York:

> "[T]he elimination of racial segregation in the schools can enhance the academic achievement of non-white children while maintaining achievement of white children and can effect positive changes in interracial understanding for all children. The latter c nsideration is paramount. If children of different races and economic and social groups have no opportunity to know each other and to live together in school, they cannot be expected to gain the understanding and mutual respect necessary for the cohesion of our society. The stability of our social order depends, in large measure, on the understanding and respect which is derived from a common educational experience among diverse racial, social, and economic groups – integrated education. The attainment of integrated education is dependent upon the elimination of racial segregation in the schools." 318 *F.Supp.* at 714.

The judgment in *Lee v. Nyquist* was summarily affirmed by the Supreme Court without opinion. 39 *U.S.L.W.* 3478 (May 4, 1971).

Views along the lines found in *Lee v. Nyquist* were expressed by this Court in *Booker*. We there noted that 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. Bd. of Ed. of Montclair, supra*, 42 *N.J.* at 242-44; *cf. Schults v. Bd. of Ed. of Teaneck, supra*, 86 *N.J. Super.* 29. We pointed out in *Booker* that "in a society such as ours, it is not enough that the 3 R'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 sedparation 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." 45*N.J.* at 170-71.

It is true that *Booker* dealt with a community which was wholly contained within a single district fixed by municipal lines whereas here the commuity involves two districts. When dealing with *de jure* segregation the crossing of district lines has of course presented no barrier whatever. In *Haney v. County Board of Education of Sevier County, Ark.*, 410 *F.2d* 920 (8 *Cir.* 1969), *s.c.*, 429 *F.2d* 364 (8 *Cir.* 1970), the court of appeals flatly rejected a district court's notion that consolidation to eliminate segregation in the public schools may not be achieved without the voter approval contemplated by state law. In the course of his opinion, Judge Lay noted that "state political subdivisions have long ago lost their mastery over the more desired effect of protecting the equal rights of all citizens" (410 *F. 2d* at 924); he pointed out that political subdivisions of the state are "mere lines of convenience for exercising divided governmental responsibilities" and "cannot serve to deny federal rights" (410 *F.2d* at 925); he stressed that equal protection rights do not depend on the votes of the majority (410 *F.2d* at 925); and in response to those who still persist in their opposition to integration, he had this to say:

> Separatism of either white or black cildren in public schools thrives only upon continued mistrust of one race by another. It reflects a continuum of the fallacious "separate but equal" doctrine, which the law now acknowledges serves only as a sleeping sickness, whether it be engendered by the white or black. Separatism is just as offensive to the law when fostered by the Negro community as when the white community encourages it. Perpetuation of a bi-racial school system moves only toward further intolerances and misunderstandings. The law can never afford to bend in this direction again. The Constitution of the United States recognizes that *every* individual, white or black, is considered equal before the law. 410*F.2d* at 926.

As the Supreme Court pointed out in *Reynolds v. Sims*, 377 *U.S.* 533, 12 *L.Ed.* 2*d* 506, 535 (1964), political subdivisions of the state whether they be "counties, cities or whatever" are not "sovereign entities" and may readily be bridged when necessary to vindicate federal constitutional rights and policies. *See Gomillion v. Lightfoot*, 364 *U.S.* 339, 347, 5 *L.Ed.2d* 110, 116 (1960); *United States v. State of Texas*, 321 *F.Supp.* 1043, 1050-58 (*E.D. Texas* 1970); *cf. Jackman, et al. v. Bodine, et al.*, 55 *N.J.* 371 (1970). It seems clear to us that, similarly, governmental subdivisions of the state may readily be bridged when necessary to vindicate state consitutional rights and policies. This does not entail any general departure from the historic home rule principles and practices in our State in the field of education or elsewhere; but it does entail suitable measures of power in our State authorities for fulfillment of the educational and racial policies embodied in our State Constitution and in its implementing legislation. Surely if those policies and the views firmly expressed by this Court in *Booker* (45 *N.J.* 161) and now reaffirmed are to be at all meaningful, the State Commissioner must have power to cross district lines to avoid "segregation in fact" (*Booker*, 45 *N.J.* at 168), at least where, as here, there are no impracticalities and the concern is not with multiple communities but with a single community without visible or factually significant internal boundary separations.

