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NEW JERSEY

SCHOOL LAW

DECISIONS

January 1, 1986 to December 31, 1986

VOLUME 4

PAGES 2379-3135

Saul Cooperman
Commissioner of Education

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NEW JERSEY

SCHOOL LAW

DECISIONS

January 1, 1986 to December 31, 1986

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CHARLES A. JURIS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF RIDGEFIELD PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

It is observed that timely exceptions to the initial decision were filed by petitioner pursuant to the applicable provisions of N.J.A.C. 1:1-16.4a, b and c.

In the Commissioner's judgment, the only viable issue to be addressed in the instant matter is that which is raised in the Board's affirmative defense in its answer to the Petition of Appeal. That issue is whether the relief which petitioner seeks before the Commissioner is time barred pursuant to the 90-day rule set forth in N.J.A.C. 6:24-1.2(b).

Contrary to the arguments advanced by petitioner before the ALJ and recited again in his exceptions, the Commissioner finds and determines that the facts of this matter clearly establish that petitioner had failed to comply with the 90-day time limitation set forth in N.J.A.C. 6:24-1.2(b).

In this regard, the Commissioner affirms those findings and conclusions in the initial decision which hold that

1. As chief school administrator and ex officio member of the Board, petitioner was aware of the official action taken by Board resolution (J-2) on September 4, 1985 fixing his annual salary at $60,000 for the 1985-86 school year.

2. Absent any formal action by the Board subsequent thereto to increase petitioner's annual salary to $64,200, the Board's resolution (J-2) of September 4, 1985 was consistent with the provisions of N.J.S.A. 18A:17-19 and N.J.S.A. 18A:29-4.3.

3. Petitioner's appeal on January 9, 1986 from the Board's action to fix his salary for the

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1985-86 school year far exceeds the 90-day rule contemplated by the provisions of N.J.A.C. 6:24-1.2(b).

4. Petitioner has advanced no reason before the Commissioner for the relaxation of the 90-day rule pursuant to N.J.A.C. 6:24-1.17.

Accordingly, in support of his determination in this matter, the Commissioner also relies on those decisions rendered by the Court in Riely, supra, and North Plainfield Education Association, supra, and hereby dismisses the instant Petition of Appeal as being untimely pursuant to N.J.A.C. 6:24-1.2(b).

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

September 29, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3817-86
AGENCY DKT. NO. 214-6/86

CHRISTOPHER B. FORD,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF TRENTON,
Respondent.

V. Margaret N. Wilber, Esq., for petitioner

Audrey P. Blackburn, Esq., for respondent (Lemuel H. Blackburn, Jr., Esq., attorney)

Record Closed: July 9, 1986 Decided: August 25, 1986

BEFORE **RICHARD J. MURPHY**, ALJ:

STATEMENT OF THE CASE

Petitioner appeals from his "exclusion" for one year from Trenton High School by the respondent Board of Education pursuant to N.J.S.A. 18A:37-2 for allegedly threatening to shoot a teacher. The issue is whether the respondent Board has proven the charge by a preponderance of the credible evidence. This opinion concludes that the charge has been sustained but that the penalty is appropriate.

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PROCEDURAL HISTORY

Petitioner was "excluded" from Trenton Central High School following a Board of Education hearing on May 29, 1986. The matter was forwarded to the Office of Administrative Law on June 13, 1986 and an application for emergency relief was heard on June 19 and denied by order of June 23, 1986. Plenary hearing was held on July 9, at which time the record was closed.

FINDINGS OF FACT

The incident resulting in petitioner's "exclusion" from Trenton Central High School[1] took place on May 8, 1986 after Ms. Velechenko's fifth period English class in which he was a student. The teacher testified that, after class, she encountered petitioner outside in the hall and that he said "I'm gonna bring in a .22 and shoot you." According to Ms. Velenchenko, who stated that she was horrified by this, the tone was serious and the manner hostile. The statement was not, however, accompanied by any threatening actions. The teacher immediately wrote up the matter and petitioner was suspended, as well as arrested. Before class, the petitioner, according to the teacher, stated that he and his friends were going to push her out of the classroom window. Ms. Velechenko also wrote this matter up, although she did not immediately report it and proceeded to teach the class. She further testified that petitioner had posed an increasingly difficult disciplinary problem since the September before and that he was disrupting her class and making her job "impossible". This had been brought to the attention of the disciplinarian in March, as well as the guidance counselor. Despite these problems, Ms. Velechenko stated that she was not hostile to the petitioner and had tried to help him, including talking to his sister. Petitioner's disciplinary record did not reflect any previous threats or violence against the staff or students.

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[1] Although expulsion proceedings were commenced pursuant to 18A:37-2.1, the petitioner was not expelled but was excluded, according to respondent's brief, and may apply for readmission to Trenton Central High in 1987. He further will be allowed to attend night classes. In that petitioner has not been expelled, the action of the Board would seem to constitute a suspension within the meaning of 18A:37-2, notwithstanding respondent's statement that he has been excluded, which is a term of art not present in the statute.

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Petitioner's recollection of the events on May 8 differs substantially. As to the alleged statement concerning the gun, he testified that he was out in the hall after class discussing senior cut day, an unauthorized spring ritual in which graduating seniors leave school without permission and go somewhere and party. He claimed that he was talking about cut day, which was scheduled for May 23, with an unidentified student, identified only as "man" and he made a statement to his friend that he had up until the 22nd for cut day. Ford claims that he used the word "22" to his friend, and this was overheard by Ms. Velechenko who asked "What's a 22?" to which he replied, "It's a gun." Petitioner categorically denied having stated to Ms. Velechenko that he was going to get a .22 caliber gun and shoot her. The witness to this conversation known only as "man" was not present at the hearing. Petitioner further denies having stated that he and his friends would throw the teacher out a window. There were not other witnesses presented as to this conversation. He further claimed that he and Ms. Velechenko frequently joked with each other, a claim which she vehemently denied.

The petitioner was suspended after Ms. Velechenko brought the threat of the shooting to the attention of the principal. Petitioner was immediately suspended pursuant to N.J.S.A. 18A:37-2.1 which authorizes suspension pending expulsion proceedings for any pupil who commits an assault or a teacher acting in the performance of his duties in a situation where his authority to so act is apparent. Those proceedings were held by the Board on May 29, within the 21 day period required by the statute. He received notice on May 28 and was advised that he was entitled to counsel, which he chose not to retain. He was advised of the Board's decision sustaining the charge of threats to do bodily harm to a teacher and setting forth his exclusion for a one year period.

Having heard testimony and considered the evidence, I FIND the following facts:

1. That on May 8, 1986, after Ms. Velechenko's fifth period English class, petitioner stated to her in the hallway that he was going to bring in a .22 caliber gun and shoot her. He did not accompany this statement with any threatening physical gestures.

2. That prior to Ms. Velechenko's English class, he stated to her that he and his friends would throw her out the classroom window. Ms. Velechenko then wrote the matter up but did not immediately report it or postpone the class.

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3. That petitioner had previously been defiant and disruptive in Ms. Velechenko's class causing her to refer the matter for discipline on several occasions resulting in one prior suspension during the school year.

DISCUSSION AND CONCLUSIONS OF LAW

The issue is whether the action of the respondent Board in excluding (suspending) petitioner for one year was procedurally proper and substantively based on a fair preponderance of credible evidence. For the reasons set forth below, this opinion affirms the action of the respondent Board.

The petitioner argues that the sanction imposed was not warranted by the facts or prior disciplinary record. He further notes that no assault was committed within the meaning of 18A:37-2.1 and N.J.S.A. 2C:12-1 and that threat does not fall within any of the specifically enumerated causes for suspension or expulsion contained in N.J.S.A. 18A:37-2. While petitioner concedes that the respondent Board technically complied with the requirements of procedural due process, he claims that the matter should have been expedited concerning the proximity to his graduation[2]. Respondent argues that the charge of threat to harm a teacher has been proven by a preponderance of the believable evidence and the penalty of exclusion for one year, with the option of seeking a G.E.D. or attending night classes and then reapplying in 1987, was mild given the serious nature of the threat. I **CONCLUDE**, first of all, that the threat alleged, while not within any specific provision of N.J.S.A. 18A:37-2 is sufficient if proven to justify suspension or expulsion, depending on the specific facts. See, e.g., Jesse Stevens v. Bd. of Ed. of Woodbury, 1972 S.L.D. 58. The statute clearly provides that conduct which shall constitute good cause for suspension or expulsion of a pupil guilty of such conduction 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;

[2]Respondent claims that petitioner would not have graduated even without a suspension due to low grades and poor attendance.

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c. Conduct of such character as to constitute a continuing danger to the physical well-being of other pupils;

d. Physical assault upon another pupil;

e. Taking, or attempting to take, personal property or money from another pupil, or from his presence, by means of force or fear;

f. Willfully causing, or attempting to cause, substantial damage to school property;

g. Participation in an unauthorized occupancy by any group of pupils or others of any part of any school or other building owned by any school district, and failure to leave such school or other facility promptly after having been directed to do so by the principal or other peson then in charge of such building or facility;

h. Incitement which is intended to and does result in unauthorized occupation by any group of pupils or others of any part of a school or other facility owned by any school district;

i. Incitement which is intended to and does result in truancy by other pupils; and

j. Knowing possession or knowing consumption without legal authority of alcoholic beverages or controlled dangerous substances on school premises, or being under the influence of intoxicating liquor or controlled dangerous substances while on school premises.

Clearly, threats to the teacher, even if they fall short of assault, can warrant suspension or expulsion.

I further **CONCLUDE** that the respondent Board has proved the charge of threat to harm by a preponderance of the credible evidence. Due to the circumstances of this case, it becomes a question of the teacher's word against the student's. In this case, Ms. Velechenko testified credibly and convincingly as to petitioner's threat. His version of the

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facts was, on its face, dubious and, further, contained an admission that he had made reference to a gun. The only available witness who might have corroborated the petitioner's account was not called. The teacher's claim of the threat is butressed by the fact that she also convincingly claimed that the petitioner had, before the class, threatened to throw her out a window. She reacted to both statements immediately, by either filling out a report or going to the principal and those actions enhance her credibility. While it may be possible that the petitioner was merely joking in both instances, Ms. Velechenko, with justification, failed to see the humor and, when considered against her previous disciplinary difficulties with the petitioner, was justified in taking the threat seriously.

As to the appropriateness of the sanction, I **CONCLUDE** that a suspension for one year with an opportunity for readmission in 1987 was reasonable under the circumstances. Though it can be argued that the petitioner was adequately punished by being suspended and thereby prevented from graduating with his classmates, it is first of all not clear that he would have graduated in any event. Second, a suspension at the end of the school year with a return in the fall would cover only the summer months when school is out. The penalty would therefore involve only a few days in May. This is not adequate to address the seriousness of the threat. Teachers must be able to function and perform their essential educational tasks free of both violence and threats of violence. Given the seriousness of the threats, in this instance suspension for a period of one year was appropriate and warranted and I so **CONCLUDE.**

I also **CONCLUDE** that the petitioner was afforded procedural due process by the respondent Board.

DISPOSITION

On the basis of the above findings of fact and conclusions of law, it is **ORDERED** that the action of the respondent Board in suspending petitioner for one year be and is hereby **AFFIRMED** and the appeal **DISMISSED.**

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

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

Aug. 25, 1986
DATE

RICHARD J. MURPHY, ALJ

AUG 25 1986
8/25/86
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

AUG 27 1986
DATE

OFFICE OF ADMINISTRATIVE LAW

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CHRISTOPHER B. FORD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner's exceptions and the Board's reply exceptions were timely filed pursuant to N.J.A.C. 1:1-16.4a, b and c.

Petitioner excepts to the ALJ's conclusion that the alleged threat was sufficient to justify suspension or expulsion. He also excepts to the ALJ's citing Jesse Stephens v. Board of Education of Woodbury, 1972 S.L.D. 58 for the proposition that the punishment of exclusion was appropriate in the instant matter. Instead, petitioner contends he cited the same case in his brief as an authority for excessive punishment imposed upon him. "***[I]n the Woodbury case, B.S. was allowed to finish the year, a privilege denied to Petitioner here." (Petitioner's Exceptions, at p. 1)

Petitioner also argues that no effort appears to have been made to determine whether, in light of his attendance record and scholastic standing, he would have graduated had the instant matter not arisen. He also finds "difficult to accept" (Petitioner's Exceptions, at p. 2) the ALJ's conclusion that "[t]he penalty would therefore only involve a few days in May." (Initial Decision, ante) Petitioner suggests that the "special position of a graduating senior is well-recognized in the School Law of New Jersey, see O.P. v. Paterson Bd. of Ed., 1976 S.L.D. 658, and yet no attention appears to have been given to the specific factual situation here." (Petitioner's Exceptions, at p. 2) Petitioner also challenges the ALJ credibility conclusions, averring, inter alia, that Ms. Velechenko contradicted herself on several occasions, and that some of her testimony was hesitant and uncertain. Furthermore, petitioner objects to the ALJ's characterization of his testimony as "dubious" (Petitioner's Exceptions, at p. 2, quoting the Initial Decision, ante) "Petitioner never denied that he made reference to a gun, and did so to exculpate himself, and yet Judge Murphy seems to regard this as highly inculpatory." (Petitioner's Exceptions, at p. 2)

Finally, petitioner claims that the ALJ dealt "only very superficially with the procedural due process issue raised and discussed at some length in my brief of June 17.***" (Petitioner's Exceptions, at p. 2) Petitioner avows that "[d]espite literal compliance with the statute, it is ludicrous to conclude that due

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process was served by this method***." (Petitioner's Exceptions, at p.2) Petitioner concludes that

> the Board's action in 'excluding' Petitioner amounted to de facto expulsion. It is submitted that this exclusion 'remedy,' little known and used in New Jersey, was employed here as a smokescreen for the constructive expulsion of Petitioner from Trenton Central High School three weeks before graduation. He has been irreparably harmed as a result***."
>
> (Petitioner's Exceptions, at p. 2)

The Board's reply exceptions request that the Commissioner adopt the ALJ's ruling in all respects for the reasons articulated in the opinion filed by the ALJ on August 25, 1986.

Having reviewed the record in this matter, including the briefs of counsel, which are incorporated herein by reference, the Commissioner adopts as his own the determination of the ALJ affirming the action of the Board in suspending petitioner for one year for the reasons that follow.

Initially, the Commissioner observes that the parties did not provide a transcript of the plenary hearing in the instant matter conducted on July 9, 1986. In the absence of the transcript, the Commissioner accepts as his own the findings of fact established by the ALJ, including his credibility determinations as noted in the initial decision, ante.

Further, the Commissioner also agrees with the ALJ that "[c]learly, threats to the teacher, even if they fall short of assault, can warrant suspension or expulsion." (Initial Decision, ante) (See e.g., Jesse Stephens, supra.) He finds incorrect, however, petitioner's argument raised in exceptions inferring that seniors are entitled to special consideration by virtue of their senior status. No such "special position" (Petitioner's Exceptions, at p. 2) exists, per se. First, O.P., supra, is distinguishable from the instant matter; the circumstances therein dealt with permanent expulsion. Such is not the case in the instant matter. Furthermore, in rendering its determination penalizing a student for infraction of school rules, a board may take into account whatever condition, circumstance or status it deems appropriate, so long as its determination is not arbitrary, capricious or unreasonable. As noted in O.P.

> The Commissioner does not agree that a board must establish a shopping list of infractions with specified disciplines it may then mete out. N.J.S.A. 18A:37-2 establishes that a board of education may suspend or expel pupils from its schools for cause which it finds to be good cause. The review of a board's suspension or expulsion action takes the form of appellate review. In this context, the Commissioner, absent a showing of impropriety or illegality

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> will not and may not interfere with the actions of a board. Thomas v. Morris Township Board of Education, 89 N.J. Super. 327 (App. Div. 1965), aff'd 46 N.J. 581 (1966) (1976 S.L.D. at 660)

Of his own admission, petitioner received due process. The Commissioner's review comports with that of the ALJ that a proper hearing was conducted, petitioner having been apprised of the charges against him, and having had an opportunity to confront witnesses. Further, considering the nature of the charges, it was not unreasonable for the Board to remove petitioner from the school immediately, so long as the Board provided a hearing on the matter within 21 days of the suspension. It is unrefuted that the Board complied within the 21-day period. Petitioner had 20 days in which to garner to his defense legal counsel, witnesses or any other support he felt appropriate. See N.J.S.A. 18A:37.2 et seq.

As to the appropriateness of the sanction, the Commissioner fully supports the conclusion of the ALJ that "[t]eachers must be able to function and perform their essential educational tasks free of both violence and threats of violence. Given the seriousness of the threats, in this instance suspension for a period of one year was appropriate and warranted***." (Initial Decision, ante)

Accordingly, the initial decision is affirmed. The Petition of Appeal is dismissed with prejudice.

COMMISSIONER OF EDUCATION

October 3, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3274-86
AGENCY DKT. NO. 148-4/86

SHARON TOMPKINS,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,
Respondent.

Barbara E. Riefberg, Esq., for petitioner (Selikoff & Cohen, attorneys)

Louis C. Rosen, Esq., for respondent (Aron, Salsberg & Rosen, attorneys)

Record Closed: July 7, 1986 Decided: August 20, 1986

BEFORE **RICHARD J. MURPHY**, ALJ:

STATEMENT OF THE CASE

Petitioner seeks payment of sick leave for an allegedly work-connected disability under N.J.S.A. 18A:30-2.1. Respondent seeks partial summary decision dismissing the appeal on the grounds that the Division of Workers' Compensation has exclusive original jurisdiction over workers' compensation benefit claims under N.J.S.A. 34:15-48, and therefore, that the Commissioner of Education may not act under N.J.S.A. 18A:30-2.1 until the workers' compensation court makes a finding of causal connection between employment and injury. The jurisdictional issue is whether the Commissioner of Education may entertain an application under N.J.S.A. 18A:30-2.1 for sick leave for a

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work-connected disability before the matter is submitted to the Division of Workers' Compensation. This opinion concludes that the Commissioner has authority to consider and grant payment of sick leave under the education law without awaiting any action by the Division of Workers' Compensation, although the decision of the Commissioner would not be binding upon the Division of Workers' Compensation, which has the last word on causal connection between the work and the hurt.

PROCEDURAL HISTORY

Sharon Tompkins filed a Petition of Appeal on April 24, 1986, claiming that, as a result of an illness arising out of her employment, she had been absent from her duties from on or about January 13, 1986 to the present time. That petition seeks payment of full salary pursuant to N.J.S.A. 18A:30-2.1. Respondent answered on May 18, 1986, denying that the illness arose out of and occurred in the course of the employment, and raised the affirmative defense of lack of subject matter jurisdiction. The parties stipulated to all facts germane to the adjudication of this matter, except that the petitioner's injury is work-related, and the Commissioner has subject matter jurisdiction. The matter was referred for hearing to the Office of Administrative Law on May 15, 1986, and a prehearing conference was conducted by phone on June 25. Respondent moved for summary judgment on the jurisdictional issue on June 16, 1986, petitioner replied on June 25, and respondent submitted a reply brief on July 3, 1986. The record was closed for the purpose of this motion on July 7, 1986. This matter is being submitted to the agency head pursuant to N.J.A.C. 1:1-13.3 as an initial decision for the purpose of avoiding unnecessary litigation or expense by the parties. After determination of the partial summary decision by the Commissioner of Education, the matter can proceed, if necessary, to a factual hearing.

FINDINGS OF FACT

As indicated, the essential facts have been stipulated to, except for the question of whether petitioner's injury was work-related or whether the Commissioner of Education has subject matter jurisdiction. Only the jurisdictional issue is being decided here. Petitioner is a nontenured teacher employed by the Board, and has been absent from her duties as the result of an illness, which she claims to be work related, since on or about January 13, 1986. As of mid-March, petitioner had exhausted her accumulated sick time as well as additional payments from the respondent Board pursuant to the collectively

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negotiated agreement. No further factual discussion or findings are necessary to decide the summary decision motion and I so **FIND.**

ARGUMENTS OF THE PARTIES

Respondent argues that the Division of Workers' Compensation has exclusive original jurisdiction over all claims for workers' compensation benefits and that the Commissioner of Education therefore lacks subject matter jurisdiction to find a causal connection between an injury and work-related accident under N.J.S.A. 18A:30-2.1. Petitioner cites Handleman v. Marwen Stores Corp., 53 N.J. 404 (1969), for the proposition that workers' compensation cases must arise in the first instance in the Division of Workers' Compensation. Respondent takes issue with the State Board of Education's rulings allowing awards under Title 18A in Masino v. Bd. of Ed. of Twp. of West Deptford, OAL DKT. EDU 4347-79, decided by Comm. Nov. 20, 1980, rev'd, State Bd. of Ed., July 1, 1981. Respondent further cites the Appellate Division's ruling in the case of Forgash v. Lower Camden County School, 208 N.J. Super. 461 (App. Div. 1985), for the proposition that the statute contemplates a prior determination of compensable injury by the compensation court before the Commissioner's consideration under the education law. Respondent also relies upon the exclusive jurisdiction vested in the Commissioner of Education to decide all controversies and disputes under the school laws pursuant to N.J.S.A. 18A:6-9.[1]

Petitioner distinguishes Handleman as concerning only the Division's primary jurisdiction to develop a record before any reviewing or before any appellate tribunal could conduct a de novo review. She further cites Masino and the following cases in which the State Board of Education determined that the Commissioner had jurisdiction to proceed to determine the factual issue of whether an injury arose out of employment. As to the Appellate Division's decision in Forgash, petitioner argues that the Appellate Division decided only that prior decisions of the Commissioner do not foreclose further consideration by the workers' compensation court under the doctrines of res judicata or collateral estoppel. Petitioner claims that the workers' compensation and education statutes are motivated by different purposes and provide different benefits, and therefore require independent, though related, determination.

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[1] Petitioner represents that her claim for workers' compensation has been filed with the Division of Workers' Compensation.

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Respondent replies that the Commissioner of Education must yield to the exclusive original jurisdiction vested in the workers' compensation court by N.J.S.A. 34:15-48 over all claims for workers' compensation benefits. Respondent also erroneously claims on page 2 of its brief that the Appellate Division stated in Forgash that proceedings under 18A could not be used to "supplement" the function of the compensation court. In fact, the opinion states that a proceeding pursuant to that statute may not be used to "supplant" the court's function. This is a telling slip. See, Forgash at 467. Respondent also cites the case of Theodore v. Dover Bd. of Ed., 183 N.J. Super. 407 (App. Div. 1982), for the proposition that determination of the factual issue of causal relationship is best served by exhaustion of the administrative process by initial decision by the Division of Workers' Compensation.

DISCUSSION AND CONCLUSIONS OF LAW

The question presented is whether the worker's compensation statute, N.J.S.A. 34:15-48, precludes the Commissioner of Education from rendering a decision on an application for sick leave benefits pursuant to N.J.S.A. 18A:30-2.1 before the matter has been decided by a workers' compensation court. For the reasons set forth below, I **CONCLUDE** that the Commissioner is not so precluded and may proceed to entertain and decide petitioner's application for sick leave, but that the Division of Workers' Compensation is not bound by that determination.

Education law provides at N.J.S.A. 18A:30-2:1 that:

> 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. (Emphasis added.)

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As noted, the Commissioner of Education is given jurisdiction over controversies and disputes under school law by N.J.S.A. 18A:6-9. Jurisdiction of the Division of Workers' Compensation is established by N.J.S.A. 34:15-49 which provides, in part, that "[t]he Division of Workers' Compensation shall have the exclusive original jurisdiction of all claims for workers' compensation benefits under this chapter (emphasis added)." The essence of respondent's argument is that the vesting of exclusive original jurisdiction in the Division effectively precludes the Commissioner from granting sick leave for service-connected disabilities under Title 18A.

In the first place, the plain language of the statutes, when read alone or together, does not require the result urged by respondent. N.J.S.A. 18A:30-2.1 clearly envisions the award of payments, in appropriate cases, during the waiting period for workers' compensation and during the period the employee may have received or was eligible to receive temporary disability benefits. The statute is further clear that any salary or wages paid under it are to be reduced by the amount of the workers' compensation award. Clearly then, N.J.S.A. 18A:30-2.1 was intended to establish a complementary mechanism for the payment of sick leave at salary level to employees for service-connected disabilities, which supplements the scheme of reimbursement and compensation established by the Workers' Compensation Act.[2]

In Forgash, the Appellate Division clearly stated that:

> Moreover, as the express function of N.J.S.A. 18A:30-2.1 is to complement worker's compensation benefits for a strictly limited time period, a proceeding pursuant to that statute may not be utilized to supplant the function of the compensation court. Id. at 466-67. (Emphasis added.) By its terms, this statute contemplates a prior[3] determination of a compensable injury by the compensation court before consideration by the Commissioner or the eligibility of the injured employee for the additional benefits provided by statute.

---

[2]N.J.S.A. 34:15-12 provides for payments based on a percentage or weekly wage (e.g. 20%). N.J.S.A. 18A:30-2.1 allows for payment or salary which makes up the difference and applies before workers' compensation is awarded if the Commissioner chooses.

[3]This statement is dicta in that Forgash concerns whether a compensation judge's hands are tied by a Commissioner's compensation decision under 18A:30-2.1. That section does not expressly contemplate a prior determination by a compensation court and, indeed, expressly allows for payment during the workers' comp waiting period, as well as deduction of any chapter 34 benefits later paid from 18A payments already made.

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Nothing in N.J.S.A. 34:15-49 contradicts the essential conclusion that chapters 18A and 34 are complementary. That statute vests original and exclusive jurisdiction of all claims for workers' compensation benefits made under that chapter in the Division of Workers' Compensation. It does not preclude, expressly or implicitly, the grant of payment of sick leave by the Commissioner under Title 18A because those benefits are distinct and separate from workers' compensation benefits provided under Title 34, although the two are to be considered together in the sense that payment of sick leave under the education law is to be reduced by any workers' compensation award.

Respondent's erroneous statement claiming that the Appellate Division stated that Title 18A could not be used to "supplement" rather than supplant, the function of the compensation board clearly crystalizes the central weakness in respondent's reading of the law. In Forgash, as well as other decisions, the courts recognize that the very purpose of Title 18A is to complement or supplement the workers' compensation benefits for a limited period. See also, Theodore v. Dover Bd. of Ed. at 416. The concern of the Appellate Division in Forgash was that the Commissioner of Education not use 18A to "supplant" or disregard the function of the compensation court, whose distinctive function and expertise qualify it as the more appropriate tribunal for adjudication of work-related injuries. Forgash concerned only the issue of whether a prior determination by the Commissioner of Education could be used to foreclose further consideration by the compensation court under the doctrines of res judicata or collateral estoppel. Such a reading of 18A would not, the Appellate Division concluded, be consistent with Title 34, which vests exclusive original jurisdiction over workers' compensation benefits claims in the Division. The concern of N.J.S.A. 34:15-49 was primarly to protect the workers' compensation court, an administrative tribunal, from having its jurisdiction whittled away by petitions filed in Superior Court. See, Doe v. St. Michael's Medical Center of Newark, 184 N.J. Super. 1 (App. Div. 1982). In this instance, the Commissioner of Education acts as a parallel administrative body applying a distinct, though related, mechanism to award benefits. The Appellate Division in Forgash established that the Commissioner of Education could not, by awards of sick leave, supplant the function of the compensation court. It did not decide, or even imply, that it could not supplement it, which is the clear intent of N.J.S.A. 18A:30-2.1. A different result is not dictated by the Supreme Court's decision in Handleman, which merely emphasizes that workers' compensation claims should arise in the first instance in the Division of Workers' Compensation. An application for sick leave under 18A is a different matter, although it relates to the same events and injuries.

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It is further noted, however, that while the Commissioner of Education has statutory authority to proceed to consider an application for sick leave benefits under 18A:30-2.1, before decision by the compensation court there might be valid reasons in any given case to hold consideration of the 18A claim pending determination by the Division or the underlying question of causal connection between employment and injury.

DISPOSITION

On the basis of the above findings of fact and conclusions of law, it is hereby **ORDERED** that the respondent's motion for summary decision dismissing the appeal for lack of subject matter jurisdiction be and is hereby **DISMISSED**, and this matter is referred to the Commissioner of Education pursuant to N.J.S.A. 1:1-13.3(b) as an initial decision. Further proceedings on the underlying factual issue of causal connection between the work and disability will be held in abeyance pending, resolution of the jurisdictional issue.

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

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

Aug. 20, 1986
DATE

RICHARD J. MURPHY, ALJ

AUG 2 1986
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

AUG 22 1986
DATE

OFFICE OF ADMINISTRATIVE LAW

sc/ds

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SHARON TOMPKINS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	PARTIAL SUMMARY DECISION
RESPONDENT,	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The Board's exceptions and petitioner's reply exceptions were filed within the time prescribed by N.J.A.C. 1:1-16.4a, b and c.

In its exceptions the Board admits, through an error in dictation, incorrectly using the word "supplement" instead of "supplant" in quoting a citation from the Appellate Division decision in Forgash v. Lower Camden Cty. School, 208 N.J. Super. 461, 467 (App. Div. 1985). Notwithstanding its "slip in dictation" (Board's Exceptions, at p. 2), it is the Board's "position that a determination by the Commissioner of causal connection in these types of cases would, indeed, supplant the original exclusive jurisdiction of the workers' compensation court to find causal connection between the word place and the injury.***" (Board's Exceptions, at p. 2) (emphasis in text)

Citing Forgash, supra, Handelman v. Marwen Stores Corp., 53 N.J. 404 (1969), and N.J.S.A. 18A:30-2.1, the Board contends that "[p]rimary jurisdiction should and must lie in the workers' compensation division in order to obtain the benefit of that court's expertise in the instant matter, thereby diminishing the possibility of an inconsistent or wrong decision." (Board's Exceptions, at p. 4, citing also Texas & Pacific R.R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907); Far East Conference v. United States, 342 U.S. 570 (1952)) Because Forgash prohibits the Commissioner of Education from deliberating on the instant matter until a workers' compensation court makes a determination of causal connection, the Board argues, petitioner is not entitled to payment of her full salary under N.J.S.A. 18A:30-2.1 at this time. "Such a result is not only required by statutory construction by the courts, it is demanded by theories of judicial economy and exhaustion of the administrative process.***" (Board's Exceptions, at p. 4) The Board further argues that primary jurisdiction should lie in the workers' compensation division in order to obtain the benefit of that court's expertise in the instant matter. Finally, the Board claims that "[i]t is curious that the administrative law judge indicates that the workers' compensation court should 'in any given case' make the initial determination of causal connection between employment and injury." (Board's Exceptions, at p. 5, quoting the

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Initial Decision, ante) The Board urges instead that in every instance, the workers' compensation court should make the initial determination of causal connection.

Petitioner's reply to the Board's exceptions agrees with the decision of the ALJ that the Commissioner of Education does have jurisdiction to entertain a claim pursuant to N.J.S.A. 18A:30-2.1. Petitioner submits that Forgash v. Lower Camden County School, 208 N.J. Super. 461 (App. Div. 1985) "merely holds that the Commissioner cannot bind the Division of Worker's Compensation by his determination." (Petitioner's Reply Exceptions, at p. 1) Further, petitioner avers that "[t]he case of Handelman v. Marwen Stores Corp.[,] 53 N.J. 404 (1969) is clearly inapplicable since it dealt exclusively with the Division of Workers' Compensation's jurisdiction to hear claims for workers' compensation benefits in the first instance for the development of a full factual record before any reviewing or appellate tribunal would have an opportunity for a de novo review." (Petitioner's Reply Exceptions, at p. 1)

Petitioner suggests that the Commissioner's jurisdiction over school law claims is original and primary. Since the instant matter arises under N.J.S.A. 18A:30-2.1, it was appropriate for the ALJ to deny the Board's Motion for Summary Decision, argues petitioner.

Petitioner requests that the decision of the ALJ be affirmed and that the matter proceed to plenary hearing.

Upon review of the record before him, the Commissioner concurs with the determination of the Office of Administrative Law that the Commissioner of Education is not precluded from rendering a decision on an application for sick leave benefits pursuant to N.J.S.A. 18A:30-2.1 before the matter has been decided by a workers' compensation court, "but that the Division of Workers' Compensation is not bound by the Commissioner's determination." (Initial Decision, ante)

The Board's exceptions bring nothing new to the record, but rather reiterate the arguments it posited before the ALJ. Whether or not the Board's substitution of the word "supplement" for "supplant" in quoting from Forgash, supra, was a "telling slip" (Initial Decision, ante) or merely an inadvertent error in dictation, the Commissioner is in accord with the discussion and conclusions of the ALJ as contained in the initial decision. See Herman Masino v. Board of Education of the Township of West Deptford, decided by the Commissioner November 20, 1980, State Board rev'd/rem'd July 1, 1981. He notes disagreement with the phrase found in the initial decision, ante, however, wherein the ALJ suggested that the Division of Workers' Compensation "***has the last word on causal connection between the work and the hurt." Instead, the language found in Masino is the correct statement of the subject matter jurisdictional bounds of the Commissioner in regard to the instant matter:

> ***Even though compensation under N.J.S.A. 18A:30-2.1 and under the Workers' Compensation

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> Law both depend on a factual finding that the injury arises out of and in the course of one's employment, the Commissioner clearly has jurisdiction to determine that issue insofar as the provisions of title 18A are involved. Whether or not an award will also be made under the Workers' Compensation Law will be decided by the Division of Workers' Compensation. That does not mean, however, the Commissioner cannot determine the same factual issues for the purpose of applying N.J.S.A. 18A:30-2.1
> (Slip Opinion, at p. 2) (emphasis supplied)

Thus, the Commissioner finds that a determination rendered under N.J.S.A. 18A:30-2.1 is a wholly separate finding with its own standard of review from that rendered under Chapter 15 of Title 34, Labor and Workmen's Compensation, of the Revised Statutes, although their factual findings may be the same. Finally, the Commissioner notes with approval the ALJ's comment that:

> It is further noted, however, that while the Commissioner of Education has statutory authority to proceed to consider an application for sick leave benefits under 18A:30-2.1, before decision by the compensation court there might be valid reasons in any given case to hold consideration of the 18A claim pending determination by the Division or (sic) the underlying question of causal connection between employment and injury.
> (Initial Decision, ante)

Accordingly, the Board's Motion for Summary Decision dismissing the Petition of Appeal for lack of subject matter jurisdiction is hereby dismissed with prejudice. The Commissioner accepts the recommendation of the Office of Administrative Law and adopts it as the final decision in this matter for the reasons expressed in the initial decision as modified above. It is further ordered that the matter now proceed to plenary hearing on the merits.

COMMISSIONER OF EDUCATION

OCTOBER 3, 1986

Pending State Board

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2893-86
AGENCY DKT. NO. 115-4/86

WALTER F. CAMPBELL,
Petitioner,
v.
POINT PLEASANT BOROUGH
BOARD OF EDUCATION,
Respondent.

Walter F. Campbell, petitioner, pro se

James Brady, Esq., for respondent (Novins, Farley, York, DeVincens & Pentony, attorneys)

Record Closed: August 1, 1986 Decided: September 8, 1986

BEFORE **DANIEL B. MC KEOWN**, ALJ:

Walter F. Campbell (petitioner), a defeated candidate for election to membership on the Point Pleasant Borough Board of Education at the annual school election held April 15, 1986, requested an inquiry be conducted into seven general allegations that irregularities statutory violations of N.J.S.A 18A:14-1 et seq., School Elections, were committed during the election. The Commissioner of Education transferred the matter to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52: -1 et seq. A prehearing conference was conducted May 29, 1986 at which the issues were refined, procedural matters were addressed, and a hearing scheduled for July 17, 1986. The hearing was conducted, as scheduled, in the Point Pleasant Borough Municipal Courtroom, Point Pleasant. The record closed August 1, 1986 for reasons to be discussed post.

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BACKGROUND FACTS

On or about April 22, 1986, petitioner filed with the Commissioner a two page letter consisting of seven allegations. At the prehearing conference, petitioner withdrew five of the seven stated allegations. Two allegations remained viable for hearing. The issues, therefore, with which the scheduled hearing concerned itself are as follows:

1. Whether the allegations contained within either Counts 1 and/or 2 of the inquiry request are, if proven to be true in fact by a preponderance of credible evidence, are sufficient to grant the requested relief of setting aside the election conducted April 15 and to order a special election.

2. If the allegations are true but nevertheless insufficient to grant the requested relief, to what relief, if any, is petitioner entitled.

Petitioner was advised he carried the burden of going forward and the ultimate burden of persuasion on the truth of his allegations. The Board, prior to hearing, moved to dismiss by memorandum filed June 9, 1986. The motion was held in abeyance pending a response from petitioner. No response was filed by petitioner prior to the time of hearing.

Counts 1 and 2 are reproduced here in full:

1. Campaign Literature Distribution

   a. Campaign literature placed in teacher mailboxes in school district buildings on afternoon of April 14. (Principals' lerters to verify this.)

   b. Point Pleasant Borough Teachers Association newsletter, distributed to staff mailboxes on morning of April 14, contained front page campaign article urging staff to elect Bittenbinder and Magley.

2. Campaign literature was introduced into the classroom and discussed by the students in Mrs. Stavres' (former Brielle Board of Education member) class. Parental complaint was made to Mr. Campbell. Mr. Campbell referred the complaint to Dr. DeBellis, Superintendent of Schools.

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At the scheduled hearing on July 17 and despite not having answered the motion to dismiss, petitioner was granted the opportunity to bring forth documentary evidence or sworn testimony regarding the truth of his allegations. Petitioner produced no witnesses but explained that those who had personal knowledge regarding the truth of his allegations are all Board employees or have relatives employed or have children in school. Consequently, petitioner explains they refused to testify for fear of Board reprisal. Petitioner does rely in large measure on a series of documents contained within P-1 to prove the truth of his allegations. Those documents include election material for two successful candidates, letters ostensibly from the school superintendent to the Ocean County superintendent of schools, memoranda from the school principal to the superintendent and association newsletter, a Board policy, and other similar kinds of documents. However, petitioner produced no witnesses who could authenticate that the documents were used as he alleged in Counts 1 and 2 above.

At the conclusion of the hearing, petitioner was advised his evidence in support of the charges was at best weak. In any case, petitioner was granted until August 1, 1986 within which to respond to the Board's motion to dismiss. Once again, petitioner failed to respond to the motion.

CONCLUSION

I decline to rule on the Board's Motion to Dismiss because its argument in support thereof raises significant legal issues regarding constitutional rights of free speech. These issues have not been joined in any manner. Consequently, the Board's legal argument should not now be addressed particularly when a ruling on the merits of the substantive allegations may be entered.

In view of the absence of evidence produced by petitioner to prove the truth of the allegations brought against the conduct of the annual school election held April 15, 1986 in the Borough of Point Pleasant, I must **CONCLUDE** petitioner Walter F. Campbell has failed to carry his ultimate burden of persuasion \ccordingly, the allegations contained within Counts 1 and 2 of the inquiry are deer to be without merit and are hereby **DISMISSED.**

It is so **ORDERED.**

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

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

September 8, 1986
DATE

DANIEL B. MC KEOWN, ALJ

SEP 8 1986
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

SEP 15 1986
DATE

OFFICE OF ADMINISTRATIVE LAW

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EXHIBIT LIST

P-1 (Petitioner's documents)

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OAL DKT. NO. EDU 2893-86

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE BOROUGH OF POINT PLEASANT, OCEAN COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon careful review of the record of this matter, the Commissioner agrees with the findings and the conclusion of the Office of Administrative Law that Petitioner Campbell failed to carry his ultimate burden of persuasion in proving the truth of the allegations concerning the conduct of the annual school election held April 15, 1986 in the Borough of Point Pleasant.

Accordingly, the Commissioner accepts the recommendation of the Office of Administrative Law dismissing the Petition of Appeal and adopts it as the final decision in this matter for the reasons expressed in the initial decision.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 6, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6736-85
AGENCY DKT. NO. 333-10/85

FLORA TURNER,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF CAMDEN,
Respondent.

Tina E. Bernstein, Esq., for petitioner (Kivler & Halper, attorneys)

M. Allan Vogelson, Esq., for respondent (Mitnick, Vogelson, Josselson & DePersia, attorneys)

Record Closed: July 18, 1986 Decided: August 29, 1986

BEFORE **RICHARD J. MURPHY,** ALJ:

STATEMENT OF THE CASE

Flora Turner (petitioner) appeals from the action of the respondent Board of Education of the City of Camden (Board) in withholding her annual increment pursuant to N.J.S.A. 18A:29-14. She claims that she is being unfairly singled out by the Board in retaliation for previous tenure charges and that she suffers from a number of medical problems which hamper her performance. The question presented is whether the action of the Board in withholding her increment was arbitrary and capricious. This opinion affirms the action of the Board and dismisses the appeal.

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PROCEDURAL HISTORY

The petition of appeal was filed on October 7, 1985, and answered on October 15. The matter was referred to the Office of Administrative Law for hearing on October 23, 1985, and a prehearing conference was held on February 28, 1986, to settle the issues. The full hearing commenced on July 1 and was completed on July 2. The record was closed on July 18, 1986, after receipt of exhibits and post-trial submissions.

FINDINGS OF FACT

Petitioner claims that the action of the Board in withholding her increment at its meeting on June 24, 1985, was arbitrary and capricious, without rational basis for good cause and further induced by improper motives contrary to N.J.S.A. 18A:29-14. She further claims that she did not receive prior notice of the meeting or subsequent written notice setting forth the reasons for the withholding. At the prehearing conference an additional allegation that the action of the Board was ultra vires and in direct violation of N.J.S.A. 18A:6-10 was abandoned by petitioner and voluntarily dismissed. The Board generally denied the allegations and raised the defense that the withholding of the increment was based on petitioner's performance.

With respect to that performance, petitioner claims that she received biased treatment from the administration of the Northeast Elementary School, where she had been for two years, and pointed to the actions of Principal Frances Gibson, among others. She claimed that from the outset at Northeast Elementary School she was singled out by Gibson who introduced her, saying that she might not be around long. Petitioner also alleged that she complained of heating conditions in her classroom both in the hot and cold months and received no real help until April 1986. She further stated that she generally did not get supplies on time, and that for several months her supplies were given to the assistant principal, Mrs. Johnson. As to performance evaluations, petitioner claims that she was evaluated on a number of occasions the day after she was ill or hospitalized or had to deal with family illnesses or deaths. She cited a number of medical conditions, including thyroid, heart, and nervous system which impaired her performance and required medication. Principal Gibson and other evaluators were aware of these conditions. Petitioner claims that the source of the bias was her successful defense of tenure charges which arose at a different school.

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Evaluations were performed by Principal Gibson on petitioner's performance on April 2, April 16 and May 29. She also received evaluations from Director W.J. Farmer, who had previously observed the petitioner and been involved in the prior tenure proceedings. Farmer was the director of elementary education in Camden in 1985. Petitioner was also observed by Mrs. Gavin, the elementary supervisor on February 15. Another evaluation was conducted on March 2 by Mrs. Johnson, assistant principal of Northeast Elementary School. All of these evaluators found problems with petitioner's teaching procedures, and most had questions as to her management of various matters, including supplies and equipment. Principal Gibson, in her April 16 evaluation, focused on classroom techniques and noted that some of the games utilized were not appropriate to the level of the students and also that petitioner's discipline was ineffective. She further noted problems with preparation and use of plans, handling of routine items, as well as use of school supplies (P-1). Petitioner was evaluated twice on April 16 at her request because of her claims of problems with a thyroid condition. The earlier evaluation, also performed by Principal Gibson, noted problems with teaching procedures in the areas of appropriateness of objectives, attention to relationships and use of group work. After that morning math lesson, petitioner requested that she be permitted to re-do the same lesson later in the day because of health problems. Gibson's final and annual performance report of May 29 also cites problems with teaching procedures and management. Petitioner maintains that she did not receive these written reports until May 30, and she had not been advised of any of defects in her performance during the course of the year.

Evaluations performed by others in addition to Principal Gibson also focused on teaching procedures and management. Director Farmer noted on April 2, 1985, that she felt the petitioner was making excuses for not teaching because she had been absent on Monday and was not prepared to teach on Tuesday. She also had substantive comments concerning the presentation of a math class (R-4). An earlier review of petitioner by Florence Gavin on February 15, 1985, also revealed problems with teaching presentation. On that occasion, petitioner asked the evaluator to come back another day because of her mother's recent illness. Gavin eventually left at petitioner's request and intended to return when her schedule permitted. A second observation by Gavin on March 8 also was critical of teaching procedures involving what she thought was wasted time. That evaluation also followed a day on which petitioner was absent and she used this as an excuse, according to Gavin, for lack of preparation. Another evaluation by Mrs. Johnson

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on May 7, some two months later, indicated continuing problems with teacher procedures and management, including classroom presentations.

Petitioner took issue with these evaluations both at the time they were made and in her testimony. She claimed that the timing of the evaluations was unfair and, in and of itself, demonstrates bias because many were performed on or after days of absence.[1]

In addition, petitioner claimed that the substance of the evaluations does not accurately reflect her teaching procedures and management. She provided rebuttals to several of the evaluations, and either disagreed with the comments or provided some explanation, such as illness or death in the family. She did agree that some of the criticisms offered were valid and claims that she attempted to adapt her teaching methods accordingly. She discounts the evaluations done by Assistant Principal Johnson, as being carbon copies of those done by Principal Gibson, who she claimed was biased against her. She also states that she has received previous increments and positive evaluations. She further cited various "catty" comments made by Gibson and Farmer as evidence of their prejudice against her.

Principal Gibson as well as Director Farmer and Assistant Principal Johnson, denied any bias towards petitioner and claimed that their evaluations are based on observation of her classroom performance. Ms. Gibson also noted that she was in no way involved in the prior tenure proceeding.[2] Ms. Johnson, as Ms. Gibson, claimed no previous knowledge of petitioner. She further stated that it was her practice and the practice of the Northeast School to have teachers evaluated four times in one year, and claimed that the petitioner is prone to exaggeration to such an extent that she felt necessary to have Ms. Gibson in on some conversations for the record. All the witnesses denied timing their evaluations to coincide with previous absences of the petitioner, and expressed sympathy for her physical conditions.

---

[1]These would include evaluations on Februry 15, March 8, April 2, April 16 and May 29 following her absence on May 22.

---

[2]Director Farmer and Ms. Gavin did have some connection to those prior proceedings by virtue of their official positions, but neither was a witness.

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Having heard the testimony and considered the evidence, I **FIND** the following **FACTS:**

1. That the petitioner was evaluated by four professional educators, including Principal Gibson, Assistant Principal Johnson, Director Farmer and Florence Gavin, on at least six occasions between February and May 9, 1985, and that both Principal Gibson and Ms. Gavin performed two evaluations, or agreed to come back at a later time when it was requested by the petitioner;

2. That all the evaluations indicated perceived problems with teaching procedures and management, as discussed above and of which the petitioner was made aware;

3. That many of the evaluations were conducted in close proximity to days of absence due to illness and other factors, but that at least two were rescheduled, and further, that there is no evidence that this was done in an intentional manner in order to place the petitioner at a disadvantage. Observations performed on May 7 and May 29 were done well after days of absence;

4. That the petitioner is suffering from a number of physical conditions, including thyroid condition and a heart problem, but that these are controllable by medication and do not disable her from performing her classroom duties.

ISSUE

The issue is whether the Board acted arbitrarily and capriciously in withholding petitioner's increments under N.J.S.A. 18A:29-14. For the reasons set forth below, I **CONCLUDE** that the action of the Board should be affirmed and the appeal dismissed.

The statute in question provides that "any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjusted increment, or both, of any member in any year by a recorded role call majority vote of the full

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membership of the board of education." N.J.S.A. 18A:29-14. The evidence presented by the Board in this instance amply demonstrates such good cause in the form of difficulties with teaching procedures substantiated by the observations of four different professional educators on as many as six occasions in a four-month period. On at least two of those occasions, the petitioner requested, and was allowed, to have the observation delayed because of illness or other adverse circumstances the day before. These evaluations concern substantive and procedural matters of teaching methods and management and are replete with constructive suggestions to the petitioner for improvement of her teaching. It is also clear the principal and others made an attempt in their evaulations and observations to take into consideration the physical impediments under which petitioner was suffering.

There is no direct evidence that petitioner's prior successful defense against tenure charges biased the school administration so as to make any fair evaluation impossible. While Dr. Johnson and others may have been aware of petitioner's successful defense against tenure charges, and consequently subjected her to somewhat closer evaluation as a result, this was not, in and of itself, arbitrary or inappropriate as long as that evaluation was done in a full and fair manner. The record reflects that it was, and I conclude on that basis that the action of the Board in withholding petitioner's increment had a ample rational basis and, therefore, was not arbitrary and capricious so as to warrant reversal. This is not a matter where a board of education or principal applied arbitrary and baseless presumptions which disregarded the full facts and the overall circumstances which was the case in Basile v. Board of Education of the Borough of Elmwood Park, 2 N.J.A.R. 199 (1980). Rather, after full and fair evaluation, the Board in this instance reasonably concluded that petitioner's teaching procedures and management practices were not sufficient to warrant an increment.

DISPOSITION

On the basis of the above findings of fact and conclusions of law, it is hereby **ORDERED** that the action of the respondent Board in withholding petitioner's annual increment be and is hereby affirmed and the petition of appeal dismissed.

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

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

Aug. 29, 1986
DATE

RICHARD J. MURPHY, ALJ

SEP 2 1986
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

Mailed To Parties:

SEP 4 1986
DATE

OFFICE OF ADMINISTRATIVE LAW

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FLORA TURNER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful review of the record of this matter, the Commissioner agrees with the finding and the conclusion of the Office of Administrative Law that the Camden City Board of Education did not act in an arbitrary or capricious manner in withholding petitioner's 1985-86 annual increment.

The Commissioner adds that "the annual increment is in the nature of a reward for meritorious service to the school district." North Plainfield Education Ass'n v. Bd. of Ed., 96 N.J. 587, 593 (1984) quoting Bd. of Ed. of Bernards Tp. v. Bernards Tp. Ed. Ass'n, 79 N.J. 311, 321 (1979) It is not an entitlement. The Commissioner observes that regular attendance and good health are basic components to satisfactory performance as a teacher. He notes with approval the comment made by the principal in the instant matter on petitioner's April 2, 1985 evaluation:

> Suggestions:
>
> 1. Avoid making excuses for not teaching. Your absence on Monday is no reason for not teaching on Tuesday. Remember, everyday (sic) you don't teach, you deny students valuable learning opportunities. (P-4)

Accordingly, the Commissioner accepts the recommendation of the Office of Administrative Law dismissing the Petition of Appeal and adopts it as the final decision in this matter for the reasons expressed herein and in the initial decision.

COMMISSIONER OF EDUCATION

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 800-86
AGENCY DKT. NO. 3-1/86

TRENTON EDUCATION ASSOCIATION,
Petitioner,
v.
TRENTON BOARD OF EDUCATION,
Respondent.

Richard A. Friedman, Esq., for petitioner (Ruhlman, Butrym and Friedman, attorneys)

Hope R. Blackburn, Esq., for respondent (Lemuel H. Blackburn, Jr., attorney)

Record Closed: July 14, 1986 Decided: August 22, 1986

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

Action for an order of the Commissioner of Education declaring that the Trenton Board of Education (Board) has improperly reduced the salaries of certain teaching staff members and directing restoration of the salary of each affected member to the appropriate sum and place on the salary guide. The petition also seeks restoration and adjustment of all emoluments, including but not limited to pension credit.

The issue to be tried is whether the salaries of certain teaching staff members have been improperly decreased and, if so, to what relief they are entitled.

The matter was opened before the Commissioner of Education when the Trenton Education Association (Association) filed a petition of appeal on January 6, 1986. The Board filed its answer on February 3 and the matter was transmitted on February 4 to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. After notice, a prehearing conference was

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held on April 1, and the matter was set down for hearing on June 9. The parties also agreed to submit a joint stipulation of facts by May 16. On June 4, I received a message from counsel that no issues of fact remained in contention. Counsel asked leave to submit the matter for summary disposition. They also requested a one-week extension of time in which to file the joint stipulation of facts.

On June 5, I wrote to counsel stating, among other things:

1. The hearing set down for June 9, 1986, is adjourned.

2. Counsel will prepare a joint stipulation of facts and submit it to me by June 17, 1986.

3. The petitioner's papers relative to the summary disposition are due on June 24, 1986.

4. The respondent's papers are due on July 1, 1986.

Counsel were unable to meet this schedule but, with permission, completed all submissions on July 14.

STIPULATIONS OF FACT

The parties stipulate and I hereby adopt as **FACTS** in this matter the following:

1. On or about April 15, 1985, the teaches signed contracts for the 1985-1986 school year. Copies of the contracts are attached hereto as Exhibit "A".

2. The contracts were marked "salary to be adjusted upon ratification of new contract. Salary subject to audit." The salary amount was based upon the next salary step for the 1985-1986 school year under the terms of the 1983 through 1985 salary guide.

3. On August 29, 1985, the Trenton Board of Education ratified a new contract.

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4. The new contract altered the salary step system previously in existence.

5. In August through September 1986, the Business Department of the Trenton Board of Education was both understaffed and in the process of switching to a computerized system.

6. Rather than wait until the system was fully operational and all entries were checked for accuracy before paying the teachers, the Business Department decided to pay the teachers and then verify the salaries.

7. Due to a clerical error, Level 13 on the salary step scale was omitted.

8. This omission resulted in placing teachers who should have moved to Step 13 on Level 12 and placing teachers who should have stayed on Level 13 on Level 14.

9. The teachers received these erroneous paychecks on September 13, 1985.

10. After the first paychecks but, on or before September 27, 1985, the Business Department of the Trenton Board of Education discovered that the following ten teachers had been erroneously overpaid in their first paychecks for the 1985-1986 school year:

    Sharon Davis;
    Nancy Puri;
    Patricia Jackson;
    Gloria Tunstall;
    Mary Taylor;
    Winifred Ramsey;
    Charles Hill;
    Robin Young;
    Marjorie Albright; and
    George Montgomery.

11. After the first paycheck but, on or before September 27, 1986, the aforementioned ten teachers were notified of the erroneous payment and

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their salaries were adjusted to their proper contractual levels in the second paycheck of the school year which was issued on September 27, 1985.

12. As a result of the discovery of this error, a review of all salaries was performed for each teacher listed on the payroll. See attached Affidavit of David Shafter for a full description of the review, marked as Exhibit "B".

13. The review revealed approximately 70 teachers who had been erroneously paid.

14. On or before October 11, 1985, the date of the issuance of the next payroll checks, the affected teachers were given notice of the error and the method which would be used to rectify it. The 30 techers who had been erroneously paid on Level 12 were moved to Salary Level 13.

15. The remaining 32 teachers erroneously paid on Level 14 were paid on Level 13. The overpayment made in the first two checks was deducted from these teachers' paychecks over a ten-week period.

16. The yearly overpayment for most of the teachers would have been $1,033.50 per teacher. The majority of the ten teachers who were overpaid in only one check received a $52.00 overpayment. The majority of the 32 teachers who were overpaid for two paychecks received an overpayment of $104.00. Deducted over a ten-week period this resulted in a $20.80 deduction per check.

17. The total amount of the overpayment, if the teachers are kept on the erroneously paid level, is $46,833.50.

18. The total amount of the underpayment, had the underpaid teachers been kept on the erroneously paid level, was $29,549.00.

19. The teachers' payroll checks were issued in accordance with the normal and proper procedures used to sign teachers' payroll. Pursuant to this procedure the checks are not seen or signed by Board members.

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20. A list of the overpaid teachers along with the yearly amount of the overpayment, should the Board be required to pay the erroneously set salaries, is attached hereto as Exhibit "C".

Copies of the 1985-86 employment agreements between the Board and 39 teaching staff members are appended to the stipulation of facts as is an affidavit of the Assistant Secretary for Business Services for the Board. The petitioner expressly does not stipulate that an audit took place as suggested by the Assistant Secretary's affidavit. There seems little question, however, that an employee of the Business Services Department made a thorough review of all teachers' salaries upon discovery that some teachers had been overpaid in the first paychecks of the academic year issued on September 11, 1985.

PETITIONER'S ARGUMENTS

The petitioner contends salaries of Trenton teachers were improperly reduced. The teachers are entitled to have their salaries restored to the same sum and level that the Board fixed at the beginning of the 1985-86 school year and to be compensated for any differences in salary and monies deducted by way of recoupment. The Commissioner of Education has stated in many decisions that where there is a mistake in placement by the board of a teacher on a salary schedule and the teacher is not responsible for the error, the teacher's salary cannot be reduced nor can monies be recouped in an attempt to correct that error. Honaker v. Hillsdale Bd. of Ed., 1980 S.L.D. 898; Conti v. Montgomery Tp. Bd. of Ed., OAL DKT. EDU 7118-84 (Apr. 25, 1985), rev'd, Comm'r of Ed. (June 10, 1985), rev'd St. Bd. (July 2, 1986); Galop v. Hanover Tp. Bd. of Ed., 1975 S.L.D. 358, aff'd, St. Bd., 1975 S.L.D. 366.

In Galop, the petitioner had been placed at a certain step on the salary guide by board action. The board discovered the error and withheld monies from Gallop's salary. The board argued that its acts were legal and reasonable measures to correct an administrative error. The Commissioner held that because Gallop was not responsible for the error and had received payment in the incorrect amount for several months, she could rely upon the board's official act setting her salary at that level for one school year. Further, the board was bound by its initial action in setting her salary. Accordingly, the

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Commissioner held that the board was not entitled to recover any portion of the salary it had paid to Galop and was not entitled to reduce her monthly rate of salary payments.

The petitioner urges that the Galop rule is applicable to this case. Here, because of clerical error, 42 teachers were placed on the next salary step of the salary guide and paid at that level for one or two pay periods in the 1985-86 school year. The error was in no way the teachers'. The teachers had no reason to suspect that they were being paid erroneously. Consequently, the Board is bound by its actions and obliged to continue to pay the teachers according to the salaries fixed at the beginning of the school year. At the very least, the Board is not permitted to recoup the monies it paid the teachers in error.

In Rivers v. Mercer County Vo-Tech Schools Bd. of Ed., OAL DKT. EDU 1368-83 (Nov. 30, 1983), aff'd, Comm'r of Ed. (Jan. 17, 1984), the petitioner claimed his employer had illegally reduced his salary during November 1982. The board, while admitting that it began to pay petitioner in the 1982-83 school year at the annual rate of $24,760, took no official action to fix his salary for 1982-83 and contended further that its action reducing his salary from $24,760 to $24,050 during November 1982 was a legal action taken to correct an error. The ALJ found that although there was no evidence the board had formally set the petitioner's salary at any level, the petitioner had reason to rely on the board's action. Since he was not responsible for the error, which fixed and paid his salary at a higher level on the guide then that to which he was entitled, he was maintained at that salary for the remainder of the school year.

In Bree v. Boonton Bd. of Ed., OAL DKT. EDU 737-84 (Jun. 21, 1984), adopted, Comm'r of Ed. (Aug. 6, 1984), the board questioned during the petitioner's thirteenth year of employment whether he had been properly placed on the salary guide in his first year of employment in the district. The board determined he had been improperly granted salary credit for two years of teaching experience before coming to the district. The board determined his 1983-84 salary by deducting two years' experience from what it would have been. The board froze the petitioner's salary for the 1984-85 school year. The ALJ found and the Commissioner agreed that if an error was made in the petitioner's salary placement in his first year of employment, it was a unilateral error on the board's part. The petitioner's salary interest vested after the board acted in establishing his guide placement during his first year of employment. Efforts to recoup the salary payments allegedly made in error in the manner described were improper. The Commissioner

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emphasized that the error was unilateral and that the board was estopped from trying to recoup the monies.

The petitioner here argues that as in Rivers and Bree, the Trenton teachers were actually paid the allegedly improper salaries entirely because of the Board's action and not because of an misrepresentation or error on the part of the teachers. The Board must be estopped from trying to realign their salaries for this year or recovering monies paid.

The petitioner also urges that it is unlawful to reduce a teacher's salary or to place him at a lower step on the salary scale once the step is fixed. N.J.S.A. 18A:28-5, Tenure of teaching staff members, and N.J.S.A. 18A:6-10 et seq., the Tenure Employees Hearing Law, both prohibit the reduction in salary of any tenured teaching staff member except for inefficiency, incapacity, unbecoming conduct or other just cause.

In another case of administrative error, Anson v. Bridgeton Bd. of Ed., 1972 S.L.D. 638, three teachers' salaries were set at a higher level than provided by the salary guide. The board argued that it issued new statements of salary only to correct an administrative error that came to light upon an objective examination of personnel files. At 640, the Commissioner stated:

> Petitioners acquired vested rights to the salary established for them by the Board's adoption of their salary placement. The Board notified each petitioner of his salary for the 1970-71 school year. If there had been a mistake in the placement of petitioners on the salary guide, it was not of their making and they cannot, as teachers under tenure, be deprived of a right they had acquired by the action of the Board in fixing their salaries for the 1970-71 school year.
>
> The Commissioner finds and determines, therefore, that the Board only computed and offered salaries to petitioners for the school year 1970-71, which petitioners had accepted and were receiving. The Board's unilateral action, which resulted in petitioners being paid at lower salaries, is in violation of petitioners' vested rights as protected by the provisions of the Teachers' Tenure Act.

In the present case, the majority if not all of the teachers were tenured. As such, they had a statutory right not to have their salaries reduced without just cause. The teachers were in no way responsible for the errors and should not be required to carry the burden as a practical matter or a statutory one. They acquired vested rights to the salary steps on which they were actually paid at the commencement of the school year. This is

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true even though there is no evidence that the Board fixed the salaries by formal resolution. Rivers, above.

The Board suggested that the salaries of the teachers in question were "incorrectly paid" but not "wrongfully set." This is a distinction without a difference given the clear and obvious intent of the above mentioned cases to place the burden for administrative clerical errors on the board and their administrative staffs which were responsible for them. The Commissioner in Galop warned boards and their administrative agents that they are responsible to investigate, know and examine the facts material to a proper consideration of an issue before them before acting on the matter so as to avoid "careless and inadvertent error." When a board, acting as a body, or its administrative officers in their official capacities, fail in that duty, and there is reasonable reliance upon their official acts, they should not be permitted to undo their deeds, particularly where tenure rights are implicated.

In this case, the Board's business department, rather than check for accuracy before paying the teachers, decided to pay the teachers and then verify their salaries. It was then discovered in late September and mid-October, after the issuance of paychecks, that clerical errors had occurred. The teachers were not responsible for the errors and in all likelihood they were unaware of the errors. The burden must fall on the Board through its administrative staff, which was totally responsible for the errors. The Board cannot escape responsibility by the notation on the contracts that "Salary to be adjusted upon ratification of new contract. Salary subject to audit." The intent of those provisions was to indicate that salaries were temporary and subject to the outcome of pending contract negotiations. This contingency was resolved, however, by ratification of the new contract on August 29, 1986. Higher salaries having been set, the Board may not look to this language to justify changes made because of administrative errors after ratification.

A determination that the teachers here are entitled to be paid at the salary fixed at the commencement of the school year and/or are entitled to be repaid the monies which were recouped by the Board in an attempt to "rectify" their salaries would not be an award of windfall or unreasonable proportions. Such a precaution is arguably aimed at individual gains and not those obtained as a group. Were this not so, the individual rights, particularly of tenured teachers, would fall victim to situations such as the one at hand where the Board has made an error affecting many employees. Awards of "windfall proportions" by their nature, suggest that the individual affected is on notice that there

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has been an error. Such was not the case here and all the petitioners should be granted the relief requested.

BOARD'S ARGUMENTS

The Board first contends that the petitioners are barred from litigating the issue of salary adjustments as to ten specified petitioners because the ten were notified by a memorandum on or before September 27, 1985 that an error had been detected in their first paychecks for the 1985-86 school year and that their next paychecks would be adjusted accordingly. In order to comply with the provisions of N.J.A.C. 6:24-1.2, a petition as to these ten teachers would have had to be filed no later than December 27, 1985. However, the present petition was filed on January 3, 1986, seven days beyond the filing deadline.

The Commissioner has ruled on many occasions that the 90-day filing period, as provided by N.J.A.C. 6:24-1.2, begins to run from the date of notice of the action, rather than the date the Board actually takes the action or the date on which the action becomes effective. Riely v. Hunterdon Central High Bd. of Ed., 173 N.J. Super. 109 (App. Div. 1980). Because the 90-day filing period for these ten teachers commenced on or before September 27, 1985, any dispute which the petitioner had concerning the action of that date should have been brought before the Commissioner no later than December 27, 1985.

I take official notice that the 90th day following September 27 is December 26, not December 27.

The Board further argues that the petitioner Association filed this appeal on January 3, 1986. Therefore, the petition must be dismissed with respect to the ten teachers on the basis of notice to them on or before September 27, 1985 advising of an error in their salaries and the correction of their salaries. The Board acknowledges that the Commissioner had discretion concerning the rule "where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice." N.J.A.C. 6:24-1.17. In this event, the burden is on the petitioner to establish compelling reasons to justify enlargement of the 90-day period. The nature of the present matter just does not show compelling circumstances to warrant a relaxation.

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As the facts demonstrate, the September 11, 1985 overpayment was based on an erroneous interpretation and application of the newly negotiated contractual salary scale. The affidavit of the assistant secretary shows that errors, as a result of misapplications of the newly negotiated contractual salary scale, were made in the first checks of approximately 72 teachers.

The monies involved in this case are public, not private, funds. An expenditure of monies for unwarranted salaries would constitute illegal utilization of public funds which the Commissioner cannot encourage.

The petitioner cannot claim its members detrimentally relied on the Board's action. The notification of the salary error was sent to the first ten teachers on or before September 27, 1985. All other notices were sent by October 11, 1985. At that time, ten teachers had received only one paycheck. The remaining 32 overpaid teachers had received only two paychecks for the 1985-86 school year. Another 30 teachers were underpaid for the first two pay periods. The respondent was entitled to rely upon the limitation found in N.J.A.C. 6:24-1.2 and to assume that its action in amending the salaries of the employees would be final.

The Board also asserts it was legally entitled to adjust the staff members' 1985-86 annual salaries in September and October 1985 upon discovering that the teachers were being paid at the wrong levels because of a clerical error in implementing the new labor contract. This error caused 30 teachers to be underpaid and 42 teachers to be overpaid. These corrections did not violate the staff members' tenure rights.

The Board cites N.J.S.A. 2A:49-1 in support of its right to recover school district monies which have been erroneously paid. The Board asserts that the statute recognizes a public interest in protecting public funds. The facts show that certain teaching staff members were overpaid and underpaid in two pay periods as a result of the erroneous elimination of salary step 13 from the salary guide in September 1985. All errors had been corrected by October 27, 1985. The facts also show that the 42 overpaid teachers would each receive $1,033 more than the amount to which they were entitled. Because step 13 was erroneously omitted from the salary scale, those teachers who should have moved to step 13 remained at step 12 and those who should have stayed at step 13 moved to step 14. The teachers had no entitlement to the additional monies. Immediately upon discovering the error, the Board notified petitioners in writing. After notice, the Board then deducted

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the monies which had been erroneously paid to the first group of ten teachers on September 27, 1985 and the other group of 32 teachers on October 11, 1985. The Board also raised the salaries of the 30 underpaid teachers retroactive to September 1985.

The Board's adjustment of the teaching staff members' salaries and the recovery of monies overpaid was entirely legal and warranted.

In 1972, New Jersey adopted the rule articulated in federal courts and other state jurisdictions. Bd. of Ed. of Passaic v. Bd. of Ed. of Wayne, 120 N.J. Super. 155, 163, 164 (Law Div. 1972), certif. den., 64 N.J. 508 (1974). Simply stated, the rule is that a municipality or school district may recover public funds paid under mistake of law. At 163-164, the court stated, ". . . this court will adopt the majority view and hold that municipalities may recover payments made under mistake of law. The reasoning behind such a decision is that this court does not feel that a municipality or subdivision thereof, as the instrument of the people, should be bound by a misinterpretation of the law by the authorities in charge."

If the Board were ordered to compensate the teachers overpaid in error at a higher wage than they had a right to receive, the public would be penalized. The Board acted immediately to correct all errors and made salary adjustments upward and downward as soon as feasible.

The Board also argues the present case is distinguishable from all prior cases that have held a school district may not recover money erroneously paid to teachers once that salary has been set by the board. The leading case, Galop, above, is distinguishable. There, the board took action to recover money paid as the result of an administrative error which erroneously computed the amount of credit to which the petitioner was entitled. The error was made in October 1973 and was adopted by a formal resolution of the board. No recovery for the error was sought until March 1975, five months later. A total of $412.50 had been overpaid.

In the present case, the Board took no formal action setting the erroneously paid salaries. Moreover, the salaries the Board did establish were expressly made subject to audit.

In Galop, the Commissioner stated at 365:

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> [W]hile relatively small sums, as herein, may be decided in keeping with those precedents established in past school law decisions, he [the Commissioner] will in no way support any errors which might conceivably bestow unearned salary benefits of windfall proportions or in such amounts as to threaten the thorough and efficient operation of a local school district.

The aggregate amount sought by the petitioner is in excess of $46,800. This clearly is of windfall proportions. At a time when the Board is under orders from the State Board of Education to cut $2,000,000 from its budget, an award to teachers of unearned salary totalling over $40,000 could threaten the thorough and efficient operation of the school district.

No New Jersey court decision has held that correcting a clerical error in a teacher's salary amounts to a tenure violation. All of the recent cases decided by the Commissioner have dealt with relatively small amounts of money which have been erroneously paid over a period of months or even years. In the present case, however, the error was made in one and/or two paychecks. It was discovered and rectified in less than one month. To require the Board to pay $46,833.50 unearned is a grave harm to exact for a clerical error.

As the Appellate Division stated in Williams v. Bd. of Ed. of Deptford Tp., 192 N.J. Super. 31, 42 (App. Div. 1983), aff'd on other grounds, 98 N.J. 319 (1985), "We must be mindful of the fact that public funds are involved. An erroneous payment due to a misinterpretation of the law inures to the detriment of the taxpayers of the school district. Hence, on balance equity demands that the Board be permitted to recoup moneys paid under such circumstances and rectify its error."

The Board submits that if it must overpay the subject teaching staff members, it must also continue to underpay those who were mistakenly underpaid at the same time.

The Board asserts it cannot be bound by the salary set forth in the September 27, 1985 notice since it never voted to approve the incorrect salaries. Because the Board has the sole authority to establish an employee's salary, it cannot be bound by the erroneous salaries paid in September 1985 when such figures were merely computed by employees who were understaffed and converting to a computerized system. The Board derives its authority to establish salaries pursuant to N.J.S.A. 18A:16-1 which states, among other things, that each board of education, subject to the provisions of this title and any other

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law, shall fix and alter employees' compensation. Furthermore, N.J.S.A. 18A:29-4.1 provides, among other things, that a board 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. In addition, N.J.S.A. 18A:11-1 gives broad power to boards to make, amend and repeal rules for their own government and the transaction of their business.

The Commissioner has considered all of these statutes and concluded that "the sole authority and responsibility for 'fixing' or 'establishing' a salary for an employee of a local board of education rests solely with that board." Gersie v. Clifton Bd. of Ed., 1972 S.L.D. 462, 466. The issue of whether local boards can delegate the authority to fix and establish salaries was also dealt with in Gersie and answered in the negative. The Commissioner ruled, citing Vandenbree v. Wanaque Bd. of Ed., 1967 S.L.D. 4, 6:

> As to the purported contract executed by the President and Secretary of the Board with Petitioner . . . there is no evidence of the requisite action as set forth in R.S. 18:7-70 [now N.J.S.A. 18A:16-1; 17-15; 17-17; 17-19; 17-20] . . . to authorize the execution of the contract. Action of the President and the Secretary of the Board in this case cannot be held to satisfy the statutory requirement . . . . Absent such an authorization the contract must be held to be void and of no effect.

The Commissioner in Gersie went on to say, "Therefore, in the instant matter, absent affirmative action by the Board in the form of a duly-passed resolution, the allegation that the Board Secretary's memorandum . . . "fixed" petitioner's salary . . . is without merit."

As attested to by the assistant secretary, the Board here did not take any formal action to approve the 1985-86 salary payments to the subject teaching staff members. The Board voted only that the teachers be paid pursuant to the terms of the newly negotiated contract. The Payroll Office then computed and erroneously omitted salary step 13, resulting in overpayments and underpayments. Neither the Payroll Office nor any staff person had the power, in light of the aforementioned statutes and case law, to "fix" or "establish" teachers' salaries at any amount, especially an incorrect and higher amount than one to which a teaching staff member is entitled.

The fact that the teachers signed the September Notice of Intent subject to ratification of a new contract and subject to audit does not "fix" the salaries at the wrong

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level. In view of its clear action merely to approve the negotiated salary guide, the Board cannot be bound by the erroneous figures in the September 1985 paychecks.

Payment of the higher salaries to the teaching staff members will result in a windfall to them of $46,833.50 and would seriously threaten the Board's budget and its ability to provide a thorough and efficient system of free public education. As the Commissioner stated in Galop, above, he will not support errors that would bestow unearned salary benefits of windfall proportions. He also stated in that case that he would not support errors that would threaten the thorough and efficient operation of a local school ditrict. If the Trenton Board were required to pay teachers at the salaries initially overpaid in September 1985, the impact would be substantial in light of the fact that the Board is under an order to cut $2,000,000 from its budget. There is no justification for jeopardizing the district's operation. Even though an error was made, the effect of the error on the petitioner was minimal. On the other hand, perpetuation of that error would penalize the Board as well as those teachers who arguably would be required to give back monies to which they were entitled. Under all these circumstances, the Commissioner must deny the present petition.

DISCUSSION AND DETERMINATION

On August 29, 1985, the Board ratified a new labor agreement with the petitioner. That contract altered the salary system previously in effect (Stipulations 3 and 4). The Board's Business Department was concededly understaffed and in the process of changing over to a computerized system (Stipulation 5). However, as set forth in Stipulation 6, rather than wait until all entries were checked for accuracy before issuing the first paychecks of the 1985-86 academic year, the Business Department decided to pay the teachers and then verify the salaries. It is admitted that because of a clerical error, Level 13 on the slary scale was omitted (Stipulation 7). This led to the errors and confusion chronicled in the balance of the Stipulations which, in turn, led to the present appeal.

Although the Teacher Quality Employment Act, N.J.S.A. 18A:29-5, L. 1985, c.321, effective September 9, 1985, repealed and replaced several provisions of Chapter 29 of Title 18A, Compensation, N.J.S.A. 18A:29-14 was undisturbed by that act. N.J.S.A. 18A:29-14 states, in pertinent part:

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> 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.

Thus, concerning the teachers who were underpaid because of the clerical error, immediate adjustment of their salaries was right and proper lest the Board be in violation of N.J.S.A. 18A:29-14. The Board's argument that, if it is required to continue to pay those teachers who were erroneously overpaid, it must also continue to underpay those teachers who were erroneously underpaid, must be rejected.

I also reject the Board's attempted reliance on N.J.S.A. 2A:49-1. That statute provides "10 freeholders of such municipality or [school] district who have paid taxes on real estate in such municipality or school district" may maintain an action if moneys, funds or other property shall have been obtained, received or paid wihtout right. The statute is inapposite on its face to the present case.

The balance of the case was addressed succinctly by the State Board in Conti, above. In that matter, the petitioners were paid at the level specified in their employment contracts in the 1983-84 school year. After their initial employment, it was discovered that their placements on the salary schedules were not in accord with the collective bargaining agreement in effect in the district. In April 1984, the board resolved to maintain the petitioners at the salaries they were receiving for the balance of the 1983-84 school year, but to hold them at that level for the 1984-85 school year until, in effect, the salary guide caught up to them. The petitioners appealed the latter action. The initial decision and the State Board decision concluded that the board could properly hold the petitioners at their present salary levels until the guide caught up to them.

The State Board explained:

> Nor do we find that the Board's corrective action constituted an increment withholding to which N.J.S.A. 18:29-14 would be applicable. N.J.S.A. 18A:29-6 (repealed 1985) defines an employment increment as an annual increment of a specific

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> statutory amount to be granted each full-time teaching staff member for one "year of employement." That same provision defines "year of employment" to include employment for one academic year in any publicly owned and operated college, school or other institution. . . . [W]e therefore conclude that N.J.S.A. 18A:29-14 applies only when a board acts to withhold an annual increase to which a staff member is entitled by virtue of years of employment and not to situations such as in this case where there is not an entitlement to the increase based on years of employment.

The common thread in Honaker, Galop, Rivers, Bree, and Anson is administrative error. It is true that some of these cases advert to a mistake of law. However, I **FIND** and **CONCLUDE** that a mistake of law is not at work in this matter. A mistake of law arises when a party, having full knowledge of the facts, comes to an erroneous conclusion as to their legal effect. See, Brodzinski v. Pulek, 70 N.J. Super. 63 (Chan. Div. 1961). Rather, I **FIND** that the administrative error in this case is a mistake of fact.

The administrative errors admitted here cannot be condoned. The problems caused thereby are obvious and far reaching. While in no way excusing the responsible employees' failure to verify the system before running checks for the first pay period, this judge believes errors of this type to be a fact of life in this computer age. To leave any party, whether a political subdivision of the State or not, without a remedy for such errors seems excessively harsh and inconsistent with common experience in the everyday world.

Although Conti makes clear that a board may hold a teaching staff member who has been overpaid at his or her place on guide until the guide catches up, it does not overrule the holding of the long line of Commissioner decisions cited above that once fixed and paid, a salary may not be reduced, even if calculated in error, without resort to N.J.S.A. 18A:29-14 or the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq. The ordinary meaning of the word "fix" is to determine, settle or make permanent. According to Black's Law Dictionary 573 (rev. 5th ed. 1979), the term imports finality and certainty. In United States v. Masonite Corp., 316 U.S. 265 (1941), the Supreme Court stated that prices are fixed when they are mutually agreed upon. Salaries are not the same thing as prices, but an analogy does exist. The setting of prices in a sales contract is very much like the setting of salaries in a collective bargaining contract. When the Board ratified the labor agreement on August 29, 1985, it accepted - it fixed - the schedule of salaries

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the two parties had agreed upon. The subsequent error was administrative error. At no time did the Board fix the improper salaries.

Viewing the controversy from another perspective, it is apparent that if the Board were required to pay the subject teaching staff members at the higher levels for the 1985-86 school year, it could maintain them at those levels until the salary guide caught up to them. The question, then, is not one of more money, for it is obvious that the teachers would come out at the same place in the end. It is merely a question of when the money would be paid. It is also clear that, unlike the line of cases cited above, the errors here, both of overpayment and underpayment, were quickly noticed and rectified. The 32 teachers who were erroneously paid at a higher level for two pay periods had that amount deducted from their paychecks over a subsequent 10-week period. As set forth in Stipulation 16, most of the teachers who were overpaid were overpaid by only $52 or $104. This is not an insignificant amount to a teaching staff member. On the other hand, common sense dictates that to overpay each of these teachers in excess of $1,000 for the year would have a susbstantial cumulative impact on the Board's financial situation. The $46,833.50 of cumulative overpayment certainly was not budgeted. By the same token, the Board did not hesitate to repay the amounts erroneously held from certain teaching staff members even though perpetuating them at the wrong salaries would have meant a saving of $29,549.

In addition to the previously adopted facts I **FIND:**

1. The error complained of was a mistake of fact, not a mistake of law.

2. The Board did not fix the erroneously calculated salaries complained of.

3. Although the Board ratified a contract containing the correct salary figures, clerical errors caused certain teaching staff members to be paid at the wrong rates in the first and/or second pay periods of the 1984-85 academic year.

4. As soon as the errors were discovered, a review of all salaries was performed (Stipulation 12).

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5. By October 11, 1985, all affected teaching staff members were noticed of the error and of how it would be rectified.

In consideration of the foregoing, I **CONCLUDE** that neither N.J.S.A. 18A:29-14 nor N.J.S.A. 18A:6-10 et seq. was violated in the present case. The compelling consideration here is that there was not an entitlement to the increases, concededly paid in error, based on years of employment. I further **CONCLUDE** that there was no failure to pay an annual increase based on years of employment. The 30 teachers who had been erroneously paid at step 12 were moved to step to 13 on or before October 11, 1985. While mindful of the tenor of Commissioner decisions prior to the State Board decision in Conti, nevertheless, I **CONCLUDE** that the corrective action taken by the Trenton Board of Education in this matter was proper under the circumstances and there is no relief to which the petitioner is entitled.

Accordingly, it is **ORDERED** that the petition of appeal be and is hereby **DISMISSED.**

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

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

22 AUGUST 1986
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

AUG 25 1986
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

AUG 26 1986
DATE

OFFICE OF ADMINISTRATIVE LAW

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TRENTON EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by petitioner within the time prescribed by N.J.A.C. 1:1-16.4a and b.

Petitioner objects to the initial decision and relies on the brief submitted to the ALJ as demonstration that the ALJ erred.

Upon a thorough examination of the record in this matter and the legal arguments advanced by each of the parties, the Commissioner accepts the recommended decision of the Office of Administrative Law as modified herein and as explained below.

I. Entitlement to Higher Salaries for Duration of 1985-86

Firstly, the Commissioner concurs with the ALJ's finding and conclusion that at no time did the Board take official action to fix or set the erroneous salaries paid out to the teachers in this matter. This factor distinguishes it from all but one of the cases cited by petitioner in its brief, cases wherein official board action was deemed to have bestowed vested rights to the salaries set.

The exception to those cases is Rivers, supra, wherein no official board action was taken. The case is nonetheless distinguishable insofar as three months prior to the board's official action to correct the salary error, the petitioner had received a letter from the superintendent notifying him of the following:

> Please be advised that the members of the Board of Education of the Vocational Schools in the County of Mercer, at the regularly scheduled meeting held Tuesday, August 17, 1982, approved your annual salary of $24,760 retroactive from July 1, 1982 for school year 1982-83.
>
> (Slip Opinion, at p. 6)

It was determined that Rivers justifiably had reason to rely on this letter, particularly when coupled with the fact he had been paid at that salary for four months prior to the board's action to reduce his salary $710 to make it consistent with the negotiated contract.

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A second distinguishing factor between the instant matter and each of the cases cited by petitioner relates to the duration of the error prior to corrective action. In present matter, the error was discovered within two paychecks as opposed to the other cases which ranged from 3.5 months in Dowd v. Bd. of Ed. of East Orange, decided February 26, 1986 to years in Anson, supra, and Bree, supra.

A third and the most critical distinguishing factor between the present case and all prior cases dealing with error in salary relates to the amount of financial impact involved. The oft-quoted passage from Galop, supra, has bearing on this issue and is repeated below.

> The Commissioner is further constrained to state that, while relatively small sums, as herein, [$412.50], may be decided in keeping with those precedents established in past school law decisions, he will in no way support any errors which might conceivably bestow unearned salary benefits of windfall proportions or in such amounts as to threaten the thorough and efficient operation of a local school district.*** (emphasis supplied) (1975 S.L.D. at 365)

The amount of money at issue here is not a "relatively small" sum, albeit that any one salary overpayment may be deemed so. What the instant matter presents which distinguishes it dramatically from any other school law decision dealing with error in salary is the large number of erroneous salaries involved. An expenditure of $46,833.50 unbudgeted funds would be required if the Board were ordered to reimburse the 42 overpaid teachers the difference between their contractual entitlement for 1985-86 school year and the amount of salary erroneously calculated by the payroll personnel. Thus, the Commissioner fully agrees with the ALJ's statement that "***common sense dictates that to overpay each of these teachers in excess of $1,000 for the year would have a substantial cumulative impact on the Board's financial situation.***" (Initial Decision, ante)

Lastly, but admittedly not as important as the factor addressed above, the Commissioner agrees with the ALJ's observation which reads:

> Viewing the controversy from another perspective, it is apparent that if the Board were required to pay the subject teaching staff members at the higher levels for the 1985-86 school year, it could maintain them at those levels until the salary guide caught up to them. The question, then, is not one of more money, for it is obvious that the teachers would come out at the same place in the end. It is merely a question of when the money would be paid.*** (Id., ante)

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If petitioner's request for relief were granted in this matter, the Board would be required to pay out in one lump sum $46,833.50. In the Commissioner's judgment, common sense and sound fiscal management would be defied if this decision required the Trenton Board to expend such a staggering amount in unbudgeted funds for salaries erroneously calculated by clerical staff which were quickly rectified, only to ultimately have the teachers' current salaries held in place until the guide caught up to them. Thus, the Commissioner dismisses petitioner's claims for entitlement to the erroneously calculated salary for the entire 1985-86 school year.

The Commissioner must stress, however, that he in no way condones the managerial ineptitude demonstrated in this matter. That a payroll which was based on a newly ratified contract and which lacked official Board action setting specific salaries for each staff could be released without thorough scrutiny by management/supervisory staff is inexcusable. With respect to this and in keeping with Galop, supra, the Commissioner cautions the Board and its administrative officers to examine thoroughly and in minute detail each and every matter related to contractual salaries regardless of the "pressures" this may create so as to avoid not only the payment of unnecessary sums but disharmony and unnecessary litigation occasioned by careless and inadvertent error.

II. Recoupment of Monies Erroneously Paid Out

Notwithstanding the above, the Commissioner does not agree with the ALJ that the Petition of Appeal be dismissed in its entirety. He concurs with petitioner's position that the Board is not permitted to recoup through salary deductions the monies it had already paid to the teachers prior to the discovery of the error. While case law such as Galop, supra, and others is deemed distinguishable from the instant matter insofar as entitlement to continue for the remainder of the 1985-86 school year at the erroneously calculated salary, the decisional law with respect to a board being prohibited from deducting from a teacher's salary monies paid out in error through no fault of the teachers is applicable herein as well.

Thus, while the teachers herein are not deemed entitled to continue at the erroneously calculated salary level, this does not entitle the Board to reduce the salary they were entitled to by making deductions from that salary when the error was through no fault of the teachers. Such deductions would constitute a reduction in salary contrary to N.J.S.A. 18A:28-5 and N.J.S.A. 18A:6-10. (Galop, supra; Anson, supra; Dowd, supra; and others) It must be emphasized that the appropriate step for a board to take when the issue of erroneous salary level arises is to hold the salary level in place, not to reduce it through deductions.

Consequently, the Board is ordered to reimburse to the teachers in question the amount improperly deducted from their salaries once correctly established. The amount of money the Board will be required to pay out, on the average of $52 for 10 of the teachers and $104 for 32 of them, does not constitute so high a sum as to preclude such relief.

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In ordering the above, the Commissioner is aware that the Board has raised the argument that N.J.A.C. 6:24-1.2 bars the claim submitted by the 10 teachers who were noticed on or before September 27, 1985 because the petition was alleged to have been filed 7 days beyond their timeline. The issue was not addressed by the ALJ. Therefore, assuming arguendo the Board is correct, the Commissioner determines that given the circumstances in this matter and in the interest of justice and fair play, relaxation of N.J.A.C. 6:24-1.2 (as authorized by N.J.A.C. 6:24-1.17) is warranted.

COMMISSIONER OF EDUCATION

October 6, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2914-86
AGENCY DKT. NO. 145-4/86

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

Lee B. Laskin, Esq., for the challenger, Ann Wisnewski (Laskin & Botcheos, attorneys)

A. Lois Graham, a declared winning candidate, pro se.

Stephen J. Mushinski, Esq., for the Shamong Township Board of Education (Parker, McCay & Criscuolo, attorneys)

Record Closed: July 10, 1986 Decided: August 22, 1986

BEFORE **BEATRICE S. TYLUTKI**, ALJ:

This matter concerns the results of the April 15, 1986 school board election for two full three-year term positions on the Shamong Township Board of Education (Board). Ann Wisnewski, a write-in candidate for the April 15, 1986 election, challenged the election results and requested the Commissioner of Education (Commissioner) to hold a recount and to initiate an inquiry into the matter, pursuant to N.J.S.A. 18A:14-63.12.

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PROCEDURAL HISTORY

The Commissioner referred the matter to the Office of Administrative Law on April 30, 1986, for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. In addition, the Commissioner arranged for a recount of the ballots cast at the April 15, 1986 election, which was conducted on April 29, 1986, by John B. Wright, the Burlington County School Business Administrator. The results of the recount were the same as those listed on the Combined Statement of Results of School Election (J-5), which indicates the following:

CANDIDATES	AT THE POLLS	ABSENTEE	TOTAL
James Skaggs, Jr.	282	0	282
A. Lois Graham	143	1	144
Ann Wisnewski	83	0	83
R.M. Gallagher	1	0	1

There were two candidates on the printed ballot; A. Lois Graham's name appeared on line one and James Skaggs, Jr.'s name appeared on line two. There were no printed numbers on the ballot next to the names of the candidates. Ann Wisnewski and R.M. Gallagher did not appear on the ballot and received write-in votes.

At the recount, Mr. Wright questioned John Boldizar, the voting machine custodian employed by the Office of the Burlington County Superintendent of Elections; Marilyn Prado, the Board's business administrator-secretary; and the four officials who were in charge of the April 15, 1986 election: Lillian Gardner, Nina King, Brenda Choppine and Laura King. Mr. Wright concurred with the decision of the election officials not to count 97 write-in votes for Ann Wisnewski and one write-in vote for Ken Ruhland since their names had not been placed at the appropriate locations on the voting machines. For this election, the appropriate locations were lines one and two on the voting machines.

The Commissioner, upon receipt of the report of the recount, issued a final decision in this matter on May 20, 1986, in which he concluded:

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> Accordingly, the Commissioner affirms the report of his authorized representative and finds and determines that James Skaggs, Jr. and A. Lois Graham were elected to full terms of three years each on the Board of Education of the School District of the Township of Shamong.
>
> The record of this matter shall immediately be transmitted to the Office of Administrative Law where an inquiry is pending into the allegations made by Ms. Wisnewski. The purpose of this transmittal is to supplement the record of the inquiry and to permit any responsive statements made by those persons at the time of the recount, which are contained in the report of the Commissioner's representative, to be subject to further inquiry under oath as deemed appropriate by the ALJ. This decision is binding upon the parties unless a contrary determination is rendered by the Commissioner upon receipt and review of the initial decision to be issued by the Office of Administrative Law.

The final decision of the Commissioner, including the exhibits referred to in the decision, were hand-delivered to the undersigned on May 21, 1986. On May 22, 1986, there was a prehearing conference in the matter before the undersigned, at which time the parties agreed that the issues are:

A. Whether any write-in votes for Ann Wisnewski which were placed below line two on the voting machines should be counted.

B. Whether the school election workers should have counted four votes which had been eliminated because the full name of the person was not listed.

C. Whether the write-in votes should be counted if it is shown that the voters were not given any information or were given inadequate information relating to the procedure for write-in votes by official school election workers.

At the prehearing conference, A. Lois Graham was represented by Dennis C. Germano, Esq., and thereafter, Mr. Germano submitted a motion for summary judgment. After reviewing this motion, as well as the response filed by Lee B. Laskin, Esq., on behalf of the challenger, Ann Wisnewski, I denied the motion by order, dated June 20, 1986, on the basis that there were factual questions which necessitated the taking of testimony at a hearing.

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The hearing took place on June 23, 1986, and after receipt of briefs, the record in the matter closed on July 10, 1986. At the hearing, Mr. Laskin indicated that the challenger would not be pursuing Issue B as identified herein. In addition, it should be noted that Ms. Graham terminated the services of Mr. Germano and that she appeared pro se at the hearing. Stephen J. Mushinski, Esq., did not participate at the hearing; however, he was present at the prehearing conference and during the testimony of Ms. Prado at the hearing.

FACTUAL FINDINGS

Based on the testimony of the witnesses and the exhibits received into evidence, I **FIND** that the pertinent facts in this matter are not in dispute.

Some of the citizens of Shamong Township organized the Citizens Advocating Sensible Taxation (C.A.S.T.). This organization sent literature to the registered voters of Shamong Township urging them to vote for James Skaggs, Jr., and a write-in candidate, Ann Wisnewski, at the April 15, 1986 school board election. In the material sent by C.A.S.T., there was a sticker with the name "Ann Wisnewski" which could be used for the write-in vote, and there was a photograph of part of a voting machine and instructions as to how to cast a write-in vote (J-3). These instructions for the write-in vote procedure state:

1. To vote for a candidate of your personal choice, place finger of left hand, on small lever indicated. Pull lever to right, this will release window slides.

2. Pull to right the window slide of the designated office for which you desire to cast your vote. Paper will then be exposed for your write-in vote.

3. You must place an X after a written name or it is also permissible to attach a sticker on the paper with a candidate's name plus the X.

The photograph and instructions used by C.A.S.T. were obtained from the Office of the Camden County Superintendent of Elections by John Weaver, one of the organizers of C.A.S.T., who was assured that the write-in procedure was the same in Shamong Township, even though it is located in Burlington County.

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At the hearing, 31 persons who voted at the April 15, 1986 school board election testified on behalf of Ann Wisnewski, and a number of these witnesses indicated that they had received the C.A.S.T. literature and had read it before going to vote. Of the witnesses who read the literature, several alleged that they were confused or did not fully understand the information regarding the write-in vote procedure.

Since the Board was aware of the write-in vote campaign, Ms. Prado recommended that another voting machine be used for the April 15, 1986 election. The Board agreed and two voting machines were ordered and inspected by Ms. Prado before the election. On April 15, 1986, a single voting election location was used for the Board's election and for the Laurel Regional School District election. These were separate elections, and each used their own election machines and had their own election officials. However, the same roll books of registered voters were used for both elections.

For the Board's election, there were four election officials: Nina King, the judge of elections; Lillian Gardner, the inspector of elections; and Laura King and Brenda Chappine, both clerks of elections. All four officials had worked during a number of previous general and primary elections and had been trained by the Office of the County Superintendent of Elections. None of the officials had received any specific training for school board elections, and on April 15, 1986, they followed the procedures used for general and primary elections.

As part of their instructions from the Office of the County Superintendent of Elections, Ms. King stated that they were specifically told that they could not explain the write-in vote procedure and were told to refer the voters to the written instructions. All four election officials testified that they had received inquiries from the electorate on April 15, 1986, regarding the procedure for write-in votes, and that their only response was to advise the voters to read the write-in vote instructions which were located on the voting machines. Thirteen of the voters who testified on behalf of Ms. Wisnewski were told or overheard the election officials tell voters to read the instructions on the machine regarding write-in votes.

On each of the two voting machines used for the April 15, 1986 election, there was an attached white card (J-2) which gave the following instructions regarding the write-in vote procedure:

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1. Do all other voting first (for candidates on printed ballot).

2. To open write-in slot: Press release trigger to the right with right hand thumb. At the same time open slot with left hand index finger in line with the number corresponding to the number by the office for which you desire to write in.

3. White paper shows - write in here. [On the card is a photograph showing two fingers accomplishing the action set forth in instruction number 2.]

It was established at the hearing that on the two voting machines used for the April 15, 1986 election, the release lever for the write-in votes was located between lines 13 and 14. John Boldizar testified that this lever is labeled "write-in release lever" on the voting machines. Mr. Boldizar stated that for the April 15, 1986 election, lines 1 and 2 were to be used to vote for the candidates for the positions on the Board, lines 3 to 5 were to be used for the school budget questions, and that lines 1 through 50 were open for purposes of receipt of write-in votes. According to Mr. Boldizar, it was the normal practice for school board elections to have all the lines on the voting machine open for votes.

Although I accept Mr. Boldizar's testimony as to the words on the label for the write-in release lever, I should note that at least three witnesses for the challenger testified that the words next to the lever indicated that the write-in vote should be placed adjacent to the lever. Also, there was testimony indicating that the write-in release lever on one of the voting machines was working improperly during the recount; however, there was no evidence to indicate that there was a problem with this lever on the day of the election.

Of the 31 voters who testified for the challenger, just a few stated that they had only voted for two Board candidates on April 15, 1986, and only three felt that they had properly placed their write-in vote for Ann Wisnewski. Sixteen of these voters indicated that they had placed their write-in vote near the write-in release lever, since they were either confused by the written instructions or felt that this was the right place for the write-in vote. Four of the voters stated that they had placed their write-in vote on either line 3 or 4, since they did not think it was appropriate to place it on a line which

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contained the name of another candidate; and four other voters placed their write-in vote on a line chosen at random. Three of the persons who testified stated that they did not vote because they were either confused by the instructions or were unable to open the slot on the machine for the write-in vote.

Although I find that it is not material to the issues before me, I should note that there was testimony during the hearing regarding conversations among the election officials and conversations with Mr. Weaver, Ms. Prado and representatives of the County Superintendent of Elections, as to where the write-in vote had to be placed in order to be counted.

After he had voted and properly cast a write-in vote, Mr. Weaver got involved in the conversations regarding the tabulation of write-in votes. Mr. Weaver stated that the election officials had conflicting positions as to where the write-in vote had to be placed. One official stated that the write-in votes had to be on the line opposite the named candidate the person did not want to be elected, another official said that the write-in vote could be on either line 1 or 2, and another official stated that the write-in vote could be placed on any line. At the hearing, Marie Giberson stated that she was the person who told Mr. Weaver that the write-in vote had to be placed on the line opposite the candidate the person did not want to be elected. Although Ms. Giberson has been an election offical in the past, on April 15, 1986, she was not working as an official and was present only to vote in the Shamong election.

After telephone calls had been placed to Ms. Prado and the Office of the County Superintendent of Elections, Mr. Weaver was informed that the write-in vote should be placed on lines 1 or 2, but that the votes would be counted if they were placed on any of the lines in column 1 of the voting machines. Mr. Weaver then left the voting location and when he returned, he was informed that the Office of the County Superintendent of Elections had indicated that the write-in votes would be counted only if the vote appeared on the first three lines. Mr. Weaver again left the voting location and when he returned, he was informed that the Office of the County Superintendent of Elections had again called and stated that only the write-in votes that appeared on lines 1 and 2 would be counted. The 97 write-in votes for Ann Wisnewski which did not appear on either lines 1 or 2 were not counted by the election officials.

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There is no question that there was confusion among the election officials as to where the write-in votes had to be placed in order to be counted; however, there was no testimony to show that any of this confusion was conveyed to any person before he or she voted. The testimony clearly establishes that the election officials told voters only to read the instructions relating to the write-in procedure, and even refused on several occasions to give oral instructions regarding the procedure when they were questioned by voters.

CONCLUSIONS OF LAW

In closing, Mr. Laskin argued that the 97 write-in votes should be counted because the persons casting these votes had attempted in good faith to vote for Ann Wisnewski, and because the instructions for the write-in vote procedure are unclear and confusing. Mr. Laskin argued that it has been well established that election laws are to be liberally construed to effectuate their purpose and should not be construed to as to deprive voters of their franchise or render an election void for technical reasons. In re Keogh-Dwyer, 106 N.J. Super. 567 (Law Div. 1969), aff'd 54 N.J. 523 (1969); In re Atlantic Cty. Bd. of Elections, 117 N.J. Super. 244 (App. Div. 1971); Cavanagh v. Morris Cty. Democratic Committee, 121 N.J. Super. 430 (Ch. Div. 1972); In re Petition of Hartnett, 163 N.J. Super. 257 (App. Div. 1978); Mays v. Penza, 179 N.J. Super. 185 (Law Div. 1981).

As to the information given to the voters on April 15, 1986, I **CONCLUDE** that the election officials properly followed the procedure of referring voters to the written instructions contained on the voting machines, and that it would have been improper for them to try to explain the write-in vote procedure to any person, unless the person was handicapped. Although I recognize that the write-in vote procedure set forth in the C.A.S.T. literature and on the card which was placed on the voting machines could have been written in better and clearer language, I **CONCLUDE** that if the instructions are read carefully, the person will be able to complete the write-in vote procedure correctly. Also, since there were only two Board positions and the school budget on the ballot, I **CONCLUDE** that the lack of numbers next to the names of the candidates should not have caused any confusion, even though there is a reference to numbers in the instructions for the write-in vote. In addition, I **CONCLUDE** that the challenger has not shown that there was any fraud or nonfeasance by the election officials at the April 15, 1986 election.

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In considering this matter, I have considered Mr. Laskin's arguments as well as the legislative mandate set forth in N.J.S.A. 19:49-5, which in part, provides:

> Ballots voted for any person whose name does not appear on the machine as a nominated candidate for office are herein referred to as irregular ballots. . . . An irregular ballot must be cast in its appropriate place on the machine, or it shall be void and not counted.

Generally, the courts have not invalidated write-in votes for technical reasons, such as the failure to register a check mark or the failure to spell properly a write-in candidate's name, so long as the person can be identified. In re Klayman, 97 N.J. Super. 295 (Law Div. 1967); Riecker v. Hartmann, 130 N.J. Super. 266 (Law Div. 1974); In re Borough of South River, 26 N.J. Super. 357 (Law Div. 1953), vacated on other grounds, 27 N.J. Super. 109 (Law Div. 1953); In the Matter of The Annual School Election held in Hopewell Twp., Cumberland Cty., 1978 S.L.D. 204. However, there is no precedent to count write-in votes which were inappropriately placed. The placements of the write-in votes on lines other than 1 and 2 were not technical errors or minor irregularities, and I **CONCLUDE** that the Board's election officials properly decided not to count the 97 write-in votes in issue.

Further, I recognize, as pointed out by Mr. Germano in support of the motion to dismiss, that the Commission recently affirmed the decision not to count write-in votes which were placed below the proper lines in a school board election. In the Matter of The Annual School Election held in Haddonfield Borough, Camden Cty., 1981 S.L.D. 708.

DISPOSITION

For the reasons stated above, I **CONCLUDE** that the determination that James Skaggs, Jr. and A. Lois Graham were elected to full terms of three years each on the Board be **AFFIRMED**, and that the proceedings in this matter be **DISMISSED**.

Although this initial decision conforms with the determination reached by the Commissioner in his final decision of May 28, 1986, this initial decision is subject to review by the Commissioner of Education.

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

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

August 22, 1986
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

AUG 25 1986
8/25/86
DATE

Receipt Acknowledged:
Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

AUG 27 1986
DATE

Ronald L. Parker/K.S.
OFFICE OF ADMINISTRATIVE LAW

ks/e

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IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF SHAMONG, BURLINGTON COUNTY.	:	
	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law. It is observed that no exceptions to the initial decision were filed by the parties pursuant to the applicable provisions of N.J.A.C. 1:1-16.4a, b and c.

At issue herein is whether or not those write-in votes cast for Ann Wisnewski, which were placed below line two on the voting machines used in the election, should be counted inasmuch as such votes were not placed in conformance with the provisions of N.J.S.A. 19:49-5. A proper determination of this issue cannot be reached without further examination and review of those pertinent facts related to a second issue which is raised by counsel for write-in candidate Ann Wisnewski, that issue being whether the write-in votes cast below line two in column 1 of the voting machines should be counted in the event that Ms. Wisnewski is able to establish that the voters were not given any information or were given inadequate information by the school election officials related to the proper procedure for casting write-in votes.

Prior to the school election inquiry conducted into this matter, it must be noted that the Commissioner was required to conduct a recount of the ballots cast for two full three-year terms on the Board of Education at the annual election held in Shamong Township on April 15, 1986. This recount was conducted on April 29, 1986, pursuant to a written request from write-in candidate Ann Wisnewski, through counsel, in accordance with the provisions of N.J.S.A. 18A:14-63.2. See: In the Matter of the Annual School Election Held in the School District of the Township of Shamong, Burlington County, decided May 20, 1986.

In the above-cited decision on the recount of the ballots cast on the voting machines in question, it was determined by the Commissioner that those 97 write-in votes, which were not cast in the appropriate spaces on the voting machines (lines 1 and 2, column 1), were in violation of N.J.S.A. 19:49-5 and therefore could not be counted for Ms. Wisnewski and added to the 83 write-in votes she received which were appropriately placed on the voting machines.

The Commissioner's decision on the recount of the school election in this matter was then transmitted to the Office of Administrative Law where the inquiry into allegations of violations of statutorily prescribed procedures (N.J.S.A. 18A:14-63.12) raised by Ms. Wisnewski was pending as a contested matter before the Office

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of Administrative Law. In making such transmittal to OAL, the Commissioner determined that his decision was an official record to be provided to the ALJ who was conducting the inquiry on the Commissioner's behalf pursuant to N.J.S.A. 18A:14-63.12 and N.J.S.A. 52:14F-1 et seq. for purposes of determining whether the alleged violations of statutorily prescribed procedures influenced the result as reported and confirmed by the recount.

Upon review of Ms. Wisnewski's post-hearing letter of July 7, 1986 to the ALJ, it is observed that the following arguments, listed in summary form below, were advanced in an effort to persuade the ALJ that the 97 write-in votes in question should be added to the total number of votes cast for her at the annual school election in Shamong Township:

1. The Courts have held that election laws are to be liberally construed to effectuate their purpose. (Citations in the Initial Decision, ante)

2. The instruction cards (J-2) on the voting machines in question were poorly worded and resulted in voter confusion regarding the manner in which write-in votes were to be cast. These instructions were not as clear as those contained in the literature (J-3) obtained from the Camden County Board of Elections and distributed by C.A.S.T. to the voters of Shamong Township. For example, the instructions (J-2) on the voting machines directed voters to open the write-in slot corresponding to the number by the office where a write-in vote was to be cast. Ms. Wisnewski points out that there were no numbers on the voting machine ballots. In contrast, however, the instructions in C.A.S.T. literature (J-3) do not refer to a number on the ballot and further advise the voter to seek help if needed from the poll workers. Although similar instructions were contained on the sample ballot issued to the voters for the primary election then to be held in Burlington County on June 3, 1986, such information was not available to the voters in the Shamong Township school election held on April 15, 1986.

3. The Commissioner's earlier decision on the recount of the ballots at the annual school election held in Shamong Township was improperly rendered prior to the hearing of the inquiry held in this matter.

4. The school election officials gave no direction to the voters who wanted to cast write-in votes other than to tell them to read the instructions on the voting machines which were confusing at best.

5. The training of the school election officials was inadequate.

6. The term "write-in" next to the write-in lever on the voting machines was confusing and misleading to the voters inasmuch as the instruction card (J-2) was not informative with respect to the appropriate place to cast a write-in vote in column 1 on the voting machines.

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7. During the course of the annual school election, conflicting opinions were obtained by the school election officials from the Burlington County Board of Elections with regard to the appropriate placement of write-in votes on the voting machines.

In the Commissioner's judgment, the arguments made by Ms. Wisnewski and advanced before the ALJ bear further comment. Initially, there is nothing in the record of this matter as presented by petitioner which specifically cites any statutorily prescribed procedures that were violated pursuant to the provisions of N.J.S.A. 18A:14-1 et seq. or N.J.S.A. 19:1-1 et seq. by the school election officials at the annual school election. Additionally it must be pointed out that the court cases which are relied upon herein for the liberal construction of election laws are all distinguishable from the factual circumstances at issue herein.

The Commissioner also rejects that argument advanced by Ms. Wisnewski that he improperly decided the recount of the ballots cast in the annual school election in Shamong Township prior to the time of the hearing on the inquiry held by OAL. The specific functions regarding the recount of ballots and the conduct of inquiries in school elections by the Commissioner are separate pursuant to the provisions of N.J.S.A. 18A:14-63.5 and 63.12. While the Commissioner is required to render a final determination in both instances, the conduct of a school election inquiry must first be heard as a contested matter with an initial decision rendered through OAL, while a recount may be conducted by the Commissioner's authorized representative. Consequently, inasmuch as the Commissioner had previously decided the question of the recount of the ballots on May 20, 1986, it was entirely appropriate for such decision to be issued and transmitted to the ALJ conducting the inquiry since the purpose of the recount is to certify the actual count while the purpose of the inquiry is to determine whether improper election procedures influenced that count. Such purpose is illustrated by the following instructions to the ALJ:

> ***The purpose of this transmittal is to supplement the record of the inquiry and to permit any responsive statements made by those persons at the time of the recount, which are contained in the report of the Commissioner's representative, to be subject to further inquiry under oath as deemed appropriate by the ALJ. This decision is binding upon the parties unless a contrary determination is rendered by the Commissioner upon receipt and review of the initial decision to be issued by the Office of Administrative Law.*** (Slip Opinion, at pp. 8-9)

Similarly, the Commissioner finds without merit those arguments raised by Ms. Wisnewski to the effect that the write-in instructions (J-2) on the voting machines were defective because they were not the same as those provided on the voting machines in Camden County (J-3) or those provided on the sample ballots of the primary election in Burlington County (P-1). There is no require-

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ment in law that such instructions be identical in either of the instances cited above. While it is true that the standard instructions for casting a write-in vote (J-2) contained on the voting machines in Burlington County make reference to the "number" of the line corresponding to the office on the ballot for which a write-in vote may be cast, the fact that such line numbers are not used on the voting machine ballots in local school elections does not compromise the validity of the write-in instructions placed on the voting machines in question. These instructions have been used in the past and continue to be used on those voting machines utilized in Burlington County in general, primary and local school district elections. Consequently, absent any violation of specific, statutorily prescribed procedures which would require local school election officials to provide further specific instructions to voters except those provided for blind, disabled or illiterate voters (N.J.S.A. 19:50-3), the school election officials in Shamong Township did not commit violations of statutorily prescribed procedures cognizable by the Commissioner pursuant to N.J.S.A. 18A:14-63.12.

Upon review of the record of this matter, the Commissioner finds and determines from the exhibits in evidence, as well as the testimony of Mr. Weaver, chairman of C.A.S.T., the Committee which supported Ms. Wisnewski as a write-in candidate, that the confusion which may have resulted at the polls was caused by the literature (J-3) distributed to the voters by C.A.S.T. and not by the school election officials in Shamong or the instructions (J-2) that appeared on the voting machines in question.

The reasons for the Commissioner's determination in this matter are as follows:

1. Mr. Weaver obtained the voting machine instructions for casting write-in votes from the Camden County Board of Elections rather than the Burlington County Board of Elections. The Burlington County Board of Elections is responsible for regulating the use of voting machines used in local board elections within Burlington County.

2. Although the instructions for write-in votes that appear on the voting machines used in both Camden and Burlington Counties are similar, there are significant differences in certain respects. Consequently, when C.A.S.T. used the instructions for write-in votes contained on the voting machines in Camden County in their literature to instruct the voters in Shamong Township, Burlington County, voter confusion resulted at the polls. In order to illustrate this point the instructions appearing on the voting machines in both counties are set forth below.

The Camden County voting machine instructions for write-in votes as they appear on the C.A.S.T. literature distributed to the voters of Shamong Township read in pertinent part:

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PERSONAL CHOICE "WRITE-IN" VOTE

1. To vote for a candidate of your personal choice, place finger of left hand on small lever indicated. Pull lever to right, this will release window slides.

2. Pull to right the window slide of the designated office for which you desire to cast your vote. Paper will then be exposed for your write-in vote.

3. You must place an X after written name OR it is also permissible to attach a sticker on the paper with a candidates name plus the X.*** (emphasis supplied) (J-3)

The Burlington County voting machine instructions read in pertinent part:

INSTRUCTIONS FOR CASTING A WRITE-IN VOTE

1. DO ALL OTHER VOTING FIRST
(for candidates on printed ballot)

2. TO OPEN WRITE-IN SLOT:
Press release trigger to the right with right hand thumb. At the same
3. *** time OPEN SLOT with left hand index finger in line with the number corresponding to the number by the office for which you desire to write in.

4. You are now finished. Leave all levers and slots as they are.

PUSH RED SWITCH (at top) to clear your vote into the machine

THE CURTAIN WILL THEN OPEN.
(emphasis supplied) (J-2)

Both of the illustrations pertaining to voting machine instructions for write-in votes may be viewed as Exhibits J-2 and J-3.

A significant distinction provided between these instructions (J-2; J-3) relates to which hand or finger was to be employed on the machines to enable the voter to cast a write-in vote.

It is also evident from a review of the paper rolls (J-1) containing the write-in votes that many of those voters who cast write-in votes followed the erroneous instructions (J-3) distributed by C.A.S.T. which direct the voter to place an X beside the name of

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the write-in candidate. These directions were not given on the instructions (J-2) provided on the voting machines used in the Shamong Township school elections inasmuch as they are not required by law. See: Application for Recheck of Irregular Ballots, Borough of South River, Middlesex County, Districts 1 to 11, 26 N.J. Super. 357 (1951).

It is also noted that the written instructions for write-in votes distributed by C.A.S.T. (J-3) direct the voters to take the instructions with them to the polls. These instructions directly conflicted with those instructions (J-2) which appeared on the voting machines.

In light of the foregoing reasons and for those reasons stated in the initial decision of this matter, the Commissioner finds and determines that there were no violations of statutorily prescribed procedures (N.J.S.A. 18A:14-63.12) committed by the school election officials in the annual school election held in Shamong Township on April 15, 1986. It is further found and determined that the school election officials properly instructed voters to read the instructions (J-2) contained on the voting machines in order to cast a write-in vote. These instructions are determined to contain sufficient specificity so as to enable voters to cast their write-in votes in the appropriate place as required by N.J.S.A. 19:49-5.

Finally, it is found and determined that any voter confusion which may have resulted at the polls was not due to improper directions given by the school election officials or by the instructions (J-2) placed on the voting machines, but rather it was caused by the erroneous instructions (J-3) distributed by C.A.S.T.

Ms. Wisnewski accepted the support of C.A.S.T. and consequently any misinformation which was distributed to the voters in this regard must rest with that organization and may not be attributed to the school election officials in Shamong Township.

Thus, having determined that the 97 write-in votes cast for Ms. Wisnewski violated the provisions of N.J.S.A. 19:49-5, the Commissioner rejects her claim to have such votes counted and added to the 83 write-in votes cast for her which were appropriately placed on the voting machines at the annual school election. The provisions of N.J.S.A. 19:49-5 are repeated below:

> Ballots voted for any person whose name does not appear on the machine as a nominated candidate for office are herein referred to as irregular ballots. Such irregular ballot shall be written or affixed in or upon the receptacle or device provided on the machine for that purpose. No irregular ballot shall be voted for any person for any office whose name appears on the machine as a nominated candidate for that office; any irregular ballot so voted shall not be counted.

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An irregular ballot must be cast in its appropriate place on the machine, or it shall be void and not counted. (emphasis supplied)

Accordingly, the results of the annual school election held in Shamong Township on April 15, 1986 stand affirmed as originally announced at the conclusion of the election.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

October 8, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1126-86
AGENCY DKT. NO. 23-1/86

M.C. AND R.C.,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWN OF HAMMONTON, ATLANTIC COUNTY AND GUSTAV RUH, ATLANTIC COUNTY SUPERINTENDENT OF SCHOOLS,
Respondents.

M.C., petitioner, pro se

Samuel Donio, Esq., for respondent, Hammonton Board of Education (Donio, Bertman, Johnson, Sahli and Greco, attorneys)

Arlene Lutz, Deputy Attorney General, for respondent, Gustav Ruh (W. Cary Edwards, Attorney General of New Jersey, attorney)

Record Closed: July 24, 1986 Decided: August 29, 1986

BEFORE **LILLARD E. LAW**, ALJ:

STATEMENT OF THE CASE

Petitioners, both working parents who reside in a non-transportation zone under the direction and control of the Board of Education of the Town of Hammonton (Board), appeal from a determination by the Board to deny transportation for their minor child from a babysitter's residence, which is within an approved transportation zone, to the Board's elementary school. The Board, by way of Answer and Separate Defenses,

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contends, among other things, that its denial to provide pupil transportation to petitioners child is proper, reasonable and within its discretionary authority.

PROCEDURAL ASPECTS

Petitioners perfected their Petition of Appeal before the Commissioner of Education on January 16, 1986. The Board filed its Answer on February 18, 1986. On February 21, 1986, the Commissioner's representative transmitted the matter to the Office of Adminstrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. A prehearing was held on March 31, 1986, at which, among other things, the issues to be determined were settled and Deputy Attorney General Arlene G. Lutz propounded a motion for summary decision, together with a brief and affidavit, to dismiss respondent Gustav Ruh as a party respondent. Respondent Ruh's motion to dismiss was grounded, in part, upon his lack of statutory authority to grant the relief requested by the petitioners. Neither petitioners nor the Board opposed the motion, thereafter for good cause shown, this administrative tribunal granted respondent Ruh's motion and thereby dismissed him as a party respondent.

Thereafter, a hearing was held on June 24, 1986, at the Atlantic County Civil Courthouse, Atlantic City, New Jersey. The Board requested and was granted leave to submit a post-hearing memorandum. Petitioner made no such request, however, was granted leave to do so. The Board's memorandum was received by the undersigned on July 24, 1986, which constituted the closing date of the herein matter.

ISSUES TO BE DETERMINED

The parties agreed at the prehearing conference upon the following as those issues to be determined by this tribunal:

1. Whether petitioners' minor child, who resides in a non-pupil transportation area under the control of the Board, is eligible for pupil transportation from the child's babysitter's residence, which is within a pupil transportation area established by the Board.

2. Whether the Board's action to deny petitioners' request for transportation from the child's babysitter's residence is arbitrary, capricious and/or unreasonable?

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3. Whether the Board, in denying petitioner's request for transportation, acted within its discretionary authority under N.J.S.A. 18A:39-1 et seq.?

4. Whether the Board's policy to transport kindergarten pupils in its non-transportation areas and to deny pupils of other grades the same opportunity, discriminates against petitioner.

FINDINGS OF FACT

Having carefully reviewed and considered the entire record in this matter, including the testimony of the parties and the documents marked into evidence, and having given fair weight thereto; I FIND the following facts:

The Board has adopted a comprehensive Student Transportation Operation Policy (STOP) which, among other things, establishes geographical zones and boundaries for the transportation of pupils to its public schools (J-1, pp. 35-39). All pupils who reside within the established transportation zones are eligible for school bus transportation from their place of residence to the schoolhouse and return (J-1, pp. 36, 39). While the STOP is uniformally administered, the Board instituted a practice in 1984, to transport kindergarten pupils to school who reside in non-transported zones and who are placed with babysitters residing in established transported zones, upon request and provided:

(a) That there is space available on the school bus.

(b) That the request be in writing. (form provided by H.B.O.E.)

(c) That the request does not cause a change of the student from A.M. status to P.M. or from P.M. to A.M. status. (J-11)

Petitioners, who reside in a non-transportation zone, were afforded the opportunity of the above practice during the 1984-85 school year where their child was enrolled in kindergarten and placed with a babysitter who resides in a transportation zone. Petitioners' child was transported from the babysitter's residence to the elementary school for kindergarten classes and, thereafter, returned to the babysitter.

The Board's STOP provides, among other things, for a procedure to request a reconsideration of a denial for the transportation of a pupil who resides in a non-transportation zone as follows:

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PROCEDURE FOR REQUESTING
TRANSPORTATION RECONSIDERATION DECISION

A parent or legal guardian may make a request for Reconsideration of a Transportation Decision by filling out and submitting a Standard Prescribed Form. The form for this is available at the Business Administrator's Office.

After this form is filled out, it is then submitted to the Office of the Business Administrator. The Business Administrator and the Transportation Coordinator will make an evaluation and recommendation. A Response will then be given to the parent.

If the parent is still in disagreement, the second level of Reconsideration will be a submission of the Request to the Services Committee for its determination.

Once a determination is rendered by the Services Committee the parent initiating the Reconsideration Decision will be notified of the outcome through the Office of the Business Administrator (J-1, p. 12).

The Services Committee is composed of members of the Board authorized to make initial decisions upon transportation requests, with the ultimate determination as to whether to approve or disapprove a request resting with the whole Board (J-3, J-4, J-5, J-6).

On September 13, 1984, subsequent to the Board approving and denying certain transportation requests, a motion was unanimously carried to appoint an ad hoc committee of two Board members to study its transportation problems (J-6).

Subsequently, on September 27, 1984, as the result of the Board's ad hoc Transportation Review Committee meeting with members of the Board's administration, the Board acted upon a recommendation to place a moritorium on any further requests from individuals residing in non-transportation zones. The purpose of the moritorium was to allow the Board's ad hoc committee time to study whether or not changes should be made to the Board's then current policies (J-7). The moritorium was to remain in effect until December 13, 1984. Subsequent Board action continued the moritorium to January 10, 1985 (J-9).

It is apparent, although not specified on the record, that a tragic event occurred which resulted in a fatal accident involving a transported pupil under the Board's

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direction and control. As a consequence of this unfortunate accident, the Board directed its Superintendent and School Business Administrator, on October 11, 1984, to conduct a complete investigation of the accident together with a thorough review of the Board's Transportation Safety Procedures (J-8). On January 24, 1985, the Board adopted certain recommendations advanced by its Transportation Review Committee by way of a School District Safety Program Report (J-10).

On July 22, 1985, the Board's School Business Administrator issued a written report to the Board with respect to the school district boundaries for school bus transportation (P-1). The report included, among other things, a recital of the applicable statutory (N.J.S.A. 18A:39-1) and regulatory (N.J.A.C. 6:21-1.3) provisions governing pupil transportation, together with certain decisions rendered by the Commissioner of Education (Bd. of Ed. of Hazlet v. Garrison, 1972 S.L.D. 296) and the Board's adopted transportation policy with maps (P-1). On August 8, 1985, the Board acknowledged receipt of P-1.

Subsequently, on September 12, 1985, the Board discussed petitioner's request to reconsider the denial of their application to have their first grade child transported to and from school from a babysitter who resides within the Board's established transportation zone. Petitioners' request failed for the lack of a second to a motion propounded by a Board member to approve the application for reconsideration. (J-12). As a consequence, the herein Petition of Appeal was filed.

DISCUSSION AND CONCLUSIONS

This is a novel issue which has not been squarely addressed in any decision issued by the Commissioner. The Commissioner had, in a series of decisions since at least 1938, dealt with issues of pupil transportation eligibility and safety, among others. Read et al v. Bd. of Ed. of Twp. of Roxbury, 1938 S.L.D. 763; Trossman v. Bd. of Ed. of the Boro of Highland Park, 1969 S.L.D. 61; Frieman et al v. Bd. of Ed. of the Boro of Haworth, 1970 S.L.D. 113; Bocco v. Bd. of Ed. of the City of Camden, 1971 S.L.D. 71; Concerned Parents of Howell Twp. Sch. Children v. Bd. of Ed. of Twp. of Howell, 1972 S.L.D. 600; Beggins, Jr., et al v. Bd. of Ed. of the Town of West Orange, 1974 S.L.D. 829, aff'd State Board of Education 1975 S.L.D. 1071, aff'd New Jersey Superior Court Appellate Division, Docket No. A-1928-74, 1975 S.L.D. 1071; Baldanza v. Bd. of Ed. of Tinton Falls et al, 1976 S.L.D. 362; Wells v. Bd. of Ed. of the Twp. of Washington 1981 S.L.D. (Aug. 4, 1981); C.R.C. &

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G.M.C., parents of J.C. v. Bd. of Ed. of the Twp. of Oxford, 1985 S.L.D. (September 9, 1985).

Here, petitioners do not dispute that they reside in a school attendance area which has been established by the Board as a non-transportation zone. They contend, however, that as working parents they are required to deposit their child with a babysitter prior to the commencement of travel to their respective places of employment and that the babysitter's residence is within the Board's pupil transportation zone, therefore, making their child eligible for such pupil transportation. Alternatively, petitioners argue that their child was afforded transportation services by the Board under the identical circumstances when the child was enrolled in kindergarten, therefore, the Board now discriminates against them because their child is enrolled in the Board's first grade

The controlling statute is found at N.J.S.A. 18A:39-1, which states in pertinent part that:

> 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.