In addition to the broad general grants of supervisory powers to the Commissioner, typified by statutes such as *N.J.S.A.* 18A:4-23 and *N.J.S.A.* 18A:6-9, there are legislative enactments which specifically call for crossing of district lines. *See N.J.S.A.* 18A:38-8 *et seq.*; Blumrosen, *supra*, 19 *Rutgers L.Rev.* at 266-69. Among these are the provisions which relate explicitly to sending-receiving situations such as the one now in existence between Morris Township and Morristown; as we have already noted, that relationship under which the Township sends Township students to Morristown High School has, apart from a two-year interruption in 1958 and 1959, continued for over a hundred years. *N.J.S.A.* 18A:38-11 provides that a board of education in a district lacking high school facilities shall designate a high school outside its district for attendance by its high school students; and *N.J.S.A.* 18A:38-13 provides, in pertinent part, that no such designation "shall be changed or withdrawn" except for "good and sufficient reason upon application made to and approved by the commissioner."

Antecedents of *N.J.S.A.* 18A:38-11 and 13 were in force before the Legislature adopted *L.* 1953, *c.* 273—now *N.J.S.A.* 18A:38-20 *et seq.* That statute provides that when a board of education of a receiving district is furnishing high school education to students from a sending district and additional facilities are required, the receiving district may, as a condition to providing the additional facilities, enter into a contract for a term not exceeding ten years under which the receiving district agrees to provide the education and the sending district agrees not to withdraw its students except as provided in paragraph two of the statute. *N.J.S.A.* 18A:38-20. That paragraph sets forth that any receiving district may apply to the Commissioner for consent to terminate the contract on the ground that it is no longer able to provide the necessary facilities, and any sending district may apply to the Commissioner for permission to withdraw its students and provide its own high school facilities on the ground that the receiving district is not providing suitable facilities or that the receiving district will not be seriously affected educationally or financially by the withdrawal. *N.J.S.A.* 18A:38-21.

Apparently the 1953 enactment was intended to give additional assurance to the receiving district furnishing additional facilities that it would not be endangered during the ten-year contract period. But the enactment was not in anywise intended to repeal nor did it have the effect of repealing the preexisting statutes such as that now embodied in *N.J.S.A.* 18A:38-13. Thus when the 1962 contract expires or is terminated in accordance with its terms, the Township's prior designation of Morristown High School continues in full effect until it is changed or withdrawn in strict accordance with *N.J.S.A.* 18A:38-13. That statute appeared in the 1937 Revision as part of *R.S.* 18:14-7. At that time it made no specific reference to withdrawal but did provide that no change of designation could be made except for good and sufficient reason and subject to the approval of the Commissioner. In 1956 *R.S.* 18:14-7 was amended to provide that the designation shall not be "changed or withdrawn" unless good and sufficient reason exists for the change and subject to the approval of the Commissioner *L.* 1956, *c.* 68. In the 1968 Revision of the Education Law (*L.*

1967, c. 271) the pertinent statutory language was put into its current form which explicitly provides, as set forth earlier, that the designation shall not be "changed or withdrawn" except for "good and sufficient reason upon application made to and approved by the commissioner." *N.J.S.A.* 18A:38-13.

Despite the cited broadening and sweep of the statutory terms, the Commissioner expressed the view that he had no power whatever under *N.J.S.A.* 18A:38-13 to prevent the withdrawal of the Morris Township students from the Morristown High School. He cited earlier administrative rulings in which his predecessors had taken the position that "once a school district provides its own high school facilities" *R.S.* 18:14-7 is inapplicable. They in turn had relied on language in *R.S.* 18:14-7 to the effect that any district which "lacks or shall lack high school facilities" may designate a high school outside its district for its high school students. In the present statute (*N.J.S.A.* 18A:38-11) the reference to "shall lack" is omitted and the provision now is that every district "which lacks high school facilities" shall designate a high school in another district for its high school students. Morris Township still comes within the literal terms of the statute but, more important, is our present disapproval of the administrative holding that the unilateral determination by Morris Township to build its own high school (*cf. N.J.S.A.* 18A:45-1) has the legal effect of nullifying the precise statutory requirement (*N.J.S.A.* 18A:38-13) under which ultimate withdrawal of its high school students from Morristown High School may not be accomplished without a prior showing to the Commissioner of good and sufficient reason and express approval on his part.