The State Board of Education has, pursuant to its statutory authority by way of the Administrative Procedure Act of the Laws of 1968 (N.J.S.A. 52:14B-1 et seq.) defined the words and phrase "remote from the schoolhouse" as found in N.J.S.A. 18A:39-1. The regulation, N.J.A.C. 6:21-1.3., as promulgated by the State Board of Education, reads as follows:

> (a) The words "remote from the schoolhouse" shall mean beyond 2-1/2 miles for high school pupils (grades 9 through 12) and beyond two miles for elementary pupils (grades kindergarten through eight), except for pupils suffering from physical or organic defects. State aid for shorter distances for the sole reasons of traffic hazards should not be given, inasmuch as traffic hazards are a local responsibility.
>
> (b) For the purpose of determining remoteness in connection with pupil transportation, measurement shall be made by the shortest route along public roadways or walkways from the entrance of the pupil's residence nearest such public roadway or walkway to the nearest public entrance of the assigned school. [Emphasis supplied]

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The key element, for the purposes of this matter, is found at subsection (b) of the regulation which unambiguously sets forth the pupils residence as the measuring point for determining eligibility for transportation service and no other; i.e., not a babysitter's residence. Here, the Board has uniformly applied residence as the determinate to establish its transportation zones and those pupils eligible for transportation services (J-1).

The Board's exception to the regulation is its adopted provision to afford transportation to kindergarten pupils placed with babysitters residing within its established transportation zones whether or not the pupil resides within or without a transportation zone (J-11). It is this exception upon which petitioner grounds its claim of discrimination. In Garrison, supra., the Commissioner addressed the issue of the Hazlet Board of Education's discriminatory practice of allowing and permitting non-eligible transportation pupils to ride its buses when such buses "...with otherwise empty seats, pass their homes, even though these homes are a 'lesser distance' from the respective schools than the distance minimums otherwise established as a necessary prerequisite for transportation entitlement." Garrison at 296. The Commissioner, relying, in part, upon a holding in Schrenk v. Bd. of Ed. of the Village of Ridgewood, 1960-61 S.L.D. 185, determined that the Hazlet Board's policy was discriminatory and a denial of those basic rights to equal protection where "...such a blanket, encompassing policy, dependent only on bus seats that are available, or otherwise 'empty,' favors certain students at the expense of others in 'entirely the same circumstances,' and that such favoritism is proscribed." The Commissioner, in Garrison at 187-188, further quotes from Schrenk, where he said:

> ". . .In order to establish discrimination, there must be a showing that one group in entirely the same circumstances as another is given favored treatment.
>
> In the Commissioner's judgement, a board of education may, in good faith, evaluate conditions in various areas of the school district with regard to conditions warranting transportation. It may then make reasonable classifications for furnishing transportation, taking into account differences in the degree of traffic and other conditions existing in the various sections of the district. Such differences need not be great in classification, but no classification may be unreasonable, arbitrary or capricious. Guill, et al. v. Mayor and Council of City of Hoboken, 21 N.J. 574 (1956); Pierre v. Baxendale, 20 N.J. Super. 210 (App. Div. 1951)." [Emphasis supplied.]

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In the instant matter, the Board has evaluated the conditions and reasonably classified kindergarten pupils as a class warranting transportation who would otherwise be ineligible for such service but, when desposited at a babysitter or child-care facility within its transportation zone, is deemed to be eligible. This classification is not grounded upon the convenience of the working parents of the kindergarten pupil but, rather, upon the pupils tender years and first experience with the public schools. This transportation service is available to all pupils in the classification; i.e., non-eligible pupils deposited with babysitters in transportation zone, therefore, it cannot be said that "..- one group in entirely the same circumstances as another is given favored treatment." Schrenk.

I **CONCLUDE,** therefore, petitioners herein have failed to carry their burden to establish, by a preponderance of the reliable and credible evidence, that the Board's denial of their request to supply transportation to their first grade child who resides in a non-transportation zone was in any manner arbitrary, capricious and/or unreasonable.

I further **CONCLUDE** that the Board, by establishing specific classification of pupils eligible for its transportation services who would otherwise by ineligible, is non-discriminatory on its face and as applied. Petitioners nor their children fit the Board's classification, consequently no discrimination against them has been shown or proved.

ORDER

Accordingly, it is **ORDERED** that the herein Petition of Appeal be and is hereby **DISMISSED.**

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

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

29 August 1986
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

SEP 2 1986
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

SEP 4 1986
DATE

Ronald J. Parke /ss
OFFICE OF ADMINISTRATIVE LAW

bc

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WITNESSES

None

EXHIBITS

JOINT EXHIBITS IN EVIDENCE

J-1	Students Transportation Operation Policy (Stop) (Part XI Excluded)
J-2	Portion of Board Minutes, September 2, 1976 (page 30)
J-3	Portion of Board Minutes, September 22, 1977 (page 139)
J-4	Portion of Board Minutes, June 7, 1984 (page 47)
J-5	Portion of Board Minutes, August 9, 1984 (page 83-84)
J-6	Portion of Board Minutes, September 13, 1984 (pages 89-90)
J-7	Portion of Board Minutes, Sep[illegible]mber 27, 1985 (page 108)
J-8	Portic[illegible] Baord Minut[illegible]s, October 11, 1984 (page 114)
J-9	Portion [illegible] Board Minutes, December 13, 1984 (page 51)
J-10	Portion of Board Minutes, January 24, 1985 (page 20)
J-11	Portion of Board Minutes, August 8, 1985 (page 200)
J-12	Portion of Board Minutes, September 12, 1985 (page 204)

M.C. AND R.C. v. B.O.E. of Hammonton

RESPONDENT BOARD'S EXHIBITS

R-1	Portion of Board Minutes, A[illegible]:4, 1986 (page 371)

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M.C. AND R.C.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF HAMMONTON, ATLANTIC COUNTY, AND GUSTAV RUH, ATLANTIC COUNTY SUPERINTENDENT OF SCHOOLS,	:	DECISION
RESPONDENTS.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a comprehensive review of the record of this matter, the Commissioner agrees with the findings and the conclusion of the Office of Administrative Law that the Hammonton Board did not act in an arbitrary or capricious manner in denying petitioners' request to supply transportation to their first grade child who resides in a non-transportation zone. The Commissioner also finds that the Board's policy establishing specific classification of pupils eligible for its transportation services, who would otherwise be ineligible, is nondiscriminatory on its face and as applied. Thus, the Commissioner concurs with the finding of the ALJ that petitioners have failed to carry their burden to establish, by a preponderance of the credible evidence, discrimination against their child.

Accordingly, the Commissioner accepts the recommendation of the Office of Administrative Law dismissing the Petition of Appeal and adopts it as the final decision in this matter for the reasons expressed in the initial decision.

COMMISSIONER OF EDUCATION

October 9, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4238-85
AGENCY DKT. NO. 159-6/85

GERALD NOSNITSKY,
Petitioner,
v.
WILLINGBORO BOARD OF EDUCATION,
Respondent.

Susan Enste Holley, Esq., for petitioner (Ruhlman, Butrym and Friedman, attorneys)

John T. Barbour, Esq., for respondent (Barbour & Costa, attorneys)

Record Closed: July 24, 1986 Decided: September 2, 1986

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

Gerald Nosnitsky (petitioner) alleges the Willingboro Board of Education (Board) has violated his tenure and seniority rights by employing nontenured teachers or teachers with less seniority than he in health and physicial education positions to which he lays claim.

At issue is whether the petitioner has improperly been denied employment by the respondent Board for the 1985-86 school year and, if so, to what relief he is entitled.

The matter was opened by the filing of a petition of appeal with the Commissioner of Education on June 5, 1985. The Board filed an answer on June 25, and the matter was transmitted on July 10 to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

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Because of the pendency of an appeal of an earlier matter between these parties having the same legal context as this matter, as well as the pendency of related appeals, this matter was placed on the inactive list, at the request of the parties, until December 20, 1985.

In January 1986, the petitioner's counsel requested and received, for good cause shown, another delay of 90 days. The matter was set down for hearing on June 23, 1986. Counsel than attempted to draw and ultimately did draw a stipulation of facts that was filed on June 20, 1986. I adjourned the June 23 hearing and informed the parties that they could proceed on cross-motions for summary judgment, there being no factual dispute. The parties filed their moving papers as directed, and the record closed on July 24, 1986.

STIPULATED FACTS

1. Petitioner, Gerald Nosnitsky, was employed as a teaching staff member by respondent Board of Education commencing on or about September 1, 1973. Petitioner served continuously in said capacity through the 1983-84 school year. Petitioner, therefore, acquired tenure and seniority with respondent.

2. During all of petitioner Nosnitsky's employment with respondent, he was assigned as a teacher of Health and Physical Education, a position that required a (K-12) teacher of Health and Physical Education certification which petitioner possessed prior to being employed by respondent. Petitioner Nosnitsky also obtained his M.E.D. in Health and Physical Education from Trenton State College in August 1974.

3. During all of his employment with respondent, petitioner Nosnitsky served as a health and physical education teacher in grades 7-12, departmentalized.

4. Petitioner Nosnitsky's employment was terminated by respondent effective July 1, 1984, due to a reduction in force. Respondent determined that petitioner was subject to the reduction in force because, according to respondent, petitioner's seniority was limited to the secondary category.

5. Petitioner Nosnitsky was called back to work, however, effective February 1, 1985, to teach 10th and 11th grade Health for the remainder of the 1984-85 school year.

6. On or about April 29, 1985, respondent resolved that the employment of petitioner would be terminated effective June 30, 1985.

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PETITIONER'S ARGUMENTS

The petitioner makes two main assertions: (1) the amended seniority regulations, N.J.A.C. 6:3-1.10, operate only prospectively and do not affect rights accrued prior to September 1, 1983; and (2) the petitioner had vested rights in the seniority he accrued during his service which could not be disturbed by amendment of the prior regulations.

In support of these assertions, the petitioner argues he accrued seniority on a district-wide basis (K-12) as a health and physical education teacher for all periods of employment prior to September 1, 1983, the effective date of amendment of N.J.A.C. 6:3-1.10. The petitioner cites several cases in support of his position, but these cases either apply to reductions in force (RIFs) effected before September 1, 1983, or are adverse to his position. For example, Hill v. Bd. of Ed. of W. Orange, OAL DKT. EDU 4113-84 (Dec. 5, 1984), adopted Comm'r of Ed. (Jan. 21, 1985), aff'd St. Bd. (May 1, 1985), aff'd N.J. App. Div., Feb. 19, 1986, A-4355-84T1 (unreported), clearly establishes that RIFs occurring on or after September 1, 1983, shall be subject to the new rules. Further, the new rules recognize service only in categories in which there has been actual service, a distinct departure from the prior practice, as opposed to categories in which one was eligible to serve or could have served.

The petitioner's vested interest argument also is laid to rest by Hill and related cases. As the appellate court in Hill noted (slip opinion at p. 2), prior to the amendment, Hill would have prevailed because "there was no requirement that one have actually taught at the level to which one laid claim by reason of seniority. The revised rule precludes seniority preference to a position at a level at which one has never taught." (Emphasis added.)

The administrative law judge in Hill rejected the vested right theory. The Commissioner and State Board affirmed. The Appellate Division affirmed for the reasons expressed by the judge. (Slip opinion at pp. 2-3.)

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RESPONDENTS ARGUMENTS

The Board argues that a board may reduce its teaching staff when advisable (N.J.S.A. 18A:28-9), it may not dismiss on the basis of any proscribed reason (N.J.S.A. 18A:28-10), and the State Board has provided rules and regulations for the establishment of seniority for categories of teachers when a RIF is effected (N.J.A.C. 6:3-1.10).

Among the rules is the clear provision of N.J.A.C. 6:3-1.10(l)15i:

> Any person holding an instructional certificate with subject area endorsements shall have seniority within the secondary category only in such subject area endorsement(s) under which he or she has actually served.

The equally clear provision of N.J.A.C. 6:3-1.10(l)15iii states:

> Any person employed at the secondary level in a position requiring an educational services certificate or a special subject field endorsement shall acquire seniority only in the secondary category and only for the period of actual service under such educational services certificate or special subject field endorsement.

The Board also cites Hill, above, and maintains Hill holds that seniority may accrue only in the subject matter and level taught. The petitioner makes no claim of actual service outside the secondary level.

The concept of seniority does not come into play until and unless a RIF occurs. The new regulations say what they say. When such a change occurs, the disposition of a case must be governed by the most recent enactment. S & L Associates v. Washington Tp., 35 N.J. 224, 227 (1961). The express intent of the State Board must be effectuated.

DISCUSSION AND DETERMINATION

The short answer to this controversy is that the petitioner has not been improperly denied employment or any related right in the RIF effective July 1, 1984, and in his later release after serving February 1 - June 30, 1985, as a teacher of health in grades 10 and 11.

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The latter service, of course, added one-half year to his seniority as a teacher of secondary health and physical education. The preferred eligible list the Board is required to maintain (N.J.S.A. 18A:28-12) must so reflect.

The Hill decision and related cases control the outcome here and need not be recited again. Having reviewed Hill and the record in this matter, I **FIND:**

1. The subject reduction in force was effective July 1, 1984.

2. At that time, the present revised version of N.J.A.C. 6:3-1.10 was in place, having become effective September 1, 1983.

3. Only when the reduction in force was made did the concept of senority come into play.

4. The seniority determinations made attendant to the subject reduction in force had to be made in accordance with the rules then in effect.

In consideration of the foregoing, I **CONCLUDE** the petitioner's seniority as a teacher of secondary health and physical education has been properly calculated by the Willingboro Board of Education. I further **CONCLUDE** the petitioner has not been improperly denied employment or any related right.

Accordingly, I **ORDER** the petition of appeal **DISMISSED.**

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

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OAL DKT. NO. EDU 4238-85

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

2 SEPTEMBER 1986
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

SEP 3 1986
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

SEP 5 1986
DATE

OFFICE OF ADMINISTRATIVE LAW

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GERALD NOSNITSKY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful review of the record of this matter, the Commissioner agrees with the findings and the conclusion of the Office of Administrative Law that petitioner's seniority as a teacher of secondary health and physical education has been properly calculated by the Willingboro Board of Education and that petitioner has not been improperly denied employment or any related right.

Accordingly, the Commissioner accepts the recommendation of the Office of Administrative Law dismissing the Petition of Appeal and adopts it as the final decision in this matter for the reasons expressed in the initial decision.

COMMISSIONER OF EDUCATION

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
ORDER ON MOTION
OAL DKT. NOS. EDU 7873-85
and EDU 7845-85 (CONSOLIDATED)
AGENCY DKT. NOS. 392-11/85
and 393-11/85

ELIZABETH SUTTON,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY,
Respondent.

PHILIP O. SHERIDAN,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY,
Respondent.

Paul L. Kleinbaum, Esq., for petitioner Elizabeth Sutton
(Zazzali, Zazzali & Kroll, attorneys)

Nancy Iris Oxfeld, Esq., for petitioner Philip O. Sheridan
(Oxfeld, Cohen & Blunda, attorneys)

Nathanya G. Simon, Esq., for respondent
(Schwartz, Pisano, Simon & Edelstein, attorneys)

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OAL DKT. NOS. EDU 7873-85 and 7845-85

Record Closed: August 6, 1986 Decided: September 3, 1986

BEFORE ELINOR R. REINER, ALJ:

Petitioners, Elizabeth Sutton and Philip O. Sheridan, appealed to the Commissioner of Education, alleging that respondent acted arbitrarily and capriciously by withholding their employment and adjustment increase for the 1985/86 school year. Elizabeth Sutton and Philip O. Sheridan filed their petitions on November 19, 1985 and the answers were filed on December 10, 1985. The matters were transmitted to the Office of Administrative Law on December 11 and 12, 1985, respectively. Prehearing conferences were held on February 26, 1986, at which time the following issues were isolated:

1. Did respondent act arbitrarily and capriciously by withholding petitioners' employment and adjustment increments for the 1985/86 school year?

2. Did respondent act in a timely manner to withhold petitioners' increments?

3. If respondent did not act in a timely manner, to what relief, if any, are petitioners entitled?

Pursuant to the prehearing orders entered in this matter, respondent indicated that it would move to consolidate the two matters. The two cases were, in fact, consolidated by order dated March 26, 1986. Petitioners moved for summary decision in regard to issue No. 2. The facts necessary for a determination are essentially undisputed. They are summarized as follows:

Both petitioners are tenured teaching staff members with the respondent school district. On May 29, 1985, petitioners, science teachers, supervised high school students on a field trip to the Bronx Botanical Gardens in the Bronx Zoo. Forty students left the school on the trip and 37 returned with the group. As a result of three students not

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returning with the group, it was alleged that petitioners were negligent in failing to fulfill their responsibilities and obligations on that trip. The superintendent and the high school principal, Mr. Berman, investigated the event. In fact, the administrators and the Board of Education were aware of the events which took place at the Zoo, almost as soon as they happened. On June 4, 1985, Mr. Berman, the principal of Orange High School, sent a memorandum to Mr. Woodrow Zaros, the superintendent of schools, setting forth the results of his investigation into the events of that day.

At the June 11, 1985 closed session meeting of the Board of Education (Board), Superintendent Woodrow Zaros reported the incident to the Board. The Board requested further information, as well as a recommendation from the superintendent, together with participation by the affected teachers. The Board discussed the possibility of withholding Sheridan's increase. On or about June 17, the principal met with the teachers in order to supplement the information to be submitted to the Board. On June 21, 1985, the superintendent again met with the teachers and their duly selected representatives. At that time, the superintendent advised of his intent to make the recommendation to the Board that each of the teachers have their increments withheld for the 1985-86 school year. Additionally, the superintendent advised each of the teachers of the Board's request that they appear at the next scheduled Board meeting (June 25, 1985), as well as the opportunity for each teacher to supply additional materials for distribution to the Board at that time. Written confirmation of this was contained in a memo from the superintendent to each of the teachers. In response to the written communication to the teachers, Mr. Sheridan, a day before the meeting, notified the superintendent that he was unavailable to attend the Board meeting as requested. Petitioner Sutton came to the meeting but was requested to wait outside pending discussion by the Board. At the Board meeting, in closed session, the Board once again considered this matter and whether or not the teachers' increments should be withheld. The Board was presented by the superintendent with the documentation prepared by each of the teachers. After discussion, the Board determined that it needed more time to review all the materials prior to meeting with the teachers and, therefore, requested that the matter be postponed to another Board meeting.

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The Board did not hold a regular meeting during the month of July and, therefore, the matter was not presented again to the Board until its meeting on August 20, 1985. Prior to the August 20, 1985 Board meeting, each of the teachers was advised that the matter would be discussed and acted upon by the Board after each of the teachers had an opportunity to appear and make a presentation with any representatives of their choosing. Sheridan was notified of the meeting on August 16, 1986, and Sutton was notified by letter dated August 14, 1986. While petitioner Sutton and her representative attended the August 20 meeting, Sheridan advised that he would be unavailable to attend due to prior personal commitments. (He had already booked a cruise which was to commence on August 18, 1985.) Sheridan communicated to the Board and the superintendent, both orally and in writing, his request to table the matter to the next Board meeting so that he would have an opportunity to make his presentation to the Board prior to Board action on the recommendation to withhold his increment. After due consideration of this request, a motion was made by one of the Board members that with regard to Mr. Sheridan, the issue be tabled until the next meeting so that he would have an opportunity to make the presentation. This motion was seconded and passed by a vote of 3 to 2.

With regard to Ms. Sutton, the Board heard from Ms. Sutton and her representative, and then entertained extensive discussion on the matter. Subsequent to the discussion, a motion was made to withhold the increment of Ms. Sutton, which was duly seconded and passed by the Board by a vote of 3 to 2 in closed session. (The Board also met in public session on August 20, 1985, but did not vote on the withholding of petitioner's increment). Sutton was not aware of the vote at that meeting. By letter dated August 30, 1985, the Board notified Sutton of its action and the reasons for it.

Mr. Sheridan was advised of his opportunity to appear at the next Board meeting on September 10, 1985, to make his presentation as to the superintendent's recommendation to the Board to withhold his increment.

At the September 10, 1985 closed session Board meeting, Sheridan, along with his attorney and other designated representatives, made a presentation to the Board

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concerning the recommendation by the superintendent of the withholding of his increment. Subsequent to the presentation, the Board had an extended discussion concerning same, resulting in a vote on the withholding of the increment.

The Board then proceeded into public session and voted on the two following recommendations: "the withholding of employment increment and adjustment increases for Elizabeth Sutton" and "to withhold the employment increment and adjustment increase in the case of Philip Sheridan." Both of these resolutions passed by a vote of 3 to 2. Sutton was not advised of the meeting, although she was present on other business.

The school year began on September 4, 1985. By correspondence dated September 12, 1985, from the superintendent, each of the affected teachers was notified of the Board action and the reasons therefor.

As outlined above, the issue is whether the Board has failed to withhold petitioners' increments in a timely and proper manner, pursuant to N.J.S.A. 18A: 29-14. Petitioners argue that given the undisputed manner in which respondent withheld their increments, they are entitled to judgment as a matter of law. In support, petitioners rely on N.J.S.A. 18A:29-14 which reads as follows:

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

Petitioners urge that the Commissioner has interpreted the statute to require, as a matter of fundamental fairness, a local board of education to act to withhold an increment prior to September 1 of a given school year. Moreover, they contend that a local board is required to act by public recorded roll call vote prior to the commencement of the school year. That being so, petitioners argue that when the Board took no action to withhold petitioners' increments until September 10, 1985, this was fatal since it was after "the commencement of the school year involved." In support of his argument, petitioner Sheridan contends that his request that the Board not act at its

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meeting in August 1985, does not help respondent. According to petitioner, the Board had become aware of the events of May 29, 1986, almost as soon as they happened and, in fact, discussed not only the underlying facts of the incident, but whether or not to withhold his increment at two meetings in June 1985. He argues that it was the Board's inaction which led to the instant situation. Noting that at no time did he ever waive any right to claim that the Board acted in an untimely manner, petitioner alleges that the Board had no obligation to honor his request, and did so at its own risk. Moreover, Sheridan opines that such a request does not give the Board a right to act in violation of a legally mandated time limit. Regardless of any requests he made, the Board was not relieved of its obligation to comply with decisions of the Commissioner and the Appellate Division as to when a Board must act to withhold an increment.

Essentially, Sutton's argument is the same. Sutton points out that the Board committed two errors which are fatal to its action to withhold her increments. First, its action on August 20, 1985 was defective because the vote was taken in a private business meeting and not in a public session. Second, the Board's attempt to cure this error at its September 10, 1985 public session was flawed because it occurred after the commencement of the school year. According to petitioner Sutton, the Board could have cured its error prior to September 1. However, once, her 10-month period of service commenced on September 1, and her salary expectation became an entitlement, the Board could not act to withhold her increments.

Although respondent did not contest the conclusion that an increment may only be withheld prior to the commencement of the school year in which it is to become effective, respondent argues that under special and unique circumstances, courts have considered that an exception may be warranted. In support of its argument, respondent cites Winson v. Bd. of Ed. of the Township of Ridgewood, 1981 S.L.D 102, wherein the court, adopting the board's argument that noncompliance was purely technical and minor, denied the request to void the actions taken by the board. Moreover, respondent alleges that the reasoning set forth in the Bd. of Ed. of Northern Highlands Regional High School v. Martin, (N.J. App. Div. Mar. 13, 1979, A 2119-79) (unreported) and Newark

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Teachers' Union v. Bd. of Ed. of Newark, OAL DKT. EDU 9836-83 (April 26, 1984) mod. by Comm'r. of Ed. (June 13, 1984) is applicable to the instant matter. More particularly, respondent points out that here there was knowledge prior to September 1, on the part of petitioners as to the intention of the superintendent and the Board. Contending that the only missing element was the open public meeting vote, respondent thus opines that as long as the individual effected is informed of the reasons for the action, whether same is before or after the public roll call vote is immaterial. Respondent alleges that it would be hypertechnical and unreasonable to void the action based on the fact that the public vote was not held until September 10, 1985. Noting that Sutton was afforded all due process rights, respondent argues that in regard to Sutton all the elements of N.J.S.A. 18A:29-14 were, in fact, satisfied with the exception of an open public vote, which, under the Open Public Meetings Act, can be done via corrective action nunc pro tunc. Respondent submits that there was no harm or prejudice to Elizabeth Sutton by the Board's action.

Respondent further alleges that Sheridan who requested that the Board postpone taking action on his case until his availability, which was post September 1, 1985, should be estopped from claiming that those actions taken subsequent to September 1 were untimely and should be declared void. Although respondent admits that Sheridan neither specifically waived his rights or agreed that he would not raise the issue of timeliness in a future litigation, respondent contends that the Board substantially relied on the request to its detriment believing that if it agreed to a postponement, any action taken subsequent to the presentation of Mr. Sheridan impliedly would be as if it had been taken at the previously scheduled meeting. In fact, respondent opines that the adjournment was apparently contingent upon a mutual understanding of a waiver to an untimeliness argument. In addition, respondent argues that the court should take into account the totality of the circumstances and the time of year in which the incident occurred. Respondent contends that the Board acted diligently and responsibly and simply wanted to afford each teacher the opportunity to present both written and oral information in defense of the incident prior to its action. Respondent concludes that to render a decision voiding the actions of the Board would place form over substance and technicality over merit.

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Respondent further objects to the appropriateness of a certification filed by Sheridan's attorney contending that as a representative, she is precluded from "testifying" as to the facts and circumstances of a case. In response petitioner Sheridan contends that his attorney's affidavit be considered in that she has not testified as to personal knowledge of facts, but rather states facts which were submitted by the Board to petitioners in answers to interrogatories.

I have considered the arguments presented and must agree with the position espoused by petitioners. It is well known that the retroactive withholding of increments is not permitted; a withholding must be effected prior to the start of the academic year. Gersie v. Clifton Bd. of Ed., 1972 S.L.D. 462. More to the point, a local board is required to act to withhold an increment by public recorded roll call vote prior to September 1, the start of the school year. Johnson v. Piscataway Bd. of Ed., OAL DKT. EDU 774-83 (Aug. 15, 1983), adopted Comm'r of Ed. (Sept. 29, 1983).

In view of the fact that this action was not taken in regard to petitioners, it behooves this tribunal to consider the ramifications of this inaction. The case law in this area appears to have been clearly developed and compels the conclusion sought by petitioners. In Proctor v. Orange Bd. of Ed., OAL DKT. EDU 5996-80 (Mar. 13, 1981), adopted Comm'r of Ed. (May 1, 1981), it was held that a board may withhold an increment after a teaching staff member receives a contract and proposed salary for the ensuing year, but before the Board officially sets the salary schedules for the year. And, in Van Houten v. Middletown Township Bd. of Ed., OAL DKT. EDU 3338-80 (Nov. 16, 1981), adopted Comm'r of Ed. (Jan. 4, 1982), it was held that the existence of an individual contract for the following year at a higher salary, does not preclude a board from acting to withhold the increment prior to the last day of the current school year. Moreover, in Johnson v. Piscataway, it was held that the board's action to withhold petitioner's increment for the 1982-83 school year was improper because it occurred after the start of the school year (Oct. 1982) even when the Board only found out in September 1982 that an earlier suspension of petitioner was illegal, and that he must be reinstated with back pay.

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In addition, and on point, it appears clear that once an increment has accrued or vested at the beginning of the school year, it is no longer a proposed raise, which could be withheld, but a part of the employee's contractual salary. Newark Teachers' Union v. Bd. of Ed. of Newark, OAL DKT. EDU 9836-83 (Apr. 26, 1984), mod. Comm'r. of Ed. (June 13, 1984). Thus, Newark Teachers' Union clarifies the necessity for the board to follow the procedures of N.J.S.A. 18A:29-14 and act before the start of the school year regardless of any requests made by petitioner:

> It is the belief of the Commissioner that as a matter of fundamental fairness, Board action to withhold an increment must be prior to the date the 10-month period of service commences. Therefore, this would require Board action prior to September 1 of the school year involved. Although actual service may not commence until the first day of school, September 1, nonetheless is the date upon which a staff member's salary entitlement commences for the 10-month period of service, September to June. [at 14]

Finally, it must be noted in response to respondent's argument that such a result is hypertechnical when the substance of the statute has been satisfied, that the rationale in Bd. of Ed. of Northern Highlands Regional High School District v. Martin, does not aid respondent. In fact, Bd. of Ed. of Northern Highlands Regional High School District holds that the individual may be informed any time before or after the public roll call vote, i.e., after the start of the school year, but the roll call vote must occur prior to the start of the school year.

In view of the above discussion, it appears clear that the Board in the instant matter did not act in a timely manner to withhold petitioners' increments. Formal action must be taken before the start of the school year. It was not done in the instant case.

For all the foregoing reasons, I **CONCLUDE** that formal Board action to withhold a teacher's salary increment must be taken by a Board of Education in a public roll call vote prior to the start of the school year, i.e., September 1. Inasmuch as all parties acknowledge that this was not done in the instant case, it is clear that respondent has not

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complied with the provisions of N.J.S.A. 18A:29-14. It is hereby **ORDERED** that petitioners' motions for summary decision be **GRANTED.**

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

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

September 3, 1986
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

SEP [illegible]
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

Mailed To Parties:

SEP 8 1986
DATE

Ronald I. Lamb/k.s.
OFFICE OF ADMINISTRATIVE LAW

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ELIZABETH SUTTON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
PHILIP O. SHERIDAN,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY,	:	
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The Board's exceptions and petitioners' replies were filed within the time prescribed by N.J.A.C. 1:1-16.4a, b, and c. The exceptions are a reiteration of the legal arguments already brought before and considered by the ALJ.

The Commissioner, upon review of the record, is in agreement with the conclusions reached by the ALJ. He finds as meritless the Board's argument that because N.J.S.A. 18A:29-14 does not specifically state a Board must vote in public session to withhold an increment, its vote taken in executive session should not be reversed given the circumstances of the instant matters. Likewise, he finds without merit the Board's argument that because the statute does not set a specific timeline by which a board must act to withhold an increment, its actions should be upheld.

That a board must act in public session to withhold an increment has been clearly articulated in such cases as Winson et al., supra, Walsh v. Bd. of Ed. of Rochelle Park, decided June 9, 1981 and Bd. of Ed. of Northern Highlands Regional, supra. The statement of the Appellate Division Court in this latter decision is quite concise in its language both in terms of the requirement of public vote and also on the timing of the vote. It reads in part:

> ***[T]he substance of the statutory requirement is satisfied when the school board acts by public recorded roll call vote prior to the commencement of the school year involved and the individual affected is informed of the reasons for the

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action, whether before or after the public roll call vote.*** (emphasis supplied)
(1979 S.L.D. at 853)

The decisional law considered and relied upon by the ALJ to conclude that the Board was required to act prior to September 1, 1985 is entirely correct. That this requirement and the one addressed above arise out of decisional law, not statute or regulation, does not alter a board's responsibility to be cognizant of and to act in accordance with such requirements. The New Jersey Supreme Court has clearly stated in In re Uniform Administrative Procedure Rules, 90 N.J. 85 (1982) that administrative agencies are empowered to effectuate their regulatory responsibilities through either rulemaking or decisional authority. (See pp. 91-92.)

Lastly, the Commissioner finds unpersuasive the Board's argument that Petitioner Sheridan waived his rights when he requested that the Board postpone action on his case until the next Board meeting (post-September 1) when he would be available to present his position.

It must be stressed that there was absolutely no requirement that Sheridan be given an opportunity to address the Board prior to its decision on whether or not to withhold his increment. Moreover, the record indicates that he had already been given an opportunity to address the Board on June 25, 1985 which he declined but that he submitted documentation in support of his position. The Board chose not to act on the increment withholding at that time and did not take it up again until late August.

In acceding to Petitioner Sheridan's request, the Board acted at its own peril for, as stated above, the Board should have known it was required to act prior to September 1, 1985. Further, there was nothing to preclude the Board from proceeding on the information it had before it on August 20, 1985. Had it taken action to withhold, it could have later rescinded it if, upon hearing Petitioner Sheridan's position, it was inclined to take such action.

Accordingly, the Commissioner adopts the initial decision granting summary decision to petitioners for the reasons stated therein with the following modifications. The Board is ordered to pay to petitioners the increments denied them for 1985-86. Interest is denied in view of the fact that there is no evidence the Board acted in bad faith or in deliberate violation of statute or code. N.J.A.C. 6:24-1.18(c) Expungement of petitioners' personnel records is limited strictly to any reference to the withholding actions taken on August 20, 1985 and September 10, 1985. Expungement does not extend to any other document(s) regarding and/or pertinent to the cause of the withholding action. Further, no expungement shall be executed until exhaustion of administrative remedies has occurred should an appeal to this decision be made.

COMMISSIONER OF EDUCATION

October 10, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3418-86
AGENCY DKT. NO. 153-5/86

JUDITH FRINGUELLO,
Petitioner,
v.
BOARD OF EDUCATION OF THE VOCATIONAL SCHOOLS OF THE COUNTY OF BERGEN,
Respondent.

Robert A. Fagella, Esq., for petitioner
(Zazzali, Zazzali & Kroll, attorneys)

Philip Scalo, Esq., for respondent
(Smith, Don, Alampi & Scalo, attorneys)

Record Closed: September 2, 1986 Decided: September 11, 1986

BEFORE EDITH KLINGER, ALJ:

Respondent brought a motion for summary decision on the grounds that petitioner failed to file her petition of appeal no later than the 90th day from the date of the action taken by the district Board of Education which is the subject of the requested contested case hearing as set forth in N.J.A.C. 6:24-1.2(b).

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For purposes of this motion, it will be assumed that all facts as presented by petitioner are true. The summary of facts has been taken from petitioner's Brief and Appendix in Opposition to the Motion for Summary Judgment:

> Petitioner is a tenured teaching staff member who has been employed, in a full-time capacity, at the Bergen County Vocational/Technical School since 1974. Petitioner has, at all times relevant hereto, always held an instructional certificate with an endorsement as "teacher of skilled trades." See, N.J.A.C. 6:11-6.3. A "subject category" was also listed on that skilled trades endorsement entitled "commercial art," although there is apparently no such listing in the Commissioner's regulations. In any event, petitioner alleges that she taught both "commercial art" and "printing" at respondent's facilities for almost ten years, pursuant to the terms of her "teacher of skilled trades" endorsement.
>
> In April 1985, petitioner was advised that another teacher with more seniority in commercial art was returning to the school district, and consequently would "bump" her from her position as a commercial art teacher.[1] Petitioner advised the Board, in return, that she was entitled to assignment as a printing teacher because she had always taught printing as well as commercial art until the year in question.
>
> The Board disagreed with petitioner's contention, concluding that since the "subject category" on her instructional certificate listed only commercial art, and not printing, she was not qualified to assume the available printing position. It is apparently undisputed that, if Ms. Fringuello was indeed qualified to teach printing, a position was available for her in the district for September 1985.
>
> Shortly thereafter, and in order to comply with the Board's requirement, petitioner advised the Office of Teacher Certification within the New Jersey Department of Education that, because of her experience and actual service as a printing teacher for several years, her subject category should automatically be amended to include a "printing" endorsement. Petitioner alleges, however, that because of administrative delays within the Department of Education, and the need to submit supporting documentation for her claim, the actual endorsement on her

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certification was not issued by the Department of Education until February 6, 1986. (Exhibit A). The petition in this matter was filed on April 29, 1986, within 90 days of receipt of the amended certificate.

Respondent has moved to dismiss the petition as untimely in violation of N.J.A.C. 6:24-1.2, on the theory that the petition should have been filed within 90 days of the April 30, 1985 notification that petitioner was being terminated. Petitioner claims, however, that because there is no dispute that she would have been entitled to the available printing position if the Board had properly recognized her actual service in that category previously, that the Board required an amendment to her certification, and the fact that the Department of Education delayed the amendment of her certification because of internal bureaucratic delay, she was not required to file her petition until the actual amendment of her certification by the Department of Education on February 6, 1986. It is undisputed that she filed this petition within 90 days of that date.

[1]During 1984-85, petitioner was teaching classes with only a "commercial art" component.

It is undisputed that on April 30, 1985, a letter was sent to petitioner from Connie J. Giacomarro, Board Secretary of the Board of Education of the Vocational Schools, County of Bergen, informing her that her position with the district was terminated effective June 30, 1985, because they had returned a teacher to the district after a leave of absence. This action was taken under N.J.S.A. 18A:28-9. Petitioner's name was placed on a preferred reemployment list.

The facts of the present case are similar to those in Paul Gordon v. Passaic Township Board of Education (N.J. App. Div., May 27, 1986, A-3294-84T7) (unreported). In that case, petitioner was employed as a teacher of instrumental music with the Passaic Township School System from March 1968 to June 1980. He was certified by the New Jersey Department of Education in August 1971 as a teacher of instrumental music. He was also eligible for certification as a "teacher of music" but did not obtain the certification. After serving on both a part-time and full-time basis between 1968 and 1980 he was terminated by the township board which decided to abolish the instrumental music program because of declining enrollment and for economic reasons. Gordon was

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advised by letter dated April 29, 1980, that his position was to be abolished as part of a reduction in force. During the 1981-1982 term, the township board created a position of "teacher of instrumental and vocal music" which was to be filled by a teacher certified both in vocal and instrumental music. The position was newly created for a joint vocal and instrumental program planned for the 1982-1983 school year. Gordon was not notified of the position because the Board felt that he did not have the qualifications. In the spring of 1982, the position was filled by a nontenured teacher with a "comprehensive teacher of music" certification from outside the district. When Gordon learned of the position in December 1982, he tried to obtain a comprehensive certification as a "teacher of music" which he ultimately received. On January 10, 1983, before the certification was issued, the township board denied Gordon's application for the position of teacher of vocal and instrumental music and denied any violation of his tenure and seniority rights. He filed an appeal with the Commissioner of Education on May 17, 1983, alleging violation of his tenure and seniority rights. The State Board of Education reversed the decision of the Administrative Law Judge (which had been affirmed by the Commissioner of Education) ruling that Gordon was barred from both retroactive and prospective relief pursuant to N.J.A.C. 6:24-1.2. The Appellate Division affirmed the determination of the State Board.

In its opinion, the Appellate Division denied that this was a controversy involving an absolute statutory entitlement or right which would render inapplicable the limitation period set forth in N.J.A.C. 6:24-1.2, because:

> The issue herein relates to administration of the school system, i.e., the termination of a teacher for reasons related to expenses and efficiency of the system, and the role of petitioner as a teacher. It does not concern credits or rights to which he is entitled under statute independent or irrespective of the administration of the school system or his performance or standing as a teacher.
>
> Whether the benefit flowing from a statute is to be considered a statutory entitlement or a term of the public employee's contract of employment depends upon the nature of the benefit and its relationship to the employment. Stating the problem in terms of

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> incorporation in the employment contract or as a statutory benefit begs the question. Rather, attention should be directed to the purpose of the statute and its relevance and materiality to the employment. Lavin v. Hackensack Bd. of Ed., supra, 90 N.J. at 150 (1982).
>
> We conclude that issues resulting from reduction in force in local school districts do not give rise to the type of rights by virtue of statutory entitlement as in Lavin, where there was no "functional relationship" between the military service credit required by statute and Ms. Lavin's experience as a teacher. See, 90 N.J. at 151.

See also, Judith Elsie Myer v. Board of Education of the Township of Wayne, Passaic County, OAL DKT. NOS. EDU 9036-82 (Aug. 19, 1983) and EDU 9410-83 (Nov. 1, 1984), State Bd. of Ed. Decision on Interlocutory Motion, DKT. NOS. SB 129-83 and SB 1-85 (consolidated) (March 6, 1983) at 7.

Petitioner further argues that the provisions of N.J.A.C. 6:24-1.2 should be waived because administrative delays within the Department of Education caused the "printing" endorsement on her certificate to be delayed until February 6, 1986.

A "printing" endorsement, N.J.A.C. 6:11-6.2(a)28xxvii, is required for assignment as a teacher of printing under N.J.A.C. 6:11-6.1(a). Petitioner states that she taught both commercial art and printing at Bergen County Vocational High School for almost ten years. A "commercial art" endorsement authorizes a teacher to teach that designated skilled trade in the public schools and not "printing" which is a different designated trade. Although claiming to be qualified as a teacher of printing and therefore entitled to a "printing" endorsement in accordance with N.J.A.C. 6:11-6.3(c) on the basis of her work experience, Fringuello did not consider applying for the endorsement until after she was told she was not qualified to assume the available printing position. There is no provision in the regulations for an automatic endorsement. It is the duty of the Department of Education to ensure that the teachers employed are qualified to fill their positions. There were administrative delays and delays caused by petitioner's need to submit supporting documentation before the endorsement was received, but there is no reason for the 90-day

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limit to be waived. It was petitioner's responsibility to seek the printing endorsement and this could have been done, according to the facts as she presents them, years before she did not qualify for the position of teacher of printing.

I therefore **CONCLUDE** that there is no basis for avoiding or tolling the 90-day limitation of action until February 6, 1986, when petitioner received the printing endorsement on her certification. Petitioner has presented no good cause for her failure to file her appeal within the requirement of N.J.A.C. 6:24-1.2.

The Commissioner can relax N.J.A.C. 6:24-1.2 if strict application is inappropriate, unnecessary or if it causes an injustice. However, in this case, petitioner has given no good reason why she failed to file her appeal within the time limit nor has she demonstrated that there would be no substantial prejudice to respondent by the relaxation of the rule.

Based upon the foregoing, I **CONCLUDE** that petitioner has failed to file her petition within the required 90-day period. I further **CONCLUDE** that petitioner has provided no sufficient reason to justify the relaxation of N.J.A.C. 6:24-1.2 pursuant to N.J.A.C. 6:24-1.17.

It is therefore **ORDERED** that this appeal be **DISMISSED WITH PREJUDICE.**

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

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

SEP 1, 1986
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

SEP 1986
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

SEP 15 1986
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

par/e

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JUDITH FRINGUELLO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE VOCATIONAL SCHOOLS OF THE COUNTY OF BERGEN,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by petitioner within the time prescribed by N.J.A.C. 1:1-16.4a, b and c. The Board's reply exceptions were untimely.

Petitioner contends:

> SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED BECAUSE THERE ARE DISPUTED MATERIAL FACTS AS TO WHETHER THE STATUTE OF LIMITATION SHOULD BE DEEMED TO RUN FROM APRIL 1985 OR FEBRUARY 1986, AND WHETHER RESPONDENT SHOULD BE ESTOPPED FROM ASSERTING THE LIMITATIONS DEFENSE.

Petitioner submits that "under the present factual posture of this case, the ALJ was clearly incorrect in awarding summary judgment and the matter should be set down for a plenary hearing on the question of the applicability of, and/or equitable tolling of, the 90-day statute of limitations." (Petitioner's Exceptions, at p. 4) Petitioner advances two reasons why the statute should not run from April 1985, the date the Board notified petitioner of her termination. First, she claims that "the Board was well aware that she was qualified to hold the available printing position by virtue of her prior service in this capacity for many years." (Exceptions, at p. 5) Petitioner alleges, however, that the Board stated it was precluded from awarding her the printing position because her certification did not specifically include an endorsement in printing. Petitioner avers that the "demand by the Board" that she acquire a printing endorsement, "to which she acceded, should toll the 90 day period because she diligently attempted to have the problem cleared up with the Department of Education between April 1985 and February 1986." (Exceptions, at p. 5)

Secondly, petitioner alleges that "bureaucratic delays within the Department of Education staff resulted in delays in issuance of the amended certification, notwithstanding her clear qualifications and prior experience in the printing field, and that she did not receive the revised 'printing' endorsement until February 6, 1986." (Exceptions, at p. 5) She asserts that "[t]he Commissioner should not impose a rigid statute of limitations when

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his own staff causes the statute to run on an unsuspecting employee." (Exceptions, at p. 5) Petitioner avows:

> "[T]his combination of circumstances clearly justifies starting the applicable 90 day period from the date that she received the revised certification (and was still not given the printing position) rather than from the date she was told she was not entitled to the available printing position because of the lack of a 'printing' endorsement." (Exceptions, at p. 5)

Petitioner avers that having been told by the Board that only an actual certificate endorsement in printing would satisfy the Board that she was entitled to the printing position, "she had no alternative but to request that the Department of Education perform this ministerial action and issue the appropriate endorsement." (Exceptions, at p. 6) When the Board did not reinstate her to the available position even after the amended certificate was issued, petitioner filed her petition within 90 days of receipt of said amended certificate and was thus timely, she claims.

Petitioner finds inapposite the cases relied upon by the Board and the ALJ, namely, Judith Elsie Meyer v. Board of Education of the Township of Wayne, Passaic County, decided by the Commissioner December 20, 1984, State Board aff'd in part, rev'd in part March 5, 1986 and Paul Gordon v. Board of Education of the Township of Passaic, decided by the Commissioner October 31, 1983, State Board aff'd in part/rev'd in part March 6, 1985, Superior Court aff'd May 27, 1986, cert. denied Supreme Court September 16, 1986.

In Meyer, supra, petitioner argues, petitioner therein was claiming rights to another position, years after her own position was eliminated by a reduction in force, based upon an alleged improper calculation by the Board of Education of the seniority of other employees. Meyer's claims were dismissed as untimely because the basis for the actions was known to her at the time her position was abolished, unlike the factual situation in the instant matter, petitioner contends. "Here, Ms. Fringuello had no reason to believe she would be deemed unqualified for the printing position, since she had taught printing for respondent for many years." (Exceptions, at p. 7)

Likewise, petitioner finds the ALJ's reliance upon Gordon, supra, misplaced. "In that case, the teacher was apparently eligible for 'comprehensive certification', but had only sought and obtained a limited certification as 'teacher of instrumental music.' Moreover, the teacher in that case never claimed that he had actually performed responsibilities encompassed by the comprehensive certification endorsement." (Exceptions, at pp. 7-8) Failure to file until the comprehensive certification was received should be subject to the 90-day rule under such circumstances, petitioner submits.

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In the instant matter, petitioner claims she does not seek to toll the statute of limitation solely by virtue of her statutory tenure or seniority rights, but instead relies upon equitable considerations

> whose roots are traced in the very actions of the respondent Board about which she is complaining. Simply stated, had Fringuello filed the petition without the certification demanded by the respondent, she undoubtedly would have been faced with the claim that the absence of a certification was fatal. Having been told, therefore, that a certificate endorsement of printing was a prerequisite to being placed in the printing position, and having complied with that demand, petitioner should not now suffer dismissal of her case for following the Board's instructions. (Exceptions, at p. 9)

Finally, petitioner argues that N.J.A.C. 6:24-1.17 provides that the Commissioner may relax the 90-day rule if its application would cause an injustice, which petitioner avers is the instant situation. Claiming that she filed her petition "only when it became apparent that all other efforts at amicable resolution had failed," she suggests that "[a] teacher with over ten years of exemplary experience should not be treated so harshly." (Exceptions, at p. 9)

Petitioner submits that the disputed material facts in this matter must be resolved before this motion is ripe for adjudication, and prays the ALJ's decision be reversed and the matter remanded for plenary hearing.

Upon a careful review of the record, the Commissioner affirms the decision of the Office of Administrative Law for the reasons that follow.

Although the Commissioner agrees with petitioner that Gordon, supra, and Meyer, supra, are factually distinguishable from the instant matter, it is undisputed that the Board notified petitioner in April, 1985 of the fact that her position with the district was terminated effective June 30, 1985, pursuant to N.J.S.A. 18A:28-9. It is also clearly established that the 90-day rule is strictly applied and that the time in which the petition must be filed is measured from the time when the cause of action accrued. See, e.g. Watchung Hills Regional Ed. Association v. Watchung Hills Regional School District, 1980 S.L.D. 356. See also N.J.A.C. 6:24-1.2. Had she first filed her Petition of Appeal, upon notice from the Board that she was not entitled to the printing position, petitioner's rights would have been protected. Similarly, had she timely filed her petition, she would have been provided an opportunity to present to the Commissioner the merits of the claims she makes now through her exceptions. As it is, the Commissioner finds no justification for her failure to comply with the 90-day

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rule. Finally, the Commissioner observes that no indication is present in this case of circumstances warranting relaxation under N.J.A.C. 6:24-1.17. Consequently, the Commissioner finds that petitioner's claim is time-barred.

Accordingly, the initial decision is affirmed as modified herein. The Petition of Appeal is dismissed with prejudice.

COMMISSIONER OF EDUCATION

October 20, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3153-86
AGENCY DKT. NO. 108-4/86

FRANK D'ALESSANDRO,
INDIVIDUALLY, AND AS
REPRESENTATIVE OF A CLASS
OF SIMILARLY SITUATED
INDIVIDUAL EMPLOYEES,
Petitioner,
v.
BOARD OF EDUCATION OF THE
TOWNSHIP OF MIDDLETOWN,
MONMOUTH COUNTY,
Respondent.

Mark J. Blunda, Esq., for petitioner (Oxfeld, Cohen & Blunda, attorneys)

Peter P. Kalac, Esq., for respondent (Kalac and Newman, attorneys)

Record Closed: July 28, 1986 Decided: September 10, 1986

BEFORE LILLARD E. LAW, ALJ:

STATEMENT OF THE CASE

Petitioner Frank D'Alessandro, a teaching staff member in the employ of the Board of Education of the Township of Middletown (Board), perfected his Petition of Appeal before the Commissioner of Education on April 23, 1986. Petitioner alleges, among other things, that the Affirmative Action Policy adopted by the Board on

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December 2, 1985, is in violation of the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq. and N.J.A.C. 6:4-1 et seq; Equality in Educational Programs. By way of relief, petitioner seeks an order issued by the Commissioner: (1) Compelling the Board to rescind its Affirmative Action Policy and its appointment of nineteen (19) school administrators as Affirmative Action Officers; (2) Directing the Board to adopt an Affirmative Action Policy in conformance with law and providing for non-discriminatory appointment of an Affirmative Action Officer; (3) Awarding petitioner compensatory damages, attorney's fees and costs of suit, and punitive and exemplary damages.

The Board, by way of its Answer, admits to and denies much of the allegations and sets forth three affirmative defenses, whereby it contends: (1) That the herein matter does not constitute a controversy involving school law, and therefore, it has been instituted in the wrong forum; (2) Petitioner has not alleged a claim upon which relief may be granted; and (3) Petitioner is barred by the statute of limitations by virtue of the Petition of Appeal having been filed more than ninety (90) days after the occurrence of the action in question, pursuant to N.J.A.C. 6:24-1.2.

PROCEDURAL ASPECTS

The Commissioner was in receipt of the Board's Answer on May 8, 1986. On May 9, 1986, the Commissioner transmitted the matter to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. On June 27, 1986, a telephone prehearing conference was held where, among other things, the issues to be determined by this administrative tribunal were agreed upon as follows:

1. Whether the Board's policy on Affirmative Action and its appointment of Affirmative Action Officers for the school district violate N.J.A.C. 6:4-1 et seq. and the New Jersey Law Against Discrimination.

2. Whether the herein matter constitutes a controversy or dispute involving school law under the jurisdiction of the Commissioner of Education.

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3. Whether the herein matter is time-barred by the statute of limitations pursuant to the provisions of N.J.A.C. 6:24-1.2.

The Board requested and was granted leave to file a Motion to Dismiss the herein matter with regard to Issues Nos. 2 and 3 above. A schedule for the submission of the Motion and briefs was settled with agreement by the parties that a scheduled hearing date will be held in abeyance until a final decision on the Board's Motion is rendered by the Commissioner.

STATEMENT OF FACTS

The facts in this matter, which are not in dispute, are gleaned from the pleadings, affidavits submitted by the parties, the briefs of law and exhibits attached thereto and, therefore, constitute my FINDINGS OF FACT as follows:

Petitioner Frank D'Alessandro is a teacher employed by the Board who also serves as Grievance Chairperson of the Middletown Township Education Association, the recognized employee representative organization for the Board's teaching staff members.

On November 4, 1985, the Board was in receipt of a recommendation from its administration to adopt an affirmative action policy with supplementing rules and regulations for its procedural implementation. The Board was also in receipt of a recommendation to appoint individual school building and district-wide Affirmative Action Officers, duties which include, among others, the necessary monitoring of the Board's Affirmative Action Plan. On November 4, 1985, the Board appointed its Affirmative Action Officers and conducted its first reading of the proposed affirmative action policy.

On December 2, 1985, the Board had its second reading and subsequently adopted the policy at its monthly open public meeting. At the open public meeting, petitioner D'Alessandro protested the Board's policy and the Board's designation of its Affirmative Action Officers.

The policy adopted by the Board contains an Affirmative Action Grievance Procedure which is set forth hereinbelow as follows:

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Policy No. 130

AFFIRMATIVE ACTION GRIEVANCE POLICY

It is the policy of the Board that individuals shall have a procedure available for redress of alleged violations of their rights as set forth under Title VI and Title IX.

The Superintendent shall develop procedures for the implementation of this policy.

GRIEVANCE PROCEDURE - TITLE VI AND TITLE IX

The Superintendent shall establish the following Rules and Regulations for grievances that stem from Title VI and Title IX compliance:

LEVEL I - INFORMAL DISCUSSION - BUILDING AFFIRMATIVE ACTION OFFICER

A. Each individual shall attempt to resolve all complaints on an informal basis.

B. The individual initiating the complaint shall discuss the dispute with the building Affirmative Action Officer within ten (10) working days of its alleged occurrence. The Building Affirmative Action Officer shall render a decision within five (5) working days.

C. If the grievant is not satisfied with the decision rendered at Level I, he/she has five (5) working days to submit a written grievance to the Assistant Superintendent-Personnel.

LEVEL II - WRITTEN GRIEVANCE:

Assistant Superintendent - Personnel

A. The written grievance shall be submitted to the Assistant Superintendent - Personnel. The written grievance shall set forth:

1. The specific nature of the complaint and a brief statement of the facts giving rise to it.

2. The manner in which it is alleged that the individual has been adversely affected.

3. The relief desired by the grievant.

4. The reason why the grievant believes he/she is entitled to relief desired.

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The Assistant Superintendent - Personnel shall hold a conference within ten (10) working days after receipt of the written grievance.

B. All persons involved in the dispute shall be in attendance.

C. The Assistant Superintendent - Personnel shall render a written decision within five (5) working days upon the conclusion of the conference.

D. If the grievant is not satisfied with the decision rendered at Level II, he/she has five (5) working days to submit a written grievance to the designee of the Board of Education, the District Affirmative Action Officer.

LEVEL III - DISTRICT AFFIRMATIVE ACTION OFFICER

A. The District Affirmative Action Officer has twenty (20) working days from the receipt of the written grievance to:

(1) render a decision in writing based on a review of the materials presented from Levels I and II

or

B. (2) hold a hearing of all persons involved, if it is deemed practical and appropriate, and render a decision in writing based on that hearing.

The decision of the District Affirmative Action Officer is final in this District; however, if the grievant is not satisfied with the decision of the Board, he/she may appeal the decision to the appropriate agency.

If the grievant is not satisfied with the decision rendered by the District Affirmative Action Officer, he/she has five (5) working days to petition the Board of Education, in writing, for a review of the dispute.

Pursuant to the Board's adopted grievance procedure, petitioner filed a grievance on December 8, 1985, challenging the Board's Affirmative Action Policy and its designation of Affirmative Action Officers. By letter dated December 19, 1985, the Board's District Affirmative Action Officer, William F. Hybbeneth, denied petitioner's grievance. Thereafter, on January 20, 1986, petitioner addressed a letter to the Commissioner of Education complaining of the Board's action together with an appeal to the Commissioner "...to enter and to help resolve the dispute." (Petitioner's Exhibit III). On February 20, 1986, Walter J. McCarroll, Assistant Commissioner, addressed a letter to

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petitioner D'Alessandro advising petitioner, among other things, that if he wished to file a formal complaint pursuant to N.J.A.C. 6:4-1.9, petitioner could obtain the appropriate forms from the Department's Bureau of Controversies and Disputes. The Assistant Commissioner also advised petitioner to exhaust all internal administrative remedies as outlined in the Board's grievance procedure. Petitioner's Petition of Appeal, dated April 21, 1986, was received by the Bureau of Controversies and Disputes on April 23, 1986.

THE BOARD'S MOTION TO DISMISS

The Board moves to dismiss the herein action on two grounds: (1) The Commissioner is without jurisdiction to hear and determine the matter and, moreover, the jurisdiction lies with the New Jersey Division on Civil Rights; and (2) the Petition of Appeal is time-barred.

In its Point I, the Board argues that the petitioner's claim is not a case and controversy involving school law. It contends that any claim of a violation of the New Jersey Law Against Discrimination should be brought before the Division on Civil Rights. It argues that the rules and regulations under N.J.A.C. 6:4-1 et seq. were adopted by the State Board of Education pursuant to N.J.S.A. 18A:36-20, which was legislated with the intent to protect pupils against unlawful discrimination, and neither the statute nor the rules apply to teachers.

The Board relies, in part, upon the statute, N.J.S.A. 10:5-12a, which reads in pertinent part as follows:

> It shall be unlawful employment practice, or, as the case may be, an unlawful discrimination:
>
> a. For an employer, because of the race, creed, color, national origin, ancestry, age, marital status, sex or atypical hereditary cellular or blood trait of any individual, or because of the liability for service in the Armed Forces of the United States or the nationality of any individual, to refuse to hire or employ or to bar or to discharge or require to retire, unless justified by lawful considerations other than age, from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment...

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The Board argues that there is nothing in the above-cited statute which grants a teacher the right to be appointed an Affirmative Action Officer under its direction and control.

The Board further argues that N.J.S.A. 10:5-6 establishes jurisdiction within the Division on Civil Rights for alleged violations of the Law Against Discrimination and, therefore, the instant matter should be dismissed.

In response to the Board's argument at Point I with respect to subject matter jurisdiction concerning a teaching staff member's claim that a board of education is in violation of N.J.A.C. 6:4-1.1 et seq. and the New Jersey Law Against Discrimination, petitioner contends that the Commissioner of Education has specific and mandatory jurisdiction over the instant matter, pursuant to N.J.A.C. 6:4-1.9, "Appeals," which states:

> In accordance with N.J.S.A. 18A:6-9, any individual may petition the Commissioner of Education to resolve a dispute arising under these regulations pursuant to procedures set forth in N.J.A.C. 6:24-1.1 et seq.

To further support its proposition that the Commissioner has subject matter jurisdiction over the instant matter, petitioner cites case law in the matters of: Hinfey v. Matawan Regional Board of Education, 147 N.J. Super. 201 (App. Div. 1977); certif. granted 74 N.J. 264, rev'd 77 N.J. 514 (1978) (Commissioner of Education has jurisdiction over claims of sex discrimination in the public schools); Teaneck Board of Education v. Teaneck Teachers Association, 185 N.J. Super 269 (App. Div. 1982), aff'd 94 N.J. 9 (1983) (Commissioner's jurisdiction in race discrimination claims by a coach); Board of Education of Englewood v. Englewood Teachers Association, 150 N.J. Super. 265 (App. Div. 1977) (Commissioner's jurisdiction over allegations of discriminatory practices brought on by teachers); Gilchrist v. Bd. of Ed. of Haddonfield, 155 N.J. Super. 358 (App. Div. 1978) (Commissioner's jurisdiction over a teaching staff member's claim of sex discrimination). As a consequence of the regulation and cited case law, petitioner argues, the Commissioner has mandatory subject matter jurisdiction over the instant matter, and the Board's Motion to Dismiss must be denied.

The Board, at Point II of its Motion to Dismiss, asserts that the action in question was adopted by the Board on December 2, 1985, and that petitioner's Petition of Appeal was dated April 21, 1986 and, in fact, was served upon the Board on April 22, 1986. The Board, in support of its Motion to Dismiss, cites N.J.A.C. 6:24-1.2 (90-day rule) and

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contends that the 90-day period is mandatory, pursuant to case law as found in Rielv v. Hunterdon Central High Board of Education, 173 N.J. Super. 109 (App. Div. 1980). The Board further argues that our State Supreme Court has held that the 90-day time limitation will not be relaxed for a petitioner who proceeds through grievance arbitration as the petitioner did in the instant matter. North Plainfield Educ. Ass'n. v. Bd. of Ed. at North Plainfield, 1981 S.L.D. 1341 (December 15, 1981), aff'd, State Board of Education (May 5, 1982), rev'd (App. Div., June 20, 1983, A-4583-81T3) (unreported), rev'd. 96 N.J. 587 (1984).

Based upon the regulation, N.J.A.C. 6:24-1.2, and the applicable case law, the Board asserts that the herein Petition is time-barred and, therefore, should be dismissed.

Petitioner argues, contrary to the Board's assertions, the facts in this matter clearly demonstrate that D'Alessandro filed a Petition within the 90-day period. Petitioner contends that notwithstanding the Board's policy adoption date of December 2, 1985, that is not the trigger date for the statute of limitations in this case. He contends that the law specifically prohibited petitioner from filing a Petition with the Commissioner on that date. Further, petitioner asserts that the law requires that internal remedies be exhausted before a Petition is filed, and he relies upon the letter of February 20, 1986, from the Assistant Commissioner of Education, who advised:

> Before doing this [filing a Petition of Appeal] you should exhaust all internal administrative remedies as outlined in the district's grievance procedure. (Petitioner's Exhibit IV)

As a consequence, petitioner argues that he was prohibited from filing a Petition with the Commissioner until such time as he exhausted his internal administrative remedies. Those remedies were exhausted when, on December 20, 1985, petitioner was in receipt of the District Affirmative Action Officer's final decision denying his grievance. Thereafter, on January 20, petitioner D'Alessandro wrote to the Commissioner of Education appealing the Board's action and the decision of its Affirmative Action Officer. Consequently, petitioner argues, his Petition was filed within 30 days of the denial and was well within the 90-day statute of limitations. Thus, he asserts, the instant Petition was timely filed and the Board's motion must be denied.

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In the alternative, petitioner argues that the 90-day rule is general in nature, not mandatory, and may be relaxed where its imposition "...would be inappropriate, unnecessary or result in injustice." Kallimanis v. Bd. of Ed. of Carlstadt-East Rutherford Reg. H.S. District, OAL DKT. EDU 868-80 (August 9, 1980), decided by Comm. (September 26, 1980), aff'd, St. Bd. of Ed. (March 4, 1981). Where equitable grounds or meritorious factual explanations are raised which mandate N.J.A.C. 6:24-1.2 to be inapplicable, it will be dismissed. Bertisch, et al. v. Bd. of Ed. of Borough of Bergenfield, OAL DKT. EDU 2893-85 (February 20, 1986), decided by Comm. (April 10, 1986); Accord, Bocker, et al. v. Bd. of Ed. of Twp. of Wayne, OAL DKT. EDU 5299-85 (February 27, 1986), decided by Comm. (April 17, 1986).