Surely on examination of the statutory terms themselves there is nothing in *N.J.S.A.* 18A:38-13 to support the Commissioner's restrictive construction. Nor have we found anything legislatively or judicially sustaining his suggestion that the history of the sending-receiving statute reveals "the total vulnerability of a receiving district upon the decision of a sending district to erect its own facilities and educate its pupils itself." While the earlier administrative rulings had that effect, they simply constituted the narrowing of a broad legislative provision in a manner comparable with other administrative self-limiting approaches which we have repeatedly rejected. *Cf. Bd. of Ed., E. Brunswick Tp. v. Tp. Council, E. Brunswick, supra*, 48 *N.J.* 94; *Booker v. Board of Education, Plainfield, supra*, 45 *N.J.* 161; *In re Masiello, supra*, 25 *N.J.* 590; *Laba v. Newark Board of Education, supra*, 23 *N.J.* 364. The Commissioner has been appropriately charged with high responsibilities in the educational field and if he is faithfully to discharge them in furtherance of the State's enlightened policies he must have corresponding powers. The Legislature has here granted them in broad terms and it would disserve the interests of the State to permit their administrative narrowing which in effect represents not only a disavowal of power but also a disavowal of responsibility.

In view of all of the foregoing, it is evident that the Commissioner erred in dismissing, for lack of power under *N.J.S.A.* 18A:38-13, the appellants' petition and cross-petition that he take suitable steps towards preventing Morris Township from withdrawing its students from Morristown High School. We come now to consideration of his dismissal of their further petition that he take suitable steps towards effectuating a merger of the Morris Township and Morristown school systems. Here again the dismissal was rested on lack of power, the Commissioner having concluded that the State constitutional provisions (art. 1, para. 5; art. 8, sec. 4, para. 1) and his comprehensive general statutory powers were insufficient to enable him to deal with the situation. *See N.J.S.A.* 18A:4-22, 23, 24, 25, 29; *N.J.S.A.* 18A:6-9; *N.J.S.A. 18A:55-2; cf. N.J.S.A.* 18A:4-10, 15, 16; *N.J.S.A.* 18A:45-1.

In reaching his conclusion the Commissioner stressed that while the Legislature had made specific provision for the merger of local districts into regional districts with voter approval (*N.J.S.A.* 18A:13-34), it had not made specific provision for any "alternative method." He expressed the view that the legislative grant to him of "broad supervisory powers" did not enable him to act without the stated requirements such as voter approval though this approach may be contrasted with *East Brunswick, supra,* 48 *N.J.* 94, where we recently upheld the Commissioner's power to reinstate a local school budget rejected by the local voters. For present purposes we need not pursue the issue in its broader aspects for the situation here is indeed a specially compelling one and in traditional judical fashion our holding may be confined to it. As has already been pointed out, here we are realistically confronted not with multiple communities but with a single community having no visible or factually significant internal boundary separations, and with a record which overwhelmingly points educationally towards a single regional district rather than separate local districts.

The projections leave little room for doubt as to the unfortunate future if suitable action is not taken in timely fashion. The Commissioner explicitly referred to the growing racial imbalance between the Town and the Township and to its long-range harmful effects on the school systems of both; and he recognized that unless forestalled there would be another urban-suburban split between black and white students. Unlike other areas in the State, the split can readily be avoided without any practical upheavals; indeed the record indicates not only that merger would be entirely "reasonable, feasible and workable" (*Swann v. Charlotte-Mecklenburg Bd. of Ed., supra,* U.S. at, 28 *L.Ed.2d at 575) but also that it would not significantly involve increased bussing or increased* expenditures since most of the schools within the Town and the Township are located near their boundary line. So far as the educational advantages of merger are concerned, the testimony most persuasively indicates that they will redound to the benefit of the students from the Township as well as the Town; such minor dissent as appears in the testimony is in flat conflict with the educational views firmly held by the Commissioner and with the judicial views expressed by this Court in *Booker* (45 *N.J.* 161).

In the course of his decision, the Commissioner recognized that, as a matter of State policy and apart from federal dictates, there is an "obligation to take affirmative steps to eliminate racial imbalance, regardless of its causes." Citing our constitutional provisions for a thorough and efficient school system (art. 8, sec. 4, para. 1) and against segregation in the schools (art. 1, para. 5), he noted: "it may well be that, given the racial disparity between the school populations in Morristown and Morris Township and given the disparity in socio-economic makeup of the two communities and the resultant difference in capacity to provide quality education programs, the Legislature has not fulfilled its constitutional obligation to provide for a thorough and efficient system of public schools." But it seems to us that rather than suggesting an intolerable legislative default, he could and should more reasonably and suitably have found, as we did in *Booker*, *supra*, 45 *N.J.* at 173-81, faithful legislative fulfillment of the constitutional mandate in the many broad implementing enactments delegating comprehensive powers to the Commissioner.