Petitioner asserts that the Commissioner may relax the 90-day rule, pursuant to N.J.A.C. 6:24-1.17, where it provides that:

> The rules herein contained shall be considered general rules of practice to govern, expedite and effectuate the procedure before, and the actions of, the commissioner in connection with the determination of controversies and disputes under the school laws. They may be relaxed or dispensed with by the commissioner, in his or her discretion, in any case where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice.

Petitioner contends that the facts of this case compel relaxation of the rule. Here, Mr. Frank D'Alessandro, a layman, filed an affirmative action grievance in accordance with the Board of Education's internal grievance procedure. By letter, dated December 19, 1985, Mr. D'Alessandro was advised by the District's Affirmative Action Officer that his grievance was denied. In accordance with the Administrative Code directions, N.J.A.C. 6:4-1.9, Mr. D'Alessandro filed a written appeal of the Board's action with the Commissioner of Education on January 20, 1986. While this pro se appeal may not have conformed to all of the procedural niceties outlined for petitions to the Bureau of Controversies and Disputes, it certainly satisfied the essentials.

Petitioner contends that in view of his diligent and good faith efforts to bring his complaint to the attention of the Commissioner of Education, his Petition must be considered timely and the Board of Education's Motion denied.

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DISCUSSION AND CONCLUSIONS

I

The adversaries to this action are of divergent views as to the jurisdiction and forum with which this controversy lies. On the one hand, the Board asserts that the statute (N.J.S.A. 18A:36-20) and regulations (N.J.A.C. 6:4-1 et seq.) were legislated and adopted to protect the interests of pupils against unlawful discrimination to the exclusion of teaching staff members employed by a local board of education. The Board further contends that the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq., establishes jurisdiction within the Division on Civil Rights to the exclusion of the Commissioner of Education. On the other hand, petitioner declares that the Commissioner of Education has mandatory subject matter jurisdiction over the herein Petition of Appeal.

Jurisdictional issues between the Division on Civil Rights (Division) and the Commissioner of Education (Commissioner) in regard to alleged discriminatory practices with the concomitant tension between each offices statutory authority under N.J.S.A. 10:5-1 et seq. and N.J.S.A. 18A:36-20, has been addressed by our courts on a variety of occasions. See, Hinfey and Gilchrist. The most definitive statement on the issue is found in the majority opinion by Justice Handler in Hinfey at 77 N.J. 514. There the Court held, among other things, that the Division and the Commissioner had concurrent jurisdiction to entertain complaints charging acts of sex discrimination in public school courses of study and curricula. It further determined, in reversing the Appellate Division's holding, that the jurisdiction of the Division is not mandatory and, therefore, discrimination complaints involving subject matter of public school curricula and courses of study should be handled by the Commissioner.

In the Hinfey Supreme Court opinion, Justice Handler engages in an extensive discussion of the evolution of the Law Against Discrimination, N.J.S.A. 10:5-1 et seq., which will not be recited here. The opinion continues to observe: "Public schools and public education assuredly are covered by the anti-discrimination law." 77 N.J. at 523. "There is lodged with the Commissioner encompassing responsibility over public education and broad authority to supervise all public schools, N.J.S.A. 18A:4-23." Id. at 525. "The Commissioner also has fundamental and indispensable jurisdiction over all disputes and controversies arising under the school laws. N.J.S.A. 18A:6-9." Ibid; and,

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> It is also unquestioned that the Commissioner of Education has not only the power to decide controversies under the school law which entail invidious discrimination practices, but indeed he may be regarded as having an affirmative duty to do so. [Ibid.]

Concomitant with the Commissioner's power and affirmative duty to decide alleged discrimination issues, the Court recognized the existence of the State Board of Education rules governing the implementation of N.J.S.A. 18A:36-20, as found at N.J.A.C. 6:4-1.1 et seq. Among those rules and regulations promulgated is N.J.A.C. 6:4-1.6, "Employment/contract practices," which states:

> (a) All persons regardless of race, color, creed, religion, sex, or national origin shall have equal access to all categories of employment in the public educational system of New Jersey.
>
> (b) All New Jersey public school districts shall comply with all State and Federal laws related to equal employment, including but not limited to the New Jersey Law Against Discrimination (N.J.S.A. 10:5-1 et seq.), Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, Executive Order 11246 as amended, Equal Pay Act of 1963 as amended, and Title IX of the Education Amendments 1972 (Higher Education Act).
>
> (c) No school district shall enter into any contract with a person, agency, or organization if it has knowledge that such person, agency or organization discriminates on the basis of race, color, creed, religion, sex, ancestry, national origin or social or economic status, either in employment practices or in the provision of benefits or services to students or employees.

Accordingly, I **CONCLUDE** that the Board's argument that the jurisdiction of the herein matter lies exclusively with the Division on Civil Rights must fail. I **CONCLUDE** that petitioner D'Alessandro's Petition of Appeal is properly before and cognizable by the Commissioner of Education and that he possesses the power and has the affirmative duty to "decide controversies under school law which entail invidious discrimination practices..." Hinfey at 525. See also, Appel and Riggs v. Bd. of Ed. of the City of Camden, et al., 1978 S.L.D. 607.

Therefore, the Board's motion to dismiss on jurisdictional grounds is hereby **DENIED.**

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II

In his opposing arguments to the Board's motion to dismiss the herein action on the grounds that it is time-barred, petitioner contends, among other things, that the trigger date was not December 2, 1985, the date of the Board's action; rather, it was December 19, 1985, the date the District Affirmative Action Officer rendered his decision that no violation of petitioner's rights had been found as alleged in petitioner's grievance. Petitioner asserts that the law specifically prohibited him from filing a Petition of Appeal with the Commissioner immediately subsequent to December 2, 1985, because the law requires that internal remedies be exhausted prior to filing. In support of his contention, petitioner relies upon the language of the Assistant Commissioner's letter, dated February 20, 1986, in response to petitioner's letter of January 20, 1986, addressed to the Commissioner. The Assistant Commissioner advised petitioner, among other things, that petitioner should exhaust all internal administrative remedies as outlined in the District's grievance procedures prior to filing his Petition with the Commissioner, pursuant to the provisions found at N.J.A.C. 6:4-1.9, "Appeals."

Petitioner admits that he was in receipt of the District Affirmative Officer's final decision on January 20, 1986. Petitioner contends, moreover, that his letter of January 20, 1986, constituted a written Petition of Appeal to the Commissioner. Thus, he argues, his petition was filed within 30 days of the denial and was well within the 90-day statute of limitations pursuant to N.J.A.C. 6:24-1.2(b).

Petitioner contends that although adherence to the 90-day filing rule imposed by N.J.A.C. 6:24-1.2 is the general rule, it is equally well established that the 90-day period is not mandatory and may be relaxed where its imposition "would be inappropriate, unnecessary or result in injustice." Kallimanis. If equitable grounds or meritorious factual explanations are raised which mandate N.J.A.C. 6:24-1.2 to be inapplicable, it will be dismissed. Bertisch; Bocker, et al.

Petitioner asserts that the New Jersey Administrative Code expressly provides that the Commissioner of Education may relax the 90-day rule. It states in pertinent part that:

> ...They [rules] may be relaxed or dispensed with by the Commissioner, in his discretion, in any case where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice. [N.J.A.C. 6:24-1.17.]

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Petitioner argues that the facts of this case compel relaxation of the rule. Here, the petitioner, a layman, filed an affirmative action grievance in accordance with the Board of Education's internal grievance procedure. By letter, dated December 19, 1985, petitioner was advised by the District's Affirmative Action Officer that his grievance was denied. In accordance with the Administrative Code directions, N.J.A.C. 6:4-1.9, petitioner filed a written appeal of the Board's action with the Commissioner of Education on January 20, 1986. While this pro se appeal may not have conformed to all of the procedural niceties outlined for petitions to the Bureau of Controversies and Disputes, it certainly satisfied the essentials.

Petitioner argues that in view of his diligent and good faith efforts to bring this complaint to the attention of the Commissioner of Education, his Petition must be considered timely and the Board of Education's Motion should be denied.

It is undisputed that the Board, on December 2, 1985, over petitioner's objection, took its action to adopt an Affirmative Action Plan which provided for Affirmative Action Officers under the Board's direction and control. Subsequently, on December 8, 1985, petitioner filed his Affirmative Action Grievance. On December 20, 1985, petitioner was in receipt of the Board's District Affirmative Officer's denial of his grievance. Assuming, arguendo, that the date of December 20, 1985, triggered the commencement of the "...receipt of the notice of a final order, ruling or other action by the district board of education which is the subject of the requested contested case hearing" (N.J.A.C. 6:24-1.2(b)), petitioner was bound by the provisions under N.J.A.C. 6:4-1.9, "Appeals" (Equality in Education Programs), which specifically states that:

> In accordance with N.J.S.A. 18A:6-9, any individual may petition the Commissioner of Education to resolve a dispute arising under these regulations pursuant to procedures set forth in N.J.A.C. 6:24-1.1 et seq.

The above appeal procedure is specific and unambiguous. Consequently, it cannot be fairly said that petitioner's letter to the Commissioner, dated January 20, 1986, constitutes a filing of a Petition of Appeal as prescribed by N.J.A.C. 6:24-1.3(a). The Assistant Commissioner's letter dated February 20, 1986, buttresses such a finding and conclusion where he advised petitioner "...that if you wish to file a formal complaint as per N.J.A.C. 6:4-1.9..., you can obtain the appropriate forms from the Department's Bureau of Controversies and Disputes..." Petitioner did not heed the Assistant Commissioner's advice until April 21, 1986.

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Petitioner's argument that, as a layman, he should therefore be excused from the 90-day rule and its "procedural niceties," is without merit. Petitioner failed to serve a copy of his letter to the Commissioner with the Board — a "procedural nicety" required of petitioner to give the Board notice of the nature of his complaint against it. N.J.A.C. 6:24-1.2(a). Petitioner also represents to this administrative tribunal that he serves as the Grievance Chairperson of the Middletown Township Education Association, the recognized employee representation organization for teaching staff members employed by the Board. In his leadership capacity, petitioner either knew or should have known that legal advice and counsel were available to him, under certain circumstances, through its parent organization, the New Jersey Education Association. It is evident that he knew or learned of such service by engaging present counsel.

In any event, petitioner's grievance and the Board District Affirmative Officer's subsequent denial thereof did not relieve petitioner of his obligation to file his Petition of Appeal before the Commissioner within 90 days of December 2, 1985. In Riely v. Hunterdon Central High Bd. of Ed., 173 N.J. Super. 109 (App. Div. 1980), our Appellate Court held a petition as untimely where the petitioner chose to exhaust the internal remedy of binding arbitration which was "...properly within the scope of mandatory arbitration under the grievance machinery established in the collectively negotiated contract." Id. at 113.

Based upon the foregoing discussion, I **FIND** and **CONCLUDE** that:

1. Pursuant to N.J.A.C. 6:24-1.2(b), petitioner had an affirmative duty to file his Petition of Appeal within ninety (90) days of the Board's action on December 2, 1985, in accordance with N.J.A.C. 6:4-1.9.

2. The ninetieth day from December 2, 1985, expired on March 2, 1986.

3. Even if, but not conceding that petitioner was precluded from filing his Petition until such time as he had exhausted his internal administrative remedies, those internal remedies were exhausted on December 20, 1985.

4. The ninetieth day from December 20, 1985, expired on March 20, 1986.

5. Petitioner's letter to the Commissioner of Education, under the date of January 20, 1986, did not constitute a filing of a Petition of Appeal before the Commissioner, pursuant to N.J.A.C. 6:24-1.2.

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For the reasons stated above, I **CONCLUDE** that the herein Petition of Appeal was untimely filed and, therefore, it is hereby **DISMISSED.**

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

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

10 September 1986
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

SEP 11 1986
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

SEP 15 1986
DATE

Ronald L. Parke
OFFICE OF ADMINISTRATIVE LAW

ij/ee

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FRANK D'ALESSANDRO, individually and as representative of a class of similarly situated individual employees,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner's exceptions and the Board's reply thereto were timely filed pursuant to N.J.A.C. 1:1-16.4a, b and c.

Petitioner posits three exceptions:

EXCEPTION ONE

> THE ADMINISTRATIVE LAW JUDGE'S CONCLUSION THAT THE STATUTE OF LIMITATIONS IS NOT TOLLED BY EXHAUSTION OF INTERNAL REMEDIES IS CONTRARY TO LAW AND DIRECTLY OPPOSITE TO THE COMMISSIONER['S] DIRECTION TO PETITIONER.

Petitioner reiterates the sequence of events, correspondence and argument he advanced before the ALJ concerning the timeliness of his Petition of Appeal. His exceptions add that either the ALJ's conclusion that petitioner's grievance did not relieve him of his obligation to file a petition with the Commissioner of Education within 90 days of December 2, 1985 or the Assistant Commissioner was mistaken and misled petitioner. Petitioner suggests that the ALJ erred for the following reasons.

Petitioner submits, inter alia, that the Board itself understood that a matter could not be submitted to the Commissioner until after the internal grievance procedure had been exhausted and a written reply issued. Petitioner argues that he "followed that procedure and direction, filed an internal grievance and only appealed to the Commissioner of Education after the District Affirmative Action Officer denied the grievance. (Exhibit PII)" (Petitioner's Exceptions, at p. 2) Consequently, petitioner argues, "even if the ALJ were correct in his legal conclusion, the Board's conduct would estop it from raising such a defense." (Exceptions, at p. 2)

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Petitioner also distinguishes from the instant matter the case the ALJ relied upon in dismissing the herein Petition of Appeal, Riely, supra. Petitioner argues that in Riely:

> The Commissioner of Education and Appellate Division did not rule that Ms. Riely erred in appealing to the Board her non-renewal. ***Ms. Riely erred in submitting to binding arbitration rather than to the Commissioner of Education the Board's decision to non-renew her contract in May, 1976. Mr. D'Alessandro made no such error.*** He filed within thirty (30) days of the Board's final disposition.*** (emphasis in text) (Exceptions, at pp. 3-4)

EXCEPTION TWO

> THE ADMINISTRATIVE LAW JUDGE ERRED IN CONCLUDING THAT PETITIONER'S WRITTEN APPEAL TO THE COMMISSIONER OF EDUCATION WITHIN 30 DAYS OF THE BOARD'S DECISION DID NOT SATISFY THE 90-DAY RULE.

Petitioner contends:

> It is further established that on January 20, 1986, the Petitioner transmitted to the Commissioner of Education a written "appeal" setting forth the contested Board action, the basis of Petitioner's complaint and requesting that the Commissioner "resolve the dispute". (Exhibit PIII)*** (Exceptions, at p. 5)

Averring that this appeal was filed with the Commissioner within 30 days of the Board's action, petitioner argues that the ALJ's determination that the January 20, 1986 letter to the Commissioner was defective because it was not simultaneously served on the Board is only a procedural defect that can be corrected subsequent to the commencement of the action. Also, petitioner claims, no such requirement exists in the published Board Policy and Procedure. Moreover, petitioner argues, he was pro se at that juncture and satisfied the essence of the rules when he filed his written appeal on January 20, 1986. To rule otherwise, petitioner avows, "will establish disastrous precedent in this state and contravene the stated purpose of the New Jersey Administrative Code, N.J.A.C. 1:1-1.3." (Exceptions, at p. 6)

EXCEPTION THREE

> IN VIEW OF THE ESTABLISHED FACT THAT LAY PETITIONER FILED A WRITTEN APPEAL TO THE COMMISSIONER WITHIN 30 DAYS OF THE BOARD ACTION, THE ALJ'S REFUSAL TO RELAX THE 90-DAY RULE SACRIFICES SUBSTANTIVE JUSTICE***.

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Citing Lucinda Kallimanis, supra; Martha Bertisch et al. v. Board of Education of the Borough of Bergenfield v. Bergenfield Education Association, decided by the Commissioner April 10, 1985, aff'd State Board September 3, 1986; Carol Bocker et al. v. Board of Education of the Township of Wayne, decided by the Commissioner April 17, 1986, aff'd State Board September 3, 1986; and N.J.A.C. 1:1-1.3 as well as N.J.A.C. 6:24-1.17, petitioner avers that the 90-day rule should be relaxed in the instant matter. He objects to the rationale behind the ALJ's determination to strictly adhere to the rule because, as the teachers' grievance chairperson, petitioner could be held to a higher standard than a pro se petitioner. Petitioner cites Kaczmarek v. New Jersey Turnpike Authority, 77 N.J. 329 (1978) for the proposition that "[i]f the defending party can demonstrate no prejudice due to the late filing he should not be heard to complain." (Exceptions, at p. 11) Petitioner contends that there can be no demonstration of prejudice to the Board in this case. He queries "[h]ow can the Respondent Board possibly claim that it was prejudiced by the fact that it received Mr. D'Alessandro's Petition to the Commissioner of Education on April 21, 1986, rather than March 20, 1986?" (Exceptions, at p. 11) He further avows that the Board was fully aware of his claims and addressed them on December 19, 1985.

For the above reasons, petitioner submits that the Commissioner must reject the initial decision in this matter and submit the case for plenary hearing on its merits.

The Board in reply to petitioner's exceptions submits that none of petitioner's exceptions or arguments made thereon warrant a reversal of the ALJ's decision. The Board suggests, inter alia, that "[b]ased on the facts presented on this appeal, there is no merit to the argument that the exhaustion of internal remedies tolls the Statute of Limitations." (Reply Exceptions, at p. 1) The Board concurs with the ALJ that whether the triggering date for the filing of the Petition of Appeal is set at December 2, 1985, the date when the Board took its action to adopt an Affirmative Action Plan or at December 20, 1985, the date when he exhausted his internal administrative remedies, the 90-day Statute of Limitation expired on either March 2, 1986 or March 20, 1986. Since the petitioner did not perfect his Petition of Appeal until April 23, 1986, "the Petition is out of time in either event." (Reply Exceptions, at p. 2)

The Board further takes issue with petitioner's argument that his lack of notice to the Board of his Letter of Appeal to the Commissioner dated January 20, 1986 should not be fatal inasmuch as the Board's affirmative action policy does not contain a notice provision in the event of an appeal. The Board argues that a local board of education's affirmative action policy cannot supersede the provisions of the New Jersey Administrative Code requirement that a petition be filed within 90 days after receipt of notice to petitioner of the action taken which forms the basis of the appeal. The Board contends that petitioner's argument that the Statute of Limitation should be extended for him because he is a pro se appellant should be rejected.

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As to petitioner's argument that the 90-day rule should be relaxed because it "sacrifices substantive justice for pro se adherence to procedures" (Reply Exceptions, at p. 2, quoting petitioner's exceptions, at p. 7), the Board contends it is neither appropriate nor necessary to relax the rules based on the facts in this case. To do so, avows the Board, "would necessarily mean that a pro se appeallant (sic) would be treated differently than an appellant who is represented by counsel. Further, the injustice that would occur would be to the respondent who could no longer rely on the 90-day rule when confronted by a pro se appellant." (Reply Exceptions, at pp. 2-3)

Based on the above, the Board submits that the ALJ's decision should be affirmed.

Upon a careful review of the record of this matter, the Commissioner agrees with the findings and the conclusion of the Office of Administrative Law that the instant Petition of Appeal

> is properly before and cognizable by the Commissioner of Education and that he possesses the power and has the affirmative duty to "decide controversies under school law which entail invidious discrimination practices..." Hinfey at 525. See also, Appel and Riggs v. Bd. of Ed. of the City of Camden, et al., 1978 S.L.D. 607.
>
> (Initial Decision, ante)

The Commissioner further finds that if the facts of this case are as petitioner alleges, then, potentially, the situation could constitute a continuing violation of at least the spirit of the affirmative action regulations in permitting a potentially illegal discriminatory practice to continue in perpetuity. Such circumstances could warrant relaxation of the 90-day rule. See generally, North Plainfield Education Association on behalf of Arlene Koumjian and Michael Spratford v. Board of Education of the Borough of North Plainfield, 1981 S.L.D. 1341, St. Bd. aff'd May 5, 1982, Super. Ct. rev/rem June 20, 1983, Supreme Ct. rev'd 96 N.J. 587, 595 (1984). (Continuing violation claim, which is associated with the assertion of discrimination in employment, is a basis for relaxation of N.J.A.C. 6:24-1.2. Held: 90-day rule applicable to withholding cases.)

Petitioner herein alleges, inter alia, that the Board discriminated against teaching staff members because of their economic status in violation of N.J.A.C. 6:4-1.1 et seq., and in violation of the New Jersey Law against Discrimination, in that the position of Affirmative Action Officer was not advertised or posted for prospective applicants and that none of the teaching staff members in the Middletown Township School District were considered for or interviewed as potential candidates for the position of Affirmative Action Officers. Instead, petitioner claims, on or about December 12, 1985, the Board adopted a policy of Affirmative Action and therein appointed seventeen building principals as Affirmative Action Officers, plus an Assistant Superintendent for

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Personnel as an Affirmative Action Officer and the Director of Labor Relations as the District Affirmative Action Officer. (See Petition of Appeal, dated April 21, 1986.) Because of the prospective ramifications implied by these facts, if proven, in the interest of justice, the Commissioner hereby relaxes the 90-day statute of limitations, pursuant to N.J.A.C. 6:24-1.17.

Accordingly, the initial decision is rejected. The Board's Motion to Dismiss is denied. The matter is remanded for plenary hearing on the merits.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

October 20, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1124-86
AGENCY DKT. NO. 35-1/86

UNION TOWNSHIP EDUCATION ASSOCIATION,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,
Respondent.

Gregory T. Syrek, Esq., for petitioner (Bucceri & Pincus, attorneys)

Barry Z. Goldstein, Esq., for respondent (Rubin, Rubin & Malgran, attorneys)

Record Closed: July 31, 1986 Decided: September 10, 1986

BEFORE **STEPHEN G. WEISS**, ALJ:

The petitioner, Union Township Education Association, is the collective bargaining representative for the classroom teachers employed by the respondent, Township of Union Board of Education. On January 31, 1986, the Association filed a petition with the Commissioner on behalf of 42 teaching staff members who presently are paid on the full-time teacher's salary guide contained in a collective negotiations agreement covering the period September 1, 1984 to August 31, 1987. All 42 employees, except for one, previously were employed in the school district on either an hourly, per diem or monthly basis in various auxilliary capacities such as Title 1, Supplemental Instructors, ESL teachers and the like. None was given full credit for his prior experience when he was placed on the full-time salary guide.

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According to petitioner, the Board's failure to provide the 42 individuals with salary guide credit for their years of prior experience as part-time certified teachers in Union, whether that experience was as a remedial, hourly, classroom or other type of teacher, violates the provisions of N.J.S.A. 18A:16-11 and the decision in Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982). Accordingly, petitioner requests that the Commissioner determine that each of the individuals be given appropriate credit on the salary guide for all of his years of employment in the school district and require respondent to pay each teacher all sums lost as a result of his alleged improper guide placement, together with interest.

In its answer to the petition, the Board maintained that it was not required to have placed any of the 42 teachers on a higher step when they initially were placed on the guide. In addition, the Board raised the "statute of limitations" as a bar to the action.

Following joinder of the issues, the matter was transmitted by the Commissioner to the Office of Administrative Law on February 21, 1986 for determination as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. On March 31, 1986, a prehearing conference was conducted by the undersigned administrative law judge, at which time it was agreed that the following two issues were to be addressed:

A) Are any of the individual claimants in this case barred from relief by application of the statute of limitations and, if so, which claimants and to what extent?

B) With respect to any claim or part thereof not so barred, has the Board acted improperly in failing to credit any one of the individuals with his prior hourly teaching experience in the school district in determining his placement on the salary guide? If such improper action did take place and was not barred, to what specific relief, then, was such a claimant entitled?

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STIPULATED FACTS

In lieu of a plenary hearing, counsel eventually entered into a joint stipulation of facts which has been filed with the court, together with joint cross-motions for summary decision.

The essential portions of the joint stipulation which will form the basis for my Initial Decision are as follows:

1. The petitioner, Union Township Education Association, is the designated collective bargaining representative of classroom teachers employed by the respondent, Union Township Board of Education.

2. Since September 1, 1972, petitioner and respondent have entered into collective negotiations agreements respecting the terms and conditions of employment of the persons represented by the petitioner. Each of these agreements contains salary guides which provide steps and columns for salary guide placement purposes based upon educational training and years of experience.

3. The following is a listing of each of the individuals on whose behalf the instant petition is sought by name, salary guide, class and step for the 1985/86 school year (Column A); month and year in which each individual was initially placed on the salary guide (Column B); the step on the salary guide at which each individual initially was placed (Column C); and the number of guide steps claimed by each individual in the present action (Column D):

Name	A	B	C	D
Carole Barnett	IV, 14	9/78	7 (III)	1
Kathleen Beach	III, 6	9/80	1	1
Dolores Belfer	III, 11	9/75	1	1
Donna Caruso	III, 7	10/78	1	2
Julie Casimir	III, 13	9/74	2	6
Jaclyn Chapla	IV, 8	9/78	1	4

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Name	A	B	C	D
Linda Chiariello	IV, 6	9/79	1 (III)	2
Carole Chrystal	III, 12	9/74	1	10
Virginia Curnal	III, 11	1/77	2	4
Joy Czaplinski	IV, 7	9/78	2	1
Constantine D'Allessandro	III, 14	9/73	2	3
Joan Donatiello	IV, 10	9/79	4	2
Elizabeth Eberenz	III, 11	1/77	2	2
Elaine Faulks	III, 9	11/77	1	3
Rose Marie Fletcher	IV, 8	9/78	1	2
Debra Gerber Miles	III, 8	9/78	1	2
Carol Godfrey	III, 6	9/80	1	1
Karne Hoffman	III, 7	9/79	1	1
Linda Hrevnak	III, 8	9/78	1	1
Nancy Hunter	IV, 6*	9/79	1	1
Mindy Kaye	IV, 7**	9/78	1	1
Anne Kelleher	IV, 8	9/78	1	2
Esta Kilberg	III, 7	9/79	1	2
Elaine Kurtz	III, 9	1/78	1	2
Kathleen Kuzan	IV, 7	9/80	3	1
Lorraine Libbey	III, 15	9/78	8	1
Susan Litt	V, 8	11/81	4 (III)	2
Maryann Marchetti	IV, 1	9/85	1	3
Joanne Melicharek	III, 7	9/79	1	1
Dolores Musko	III, 9	1/78	1	2
Rhona Norinsky	V, 8	9/78	1 (IV)	3
Beverly Parris	III, 8	2/80	2	2
Karen Perlman	IV, 8	9/78	1	1
Joan Polgar	V, 10	9/76	1 (IV)	2
Ellen Rever	V, 6	9/80	1 (IV)	3
Eileen Rosenhaft	III, 8	9/78	5	1
Anita Schumacher	IV, 1***	9/84	1	3
Gail Signorelli	III, 9	9/77	1	1
Jane Skarbnik	III, 7	12/77	1	1
Stephanie Szostak	V, 9****	9/78	2 (IV)	1
Harriet Weitzner	III, 10	9/78	3	1
Kim Zotti	III, 8	9/78	1	1

* Hunter was on Step 6 during the 1984-85 school year. She worked for two weeks during that year before leaving for maternity reasons. Hunter was on maternity leave of absence during 1985-86.

** Kaye was on Step 7 during the 1984-85 school year. She worked for two months during that year before leaving on a childrearing leave. This leave was extended to the 1985-86 school year. Kaye resigned in June 1986.

*** Schumacher was noticed for nonrenewal at the end of the 1984-85 school year.

**** Szostak began on Class V with the 1985-86 school year.

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4. The respective claims made by each individual for inclusion of years of credit for salary guide placement are as follows:

Barnett - 9/77 - 6/78 (S.C.E. - $48.00 per diem)

Beach - 10/79 - 6/80 (Teacher Cost Program - 17 and 1/2 hours/week)

Belfer - 9/74 - 6/75 (Title I - $6.00/hour)

Caruso - 10/76 - 6/77 (S.C.E./Title I - Freehold)
9/77 - 5/78 (S.C.E./Title I - Freehold)

Casimir - 9/68 - 6/69 (Title I - 8:20 a.m. - 3:15 p.m.)
9/69 - 6/70 (Title I - 8:20 a.m. - 3:15 p.m.)
9/70 - 6/71 (Title I - 8:20 a.m. - 3:15 p.m.)
9/71 - 6/72 (Title I - 8:20 a.m. - 3:15 p.m.)
9/72 - 6/73 (Title I - 8:20 a.m. - 3:15 p.m.)
9/73 - 6/74 (Title I - 8:20 a.m. - 3:15 p.m.)

Chapla - 9/74 - 6/75 (Title I - $6.00/hour)
9/75 - 6/76 (Title I - $7.00/hour)
9/76 - 6/77 (Title I - $7.00/hour)
9/77 - 6/78 (Title I - $48.00 per diem)

Chiariello - 9/77 - 6/78 (S.C.E. - $48.00 per diem)
9/78 - 6/79 (Preschool Assistant - $8.00/hour)

Chrystal - 9/64 - 6/65 9/65 - 6/66
9/66 - 6/67 9/67 - 6/68
9/68 - 6/69 9/69 - 6/70
9/70 - 6/71 9/71 - 6/72
9/72 - 6/73 9/73 - 6/74

Curnal - 9/73 - 6/74 (Title I - $870/month)
9/74 - 6/75 (Title I - $6.00/hour)
9/75 - 12/1/75 (Title I - $7.00/hour)
9/76 - 1/1/77 (Title I - $7.00/hour)

Czaplinski - 11/1/77 - 6/78 (Title I - $48.00 per diem)

D'Allessandro- 1/70 - 6/70 (Title I - Step 1)
9/70 - 5/71 (Title I - Step 1)
9/71 - 6/72 (Title I - Step 1)
9/72 - 5/73 (Title I - Step 1)

Donatiello - 11/77 - 6/78 (Gifted & Talented)
9/78 - 6/79 (Gifted & Talented - $40.00 per diem)

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Eberenz -	9/73 - 6/74 (Title I - $870/month) 9/74 - 6/75 (Title I - $6.00/hour)
Faulks -	9/74 - 6/75 (Title I - $6.00/hour) 9/75 - 6/76 (Title I - $7.00/hour) 9/76 - 6/77 (Title I - $7.00/hour)
Fletcher -	1/77 - 6/77 (S.C.E. - $7.00/hour) 9/77 - 6/78 (S.C.E. - $48.00 per diem)
Gerber -	1/77 - 6/78 (Title I - $7.00/hour) 9/77 - 6/78 (S.C.E. - $48.00 per diem)
Godfrey -	9/79 - 6/80 (Title I/S.C.E. at St. Michael's School)
Hoffman -	11/78 - 5/79 (Gifted Child - $40.00 per diem)
Hrevnak -	9/77 - 6/78 (Special Ed. Aide - $48.00 per diem)
Hunter -	11/78 - 6/79 (Gifted & Talented - $40.00 per diem)
Kaye -	9/77 - 6/78 (Supplemental Instructor)
Kelleher -	2/1/78 - 5/10/78 (Gifted & Talented) 11/78 - 5/79 (Gifted & Talented - $48.00 per diem)
Kilberg -	2/1/78 - 5/10/78 (Gifted & Talented) 11/78 - 5/79 (Gifted & Talented - $48.00 per diem)
Kurtz -	9/75 - 6/76 (Supplemental - $7.00/hour) 9/76 - 6/77 (Title I - $7.00/hour)
Kuzan -	9/77 - 6/78 (Supplemental - $8.00/hour)
Libbey -	9/77 - 6/78 (S.C.E. - $48.00 per diem)
Litt -	10/76 - 6/77 (E.S.L.) 9/77 - 6/78 (E.S.L.)
Marchetti -	9/82 - 6/83 9/83 - 6/84 9/84 - 6/85
Melicharek -	11/78 - 5/79 (Gifted - $40.00 per diem)
Musko -	10/75 - 6/76 (Title I - $7.00/hour) 6/76 - 6/77 (Title I - $7.00/hour)

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Norinsky -	9/75 - 6/76 (Title I - $7.00/hour)
	9/76 - 6/77 (Supplemental -)
	9/77 - 6/78 (Supplemental -)
Parris -	2/77 - 6/78 (S.C.E. - $7.00/hour)
	3/79 - 6/79 (Supplemental -)
Perlman -	3/78 - 6/78 (Title I - $48.00 per diem)
Polgar -	9/74 - 6/75 (Title I - $6.00/hour)
	9/75 - 6/76 (Media Center - $7.00/hour)
Rever -	9/77 - 6/78 (E.S.L./Supplemental)
	9/78 - 6/79 (E.S.L./Supplemental)
	9/79 - 6/80 (E.S.L./Supplemental)
Rosenhaft -	9/77 - 6/78 (Title I - $8.00 per diem)
Schumacher -	9/78 - 6/79 (Supplemental)
	9/79 - 6/80 (Supplemental)
	9/80 - 6/81 (Supplemental)
	9/81 - 6/82 (Supplemental)
	9/82 - 6/83 (Supplemental)
	9/83 - 6/84 (Supplemental)
Signorelli -	1/77 - 6/77 (S.C.E. - $7.00/hour)
Skarbnik -	9/77 - 6/78 (Title I - $48.00 per diem)
Szostak -	9/77 - 6/78 (Title I - $48.00 per diem)
Weitzner -	9/77 - 6/78 (S.C.E. - $48.00 per diem)
Zotti -	9/77 - 6/78 (S.C.E. - $48.00 per diem)

5. Except for Donna Caruso, whose employment between October 1976 and May 1978 was as an S.C.E./Title I teacher in Freehold, each of the named individuals was employed by respondent during the periods of time and in the capacities indicated in paragraph four above and for the time indicated each day.

6. None of the petitioners while employed on a hourly or per diem rate basis was given an individual contract; rather, each employment was authorized and approved by Board resolution.

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7. When any individual is placed on the salary guide initially, the Board's practice has been to give credit for up to seven years of experience within the last ten years, provided such experience was "under contract." Prior military service, of course, was recognized as well.

8. No experience credit with respect to placement on the salary guide has been given by respondent for any service within its school district as an hourly or per diem teacher, such as Title I, S.C.E., gifted and talented, supplemental, E.S.L., and the like. This practice has not, however, been formally adopted by the Board as a matter of "policy."

9. The initial placement on the salary guide for each of the named individuals was determined by the Board of Education unilaterally in accordance with its policy and was not "negotiated" with the individual or the education association.

DISCUSSION

A) The 90-Day Rule

As noted, there are two issues to be determined in this matter: (1) whether any or all of the claims are time barred, in whole or in part, by virtue of the application of any limitations provision (referred to in the pleadings as a "statute of limitations," but for purposes of this case refers to the provisions of N.J.A.C. 6:24-1.2); and (2) assuming no such time bar in whole or in part with respect to any one or more of the claims, the validity of any claim on its "merits." Accordingly, the threshold issue to be addressed is whether the "90-day rule" embodied in N.J.A.C. 6:24-1.2 stands as a bar to the claims, in whole or in part, and to what extent. In this regard, the Board first maintains that the petition clearly is subject to that provision since it is challenging the placement of individuals on a professional salary guide and that pursuant to N.J.S.A. 18A:29-9, such placement is a matter to be determined between the employee and the Board and is not mandated by statute. See, No. Plainfield Ed. Ass'n v. Bd. of Ed. of No. Plainfield, 96 N.J. 587 (1984). In the No. Plainfield case, of course, the New Jersey Supreme Court

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determined that the 90-day rule could not be raised as a defense where a right guaranteed to an employee by statute was involved. In that case, the question involved the entitlement of teachers to a salary increase or annual increment under N.J.S.A. 18A:29-8, a matter subject to the exercise of Board discretion. Similarly, in the instant case, the respondent takes the position that initial salary guide placement also is undisputedly a matter of ultimate Board discretion or, at least, not one which any statute mandates be done in a particular fashion without the Board's opportunity to provide essential input into the decision. Accordingly, since the petition in this case was not filed until January 31, 1986, and not one of the individual petitioners was put on the guide within 90 days of that filing date, the Board insists that the petition plainly is out of time and should be dismissed. Finally, while noting that the 90-day rule may be relaxed under certain limited instances (see, N.J.A.C. 6:24-1.17), the Board maintains that there is no basis in this case to justify any such relaxation. In particular, the Board points to various decisions of the Commissioner which stress the sparing exercise of the relaxation rule and the absence in this case of any justification for resort to it. See, e.g., Riely v. Bd. of Ed. of Hunterdon Central H.S., 173 N.J. Super. 109 (App. Div. 1980); Weir v. Bd. of Ed. of the Northern Valley Regional H.S. District, 1984 S.L.D. ____ (July 20, 1984), aff'd per curiam (N.J. App. Div., April 9, 1986, A-3520-84T6) (unreported); Wright and Sobanko v. Bd. of Ed. Belleville, OAL DKT. EDU 5299-80 (Dec. 5, 1980), aff'd by Comm'r of Ed. (Jan. 23, 1981); Miller v. Morris School District, Comm'r decision (Feb. 25, 1980).

Accordingly, the Board's position is that all of the claims in this case* are subject to the provisions of the 90-day rule, that the time limit was not met and that no basis exists for relaxation.

*Since the placement of the 42 individuals on the regular teacher's salary guide took place between September 1973 (in the case of D'Allesandro) and September 1985 (in the case of Marchetti), and all of the other placements occurred between those two dates, no claim was filed within 90 days of January 31, 1986, the date on which the petition was date-stamped by the office of the Commissioner of Education.

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In its brief the Board specifically refers to a recent decision of the Commissioner which dealt with the 90-day rule and its applicability to a claim challenging the propriety of a teacher's placement on a professional salary guide. See, Conner v. Bd. of Ed. of the Borough of River Vale, 1986 S.L.D. ____ (Feb. 18, 1986). The Conner case involved the claims of eight separate employees of the respondent school district who were assigned to full-time classroom teaching positions and who were placed on various steps of the regular salary guide beginning with the 1984-1985 school year. Although credit was given to them for teaching experience outside River Vale, they received no credit for their prior experience within the district as remedial or supplemental teachers. The administrative law judge found that with respect to four of the petitioners, the claims were time barred by N.J.A.C. 6:24-1.2. See also, Baker v. Bd. of Ed. of Clifton, 1985 S.L.D. ____ (Oct. 18, 1985); Bertisch v. Bd. of Ed. of Borough of Bergenfield, 1986 S.L.D. ____ (April 10, 1986); Bocker v. Bd. of Ed. of Wayne, 1986 S.L.D. ____ (April 17, 1986); and Spooner v. Bd. of Ed. of the Borough of Palisades Park, 1986 S.L.D. ____ (August 22, 1986).

The petitioner, in response to the Board's 90-day rule argument, maintains that it does not apply in this case, at least as to any present or future salary guide advancement may be concerned. In that respect it cites the decisions in Stockton v. Bd. of Ed. of Trenton, 1985 S.L.D. ____, reversed on other grounds (N.J. App. Div., May 16, 1986, A-3916-84T7) and Bree v. Bd. of Ed. of Boonton, 1985 S.L.D. ____, State Bd. of Ed. (Feb. 6, 1985). Beyond that, petitioner maintains that the provisions of N.J.A.C. 6:24-1.2 do not even apply to the sort of claims which are made in this case, citing Garfole v. Bd. of Ed. of Winfield, 1985 S.L.D. ____ (Aug. 1, 1985); Fair Lawn Ed. Ass'n v. Bd. of Ed. of Fair Lawn, 1982 S.L.D. 700, aff'd, State Bd. of Ed., 1982 S.L.D. 731, aff'd (N.J. App. Div., Jan. 11, 1984, A-2023-82T3), aff'd in part and reversed in part, 99 N.J. 8 (1985); and Bergenfield Education Ass'n v. Bergenfield Bd. of Ed., 1981 S.L.D. 567 (May 18, 1981), aff'd in part, reversed in part, State Bd. of Ed., 1982 S.L.D. 1440, aff'd in part, reversed in part (N.J. App. Div., May 19, 1983, A-2615-81T2). Finally, petitioner maintains that contrary to the Board's assertion, the entitlement of its 42 members to be compensated in the same manner as other teaching staff members is a right which is protected statutorily by virtue of N.J.S.A. 18A:16-11.

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The applicability of N.J.S.A. 18A:16-11 to claims of teaching staff members that they were "shortchanged" when initially placed on the regular salary guide following part-time experience in the district was dealt with in the Baker case. The administrative law judge rejected the argument and her decision was affirmed by the Commissioner. See, Baker, at 5-7. Accordingly, I must reject petitioner's claim that the provisions of N.J.A.C. 6:24-1.2 do not apply to the instant proceedings because of any mandated statutory entitlement.

In its decision in the Stockton case, the Appellate Division reversed the State Board with respect to whether the running of the 90-day period for the filing of a petition began either when the petitioner received his first paycheck, or three months later when his request for a correction in his pay was rejected by the assistant superintendent. The court held that it was the latter event which gave rise to the cause of action. The underlying facts in Stockton, therefore, are distinguishable from the instant matter. In Stockton, the court simply determined that the issuance of a paycheck for the wrong amount was not "an order" or a "ruling," but was "other action" within the meaning of the 90-day rule and that under the particular circumstances there involved, it was not until petitioner received a response from the assistant superintendent rejecting his claim that a dispute or controversy came into being. It is inconceivable to me that the rationale of the Stockton decision, which related to a very narrow and exquisitely specific set of facts, would apply here.

The same may be said of the decision in the Bree case where the 90-day rule, rather than being held inapplicable, was, as the Appellate Division noted, inferentially relaxed by the Commissioner. The question of whether the rule similarly ought to be relaxed in this case will be discussed infra. Of course, the Appellate Division decision in Bree is cited in a footnote to the petitioner's reply brief in support of the proposition that regardless of the timeliness of any claims related to school years prior to 1984-85, the filing in January 1986 at the very least provides each petitioner with the right to make a claim for the present and future school years. That issue was addressed directly in the Conner case wherein the administrative law judge noted that the petitioners had:

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> long since agreed to initial salary guide placement within the meaning of N.J.S.A. 18A:29-9, at various times when they accepted offers, none of which was within 90 days before their petition was filed. Passage of time has barred past, present or future correction. See, Conner at 15. See also, Spooner at 11.

The cases, then, consistently hold that claims of the sort involved in this matter are subject to application of the 90-day rule and, indeed, in the Baker, Conner, Bertisch, Bocker, and Spooner decisions the rule was applied. Therefore, left for consideration in respect to the applicability of N.J.A.C. 6:24-1.2 is whether or not under the particular circumstances the time bar ought to be relaxed under N.J.A.C. 6:24-1.17. In this respect, the decision in the Bertisch case is apropos. There, the administrative law judge, in reviewing a claim similar to the one raised in this case regarding salary guide placement, held that he was "not persuaded" by the arguments in support of relaxation and that no equitable grounds or meritorious factual explanations had been raised that would justify holding the 90-day rule inapplicable. The Commissioner affirmed the decision, noting that each of the petitioners knew no later than June 1984 that he or she would be offered employment at step one of the salary guide, yet petitioner's petition was not filed until February 1985, approximately eight months later. Based on my review of the facts set forth in the stipulation in this case, I perceive no sound basis for taking the rare step of invoking the relaxation rule.

Accordingly, having reviewed and considered the affirmative defense raised by the Board in this case, to wit, that all of the 42 claims are time barred under N.J.A.C. 6:24-1.2, whether past, current or future, I am convinced that the defense is a valid one and that the petition should be **DISMISSED**. To rule otherwise would fly directly in the face of the decisions in the Baker, Bertisch, Conner, Bocker, and Spooner cases, at least.

B) The "Merits"

Since it is conceivable that the Commissioner may reject my determination regarding dismissal of the petition under N.J.A.C. 6:24-1.2, it is incumbent upon me now

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to discuss the "merits" of this case as well. In this respect, the decisions in Baker, Conner and Spooner are particularly apropos. In Baker, as in the instant case, neither the collective negotiations contract nor any written board policy addressed the question of such placement. Thus, as the administrative law judge put it:

> The clear question is what statutory or constitutional law requires that all prior part-time service in the district must be precisely counted and credited to petitioners at initial step placement on the negotiated guide for regular teaching staff members. Baker, at 5.

She first disposed of the claim, similar to the one made in this case, that N.J.S.A. 18A:16-11 requires that all prior part-time, in-district experience be credited. That argument was rejected. Baker, at 5-7. Next, the administrative law judge turned her attention to N.J.S.A. 18A:29-9 and determined that since a principal purpose of the statute was to enable boards to make offers of employment in accordance with their needs, the statute would be meaningless and the legislative intent nullified if boards were required to offer a part-time elementary teacher in its employ the same step credit as another part-time teacher who was being hired in an area of greater need. In reaching that conclusion, the administrative law judge also observed that nothing in the decision in Hyman, et al. v. Teaneck Bd. of Ed., 1985 S.L.D. ____, State Bd. of Ed. (March 18, 1985), aff'd in part and remanded in part (N.J. App. Div., Feb. 26, 1986, A-3508-84T7), certif. denied, ____ N.J. _____ (1986), dictated any different result. At the time of the initial decision in Baker, Hyman had not yet been decided by the Appellate Division. However, the State Board had concluded, and the Appellate Division ultimately agreed, that nothing in the tenure statutes granted any teaching staff members an inalienable right to a particular place on a salary guide and that boards were free to negotiate differentiated guides if they so chose. See, Hyman, et al. v. Teaneck Bd. of Ed.

Although the petitioner in the instant case maintains that the remand in Hyman reflects a knowing determination that the issue of the use of prior remedial teaching experience vis a vis placement on the salary guide was expressly left open, I do not totally agree. As I read the Hyman decision, it seems clear to me that the State Board was, as Judge LaBastille noted in Baker, specifically aware of the notion that boards of education

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may establish differential salary schedules and thereby pay different classes of teachers at different rates in order to maintain the flexibility needed to "utilize available resources and to attract needed categories of teachers." See, Hyman, at 15. As she observed in Baker:

> It would be a curious statutory interpretation to conclude in the face of N.J.S.A. 18A:29-9 and the different salary treatment legislatively accorded to part-time staff that upon appointment to full-time positions, the Board must retroactively prorate part-time to full-time experience credits. Baker, at 9.

Interestingly, Judge LaBastille also took note in Baker of the decision by the Commissioner in Ball v. Bd. of Ed. of Teaneck, 1984 S.L.D. ____ (Aug. 31, 1984), appeal pending to the State Board of Education. The Ball decision was rendered prior to either the State Board or the Appellate Division decisions in Hyman. So, too, the affirmance of Judge LaBastille's initial decision in Baker postdated the Commissioner's decision in the Ball case, and since he affirmed Judge LaBastille's opinion in Baker, it is at least arguable that he agreed with her treatment of the relationship of the Ball decision to the Hyman decision. Although the affirmance in Baker was essentially related to Judge LaBastille's ruling that the petition was time barred, the following specific reference in that decision is enlightening:

> Upon thorough review of petitioners' exceptions to the findings and conclusions in the initial decision, the Commissioner finds and determines such exceptions to be without merit to the extent they are erroneously anchored upon other provisions of statutory and case law in an attempt to establish that a result contrary to the State Board's decision in Hyman, supra, is warranted. Baker, Comm'r of Ed. decision, at 12.

In the Conner case, the administrative law judge, specifically made reference to the Baker decision and noted that where initial step placement is not controlled by a negotiated contract, there is no statutory requirement mandating equal treatment of all teachers for that placement. Thus, the claim of the teachers in Conner who sought credit for in-district, part-time experience was found to be "meritless under existing decisional law enunciated principally in Hyman and followed perhaps most recently in Baker." Conner, at 21.

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In affirming the decision of the administrative law judge in Conner, the Commissioner made two particularly pertinent observations. First, he agreed with Judge Ospenson that given the particular factual circumstances in Conner:

> the movement from hourly, part-time wage status to full-time teaching status constituted initial employment in the district for salary guide purposes. N.J.S.A. 18A:29-9.
>
> Unlike the factual circumstances in Ball, supra, there does not exist herein a multi-step salary for part-time teaching staff members. Rather, a "flat rate" hourly wage has been negotiated by the Teachers' Association for part-time teachers [footnote omitted]. Thus, there is not the question of movement from a multi-step part-time salary guide . . . to full-time salary guide placement as was found in Ball, and Walter, et al. v. Bd. of Ed. of Teaneck, decided by Comissioner, July 22, 1985. Conner, at 34.*

Second, the Commissioner rejected the argument that the Baker decision did not apply because the petition in that case was dismissed as time barred under N.J.A.C. 6:24-1.2 and therefore all of the other discussion was obiter dictum. In his decision in Conner, the Commissioner expressly rejected this attempted dichotomy and specifically held that the Baker decision was authority for the proposition that there is no statutory right in a teaching staff member to receive in-district, part-time experience credit when moving to a full-time position on the regular teacher's salary guide. Thus, the Commissioner concluded in the Conner case as follows:

> Consequently, the Commissioner affirms the conclusion of the administrative law judge that petitioners are not entitled by statute to credit for in-district experience. Initial salary pursuant to N.J.S.A. 18A:29-9 is a matter of agreement/negotiation between the employee and the board. Further, it must be stressed that initial placement is not controlled by a negotiated contract. Baker, Conner, at 34.

Subsequently, in the Bocker case, the Commissioner specifically observed that the Ball and Walter cases had different results from the Conner and Baker cases, depending upon the individual set of circumstances involved in each. As noted, in Ball and Walter, there was a preexisting, separately negotiated "auxilliary" teacher's guide. In Conner and Spooner, there was none.

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In his initial decision in Spooner, Judge Ospenson took note of his own previous initial decision and the Commissioner's affirmance in Conner and concluded that the Board was not required to place previous in-district, part-time teachers on a specific comparable step on the full-time teacher's salary guide. Thus, placing Spooner on step four of the regular guide, rather than step seven, was "the equivalent of 'initial' placement on the full-time salary guide within the meaning of N.J.S.A. 18A:29-9 despite antecedent part-time employment in the district from 1971-1977." Spooner, at 12. Bearing in mind that the author of Spooner, as noted, was also the author of the Conner decision and further bearing in mind that he rendered his initial decision in Spooner after the Appellate Division decision in Hyman and the Commissioner's decision in Ball, it seems to me that the analysis contained in that decision, being legally correct in my judgment, ought to be followed.*

CONCLUSIONS OF LAW

Since the undisputed facts in this case reveal that there is no Board policy and/or negotiated contractual provision which would have impeded the Board in its decision with respect to initial placement of the 42 individuals who are the subject matter of this petition on the salary guide, and given the present state of the decisional authority which I have reviewed above, it seems to me that absent some authoritative decision to the contrary emanating either from the State Board of Education, the Appellate Division or the New Jersey Supreme Court, the Board acted properly in not crediting any of the 42 individuals with prior in-district hourly, per diem or other noncontract experience when initially placing them on the guide as full-time teachers.

Therefore, I herewith reach the following conclusions of law with respect to the two issues in this case:

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*I recognize that the Commissioner's recent affirmance in Spooner was ostensibly limited to the 90-day rule issue only. However, given the well-reasoned analysis by Judge Ospenson in his initial decision in Conner, and his reliance on it in Spooner, I am comfortable with a citation to Spooner, as well, insofar as the "merits" are concerned.

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(a) The claims of the 42 teachers represented by the petitioner in this case are all time-barred under N.J.A.C. 6:24-1.2, both retroactively and prospectively, and there exists no circumstances which would justify invocation of the relaxation provisions of N.J.A.C. 6:24-1.17; and

(b) With respect to the "merits" of the claims by the 42 individuals through the petitioner, the Board acted in conformance with law when it initially placed each at his particular step of the full-time teacher's salary guide.

Accordingly, for the reasons hereinabove set forth, the petition should be **DISMISSED.**

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

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

September 10, 1986
DATE

Stephen G. Weiss
STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

SEP 15 1986
DATE

Ronald J. Parker /s.s.
FOR OFFICE OF ADMINISTRATIVE LAW

md/e

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APPENDIX

EXHIBIT

J-1 Joint Stipulation of Facts with attachments

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UNION TOWNSHIP EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF UNION TOWNSHIP, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by petitioner within the time prescribed by N.J.A.C. 1:1-16.4a and b.

Petitioner alleges that the initial decision (1) improperly applied N.J.A.C. 6:24-1.2 to bar the action and (2) improperly rejected the merits of the claims. Further, petitioner points out that there is an error in the initial decision, ante, with respect to the facts regarding Esta Kilberg's employment history.

Upon review of the record and petitioner's exceptions, the Commissioner concurs with the conclusion of the ALJ that this matter is time barred pursuant to N.J.A.C. 6:24-1.2 for the reasons expressed in the initial decision. His reliance on such cases as Conner et al., supra, Bertisch, supra, and Bocker, supra, is appropriate to the matter. It is noted for the record that time bar for claims such as presented herein have been affirmed by the State Board in each of those cases.

Having determined that the matter is untimely, there is no requirement to address the substantive issue presented. However, the Commissioner does find the ALJ's conclusions and determination with respect to same entirely appropriate, again because of its consistency with the above-cited cases recently reviewed by the State Board. Further, he emphasizes that the ALJ is correct in pointing out that Ball, supra, and Walter, supra, are inapposite as those matters involved pre-existing, separately negotiated, multi-step salary guides for the teachers in question.

Accordingly, the Commissioner adopts the initial decision as the final decision in this matter, dismissing the Petition of Appeal. He passes no judgment on the correctness of the work history of Esta Kilberg as provided in the Stipulation of Facts (J-1, at p. 6) and reproduced in the initial decision.

Having examined the Joint Stipulation of Facts with attachments in the course of his review of this matter, the Commissioner recommends to the Board that the employment history cards submitted to the record be checked to assure that the

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APPENDIX

EXHIBIT

J-1 Joint Stipulation of Facts with attachments

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2913-86
AGENCY DKT. NO. 146-4/86

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE MAURICE RIVER TOWNSHIP SCHOOL DISTRICT, CUMBERLAND COUNTY.

Marc E. Chiappini, petitioner, pro se

Rushton H. Ridgway, Esq., for respondent Board of Education (Milstead & Ridgway, attorneys)

Record Closed: September 8, 1986 Decided: September 16, 1986

BEFORE **AUGUST E. THOMAS**, ALJ:

Marc E. Chiappini, petitioner, filed a letter request with the Commissioner of Education alleging certain irregularities in the conduct of the annual school election held on April 15, 1986 in the Maurice River Township School District (Board).

The Commissioner transferred the matter to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. An inquiry was conducted on September 8, 1986, in the Bridgeton City Hall, Bridgeton. Five witnesses testified and five documents were admitted into evidence.

At a prehearing conference in this matter on May 28, 1986, the nature of these proceedings and the issues were set forth as follows:

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I.

Allegations of statutory and/or procedural violations in the conduct of the annual school election pursuant to N.J.S.A. 18A:14-1 et seq.

A. Distribution of literature to pupils by teachers and bus driver on or about April 8, 1986, and

B. Illegal sign posted on private prooerty within 100 feet of polling place.

The testimony disclosed that a sample ballot favoring the election of several candidates to seats on the Board of Education was distributed by a bus driver to two handicapped pupils. Only two sample ballots were distributed to pupils because that is all she had left in her possession. The bus contained only six pupils. The sample ballot was brought to the attention of the superintendent by a mother babysitting for parents of another pupil after the child brought it home. After receiving a telephone complaint about children carrying literature to their homes, the superintendent called another parent who had a pupil on that same bus and found that that parent also received a sample ballot from the bus driver.

When he determined that the receipt of the first ballot by the babysitter was not an isolated incident, the superintendent conferred with the Board attorney who advised him to caution teachers and school board personnel about the distribution of election literature through pupils.

On April 8, the superintendent circulated a memorandum to all employees of the school district. That memorandum is in evidence as Exhibit B and it cites N.J.S.A. 18A:42-4 which prohibits the distribution of literature on any election issue or candidate through school pupils. Superintendent also learned the identity of the school bus driver who distributed the literature and cautioned her concerning her activity in this matter.

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Exhibit A is the back page of a bulletin which was mailed to citizens in the school district by the Maurice River Township Teachers Association. The ballot favored the candidates who were being backed by the Association. It is notable that the bulletin is not questioned as to its legality or its distribution. The simple issue considered here is the ballot which was given to two pupils to hand carry to their homes.

The second issue concerns a sign promoting the candidacy of certain Board members. It was posted on private property allegedly within 100 feet of the entrance to the polling place. At hearing, however, petitioner stated that he had since measured the distance from the sign to the entrance of the polling place and that it was more than 100 feet away.

The only remaining item is a fact, not disputed at hearing that the names of the candidates posted on the sign on private property did not have any inscription printed upon it giving the names and addresses of the persons who had it printed. One of the candidates whose name appeared on the sign testified that she and another person running for the Board prepared the sign. She did not remember who posted the sign. She testified that although she received statutory material concerning the conduct of the election, she was unaware that such a sign had to contain the name and address of the person preparing it.

Based on the foregoing, I **FIND** the following facts:

1. Literature promoting the candidacy of certain Board members was distributed to two or three pupils on or about April 7, 1986, by a bus driver employed by the Board of Education.

2. The superintendent took immediate steps a day or two later to caution his entire staff of employees about the distribution of any literature through school pupils (Exhibit B).

3. There were no other school election law violations committed by any employee of the Board.

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4. One successful Board candidate prepared a sign; however, it did not contain her name and address as is required by law.

5. The aforementioned sign was posted on private property more than 100 feet from the polling place.

CONCLUSIONS OF LAW

The Commissioner has repeatedly held that he will not condone irregularities in the conduct of school elections. In the Matter of the Annual School Election Held in the Toms River Regional School District, Ocean County, 1978 S.L.D. 316. In the instant matter it is clear that the superintendent took immediate steps after having learned of the distribution of literature through pupils to see that the practice was stopped. He also talked to the school bus driver and cautioned her. There is no evidence that such irregularities as reported affected the results of the election or that the will of the people was thwarted or could not be determined.

As the Commissioner stated in Toms River Regional School District, supra, ". . .there is reason to caution this Board and all other local Boards of Education to inform prospective candidates in order to prevent such irregularities in the future and to urge strict compliance with the statutes that govern the printing and distribution of campaign literature. N.J.S.A. 19A:14-97." In addition to the caution which should be given to prospective candidates in their conduct preceding an annual school election it is noted that the superintendent properly cautioned all of the district's employees about their conduct concerning the distribution of literature.

Based upon all of the above, however, there is nothing contained in this record which would warrant conclusion that the school election should be set aside.

Accordingly, the announced results of the elections on April 15, 1986, shall stand and the complaint filed by Petitioner Marc E. Chiappini is **DISMISSED WITH PREJUDICE.**

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

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

16 September 86 — August E. Thomas
DATE — AUGUST E. THOMAS, ALJ

Receipt Acknowledged:

SEP 19 1986 — [illegible]
DATE — DEPARTMENT OF EDUCATION

Mailed To Parties:

SEP 19 1986 — Ronald J. Parker/sl
DATE — OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF MAURICE RIVER, CUMBERLAND		
COUNTY.	:	
	:	

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

It is observed that no exceptions to the initial decision were filed by the parties pursuant to N.J.A.C. 1:1-16.4a, b and c.

The Commissioner concurs with those findings of fact and conclusions of law in the initial decision. Accordingly, the ALJ's recommendations in the instant matter are affirmed by the Commissioner and adopted as his own.

The complaint filed by Petitioner Marc E. Chiappini is dismissed with prejudice.

COMMISSIONER OF EDUCATION

October 22,1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2862-86
AGENCY DKT. NO. 106-4/86

IN THE MATTER OF THE
ANNUAL SCHOOL ELECTION
HELD IN BRIDGEWATER-RARITAN
SCHOOL DISTRICT

Kevin Kovacs, Esq., for the petitioner, Walter T. Blejwas, Jr. (Lowenstein, Sandler, Brochin, Kohl, Fisher, Boylan & Meanor, attorneys)

Daniel Soriano, Esq., for the respondent Board of Education (Soriano & Gross, attorneys)

Franz J. Skok, Esq., for the respondents, Enid Bloch, Albert Tornatore and Jean Crabtree (Johnstone, Skok, Loughlin & Lane, attorneys)

Record Closed: August 15, 1986 Decided: September 9, 1986

BEFORE AUGUST E. THOMAS, ALJ:

PROCEDURAL HISTORY AND UNDISPUTED FACTS

The annual school election for the Board of Education of Bridgewater-Raritan Regional School District (Board) was held on April 15, 1986. Walter T. Blejwas, Jr. (petitioner) was one of seven candidates seeking election to three vacant seats on the Board. He finished fourth, losing by one vote to Albert Tornatore.

By letter dated April 21, 1986, petitioner filed a letter request with the Commissioner of Education seeking a recount of the ballots cast and an inquiry into allegations of several violations of statutorily prescribed election procedures. An

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authorized representative from the Office of the Somerset County Superintendent of Schools was directed by the Commissioner to conduct a recount of the ballots cast. The official result of that recount was issued in a decision by the Commissioner on May 16, 1986, as follows:

THREE-YEAR TERM	AT POLLS	ABSENTEE	TOTAL
Enid Bloch	919	14	933
Jean D. Crabtree	892	17	909
Albert N. Tornatore	860	16	876
Walter T. Blejwas, Jr.	847	28	875
David A. Shriver	714	22	736
Betsy L. Cooper	637	23	660
Thomas R. Ronca	648	12	660

There was no change in the ballot count.

On April 28, 1986, this matter was transferred to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq., for the purpose of conducting an inquiry into the allegations of election violations. A prehearing conference scheduled for May 22, 1986, was adjourned on May 19, 1986, at which time the case was transferred to me. A prehearing conference was conducted on May 28, 1986, in the Office of Administrative Law, Mercerville, and the Prehearing Order of the same date set forth the agreed-upon issues.