In *Booker* we held that the Commissioner had the responsibility and power of correcting *de facto* segregation or imbalance which is frustrating our State constitutional goals; we pointed out that where the Commissioner determines that the local officials are not taking resonably feasible steps towards the adoption of a suitable desegregation plan in fulfillment of the State's policies, he may either call for a further plan by the local officials or "prescribe a plan of his own." 45 *N.J.* at 178. There was no specific statutory language to that effect but we found sufficient legislative authority in the various general statutes which have been adopted by the Legislature from time to time and are now embodied in the 1968 Revision of the Education Law (*L.* 1967, *c.* 271). In particular, we referred to the Commissioner's long standing and comprehensive power under *N.J.S.A.* 18A:6-9, pertinent here, to decide all controversies under the school laws or under the rules of the State Board of Education or the Commissioner (45 *N.J.* at 175), and we cited Blumrosen, *supra*, 19 *Rutgers L.Rev.* at 261 where many other pertinent powers of the Commissioner are enumerated. These include, as set forth earlier in this opinion, many broad supervisory powers designed to enable him, with the approval of the State Board of Education, to take necessary and appropriate steps for fullfillment of the State's educational and desegregation policies in the public schools. *Booker*, *supra*, 45 *N.J.* at 173-81; *N.J.S.A.* 18A:4-22, 23, 24, 25, 29.

The Commissioner has been expressly vested with power to withhold State aid from any school district which fails "to obey the law or the rules or directions of the state board or the commissioner." *N.J.S.A.* 18A:55-2; *cf.* *N.J.S.A.* 18A:58-16. Similarly he has been expressly vested with power to withhold State aid from any school district which fails to provide "suitable educational facilities" including proper buildings and equipment, convenience of access and courses of study. *N.J.S.A.* 18A:33-1, 2; *cf.* *N.J.S.A.* 18A:11-1. On a broad interpretation, schools with feasibly correctable racial imbalances might well currently be viewed as not affording suitable educational facilities within the meaning of the statutory language. *Cf.* Blumrosen, *supra*, 19 *Rutgers L. Rev.*

at 259 n. 155. In any event, it may be noted that the Commissioner acted with unusual hesitancy when he merely recommended the study of regionalization in which the Township Board declined to participate; he could readily have directed its participation with the ample strength of an arsenal of powers including, *inter alia*, the power to withhold State aid (*N.J.S.A.* 18A:55-2) and the power to withhold approval of school construction. *N.J.S.A.* 18A:45-1; *N.J.S.A.* 18A:18-2.

The Commissioner's criticism of the Township Board's conduct in connection with the non-binding referendum was well taken. Apart from whether Board members had the right to seek a non-binding referendum at all (*compare Botkin v. Westwood*, *supra*, 52 *N.J.Super.* 416 *with Gamrin v. Mayor and Council of Englewood*, 76 *N.J. Super.* 555 (*Law Div.* 1962)) they clearly had no right to pledge themselves in advance to abandon their individual affirmative views in favor of the majority negative vote. *Cf. Cullum v. Bd. of Education of Tp. of North Bergen*, 15 *N.J.* 285 (1954). The vote was taken without the benefit of a suitable regionalization study on the part of the Township Board and without full and fair presentation to the voters of material considerations such as projected capital cost savings to Township taxpayers, etc. It has been suggested that it was motivated by constitutionally impermissible racial opposition to merger (*cf. Lee v. Nyquist*, *supra*, 318 *F. Supp.* 710; *West Morris Regional Board of Education v. Sills*,---- *N.J.*----- (1971) but we pass that by since the Commissioner made no finding to that effect and his powers were of course in nowise dependent on any such findings.

In the light of all that has been said earlier in this opinion, we now find that the Commissioner erred not only in the dismissal of the appellants' petition and cross-petition insofar as they related to withdrawal of Township students from Morristown High School but also insofar as they related to merger of the Morris Township and Morristown school systems. The Commissioner is adequately empowered to entertain such further proceedings pursuant to the petition and cross-petition as he finds appropriate and to grant such prayers therein as he considers warranted including (1) direction for continuance of the sending-receiving relationship after the expiration of the present contract and (2) direction that the Boards of the Township and Town proceed with suitable steps towards regionalization, reserving, however, supervisory jurisdiction to the Commissioner with full power to direct a merger on his own if he finds such course ultimately necessary for fulfillment of the State's educational and desegregation policies in the public schools.

Reversed.

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