One issue asserted by petitioner is that one or more persons who were not qualified voted by affidavit. And since he lost by only one vote, petitioner asserts that these unqualified voters affected the outcome of the election. Petitioner filed a Motion for Summary Decision on this single issue, stating that one unqualified voter could affect the outcome of the election. He seeks to void the election as it pertains to Albert Tornatore and himself, and he prays that the Commissioner schedule a special election as soon as practicable.

In support of his motion, petitioner filed a Brief with his Affidavit (Exhibit A); Commissioner's Decisions (Exhibits B, C, and D); Poll List and Signature Comparison Record, voter affidavits (Exhibit E); and Certification by the supervisor of the Somerset

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County Board of Elections (Exhibit F). The Board filed a Brief in Opposition to the Motion for Summary Decision. On June 19, 1986, petitioner filed a letter brief in reply, at which time that record was closed.

The unqualified voters designated by petitioner are Allan L. and Linda D. Halperin, who filed a change of residence card on March 18, 1986, allegedly one day late to qualify to vote on April 15, 1986 (N.J.S.A. 19:31-11) (Certification, Exhibit F); and Thomas Tornusciolo, whose name was "Purged 1984" from the signature copy register as an inactive registration (Exhibit F, Documents #1 and #2).

The Board does not dispute the fact that Thomas Tornusciolo was not a registered voter on April 15, 1986, the day of the school election; however, it argues that petitioner also bears the burden of showing how Mr. Tornusciolo voted and that his vote changed the result of the election.

The Board argued that a factual dispute remained about the date of the Halperins' change of address. The Board conceded that their change of address cards were received by the Board of Elections on March 18, 1986; nevertheless, they are dated March 10, 1986, well within the time frame to make them eligible voters in the school election. The Board suggested that the cards may have been mailed "postmarked on or before the twenty-ninth day preceding any election . . ." and are, therefore, timely (N.J.S.A. 19:31-11).

Based on my review of the record, particularly the Certification filed by the supervisor of the Somerset County Board of Elections (Exhibit F), I **CONCLUDED** that a factual dispute remained concerning the timeliness of the Halperins' change of address cards. If they were mailed or filed with the municipal clerk prior to March 18, 1986, they were timely. I decided that this fact could be determined only after a hearing or presentation of other solid evidence showing that the cards were hand-delivered on March 18, 1986. The record shows only that the cards were "Received March 18, 1986" (Exhibit F).

Accordingly, I **DENIED** petitioner's Motion for Summary Decision. The Acting Commissioner concurred in a decision dated July 28, 1986, and a hearing in this matter was conducted on August 5, 1986, in the Bridgewater Township Municipal Building. Seven

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witnesses testified and seven documents were admitted in evidence. The record was closed on August 15, 1986.

The first issue to be decided is whether or not the Halperins were qualified to vote. And if not, did their votes affect the outcome of the election?[1] The remaining issue is the tenor of Thomas Tornusciolo's vote.

The Supervisor of the Somerset County Board of Elections testified about the procedure used in her office to determine if registration cards are timely filed.

Pursuant to N.J.S.A. 19:31-11, a change of residence card must be filed on or before the 29th day preceding the election. P-1 and P-2 are the Halperins' notices of change of residence cards, which are stamped "Received" at 9:08 a.m. on March 18, 1986, by the Board of Elections.[2]

Linda Halperin testified that she mailed the notices in separate envelopes to the Board of Elections some time in March 1986, using the address on the envelope in which the cards were mailed to her.

Notwithstanding this testimony, the supervisor of the County Board of Elections testified that a notice of change of residence card is mailed to the Board of Elections in a separate envelope, the envelope is retained and stapled to the notice card. The supervisor stated that she and personnel from her office searched the records when notified of this election inquiry and they could not locate any such envelope. The originals of P-1 and P-2 were observed at hearing and they do not bear any sign of having been stapled to anything. The supervisor testified that the Halperins' notices were placed in the "too late" box upon receipt because they had been received too late to vote in the upcoming Board of Education election. In response to a question about the possibility of these notices being received in a different office of the county building, the supervisor testified that in that instance there would have been some indication to her from that office regarding when and where the notices were received. The supervisor testified that in her 13 years at the Board, this problem had never occurred.

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[1] As will be discussed, the Halperins volunteered the tenor of their votes to avoid another hearing if I determined them to be unqualified voters.

[2] See Exhibit P-2, attached to petitioner's brief filed in his Motion for Summary Decision.

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The Board argues that Title 18A:14-52 does not require any time frame in which a change of address is to be filed or forwarded to the commissioner of registration of the county or the clerk of the municipality. I cannot agree. My reading of N.J.S.A. 18A:14-52 indicates that registration is required 40 days prior to the school election.[3] One cannot be registered without having that change of address brought to the registration officials of the municipality or county.

The record shows that the notice cards, P-1 and P-2, are dated March 10, 1986, well within the time frame necessary to make the Halperins eligible to vote in the annual school election. However, they were not received until March 18, 1986. Consequently, there is a conflict between the testimony of Mrs. Halperin, who testified that she mailed the cards to the County Board of Elections, and the County Board of Elections supervisor, who testified about the "procedure" in her office. Although I do not question the thoroughness of the operation of the office of the supervisor of the County Board of Elections, the testimony of Mrs. Halperin must be given the greater weight. She testified that she called about registering for the general election in October 1985, and was told that she was too late. Thereafter, she received cards in November and December so that she would be eligible to vote in the next general election. She testified that it was only by circumstance that she learned of the Board election in her synagogue, where she discussed the election with one of the Board candidates, Enid Bloch. As a result of this conversation, she made it a point to register so that she could vote in the annual school election.

Based on Linda Halperin's testimony that she mailed her notice of change of address cards, and absent proof that her notices were not mailed on time, I **FIND** as fact that the Halperins were properly registered voters for the school election on April 15, 1986.

But even assuming that the change of residence notices were not mailed on time and that their votes were invalid, we have the testimony of the Halperins themselves about the persons for whom they voted. Allan Halperin testified that he "bullet" voted for

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[3] N.J.S.A. 19:4-1 and the New Jersey Constitution, Art. II, § 3(a), changed this requirement to 30 days.

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Enid Bloch and there is no challenge to that testimony. Linda Halperin was confronted by an investigator for the petitioner at a time when she did not realize the identity of this person. She believed that he was some type of official with the state or local government. She stated to him that she voted for Enid Bloch and Jean Crabtree. The investigator testified that she "thinks" she voted for Tornatore "but that she was not sure." Based on Linda Halperin's testimony at hearing and on the investigator's testimony reaffirming the above statement, I **CONCLUDE** that no determination can be reached that Linda Halperin voted for Albert Tornatore. Certainly, if her husband cast a bullet vote for Enid Bloch, it is possible that she might not have voted for all three candidates.

Finally, after my prodding, Thomas Tornusciolo disclosed his vote by filling out a sample absentee ballot form supplied to him at hearing. That form was admitted into evidence as Exhibit P-7, and it shows that Thomas Tornusciolo voted for Jean D. Crabtree, Betsy L. Cooper, and Dr. Enid Bloch. Accordingly, his vote could not have affected the outcome of the election.

Counsel for petitioner states that there is strong circumstantial evidence to show that Mr. Tornusciolo voted for the Bloch-Crabtree-Tornatore team (P-4). He argues that the circumstantial evidence adduced at hearing, showing that Mrs. Tornusciolo and Mrs. Crabtree were good friends over a period of time, is sufficient evidence to show that Thomas Tornusciolo would indeed be motivated to vote for Albert Tornatore. Petitioner's counsel also suggested that had his vote not affected the outcome of the election, he would have had no reason to conceal it earlier when confronted by petitioner's investigator or upon his learning that the school election matter was being disputed.

I have reviewed the circumstances of the alleged friendships and relationships between the witnesses, and I **CONCLUDE** that this is not the hard evidence which must be shown in order to prove for whom someone voted or to invalidate the vote of an unqualified voter. Thomas Tornusciolo owed no duty to disclose his vote prior to hearing.

Based on all of the above, I **CONCLUDE** that petitioner has failed to show that the Halperins were unqualified voters at the annual school election on April 15, 1986. However, if the Commissioner should find that they were in fact unqualified to vote by reasons of an untimely filing of a change of address card, the evidence also shows that the Halperins did not vote for Albert Tornatore. Consequently, their ballots could not have

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affected the outcome of the election. Finally, the only evidence we have concerning how Thomas Tornusciolo voted is the sample ballot which he filled out at hearing, disclosing that he did not vote for Albert Tornatore.

Based on all of the above, I **CONCLUDE** that there is no change in the result of the ballots cast at the annual school election in the Bridgewater-Raritan Regional School District.

Consequently, the announced results of the election as set forth by the Commissioner at the end of his recount will stand.

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

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

9 September 86
DATE

August E. Thomas
AUGUST E. THOMAS, ALJ

SEP 12 1986
DATE

Receipt Acknowledged:
Seymour Ellis
DEPARTMENT OF EDUCATION

SEP 12 1986
DATE

Mailed To Parties:
Ronald L. Parker /s.s.
OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
BRIDGEWATER-RARITAN REGIONAL	:	DECISION
SCHOOL DISTRICT, SOMERSET COUNTY.	:	
	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law. It is observed that Petitioner Walter T. Blejwas, Jr., has filed exceptions to the initial decision and that a reply to those exceptions was filed by the respondent Board pursuant to the applicable provisions of N.J.A.C. 1:1-16.4a, b and c.

The primary issue to be resolved in the instant matter is whether one or more persons who were not qualified to vote at the annual school election held in the Bridgewater-Raritan School District on April 15, 1986 did, in fact, vote by way of affidavit. The persons whom petitioner alleges were not qualified to vote are Allan L. and Linda D. Halperin, as well as Thomas Tornusciolo. Petitioner's further claim is that one or more of these unqualified voters did, in fact, illegally vote for Albert N. Tornatore and thereby thwarted the will of the voters by virtue of the fact that Mr. Tornatore was elected to a full three-year term on the Board by 876 votes while petitioner, as the unsuccessful candidate, received 875 votes.

Petitioner claims by way of his exceptions that the standard by which a school election inquiry must be judged is whether the free expression of popular will has been thwarted by irregularities. In the Matter of the Election Inquiry Held in the School District of the Borough of Fair Lawn, 1977 S.L.D. 1156

Moreover, petitioner argues that the ALJ erred by completely ignoring the testimony of the Somerset County Supervisor of Elections which establishes that the change of address notifications (P-1, P-2) filed by Mr. and Mrs. Halperin with the Somerset County Board of Elections were received on March 18, 1986 and therefore were deemed to be untimely pursuant to law in order to permit the Halperins to vote in the annual school election held on April 15, 1986. Petitioner relies upon the fact that the change of address notices filed by the Halperins, although apparently dated by them on March 10, 1986, were not received by the Somerset County Board of Elections until March 18, 1986 as evidenced by the date stamp appearing on said registration notices.

The applicable controlling provisions of law pertaining to "change of residence notice" are set forth in N.J.S.A. 19:31-11 notwithstanding those arguments advanced to the contrary by the Board.

The pertinent provisions of this section of law read as follows:

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> In all counties within the State, change of residence notices shall be made by a written request, signed by the registrant, forwarded to the commissioner by mail, and actually received by him*** provided, however, that such application for change of residence shall be filed with the commissioner or municipal clerk, as the case may be, on or before the twenty-ninth day preceding any election. All applications for change of residence postmarked on or before the twenty-ninth day preceding any election shall be deemed timely.

It is clear from a reading of the above statutory language that the Halperins' applications (P-1, P-2) for a change of residence do not comply with the law and are deemed to be untimely. This is so by virtue of the fact that such applications were received by the Somerset County Board of Elections on March 18, 1986, which was the 28th day preceding the date of the election held on April 15, 1986. The second issue raised by petitioner pertains to his claim that Mr. and Mrs. Halperin's, as well as Mr. Tornusciolo's, illegal votes were cast for Mr. Tornatore, the candidate who defeated him by one vote for a seat on the Board. In this regard petitioner excepts to the findings and conclusions of the ALJ for the following reasons:

> Specifically, the ALJ stated that the Halperins volunteered the tenor of their votes to avoid another hearing. Decision at page 4, footnote 1. Actually, only Allan Halperin so volunteered and he stated that he had voted for Enid Bloch. The testimony of Linda Halperin was that she now did not remember for whom she had voted other than Enid Bloch. This testimony was properly elicited because Mrs. Halperin had previously waived any qualified privilege by discussing her voting choices with the investigator. Based on this testimony, the ALJ made the factual conclusion that Mrs. Halperin did not vote for Mr. Tornatore and, therefore, did not effect (sic) the outcome of the election.
>
> In so doing, the ALJ again failed to take into consideration contrary evidence presented. Petitioner's investigator, David Watts, stated that Linda Halperin had told him that she had voted for the "Bloch team." Of course, the "Bloch team" included Mr. Tornatore. See P4 and P5. The ALJ only noted in his Initial Decision that Mr. Watts testified that Mrs. Halperin thought she had voted for Tornatore but was not sure. To consider this portion of Mr. Watts' testimony out of context and without consideration of the testimony that she had voted for the "Bloch team," renders the ALJ's decision unreasonable, arbitrary and capricious. His

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> factual conclusions are marred by his failure to give due weight to all of the credible evidence including the contrary evidence.
>
> Finally, the ALJ ruled that Thomas Tornusciolo had voted illegally. Mr. Tornusciolo's registration card had been purged in 1984 for failure to vote in four or more election years. In Petitioner's Motion for Summary Disposition, Petitioner had argued that this alone was sufficient to have effected (sic) the outcome of a school board election won by one vote. After the decision requiring Petitioner to produce the alleged illegal voters was made, Mr. Tornusciolo refused to disclose his voting preference to Petitioner's investigator. As a subpoenaed witness, however, he testified at the hearing that he had voted for two of the team members, Bloch and Crabtree, but that his third choice had been Betsy Cooper. The ALJ considered testimony that Mr. Tornusciolo's wife was a long time friend of Mrs. Crabtree. Mrs. Crabtree also testified at the hearing that she had discussed the election and her co-team members with Mrs. Tornusciolo.
>
> (Petitioner's Exceptions, at pp. 5-6)

The Board rejects petitioner's claim of bias against the ALJ in assessing the credibility of the testimony of the Halperins and Mr. Tornusciolo. The Board maintains that petitioner has failed to come forth with substantive proof that any of the voters in question had, in fact, voted for Albert Tornatore.

In the Board's view, petitioner attempts to thread the acquaintance among the Halperins, Enid Bloch and the friendship that existed between Mrs. Tornusciolo and Jean Crabtree another member of the "Bloch team," and use these relationships as the sole basis for establishing that each of the above-named persons also voted for Mr. Tornatore another member of the "Bloch team."

In this regard, the Board urges the Commissioner to reject petitioner's claim for the same reasons he stated in Cheryl Rogers v. Board of Education of the Borough of Lawnside, 1981 S.L.D. 1169 which held in pertinent part as follows:

> ***Where conflicting evidence is offered on any issue and there is sufficient evidence contained in the record to reasonably support the findings made, the Commissioner will defer to the judgment of the hearer on questions of credibility since he/she had the opportunity to hear and observe the witnesses and so was in a better position to assess credibility. Cf. Close v. Kordulak Bros., 44 N.J. 589, 599 (1965); Parker v. Dornbierer, 140 N.J. Super. 185, 188 (App. Div. 1976).*** (at 1178)

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The Commissioner has reviewed the respective arguments of the parties regarding petitioner's claim that the ALJ did not give weight to his claim of bias relative to the credibility of the testimony and evidence introduced to establish that the Halperins and Mr. Tornusciolo did, in fact, cast their illegal votes for Mr. Tornatore.

The Commissioner has also reviewed those specific findings of the ALJ and the exhibits in evidence pertaining to petitioner's claim of bias.

It must be noted at this juncture that neither party has ordered for the Commissioner's review a transcript of the testimony of the witnesses adduced at the hearing conducted in this matter by the ALJ.

In the Commissioner's judgment, the exhibits marked in evidence pertaining to Linda D. Halperin's statement of the persons for whom she voted (P-6), as well as the sample ballot (P-7) completed at the hearing by Mr. Tornusciolo, do not support petitioner's contention that these persons did, in fact, vote for Albert Tornatore. It is also evident from the findings in the initial decision that Mr. Halperin's statement that he "bullet voted" for Enid Bloch, stands uncontradicted by any other competent testimony of those witnesses who testified at the hearing.

It appears to the Commissioner that petitioner is seeking a favorable determination with regard to the contested votes in question by relying on the testimony of his own investigator David Watts, which at best conflicts with the testimony offered by the Halperins. It further appears that petitioner has drawn certain inferences from the testimony of these witnesses in order to establish that their relationships with Mrs. Bloch and Mr. Tornatore's wife were such that it could reasonably be concluded that all three persons did, in fact, cast illegal votes for Mr. Tornatore.

The Commissioner does not agree that the record of this matter leads to the conclusion urged by petitioner. Consequently, the Commissioner finds and determines that petitioner has failed to bring forth sufficient competent credible evidence or testimony to support his claim that the illegal votes cast by Allan L. and Linda D. Halperin and Thomas Tornusciolo were credited to the total votes received by Albert Tornatore at the annual school election held in the Bridgewater-Raritan School District on April 15, 1986. In arriving at this determination, the Commissioner also relies on Close v. Kordulak Bros., supra.

Accordingly, to the extent that the initial decision concludes that Allan L. and Linda D. Halperin's change of residence application to the Somerset County Board of Elections complies with the 29th day provision set forth in N.J.S.A. 19:31-11, it is reversed. In all other respects the ALJ's findings and conclusions are affirmed.

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The instant school election inquiry appeal in the annual school election held in the Bridgewater-Raritan School District on April 15, 1986 is hereby dismissed.

COMMISSIONER OF EDUCATION

October 23, 1986
Pending State Board

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3380-86
AGENCY DKT. NO. 105-4/86
(EDU 2714-80 on Remand)

LILLIAN B. FORGASH,
Petitioner,
v.
BOARD OF EDUCATION OF THE LOWER CAMDEN COUNTY REGIONAL HIGH SCHOOL DISTRICT NO. 1,
Respondent.

Robert J. Forgash, Esq., for petitioner

Robert E. Birsner, Esq., for respondent (Maressa, Goldstein, Birsner, Patterson & Drinkwater, attorneys)

Record Closed: August 4, 1986 Decided: September 17, 1986

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

This matter originally was opened before the Commissioner of Education in 1978. The petition of appeal alleged that the Lower Camden County Regional High School District No. 1 Board of Education (Board) improperly denied the request of Lillian B. Forsgash (petitioner) for benefits under N.J.S.A. 18A:30-2.1, Payment of sick leave for service connected disability.

On May 5, 1980, the matter was referred to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. After hearing, the administrative law judge then assigned issued an initial decision (OAL DKT.

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EDU 2714-80, Oct. 9, 1981) dismissing the petition. The Commissioner of Education and the State Board affirmed the findings and determination in the initial decision on November 23, 1981 and February 3, 1982, respectively.

On April 17, 1986, the petitioner filed a new petition of appeal, incorporating by reference the original petition. The present petition demands that, because the petitioner was awarded worker's compensation benefits for the injury that was the basis for the original petition, she should be paid her salary pursuant to N.J.S.A. 18A:30-2.1 for the period March 13, 1978-June 22, 1979.

The compensation decision was appealed to the Appellate Division of the Superior Court which affirmed the compensation judge's opinion. (N.J. App. Div., Dec. 31, 1985, A-280-84T7) (unreported). The court swiftly disposed of the Board's arguments asserting res judicata and collateral estoppel. Acknowledging that important goals may be reached through a selective application of these doctrines in administrative proceedings, the court stated "agencies possessing a distinctive functional character or providing unique or special remedies are entitled to, and may be required to, exercise their statutory powers over controversies properly before them regardless of whether similar relief might have been available to the complainant through other administrative proceedings." Slip opinion at p. 5.

Even more pertinent to the present case, the court held that the distinctive function and expertise of the compensation court qualified it as the more appropriate tribunal for the adjudication of Forgash's claim for her work-related injuries. The judge of compensation was entitled to, if not required to, entertain her claim and proceed to a final determination despite the earlier denial of benefits under N.J.S.A. 18A:30-2.1 by the Commissioner. Slip opinion at pp. 5-6.

Equally instructive is the court's recognition that the express function of N.J.S.A. 18A:30-2.1 is to complement workers' compensation benefits for a strictly limited period. A proceeding under N.J.S.A. 18A:30-2.1 may not be used to supplant the function of the compensation court. The statute contemplates a prior determination of a compensable injury by the compensation court before consideration by the Commissioner of the eligibility of the injured employee for the additional benefits provided by the statute. The doctrines of issue preclusion did not prevent consideration by the compensation court of Forgash's claim as the fundamental question in the case involved a

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matter of law and its determination was required to avoid an inequitable result. The determination of whether the petitioner's claimed disability was compensable required an interpretation and application of N.J.S.A. 39:15-7 with respect to the causal relationship between a work-related injury and the asserted aggravation or exacerbation of a preexisting condition. Although dependent upon the relevant facts, a finding of causality requires the application of the proper legal standard. The compensation judge applied the correct standard. If he had been barred from making this new determination, Forgash would have been denied any recompense for her compensable injury, clearly an inequitable result. Slip opinion at pp. 6-7. The court was satisfied that the compensation judge had ample and sufficient reason to proceed to a determination of Forgash's claim. Id. at p. 7.

The court's expression that N.J.S.A. 18A:30-2.1 is to complement workers' compensation benefits and its further guidance that the compensation judge properly considers a case under Title 34 irrespective of any determinations on the same facts under Title 18A make plain that the two tribunals may reach different results on the same question. It is also plain that the workers' compensation tribunal is in no way bound by a determination of the Commissioner. Similarly, it is neither expressed nor implied that the Commissioner is bound by a determination of the compensation tribunal.

Until recently, the accepted view was that the Division of Workers' Compenstion had exclusive jurisdiction to determine if an injury were work-related. Wellington v. Caldwell-West Caldwell Bd. of Ed., AGENCY DKT. NO. 209-5/78 (Dec. 15, 1980), adopted Comm'r of Ed. (Jan. 29, 1981). However, the State Board in the same year decided that:

> Even though compensation under N.J.S.A. 18A:30-2.1 and under the Workers' Compensation Law both depend on a factual finding that the injury arises out of and in the course of one's employment, the Commission clearly has jurisdiction to determine that issue insofar as the provisions of Title 18A are involved. Whether or not an award will also be made under the Workers' Compensation Law will be decided by the Division of Workers Compensation. That does not mean, however, that the Commissioner cannot determine the same factual issues for the purpose of applying N.J.S.A. 18A:30-2.1 (citations omitted). Masino v. West Deptford Tp. Bd. of Ed., OAL DKT. EDU 4347-79, St. Bd. (Jul. 8. 1981).

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N.J.S.A.. 18A:30-2.1 reads, in its entirety, 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.

The Appellate Division has decided that the phrase "accident arising out of or in the course of his employment" as used in this section was intended by the Legislature to have the same meaning as it does in the context of the Workers' Compensation Act. In the compensation context, the term "accident" has traditionally been construed to include all work-related episodes and events resulting in injury, and indeed all unexpected injuries, whether or not unusual strain or exertion was involved and whether or not there was direct impact. Theodore v. Dover Bd. of Ed., 183 N.J. Super. 407 (App. Div. 1982).

The petitioner here contends that this tribunal must apply the same standard as did the compensation judge. She suggests that, the correct causal relationship having been established by the compensation judge and approved by the Appellate Division, it would be inequitable to deny her the benefits to which she is entitled under N.J.S.A. 18A:30-2.1.

The Board counters that it is by no means automatic that the decision of the compensation judge must prevail insofar as it is contrary to the decision of the administrative law judge in this matter. Masino, above. The decision of the State Board in Masino is clear. It requires that jurisdiction be assumed by the Commissioner and further requires that the present petition be denied. Whether the compensation judge's decision was congruent with that of the administrative law judge is of no consequence to the petition filed before the Commissioner because, while the compensation judge may enter an award under the Workers' Compensation Law, "that does not mean, however, that the Commissioner cannot determine the same factual issues for the purpose of applying N.J.S.A. 18A:30-2.1." Masino, Slip Opinion at p. 2.

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Reading the statute and giving the words therein their ordinary meanings, I **FIND** that the legislative intent is to give to any school employee, entitled to sick leave under the school laws, who is absent from duty as the result of a personal injury caused by an accident arising out of and in the course of employment, full salary or wages for the period of that absence for up to one calendar year without having the absence charged against accumulated sick leave.

I further **FIND**, as did the administrative law judge on first hearing, that the petitioner was injured at work on several occasions and that there were workers' compensation determinations that she sustained permanent, partial disabilities.

Although the Commissioner and, hence, this tribunal, are clearly authorized to make findings independent of the Division of Workers' Compensation, I **FIND** persuasive the award of Judge Donald A. Curtis, dated October 4, 1984, in which it was determined that four specific accidents were work-related and, therefore, compensable.

Accordingly, I **CONCLUDE** that Lillian B. Forgash is entitled to full salary according to the then appropriate teacher salary guides for a period of one year commencing March 13, 1978, mitigated by the amount of any compensation award made for temporary disability, but not mitigated by any compensation award made for permanent disability, because such is not contemplated by the statute. I further **CONCLUDE** that in addition to the mitigated payments, the petitioner shall have restored to her any sick leave charged during the one year period commencing March 13, 1978.

It is **ORDERED** that the Lower Camden County Regional High School District Board of Education accomplish the payments and adjustments required by this determination not later than 30 days following the date of the final decision in this matter by the Commissioner of Education.

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

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

17 SEPTEMBER 1986
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

SEP 18 1986
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

SEP 22 1986
DATE

Ronald J. Parks/K.S.
OFFICE OF ADMINISTRATIVE LAW

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LILLIAN B. FORGASH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE LOWER CAMDEN COUNTY REGIONAL HIGH SCHOOL DISTRICT NO. 1, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The Board's exceptions were timely filed pursuant to N.J.A.C. 1:1-16.4a, b and c as was petitioner's reply to those exceptions.

The Board's exceptions rely upon its Answer to the Petition of Appeal, with attachments previously forwarded to the ALJ, which are incorporated herein by reference. In addition, the Board directs the Commissioner's attention to page 4 of the ALJ's decision wherein he "acknowledges that the Masino decision requires that Petitioner's application be dismissed." (Board's Exceptions, at p. 1)

Petitioner replies that the last paragraph of the Board's exceptions misread the ALJ's decision. Petitioner avers that the last paragraph of page 4 of Judge Campbell's decision outlines the argument made by the Board. "That paragraph," argues petitioner, "follows the paragraph which outlines Petitioner's arguments." (Reply Exceptions, at p. 1)

Otherwise, there are no contentions made by the Board which were not argued and decided by the ALJ, submits petitioner. Petitioner avows that the initial decision is well reasoned, legally correct and should be affirmed.

Initially, the Commissioner notes accord with the petitioner's reply exceptions wherein it is noted that the Board misread the initial decision. At page 4, the ALJ was reciting the arguments to counsel; in no way can it be construed at that point in the development of the initial decision the ALJ was acknowledging "that the Masino decision requires that Petitioner's application be dismissed." (Board's Exceptions, at p. 1)

Upon a careful review of the record of this matter, including the exceptions of the parties, the Commissioner agrees with the findings and the conclusion of the Office of Administrative Law that petitioner "is entitled to full salary according to the then appropriate teacher salary guides for a period of one year

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commencing March 13, 1978, mitigated by the amount of any compensation award made for temporary disability, but not mitigated by any compensation award made for permanent disability***." (Initial Decision, ante) Additionally, the Commissioner agrees with the ALJ that "in addition to the mitigated payments, the petitioner shall have restored to her any sick leave charged during the one year period commencing March 13, 1978." (Initial Decision, ante) The Commissioner notes the language of the Appellate Division in Lillian B. Forgash v. Lower Camden County Regional High School District #1, Division of Workers' Compensation, Claim Petition No. 79-547666, October 4, 1984, aff'd N.J. Superior Court, Appellate Division, A-280-84T6, December 31, 1985 in support of his determination, wherein it was stated:

> Further, the asserted doctrines of issue preclusion did not prevent consideration by the compensation court of petitioner's claim as the fundamental question in the case involved a matter of law and its determination was required to avoid an inequitable result. The compensability of petitioner's claimed disability required an interpretation and application of N.J.S.A. [34]:15-7 with respect to the causal relationship between a work-related injury and the asserted aggravation or exacerbation of a preexisting condition. Although dependent upon the relevant facts, a finding of causality requires the application of the proper legal standard. In finding a causal relationship between petitioner's injury and her disability, the compensation judge applied the correct standard whereas the administrative law judge did not. See Theodore v. Dover Bd. of Ed., 183 N.J. Super. 407 (1981). If the judge had been precluded from making this new determination, petitioner would then have been denied any recompense for her compensable injury. Such an inequitable administration of the law was avoided by the completion of the compensation proceedings.
>
> (Slip Op., at pp. 6-7)

Consequently, it is hereby ordered that the Lower Camden County Regional High School District Board of Education accomplish the payments and adjustments required by this decision no later than 30 days from the date of this decision.

Accordingly, the Commissioner accepts the recommendation of the Office of Administrative Law and adopts it as the final decision in this matter for the reasons expressed in the initial decision and as supplemented herein.

COMMISSIONER OF EDUCATION

October 27, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1205-86
(ON REMAND EDU 6676-80)
AGENCY DKT. NO. 460-9/80A

FAIR LAWN EDUCATION ASSOCIATION, KATHERINE SOLOMON, ARLENE ALBALAH, ELAINE PAVON AND PHYLLIS STOLAR,
Petitioners,
v.
FAIR LAWN BOARD OF EDUCATION,
Respondent.

Gregory T. Syrek, Esq., for petitioners
(Bucceri and Pincus, attorneys)

Reginald F. Hopkinson, Esq., for respondent
(Jeffer, Hartman, Hopkinson, Vogel, Coomber & Peiffer, attorneys)

Record Closed: August 5, 1986 Decided: September 17, 1986

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BEFORE SYBIL R. MOSES, ALJ:

I

Procedural History

This matter was originally brought before the Office of Administrative Law (OAL DKT. EDU 6676-80) as the result of a petition filed by the Fair Lawn Education Association (FLEA) and certain individual teachers asking that they be declared to have been employed in tenurable positions while with the Fair Lawn Board of Education (Board) and that they receive all emoluments attached to tenured status. After taking testimony and reviewing briefs, I filed an Initial Decision in OAL DKT. EDU 6676-80 on May 19, 1982. The decision held that the positions of Title I, SCE and supplemental teachers were tenurable and ordered that petitioners Solomon, Albalah, Pavon and Stolar be granted part-time tenure as presently employed teachers. The decision ordered that the specific part-time tenured positions be determined after review of the hours and years taught and after comparison with full-time teaching positions. The decision denied retroactive compensation and other emoluments and ordered salary level and other benefits adjusted to accord with the receipt of part-time tenure, to be awarded prospectively only, with placement on the appropriate step of the tenured teachers' salary guide as part-time tenured teachers.

The Commissioner of Education (Commissioner) affirmed the findings and determination rendered in the Initial Decision and adopted them as his own. 1982 S.L.D. 729 (July 20, 1982). The State Board of Education (State Board) affirmed the decision of the Commissioner for the reasons expressed therein. 1982 S.L.D. 731 (Dec. 17, 1982).

This decision of the State Board (State Board DKT. 77-82) was appealed to the Appellate Division of Superior Court, DKT. A-2023-82T3. The Appellate Division affirmed the decision of the State Board, holding that it was in accord with Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982) and directing that any prospective relief awarded to the teachers be calculated from June 23, 1982. The Appellate Division remanded the

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cases of these named teachers to the Commissioner of Education for a determination of what prospective benefits were owed them, consistent with that court's opinion.

The Supreme Court granted the teachers' petition for certification, Rutherford Ed. Ass'n v. Bd. of Ed. of Rutherford, 97 N.J. 595 (1984). On April 11, 1985, the Supreme Court affirmed the judgment of the Appellate Division in this matter, to the extent that it denied retroactive tenure or emoluments to teachers terminated prior to the decision in Spiewak. The Supreme Court reversed the judgment of the Appellate Division in Fair Lawn to the extent that it denied retroactive tenure to teachers still employed at the time of Spiewak. The Supreme Court remanded the case of the named teachers herein to the Commissioner for a determination of when each teacher achieved tenure, of what emoluments each teacher was entitled to receive due to his or her tenure status and for a calculation of such benefits in accordance with its opinion. Rutherford Ed. Ass'n, et al. v. Bd. of Ed. of the Borough of Rutherford et al., 99 N.J. 8 (1985).

In the meantime, on June 16, 1983, the Honorable Sherwin D. Lester, J.S.C., heard an Order to Show Cause filed by these petitioners requesting that the December 17, 1982 decision of the Commissioner in this matter be entered as a judgment and that the Board be directed to comply with its terms. Judge Lester determined that the decision of the Commissioner was insufficiently precise to permit directing the defendant to comply with its terms. He remanded the matter to the Commissioner for a precise determination of the entitlements of these plaintiffs. The Commissioner forwarded the remanded matter to the OAL for determination as a contested case on July 18, 1983. That contested case was designated EDU 5777-83 (Jan. 3, 1984) and assigned to this judge. The only issue in controversy in EDU 5777-83 was the question of the appropriate placement, if any, on the tenured teachers' salary guide for the instant petitioners. I concluded that these petitioners should be granted placement on the regular teachers' salary guide as of September 1982, said placement to be commensurate with their education and years of teaching experience. The Commissioner affirmed the findings and determination of that initial decision. 1984 S.L.D. _____ (Feb. 21, 1984). This Commissioner's decision is presently pending determination of an appeal by the State Board (State Board DKT. NO. 23-84).

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This particular matter was forwarded to the OAL by the Commissioner for determination as a contested case on February 25, 1986. It should be absolutely clear, then, that this case, EDU 1205-86, is the remand from the Supreme Court, reversing, in part, the Appellate Division decision, DKT. A-2023-82T3, which had affirmed State Board, DKT. 77-82 (Dec. 17, 1982), which had affirmed the Commissioner's decision, 1982 S.L.D. 729 (July 20, 1982), which had affirmed this judge's decision in EDU 6676-80.

A prehearing conference was held on April 14, 1986. Counsel agreed that this remand would specifically determine the emoluments of tenure of Katherine Solomon, Arlene Albalah, Elaine Pavon and Phyllis Stolar. Counsel agreed that the case could be decided as a matter of law. The only legal issues to be determined are:

1. Is placement on the regular teachers' salary guide an emolument of tenure for these part-time teachers?

2. If it is, what is the exact placement to which each teacher herein is entitled?

3. Is each teacher entitled to be credited with sick days commencing from six years prior to the Spiewak decision?

Counsel stipulated that the named teachers are, in fact, tenured. Counsel agreed that should a State Board decision issue in the pending appeal, Solomon, et al. v. Fair Lawn Bd. of Ed., State Board DKT. 23-84, OAL DKT. NO. EDU 5777-83, said ruling would be controlling in this matter. However, as of the date of this Initial Decision, the State Board had not issued a decision.

While the appellate ladder was being climbed by the instant petitioners, the Appellate Division issued a decision in Francis W. Hyman, et al. v. Bd. of Ed. of the Tp. of Teaneck, Bergen County (N.J. App. Div., Feb. 26, 1986, A-3508-84T7). The Appellate Division affirmed in part, and remanded in part, the decision of the State Board in Hyman, et al. v. Teaneck Bd. of Ed. (March 6, 1985) substantially for the reasons expressed by that Board in its written decision. The State Board held that Spiewak v. Rutherford Bd. of Ed.,

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90 N.J. 63, did not preclude a local board from negotiating different salary guides for different categories of teacher and rejected petitioners' argument that as auxiliary instructors, they were entitled to be compensated on the same salary scale governing regular classroom teachers. The petitioners in Hyman filed a petition for certification with the Supreme Court, which was denied on June 30, 1986. ___ N.J. ___ (1986).

It should also be noted that in 1985 other ancillary teachers (comp. ed., supplemental, Chapter I, support, Title I, bedside home instructors and ESL teachers) employed by the Fair Lawn Board filed a petition with the Commissioner claiming that they were entitled to receive salaries and benefits comparable to those provided other teaching staff members in the district. See, FLEA et al. v. Fair Lawn Bd. of Ed., OAL DKT. EDU 2895-85 (June 23, 1986), Comm'r of Ed. Decision (July 30, 1986). The administrative law judge in that case denied that petition, stating that the State Board's reasoning in Hyman was controlling and that supplemental teachers were not entitled, by law, to placement on the regular classroom teachers' salary guide. The Commissioner modified the ALJ's Initial Decision in EDU 2895-85 only to the extent that he found petitioners were entitled to calculation of accumulated sick leave, retroactive for six years prior to the date of his decision, with prospective utilization only of such sick leave. He agreed that those petitioners were not entitled to placement on the full-time teachers' salary scale. See, FLEA, et al. v. Fair Lawn Bd. of Ed., Comm'r of Ed. Decision (July 30, 1986), at 14. As a result of that ruling, counsel in this case agreed that the instant petitioners would be entitled to be credited with accumulated sick days commencing from six years prior to the date of this decision.

Briefs and responses here were timely filed. Oral argument was held on August 1, 1985 and the Board withdrew previously entered objections to the filing of the stipulation of facts. On August 5 I adopted the stipulation of facts executed by both attorneys as the facts in this case. Said stipulation is attached to this Initial Decision and designated Appendix I. It contains all facts relevant to this matter.

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II

Arguments of Counsel

In lengthy briefs and in oral argument petitioners assert that the determination in prior cases that they were entitled to placement on the appropriate step of the full-time tenured teachers' salary guide, as part-time tenured teachers, has never been reversed or stayed, and therefore they must be placed on the regular teachers' salary guide. Counsel argues that Solomon, et al. v. Fair Lawn Bd. of Ed., EDU 5777-83, Comm'r Decision, 1984 S.L.D. ___ (Feb. 21, 1984), appeal pending, State Board of Ed., established the mechanics of placing these four teachers on the regular salary guide and that there is no legal basis to ignore the controlling nature of these decision which have never been appealed, stayed, reversed or overturned. Counsel thus relies on the legal theories of res judicata and collateral estoppel in support of petitioners' position that they are entitled to be placed on the regular teachers' salary guide.

Counsel argues that these teachers are entitled, as a matter of law, as a result of Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982), and as a matter of equity, to be placed on the regular teachers' salary guide on a prorated basis. Counsel cites N.J.S.A. 18A:16-11 to support petitioners' position that they are public employees, performing the duties of their position, and therefore entitled to be fully compensated for that performance. Counsel asks for application of the determination in Solomon, EDU 5777-83, establishing the method and formula for determining prorated salaries, and back pay, extending back six years prior to Spiewak, as well as pre-and postjudgment interest.

At no point in his initial brief or letter memorandum in reply to respondent's brief did petitioners' counsel deal with the holding of the State Board and Appellate Division in Francis W. Hyman, et al. v. Bd. of Ed. of the Tp. of Teaneck.

Counsel for the Board argues that there is no prior controlling litigation in regard to these litigants, or any prior controlling law generally, which has established that salary guide placement on the regular teachers' salary guide is an emolument of tenure of ancillary teachers. Counsel points out that this specific case is a remand from the

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Supreme Court, related to an appeal involving five consolidated matters, Rutherford Ed. Ass'n, et al. v. Bd. of Ed. of the Borough of Rutherford, et al., 99 N.J. 8. Counsel asserts that, in that decision, the Supreme Court neither stated nor suggested salary was an emolument of tenure. He relies heavily on this language of the Supreme Court in Rutherford: "We did not decide in Spiewak, nor did we decide today, what are the emoluments of tenure." 99 N.J. at 14, and at Footnote 1, p. 14 of 99 N.J. 14. This particular case was remanded to the Commissioner and thus to the OAL for the sole purpose of determining the emoluments of tenure.

The Board asserts that the State Board has resolved the specific question of what are the specific emoluments of tenure due to ancillary teachers in Francis W. Hyman, et al. v. Bd. of Ed. of the Tp. of Teaneck, State Board Decision (March 8, 1985), aff'd in part, remanded in part, N.J. App. Div., Feb. 26, 1986, A-3508-84T7, certif. den. _____ N.J. _____ 1986. Therefore, Hyman is wholly dispositive of the only question in controversy before this judge. Counsel points out that the decision of this judge in EDU 5777-83, concluding that these petitioners should be granted placement on the regular teachers' salary guide as of September 1982, was made prior to Hyman and therefore is not controlling.

It should be noted that petitioners' counsel conceded that the Supreme Court has not decided the emoluments of tenure of part-time teachers. He argues that the question of salary guide placement was not appealed by the boards of education in Rutherford, et al. The teachers appealed the denial of retroactive benefits. Therefore, the lower court decision in regard to salary guide placement should control.

At oral argument, petitioners' attorney argued that the facts in Hyman were very different from those in the case at bar because in Teaneck, there was a specific, separate collective bargaining agreement. Here, counsel argues, there have only been a few years where salary discussions took place. He asserts there was never any collective bargaining agreement entered.

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III

Conclusions of Law

The Supreme Court remanded three questions concerning these petitioners to the Commissioner in Rutherford Ed. Ass'n, et al. v. Board of Education of the Borough of Rutherford, et al., 99 N.J. 8. The first question remanded was whether or not the named teachers in this appeal were entitled to tenure. Counsel have stipulated that the named teachers are, in fact, tenured. I therefore conclude that, as a matter of law, petitioners Katherine Solomon, Arlene Albalah, Elaine Pavon and Phyllis Stolar are tenured teachers in the employ of the Fair Lawn Board of Education.

The second question was whether each teacher is entitled to be credited with sick days commencing from six years prior to the Spiewak decision. At oral argument, counsel for the Board agreed that it would be hard to argue that sick days were not an emolument of tenure and were not to be awarded pursuant to the guidelines set out in Rutherford and Spiewak. I therefore conclude that these petitioners have a statutory entitlement to accumulated sick leave. I further conclude that the six-year statute of limitations articulated in Lavin v. Hackensack, 90 N.J. 145 (1982) and Rutherford Ed. Ass'n, et al. v. Rutherford Bd. of Ed., et al., 99 N.J. 8 and as applied in Kloss, et al. v. Bd. of Ed. of Lyndhurst, Comm'r of Ed. Decision, 1983 S.L.D. ___ (June 20, 1983) and Arndt, et al. v. Bd. of Ed. of Rockaway Tp., Comm'r of Ed. Decision, 1984 S.L.D. ___ (Nov. 2, 1984), controls the calculation of these petitioners' statutory entitlement to such accumulated sick leave. In accordance with Spiewak, I conclude that the utilization of accumulated sick leave is prospective only. No payment for loss of salary due to illness in the past six years will be made, although accumulation of sick days for prospective application will be permitted. See also, Fair Lawn Ed. Ass'n, et al. v. Bd. of Ed. of the Borough of Fair Lawn, EDU 2895-85, Comm'r of Ed. Decision (July 30, 1986), at 13-14.

The last and controverted question in the case at bar is whether placement on the regular teachers' salary guide is an emolument of tenure. This question can be decided only after considering the effect of the Supreme Court decision in Rutherford Ed. Ass'n, et al. v. Bd. of Ed. of the Borough of Rutherford, et al., 99 N.J. 8 and of the Appellate

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Division decision, affirming the State Board, in Hyman v. Teaneck Bd. of Ed. (N.J. App. Div., Feb. 26, 1986) on this remand. The two decisions are of great moment here. The opinion of the Supreme Court in Rutherford was that it did not decide in Spiewak, nor did it decide in Rutherford, what are the emoluments of tenure. Rutherford, 99 N.J. at 14. Since that question was not decided by the Supreme Court, but remanded in April 1985 to the Commissioner, and in February 1986 to this judge, one must consider what has happened in the interim.

On March 6, 1985, the State Board resolved, in clear and dispositive language, the issue of whether salary guide placement on the regular teachers' salary guide is an emolument of tenure of ancillary and/or part-time teachers. In Francis W. Hyman, et al. v. Bd. of Ed. of the Tp. of Teaneck, Bergen County, State Board Decision, 102-83 (March 6, 1985), aff'd, App. Div. A-3508-84T7 (Feb. 26, 1986), certif. den. ___ N.J. ___ 1986 (June 30, 1986), the State Board categorically held that salary guide placement is not an emolument of tenure. One can only assume that any decision by the State Board of the pending appeal of EDU 5777-83, issued prior to Hyman v. Teaneck, will be controlled by the Hyman decision. I am confident that this case is controlled by the language of the State Board in Hyman, affirmed by the Appellate Division "substantially for the reasons expressed by the State Board," App. Div. (unreported) at 2.

> In sum, the statutes governing compensation apply only to full-time teaching staff members and, therefore, do not confer the right to placement on any salary guide to part-time teachers. Further, there is no requirement that a board adopt a salary policy for its full-time teaching staff members, although it is authorized to do so under N.J.S.A. 18A:29-4.1. Hyman, State Board at 10.

A review of school law decisions prior to Hyman indicates there was some uncertainty as to what were the emoluments of tenure. That has now been clarified by the State Board in Hyman. Neither Spiewak, the tenure statutes, the compensation statutes, nor any regulations confer on any teaching staff member the right to placement on any particular salary guide. Id. at 11. Therefore, supplemental part-time teachers are not entitled by law to placement on the salary guide for full-time classroom teachers. In Hyman, the State Board characterized the Spiewak decision as one based on an analysis of

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the tenure statues. Id. at 4. In the absence of a statutory exception or contrary legislative intent, neither present here, remedial teachers were held to come within the mandatory provision of N.J.S.A. 18A:28-5. Spiewak distinguished the statutory basis of tenure from the contractual nature of salaries and other benefits. Therefore, it cannot be cited as support for the placement of remedial teachers on a particular salary scale as a matter of law.

In Hyman, the State Board examined the statutory provisions for tenure, seniority and compensation in order to determine whether there is a right to salary guide placement or salary parity. The State Board pointed out that tenured teachers receive procedural protection from arbitrary dismissals, N.J.S.A. 18A:6-10, and seniority rights in the event of an economic layoff, N.J.S.A. 18A:28-12. However, the State Board concluded that there is nothing in either the tenure or seniority statutes which confers the right, as a matter of law, to placement on a particular salary guide. Id. at 8. The Teachers' Compensation statute, N.J.S.A. 18A:29-4.1, provides authorization for, but does not mandate, a salary policy for all full-time teaching staff members. Ibid. A board of education has discretionary authority to adopt salary scales for full-time teaching staff members, N.J.S.A. 18A:29-4.1, but it need not have one salary scale for all full-time teaching staff members and may provide different salary scales for different groups of full-time teachers. Id. at 9. The only statutory requirement is that all groups of full-time teachers must be covered by a salary scale if any one group is covered by a salary scale. The salary scale statutes, unlike the tenure statutes, expressly distinguish full-time teachers from part-time teachers. The statutes governing compensation only apply to full-time teachers, and therefore do not confer the right to placement on any salary guide to part-time, supplemental or remedial teachers. Id. at 10.

The State Board concluded that compensation is a term and condition of employment within the contemplation of the New Jersey Employer-Employee Relations Act, and therefore local boards are free to negotiate terms of compensation within the parameters of the school law statutes. Id. at 11. This negotiation process clearly allows different categories of teaching staff members to be treated differently in terms of salary. Id. at 15. The State Board determined that such flexibility in establishing salaries

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is necessary to enable boards to utilize available resources and attract needed categories of teachers. Ibid. The negotiation process which results in such salary agreements is not within the jurisdiction of the State Board, but within that of PERC. Id. at 16.

The State Board, in Hyman, reversed the Commissioner's determination that Spiewak mandated salary parity between supplemental and full-time teaching staff members. Id. at 3. The State Board held, without differentiating between whether there was a negotiated agreement or whether there was a refusal to negotiate a separate agreement, that the fact that there is a separate negotiated salary guide applying to supplemental teachers does not in and of itself, violate school laws.

I include the language of the State Board in Hyman because it is unambiguous.

> Although the court [in Spiewak] acknowledged that supplemental teachers may be entitled to additional benefits, it clearly stated that such benefits, unlike tenure rights, are primarily a matter of contract. Thus, we conclude that the decision in Spiewak does not grant to supplemental teachers any statutory entitlement to benefits beyond that which may be conferred on them by existing statutes.... Hyman at 5-6.
>
> The State Board agrees that the footnote in Spiewak does not deny the award of benefits provided by contract or statute. However, we emphasize that the decision in Rutherford did not address the issue of whether supplemental teachers are entitled to guide placement as a matter of law. We must therefore turn our consideration to the relevant statutes in order to determine whether such rights exists....
>
> ...However, review of the tenure statutes indicates that those statutes do not grant to any teaching staff members the right to placement on a salary guide. Hyman at 6-7.
>
> We therefore conclude that supplemental teachers are not entitled by law to placement on the salary guide for full-time classroom teachers. Hyman at 11.

The State Board went out of its way to clarify the situation surrounding negotiations between a Board and part-time teachers.

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> We hold today that the fact that there is a separate negotiated salary guide applying to supplemental teachers does not in itself violate the school laws. Because we find no right to placement on the "regular" full-time teacher's salary guide under the school laws, it is unnecessary to consider under what circumstances such right, if it existed, could be properly waived. Although we recognize that this result allows different categories of teaching staff members to be treated differently in terms of salaries, we emphasize that such differences are permissible under the existing statutory framework. Moreover, the State Board believes that boards of education must be able to exercise flexibility, within the statutory guidelines, in establishing salaries so that they may maximally utilize available resources and attract needed categories of teachers. We conclude that the proper exercise of such flexibility is consistent with the principles articulated in Spiewak since, if a board adopts a salary policy that includes a salary schedule covering auxiliary teachers, all auxiliary teachers within the same category would be treated the same in terms of their salary entitlements. See, 90 N.J. 63, at 80. We also emphasize that, although a salary guide for supplemental teachers may fully comply with the requirements of the school laws, negotiated agreements that include salary guides, as well as the negotiation process that results in such agreements, are within the scope of the New Jersey Employer-Employee Relations Act. N.J.S.A. 37:13A-1 et seq. Allegations of violations of that Act, however, are not within our jurisdiction, but rather within the jurisdiction of the Public Employees Relations Commission (PERC), which is charged with enforcing that Act.
>
> In sum, we conclude that the decision in Spiewak does not mandate the placement of supplemental teachers on the salary guide for regular teaching staff members and that such right is contained in neither the tenure statutes nor those governing compensation. Because supplemental teachers are not entitled to guide placement as a matter of law, we hold that separate guides covering supplemental teachers are permissible so long as such guides conform to the requirements established by the school laws. However, we emphasize that where a board has adopted a salary schedule for any group of full-time teaching staff members, all full-time members must be covered by a schedule. Finally, we reiterate that under the New Jersey Employer-Employee Relations Act, boards and teachers are free to negotiate terms of compensation within the statutory framework of the school laws. Hyman at 15-17, emphasis added.

Subsequent to the State Board's decision in Hyman, the Commissioner of Education has approved negotiation of separate salary schedules for part-time, Title I and remedial

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teachers in the following cases: Walter v. Bd. of Ed. of Teaneck, OAL DKT. EDU 0017-85 (May 16, 1985) mod., Comm'r of Ed. (July 22, 1985) at 31-32; Watchung Hills Ed. Ass'n v. Bd. of Ed. of Watchung Hills, OAL DKT. EDU 165-85 (July 3, 1985), adopted, Comm. of Ed. (Aug. 19, 1985) at 9-10; Garfole v. Winfield Tp. Bd. of Ed., OAL DKT. EDU 8417-84 (June 17, 1985), mod., Comm'r of Ed. (Aug. 1, 1985) at 17-18; Baker, et al. v. Bd. of Ed. of Clifton, OAL DKT. EDU 1911-85 (Aug. 26, 1985), adopted, Comm'r of Ed. (Oct. 18, 1985), at 12; Trucillo v. Bd. of Ed. of Kearny, OAL DKT. EDU 2456-85 (Oct. 9, 1985), rev'd, Comm'r of Ed. (Nov. 25, 1985) at 13-14; Fucetola v. Bd. of Ed. of Totowa, OAL DKT. EDU 2279-85 (Dec. 12, 1985), adopted, Comm'r of Ed. (Jan. 28, 1986). All these decisions reject the claims of part-time remedial teachers to mandatory placement on the full-time teachers' salary guide as a matter of law. Research has uncovered no post-Hyman decision which held that part-time remedial teachers are entitled to salary parity with full-time teaching staff members. Cf. Union Tp. Ed. Ass'n v. Bd. of Ed. of the Tp. of Union, OAL DKT. EDU 1124-86 (Sept. 10, 1986).

In the case at bar, all four petitioners are part-time teachers who have, for years, negotiated on a contractual basis with the Fair Lawn Board and who organized, at one time, as a bargaining unit separate from the full-time teachers. The stipulation of facts (# 15 and # 17) clearly shows that there was a separate election in which ancillary teachers were placed in a separate bargaining unit of FLEA. This bargaining unit negotiated a separate, hourly salary range. In fact, there has been an unfair employment practice charge filed against the FLEA by the Board alleging that the FLEA refused to bargain.

Given those facts and the clear, unambiguous applicable law, I must conclude that remuneration is not an emolument of tenure. It is a negotiable item, pursuant to the Public Employer-Employee Relations Act. These petitioners have negotiated for salaries on an hourly basis. The emoluments of tenure do allow tenured teachers the right to acquire seniority rights in the event of a reduction in force, the right to remain on a preferred eligibility list, and the right to protection from arbitrary dismissals. There is no right to placement on a salary guide, to specific yearly increments, to adjust salary or to provide for initial salaries. I conclude that the State Board decision in Hyman, aff'd,

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"substantially for the same reasons" by the Appellate Division, certif. den. ___ N.J. _____ (1986), supercedes all prior case law, including my prior decision, EDU 5777-83, and is controlling here on the issue of salary placement. The petitioners in this case are not entitled to placement on the full-time teachers' salary guide as a matter of law.

Accordingly, based on the foregoing stipulation of facts and conclusions of law, it is hereby **ORDERED:**

1. Petitioners in this matter are deemed tenured employees of the Fair Lawn Board of Education.

2. Petitioners in this matter are statutorily entitled to accumulated sick leave, for six years prior to the date of this decision, for prospective use only.

3. The claims of petitioners for placement on the full-time teachers' salary guide, on a prorated basis, is denied.

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

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

SEPT. 17, 1986
DATE

SYBIL R. MOSES, ALJ

Receipt Acknowledged:

SEP 19 1986
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

SEP 22 1986
DATE

Ronald J. Parks, Jr.
FOR OFFICE OF ADMINISTRATIVE LAW

amn/e

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FAIR LAWN EDUCATION ASSOCIATION, KATHERINE SOLOMON, ARLENE ALBALAH, ELAINE PAVON AND PHYLLIS STOLAR,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON REMAND
BOARD OF EDUCATION OF THE BOROUGH OF FAIR LAWN, BERGEN COUNTY,	:	
RESPONDENT.	:	

The record and initial decision on remand have been reviewed. Exceptions were filed by the parties within the time prescribed by N.J.A.C. 1:1-16.4a, b and c.

Petitioners except to the sick leave remedy ordered by the ALJ, contending that the six years' retroactivity should be calculated from the date of the 1982 Spiewak, supra, decision, not the date of the initial decision in this matter. The New Jersey Supreme Court's remand language in Rutherford, supra, is cited in support thereof. That language returned the instant matter to the Commissioner with the instruction to calculate applicable emoluments "each teacher is entitled to receive from a date six years prior to our decision in this case." (99 N.J. 8, 30 (1985)) Petitioners argue that the point of reference is Spiewak, supra.

Upon review of the exact language of the limitation on retroactivity articulated by the Court in Rutherford, the Commissioner clarifies the initial decision to reflect that the six years be calculated from April 1985, the date on which the Supreme Court's decision in Rutherford, supra, itself was rendered, not Spiewak, supra, as argued by petitioners. Such conclusion is based on the fact that the Court stated entitlement was to be "from a date six years prior to our decision in this case," whereas within the same paragraph it refers to Spiewak as "that" decision (emphasis supplied) as can be seen below.

> The second limitation on retroactivity reflects our concern with the financial impact on the boards of education if Spiewak is given unlimited retroactivity as to all teachers employed by a board at the date of our Spiewak decision who had petitioned the Commissioner of Education prior to that decision. Even with respect to those teachers, retroactivity is limited. Although tenure is to be calculated for those teachers from the date of their employment, we hold that the Commissioner of Education shall determine and

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> calculate the emoluments of tenure each teacher is entitled to receive from a date six years prior to our decision in this case. (at 30)

This date for calculating retroactivity differs from that of Fair Lawn Education Association, supra, (1986) because the petitioners in that case are not party to the instant matter.

Petitioners' second exception informs that the unfair labor practice charge referred to in the initial decision, ante, has been withdrawn and that no significance should be attached to the fact that the charge had been filed.

The third exception argues that the ALJ's conclusion that petitioners negotiated for salaries on an hourly basis is incorrect and is inconsistent with the prior conclusion that an unfair practice charge was filed because no negotiations took place. Upon review of petitioners' arguments with respect to this exception, the Commissioner is unpersuaded that because the $14 per hour was an interim agreement between the parties without prejudice to any claims or defenses, the ALJ is incorrect in concluding that petitioners for years have negotiated for salaries on an hourly basis. The importance of such a conclusion rests not with how the $14 was struck but rather that the compensation of part-time teachers herein constitutes a term and condition of employment subject to negotiations, not an emolument of tenure or statutory entitlement. (Hyman, supra)

Lastly, petitioners allege that the initial decision fails to apply the "law of the case" which they believe to be controlling herein. They reiterate the argument that because there has never been a reversal or a stay of the Commissioner's original decision in this matter rendered on July 20, 1982 and on February 21, 1984, sub nom. Solomon et al., supra, (pending on appeal to State Board), there is no legal basis for ignoring or overturning the determinations contained therein. In addition, petitioners raise anew their arguments that the doctrine of res judicata applies in this matter, as does collateral estoppel. (See the ALJ's thorough procedural history of the two cases constituting the adjudication of this matter in the initial decision, ante.)

Upon careful review of the record and consideration of petitioners' legal arguments, including those pertaining to res judicata and collateral estoppel, the Commissioner determines to accept the ALJ's conclusions that (1) petitioners are not as a matter of law entitled to placement on the full-time teachers' salary guide and (2) the State Board's decision in Hyman, supra, affirmed by the Appellate Division, supersedes all prior case law, including the prior decision rendered in this matter. Notwithstanding the fact that the original Fair Lawn Education Association, supra, and Solomon, supra, (1984) decisions have never been reversed or a stay granted, the fact remains that the Supreme Court has remanded this matter for a determination by the Commissioner of the emoluments each teacher is entitled to receive as a result of his/her tenure status and the calculation of such benefits in

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accordance with its decision. In the absence of a direct statement of affirmance by the New Jersey Supreme Court in Rutherford that the petitioners herein are entitled to full-time teacher salary guide placement, the Commissioner cannot but agree with the ALJ that Hyman, supra, is controlling when determining what salary emoluments petitioners are entitled to receive retroactively by virtue of their tenure status.

With respect to the above, the Commissioner notes that counsel have agreed that the decision by the State Board pending in Solomon, supra, (1984) would be controlling (see the initial decision, ante) as it addresses the very same petitioners and issues as herein, but on a prospective, rather than retroactive, basis. Therefore, the Commissioner's adoption of the initial decision is qualified to the extent that, should full-time salary guide placement be upheld by the State Board in Solomon (1984), it is also to be made available retroactively for the six years prior to the Supreme Court decision in Rutherford, supra, less mitigation for any money received during that period.

COMMISSIONER OF EDUCATION

October 27, 1986

Pending State Board

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7665-85
AGENCY DKT. NO. 368-10/85

ARLENE HARCAR,
Petitioner,
v.
PISCATAWAY TOWNSHIP
BOARD OF EDUCATION,
Respondent.

Stephen B. Hunter, Esq., for petitioner (Klausner & Hunter, attorneys)

David B. Rubin, Esq., for respondent (Rubin, Rubin & Malgran, attorneys)

Record Closed: August 4, 1986 Decided: September 18, 1986

BEFORE BRUCE R. CAMPBELL, ALJ:

Arlene Harcar, petitioner, claims the Piscataway Township Board of Education (Board), respondent, has recalled to employment a less senior art teacher than she in deregation of her tenure and seniority rights. The issues to be determined are: (1) whether the petitioner is more senior in respect to the controverted position than the art teacher who was recalled, and (2) if so, to what relief she is entitled.

The matter was opened before the Commissioner of Education, who transmitted it to the Office of Administrative Law on December 3, 1985, as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. After notice, a prehearing conference was held on January 9, 1986. It was determined at that time that all material facts could be stipulated and that the matter could proceed on cross-motions

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for summary judgment. A schedule of submissions was established which, for good cause concerning discovery problems, was enlarged. All submissions and supplementary submissions were received by and the record was closed on August 4, 1986.

FACTUAL BACKGROUND

The petitioner was employed as an art teacher by the Board beginning September 1, 1973. She subsequently acquired tenure as a teacher of art. During all of her employment, the petitioner served as an art teacher, a position that required certification covering grades K-12. The petitioner held such certification from her date of employment.

In April 1982, the Board adopted a resolution abolishing the petitioner's position. However, on June 21, 1982, the Board adopted a resolution reappointing her as an art teacher for the 1982-83 school year. In June 1984, the petitioner and another art teacher were the subjects of a reduction in force (RIF) and neither was recalled to a teaching position for the 1984-85 school year. On July 22, 1985, the Board voted to recall the other teacher to a full-time art teacher position at the high school, which involved grades 9-12. The Board did not recall the petitioner to that position or to any other art teaching position within the system as of the start of the 1985-86 school year. In March 1986, the Board did recall the petitioner to an art teaching position. During the years 1973-74 through 1983-84, the petitioner taught art at the kindergarten through sixth-grade level. The Board has credited her with eleven years' service as an elementary art teacher. N.J.S.A. 18A:28-11; N.J.A.C. 6:3-1.10.

The other art teacher, also certified on a K-12 basis, was first employed on February 1, 1974. She taught grades six, seven and eight at a middle school in the district from February 1, 1974 to June 30, 1982. It is stipulated that grades seven and eight were departmentalized during all of the time that this teaching staff member served as an art teacher at the middle school level.

This teacher was the subject of a RIF effective June 30, 1982. However, she was recalled to teach at another middle school effective October 20, 1982. She taught the remainder of the 1982-83 school year and all of the 1983-84 school year at the middle school level. The Board concluded that this teacher had 10.3 years of seniority as an

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elementary art teacher and as a secondary art teacher within the district. N.J.S.A. 18A:28-11; N.J.A.C. 6:3-1.10.

PETITIONER'S ARGUMENTS

The petitioner contends that she was employed as an art teacher and acquired tenure in a district-wide art teacher category covering grades K-12, pursuant to N.J.A.C. 6:3-1.10(l)15 and 16. She asserts that she had eleven years of seniority at the secondary level as well as at the elementary level as of the start of the 1985-86 school year. This is clearly superior to the other teacher's 10.3 years of seniority as a secondary art teacher. It was the petitioner, therefore, who should have been recalled when a secondary art position became available.

Because the petitioner has been recalled to a teaching position, she primarily seeks relief related to the period between September 1, 1985 and March 1986. During that period, she was employed as an art teacher within the Plainfield School District; however, this employment was at a lower rate of pay.

The petitioner submits that the Commissioner of Education decision in Felper v. West Orange Bd. of Ed., OAL DKT. EDU 5942-84 (Dec. 13, 1984), mod., Comm'r of Ed. (Jan. 28, 1985), requires the conclusion that the petitioner here had greater district-wide seniority and/or greater secondary seniority as a teacher of art within the district than did the other concerned teacher. The petitioner says she was the subject of a RIF relating to the abolition of an elementary level art teacher position at the end of the 1981-82 school year and again at the end of the 1982-83 school year. It is of no moment that she was subsequently retained as an art teacher during the succeeding 1982-83 and 1983-84 school years and did not, in fact, ultimately lose employment during that particular period of time.

It is urged that Felper and the cases following it mandate the conclusion that the RIFs resulted in an effective vesting of the petitioner's district-wide seniority. This seniority could not subsequently be affected by the application of the new seniority regulations which became effective September 1, 1983.

In Camilli v. Northern Highlands Reg'l High School Dist., OAL DKT. EDU 5257-84 (Nov. 14, 1984), adopted in part, mod. in part, Comm'r of Ed. (Jan. 3, 1985), the

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Commissioner addressed situations in which teaching staff members had been the subject of a RIF only after the effective date of the new seniority regulations and those situations in which teachers were the subject of RIFs before September 1, 1983. The Commissioner held that seniority regulations in effect prior to September 1, 1983, had no applicability in that case and that the petitioner did not have a vested right to seniority under those regulations because the RIF that triggered calculation of his seniority rights did not occur until June 1984.

In Hill v. West Orange Bd. of Ed., OAL DKT. EDU 4113-84 (Dec. 5, 1984), adopted, Comm'r of Ed. (Jan. 21, 1985), aff'd, St. Bd. (May 1, 1985), the administrative law judge and the Commissioner held that the new seniority regulations were applicable to that matter because the new regulations "shall apply prospectively to all future seniority determinations as of the operative date of this rule, September 1, 1983." N.J.A.C. 6:3-1.10(m). Under the circumstances in Hill, the petitioner's service was determined to be credited as art teacher at the secondary level, not in the general category of teacher of art. Therefore, Hill's petition was dismissed, but she was entitled to placement on a preferred eligibility list in the category of secondary art teacher.

The petitioner cites other cases, both within and outside this State. Those cases are noted. It is also noted, however, that they are cumulative to the petitioner's basic argument.

Alternatively, the petitioner argues that the seniority regulations themselves provide for continuation of previously accrued seniority. Therefore, the petitioner must retain her previously accrued district-wide seniority as a teacher of art. N.J.A.C. 6:3-1.10(c) provides:

> In computing length of service for seniority purposes, full recognition shall be given to previous years of service within the district and the time of service in or with the military or naval forces of the United States or this State, pursuant to the provisions of N.J.S.A. 18A:28-12.

The petitioner believes this makes clear that prior service in a school district shall be recognized when a teacher's total service in the district is computed for seniority purposes. A teacher's seniority is not calculated from September 1, 1983 only, but all prior service in the district is considered in determining seniority.

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N.J.A.C. 6:3-1.10(d) provides, "Employment in the district prior to the adoption of these standards shall be counted in determining seniority." Rather than focusing on the length of service, thus requiring that all service in the district be included in computing one's seniority, a different phrase is used; that is, all prior employment will be counted in determining seniority. This phrase is not limited to length of service and includes a broader concept: a teacher will not lose the benefit of prior service in the district for seniority purposes. Any other construction would deprive the language of subsection (d) of its full force and effect. The petitioner then cites certain well-known cases on statutory construction that need not be recited here.

In addition to the above, the petitioner urges that N.J.A.C. 6:3-1.10(h) also provides for recognition of prior service for seniority purposes. That subsection provides:

> Whenever a person shall move from or revert to a category, all periods of employment shall be credited towards his or her seniority in any or all categories in which he or she previously held employment.

Prior to the effective date of the new regulations, the petitioner had obtained tenure on a district-wide (K-12) basis and had accrued seniority on a district-wide basis. Now, because of an asserted reclassification of seniority standards, the Board states that the petitioner suddenly no longer has any seniority as a teacher of art at the secondary level. Because she served in the position of a K-12 art teacher and achieved tenure status in that position, N.J.A.C. 6:3-1.10(h) applies. Her post-September 1, 1983 service as an art teacher at the elementary level tacks on to her prior seniority on a district-wide basis relating back to the date of initial employment.

As another alternative, the petitioner argues that she has vested rights in the seniority she accrued under the prior regulations which could not be disturbed by the amendments to those regulations. The petitioner cites many cases addressing the sources and treatment of vested rights.

RESPONDENT'S ARGUMENTS

The Board asserts that the petitioner's employment was uninterrupted until June 30, 1984. N.J.A.C. 6:3-1.10(m) provides that the new rules "shall apply prospectively to all future seniority determinations as of the operative date of this rule, September 1,

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1983." The RIF giving rise to this petition occurred in June 1984, after the effective date of the new rules. Accordingly, consistent with the new policy of distinguishing between elementary and secondary experience, the Board calculated the petitioner's seniority in the elementary category, the only category in which she had actually served.

The petitioner has submitted long legal arguments urging the so-called "vested rights" theory urged in Hill, above. That argument was rejected by the administrative law judge, the Commissioner, the State Board, and the Appellate Division. The Piscataway Board assumes the purpose of including the arguments is to preserve them in the event that the New Jersey Supreme Court grants certification in Hill and reverses the Appellate Division. This tribunal, however, is currently bound by the ruling of the Appellate Division on this matter.

The sole issue in this case is whether the April 19, 1982 vote to RIF petitioner somehow crystalized her seniority rights as a district-wide art teacher under the rules then applicable, regardless of her lack of experience at the secondary level. The Commissioner has consistently ruled that a teaching staff member's seniority rights are to be calculated under the rules applicable at the time of a RIF. If the individual is recalled to service, the subsequent years are "tacked on" to the seniority category applicable when the reduction in force occurs. The absurdity of this approach, as a practical matter, was noted by the administrative law judge in Cohen v. Emerson Bd. of Ed., OAL DKT. EDU 5560-84 (July 18, 1985), mod., Comm'r of Ed. (Sept. 3, 1985). In that matter, the teacher had suffered a reduction in hours but had never been terminated from employment in the district as had been the case in Felper. The judge observed:

> An unfortunate side-effect of the Felper analysis is that someone previously terminated because of low seniority prior to September 1, 1983 now receives an advantage over other teachers who survived the original reduction because of their greater seniority. The practical result is to turn the seniority regulation on its head. Unless absolutely unavoidable, the Felper ruling should not be extended to the present case where Cohen has suffered prior cutbacks in hours, but has never been dismissed from employment. [Id. at 14-15].

The Commissioner rejected the judge's distinction, holding that the decrease from four days per week to 2.5 days was, in effect, a RIF even though not denominated as such by the board of education.

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Cohen and related cases stand for the proposition that the existence of a RIF is a matter of substance, not form. The Commissioner found that a reduction in time spent on the job may be an abolition of position in substance.

In the present case, the Board characterized its action in 1982 as a reduction in force. However, in substance, there was no reduction in force. The petitioner returned to full-time service in the district at the beginning of the following year. There was no break in service. Unlike Cohen and others, the petitioner here returned to the same position she enjoyed the previous year. In fact, she was rehired before the end of the very same school year in which the Board had voted to effect a RIF. Thus, at the end of the 1981-82 school year, the petitioner enjoyed a promise of employment in the same position for the following school year.

In consideration of the clear direction of the Commissioner, this petition of appeal must be dismissed.

DISCUSSION AND DETERMINATION

This case requires a determination of whether the petitioner is more senior in respect of a secondary art teacher than the art teacher who was recalled to fill that position. The short answer is no.

Despite the long and well-constructed arguments of the petitioner, I **FIND** that the petitioner's seniority rights were inchoate until June 30, 1984. I further **FIND** that the standards for determining seniority, N.J.A.C. 6:3-1.10, in effect on June 30, 1984, must control the outcome of this case.

N.J.A.C. 6:3-1.10(l)16ii provides:

> Any person employed at the elementary level in a position requiring an educational services certificate or a special subject field endorsement shall acquire seniority only in the elementary category and only for the period of actual service under such educational services certificate or special subject field endorsement.

In addition to the findings above, I further **FIND** that the petitioner's service was exclusively at the elementary level under a special subject field endorsement.

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Although the petitioner could have taught at the secondary level under the scope of her special subject field endorsement, she did not. Having had no service whatsoever at the secondary level, I **FIND** that the petitioner's seniority is limited to the elementary art category and may be asserted only against other teaching staff members in the elementary art category.

In consideration of the foregoing, I **CONCLUDE** that the present petition of appeal is without merit. Accordingly, it is **ORDERED** that the petition of appeal be and is hereby **DISMISSED.**

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

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

18 SEPTEMBER 1986
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

Sept. 18, 1986
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

SEP 23 1986
DATE

Ronald D. Pankey, J.S.
OFFICE OF ADMINISTRATIVE LAW

ks/e

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ARLENE HARCAR,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by petitioner within the time prescribed by N.J.A.C. 1:1-16.4a, b, and c.

Petitioner disputes the ALJ's conclusion that her seniority rights were inchoate until June 30, 1984, averring that the ALJ reached his decision without reference to Brian Small v. Board of Education of the Borough of Westwood Regional High School, decided by the Commissioner July 17, 1986.

Petitioner contends that it is uncontroverted that she was the subject of two reductions in force within the Piscataway Township School District prior to September 1, 1983 and argues that the Commissioner's decision in Brian Small mandates the conclusion that, "as a result of these two prior reductions in force, Petitioner's district-wide (elementary and secondary) seniority as a Teacher of Art was vested pursuant to the principles first enunciated in the Commissioner of Education's decision in Terry Felper v. West Orange Board of Education, [decided by the Commissioner, January 28, 1985]." (Petitioner's Exceptions, at pp. 1-2) Petitioner submits that since the two reductions in force affecting her prior to September 1, 1983 resulted in the vesting of her K-12 Teacher of Art seniority rights, which could not therafter be abrogated by subsequent amendments to the seniority rules, she had greater seniority entitlement to the art position at issue than did the teaching staff member assigned by the Board of Education to that position for the 1985-86 school year.

Additionally, petitioner argues that:

> It is also obvious, by Judge Campbell's decision, that he at least implicitly has ignored the implications of the aforementioned Terry Felper line of cases themselves and/or fails to acknowledge the applicability of these seniority rights decisions, even assuming arguendo that the Brian Small decision had not been issued by the Commissioner of Education.
>
> (Petitioner's Exceptions, at p. 3)

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In support of this assertion, petitioner recites verbatim the arguments he posited before the ALJ in his post-hearing brief, which are incorporated herein by reference. Citing, inter alia, Camilli v. Northern Highlands Regional High School District, decided by the Commissioner January 3, 1985, aff'd State Board May 1, 1985; Elsa Hill v. Board of Education of the Town of West Orange, decided by the Commissioner January 21, 1985, aff'd State Board May 1, 1985, aff'd Superior Court, Appellate Division February 26, 1986, and Terry Felper v. Board of Education of the Town of West Orange, decided by the Commissioner January 28, 1985, petitioner maintains that the two reductions in force affecting her during the 1981-82 and 1982-83 school years "vested her seniority as an Art teacher within the Piscataway Township School District on a district-wide (K-12) basis, which could not be abrogated or nullified through the operation of the new seniority regulations.***" (Petitioner's Exceptions, at p. 7) Petitioner "submits that the instant case is 'on all fours' with the Felper decision and 'its progeny including the Small/Westwood Board of Education decision." (Petitioner's Exceptions, at p. 7)

Petitioner avers that because she was the subject of two pre-September 1, 1983 reductions in force:

> [Petitioner] had greater district-wide and/or secondary seniority as a Teacher of Art within the Piscataway Township School District than Frances Moore, as of the start of the 1985-86 school year, and is entitled to the relief sought in this proceeding, i.e., back pay and other related emoluments and additional seniority credit.*** (Petitioner's Exceptions, at p. 8)

She submits that the initial decision must be reversed.

Upon his careful review of the record of this matter, the Commissioner reverses the conclusion of the Office of Administrative Law for the following reasons.

For the record, the Commissioner sets forth the following chronology:

	Harcar		Moore
9/1/73	Hired as K-6 art teacher	2/1/74	Hired as 6-8th grade departmentalized art teacher.
4/82	Position abolished (See Exhibit A)		Position abolished
6/21/82	Reappointed as elementary art teacher	10/20/82	Reappointed to another middle school position
6/83	Position abolished		

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6/83	Reappointed as elementary art teacher		
6/84	Position abolished	6/84	Position abolished
7/84	No recall 1984-85 school year	7/22/85	Reappointed to secondary art position
3/86	Reappointed to elementary art position		

It is observed that the threshold question to be resolved in this matter pertains to the Board's actions of April 29, 1982 and of June 21, 1982 whereby, it is petitioner's contention, it terminated on the former date the tenured employment of petitioner because of a reduction in staff, pursuant to N.J.S.A. 18A:28-9 and 10 and, thereafter, on the latter date, recalled petitioner by virtue of the preferred list for reemployment effective September 1, 1982 to a full-time position as an elementary art teacher pursuant to N.J.S.A. 18A:28-11. The statutes in question read as follows:

> 18A:28-9. Reduction of force; power to reduce and reasons for reduction
>
> 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, empoyed in the district whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause upon compliance with the provisions of this article.
>
> 18A:28-10. Reasons for dismissals of persons under tenure on account of reduction
>
> Dismissals resulting from any such reduction shall not be made by reason of residence, age, sex, marriage, race, religion or political affiliation but shall be made on the basis of seniority according to standards to be established by the commissioner with the approval of the state board.
>
> 18A:28-11. Seniority; board to determine; notice and advisory opinion
>
> 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

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> commissioner for an advisory opinion with respect to the applicability of the standards to particular situations, which request shall be referred to a panel consisting of the county superintendent of the county, the secretary of the state board of examiners and an assistant commissioner of education designated by the commissioner and an advisory opinion shall be furnished by said panel. No determination of such panel shall be binding upon the board of education or any other party in interest or upon the commissioner or the state board if any controversy or dispute arises as a result of such determination and an appeal is taken therefrom pursuant to the provisions of this title. (emphasis supplied)
>
> 18A:28-12. Dismissal of persons having tenure on reduction; reemployment
>
> 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, and the time of service by any such person in or with the military or naval forces of the United States or of this state, subsequent to September 1, 1940 shall be credited to him as though he had been regularly employed in such a position within the district during the time of such military or naval service. (emphasis supplied)

In addition to the above-mentioned statutes, the Commissioner takes notice of Exhibits A and B attached to petitioner's exceptions. While not made a part of the record below, the Commissioner accepts these minutes of the Board meetings of April 29 and June 21, 1982, respectively, as evidence, due to their relevance and materiality to the contested matter herein and because there was no objection to their admission voiced by the Board. Said Board minutes, as well as the uncontroverted facts in the record, leave no doubt in the Commissioner's mind that a bona fide reduction in force was effected by the Board's action of April 29, 1982, and that petitioner was affected by such RIF.

Because petitioner's position was abolished on April 29, 1982, her seniority rights were triggered under the old regulations then in force and, thus, vested on a district-wide basis in 1982. See N.J.S.A. 18A:28-9, 28-10, above. This finding is not only

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consistent with the statutes, but also with Felper, supra, in which the Commissioner previously held that a reduction in force which occurred before September 1, 1983 was controlled by the then existing provisions of N.J.A.C. 6:3-1.10 et seq., which vested district-wide (K-12) seniority rights of tenured teachers under those subject fields originally endorsed on their teaching certificates required for employment for a local board of education.

Moreover, the fact that petitioner was recalled for employment in June 1982 occurred by virtue of the Board's compliance with N.J.S.A. 18A:28-11, 28-12, above. That is, as a result of the Board's properly developing a preferred eligibility list at the time of the RIF, and its reference to it in recalling riffed employees, petitioner was rehired, as she held seniority to the position over any other qualified employee on said list. See also Brian Small, supra, wherein the Commissioner held that although intervenor was not dismissed in 1982, a RIF did take place at that time, triggering her seniority rights. Her seniority vested in 1982 on a district-wide basis, notwithstanding the fact that the board did not abide by the precise dictates of N.J.S.A. 18A:28-11. The facts herein are also similar to those in Brian Small, supra, in that the Board was not aware that petitioner actually possessed district-wide seniority in the area of art instruction during those periods of time controverted herein.

Accordingly, the Commissioner finds and determines that petitioner at all times subsequent to the Board's action of April 29, 1982, possessed greater district-wide seniority vested in art instruction than did Ms. Moore. Consequently, the Commissioner reverses the initial decision. The Board herein is directed to credit petitioner with eleven years of seniority K-12 as of the start of the 1985-86 school year. The Board is further directed to remit to petitioner all back pay and emoluments due and owing her from July 22, 1985 through that day in March 1986 when she assumed her duties again within the district. In the absence of bad faith on the part of the Board in this matter, the Commissioner, however, declines to assess interest.

COMMISSIONER OF EDUCATION

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5009-86
AGENCY DKT. NO. 268-7/86

L.L.S. BY G.H.S.,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF HADDONFIELD,
Respondent.

Bari J. Gambacorta, Esq., for petitioner (Farr, Wolf & Lyons, attorneys)

Allan R. Schmoll, Esq., for respondent (Capehart & Scatchard, attorneys)

Record Closed: August 13, 1986 Decided: September 26, 1986

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

G.H.S., on behalf of his minor daughter, L.L.S., petitioner, alleges and the Haddonfield Board of Education (Board), respondent, denies that L.L.S. has been improperly denied the position of coequal drum major for the 1986-87 school year. The petition of appeal also alleged that L.L.S. had been excluded improperly from attendance at a drum major camp that was to begin on August 4, 1986, in West Chester, Pennsylvania.

The petition was filed with the Commissioner of Education on July 30, 1986. It was transmitted to, and received by, the Office of Administrative Law on July 31, 1986, for disposition as a contested case pursuant to N.J.S.A. 52:14-B-1 et seq. and N.J.S.A. 52:14F-1 et seq. The matter was set down for expedited hearing on August 6, 1986, and was heard on that day at the Office of Administrative Law, Quakerbridge Plaza, Trenton. The petitioner delivered on the same day his brief in support of emergent application. On August 7, the Board filed its answer to the verified petition for emergent relief.

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EMERGENT RELIEF REQUEST

The petitioner alleges that by past practice the drum major competitions at Haddonfield Memorial High School were limited to members of the band. The petitioner also states the competitions had been judged for a number of years by individuals not members of the Haddonfield Memorial High School faculty. L.L.S. believed that these practices would be continued, but they were not adhered to in the competition that took place in June 1986 for the 1986-87 marching band season. The petitioner also claims that a nonband member was selected to be drum major. The then band director, however, announced at the conclusion of the competition, in the presence of judges and competitors, that L.L.S. would be assistant drum major and would be entitled to attend drum major camp and to take part in all drum major activities in the 1986-87 school year.

The petitioner further claims that despite assurances by the former band director and the former high school principal, this was not done. L.L.S. asks to be restored to the position of coequal drum major, as she says was promised to her by the former principal and former band director, and asks that she be entitled to attend drum major camp scheduled to begin August 4, 1986, in accordance with the decision of the judges at the time of the drum major competition.

At hearing on August 6, counsel informed this judge that L.L.S. was in attendance at the drum major camp. The Board had ordered her attendance at its meeting of July 31, 1986 which continued into the early morning hours of August 1. This rendered moot the second prayer for relief in the petition of appeal. Accordingly, the hearing was conducted on an expedited basis as to the request that L.L.S. be restored to the position of coequal drum major, as promised by the former principal and former band director or, in the alternative, that she be given a full hearing to determine why she was "stripped of this award." Petition of appeal at p. 3.

DEMAND FOR APPOINTMENT AS COEQUAL DRUM MAJOR

G.H.S. testified that L.L.S. has been a member of the Haddonfield Memorial High School Band for three years; she has sought to be a leader; she has wanted to be a drum major; she worked out her schedule with her guidance counselor so that she could take band in the first period of each school day; she built her course sequences and

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selections around band participation; she stated in the spring of 1986 that she wanted to try out for the drum major position; she informed her parents that the judges would be from outside the school district, and she informed her parents that in the 1985-86 band season there were two drum majors.

The day before the competition, L.L.S. learned that judges from within the school would be used. The former band director had postponed the tryouts from the originally scheduled day because he was ill. G.H.S. testified he had told his daughter not to try out because "the scuttlebutt is that [D.S.] will get it." The competition was held and D.S. was selected to be drum major.

L.L.S. asked her father what she should do. He advised her that people can be vindictive and it would be wise to "think a day or two."

G.H.S. decided to call the school and set up a meeting. He met on June 10, 1986, with the former band director and former principal. Although he had requested that L.L.S.'s guidance counselor be present, the guidance counselor was not. G.H.S. alleged mistakes in the competition. The principal asked him what the mistakes were and G.H.S. replied that the use of "inside" judges was a violation of past practice. It was also past practice that candidates had to have been in the band class for three years; that is, juniors who had been in band for three years. The band director changed these practices without notice.

The former band director said he did not use outside judges because it was too late in the season. Furthermore, D.S., the selected pupil, had been a member of the band front.[1]

G.H.S. also told the principal that at the end of the competition competitors had been told to "get lost" for 10 minutes or so. G.H.S. could not understand why the judges could not tally the scores then and there. The scoring placed D.S. first, L.L.S. second and

[1]The term band front indicates nonmusician members of the band who carry the colors, twirl batons, swing flags and perform other nonmusical elements of the band presentation.

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a third competitor as "a close third." G.H.S. also told the principal that the former band director had announced, immediately at the end of the competition, that L.L.S. would go to band camp and would be prepared to take over if D.S. could not perform for any reason.

In June, band members were called to the school to meet the new band director. The assistant director called certain pupils, not including L.L.S., to come forward and meet the new band director. At some time after the meeting, L.L.S. and all band members received a letter (P-1) from the new band director. It indicated that only the drum major and drum captain, a new position, would attend band camp.

After G.H.S. reported this to the principal at their June 10 meeting, the principal said that there were alternative solutions. First, the tryouts could be done over. The principal did not wish to exercise that option. The principal then addressed the former band director and asked if he had had two drum majors in the 1985-86 year. The band director replied, "yes." The principal then asked if there were any reason why there could not be two drum majors again in the 1986-87 school year. When the band director replied, "no," the principal said, "My decision is that we will have two coequal drum majors, one of whom will be L.L.S." G.H.S. then asked the principal if he could count on this decision because the principal was leaving. The principal replied, "yes." The principal also said he would call G.H.S. after he spoke to the incoming principal and the incoming band director.

G.H.S. returned home and reported the results of the meeting to L.L.S. However, he received no call from the former principal. After several attempts, he made contact with the former principal, who suggested that he talk to the new principal. G.H.S. protested that that was not the agreement. The principal then agreed to talk to the incoming principal.

After more time passed, G.H.S. became concerned. He contacted the superintendent of schools and informed him of the whole situation. On the former principal's last day in the district, he called G.H.S. and said, "I have bad news, 'they' are going to stick with the original choice of D.S. only." G.H.S. then wrote to the superintendent (P-2). When he received no reply, he contacted an attorney and the county

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superintendent of schools. The county superintendent asked G.H.S. and his wife to meet with the Board.

G.H.S. delivered the present petition to the superintendent. On Tuesday, July 29, the superintendent called the S. house and asked G.H.S. to call him. When G.H.S. and the superintendent spoke, the superintendent asked G.H.S. and his daughter to meet with the superintendent and the new band director. On Wednesday, July 30, the superintendent called again and asked G.H.S. to meet with him at 3:00 p.m. on the following day.

On Thursday, July 31, G.H.S. attended the meeting, but the band director was not present. The new principal and superintendent were present. The superintendent told the new band director, "These are the [S]s and you don't get any trouble from the [S]s."

G.H.S. protested that L.L.S. was not going to drum major camp because she had been replaced by a drum captain. The superintendent stated that he would try to get her into the drum major camp. The new principal stated that the former principal had never spoken to him about this situation. The superintendent expressed surprise and G.H.S. stated that the particulars were laid out in the petition that he had served earlier that morning.

On Monday, August 4, G.H.S. spoke to the new band director at the high school in the principal's office. The meeting took place early in the morning. The new principal stated that he was able to contact the new band director over the weekend and that the new band director was "in the dark" about this situation.

The new band director stated that he had not replaced L.L.S. with anyone. The assistant band director had informed him who was going to drum major camp. He had never met with the former principal on this subject. The new band director did say, however, that the former principal had told him there was a problem with parents of a band member, but "Don't worry, I'll take care of it."

Before leaving the meeting, G.H.S. asked whether L.L.S. was removed from band camp attendance. The band director reiterated that the assistant band director had told him who was going to attend the camp and the former principal had never specifically mentioned this problem; only a problem.

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At the Board meeting of July 31, the new principal was directed to make arrangements for L.L.S. to attend drum major camp. The principal telephoned G.H.S. late Friday afternoon, August 1, and stated that L.L.S. could attend drum major camp as a commuter.

On August 4, G.H.S. again asked the band director if he had any objection to two, coequal drum majors. The band director said he had none.

On cross-examination, the witness testified that he had seen the Haddonfield High School Handbook (Volume XXIII, 1985-86). On page 24, under the heading "DRUM MAJOR," the handbook states:

> Each spring, tryouts are held for this position. The HMHS Drum Major position is open to any interested student in the school. A basis [sic] knowledge of music is helpful.

G.H.S. stated that he had seen this before. He saw it first perhaps a year ago, but does not believe the position has indeed been open to all pupils in the school for approximately two years. G.H.S. also stated that all bands in the Haddonfield High School conference have band fronts.

When L.L.S. was told she was No. two in the tryouts and would be an alternate, she did not accept the outcome. G.H.S. believed it would be wise to wait for several days because all involved needed time to think and to hold a family talk. He does not know if L.L.S. protested to the former band director. Mrs. S. called the principal's office several days after the competition. This led to a meeting on or about June 10, the meeting at which the principal promised that L.L.S. would be given codrum major status. When G.H.S. later wrote to the superintendent, he did not mention the former principal's broken promise but did mention perceived errors of the former band director.

G.H.S. did not see the letter (P-1) from the new band director immediately. It was addressed to his daughter, who was away at camp at the time. When she returned home, the family learned of the contents of the letter. In his own letter to the superintendent, G.H.S. insisted that he had no intent to deny others of any rights or privileges.

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When asked which Haddonfield teacher who was a judge acted in other than a professional manner, G.H.S. replied, "I wasn't there." However, he believes Judges Manion and Greenspan had reason to be prejudiced. One of the main reasons for his appeal is that a promise was given to all pupils that outside judges would be used. G.H.S. stated that he had no direct evidence that any of the judges did not exercise their own best judgment. G.H.S. also acknowledged that, other than 1985-86, there was usually one drum major at Haddonfield Memorial High School.

At the July 31 afternoon meeting, the superintendent asked L.L.S. if she would go to camp as an alternate. L.L.S. replied she would not because she did not "believe it proper."

G.H.S. also stated that the band director immediately prior to the outgoing director had participated in judging drum majors. Therefore, not all judges had been from outside the district. G.H.S. also knows that an announcement of the competition was made in school sometime before the competition. D.S. has been part of the band front. The band front is part of the band. If L.L.S. is not awarded coequal drum major status, she in, all likelihood, would have all other opportunities for participation in the band.

Although G.H.S. learned of the composition of the judges' panel on the day before competition, he protested to no one at the school about it. His daughter may have protested to the then band director. G.H.S. was informed that the judges had chosen D.S. unanimously. He was not told what judges gave L.L.S. the highest marks.

G.H.S. met the new band director for the first time on Monday, August 4. He did not write to the band director between the the director's letter (P-1) and August 4.

C.S., mother of L.L.S., testified similarly to G.H.S.

The petitioners rested their case and survived a motion to dismiss by the Board. Making all inferences that fairly might be made in favor of the party not the maker of the motion, I held that enough had been shown that the Board must put on its case. I further **ORDERED** that L.L.S. be continued in the status quo. The Board represented that L.L.S. would, indeed, continue to attend drum major camp and attend all rehearsals and exercises of the band.

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The Board called Dr. Alfred Arena, now superintendent of the Mainland Regional High School District, who had served as principal at Haddonfield Memorial High School from 1979-1986.

As principal, he had contact with G.H.S. in the morning of June 10. He, Mr. and Mrs. S., and the former director met. L.L.S. was not present. G.H.S. expressed concern about the selection of drum major, credibility of the judges and changes in procedures previously announced to pupils.

The principal stated there was more than one option. Among them was redoing the tryouts and having coequal drum majors. The S.s did, indeed, state that they did not want D.S. removed.

The principal said he rejected the first option, redoing the tryouts, because final examinations were in progress and the many details associated with the closing of school were underway. The meeting lasted from 45 to 60 minutes.

Mr. and Mrs. S. were concerned that he and the band director were leaving. He said he would make a decision before he left.

The principal determined to meet with the new band director and the assistant band director. He did not promise coequal status to G.H.S.; it was merely one option of many.

During the week of June 23, he met with the new band director and the assistant band director. They discussed G.H.S.'s concerns. He asked to see the actual judges' ballots. The band director and assistant band director thought coequal drum majors would be inadvisable. The principal backed their decision, called G.H.S. the next day and informed him of the decision.

Upon reviewing the judges' tally sheets, he believed the judging process to be acceptable. He believed the judges acted both independently and professionally. They made what are clearly "judgment calls" and he is obligated to back his staff. If he were not to do so, the principal would be choosing football captains, drama presentation stars and the like.

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The principal recalls no further contacts with G.H.S. He repeated that he made no decision until he had spoken to the director and assistant director. Faculty commonly judge and select pupils for various positions. The teacher in charge of a given activity decides how selections shall be made within broad general guidelines. The outgoing band director was the "top hand" and made the decision as to drum majors.

Concerning the statement in the student handbook (R-1), there has been no change in that paragraph recently except to change "girl" to "student."

So far as the former principal knows, drum majors were selected from band class. The marching and the band class are not the same thing. There is no credit for participation in marching band; band class is a credit course for which pupils receive grades.

The principal stated that the former band director had said something was going to be done; that is, the use of outside judges, but did not do it. The former director was justified in changing the procedure under the circumstances, but he should have alerted the principal to the change. The former director announced the new procedure in band class. It was also announced over the public address system. The principal did not discuss the announcements with the band director, and he has no recall of discussing them with Mr. and Mrs. S. on June 10. The outgoing principal did not discuss this situation with the new principal. He did not know that L.L.S. was an alternate until Mr. S. told him. Although he discussed alternatives and options with the new band director at a meeting on June 23 or 24, he believes the director has the right to organize the program as the director prefers.

The former principal stated that Manion, the assistant band director, never informed him there would be a new position of drum captain. After speaking to the director and assistant director, he decided to back their decisions. He did not call Mr. and Mrs. S. immediately because of end-of-school pressures. When he did call Mr. S. and give his decision, he suggested Mr. S. go to the superintendent and even the Board of Education. He does not recall advising Mr. S. to talk to the new principal.

Exhibit P-1 speaks of drum major singular and drum captain singular. He believed L.L.S. would go to band camp as an alternate to the drum major. When he left

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the district, L.L.S. still was alternate to the drum major. Her standing was not affected by his acceptance of the new director's decision to have one drum major.

The former principal stated he would not have hesitated to overturn the judging if he believed it unfair. He has always allowed discretion to all activity directors. He believes pupils had adequate preparation time for the tryouts and the only change in the tryouts was the judges. He believes the tryout process to have been both fair and reasonable.

L.L.S. testified that she has been in band class for three years and has always wanted to try out for drum major. Her belief, taken from a former director, was that the drum major must be able to play an instrument, must be a three-year band class member and must try out for the position.

Tryouts in the past have involved outside judges. Only band class members have tried out for the position. She talked to the then band director in 1986 and asked if outside judges would be used. He said that they would be.

In June, she heard D.S. was to try out for the position. When she approached the then band director, he said that was the way it would be. However, he still maintained there would be outside judges. Two or three days later, before the competition, the band director announced that there would be three "inside" judges.

Her only complaint about the competition was the use of inside judges. The assistant director announced results, including the result that L.L.S. would be the assistant drum major. The director stated that the assistant would know everything the drum major knew and would attend drum major camp. Five competitors, the judges and one other pupil were present when the band director made the announcement.

On or about June 25, L.L.S. received the letter (P-1) from the new band director. It stated that the drum major and drum captain would attend drum major camp. She was never informed before receipt of that letter that she was not going to attend drum major camp.

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On the night of June 16, the new band director came to the school and talked to the band. At the conclusion of the meeting, he met with band captains and band officers. She went to him later and asked if he would use two drum majors. He replied that he would let her know at the end of the week. L.L.S. stated she never received a reply from the director.

L.L.S. also testified that she is presently not enrolled for band in the 1986-87 school year. She could be scheduled into band class by the first week of school, however.

L.L.S. also testified that when told she was to be the alternate, the band director told her she could see the information concerning band camp. She looked at the literature but took none. When she received exhibit P-1, she assumed she was not going to camp. No one told her she could not go, however.

L.L.S. stated she has been in band for three years. She is a member of the band. The band has always had a band front. All band fronts are band members.

Exhibit R-1 does not say that drum major tryouts are limited to band class members and does not say that outside judges would be used. L.L.S. does not know if the first band director under whom she participated made the final decision as to drum majors or delegated that decision to judges. She does not know if he reserved to himself the decision on band-leadership positions. L.L.S. acknowledged that the band director has discretion as to the band front and the number of drum majors.

At tryouts, all participants were given directions, as a group, before the tryouts began. L.L.S. had no recall of directions being repeated. Despite the former band director's announcement that she would do everything that the drum major did, when L.L.S. received the letter from the new band director (P-1), she believed she was being excluded from drum major camp participation. L.L.S. acknowledged that the band director has the authority to select a drum captain. L.L.S. stated she believed the selections were biased because Greenspan and Manion knew D.S. personally, but did not know her personally. This is her belief and feeling; she has no other basis for her judgment.

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All three judges placed D.S. highest. This includes the former band director. L.L.S. knew of the former band director's illness and absence and that it was the reason for postponement of the tryouts. L.L.S. believes the former principal said she would be a coequal drum major. However, he did not make the statement to her. She knows she is the alternate drum major as of now. When the former band director announced results of the tryouts, she was ready and willing to go to camp as an alternate, but still objected to the selection process. She still objects to the process although she has no direct evidence of bias on the part of Manion or Greenspan.

G.H.S. and the superintendent met in late July. L.L.S. was present. The superintendent asked if it would be acceptable to her to be assistant drum major and go to camp. She declined. At the July 31 Board meeting, the Board did not present this concept as a package, but held the question of the position in abeyance and simply directed that L.L.S. attend the band major camp. She arrived at camp at approximately 8:00 p.m. on Monday, August 4.

The assistant band director testified that she has been in the district for five years. The band front is made up of all auxiliary units who are not playing musicians. She knew L.L.S. and D.S. prior to June 1985. L.L.S. was in her middle school band. She knew D.S. as an orchestra member.

All band front positions are contested for. Judging has varied over the years. In 1985-86 all judges were inside staff. In prior years, the band front adviser has made decisions.

The new band director assumed his position, effective July 1. Mr. Sutnick served before him in the 1985-86 school year, and Mr. Hackenberg served for several years before that.

When Mr. Hackenberg was director, there were tryouts and a band director from another district assisted in judging. However, Hackenberg made the final decisions. Voice, knowledge, leadership, poise and conducting were the points on which pupils were judged.

Mr. Sutnick helped judge for 1986-87. He placed D.S. first and L.L.S. second.

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This witness made up exhibit R-2, the judging form for this year's competition. The headings are the generally accepted criteria for tryouts of this type.

This year, the three judges all reviewed exhibit R-2. Mr. Sutnick made up routines for each pupil under March Fundamentals. Each pupil did the same elements, but not necessarily in the same order. Each judge scored each pupil separately. Scores were then compiled. The drum major was selected on the basis of high score. The tryouts lasted from an hour to an hour and one-half. This witness had no favorite candidate going into the competition. She had no bias against any competitor. She has judged tryouts for band positions, both in North Carolina and New Jersey.

The witness testified that she made up exhibit R-5, the overall tally of judges' scores. D.S. and L.L.S. were first and second, respectively. D.S. was awarded the drum major position. No judge made any prejudicial statement at or after the competition.

The competition originally was scheduled for the end of May. Sutnick was out for several days because of illness. When he got back, he and the witness decided to move the competition along as expeditiously as possible and, in relation to that, not to use outside judges. All music teachers are busy at that time of year. Because Ms. Greenspan had helped with the band front tryouts in the prior year, they asked her to be the third judge.

D.S. and L.L.S. both have knowledge of music. Band front members know marching fundamentals as well as musicians do. Vocal commands are not related to musicianship, nor are conducting potential or the overall rating. No score sheet was changed during or after the tryouts. Each judge scored independently. This witness announced the selections for drum major and alternate. They then discussed band camp. Sutnick said that both girls would go to drum major camp at West Chester. He announced that a packet of information was on his desk and that each selected pupil should familiarize herself with the camp information. This witness never told L.L.S. that she could not go to camp and this witness expected that L.L.S. would go to camp. So far as this witness knows, L.L.S. never said that she would not attend camp.

The assistant director stated she knew before tryouts that L.L.S. was upset. Other band parents had told her that Mr. and Mrs. S. and L.L.S. were upset because a

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"nonband class" member was being allowed to tryout. She has no recall of nonband members ever trying out. The band director decided that, because Mr. and Mrs. S. had not contacted him, they should go ahead with the tryouts.

The assistant director attended two meetings with the former principal. One meeting, approximately on June 23, was attended by the former band director. A later meeting was attended by the present band director. At the first meeting, the principal wanted information from her as to how tryouts had been conducted. He also asked her opinion as to one or two drum majors. The principal said he would leave the decision to the incoming band director and incoming principal. He discussed the alternatives mentioned above. To her knowledge, no decision was made at the conclusion of the meeting.

The drum captain position was suggested by the incoming band director, who also picked the person to fill the position. He wanted a person skilled in percussion to act as a student leader for the drum section. The new director asked the assistant director who the strongest percussion player was. She identified a pupil, E.P. The new director selected E.P. without tryout.

This witness had never seen exhibit P-1. She had no involvement in arranging drum major camp attendance.

At the June 16 evening meeting with the new director, this witness did call individuals down to meet him. She does not know why L.L.S. was not called down. She knew L.L.S. was going to camp. E.P. was called down to the front of the auditorium to meet the new director.

D.S. was a majorette captain. Majorettes have been both elected and appointed. The witness worked with D.S. more than with other majorettes simply because D.S. was the majorette captain. The assistant director has no social contact with D.S.

On June 13, at the after-school meeting, she specifically told the new band director that L.L.S. would attend drum major camp. At that meeting she also recommended one drum major, rather than two. However, the question was not decided at that time. In the prior year, there had been two drum majors because the two

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candidates were close in score and the third place candidate's score was quite far behind. This year, D.S.'s score was significantly higher than that of L.L.S. The third place finisher's score was quite close to that of L.L.S.

The present band director testified. On June 16, he met with band members and parents. He explained his philosophy, background and expectations. At the close of the meeting he asked the assistant director to call down the band officers. He only asked the assistant director for officers. He did not know at that time who they were.

He met with the then principal on June 26. The principal explained what had occurred during drum major tryouts and explained the options. The principal asked if one drum major would be sufficient. The director looked at the tryout score sheets and the size of the band, and answered yes.

The witness expressed his belief and professional judgment that exhibit R-2 adequately covers the necessary elements for a tryout of this type. Concerning the overall scores, a 10-point difference is a clear margin to him. This witness also stated he saw nothing wrong with using inside staff as judges. Many schools do so. Many schools also allow the band director to make such decisions unilaterally.

The director drafted exhibit P-1. He asked that the high school mail this to all band members. The assistant director had no input.

The director does not believe L.L.S. appeared for July practices. However, it is common, because of vacations, for many pupils to miss some or all practices. The director has been employed since July 1, and has worked since then except for the last week in July (July 26 - August 2) when he and his family were on vacation.

Upon return from vacation, he received a call from the present high school principal. The principal informed the director that the Board had decided to send L.L.S. to drum major camp. The principal asked if the director could get her in. He replied that he would try.

The director called the assistant director and asked if L.L.S. had been promised attendance at camp. The assistant director replied that she had. On Monday morning, the

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director made several calls to West Chester. It seemed fairly certain that L.L.S. could attend. At approximately 10:00 a.m. he left for West Chester. L.L.S. arrived that night.

This witness stated that the assistant director has never expressed a bias for or against any pupil in the drum major selection process. He acknowledged that the alternate drum major would lead the band only in an emergency. He has not yet assigned duties to any band officers. He also acknowledged that on the night of June 16, L.L.S. introduced herself to him and asked what her duties would be. He replied that he was not sure and would get back to her.

The director first met G.H.S. on the morning of August 4. He met early that morning with G.H.S. and the new principal. He did not state at that time that he had not had a meeting with the former principal concerning drum majors. Neither did he say that he had not removed L.L.S. from any list.

On June 26, the director said he believed one drum major was adequate for his purposes but that he would work with "whatever is handed to me." He left that meeting with the understanding that the then principal would handle this situation.

The director has used a drum major at another high school. That pupil might or not be in band class. In his opinion, it is not unusual for a band front member to be chosen drum major, provided the pupil has musical background and experience.

The superintendent testified that he became aware of the present issue when G.H.S. telephoned him during the last week of June. G.H.S. complained that the then principal had not returned a telephone call. He wanted a final decision that the former principal had promised. G.H.S. did not tell the superintendent that the former principal had decided that there would be coequal drum majors. G.H.S. merely reported that the former principal said he would give a resolution, but had not.

The superintendent tried to contact the former principal. He was not immediately successful. When he did make contact, the principal stated that he had met with G.H.S., along with the former director and the assistant director. They reviewed the selection process. It was fair as far as the principal was concerned. The superintendent directed the principal to "finish up" the matter and not leave it for his successor. The

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principal stated he wanted to talk to the new band director and the assistant director first. The superintendent approved this, but urged the principal to get a reply to G.H.S.

Some time later G.H.S. called the superintendent again and complained that the principal still had not contacted him. This was probably on June 30. The superintendent directed his secretary to call the principal and tell him to conclude the matter. His secretary reached the principal who reported to the superintendent that the principal would call G.H.S.

The superintendent received a letter from G.H.S. dated July 1, 1986 (P-2). The new principal was then at the high school. The superintendent filled in the new principal as far as the superintendent understood the situation. He told the principal that since he would have to live with this problem that the principal should review the process, talk to the people involved and give his opinion. The new principal promptly followed up with a telephone call and a memorandum. On these bases, the superintendent concluded that there was not enough reason to overturn the decision selecting D.S. to be drum major. The superintendent also backed the former principal's original decision, concurred in by the new principal, to use one drum major.

On July 8, the superintendent wrote to G.H.S. (P-3). The superintendent was on vacation from July 9-28. Subsequently, G.H.S. again wrote to the superintendent. The superintendent returned the letter (P-3) and advised G.H.S. to appeal to the Board, in writing, if G.H.S. disagreed with the superintendent's decision. G.H.S. did not do so in the time specified by Board policy.

The superintendent returned to his office on July 28. On July 29, the present petition of appeal was served.

The drum captain role was explained at the July 16 meeting with L.L.S. Subsequently, the superintendent explained again to G.H.S. that L.L.S. was removed from nothing because of creation of the drum captain position. She still was and always had been alternate drum major.

On July 31, Mr. and Mrs. S., the new band director and the superintendent met. Mr. and Mrs. S. explained their point of view and stated that the former principal had

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promised coequal drum majors. This was the first time the superintendent had heard of any promise or alleged promise. When the superintendent did reach the former principal, the principal denied that he had so promised. He had explained that it was an option that he explored with the new director and the assistant director.

Mr. and Mrs. S. believed L.L.S. could not go to drum major camp. They conceded they were not told directly that L.L.S. could not attend. They based their belief on exhibit P-1. The superintendent explained that L.L.S. was never excluded from drum major camp, even if exhibit P-1 were not clear.

Because L.L.S. had been promised attendance at drum major camp, he would see to it that she went. He asked if they would agree to L.L.S. attending as an alternate. This was rejected by L.L.S. herself. When the meeting ended, the situation was that Mr. and Mrs. S. might or might not appear at the Board meeting that night. On the Tuesday or Wednesday immediately preceding, Mr. and Mrs. S.'s attorney had asked to be on the executive session board agenda for July 31. The Board president agreed to this when the superintendent recommended that the attorney be heard.

After considering the regular agenda, the Board considered the L.L.S. question at approximately 11:00 p.m. They concluded their deliberations at approximately 12:45 a.m. Mr. and Mrs. S., L.L.S. and their attorney were heard. The Board did not overrule the superintendent's decision. The Board asked him to contact the former principal concerning any promise to L.L.S. The Board reiterated its offer to send L.LS. to drum major camp in the alternate position. After conferring, Mr. and Mrs. S. and their attorney accepted the offer. The Board stated it could not rule on the promise of coequal status until hearing what the former principal had to say.

The superintendent contacted the former principal and reported to Board members, by telephone, the former principal's statement that he had made no promise of coequal status, but had merely mentioned it as one of the options. The Board voted not to overrule the superintendent's decision.

D.S. also testified. Her pertinent testimony was consistent with that of the former principal, the assistant director and the present director. One area of her testimony, however, is illuminating. The present petition states that there is a practice

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at the school that dictates that the drum major could be selected from band musicians. A review of yearbooks, however, indicates that this is not so. A review of six yearbooks indicates that four out of six drum majors were selected, not from band musicians, but from among majorettes.

This witness also testified that she competed for the position of featured twirler in her sophomore and junior years, but was not selected. In her junior year, she lost by .2 points. However, she did not challenge the results. Mr. and Mrs. S., however, advised her parents to challenge the results because "it might be politics."

DISCUSSION AND DETERMINATION

The extensive recitation of testimony speaks for itself. As the Commissioner succinctly stated in H.O. v. Montgomery Bd. of Ed. et al., OAL DKT. EDU 6887-85 (Mar. 12, 1986), adopted Comm'r of Ed. (Apr. 28, 1986):

> First, New Jersey case law clearly holds that there is no right to participation in cocurricular activities. Larry and Arline Dennis v. Holmdel Bd. of Ed., 1977 S.L.D. 388 Participation in sports at public schools is "privilege," not a right. (at 390) Further, as noted by respondents, if there is no legal right to be on the varsity soccer team, or indeed any team, then any claim to play which a student may possess must be predicated upon a showing of arbitrary or unlawful conduct by respondents.

These words apply equally to a drum major position and a soccer team position. The burden of proving that the Board's or its agents' actions were improper and illegal falls on the petitioner. R.P. and F.P. v. Bd. of Ed. of Borough of South Plainfield, 1978 S.L.D. 135, 137; Thomas v. Bd. of Ed. of Morris Tp., 89 N.J. Super. 327 (App. Div. 1965), aff'd 46 N.J. 581 (1966).

However, on the basis of a review of the whole record, I **FIND** that the petitioners have failed to make out a case of arbitrariness, caprice or of discriminatory motive or intent.

I further **FIND** that the procedures followed by the Haddonfield Memorial High School in selection of its drum major for the 1986-87 school year were properly directed to an assessment of the skills and abilities of those persons trying out for the position.

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Based on these findings, I **CONCLUDE** that there has been no abuse of discretion on the part of the Haddonfield Board of Education and no violation of any claimable right on the part of L.L.S. It is long been said by the Commissioner of Education that:

> The School Law vests the management of the public schools in each district in the local boards of education, and unless they violate the law, or act in bad faith, the exercise of their discretion in the performance of the duties imposed upon them is not subject to interference or reversal. Kenney v. Bd. of Ed. of Montclair, 1938 S.L.D. 647 (1934) aff'd, St. Bd. of Ed. 649, 653 (1935).

This judge has no doubt that L.L.S.'s disappointment is deep. However, this record fails to show an abuse of discretion on the part of the respondents. Accordingly, it is **ORDERED** that the petition of appeal be and is hereby **DISMISSED.**

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

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

26 SEPTEMBER 1986
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

SEP 29 1986
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

OCT 1 1986
DATE

Ronald L. Parker /ts
OFFICE OF ADMINISTRATIVE LAW

ds/e

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WITNESSES

G.H.S.
C.S.
Alfred Arena
L.L.S.
Mary Beth Manion
Joseph A. Akinskas
Barry R. Ersek
D.J.S.

EXHIBITS

P-1	Letter, Akinskas to Band Members and Parents, 6/25/86
P-2	Letter, G.H.S. to Ersek, July 1, 1986
P-3	Letter, Ersek to G.H.S., July 8, 1986
R-1	Haddonfield Memorial High School Student Handbook: Vol. XXIII - 1985-86
R-2	Drum Major Try-Outs, 1986 score sheet, in blank
R-3a	Judge Greenspan's score sheet for L.L.S.
R-3b	Judge Sutnick's score sheet for L.L.S.
R-3c	Judge Manion's score sheet for L.L.S.
R-4a	Judge Greenspan's score sheet for D.S.
R-4b	Judge Sutnick's score sheet for D.S.
R-4c	Judge Manion's score sheet for D.S.
R-5	Overall tally of judges' scores

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L.L.S., by her parent G.H.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HADDONFIELD, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful review of this matter, the Commissioner agrees with the findings and the conclusion of the Office of Administrative Law that the Haddonfield Board did not act in an arbitrary or capricious manner with respect to the procedures followed in selection of its high school drum major for the 1986-87 school year.

Accordingly, the Commissioner accepts the recommendation of the Office of Administrative Law dismissing the Petition of Appeal and adopts it as the final decision in this matter for the reasons expressed in the initial decision.

COMMISSIONER OF EDUCATION

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3379-86
AGENCY DKT. NO. 99-4/86

PERRY ALPERT AND ELEANOR ALPERT,
Petitioners,
v.
WATCHUNG BOROUGH BOARD OF EDUCATION,
Respondent.

Perry Alpert and Eleanor Alpert, petitioners, pro se

Victor E.D. King, Esq., for respondent (King, King and Goldsack, attorneys)

Record Closed: August 15, 1986 Decided: September 29, 1986

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

Perry Alpert and Eleanor Alpert (petitioners) seek an order of the Commissioner of Education directing that their children, who attend nonpublic schools, and other children similarly situated, be allowed to participate in extracurricular activities of the Watchung Borough Public Schools.

At issue is whether children, concededly resident in the district, who attend nonpublic schools, may be permitted or must be permitted to participate in any extracurricular activities of the district public schools.

The matter was opened by the filing of a petition of appeal before the Commissioner of Education on April 10, 1986. The Watchung Board of Education (Board) filed an answer on May 8, 1986. On May 20, 1986, the Department of Education forwarded the matter to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F- 1 et seq.

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After notice, a prehearing conference was held on July 16, 1986. The parties stipulated the following facts:

1. The petitioners are residents and taxpayers of the Borough of Watchung.

2. The petitioners have two school-age children who attend a private school.

3. The petitioners' children have prospectively been denied permission to participate in any and all public school extracurricular activities.

The Board has moved for summary judgment in its favor. There being no essential facts in dispute, the matter is ripe for summary judgment. The Board submitted its supporting papers on August 8, 1986, and the petitioners submitted their responsive papers on August 15, 1986.

BOARD'S ARGUMENTS

The Board expresses concern that unmanageable disciplinary problems could be encountered if private school children are allowed to attend extracurricular events because school district personnel would have no contact with the private school pupils at school the next day. The Board is also concerned that allowing a nonpublic pupil to attend an extracurricular activity will set a precedent and require the Board to allow all local private school pupils to attend the numerous extra- and cocurricular activities which it offers to public school pupils such as ski trips, roller skating parties, ice skating parties, trips to the threater and museums, and others. The Board is also concerned about civil liability should any of these nonpublic school pupils be injured during an extracurricular activity or event.

It is well recognized that the State's duty to educate its children is a matter constitutional mandate. Pingry Corp. v. Tp. of Hillside, 46 N.J. 457, 461 (1966). The New Jersey Constitution requires that "The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all children in the State between the ages of 5 and 18 years." N.J. Const., (1947), Art. VIII, SIV,par. 1.

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The education clause has been interpreted to allow the Legislature to provide a thorough and efficient system of public schools by any means that achieves the ultimate constitutional objective. Historically, this has been achieved by the creation of local school districts which have the primary responsibility of providing a thorough and efficient education for the children within their districts. West Morris Reg'l Bd. of Ed. v. Sills, 58 N.J. 464 (1971); Bd. of Ed. of City of Elizabeth v. City Council, 55 N.J. 501 (1970). Local boards of education must, pursuant to N.J.S.A. 18A:38-1 et seq., provide a free public education to children resident in the district between the ages of 5 and 20.

The Legislature has further provided that a child's attendance at school be compelled. N.J.S.A. 18A:38-25. Although instruction is compelled, parents have some choices. They have a constitutional right to choose the type and character of education they believe is best suited for their children, be it public or private, secular or sectarian. Pierce v. Society of Sisters, 268 U.S. 510 (1925). The Compulsory School Law permits a parent to cause a child to attend a school other than the public schools or to receive instruction in other than a school setting provided such instruction can be shown to be equivalent. [State v. Massa, 95 N.J. Super. 382 (Cty. Ct. 1967).]

The present issue is whether the parent of a private school pupils who has already exercised the choice allowed under the Compulsory School Law to send his child to a private school may selectively participate in public school activities that are not directly mandated by the statutes of this State or federal law.

While New Jersey statutes do require local school districts to provide transportation, N.J.S.A. 18A:39-1, textbooks, N.J.S.A. 18A:58-37.3, and certain auxiliary services for handicapped children, N.J.S.A. 18A:46-19.1 et seq., when these children attend private school, there is no provision specifically requiring school districts to make all its extracurricular activities available to private school pupils.

Mere entitlement to attend the public schools by virtue of residence within the district does not, however, mean that these pupils are entitled to equal benefits or aid from public schools where their parents have chosen that they attend nonpublic schools, absent specific legislative authorization. Norwood v. Harrison, 413 U.S. 455, 462 (1973); Cook v. Griffin, 47 A. 2d 23, 364 N.Y.S. 2d 632, 637 (1975). That a child or his parents on his behalf elect to forego the opportunities of public education does not deprive the child

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of any constitutionally protected right, Cook, above, nor has N.J.S.A. 18A:38-1 been construed to require school districts to make all of their facilities and activities equally available to children who do not attend public schools.

Because there is apparently no constitutional or statutory right for a public school pupil to attend a public school activity, the validity of the Board's denial of petitioner's request should be judged according to principles generally applicable to school Board decisions. N.J.S.A. 18A:11-1 grants school boards wide discretion in making rules, regulations, and decisions to carry out the business and conduct of schools. E.g., Parsippany-Troy Hills Ed. Ass'n v. Parsippany-Troy Hills Bd. of Ed., 188 N.J. Super. 161 (App. Div. 1983). This discretion of the Board of Education has been held to extend not only to the establishment of the curriculum of the schools, but also to rules governing student participation in extracurricular activities. Rovere v. Ridgefield Park Bd. of Ed., 1973 S.L.D. 97. In reviewing discretionary acts of a school board, the courts will only look to whether the decision is reasonable, and the decision will not be upset unless it is patently abitrary, without a rational basis, or induced by improper motives. Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288 (App. Div. 1960).

On these principles, the Board's decision to deny the petitioners' child admission to an extracurricular activity should be upheld as a reasonable exercise of discretion. The school board's concern that allowing admission of this child could open the flood gates to requests by other private school pupils to be admitted to other extracurricular activities is a legitimate and reasonable concern, particularly in light of the administrative difficulties it might impose on the district. In Thomas v. Allegany Cty. Bd. of Ed., 51 Md. App. 312, 433 A. 2d 622 (1982), a public school system, having decided to offer an all county music program to full-time students in the public school system, was not required to extend the benefits of the program to private school students as well. Its refusal to do so did not infringe on the private school students' freedom of religion, nor violate protection guarantees, nor constitutionally burden the right to freedom of educational choice. Because all individuals 5-20 years of age were entitled to a free public education in Maryland did not entitle a private student to be admitted to any part or portion of the public school system he chose. The Maryland court also held that school administrators and not the courts should decide how much administrative disruption is too much to allow participation by private students in public school programs.

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While New Jersey has not decided the precise question presented here, an analogy may be drawn from Christian Brothers Institute of New Jersey v. Northern New Jersey Interscholastic League, 86 N.J. 409 (1981). In that matter, a private high school sued an athletic association to gain admission to the association so that the private school's teams could participate in athletic contests against the association's public schools. The New Jersey Supreme Court rejected the private school's equal protection argument, stating that a rational basis existed for the league's exclusion of private schools. The Court noted that the association's rules prevented athletic recruiting, helped maintain a competitive balance, and combatted the problem of adolescents choosing schools based on athletic, rather than academic, criteria. The rule was rationally related to valid objectives and did not violate equal protection. This case establishes that a distinction drawn between public and private schools need only be supported by a rational basis, and not a compelling state interest.

Extra- or cocurricular activities have long been considered in this State to be an intergral part of the formal curriculum offered by public schools. In Smith v. Paramus Bd. of Ed., 1968 S.L.D. 62, the Commissioner noted at 64-65:

> Boards of education are free to determine whatever other learning experiences are suitable to the pupils to be served and will best achieve the aims and objectives of the schools. In pursuit of the goal of the highest degree of self-realization possible for each individual, the schools have traditionally sought an even greater diversity than is provided by formal classroom learnings. Thus, they have provided opportunities for a wide variety of extra-classroom activities in which pupils are encouraged to explore and pursue individual interests. Historically, these pursuits became known as "extra-curricular," unfortunately connoting something which was tacked on and of minor importance compaired with the classroom teaching program. . . . Willett v. Colts Neck Board of Education, 1966 S.L.D. 202, 206, the Commissioner held that school affairs such as dances, concerts, dramatic productions, athletic events and the like, although generally referred to as "extracurricular" were better designated "extra-classroom," and are certainly part of the total curriculum.

The Board argues that extra- or cocurricular activities which are seen by educational experts as an essential part of the total educational experience offered in its district can not be shared with pupils who do not attend the public schools but whose parents have chosen to place them in private institutions of learning.

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PETITIONER'S ARGUMENTS

The petitioners argue that, as residents and taxpayers and as involved parents within their community, they are being denied the right for their children to part take in extracurricular activities in the public schools, thus "breaking the continuing bond and segregating our children from their community peers."

The petitioners assert that education is not solely a matter of attending a particular building. Rather, it is a combined effort of many variables. Education and the learning experience is an ongoing function that does not become a dichotomy. It involves the complete spectrum of experience. Education incorporates within its boundries the social as well as the academic.

These petitioners do not ask for transportation, textbooks or tuition. Furthermore, the issue regarding field trips and who should bear the cost of such trips is not an issue. It is absurd to entertain the thought than an entire chemistry class in a private school would be transported to a public school for their chemistry education provided that their professor was absent.

The question squarely presented in this matter is not whether a private school pupil may selectively participate in public school activities as opined by the Board, but rather whether a nonpublic school pupil may participate in extracurricular activities of a social nature that are sponsored by the Board as opposed to those of an educationally oriented nature during the regular school day. The Board has extrapolated a narrow and carefully controlled situation into a broader issue. The petitioners do not seek the right to participate in any activities that are designed for the purpose of educating the child in an academic sense or in any activity held during regular school hours. The Board "has not cited a single case which would preclude a public [private?] school student from participating in a social activity during nonschool hours which are sponsored by the Board of Education." Petitioners' brief at p. 2.

The arguments raised by the Board regarding potential liability and the inability to control disruptive influences are clearly unfounded. The school could be clearly protected from incurring any liability by such formats as parental releases. Likewise, disruptive chidren could easily be disciplined by adults who are in attendance at all such

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functions exclusively for the purposes of monitoring such situations. If the local school board should warrant payment from the private school students for admissions to these extracurricular activities, the petitioners would comply.

It is the petitioners' petition that there is a definite distinction between classroom or academically oriented educational activities and extracurricular or social activities that are participated in after school hours and are not part of or intergrated with any activity related to the regular school day. As quoted in Smith v. Paramus Bd. of Ed., above, at 65:

> The school provides for two generally kinds of educational experiences, the regular classroom activities and those called extracurricular or cocurricular. Together they form an intergrated whole aimed toward a common objective.

As cited in the Willett case, there is a distinction between activities that are not part of the classroom teaching program and procedures which are an integral part of the classroom teaching learning progress where attendance is mandatory. In the former, they occur after normal school hours and attendance is voluntary.

Although the Board fails to differentiate between activities such as ski trips, afterschool dances and roller skating parties on the one hand and field trips to museums and the state capital on the other, there is a clear distinction. One involves an extension teaching program and the other is totally unrelated to the classroom program.

After research to the best of the petitioners' ability, they are unable as was the Board to find a case precisely on point.

It is the petitioners' position that extracurricular activities such as those in issue which are unrelated to the classroom learning program and are not offered during regular school hours should be opened to children who reside in the Borough of Watchung and who attend public school.

Rhetorically, the petitioners ask, "Who has the distinct right to segregate long-term community friendships that were initiated prior to school age." The petitioners further contend that sending their children to private school then appears to be a

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punishment to these children rather than a highly regarded educational facility. Community friendships do not cease because of different schools. Socializing with their neighborhood peers in extracurricular activities that are school-sponsored maintains a social balance and camaraderie they believe is a psychological advantage and a building tool to the future growth of their children.

DISCUSSION AND DETERMINATION

This tribunal is asked to decide whether children resident in a school district, but who attend nonpublic schools, may be permitted or must be permitted to participate in extracurricular activities of the public schools. For the reasons set forth below, the answer to the first inquiry is yes and to the second, no.

Public schools are financed by public monies. In New Jersey, a large measure of this support is dervived from local property taxes. The taxes are levied on and paid by all property owners in the community. The taxes are levied generally and without regard to whether a particular taxpayer has children or whether his children attend private or public institutions. Further, under our Compulsory Education Law, every child in the district has the right to attend the public schools and is required either to attend public schools or to receive some equivalent instruction elsewhere. N.J.S.A. 18A:38-25. By the same token, parents have a constitutional right to choose the type and character of education they believed best for their children, be it sectarian or secular. Pierce, above. The issue, then, may be framed in terms of whether the exercise by a parent of his constitutional right to send his child to a nonpublic school prohibits boards of education from offering that child some of its services and facilities when he would otherwise be entitled to all of its services and facilities.

So far as this judge knows, it has never been judicially suggested that the exercise of the basic right to forego a public education in favor of equivalent instruction precludes a person from availing himself of any state supported educational service or facility. The State has a vital interest in the universal improvement of the educational standards and achievements of its children irrespective of the schools they attend. It may be said with some certainty that one of the major problems confronting government today is the provision of an adequate education for all of its citizens so that every pupil becomes, at least potentially, a productive member of society. The Congress in its

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enactment of the Elementary and Secondary Education Act of 1965 attempted to address this issue, at least in part, by adopting the dual enrollment concept. 79 Stat. 27 et seq.

Because there is some similarity between dual enrollment programs, commonly referred to as "shared time," and the issue in this case, a distinction is necessary. In shared time situations, pupils attending private schools on a full-time basis are permitted to attend public schools and avail themselves of particular educational programs, services or facilities of a public school district. In Abington School v. Schempp, 374 U.S. 203 (1963) the question of transportation of children from sectarian schools to public schools for purposes that were purely educational and wholly unrelated to religion were found not to have infringed on the Free Exercise Clause of the U.S. Constitution. If the option to have a private or sectarian education were to result in the forfeiture of other public education programs or activities, this could seriously discourage or inhibit private or sectarian schooling which, in turn, might well approach the compulsion that the Free Exercise Clause interdicts.

Since the purpose of dual enrollment is essentially secular, and its primary effect is not the direct advancement of religion but, rather, the provision of greater educational opportunities, the concept does not violate the First Amendment. Att'y Gen. Form. Op. 1965 - No. 4. The question then becomes whether these arguments can be extended to include extracurricular activities.

Obviously, most extracurricular activities can be defined to be educational opportunities in the development of well-rounded pupils. However, not all extracurricular activities are purely educational. It would seem that a public school district may allow nonpublic school pupils to participate in extracurricular activities but does not have to let them participate.

As in the case of dual enrollment programs, allowing nonpublic school pupils to participate in extracurricular activities passes the "wholesome neutrality" test found in Schempp, above, because extracurricular activities have neither advancement nor inhibition of religion as their primary effect or purpose. Extracurricular activities do not violate the First Amendment. Importantly, however, participation in extracurricular activities is not a fundamental right as is the right to an education. Christian Bros., above, establishes that a rational basis can exist for an interscholastic league limited to

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public schools and that such a limitation does not result per se in a denial of equal protection under the Federal Constitution. Similarly, a rational basis would be sufficient to withstand any challenge under Article I, paragraphs 1 and 5 of the New Jersey Constitution. 86 N.J. at 418 (1981).

Extracurricular activities are not services and facilities that a pupil would be otherwise entitled to but for his attending private school. This is the distinction between dual education programs and extracurricular activities. Participation by nonpublic school pupils in extracurricular activities is not required.

Having considered the arguments of both parties and the instruction in case law discussed above, I FIND:

1. The concept of dual enrollment, although seemingly related to the issue in this matter, is distinguishable from the inquiry here.

2. Extracurricular activities are not "services and facilities" that a pupil would be otherwise entitled to but for his attending private school.

3. No Federal or State constitutional guarantee is disturbed when nonpublic school pupils either or granted or are denied participation in those public school activities commonly called extracurricular.

4. No Federal or State statute is violated when nonpublic pupils either are granted or are denied participation in public school extracurricluar activities.

5. While administrative disruption would not necessarily flow from the admission of nonpublic school pupils to public school extracurricular activities, the potential for that disruption does exist.

The reasoning of the Maryland Court of Appeals in Thomas, above, is pursuasive. I think the decision of how much administrative disruption is too much should be made at the local level.

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Accordingly, I **CONCLUDE** that a district board of education may permit children, concededly resident in the district, who attend nonpublic schools, to participate in extracurricular activities of the district's public schools but is not compelled to do so. The decision of this question lies clearly within the compass of authority delegated to local boards of education by the Legislature.

The decision complained of in the present appeal having been a proper exercise of the Watchung Board of Education's legislatively invested discretion, the petition of appeal is **DISMISSED.**

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

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

29 SEPTEMBER 1986
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

9-29-86
DATE

Sejmour Wilson
DEPARTMENT OF EDUCATION

Mailed To Parties:

OCT 2 1986
DATE

Ronald L. Parke
OFFICE OF ADMINISTRATIVE LAW

ds/e

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PERRY ALPERT AND ELEANOR ALPERT,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WATCHUNG, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful review of the record of this matter, the Commissioner agrees with the findings and the conclusion of the Office of Administrative Law that the Watchung Borough Board of Education did not act arbitrarily in denying children who reside in the district, but who attend nonpublic schools, participation in extracurricular activities of the district's public schools. The Commissioner further concurs with the ALJ's conclusion that a board is not compelled to either permit or disallow such participation. Rather, the Commissioner agrees with the ALJ that the matter herein is a decision lying "clearly within the compass of authority delegated to local boards of education by the Legislature." (Initial Decision, ante)

Accordingly, the Commissioner accepts the recommendation of the Office of Administrative Law dismissing the Petition of Appeal and adopts it as the final decision in this matter for the reasons expressed in the initial decision.

COMMISSIONER OF EDUCATION

October 31, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 340-86
AGENCY DKT. NO. 12-1/86

WILLINGBORO EDUCATION ASSOCIATION,
Petitioner,
v.
WILLINGBORO TOWNSHIP BOARD OF EDUCATION, BURLINGTON COUNTY,
Respondent.

Joel S. Selikoff, Esq., for petitioner (Selikoff & Cohen, attorneys)

John T. Barbour, Esq., for respondent (Barbour & Costa, attorneys)

Record Closed: August 11, 1986 Decided: September 19, 1986

BEFORE **DANIEL B. MC KEOWN**, ALJ:

The Willingboro Education Association (petitioner), the majority representative of all nonsupervisory teaching staff members employed by the Willingboro Board of Education (Board), challenges on behalf of that membership the authority of the Board to assign teachers involuntarily to crowd control duty at interscholastic athletic contests that are conducted on the Board's athletic fields and in its gymnasiums at a time generally, if not exclusively, after regular school hours. The Commissioner of Education transferred the matter on January 16, 1986 to the Office of Administrative Law as a contested case under N.J.S.A. 52:14F-1 et seq., including petitioner's motion for a restraining order to prohibit such assignments pending an adjudication on the merits. The motion was denied at a prehearing conference conducted February 27, 1986. The matter was scheduled and heard June 23 and 24, 1986 at the Willingboro Municipal Courtroom, Willingboro. The record closed August 11, 1986 upon receipt of petitioner's brief in support of its position.

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ISSUE

The issue to be adjudicated in the matter and as agreed by the parties is:

> Whether the involuntary assignment of teaching staff members to crowd control at extracurricular athletic events is beyond the scope of duties to which teaching staff members may be assigned under N.J.S.A. 18A:16-1 and/or an assignment that is otherwise arbitrary, capricious or unreasonable.

The essence of this dispute is that before December 1985 the Board had sufficient volunteers from among its employees, including teachers, and local residents to perform crowd control duty at interscholastic athletic events conducted at its facilities. Subsequent to December 1985, most teachers no longer volunteer for crowd control. The Board then directed that teachers be involuntarily assigned the duty under threat of discipline. The Board maintains that such assignments are within its discretionary management prerogative to assign teachers, involuntarily, to extracurricular or cocurricular duties[1].

It is noted that at the prehearing conference the Board raised the issue of mootness in that between January 12, 1986 through the conference date of February 27, 1986, no involuntary assignments had been made by the Board nor was physical injury inflicted upon any teacher involuntarily assigned. (See Prehearing Order). The Board, nevertheless, is deemed to have waived that defense by virtue of its failure to move to dismiss by the scheduled date of May 6, 1986. Nevertheless, the possibility of dismissal on the ground of mootness alone is remote, if not nonexistant. The plain fact is regardless of the absence of involuntary assignments during that discrete period of time, the Board's directive regarding involuntary assignment remains in effect. Thus, the issue is not moot because the controverted directive remains in effect.

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[1]The terms "extracurricular" and "cocurricular" are used interchangeably in this opinion. In prior opinions, the Commissioner characterized dances, concerts, dramatic productions, athletic events, and the like as "extracurricular" or "extra-classroom" because such activities occur away from a regular classroom setting and at a time other than the regular time for academic offerings. See, Willett v. Colts Neck Bd. of Ed., 1966 S.L.D. 202. New Jersey courts refer to the same activities as "cocurricular". See, Mainland Reg'l Teachers Ass'n v. Mainland, etc., 176 N.J. Super. 476 (App. Div. 1980).

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Petitioner contends crowd control duty for teachers is synonomous to police security work which, it is asserted, is inherently dangerous and, as such, is plainly beyond the scope of duty which may reasonably be expected of teachers on an involuntary basis. Moreover, petitioner asserts that the involuntary assignment of teachers to crowd control is simply beyond the call of a teacher's duty and that such an assignment is therefore arbitrary, capricious, and unreasonable, which is compounded by a lack of training in crowd control procedures for those involuntarily assigned. The Board claims that crowd control duty assignments are within the normal, ordinary and historic functions of Willingboro teachers regarding the supervision of extracurricular activities and that this case presents nothing more than an illegal work stoppage by its teachers.

BACKGROUND FACTS

A review of the evidence as a whole shows the following facts not to be in dispute. As occurs in most if not all secondary school districts in the State, Willingboro offers its pupils participation in a broad range of extracurricular activities, including interscholastic athletic teams of football, basketball, wrestling, soccer, and field hockey, to name a few.[2] Pupil participation in athletics may be on varsity and junior varsity level depending upon but not limited to the individual's skills, abilities and grade level.

The Board operates two high schools; Willingboro High and John F. Kennedy High. Thus, the Board has two varsity and junior varsity teams in each sport. Varsity teams participate in competitive contests with other school districts who, generally though not exclusively, are participants in the same conference with Willingboro. Contests occur either at home at Willingboro's facilities, or away at the other team's facilities. Junior varsity contests generally follow the same pattern. Spectators may attend athletic contests and, for certain contests, only upon the purchase of admission tickets at the home school. Spectators may be pupils who attend the Willingboro schools, pupils who attend the visiting school, pupils from any school district and nonpupils, or adults, regardless of residence. There is no evidence to show the disposition of admission ticket receipts, or gate receipts, realized from invitees at any or all contests.

[2]While New Jersey recognizes the New Jersey Interscholastic Atheltic Association as a voluntary association authorized to regulate the conduct of interscholastic athletic activities, N.J.S.A. 18A:11-3, there is no evidence in this record nor did either party argue that that Association regulates, or attempts to regulate, the assignment of crowd control personnel at interscholastic atheltic contests.

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The testimony of the Board's athletic director, Richard P. Luttrell (or athletic director), given at deposition prior to the hearing, shows that the combined number of home interscholastic athletic contests for both Willingboro high schools are nine in varsity football; 19 in junior varsity football; 20 in boys' varsity basketball; 20 in junior varsity boys' basketball; 20 in varsity girls' basketball; 20 in junior varsity girls' basketball; 18 in varsity wrestling; 10 in field hockey; and, 26 home contests in both boys' and girls' soccer.

The largest number of spectators attend varsity football games. Willingboro varsity football games are played either Friday or Saturday night. Approximately 2,000 to 2,200 spectators attend Friday night varsity football games while approximately 1,400 to 1,500 spectators attend Saturday night football games. Approximately 400 to 500 spectators attend varsity boys basketball games, while smaller crowds attend varsity girls basketball games. Varsity wrestling does not draw "that big a crowd." Approximately 50 spectators attend field hockey games. No figures nor estimates of spectators who attend soccer contests are available from the evidence of record.

Prior to December 1985, crowd control personnel were engaged on a volunteer basis for each of these home contests. Teachers, janitors, aides, secretaries, clerks and residents volunteered, for pay established by the Board, for crowd control. The janitors, aides, secretaries, clerks and residents are not under the direct or indirect supervision of teachers on crowd control. All school districts in Burlington County, according to the athletic director, engage crowd control personnel but there is no evidence to show whether teachers are involuntarily assigned crowd control in other districts. The athletic director determines the duties to be assigned crowd control personnel. He also maintains a "list" of persons, ostensibly approved by the Board to be engaged for pay, for crowd control. In regard to this list, the athletic director explained that some years ago he prevailed upon a coach, a Board employee, to perform crowd control work in an emergency situation. Thereafter, the Board refused the athletic director's request to pay the coach the then prevailing stipend for crowd control personnel because the coach was not on the "list" of persons to perform crowd control work. Consequently, the athletic director began to maintain a list of persons to be selected by him for crowd control assignments. Prior to December 1985, the list included only those teachers, other employees, and local residents who volunteered or who were willing to perform crowd control work for the pay offered by the Board. The 60 to 70 coaches of all athletic teams employed by the Board were automatically on the list by virtue of being coaches according to the athletic director. Nevertheless, even the coaches whose teams were not

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in contest on the relevant occasions volunteered for the duty as opposed to being involuntarily assigned.

Depending upon the contest, crowd control duties include assignments such as but not limited to ticket seller, ticket collector, clock operator, announcer, official scorer, chain gang[3], sideline control people[4], and to security by being stationed inside the school building, the home and visitor stands, refreshment areas, with the visiting band, the visiting buses and to act as guides for the visiting team. Not all contests require the same number of crowd control persons. Persons are assigned crowd control duty when, in the judgment of the athletic director, it is necessary to control a crowd. In his view, it is generally necessary to plan to control a crowd, hence have crowd control personnel on duty, for a contest "* * * where emotions would be involved, such as football, basketball, * * * " (Deposition, p. 5). In addition, crowd control personnel are on duty for all wrestling matches and at other contests "* * * determined by the opponent and particular attitudes that might surround that event at the time." (Id., at p. 6). Crowd control personnel on duty at least those assigned security work wear orange vests with SECURITY emblazoned thereon.

In addition to the employees and residents who have been traditionally engaged by the athletic director on behalf of the Board for crowd control work, the Willingboro police department provided and continues to provide special officers upon request of school officials to be in attendance in uniform at certain contests.

[3]"Chain gang" are those persons appointed to keep track generally of a football team's forward progress in ten yard segments during the course of the game.

[4]"Sideline control" involves crowd control persons prohibiting spectators at soccer and field hockey games from going onto the playing field. Generally, soccer and field hockey are played on athletic fields which have no bleachers for spectators nor fences surrounding the fields. Consequently, spectators mill about the perimeter of the playing fields.

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The testimony of the athletic director regarding the numbers of home contests for each interscholastic sport, the average spectator attendance at each contest, and the numbers of crowd control personnel and police assigned each event may be summarized in chart form as follows:

Contest	Home Contests Per Year	Spectator Attendance	(1)[5]	(2)[6]
Varsity Football	9	Fridays - 2000-2200 Saturdays - 1400-1500	12	28
J.V. Freshman Football	19	Less than 100	—	2-3
Boys Basketball	20	400 - 500	4-5	8
Freshman Boys Basketball	20	Less than 100	—	1-3
Girls Basketball	20	Less than 400-500	1-2	4
Freshman Girls Basketball	20	Less than 100	—	1-2
Wrestling	18	"Not a large crowd"	-[7]	4-5
Field Hockey	10	50[8]	—	1
Boys & Girls Soccer	36	No estimate	—	1-2

[5]Police Assigned
[6]Crowd Control Personnel Assigned
[7]Number, if any, not given
[8]See 1T. 41

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The athletic director authored written crowd control procedures for basketball games and wrestling which occur inside a gymnasium. (P-3) The procedures are posted in each gymnasium in the school district. They set forth rules and regulations for spectators to abide and the responsibilities of crowd control personnel regarding the enforcement of those rules upon spectators. The procedures are reproduced here in pertinent part:

* * *

BURLINGTON COUNTY SCHOLASTIC LEAGUE

As a member school of the Burlington County Scholastic League we welcome you to this athletic contest. In order to standardize crowd control and the conduct of athletic contests we must set forth the following policy. Failure to comply with any portion may mean removal from the contest and forfeiture of attendance at future contests.

*No possession or consumption of alcoholic beverages
*No possession or use of illegal drugs.
*No smoking in the gymnasium at any time.
*No shooting baskets.
*No beverages in the gymnasium at any time.
*No radios or other AV equipment.
*No posters, banners or noise makes of any kind.
*Cheers should be positive in nature.
*Whenever possible all spectators should remain in the stands.
*Anyone who leaves the building will not be allowed back inside.

Other basic rules are:

1. Spectators must remain in designated areas.
2. All spectators must be in the bleachers.
3. Proper conduct, in relationship to the manner in which opposing players, and/or officials are addressed, is required.
4. Verbal abuse, directed toward players or officials, will not be tolerated.

Crowd Control Personnel

1. Maintain the discipline within the gymnasium, and are responsible for specific control areas.
2. Crowd control personnel will attempt to prevent problems while remaining courteous at all times.
3. Crowd control personnel make every effort to maintain a wholesome atmosphere, which is vital to the basic requirements of interscholastic athletic competition.
4. Any potential problem which cannot be handled by school personnel should immediately be referred to the closest law enforcement officer.

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Police

Police are required for special duties. The mere presence of a uniformed officer has a positive effect on crowd control.

Police will be stationed in strategic areas so they will immediately be available to the staff, and/or each other.

Stations for Police:

JFK [John F. Kennedy High]
- 1 Main entrance near money.
- 1 Front hall (keep doors closed)
- 2 Opposite ends of gym
- 1 Officer in charge (OIC) - circulating

WHS [Willingboro High]
- 1 Gym lobby near money. Keep doors closed
- 2 Opposite end of gym.
- 1 Officer in charge (OIC) - circulating.

There are occasions where we hire extra police for special assignments, such as keeping doors closed in the JFK hallway, or WHS lobby.

Police also help enforce all of the previous rules herein stated, such as no smoking, drinking, etc.

In case of a crowd disturbance, the intervention of an offficer is necessary. However, the closest staff person should attempt to handle all problems.

In the event of a disturbance the coaches are always responsible for the players conduct. Police are required to keep people off the playing area, away from the players. Staff personnel will attempt to control the students, utilizing the police when absolutely necessary.

Following the game, police will escort the visiting team to their bus, and provide a guided escort out of town.

Remember: Good sportsmanship is the key. Working together, we can maintain a healthy atmosphere for championship competition.

Similar written crowd control procedures have not been promulgated for outdoor contests such as football, field hockey or soccer.

The athletic director explained the relationship between and among the coaches of the interscholastic teams then in competition, with assigned crowd control personnel, and the Willingboro special police officers in the following manner:

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> * * * We have very definite instructions at a basketball game. Our coaches are responsible for the players. Our crowd control people are responsible for spectators. In other words, they [crowd control personnel] are to prevent a problem and anything that they cannot handle, they're supposed to call police into it or if police see any violence occurring, they're supposed to interfere. They're supposed to handle the problem, prevent it. The coaches on the players, our personnel on the fans and the police, an auxiliary unit, to help in case violence does occur.
>
> (Deposition, at pp. 37-38)

The evidence of record shows that crowd control personnel, regardless of their specific assignment, are required to at least make an initial attempt to stop spectators from engaging in verbal or physical abuse, threats, violence, the use of alcoholic beverages and controlled dangerous substances. When crowd control personnel acquire knowledge spectators are carrying weapons, they determine whether to individually attempt to confiscate the weapon or to seek the assistance of a special officer who may be assigned the event. Teachers on crowd control are to clear spectators from school bathrooms who are violating regulations regarding smoking, they engage in the surveillance of bathrooms and spectator stands for the use of alcoholic beverages and controlled dangerous substances, they are expected to eject those found to be using such substances, they observe spectators to determine whether they are carrying weapons and then determine a course of action, and they attempt to maintain order among all spectators and assist police in the quelling of disturbances.

In short, crowd control personnel, particularly those assigned security, are initially responsible to maintain order at interscholastic home games among all spectators. Special police who are present act only when the efforts of crowd control personnel fail. There is no specific or special training offered to persons on crowd control other than the written crowd control procedures (P-3) set forth above and brief oral instructions given immediately before the start of the contest. Crowd control personnel have no electronic means of communication with each other or with the special officers who may be on duty.

The Board's athletic manager at the John F. Kennedy High School, Dale Hechman, as well as its athletic manager at the Willingboro High School, Steven Bertuglia, both of whom are in charge of the sale of admission tickets to home games at

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the respective schools and who are otherwise employed by the Board as teachers, testified that during 1985-86 a combined total of 11,073 student spectator tickets and 7,699 adult tickets were sold for all interscholastic athletic contests conducted at the Willingboro schools for which admission was charged. Thus, 59 percent of all spectator tickets sold during 1985-86 was to students without regard to which school distrit they attend, while 41 percent of all spectator tickets sold was to adults without regard to residency. Hechman, it is noted, is a teacher in the Board's employ who also applied for and has been appointed to the extracurricular duty of athletic manager for the past eight years. Bertuglia, also a teacher in the Board's employ, applies and is reappointed every year as athletic manager. Both persons acknowledge that crowd control duty, on a voluntary basis, has been historically part of the function of athletic manager.

Over the years certain untoward incidents occurred during interscholastic contests which bear recitation here. In 1984-85, the Willingboro police installed a metal detector at the entrance doors for spectators to pass through for attendance at the Willingboro High-John F. Kennedy High basketball game. Weapons were subsequently found on exterior school grounds ostensibly discarded by spectators who intended to take the weapons into the gymnasium until they discovered the metal detector was in use. (See P-4). Luttrell testified in deposition that metal detectors were used by the Willingboro Police at interscholastic home games in Willingboro on at least two, perhaps three, occasions. In 1984-85, one student spectator brought a knife with a six to eight inch blade into the school gymnasium. The knife was confiscated by Bertuglia. Two years ago, the bus of a visiting team was stoned and its windows broken by unruly persons. Four years ago, a near riot occurred at a Willingboro freshman basketball game. Five years ago, the Willingboro police used mace on one unruly student which resulted in several fist fights breaking out on the gymnasium floor following a Willingboro-John F. Kennedy High School basketball game. Other examples of untoward incidents over the years at interscholastic events were given by Chester R. Closson who, during his 17 years of employment as a teacher by the Board, performed crowd control security work ten years. Closson described the incidents he recalls in the following manner:

> [S]everal years ago, five, six, seven years ago, I was taking tickets at the door at Willingboro High School [for a basketball game], and there was a disturbance in the girls' room which, as I recall, the crowd control person called for the assistance of one of the special police officers, one of the females and when she came out of the lavatory, they proceeded to bring a female student with them and the special officer exclaimed that the girl had tried to cut her with a knife.

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I was also at the Willingboro-Kennedy basketball game four years ago when a student was — the police were attempting to handcuff a student and remove him from the gym and the fans, the spectators, were not going to allow those officers to do their job, and the student was encircled by police as well as crowd control people and when the crowd got too close the police officers used Mace to force them back.

I have been present both occasions at Willingboro-Kennedy basketball games when the metal detectors were used and in my capacity as a ticket seller. It was done right in front of me. Students, as well as adults, had weapons removed from them in the main lobby of John F. Kennedy high school. At one point several of the special officers came over and actually handed me several of the knives in order to keep them behind the ticket selling booth until they were ready to collect them.

I can recall selling tickets at Willingboro High School for football games where * * * the spectators were so excited and so anxious that myself and the other ticket seller were literally pushed, table, chairs, money box, everything, literally pushed at least 10 to 15 feet into the hallway. And it was at that point that we had to yell for the police who were not in the immediate vicinity, but we had to yell to other people to get the police to come and control these people before we would continue selling any more tickets.

At a Kennedy-Trenton High School at John F. Kennedy, we had a load of spectators who * * * at one point * * * physically threatened the ticket taker * * * [the ticket taker was physically distraught about the fact that he was making statements to the effect that he was going to physically beat her up.]

* * * Certainly, any big basketball game where you're in the stands or you are actually along the floor area where there's a call that is questioned, you have to physically put yourself in front of any number of people who are desiring to get out onto the floor either after other players or after the coach or specifically after the referees.

I can recall on a number of occasions where we had — actually had to escort the referees off the court and into the locker rooms because of the intensity of the game.

* * * It doesn't really have to be the number of spectators. We have parking regulations in the front of Kennedy. You're not allowed to park there, its a fire zone, and that was a small crowd wrestling match and [the athletic director] had arrived and he said these cars have to be removed from in front here, and before we could make the announcement in the gym, there was a patrol car that had been patroling the area and he pulled in and ticketed all the cars, and one of the adults who was there, a parent, came out and if there hadn't been crowd control people there, I'm almost certain he would have physically assaulted [the athletic director] claiming that he was the one who had called to have these cars ticketed and that in fact they did receive tickets and he was to blame for this.

(Tr. 104-108)

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Other examples offered by Closson include the confiscation of beer from spectators in the stands (Tr. 112) and the confiscation of a nunchaku, a martial arts weapon, from a student (Tr. 117). Despite these untoward incidents no school district has ever refused to play a contest scheduled at Willingboro.

THE DISPUTE

Some time during December 1985, the Board rejected athletic director Luttrell's request to increase its pay of volunteer crowd control personnel. It is noted that historically the Board set the crowd control stipend unilaterally and, in the main, alwys had sufficient volunteers to adequately staff the crowd control functions. Teachers, janitors, clerks, citizens all received the same pay. The pay rate established by the Board for crowd control duty, insofar as teachers are concerned, is not set forth in Schedule C of the existing negotiated agreement (P-6, p. 62) between the Association and the Board. Schedule C sets forth honoraria for cocurricular or extracurricular and coaching duties various teachers apply for and are appointed to each year by the Board.[9] The Board stipulates that the issue of teacher assignment to crowd control was not subject to negotiation. Crowd control duty is not an assignment listed in Schedule C.

Upon the completion of the 1985 fall interscholastic season, teachers who were otherwise on the volunteer list for crowd control decided they did not want to perform crowd control work for the amount of money being paid by the Board. The Board, in response to the refusal of teachers to volunteer for such assignments, ordered its athletic director to assign school administrators to crowd control duties. Thereafter, however, the athletic director was told by the Board

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[9]Schedule C of the Agreement lists the following pupil activities to which teachers may apply or be assigned by the Board as coaches, assistant coaches, teachers-in-charge, advisors, directors, and athletic manaagers for each activity at a honorarium negotiated between the Association and the Board: marching band, cheerleaders, jazz rock ensemble, high school class advisors, yearbook, National Honor Society, student council, drama, school newspaper, set/scenery-design, key club, concert jazz band, general detention, Afro-American club, chemistry club, chess club, interact, humanities, school bank, DECA, Russian, German, Spanish, French, Hero, TV lead teachers, Olympics of the Mind, vocational clubs, dance theater, football, soccer, cross-country, hockey, basketball, wrestling, gymnastics, baseball, track, tennis, golf, swimming, lacross, athletic manager, cross-county and hockey. At the junior high school level, pupil activities include pom-pom adivsor, student council, intramural activity coordinator, gymnastics, stage band, and the National Honor Society. At the elementary level, pupil activities include district chorus, band, orchestra, and safety patrol.

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> * * * to assign people crowd control duties and to begin with the coaches first and that I was supposed to work through the entire staff which would have included, I assume, every name that was on there [the list] and that would have included others also. Just to assign faculty. That's what the order was, basically, but it was to start with coaches.
>
> (Dep. at p. 30)

Ronald Cheesman, a teacher with 24 years experience and who had volunteered to perform crowd control in prior years, was told by Luttrell subsequent to December 1985 that unless he continued to "volunteer" for crowd control he would risk the loss of his teaching certificate. (Tr. 88).

On or about January 8, 1986, the following help wanted advertisement was placed by the Board in the Burlington County Times:

> CROWD CONTROL - WORKER. To supervise school athletic events. Duties include: officials, timers, announcers, ticket sellers/collectors. Crowd control in bleachers, halls, doors, lavatories, etc. Approximately 4 hrs. for $14. 3:15-7:15 p.m. 5:30-9:30 p.m. or longer. Please call — Willingboro public schools.
>
> (P-5)

The athletic director explained that the advertisement did result in some responses. The evidence of record discloses some Board members resented the teachers who personally elected not to volunteer for crowd control duty. The Board submitted a series of newspaper articles which covered the crowd control dispute in which a Board member is quoted as having declared "'I feel everyone should be stricken from that (list) forever'" and "'How dare they stand before us and tell us they will not do this * * * because of a few extra dollars?'" and "'I think its high time for some of these people to hit the road * * * I don't want them in my town, I don't want them in my life, I don't want them messing around with my kids - most of them don't even live here'" and "'I am sick and tired of you people [crowd control teachers] taking advantage of Willingboro * * * you drain Willingboro dry and then you run away from us.'" (R-3, at p. 2). It should be quickly noted that the superintendent who was in attendance at that Board meeting is reported to have fought off criticism of the staff.

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Nevertheless, there is no evidence in the record before me to show any teacher, individually or in concert with any other teacher, refused to perform crowd control duty when involuntarily assigned by Luttrell, under order of the Board, from December 1985 forward.

This concludes a recitation of the background facts of the matter which I FIND to be relevant facts of the matter.

PETITIONER'S PROOFS

In addition to the relevant background facts above, petitioner offers the testimony of athletic director Luttrell in support of its position that crowd control duty is inherently dangerous and, as such, is beyond that which may be reasonably and properly assigned teachers on an involuntary basis or, simply, that such an assignment is beyond the scope of a teacher's duty. Luttrell offered the opinion that crowd control employees

> * * * are exposed to physical danger. I don't think there's ever been a question about that in the history of our athletic program. Of course, we've always had volunteers that have worked these positions in the past and those people are ones who feel quite competent in the performance of their duties and they know most of the spectators and most of the spectators know them, but there is a danger in the larger crowd, obviously. The more likely there is to be a problem that could create physical harm to a person * * * I'm referring to the emotions that are involved in an athletic event and the fact that you have most of your crowd being in the teenage classification. You might consider them to be immature or young adults that have to be controlled. * * *
>
> (Deposition, at pp. 11-12)

Luttrell also offered the opinion that the involuntary assignment of teachers to crowd control is a "very poor" Board action

> Because everybody — all people are not capable of entering a gymnasium or field area where there's emotional contests being contested. Some people just can't function in that type of environment. We know that from the type of people that have volunteered over the years to handle it. Some people enjoy being involved in a crowd; others don't want to be near a crowd. I was asked to assign people on an involuntary basis knowing that some

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> would not be able to do the job, even if they were required to do something at the time. That was my professional opinion of it. * * *
>
> (Id., at pp. 17-18)

Petitioner also offered the expert opinion of Kirk Habby, who is presently a member of the Temple University Police Department with the rank of lieutenant and who has had extensive training and experience in law enforcement. Habby is of the view that only persons who are professional trained in security or a police officer should be assigned crowd control security work as he understands the crowd control function of security to exist in Willingboro. This opinion, it is noted, is based on Habby's view that crowd control personnel assigned by the Board to its athletic events are responsible for "* * * the clearing of bathrooms, the surveillance of stands, [to] be on the lookout for people who are carrying weapons or consuming alcohol or controlled dangerous substances * * * " (1T. pp. 139-140) and to physically remove such persons from the facility. (1T-148).

This concludes a recitation of the proofs offered by petitioner, in addition to the relevant background facts set forth above, in support of its position that the involuntary assignment of teaching staff members to crowd control duty at interscholastic athletic events is beyond the scope of duty which may reasonably be expected of teachers and that such duty is inherently dangerous.

BOARD'S DEFENSE

The Board in support of its position that its action to involuntarily assign teachers to crowd control duty is a normal, ordinary, and historic duty generally assigned Willingboro teachers for the supervision of extracurricular athletic events, relies on the testimony of Dale Hechman, Steven Bertuglia, Ronald Cheesman, Chester Closson, and Fred Noller. (See Board's letter memorandum, at p. 5). This reliance presumably is predicated on their individual and collective testimony that athletic managers (Hechman and Bertuglia) acknowledge that historically they accepted as part of their duties as athletic managers an obligation to volunteer for crowd control duty. The Board also relies on the testimony of Cheesman, Closson, and Noller for the proposition that subsequent to December 1985 when the Board refused to increase the pay for crowd control volunteers they, and hence all teachers, no longer volunteered for crowd control duty.

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The Board also relies upon the testimony of Sergeant William A. Painter, the Willingboro police officer who is the direct supervisor of special officers assigned to the Boad's interscholastic athletic events. While the Board relies on Sergeant Painter's testimony to refute the expert testimony of Kirk Habby, it must also be noted that Sergeant Painter, who does not attend all events at which special officers are assigned, testified regarding the functions of the crowd control personnel assigned by the Board compared to the functions of the special officers assigned the events at the request of the Board in the following manner:

> At the events that the police are in attendance, the main function is to, of course, arrest any violators of any acts of breach of the peace that are evident to them at the time. They are there as a back-up unit to the employees of the township which has been directed to me through the — their supervisors, most of them, Mr. Lutrell, who handles most of the assignment crowd control at football games, basketball games. Should there be altercations or disagreements or a problem of any nature that is not evident to us, as I say, of a breach of peace, they [crowd control personnel] are to control that. If kids are getting loud or in the wrong place, congregating, anything that is a violation of rules set forth by the school board or school administration, who ever sets the ruling, if they have problems executing their job function of keeping the crowd in conformance to these rules, we back them up. We will act on behalf — if they wish someone to be removed or if someone becomes rowdy or someone commits a crime or again a breach of the peace, our function is to then intercede and take appropriate police action.
>
> (Tr. 2, p. 13-14)

The Board relies on Sergeant Painter's testimony to essentially challenge the expert opinion offered by Habby that crowd control is essentially an assignment for professionally trained security person or a police officer. See also, IT., pp. 169-189; R-1, R-2, R-3, R-4, R-5, R-6 and R-7.

This concludes a recitation of the proofs offered by the Board in support of its position.

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ADDITIONAL FINDINGS ON THE
PROOFS OF THE PARTIES

I am persuaded by a preponderance of credible evidence that crowd control personnel, regardless of whether voluntarily or involuntarily assigned by the Board, are primarily responsible for maintaining order at all interscholastic athletic events. Crowd control personnel are expected to take the first steps towards maintaining order and security for all spectators and only if their efforts fail are they to then turn to the Willingboro special police officers who may be present. Crowd control personnel, teachers, nonteachers, and residents alike, oversee or supervise, for reasons of security, the general public who attend the contest and a segment of that public includes Willingboro pupils and pupils from other school districts.

I find persuasive Luttrell's opinion that crowd control personnel, particularly those directly assigned to security or who are expected to assist in maintaining order at an interscholastic atheltic contest, expose themselves to the risk of physical danger in performing such duties. The risk of physical danger, nevertheless, does not equate with inherently dangerous duty. I find no evidence to support petitioner's view that crowd control personnel are assigned inherently dangerous duties in the manner of a public school janitor being required to engage in hands-on searches of school buildings and grounds for explosive devices as in Cherry Hill Supportive Staff Association v. Cherry Hill Twp. Bd. of Ed., 1984 S.L.D. -- (Aug. 16, 1984).

Nevertheless, teachers on crowd control expose themselves to the risk of physical danger because they are expected to control persons who have no relationship to them as a teacher, persons who may not have any relationship to the Willingboro community, and persons who otherwise are not subject to the discipline teachers may impose on students who are present on school facilities for a school sponsored activity. It may be safely stated without contradiction that from time to time interscholastic athletic contests, by the very nature of that activity, elicit emotional responses from some of the teams' more ardent followers. It is not unheard of, as the evidence in this record shows, for emotional responses to result in physical assaults between and among spectators from opposing sides, spectators on the same side and physical assaults upon officials, referees, coaches and between and among and to athletes themselves. While such reactions may not be a common occurrence at each and every athletic contest played, the latent risk of physical danger to crowd control personnel from harmful third party conduct is real. The

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danger is particuarly acute when crowd control personnel are called upon to engage in crowd control security by controlling spectators engaged in improper conduct. There is no evidence in this record to show teachers, by virtue of their academic training or teaching experience or certification as teachers, are better equipped and able to perform crowd control functions than nonteachers.

This concludes a recitation of all relevant and material facts of the issue as presented.

LEGAL ANALYSIS

It is recognized as pointed out by the Board that actions taken by a local board of education carry a presumption of correctness and may not be set aside unless patently arbitrary, capricious, unreasonable or contrary to law. Thomas v. Morris Twp. Bd. of Ed., 89 N.J. Super. 327 (App. Div. 1965), aff'd o.b. 46 N.J. 581 (1966); Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288 (App. Div. 1960). It is also recognized that one who challenges an action taken by a board of education carries the burden of ultimate persuasion to overcome the presumption of correctness and to show by a preponderance of credible evidence that the controverted action must be set aside.

New Jersey public school pupils, by constitutional mandate, are to be afforded a thorough and efficient system of free public schools. N.J. Const., (1947), Art. VIII, ¶IV, para. 1; N.J.S.A. 7A:1-1 et seq. N.J.S.A. 18A:33-1 mandates that

> Each school district shall provide, for all children who reside in the district and are required to attend the public schools therein * * * 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. * * *

The goal of a thorough and efficient system of free public schools is " * * * to provide to all children in New Jersey regardless of socioeconomic status or geographic location, the educational opportunity which will prepare them to function politically, economically and socially in a democratic society." N.J.S.A. 18A:7A-4. To carry out its obligtion to provide its pupils with a thorough and efficient program of education, boards of education are authorized to employ such teachers as it shall determine, N.J.S.A.

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18A:16-1; make rules governing the employment of its teaching staff members and to change, amend, or repeal such rules, N.J.S.A. 18A:27-4; and, to make, amend and repeal rules for the government and management of the public schools and perform all acts and to all things necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district. N.J.S.A. 18A:11-1.

This case cannot be decided without acknowledgement of the existence of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., which expressly authorizes negotiations, in this case between the Association and the Board, with respect to "terms and conditions" of public employment. N.J.S.A. 34:13A-5.3. There are two legislatively directed categories of subjects in public employment negotiation -- mandatorily negotiable terms and conditions of employment and nonnegotiable matters of government policy. Ramapo-Ind., etc. v. Ramapo-Ind., etc., Bd. Ed., 176 N.J. Super. 35, 42 (App. Div. 1980), citing Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 162 (1978). To be mandatorily negotiable, the terms and conditions of employment must not "'significantly interfere with the exercise of inherent management prerogatives pertaining to the determination of government policy.'" Woodstown-Pilesgrove, etc., Bd. of Ed. v. Woodstown-Pilesgrove, etc., Ed. Ass'n, 81 N.J. 582, 590-591 (1980), citing State v. State Supervisory Employees Ass'n, 78 N.J. 54, 67 (1978).

In Mainland Reg'l Teachers Ass'n v. Mainland, Etc., 176 N.J. Super. 476, 482 (App. Div. 1980), the court specifically held that:

> The number of such extra classroom activities [extracurricular activities which the Mainland court referred to as co-curricular], their nature and scope, and the extent to which teachers and school space shall be allocated to such undertakings as part of the learning process clearly involves educational policy and management prerogatives.

In Dunellen Bd. of Ed. v. Dunellen Ed. Ass'n, 64 N.J. 17, 24 (1973), the Court ruled the Legislature did not contemplate that local school boards could abdicate their management responsibility to implement local educational policy. In Englewood Bd. of Ed. v. Englewood Teachers Ass'n, 64 N.J. 1, 7 (1973), the Court observed that "major educational policies which indirectly effect the working conditions of the teachers remain exclusively with the board and are not negotiable * * * ". This right of boards of education includes the prerogative to assign the "teaching staff member best suited for the job". Ramapo-Ind., supra, 176 N.J. Super. 42-46, quoted with approval at Penns Grove-Carneys Pt. Educ. v. Bd. of Educ., 209 N.J. Super. 115, 119 (App. Div. 1986).

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The parties in this case agree boards of education have authority to exercise their discretion, or management prerogatives, to unilaterally assign teaching staff members to extracurricular or cocurricular activities so long as such assignments are not arbitrary, capricious or unreasonable. (Petitioners' brief, at p. 7; Board's letter memorandum, at p. 3). It is necessary, therefore, to determine whether crowd control duty is an extracurricular activity the Board may involuntarily assign teachers pursuant to its inherent management prerogative pertaining to a major education policy and, if so, are the controverted assignments reasonable under the circumstances.

The concept of extracurricular activities to which teachers may be assigned by the Board as an express or implied duty has been addressed by the Commissioner on prior occasions. In Dallolio v. Vineland Bd. of Ed., 1965 S.L.D. 18, 20-21, the Commissioner held that:

> Teachers in public schools customarily direct or supervise a variety of activities which are a part of the curriculum but which are not necessarily directly related to their classroom teaching assignment. These activities are not limited to the coaching of teams in the various sports but might include an assignment to direct (or coach) the school dramatic productions, to advise the student council, to sponsor one or more school clubs, to direct the school assembly programs, to direct the school orchestra, band, or chorus, to supervise school publications, and many others * * *

In Willett v. Colts Neck Bd. of Ed., 1966 S.L.D. 202, 206 the Commissioner distinguished extracurricular or extraclassroom activities from a field trip held to be part of the regular classroom program of instruction or course of study. In Smith v. Paramus Bd. of Ed., 1968 S.L.D. 62, the Commissioner said the following regarding extracurricular activities:

> * * * [B]oards of education are not only permitted under the law, but have an affirmative duty and responsibility to develop a broad program of pupil activities beyond formal classroom instruction as an essential part of the curriculum offered.
>
> Such pupil activities require leadership, participation, and supervision by members of the professional staff. While lay persons with particular skills or knowledge may be called upon to contribute, it is properly the duty of professionally trained and licensed teachers to plan, guide, direct, evaluate and supervise the extracurricular activities of pupils. These are functions of teachers which cannot be delegated. If, therefore, there is to be an effective extracurricular program, it must be staffed by teachers * * *

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> Boards of education have a duty to provide a thorough and efficient system of free public schools * * * they must necessarily provide to as great an extent possible an extensive program of student activities as an essential element in the achievement of that objective, and the proper supervision of such activities can be performed only by the school's professional staff.
>
> at p. 66

In Bd. of Ed. Asbury Pk. v. Asbury Pk. Ed. Assn., 145 N.J. Super. 495 (Chan. Div. 1976), aff'd in part, dismissed in part, 155 N.J. Super. 76 (App. Div. 1977), relying upon and citing with approval Parrish v. Moss, 200 Misc. 375, 106 N.Y.S. 2d 577 (Sp. Ct., Spec. T), aff'd without opinion, 279 App. Div. 608, 107 N.Y.S. 2d, 580 (1951), the court quoted Parrish regarding the obligations with properly may be imposed upon a teacher by way of extracurricular duty as follows:

> * * * The broad grant of authority to fix 'duties' of teachers is not restricted to classroom instruction. Any teaching duty within the scope of the license held by a teacher may properly be imposed. The day in which the concept was held the teaching duty was limited to classroom instruction has long since passed. Children are being trained for citizenship and leadership in such training is the teacher. * * * Any teacher may be expected to take over a study hall; a teacher engaged in instruction in a given area may be expected to devote part of his day to student meetings where supervision of such teacher is, in the opinion of the board, eductionally desirable. Teachers in the fields of English and Social Studies and undoubtedly in other areas may be expected to coach plays; physical training teachers may be required to coach both intramural and inter-school athletic teams; teachers may be assigned to supervise educational trips which are properly part of the school curriculum. The band instructor may be required to accompany the band if it leaves the building. These are illustrations of some of the duties which boards of education have clear jusitification to require of their employees * * *.
>
> 145 N.J. Super. at 502-503

The Asbury Park court, relying upon Bolmeier, Teachers' Legal Rights, Restraints and Liabilities, ¶9.7 at 125 (1971) adopted the following factors to be considered in determining the reasonableness of extracurricular assignments:

> [T]he extra assignment must be reasonable: it (1) must not require excessive hours beyond the normal teaching period; (2) must have some relation to the teacher's interests, abilities and certification;

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(3) must be made with a purpose beneficial to pupils; (4) must not be discriminatory; and (5) must be professional in nature.

These cases teach that an extracurricular activity is a board approved activity related to the education of pupils which may occur within or without the regular school day with the intent to develop pupils into whole persons compatible with the goals of a thorough and efficient program of education. The focus of the activity is pupils; the activity is intended for pupils, designed for pupils, and is carried out for pupils. Teaching staff members are obligated, absent volunteers, to accept assignments in order to carry out the purpose of an extracurricular activity. Such assignments may properly expect teachers " * * * to plan, guide, direct, evaluate and supervise the extracurricular activities of pupils" because of the teachers' professional training, teaching experience and certification. Smith, supra, 1968 S.L.D. at 66.

Teachers on extracurricular assignment further the teaching-learning process initiated in the classroom. A teacher of music, as an example, may be ideally suited to be the director of a school marching band, a school jazz rock ensemble, or a concert jazz band, chorus, band, or orchestra. In such a case, the assigned teacher is obviously planning, guiding, directing, and supervising the pupils in developing their musical talents. Other teachers, as examples, fluent in Russian, German, Spanish and French, may be better suited for conducting extracurricular activities for pupils to inquire into and learn about the broad expanse of the Russian, German, Spanish and French cultures. Physical education teachers, on the other hand, by virtue of their academic training and experience in physical education may be better suited, though not necessarily best suited, to be coaches of football, basketball, wrestling and all other sports. These kinds of assignments to those extracurricular activities foster and enhance pupil learning because the teacher continues in their professional tasks of planning, guiding, directing, supervising and evaluating pupils. The symbiotic relationship between and among teachers and pupils involved in these kinds of extracurricular activities and as recognized in Schedule C of the Agreement[10] is easily discerned. Accordingly, teachers best suited for the job may be involuntarily assigned by the Board, if necessary, to plan, guide, direct, evaluate and supervise the participating pupils. Teachers are academically trained, professionally experienced and certified to carry out those professional obligations.

[10]See, Footnote 9, infra.

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Board sponsored athletic teams which engage in interscholastic competition as implicated here are properly considered extracurricular activities because the focus of the teams is the pupils; the teams are intended for pupil participation; the teams' competitors are scheduled by design for the participating pupils; and, the entire structure of interscholastic athletic competition is carried out for pupils to test their skills against others and to learn honest competition and acquire desirable traits of good sportsmanship. Thus, a board of education through its management prerogative pertaining to major educational policy, may assign a teacher involuntarily to be a coach or athletic manager of one or more such teams so long as the duties of the assignment are to further pupil learning.

Crowd control duties, however, may be distinguished from valid extracurricular assignments. Teachers involuntarily assigned crowd control duties of selling tickets, collecting tickets, operating a game clock, performing as an announcer for the general public at contests, acting as guides, securing the behavior and conduct of spectators in attendance, being an official scorer, operating the chains during a football game, and controlling the sidelines by prohibiting spectators at soccer and field hockey games from going on to the playing field, are not engaged in duties for which they have been academically trained, professionally experienced or certified. Unlike the symbiotic relationship easily discerned between and among teachers and pupils in the extracurricular activities set forth above, crowd control duties are only remotely related to the interscholastic athletic team which is the extracurricular activity. Teachers who are the coaches of the members of the participating teams are, in fact, performing legitimate extracurricular duties because they have and carry out the obligation to plan, guide, direct, supervise and evaluate the pupil participants on the athletic team. The sale and collection of tickets, operating a clock, being an announcer, securing the stadium and gymnasium against misconduct, and acting as guides are duties which do not by their nature require formal academic training as a teacher, experience as a teacher, nor a certificate to perform as a teacher. Crowd control teachers personally perform these duties; they are not assigned the obligation to plan, guide, direct, supervise and evaluate pupils who are performing these duties. Crowd control teachers do not assume the role of professional planner, director, or supervisor of pupil learning; rather, their assignments focus upon the general public pertaining to security, the sale and collection of admission tickets, and so on. Teachers simply are not trained to carry out a security function with the general public nor is such an obligation an implied duty of a public school teacher. Teachers are not uniquely suited to perform the remaining associated tasks of crowd control by virtue of the fact this Board engages nonteachers for the very same tasks.

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Recently, the New Jersey Superior Court, Appellate Division, in a per curiam opinion, addressed its view of "* * * the normal stress of public school educators" in a setting pertaining to the application for a disability pension. In Pushko v. Bd. of Trustees of Teachers' Pension, 208 N.J. Super. 141 (App. Div. 1986), Pushko was a physical education teacher who applied for a disability pension. The evidence showed Pushko had a psychiatric breakdown following three episodes with pupils, considered by the court to be traumatic. On one occasion, Pushko was brutally assaulted by a student who hit him across the mouth and then struck him over the head with a cane. On another occasion, Pushko was punched in the chest by a student who was assaulting two other students. When Pushko attempted to assist the two boys, the aggressor not only struck Pushko but threatened to get a gun and kill him. Finally, on another occasion Pushko was walking into a generally unused hallway when he came upon a group of about ten students who were egging on two boys engaged in a fist fight. Pushko broke up the fight by pushing one of the boys up against the wall and, without being aware of what he was doing, started to choke him. The court observed

> While we appreciate that many urban schools have disciplinary problems and that some of these problems are severe, we cannot conclude that having to break up fist fights in a school corridor and then suffering the physical or emotional sequelae thereof are part of the "'stress or strain of the normal work effort'" of a teacher. It may be part of the stress or strain of the normal work effort of a policeman or a security guard, but we do not regard the hazards of combat as part of the normal stress of public school educators.
>
> at p. 145.

While the issue in Pushko was of the disability pension, the observations of the court regarding the normal stresses and strains to be expected by public school teachers are equally applicable here. The risk of physical injury to crowd control personnel is real, though the duties are not inherently dangerous.

Crowd control duties are dissimilar, by comparison, to duties performed by teachers at the beginning of the school day such as taking attendance, or collecting milk money, lunch money, field trip money, and the like. Crowd control duties are also dissimilar from teachers chaperoning dances, supervising pupils at a play, concert or recital performed for parents, pupils and the general public. The former examples are simply housekeeping kinds of duties occurring during the regular school day which, while clerical and nonprofessional in their nature, must be performed and the teacher is the one best suited to perform such tasks. The latter examples are valid kinds of extracurricular

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assignments because the associated duties of the teacher are to plan, guide, direct, supervise and evaluate the participating pupils. In neither set of examples are teachers obligated to control the conduct of the general public, or to assume the role of ticket seller and collector, or to perform duties not related to their professional status. It is recognized that in the present case the Board obviously determined to invite the general public to witness interscholastic athletic competition at their facilities. While the authority of the Board to do so is not questioned, that invitation and acceptance by the general public to attend football, basketball and wrestling contests creates the need of the Board to engage crowd control personnel. But because the Board has a need to engage crowd control personnel through its determination to invite the general public to be spectators does not translate into an obligation on the part of its teaching staff members to involuntarily accept assignments which are clearly onerous and without a reasonable relationship to the extracurricular activity itself.

There is no evidence to establish that any teacher, individually or in concert with others, refused involuntary assignments by the Board to crowd control duty prior to or pending the disposition of this case. Consequently, the Board's argument that teachers are engaged in an unlawful work stoppage is clearly without merit.

In sum, I **CONCLUDE** that the crowd control duties of ticket seller, ticket collector, clock operator, announcer, official scorer, chain gang, sideline control people, security, and guides are duties outside the scope of recognized extracurricular duties. I further **CONCLUDE** that the Board's management prerogatives pertaining to major educational policy do not include the involuntary assignment of teaching staff members to crowd control duties because such duties are not within the scope of extracurricular duties. I **CONCLUDE** that the Board's determination to involuntarily assign its teaching staff members to crowd control duty is an arbitrary, capricious, and unreasonable action, without a basis in law. Finally, I **CONCLUDE** that the involuntary assignment of the teachers to crowd control duty by the Willingboro Board of Education is not a reasonable assignment because such duties are beyond the express or implied obligations of teachers. Mr. Habby's opinion pertaining to the nature and quality of training necessary for crowd control personnel need not be addressed here.

Accordingly, the Willingboro Board of Education is **ORDERED** to cease forthwith its involuntary assignment of its teaching staff members to crowd control duty and it, together with its agents, officers, and employees, are **ORDERED** to refrain from threatening in any manner any teacher who refuses crowd control duty. .

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

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

September 19, 1986
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

SEP 22 1986
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

Mailed To Parties:
SEP 24 1986
DATE

OFFICE OF ADMINISTRATIVE LAW

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EXHIBIT LIST

P-1	Deposition of Richard P. Luttrell
P-2	Petitioner's first set of interrogatories
P-3	Crowd control procedures
P-4	Photograph
P-5	Newspaper advertisement
P-6	Agreement
P-7	Resume of Kirk E. Habby
R-1	Memorandum regarding meeting with Luttrell from Merle R. Ochrach
R-2	Statement of Chester R. Closson
R-3	Newspaper reports
R-4	Memorandum, Luttrell to superintendent on crowd control workers
R-5	Memorandum, Luttrell to assistant superintendent regarding crowd control training
R-6	Transcript of depositions taken of Captain Gary Alan Owens and Sergeant William Painter
R-7	Petitioner's first set of interrogatories

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WILLINGBORO EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties pursuant to N.J.A.C. 1:1-16.4a, b and c.

Upon examination and thorough consideration of the issues and legal arguments presented in this matter, the Commissioner does not entirely agree with the determinations reached by the ALJ and therefore modifies the initial decision as explained below.

It is undisputed that the unilateral/involuntary assignment of teaching staff members to extracurricular, cocurricular, extra-classroom, as well as supervisory or non-teaching/non-professional duties is an inherent management prerogative pertaining to major educational policy. Ridgefield Park, supra; Asbury Park, supra; Ramapo-Indian Hills, supra; Mainland Regional, supra; In the Matter of Mahwah Board of Educ. and Mahwah Education Assoc., 9 NJPER 14051, January 20, 1983; In the Matter of Ridgefield Park Bd. of Ed. and Ridgefield Park Educ. Assoc., 9 NJPER 14292, October 25, 1983.

As indicated in Dallolio, supra, such activities are not limited merely to the coaching of teams in various sports but might include such responsibilities as directing, advising, sponsoring or supervising student activities. Smith, supra, states that "***pupil activities require leadership, participation, and supervision by members of the professional staff" and that teachers have the duty "***to plan, guide, direct, evaluate and supervise the extra-curricular activities of pupils." (1968 S.L.D. 62, 66) A board's right to assign is not without limit, however. As articulated in Asbury Park, supra, "***the touchstone for the exercise of such power is reasonableness. Assignments must be nondiscriminatory, related to a teacher's interests and expertise, and not require excessive hours.***" (at 506) In Smith, supra, the Commissioner determined that teachers are obligated "to perform reasonable extra-classroom duties" (at 68) and he concurred with and endorsed a number of principles from a California case as being equally applicable to schools in New Jersey. One of the principles states:

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> ***What is reasonable must necessarily depend upon the facts of the situation and the teachers are protected in that regard by the appropriate administrative and judicial procedure. Supervising the students and being present to protect their welfare at school athletic and social activities, conducted under the name and auspices of the school,***are proper [assignments] so long as they are distributed impartially, they are reasonable in number and hours of duty and each teacher has his share of such duty. [cite omitted] (emphasis supplied) (at 68)

Upon review of the facts of the situation presented in this matter, it is the conclusion of the Commissioner that it was within the management prerogative of the Board to involuntarily/unilaterally assign teaching staff members to supervise and assist in the conduct of athletic events carried out under the auspices of the district for the benefit of its student body, the community and others when it was confronted with either an absence or insufficient number of "volunteers" to enable the event to occur. It is clear from the record that the vast majority of the so-called "crowd control" duties have historically and routinely been carried out by teachers, as well as non-certificated personnel and even community members, for many years in the Willingboro District (and in other districts statewide for that matter). Consequently, the Commissioner questions why the somewhat dramatic terminology of "crowd control" has been applied to such tasks as clock operator, scorer, chain gang, ticket sales/collection, and to supervisory duties such as monitoring of lavatories, stands, bleachers to assure that school rules are not being abridged.

Notwithstanding the above, the Commissioner is in agreement with the ALJ that "crowd control duties" entailing such responsibilities as security, law enforcement, or guiding/escorting teams and referees to their vehicles to assure safety are outside the scope of recognized extracurricular duties and the Board may not, therefore, require teaching staff members to perform duties of such nature. However, he finds as too narrow the ALJ's interpretation of what constitutes a valid extracurricular assignment with respect to athletic/sporting events.

Firstly, inclusion of athletic events as part of a district's educational program is intended to benefit not only those students who are competing, but also those students who wish to "participate" in the event as spectators. That the well-being and safety of students and the correlative maintenance of order and efficiency are matters of major educational policy falling within management's exclusive prerogative was determined by the court in the case In re Byram Twp. Board of Education, 152 N.J. Super. 12 (App. Div. 1977). Thus, it is clear that a board has the inherent management right to assign staff to perform supervisory responsibilities that assure the well-being and safety of students and the maintenance of order and efficiency at the event. The fact that students from outside the school, parents and other members of the

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public attend athletic events conducted under the name and auspices of the school does not, in the Commissioner's judgment, diminish that right. Attendance by the "general public" may well present additional responsibility on the part of the board, however, to assure that sufficient numbers of police and security personnel are on hand to perform law enforcement duties which may arise and for which they are trained as the needs of the particular event appear to dictate.

Thus, to the extent that teaching personnel are expected and/or required to perform tasks beyond what may reasonably be expected of teachers, the Board is ordered to refrain from making such assignments. It is likewise ordered to refrain from having staff wear garb emblazoned with the word "Security."

As regards the involuntary assignment of staff to tasks related to the actual conduct of the game - clock operator, official scorer, chain gang, etc. - the Commissioner determines that involuntary assignment of teaching staff is within a board's management prerogative when such tasks are necessary for the game/event to occur and there is an absence or insufficient number of "volunteers" forthcoming.

It is incumbent upon the Commissioner at this point to emphasize that when faced with circumstances such as in this matter, a balance must be struck between the right of staff to be free of assignments for which they do not desire to "volunteer" and the right of the board to secure the services of teachers where necessary in order to insure that the school-sponsored event is carried out even when the responsibilities are only peripherally related to one's teaching assignment. Further, it is the Commissioner's belief that boards should make reasonable, good faith efforts to secure individuals to perform such services without having to reach to involuntary/unilateral assignments; but when a board, after expending such efforts, fails to accomplish this end, it must have the right to assign whomever it deems fit to assure that the tasks essential to an event are carried out in an orderly and efficient manner.

Accordingly, the initial decision is modified to the extent that the impropriety of involuntaily assigning teaching staff to duties rightfully deemed police or security in nature is affirmed. However, the remainder of the petition is dismissed insofar as it is within a board's right to assign and it is reasonable for teaching staff to perform duties essential/necessary to the conduct and supervision of extracurricular events carried out under the name and auspices of the school.

COMMISSIONER OF EDUCATION

October 31, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 4098-86
AGENCY DKT. NO. 198-6/86

LAKEHURST BOARD OF EDUCATION,
Petitioner,
v.
BOROUGH OF LAKEHURST,
Respondent.

Kenneth B. Fitzsimmons, Esq., for petitioner (Sinn, Gunning, Fitzsimmons, Cantoli, West & Pardes, attorneys)

Mark S. Ruderman, Esq., for respondent

Record Closed: August 22, 1986 Decided: September 24, 1986

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

The Lakehurst Board of Education (Board) appeals from an action taken by the Borough Council of Lakehurst (Borough) under N.J.S.A. 18A:22-37 by which the Borough certified to the Ocean County Board of Taxation a lesser amount of appropriations for current expense school budget purposes for the 1986-87 school year than the amount the Board proposed in its budget which was rejected by the voters on April 15, 1986.

The matter was transmitted to the Office of Administrative Law on June 23, 1986, as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. After notice, a prehearing conference was held on July 18, 1986. The matter was set down for hearing on September 26, 1986. However, in view of the relatively small amount in dispute, the parties entered settlement discussions. On July 15, 1986, the Board moved for summary judgment in its favor. On August 22, 1986, the Borough filed papers in opposition to the motion for summary judgment and its own motion to amend its answer herein.

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Certain facts are not in dispute and reveal the context of the case. On April 15, 1986, the Board submitted a referendum to the voters of the Lakehurst School District for approval of $772,760 as the tax levy for current expenses for the school year 1986-87. The Board sought no monies at referendum for capital outlay. The proposed budget was rejected by the voters.

On October 17, the Board, pursuant to N.J.S.A. 18A:22-37, forwarded its budget to the Borough. A meeting was held on May 8 at Borough offices so that the Borough might fulfill its duty to consult with the Board in accordance with N.J.S.A. 18:22-37. At that meeting, the Borough presented the Board with a letter dated May 8, 1986, entitled "Recommendation For Reduction In 1986-87 School Budget."

On May 13, the municipal clerk, on behalf of the Borough, filed a Certificate and Report of School Taxes (1986-87 School Year) with the Ocean County Board of Taxation.

On the same day, the Board adopted a resolution by unanimous vote authorizing filing of the present petition. The Board's counsel than filed a petition with the Commissioner of Education seeking restoration of $110,250, the entire amount by which the Borough had reduced the budget.

The Borough timely filed an answer to the petition before the Commissioner. The record developed so far shows no statement by the Borough of its underlying determinations and supporting reasons for the reductions in the school budget or an itemization of such reductions on a line item basis.

BOARD'S ARGUMENTS

The Board maintains that N.J.S.A. 18A:22-37 requires the governing body to determine the amount necessary for each item in the budget to provide a thorough and efficient education. The governing body must substantiate its assessment of the school budget and its determinations must be independently reached, properly relating to educational considerations rather than voter reactions. Bd. of Ed., E. Brunswick Tp. v. Tp. Council, E. Brunswick, 48 N.J. 94, 105-106 (1966).

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In the present case, the Borough failed to make an item-by-item determination of the amounts required for the school budget by the statutory cutoff date. By the Borough's own admission, no resolution making such a determination was adopted by the Borough. Borough's answer, para. 4. The Board submits with its papers the certifications of its chief school administrator, Board secretary and Board president, all of whom were present at the May 8 meeting. These certifications tend to show that the Borough failed to provide a detailed statement setting forth its underlying determinations and supporting reasons for the reductions. The Borough's letter of May 8 simply focuses on tax rates and tax increases. It does not address any line item of the budget.

The Board also asserts that the Borough has failed to follow the required procedures in a budget appeal as well as failing to recommend specific economies together with supporting reasons. As stated in East Brunswick, at 106:

> Where its [the governing body] action entails a significant aggregate reduction in the budget and a resulting appealable dispute with the local board of education, it should be accompanied by a detailed statement setting forth the governing body's underlying determination and supporting reasons. This is particularly important since, on the board of education's appeal under R.S. 18:3-14 [now, N.J.S.A. 18A:22-26], 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.

The Board acknowledges that it must carry the burden of proof in a budget appeal. Bd. of Ed. of Manville v. Mayor and Council of Manville, 1970 S.L.D. 285, 288. However, the regulations require that the answer to the petition set forth certain specifics so that the Board may meet that burden of proof. Where the governing body fails to file an answer adequately setting forth its determinations, the Commissioner has restored the budget originally proposed by the Board. Bd. of Ed. of East Newark v. Mayor and Council of East Newark, 1978 S.L.D. 801; Bd. of Ed. of Haledon v. Mayor and Council of Haledon, 1970 S.L.D. 70, aff'd St. Bd., 1970 S.L.D. 75.

In the present case, the Borough has failed to file a formal answer in the format required by N.J.A.C. 6:24-1.1, setting forth admissions or denials of the allegations of the petition. Consequently, the Borough has defaulted in this action. The inadequacy of the Boroughs's reply to the petition, coupled with the Borough's failure to independently

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determine the reduction based on educational considerations only, clearly establishes that the Borough has acted arbitrarily.

BOROUGH'S ARGUMENTS

The Borough urges that summary judgment is not appropriate in this matter. Citing the signal case of Judson v. People's Bank and Trust Co. of Westfield, 17 N.J. 67 (1954), the Borough urges that I follow the court's holding:

> [The] role of the judge . . . is to determine whether there is a genuine issue as to a material fact . . . . The standards of decision governing the grant or denial of the summary judgment emphasize that a party opposing a motion is not to be denied a trial unless the moving party sustains the burden of proof clearly showing the absense of a genuine issue of material fact . . . .

All inferences of doubt are drawn against the moving party.

The Judson principle has been applied in education cases in Wyckoff Education Ass'n. v. Wyckoff Bd. of Ed., 1981 S.L.D. 1128 and Jenkins v. Tp. of Morris, 1969 S.L.D. 27.

The Borough does not believe that the cases cited by the Board support the Board's position. A review of East Newark and Haledon supports the Borough's position rather than the Board's. In Haledon, the Commissioner found that when the municipality filed its "information submitted by governing body" because it failed to show which item of the budget should be used for what reason, that served as significant grounds to indicate that the Board's motion for summary judgment should be granted. The Commissioner noted that not only did the borough fail to submit the required information to the petitioner, it failed to submit such information to the Commissioner for his determination.

Should the present case not be amicably resolved, the Borough intends to file the detailed informational statement with the Commissioner of Education specifying its "underlying determinations and supporting reasons" for the reduction in each of the line

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items discussed at the May 8, 1986 meeting. Therefore, there is a significant distinction between the Haledon decision and this case.

East Newark provides even more support for the Borough's position to deny the motion. The motion in East Newark was granted because of the following deficiencies on the part of the Borough:

1. The Borough failed to file the answer together with proof of service with the Commissioner and petitioner, pursuant to N.J.A.C. 6:24-7.4.

2. The Borough's counsel failed to appear for the scheduled conference of counsel.

3. The Commissioner and his representative attempted to contact the Borough's counsel, without success, by letter and telephone on six different occasions.

4. The mayor and council did not acknowledge the Board's notice of motion for summary judgment, and

5. The Borough did not appear at the motion for summary judgment oral argument.

Based on these two cases, it is clear that the motion should be denied. However, there is additional support for the Borough's request that the motion be denied. As discussed in Judson, there must be no genuine issue as to a material fact. Further, all inferences of doubt are drawn against the party, not the maker of the motion. In this case, the Board was informed, in writing, of the line item-by-line item reduction sought by the Borough. Furthermore, orally, the Borough informed the Board as to the rationale for its cuts for each line item. Therefore, there certainly exists a genuine issue of material fact. Accordingly, the motion should be denied.

The Board also moves to be allowed to amend its answer.

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DISCUSSION AND DETERMINATION

The pertinent parts of N.J.S.A. 18A:22-37 provide:

> If the voters reject any of the items submitted at the annual school election, the board of education shall deliver the proposed school budget to the governing body of the municipality, or of each of the municipalities included in the district within 2 days thereafter. The governing body of the municipality, or of each of the municipalities, included in the district shall, after consultation with the board, and by April 28, determine the amount which, in the judgment of said body or bodies, is necessary to be appropriated, for each item appearing in such budget, to provide a thorough and efficient system of schools in the district, and certify to the county board of taxation the totals of the amount so determined to be necessary . . . .

On May 8, 1986, the Mayor wrote a recommendation for reduction in the 1986-87 budget. Petitioner's exhibit A. The letter contains comments and recommendations that recognize the projected tax increase and requests a reduction of $110,250 from the proposed budget. It closes with a request that the Board look "first to those items which may be deferred, reduced, or eliminated for this year which do not bear directly on the educational programs. . . ."

N.J.A.C. 1:6-11.1(a) provides:

> Within 10 days of receipt of the notice of hearing, the governing body shall forward to the judge assigned to hear the case a copy of the information which was given to the district board of education when the reduction was made, including the following documents:
>
> 1. If changes were made to the operating budget, a copy of the line item budget detailing the specific reductions were effectuated by the governing body; a copy of the statement of supporting reasons for each of these reductions; and a certification stating the date on which these documents were originally given to the district board of education;
>
> . . . .

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Although recently recodified, these rules have been in place and known to municipalities for many years. The authority for these regulations flows from East Brunswick.

In addition to the above undisputed facts which are hereby adopted as findings of fact, I also **FIND** that budget hearing rules and case law require the governing body to determine the amount that, in its judgment, is necessary to be appropriated, for each line item appearing in the budget to provide a thorough and efficient system of schools in the district. When the Borough in this case decided to make a reduction of $110,250, it did not supply a detailed statement of reasons for that reduction. Union Tp. Bd. of Ed. v. Tp. of Union, OAL DKT. EDU 2788-81 (June 5, 1981), adopted with modification on other grounds, Comm'r of Ed. (July 9, 1981), and Keansburg Bd. of Ed. v. Borough of Keansburg, OAL DKT. EDU 6000-82 (Sep. 17, 1982), adopted Comm'r of Ed. (Oct. 29, 1982) clearly indicate that restoration of all reductions is appropriate on the facts in this matter.

I **FIND** that the mayor's request of May 8, while by no means improper prior to the meeting between the two bodies required by statute, can by no stretch of the imagination satisfy the requirement that the governing body submit a detailed statement, setting forth its determinations and supporting reasons, when it makes a significant reduction in the budget.

After review of the record in this matter and in consideration of the clear guidance in statute and case law, I **CONCLUDE** that the failure of the Borough of Lakehurst to submit its supporting reasons for reductions made in the line item budget at the time the reductions were made is fatal to the Borough's defense of this appeal.

The Board's motion for summary judgment must be **GRANTED**.

Accordingly, it is **ORDERED** that the amount of $110,250 be restored forthwith to the current expense portion of the Lakehurst Board of Education budget for the 1986-87 school year, and that this additional amount be certified to the Ocean County Board of Taxation as the additional amount in appropriations necessary for school purposes for 1986-87, so that the total tax levy for the current expense of the school district shall be $872,583.

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

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

24 SEPTEMBER 1986
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

SEP 25 1986
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

Mailed To Parties:

SEP 29 1986
DATE

Ronald L. Parks/as
OFFICE OF ADMINISTRATIVE LAW

ds/e

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BOARD OF EDUCATION OF THE BOROUGH OF LAKEHURST,

PETITIONER,

V.

BOROUGH COUNCIL OF THE BOROUGH OF LAKEHURST, OCEAN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

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

The exceptions filed by the Borough Council to the initial decision and the Board's reply are deemed to be timely pursuant to the applicable provisions of N.J.A.C. 1:1-16.4a, b and c. The Borough Council's sole exception to the initial decision reads in pertinent part as follows:

> ***[T]he Borough was unable to comply with N.J.A.C. 1:6-11.1(a) because the Lakehurst Board of Education refused numerous requests by members of the Lakehurst Borough Council for supporting documentation for every one of the requested line items that were later reduced by the Borough. The Borough orally discussed with the Lakehurst Board of Education the line items which it sought to reduce, providing supporting rational (sic). Such discussion was not reduced to writing because the requested information was not forthcoming from the Board of Education so that the Borough could strictly comply with N.J.A.C. 1:6-11.1(a). Certainly, the Lakehurst Board of Education cannot now hide behind N.J.A.C. 1:6-11.1(a) to secure a Summary Judgment motion when it in fact caused the Borough to not comply with the regulation. In essence, the Borough is asserting that the Board may not proceed with such a motion with "unclean hands".*** (Borough Council's Exceptions, at p. 2)

The Board rejects the argument raised in the exceptions to the initial decision on the grounds that there is no allegation contained within the answer to the pleadings to indicate that the Board failed in its statutory or regulatory responsibilities to cooperate with Borough Council.

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Upon review of the respective positions of the parties, the Commissioner is not persuaded by the argument advanced by the Borough Council that the ALJ erred in granting summary judgment in the Board's favor.

It is clear that the Borough Council failed to comply with the precise provisions of N.J.S.A. 18A:22-37, N.J.A.C. 6:24-1.1 and N.J.A.C. 1:6-11(a) in failing to recommend specific economies, together with its supporting reasons, for the $110,250 local tax levy reduction in current expense appropriations of the 1986-87 budget. Such failure to take appropriate action in this regard is contrary to the Court's mandate in East Brunswick, supra.

The findings and conclusions in the initial decision are affirmed and the Board's motion for summary judgment is granted with one modification. The last paragraph of page seven of the decision indicates "that the total tax levy for the current expense of the school district shall be $872,583." This is corrected to read "that with the restoration of $110,250, the 1986-87 current expense tax levy shall be $772,760.00."

Accordingly, the Ocean County Board of Taxation is hereby directed to include in the local tax levy an amount of $110,250 for current expense school purposes during the 1986-87 school year in the School District of the Borough of Lakehurst. This amount when added to the amount previously certified by the Borough Council shall total $772,760 in current expenses to be raised by local taxation for the 1986-87 school year.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1702-86
AGENCY DKT. NO. 39-2/86

RICHARD A. HUSSNATTER,
Petitioner,
v.
BOARD OF EDUCATION OF THE
TOWN OF NEWTON, SUSSEX COUNTY,
Respondent.

Richard A. Hussnatter, petitioner, pro se

Robert M. Tosti, Esq., for respondent (Rand, Algeier, Tosti, Woodruff & Frieze, attorneys)

Record Closed: September 11, 1986 Decided: October 7, 1986

BEFORE STEPHEN G. WEISS, ALJ:

The petitioner in this matter, Richard A. Hussnatter, is a resident of Newton who challenges the respondent's, Board of Education (Board), decision to reorganize its two elementary schools, effective September 1986. It is Hussnatter's contention that the Board's action of January 21, 1986 in voting to approve the reorganization was taken without sufficient consideration of all pertinent factors, and that the Board had not received a proper presentation of all relevant facts from the administration. After the Board filed its answer denying the essential allegations of the petition; the matter was then transmitted as a contested case to the Office of Administrative Law on March 13, 1986, pursuant to the provisions of N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. A prehearing conference was conducted before the undersigned on April 16, 1986, and in a prehearing order dated April 24, 1986, the following two issues were identified:

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(1) Does petitioner have standing to bring this action?[1]

(2) Was the Board's determination to reorganize its elementary schools, effective September 1986, arbitrary, capricious or unreasonable and, if so, to what relief is petitioner entitled?

Thereafter, petitioner moved for a stay of the reorganization plan, pending a final decision. The Board opposed the application and countermoved for summary decision. On June 27, 1986, I entered an order denying both motions. No interlocutory appeal was taken by either party from that determination.

A plenary hearing was conducted on August 11, 1986 at the Sparta Municipal Building, Sparta, New Jersey. At the outset of the hearing, petitioner sought to raise an additional issue regarding alleged violations by respondent of the Open Public Meetings Act (OPMA). I sustained the Board's objection to petitioner's right to pursue a claim not previously raised in the proceedings and not based upon any new facts of which petitioner previously was unaware.[2].

Prior to the taking of testimony, the parties agreed to the admission in evidence of a variety of documents (Exhibit J-1). They include the following items: (1) Minutes of the Newton Board of Education redistricting committee meeting, October 25, 1976; (2) Memorandum to Newton Board of Education from Harry H. Selover, March 24, 1977; (3) Memorandum to Newton Board of Education from Harry H. Selover, April 12, 1977; (4) Memorandum to Newton Board of Education budget committee from Harry H. Selover, December 23, 1985; (5) Letter to parents of Newton public school students from Harry H. Selover, Roberta Watson and John W. Hannon, January 10, 1986; (6) Minutes of the executive session of the Newton Board of Education, January 7, 1986; (7) Report on Board committee meeting from Edward Corbett, January 11, 1986; (8) Letter to parents of

[1]At the hearing respondent stipulated that petitioner had standing to bring this action. Thus, this issue was removed from further consideration in the case.

[2]Petitioner continued to press an OPMA claim in his posthearing brief. Respondent protested this effort. I have determined to continue to reject consideration of any issue not raised in the pleadings.

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Newton public school students from Harry H. Selover, January 17, 1986; (9) Proposed elementary school reorganization plan, Newton public schools, January 13, 1986; (10) Memorandum to Newton Board of Education from Harry H. Selover, January 20, 1986; (11) Letter to parents of Newton public school students from Harry H. Selover, January 23, 1986; (12) Statement of Mr. Baldini re motion to approve reorganization plan, January 21, 1986; (13) Memorandum to staff from John W. Hannon, January 29, 1986; (14) Letter to transportation committee from Harry H. Selover, March 4, 1986; (15) Memorandum to transportation committee from Harry H. Selover, March 20, 1986; and (16) Article entitled "Middle Schools Take Root."

TESTIMONY ON BEHALF OF PETITIONER

Petitioner presented two witnesses on his behalf, both of whom were Board members during January 1986 when action was taken by respondent to reorganize its two elementary schools. Ms. Evelyn Blake first became aware of the reorganization plan at an executive session meeting held on January 7, 1986. She did not recall the subject being discussed before then by the Board. The minutes of that session contain a notation that "[t]he reorganization of the elementary schools was discussed." They further note that "[t]he consensus of the Board was to go for the option as presented by the Superintendent which would include the reorganization of the elementary schools" (Exhibit P-5). The "option" to which the minutes refer had to do with the Board's proposed 1986-87 budget and the role of reorganization in it. When the Board voted on January 21, 1986 to approve reorganization of the schools as of September 1986, there was, as far as Blake could determine, no community opposition to it. However, she abstained because she did not feel as if she had enough information pertaining to the transportation ramifications of the plan. Subsequently, a transportation committee was appointed to consider that aspect of the reorganization.[3]

[3]At the request of the court following the conclusion of the hearing, minutes of the meetings of the Board of Education of January 13, 1986 and January 21, 1986 were provided. They have been marked as Court Exhibits -1 and -2, respectively. The minutes of January 21, 1986 contain a reference to the adoption by the Board of a motion to reorganize the district's elementary schools effective September 1986. The vote was five in favor, two opposed and one abstention.

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The second witness was Ms. Jeannette Zangerle. She, too, is a member of the Newton Board and, like Ms. Blake, first learned of the reorganization during the executive session on January 7, 1986. According to Zangerle, Dr. Selover sent a letter dated January 10, 1986 to parents regarding the plan (see attachment to Exhibit J-1) and she received many telephone calls the next day and thereafter about it. There was no prior Board discussion as to how the reorganization plan was to be presented to the public. She believed that teachers were advised of the proposal on January 8, 1986, and on that same date she spoke to Dr. Selover in order to be sure that appropriate information was published in a local newspaper so that the public could be informed in that matter. Ms. Zangerle said that if it had been up to her, she would have seen to it that more time was devoted to studying the situation. This is what occurred when the Board previously considered reorganization in 1976-77. Transportation remained a matter of major concern when the Board acted on January 21, 1986, and there was no final decision as to which students would be bused and which would not. Thus, the minutes of that meeting reflect that Zangerle voted against the motion "due to procedural process" (Exhibit C-2). However, in view of further activities taken subsequent to the Board's action, she said she now would vote in favor of the plan. Further, according to Zangerle, although the agenda for the Board meeting of January 13, 1986 had originally anticipated that a vote to approve the reorganization plan was expected to be taken that very night, action on the motion was changed from "approve" to "discuss" by the Board president.

In general, the witness said she was surprised at the speed with which the matter was moved forward, given the lack of what she believed to be appropriate background at the time the action was taken. Nevertheless, a majority of the Board did agree that the plan should be adopted for implementation in September.[4]

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[4]The other "no" vote was cast by Mr. Baldini who prepared a statement containing his reasons for that position. A copy of that statement is included as an attachment to Exhibit J-1.

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TESTIMONY FOR RESPONDENT

Five witnesses testified on the Board's behalf, the present Board president, the superintendent of schools and three Board members, including Mr. Harry Graham, the Board president in January 1986 when reorganization was discussed and adopted.

Edward Corbett has been a Board member for the last four years and presently serves as its president. He was present at the special meeting of January 13, 1986, when the first public discussion of the reorganization plan took place. There were 125 or more persons present and a good deal of discussion was generated over the transportation aspects of the proposal. Corbett was a member of the budget committee during the 1985-86 school year and said that the committee discussed school reorganization plans during that school year in connection with the budget proposal. That committee reviewed Dr. Selover's recommendations and concluded that the reorganization proposal was a sound one since it kept the Board within budget limitations and was educationally desirable. Most of the concerns had to do with busing, and the committee, Dr. Selover and eventually the Board majority believed there would be ample time for a transportation committee to be organized to work on that area. Corbett reiterated that the Board discussed the plan at its executive session on January 7, 1986, and that the public was made aware of it by virtue of the two public meetings held on January 13 and January 21, 1986, together with an article in the local newspaper.[5] The Board, he said, saw no reason to seek outside help with respect to the proposed reorganization since it felt it could rely upon the advice of Dr. Selover whose particular expertise was in the precise area of curriculum.

Greta Kemether has been a board member for over six years. During 1976-77, she was a member of a citizen's group which had discussed school redistricting and reorganization. Although the Board ultimately redrew school attendance lines at that time, it did not take any steps toward grade level reorganization because of

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[5]An article captioned "Newton weighs school reoganization" was published in the Sunday Herald on January 12, 1986 (Exhibit R-1).

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transportation concerns. The next time she was made aware of possible school reorganization was when the subject was referenced in Dr. Selover's professional improvement plan at the end of the 1984-85 school year. The discussions in committee were rather limited in nature, and related directly to the desire to effect cost savings in the district. However, the consensus was in favor of reorganization. Ms. Kemether recalled that at both the January 13 and January 21, 1986 public meetings, there was no "negative feedback," although there was a good deal of comment received from the public concerning safety. To that end, the Board created a transportation committee to look at that problem. Kemether saw no reason to have created a special committee to look at school district reorganization since the Board had done this in the late 1970s and there was no need to do it again. As a result of the new reorganization, money will be saved in the area of special education because preschool handicapped children will now be housed within the district and no transportation will be required for that area.

Terry Iliff, another Board member who testified on respondent's behalf, also recalled that a good deal of activity took place during 1976-1977 with respect to possible reorganization. At that time cost and transportation concerns were the major issues. Once the Board moved forward in January 1986 and adopted a reorganization plan, there was no "negative input." Although some comments were made about the Board's moving quickly, all agreed that the reorganization was educationally desirable and the creation of a committee to look into the specifics of transportation was a valuable move. It was Iliff's judgment that ample opportunity was given to the public to express whatever concerns they might have regarding the plan, and that those concerns were made known to the Board at the two public meetings.

The fourth Board member to testify was Harry Graham. He was the president during January 1986 when the motion to adopt the reorganization passed. According to Graham, the budget committee had considered possible reorganization as part of its work in 1985-1986 and once the project moved forward, no criticism was expressed to him that the Board was moving too fast. He also recalled that the subject of reorganization was discussed from time to time between 1977 to 1986, but could not be specific about those

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events. Like Kemether, Graham felt that no purpose would be served in creating yet another committee to look into school reorganization. The move was both financially and educationally desirable and the Board decided to act.

The major witness on behalf of respondent was Dr. Harry H. Selover who has been the Superintendent of Schools in Newton since July 1985. He had been employed in the district for many years before then, having served for seven years as Deputy Superintendent of Schools and for five years before that as Assistant Superintendent in charge of Research and Planning. Previous to that, he was a principal, a vice principal and a teacher.

Dr. Selover described Newton as a town of approximately 7,700 persons with the lowest equalized value per pupil in the county. It is not a wealthy community. Nevertheless, he felt that the town was a "leader" in municipal services and a "model small town." He proudly opined that the district is a "solid" one, a "lighthouse" school district.

With respect to reorganization, Dr. Selover recalled that this was a subject which first began to be considered, as far as he knew, as early as 1968 when Hampton Township withdrew its pupils from Newton. The item was then put on a "back burner" until 1976 because of the cost of transportation which might be involved. However, in that year, the matter was brought up again because one of the schools (Merriam Avenue) was underutilized and the other (Halsted Street) was overutilized. As a result of that inquiry, a redistricting was effected in September 1977 whereby school attendance lines were redrawn. Approximately one third of the pupils then went to Halsted, which was organized on a K-6 basis, and the remainder went to Merriam, which was organized on a K-8 basis. As he put it, the school attendance lines had to be gerrymandered in order to equalize the school population. Over the next several years, the subject of school reorganization was constantly under informal consideration. By 1986, he felt that since reorganization was educationally desirable it ought to be effected. Although busing was obviously going to be a problem, Selover took the position that transportation should not be permitted to be a "stumbling block" standing in the way of the reorganization. He

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feels strongly that a 5-8 grade level model is very desirable since the "junior high school" has problems. In short, since reorganization was both educationally sound and financially feasible, he felt it should be adopted. Thus, he specifically referred to the item in his proposed 1985-1986 professional improvement plan. Thereafter, the budget committee looked at school reorganization and reported on it to the full Board at the executive session on January 7, 1986. The plan was then discussed and there was a consensus reached in favor of it. Essentially, the reorganization involves conversion of the Merriam Avenue School from a K-6 to a K-4 school, and conversion of Halsted Street School from K-8 to 5-8. Following the Board's expression of approval at the executive session on January 7, 1986, Selover met with staff at the schools and drafted a letter to go out to parents. This letter was given to the children to take home on January 10. It informs parents that the Board intended to consider reorganization at a special meeting scheduled for January 13, 1986, that the recommendation would involve the grade level adjustments noted above and it was the strong feeling of the administration that the plan would foster both educational improvement and cost savings.

On the evening of January 13, 1986, the Board first convened at its offices but then moved to the Halsted Street School auditorium because of the large crowd. Although there originally was an intent to approve the reorganization that very night, the Board president or Selover (he could not recall which) decided to modify the proposed action to a "discussion" rather than "approval" as such. According to Selover, there were approximately 150-200 persons present that night and the discussion took place over a period of more than two hours. A question and answer handout also was distributed and there was a lot of "give and take" that night. The meeting was adjourned to be reconvened on the evening of January 21, 1986.

Thereafter, on the evening of January 21, 1986, the Board reconvened the meeting at its offices and again moved to the Halsted Street School. According to Dr. Selover, there were fewer people at the meeting that evening. He recalled that perhaps 50-60 persons came and that some of the questioning to the Board was repetitious. After about three quarters of an hour to one hour of discussion, the Board passed the following motion:

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> On a motion of Mrs. Kemether, seconded by Mrs. Iliff and duly approved, the Board approved the reorganization of the district's elementary schools, effective September, 1986, so that the Merriam Avenue School will serve all of Newton's children in grades kindergarten through grade 4 and the Halsted Street School will serve the children in grades 5-8, and the establishment of Citizen Advisory Committees for transportation and instructional resources. (Exhibit C-2.)

Following adoption of the motion, the Board subsequently implemented the establishment of three committees, a "community resource committee" in each school and a transportation committee headed by Dr. Selover. Several meetings were held thereafter by the committees. The transportation committee devoted a good deal of discussion to the implication of busing arising out of the reorganization and the final decision as to transportation was ultimately left up to the Board following the presentation of a report to the Board in June 1986. In July 1986, the Board made a final decision regarding transporation.

According to Dr. Selover, to "undo" the reorganization at this time would result in serious problems. The vocal music room can no longer be used at the Halsted Street School and there would be no available room for prekindergarten handicapped pupils there either. This would result in again having to transport these children to out of district locations. In addition, major curriculum changes would have to be made in view of the fact that the grade levels have been altered.

On cross-examination, Dr. Selover reiterated that neither he nor the Board felt there was any need to create another study committee with respect to school reorganization because all of the groundwork had been done in the 1970s and the problem remained the same—how to deal with transportation of pupils. Rather, it was his opinion and that of a majority of the Board that the most appropriate course of action would be to move forward immediately with a reorganization plan which made fiscal and educational sense. During the interim, between January and September 1986, the transportation problem would be attacked through the committee format. Since the Board had ample information before it by January 21, and felt that the public had been given sufficient opportunity to provide input, there was no reason to delay any longer.

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FINDINGS OF FACT

Based upon my review and consideration of the evidence and the testimony in this matter, I make the following Findings of Fact:

1. Petitioner, Richard Hussnatter, is a resident of Newton and the parent of children attending the Newton Public Schools.

2. The respondent, Newton Board of Education, is charged with the duty and obligation of managing and administering the school district in which petitioner resides and where his children attend school.

3. During the period 1976-1977, the Board considered the question of school reorganization and realignment of school attendance zones. At that time, the Board determined to redraw school attendance lines but no action was taken on potential reorganization of the two elementary schools. As a result, the grade levels of the two schools remained as follows: Merriam Avenue School (K-6) and Halsted Street School (K-8).

5. Between 1977 and 1985, informal consideration of possible school district reorganization was discussed intermittently by members of the school administration, if not the Board. However, no formal process was developed whereby the public was involved in any such discussions.

6. At the end of the 1984-1985 school year, the Superintendent of Schools, Dr. Harry H. Selover included in his goals and objectives for 1985-1986 a desire to effect a reorganization of the district's two elementary schools in order to have one school serve pupils in grades K-4, and the other grades 5-8. Dr. Selover was of the opinion that such grade level organization was superior to that presently existing in the school district and, in particular, that the middle school concept was particularly desirable.

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7. During the fall of 1985, members of the Board's budget committee considered school reorganization in connection with their development of a 1986-1987 school budget.

8. In a memorandum dated December 23, 1985, Dr. Selover advised the members of the budget committee that in his opinion serious consideration should be given to restructuring the two elementary schools since this would save the school district approximately $90,000 in salary and tuition costs, coordinate the K-8 curriculum and provide a vocal and second resource room at the Halsted Street School. Thereafter, in advance of a meeting held by the Board on January 7, 1986, Dr. Selover provided the members with additional information including what he believed to be the advantages if the schools were reorganized. He now estimated that the net saving to the Board would be in the neighborhood of $55,500, which essentially would be realized by reducing staff and by maintaining an in-district preschool handicapped program.

9. On the evening of January 7, 1986, at an executive session of the Board of Education, the members present, constituting a majority of the Board, discussed reorganization and the majority felt that this should take place effective September 1986. As a result, the superintendent was instructed to provide the public with notice of the Board's intent and that the Board would consider the question at a special meeting to be held on January 13, 1986.

10. In a memorandum dated January 10, 1986, which was given to pupils to take home to their parents, the superintendent and the principal of each of the two elementary schools informed parents that the Board intended at a special meeting to be held on January 13, 1986, to consider reorganization of the elementary schools. In that memorandum, parents were advised of the specifics of the proposed change and that it was the opinion of the

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administration that the plan would permit the Board to provide a better and higher quality education to their children. Parents were invited to attend the scheduled meeting to express their views.

11. On January 12, 1986, an article was published in the Sunday Herald captioned "Newton weighs school reogranization."

12. A special meeting of the Newton Board of Education was convened on the evening of January 13, 1986, at the Halsted Street School and 150 or more persons were in attendance. The minutes of the meeting reveal that there was "a lengthy discussion" on the subject of school reorganization.

13. On January 17, 1986, the superintendent dispatched another memorandum to parents regarding the question of school district reorganization. In it he advised parents that it was the intention of the Board to make a final decision at the meeting scheduled for the evening of January 21, 1986. Attached to that memorandum was a three-page question and answer format document which addressed issues surrounding school district reorganization. It included specifics of the proposed plan and noted that in the judgment of the administration the plan was both educationally and fiscally advantageous.

14. On January 20, 1986, Dr. Selover provided the members of the Board with a confidential memorandum in which he noted that in his opinion the result of the meeting of January 13, 1986, seemed to indicate a positive feeling by the members of the public towards the reorganization plan. He advised that the two school principals and he were convinced that reorganization should no longer be delayed and that the concern regarding busing could be dealt with once the essential decision had been formalized.

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15. On the evening of January 21, 1986, the Board convened to continue the meeting of January 13 which had been adjourned. Following discussion on motion of Ms. Kemether, seconded by Ms. Iliff, the Board adopted a reorganization plan for its two elementary schools, effective September 1986, whereby the Merriam Avenue School would serve all children in grades kindergarten through four, the Halsted Street School would serve children in grades five through eight and that citizens advisory committees for transportation and instructional resources would be established. The vote on the motion was five in favor, two opposed (Ms. Zangerle and Mr. Baldini), one abstention (Ms. Blake), and one absence. The vote cast by Ms. Zangerle was predicated upon her belief that not enough time had been provided to the public respecting the reorganization. As of the time of this hearing on August 11, 1986, Ms. Zangerle would now vote for reorganization.

16. The other Board member who voted against the plan, Mr. Baldini, set forth his reasons for that opposition in a written statement. He noted that information made available to the Board, the community, the teachers, parents and students was insufficient and had been "very poorly presented to all concerned." He felt that since questions continued to persist with regard to busing, cost, staffing, curriculum changes and the like, additional planning was needed.

17. Following the Board's adoption of the reorganization plan on January 21, 1986, to become effective September 1986, "community resource" committees were organized at both the Halsted Street and Merriam Avenue schools. In addition, a transportation committee was created and between March and June 1986, these committees met to discuss relevant matters of concern. In June 1986, the transportation committee reported its discussions to the Board. In July 1986, the Board voted with respect to the particulars of the transportation aspects of the reorganization plan.

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For the reasons stated, we find that, in hiring and removing its General Counsel, the Newark Board of Education must conform with the statutory mandate of N.J.S.A. 18A:17A-5(c) and that, therefore, its actions in discharging its General Counsel and hiring a new General Counsel without recommendation from the Executive Superintendent were improper. At the same time, we emphasize that, pursuant to that provision, the Executive Superintendent has a statutorily mandated responsibility to make recommendations to the Board on these matters and that, pursuant to N.J.S.A. 18A:17A-3, he must report to the Board as directed and perform the duties prescribed by the Board.[7]

We further find, as previously indicated, that so far as the specialized nature of General Counsel and the Office of the General Counsel makes them amenable to supervision, they are subject to the Executive Superintendent's supervisory authority under N.J.S.A. 18A:17A-3. However, we reiterate that the legal services provided by the General Counsel and his staff must be available to the Board, as well as to the Executive Superintendent, and we find that it is part of the Executive Superintendent's supervisory responsibility to assure that the Board has access to those legal services.

Further, we conclude that the Executive Superintendent's supervisory authority does not preclude the General Counsel and his staff from rendering legal services directly to the Board or from responding to requests from the Board. We do not consider such activities to conflict with the reporting relationship between the General Counsel and the Executive Superintendent. Here again, a basic premise of the statutory scheme is that the Board and Executive Superintendent will work cooperatively and that the Executive Superintendent will assure that the Board has access to the services it requires. Thus, the proper supervisory role in this

[7]As indicated above, we believe that the Executive Superintendent's responsibility to implement Board policy and to act under the direction of the Board includes the duty to make appropriate recommendations to the Board on matters within the scope of N.J.S.A. 18A:17A-5(c). Accordingly, when the General Counsel's annual contract expires, the Executive Superintendent would be expected to make his recommendation, thereby enabling the Board to exercise its authority under N.J.S.A. 18A:17A-7. Further, although the Board's ability to act during the contract term is limited to some degree, we find that if good cause for termination of the General Counsel arose, it would be incumbent on the Executive Superintendent to bring the matter before the Board. If the Executive Superintendent fails to meet his responsibilities, including those in the areas we have specified, we note that the Board appropriately could exercise its authority under N.J.S.A. 18A:17A-1 and -7, and could terminate him.

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who did appear were given the opportunity to speak to the Board before the official vote was taken. The Board recognized that the major concern had to do with busing and to that end directed the creation of a committee specifically to explore that issue. This was accomplished and meetings of the committee were held over the next few months. Ultimately, its input was provided to the Board in June 1986 and the Board took action in July 1986 to deal with the busing arrangements that were necessitated by the new plan.

The question, then, is whether or not in carrying out this scenario a violation of law took place by the Board with respect to its adoption of the reorganization plan. Based upon my analysis of the facts, and in light of other cases in this area, I believe that the Board's action, while hasty, should be upheld.

I note at the outset that petitioner stipulated he does not challenge the educational soundness of the plan. However, he has vigorously challenged what he believes to have been a serious violation of his rights, and the rights of other members of the public, to have had time to consider the proposal and to have a fair opportunity to provide input to the Board about it.

It is well settled that it is neither the province of an administrative law judge nor the Commissioner to substitute their judgment for that of a board in the area of discretionary decision-making. It is the local board which is vested by law with the authority to determine how best to manage and administer its schools, including how they should be organized. N.J.S.A. 18A:11-1. Board action, once taken, is presumed to be correct. See, e.g., Boult and Harris v. Bd. of Ed. of Passaic, 1939-40 S.L.D. 7, aff'd 135 N.J.L. 329 (Sup. Ct. 1947), aff'd 136 N.J.L. 521 (E. & A. 1948); Thomas v. Morris Tp. Bd. of Ed., 89 N.J. Super. 327 (App. Div. 1965), aff'd 46 N.J. 581 (1966).

A leading case in the area of school district reorganization which dealt with the question of the degree to which public participation is required in the process is Zimmerman v. Bd. of Ed. of the Tp. of Denville, OAL DKT. EDU 6493-81 (Feb. 2, 1982), aff'd by Comm'r. of Ed. (March 23, 1982), aff'd State Board (July 7, 1982). In Zimmerman,

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the Commissioner considered the question of whether "public input" was mandated by statute or regulation at all, and determined that it was not. The facts in the Zimmerman matter are not, of course, identical to the facts in the case sub judice. There, the issue of school reorganization stemming from the closing of one of the district's schools was first brought to the public's attention in November 1980 and appeared on the agenda, in one form or another, of many board meetings thereafter through June 1981. At that time, following extensive participation and dialogue between citizens and the board, a motion was unanimously passed to prepare for the closing of the school at the end of the 1981-82 school year. The administrative law judge found that opportunity for public input was provided by the board and consisted of oral participation at board meetings and in the receipt of a report which had been prepared and submitted by a private citizen's group. The contention by petitioner in Zimmerman was that the Public School Education Act requires "maximum citizen involvement," and imposes upon boards not only the obligation to give due consideration to the input of the public, but the duty to reach out to ascertain and evaluate the public's needs and desires. In rejecting the petition, the administrative law judge reviewed the provisions of N.J.S.A. 18A:7A-1 et seq., found no such mandate and concluded that the board had made a good faith effort to keep the public informed on the issue and did provide it with reasonable opportunity to be heard.

In his affirmance, the Commissioner found that although the refusal by the board to form a citizens' advisory committee to assist it in its consideration was arguably unsound, the omission did not require reversal of the board's action since, as he put it, "[i]nformation was shared with the public and lengthy discussion was encouraged at public meetings." Zimmerman, at 23.

In Marcewicz v. Bd. of Ed. of the Pascack Valley Regional High School District, 1972 S.L.D. 619, the Commissioner also addressed the question of whether a board had given adequate opportunity to the public to provide input into a question concerning redistricting. After reviewing the evidence and the report of the hearing examiner, the Commissioner said as follows:

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> [T]he Board acted in a reasonable, deliberate and thorough manner to examine the enrollment projections . . . over a period of weeks prior to the time of its final action on March 13, 1972. . . . It is the Board alone which is empowered by N.J.S.A. 18A:11-1 to make rules for its own "government" and the "government" of the public schools entrusted to its supervision, and the Commissioner determines that the Board's decision controverted herein was not contrary to its rules in this regard. In any event, the Board did invite public discussion or comment on the issue before it and received such comments prior to its final action. Marcewicz, at 625.

The Marcewicz decision was cited with approval in the case of Parents United for Better Learning in the Community v. Hamilton Tp. Bd. of Ed., Mercer County, OAL DKT. EDU 3503-85 (July 12, 1985), aff'd by Comm'r. of Ed. (August 13, 1985). In that decision, the administrative law judge specifically observed that the Commissioner has never recognized or directed an absolute need for public involvement. See also, Polak v. Bd. of Ed. of the Tp. of Woodbridge, OAL DKT. EDU 5926-80 (June 15, 1981), aff'd by Comm'r. of Ed. (July 28, 1981), aff'd, State Bd. of Ed. (Feb. 4, 1982).

Unquestionably, in this case, the Board moved quickly during January 1986 to propose, discuss and act upon the reorganization and the speed with which it acted exceeded that of other boards whose decisions were challenged on the same basis as that raised here. See, e.g., Riccio v. Bloomfield Bd. of Ed., OAL DKT. EDU 8111-84 (May 16, 1985), aff'd by Comm'r. of Ed. (July 8, 1985); Comm. to Save Bayard Street School v. Bd. of Ed. of New Brunswick, 1978 S.L.D. 451. Nevertheless, the ultimate inquiry with respect to whether adequate opportunity for public input was provided is whether, given all of the circumstances surrounding the decision-making process, the Board can be said to have acted in an arbitrary, capricious or unreasonable manner. This is why specific criteria are not always appropriate with regard, for example, as to how many meetings must first be called to discuss the issue, what committees or how many should be appointed, who should be appointed to them, should outside consultants be engaged, etc. Rather, an overall view

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must be taken which considers all pertinent activities.[6] Certainly, in this case there was no secret made about the proposal, and a good faith effort was made by the Board to present it for public consideration. The following events pertinent to the Board's decision-making process in this case occurred:

1. The question of school district reorganization had been raised in Newton during the 1970s but put aside because of concerns over the transportation component of any such plan.

2. Nevertheless, during the intervening years the administration had informally kept the item under scrutiny for possible future actions.

3. The new superintendent, Dr. Selover, determined in the latter part of the 1984-85 school year to put school district reorganization on his agenda for action beginning in the 1985-86 school year.

4. Dr. Selover then put together statistical data respecting the educational and fiscal aspects of the plan, and presented the same to the budget committee during December 1985.

5. During late December 1985 and early January 1986, Dr. Selover and Board members continued to explore the subject of school district reorganization as an essential component of the proposed 1986-87 budget, and Dr. Selover was given the "green light" to move forward on it.

---

[6]In the initial decision in Zimmerman, Judge Young "suggested" three criteria for ascertaining whether the "minimum standard of public participation intended by the Legislature is met." Zimmerman, at 16. They amount, in effect, to a duty to determine whether the board had acted reasonably and in good faith. In his affirmance, the Commissioner rejected the notion that a "laundry list of check-off points be established as a necessary prerequisite to school closings." Zimmerman, at 23. I believe the same is true with respect to school reorganization generally. Each case must be decided on the particular facts applicable to it.

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6. On two separate occasions, January 10 and January 17, 1986, Dr. Selover sent memoranda to parents informing them of the Board's proposed plan. He also developed a question and answer format document to describe more fully what the Board had in mind and it was made available to the public on January 13, 1985, and sent home to parents on January 17, 1986.

7. On January 12, 1986, an article was published in the Sunday Herald which described the reorganization plan.

8. On the evenings of January 13 and January 21, 1986, the Board discussed the proposed reorganization plan and gave members of the public every opportunity to provide their views on it.

9. On the evening of January 21, 1986, the Board, following discussion, adopted a resolution to implement the school district reorganization in September 1986 and also determined to create committees to study various aspects of the plan and to report back to the Board by June, so that when the plan was put into effect, all facets of the reorganization would have been covered.

Accordingly, there being no challenge to the soundness of the reorganization plan from an educational standpoint, and there being evidence that the Board's fiscal interests also are advanced by the plan, the effort by petitioner to stay for one year, if not set the action aside, must be rejected. From the proofs presented at the hearing there is no reason for me to substitute my judgment for that of the Board on this subject, and I **CONCLUDE** that the public did have enough opportunity, under all the circumstances, to address the Board on the issue prior to final action.

Accordingly, I herewith recommend to the Commissioner that the petition in this matter be **DISMISSED.**

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

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

October 7, 1986
DATE

Stephen G. Weiss
STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

OCT - 9 1986
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

md/e

Mailed To Parties:

OCT 14 1986
DATE

Ronald L. Parks
OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

WITNESSES

Evelyn Blake
Jeannette Zengerle
Edward Corbett
Dr. Harry H. Selover
Gretta Kemether
Terry Iliff
Harry Graham

EXHIBITS

C-1 Minutes of the special meeting of the Newton Board of Education, January 13, 1986

C-2 Minutes of the adjourned special meeting of the Newton Board of Education, January 21, 1986

J-1 Packet of documents

P-1 For identification, affidavit of Mr. Pomerantz

P-2 For identification, affidavit of Mr. Baldini

P-3 Agenda for regular meeting of the Newton Board of Education, January 7, 1986

P-4 Minutes of the regular meeding of the Newton Board of Education, January 7, 1986

P-5 Minutes of the Executive Session of Newton Board of Education, January 7, 1986

P-6 Interrogatories

P-7 For identification, agenda for special meeting, January 13, 1986

R-1 Article from Sunday Herald, January 12, 1986, entitled "Newton weighs school reorganization"

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RICHARD A. HUSSNATTER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF NEWTON, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

It is observed that no exceptions to the initial decision were filed by the parties pursuant to the applicable provisions of N.J.A.C. 1:1-16.4a, b and c.

In the Commissioner's judgment the ALJ's findings and conclusions are amply supported in the record of this matter. Absent any evidence to the contrary which might establish that the Board's school and grade level reorganization plan implemented at the commencement of the 1986-87 school year was educationally unsound, or that the public was denied an opportunity to address the issue of reorganization prior to final Board action to implement its school and grade level reorganization in the Town of Newton, the Commissioner finds and determines that petitioner's prayer for relief for a one-year stay or reversal of the Board's action is without merit.

Accordingly, the initial decision is affirmed by the Commissioner and the instant Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2243-86
AGENCY DKT. NO. 61-3/86

BARBARA CREED, ANNA MARIE TALERICO, GERALDINE APPLEGATE, KAREN TENAI, SUSAN GUICE, ELENA BEST, MARTHA DINGLE, VERONICA LOGAN AND LONG BRANCH SCHOOL EMPLOYEES ASSOCIATION,

Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF LONG BRANCH, MONMOUTH COUNTY,

Respondent.

Thomas W. Cavanagh, Jr., Esq., for petitioners (Chamlin, Schottland, Rosen, Cavanagh and Uliano, attorneys)

J. Peter Sokol, Esq., for respondent (McOmber and McOmber, attorneys)

Record Closed: September 5, 1986 Decided: September 29, 1986

BEFORE **LILLARD E. LAW, ALJ:**

STATEMENT OF THE CASE

Petitioners, elementary school secretarial employees of the Board of Education of the City of Long Branch (Board), allege that the Board requires them to administer and provide nursing-type care to pupils on a regular basis in the absence of a school nurse,

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which they contend constitutes arbitrary, capricious conduct and an abuse of discretion by the Board. The Board denies the allegations, contending that its actions are permissible under New Jersey law and, further, that the Commissioner of Education (Commissioner) lacks jurisdiction over the complaint.

PROCEDURAL ASPECTS

Petitioners perfected their Petition of Appeal before the Commissioner on March 5, 1986. Subsequently, on March 27, 1986, the Board filed its Answer. On April 1, 1986, the Commissioner transmitted the matter to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. Thereafter, on June 5, 1986, a prehearing conference was held, at which the issues were identified and the parties agreed to submit cross-motions for summary decision, pursuant to N.J.A.C. 1:1-13.1 et seq. The cross-motions for summary decision were duly and properly filed with the undersigned with the last submission received on August 21, 1986, which constitutes the closing date of the herein matter.

THE ISSUES

1. Whether the Board's policy requiring school secretaries to perform nursing duties in the absence of a school nurse is arbitrary, capricious and/or represents an abuse of discretion by the Board?

2. Even if school secretaries are required to perform nursing duties in the absence of the school nurse, what specific duties are the secretaries eligible to perform?

3. Whether the Board is responsible for any and all actions of the secretaries for fill-in nursing duties?

    (a) If so, is there an obligation by the Board to provide insurance coverage for the employee performing the assigned duties?

There being no facts in dispute, it is thereby determined that the instant matter is now ripe for summary decision. The matter comes before this administrative

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tribunal in the form of the pleadings, letter memoranda, a Certification executed by three of the eight petitioners and stipulated documents.

ARGUMENTS OF THE PARTIES

PETITIONERS' ARGUMENT

The Petitioners herein are all employed as school secretaries in the various elementary schools through the Respondent's school district. The Petition challenges the current status of their employment insofar as they are required to provide frequent and consistent nursing care and assistance to the children who attend those schools. Their opposition to the current status is predicated upon several arguments which are offered herein. It is submitted that the essential facts involving the scheduling responsibility of the Petitioners are not in material dispute, and this tribunal should have little difficulty in resolving the factual background of this controversy.

The Petitioners are well aware that there is no intractable principle in the education laws which requires that a nurse be available and on premises at all times for all situations. Both common sense and the development of salient case law indicate that some measure of flexibility must be utilized in addressing the general situation of providing direct nursing care. The secretarial staff of the Respondent's school system does not seek herein to bind the hands of the Board in such a fashion that personalized nursing care is to be available to all pupils at every conceivable moment. The Petitioners do, however, assert that the Respondent has taken advantage of the necessity to allow some deviation from full-time nursing supervision to create the situation that is detailed at length in the enclosed Certification.

An analysis of the problem must begin with the concession that is contained in the preceding paragraph. The Commissioner has determined that it is plausible for a board of education to assign guidance counselors as substitutes for the school nurse when the nurse is absent from the building, or so engaged that she cannot perform her regular duties. See, Smith v. Bd. of Ed. of Caldwell-West Caldwell, 1972 S.L.D. 232. The Respondent is not required to have a full-time certified school nurse present in every school within a system at all times. See, Outslay v. Midland Park Bd. of Ed., 1977 S.L.D. 1033. However, the essential question raised in the instant petition is whether the

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Commissioner will countenance the system being utilized by the Long Branch Board of Education, which raises several substantial and critical questions.

1. Does the acceptance of the determination that a full-time certified nurse is not required on premises at all times justify the situation developed by the Respondent, which results in regularly scheduled lengthy periods of absence from each school of certified nursing personnel?

2. If the current status in the Respondent's school system for providing nursing care is acceptable in terms of time, is the Respondent properly utilizing replacement personnel to cover the nursing duties?

3. If the secretarial staff is the appropriate group for providing nursing care and assistance on a regular basis, has the staff been properly instructed and qualified for this type of activity?

4. In the absence of certification and/or formal training and in the absence of clear and definitive direction as to their responsibilities are the staff members exposed to personal liability as a result?

5. If the individual secretaries in the Respondent's school system were hired on the basis of doing minimal fill-in nursing duties, is it appropriate to now have them performing a variety of functions which appear to be outside their job descriptions?

It appears that the legislature was sufficiently concerned with the importance and significance of nursing personnel to adopt N.J.S.A. 18A:40-3.1. That statute requires that every person employed in a nursing capacity must be separately appointed by a board of education in that capacity and supervised by the board in the performance of those duties. Similarly, the legislature adopted N.J.S.A. 18A:40-1, which also references the distinction in their employment. The underlying principle relevant thereto is the importance and significance of nursing attention and supervision.

Clearly, as mentioned earlier, a board cannot be required to provide full-time nursing supervision at all times. In fact, the Commissioner observed in Smith that in a multischool district, certain schools "...at some times will be without the physical presence of a nurse in the building..." (at 238). The initial questions which this tribunal must reconcile is whether the current situation in Long Branch is reflective of the

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flexibility granted by the Commissioner, or whether it represents a comprehensive evolution of that principle which has resulted in the exception being more common than the rule.

Attention is respectfully directed to the Petitioners' Certification and Exhibits A and B attached thereto. It is palpably obvious from a review of those exhibits and the explanation in the Certification that the Long Branch secretarial staff is frequently providing on-premises nursing care for longer periods of time, in given situations, than is being provided by the certified school nurse. Paragraph 3 of the Certification clearly indicates that on three days a week there are two schools with a nurse available approximately three hours per day, while the secretary fills that role between four and five hours per day. When testing or other situations, such as are described in Paragraph 4 of the Certification occur, this already minimal period of time is further reduced.

Was it the intention of the Commissioner, in allowing school districts some flexibility, to create situations where the secretarial staff in a given elementary school provides more on-premises nursing care for students than the certified school nurse? How can the duties of the secretarial staff in the instant case be described as "fill-in" when they are the result of a regularly scheduled program that anticipates lengthy, consistent, and frequent absences from the school by the certified school nurse? At what point will the Commissioner rebuke a board of education for utilizing his attempt to grant them some flexibility as a cost-saving technique, which exposes children and secretaries to situations, on a regular basis, which were not contemplated by the legislature or the case law?

In essence, the instant case provides a direct opportunity to resolve the issue raised above. To accept the procedure being utilized by the Respondent's school system would be to signal to every board of education in the State that economics may dictate a system of nursing care which provides for infrequent on-premises availability of certified personnel. It is respectfully submitted that this result is neither desirable nor warranted.

Assuming, but not conceding, that this tribunal determines that the time scheduled for on-premises nursing care is acceptable, the court must then examine the back-up assistance provided. First, insofar as personnel is concerned the Certification indicates that all, or substantially all, the nursing problems which arise are being handled by the secretaries. Is it not arbitrary and unreasonable to expect that the

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extensive load of nursing assistance generated by the absence of certified nursing personnel should fall entirely, or almost entirely, on the shoulders of the secretaries? The employees in question are not school health aides, as referenced in the appropriate statutes and as detailed in length in Exhibit G attached to the Certification submitted herewith. Apparently, they are being asked to perform functions that should be performed by school health aides (Certification at para 15).

In regard to the tasks being required to be performed by the secretaries, it would also appear that the Board has far exceeded reasonable bounds. Attached to the Certification submitted herewith, and marked Exhibits C, D, and E, are lists of various nursing-type activities which the secretaries are required to perform. Both the intricacy and frequency of those situations result in further exposure of the personnel in question to conditions, illnesses and other items which they are not trained to address. In fact, these are duties more appropriately assigned to school health aides under N.J.A.C. 6:11-12.8.

In recent years, the Commissioner has wisely determined that health matters are more appropriately addressed by health personnel. See, for example, Bernards Twp. Educ. Ass'n v. Bd. of Ed. of Twp. of Bernards, Somerset County, Comm'r Decision Sept. 29, 1981 and Nov. 6, 1981, aff'd State Bd. July 7, 1982, aff'd N.J. Supreme Court May 18, 1983 (unreported). The present situation as detailed herein flies directly in the face of the principle that health matters should be dealt with by personnel familiar with that type of problem. While a board need not assign every health task to a certified school nurse, surely a school health aide should be utilized to perform the back-up responsibilities.

The Petitioners contend that even if this court were to resolve the previous issues against them, it is difficult, if not impossible, to imagine a resolution of the supervision issue in similar fashion. N.J.A.C. 6:29-2.3 requires that each board of education adopt rules and a program of procedures for students injured at school, and requires that they be explained at the beginning of the school year to all employees. The Certification filed herein clearly indicates that the Respondent's school system does not abide by that directive. In addition, it is seriously questioned whether there is any supervision at all over the secretaries during the performance of their frequent "nursing" duties other than by telephone. Since the Board has still not furnished the Petitioners, nor the administrative law judge, with a copy of its liability policy the court cannot definitively determine that coverage is supplied in all the situations in which the secretaries are required to participate. In addition, there is something extremely

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distasteful to the Petitioners about having to be involved in frequent medical situations when they were neither hired to perform that function nor trained in that discipline. Finally, the attention of the administrative law judge is directed to Exhibit F attached to the Certification. Although the job description contained in this exhibit is approximately 15-years old, it is the most current one that has been discernable by the Petitioners. At the conclusion of the description it indicates that a secretary may find herself "...performing limited nurse's duties when the nurse is not available." Obviously, the intention was to utilize a secretary on the rare occasions when a nurse was "not available." The language does not give rise to an interpretation that it was intended to cover situations where the board determines to eliminate full-time personnel from a school and provide these services utilizing other personnel. While this objection could also be made in the form of an unfair practice complaint with the Public Employment Relations Commission, it would seem meaningful to note the job description in determining whether or not the conduct of the Respondent has been arbitrary and capricious in the instant matter.

As a result of the foregoing, the administrative law judge is asked to examine the issues raised herein and conclude that the actions of the Respondent have been inappropriate, arbitrary, capricious, and that they create a dangerous precedent which could result in the frequent dispensing of nursing care by personnel unqualified to do so. It is not answer for the Board to indicate that a nurse is available on a telephone-call basis, since the Certification makes it relatively clear that the majority of back-up services performed are being accomplished without the presence of a nurse. This matter presents this administrative tribunal with a critical problem, which for the sake of the employees and the pupils of the district, should be resolved favorably to the secretarial staff.

THE RESPONDENT BOARD'S ARGUMENTS

The Respondent Board bases its Motion for Summary Judgment upon two well-established principles of New Jersey law. First, there is no requirement that a nurse be in each school of the district at all hours of the school day. N.J.S.A. 18A:40-1 and Smith v. Board of Education of the Borough of Caldwell - West Caldwell, Essex County, 1972 S.L.D. 232. Second, a board of education has the discretion to require that other school employees substitute for a nurse in the nurse's absence. Smith. Id.

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Since the Petitioners have conceded the above points of law, it is not necessary to brief these points in great detail. It is, however, important to note that in each and every instance in which these issues have been raised, the Commissioner and the State Board of Education (State Board) have upheld the position taken by the Respondent. See, Smith, Roe v. Board of Education of the Township of Mine Hill, Morris County, 1976 S.L.D. 672, aff'd State Board at 677 and Outslay v. Board of Education of the Borough of Midland Park, Bergen County, 1977 S.L.D. 1033. It is respectfully submitted that a similar ruling is required in the case at hand.

Petitioners, unable to argue that Respondent's actions violate any principle of law, devote the vast majority of their argument that Respondent's actions are arbitrary, capricious and unreasonable. Respondent's actions are entitled to a presumption of validity and may only be overturned upon an affirmative showing that such decision was arbitrary, capricious or unreasonable. Thomas v. Morris Township Board of Education, 89 N.J. Super. 327 (App. Div. 1965), aff'd 46 N.J. 581 (1966). It is a heavy burden to meet and it is clear that Petitioners fail to meet the burden. The Petitioners fail to point to a single incident in which the absence of a nurse in one of the elementary schools has resulted in a problem for a student or more than an aggravation to one of the Petitioners. It is not enough to simply allege that Respondent's actions are ". . . inappropriate for the children and unfair to us as employees" (Petitioners' Certification at p. 10). It is also not enough to make generalizations and exaggerations regarding their first-aid duties.

It should also be noted that in Smith, the Commissioner determined that it was not unreasonable, arbitrary or capricious for a school system to employ five nurses to cover eight schools and to have guidance counsellors substitute in the nurse's absence. It is submitted that the case at hand is similar to Smith in that Respondent has determined to provide four nurses for six schools, a slightly higher percentage of coverage than in Smith, with secretaries substituting in the nurses' absence. It is submitted that Smith implicitly acknowledges that, at worst, a nurse's presence is only a telephone call away. Smith is directly analogous to this matter and is controlling precedent.

The final point that should be made in this matter is that Petitioners' complaints are more appropriately a subject for the collective-bargaining process. If Petitioners believe that their responsibilities are too extensive and/or inappropriate, they

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should negotiate with Respondent to either reduce their responsibilities or for additional compensation commensurate with their increased responsibilities.

In conclusion, it is respectfully submitted that Respondent's actions are lawful and justified and should be upheld. The statute and case law cited herein clearly permit Respondent to have less than one full-time nurse per school. Further, Respondent is clearly permitted to assign other school personnel to substitute in the absence of a nurse. It is also clear that the Petitioners have failed to prove that any action of Respondent is in any way arbitrary, capricious or unreasonable. Respondent respectfully requests that its Motion for Summary Judgment be granted and that Petitioners' Motion for Summary Judgment be denied.

DISCUSSIONS AND CONCLUSIONS

Having carefully considered the pleadings, exhibits, petitioners' Certification and the legal arguments of the parties in the light of existing education law; I **FIND** and **CONCLUDE** that petitioners have failed to carry their burden that the Board's actions were either arbitrary, capricious and/or unreasonable. Thomas. At the outset, petitioners concede ". . . that there is no intractable principle in the education laws which requires that a [school] nurse be available and on premises at all times for all situations" (Petitioners' Brief at p. 2). Petitioners' concession is grounded upon decisional law where the Commissioner has held that there is no statutory requirement for a school nurse to be assigned to each school building at all hours of the school day. Smith, Outslay. In Outslay at 1038, the Commissioner quotes from Roe, where he said:

> . . . The Commissioner also holds that there is no requirement that each school district of the State employ a full-time nurse or that a nurse be present at all times in each school building [citing Smith] . . . . Thus, the conditions pertinent to the position of school nurse are left to the discretion of local boards charged with the general government and management of the public schools. N.J.S.A. 18A:11-1. The statutes nowhere provide that nurses or any teaching staff member must be employed on a full-time basis. . . . (Roe at 677).

Thus, for petitioners to raise the question as to whether the Board's determination not to employ full-time school nursing staff is arbitrary, capricious and unreasonable is to answer it. The Board provides the requisite school nursing staff and services under N.J.S.A. 18A:40-1 et seq. The Board further exercised its broad

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discretionary authority with respect to the most efficient use of the school nursing staff by electing to provide four school nurses for the service to six of its elementary schools. Smith; Roe; Outslay.

With regard to Issue Number 2, petitioners also answer this question by its proffered Exhibits C, D and E attached to their Certification. Exhibit C expresses the Board's Standing Orders for first aid procedures approved by its school physician and to be carried out by all school staff members. The procedure for handling pupil accidents or illnesses are found in Exhibit D. Exhibit E articulates, among other things, the Board's policy as to the priority of responsibility of its employees to care for ill or injured pupils. These orders, procedures and priorities are posted and readily available for immediate reference for exigent circumstances in the absence of a school nurse. Thus, the Board's enunciated orders, procedures and priorities constitute the duties to be performed and responsibilities to be met. To the extent that the school secretary is first in priority of responsibility in the absence of the school nurse is a policy consideration on the part of the Board to assure that injured and/or ill pupils are properly attended to and cared for under emergeny conditions. Such a policy determination by the Board is squarely within its broad discretionary authority under N.J.S.A. 18A:11-1 which provides that:

> The board shall
>
> a. Adopt an official seal;
>
> b. Enforce the rules of the state board;
>
> c. Make, amend and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government and the transaction of its business and for the government and management of the public schools and public school property of the district and for the employment, regulation of conduct and discharge of its employees, subject, where applicable, to the provisions of Title 11, Civil Service, of the Revised Statutes; and
>
> d. Perform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district.

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In the absence of any violation of law or State Board rules and regulations, the Board is therefore free to make such rules for the government and management of its schools; i.e., assign school secretaries such duties as it deems proper and appropriate in the absence of a school nurse.

Petitioners complain, at Issue Number 3, that they have been unable to ascertain the extent of the Board's liability insurance coverage for the performance of their assigned duties in the absence of a school nurse. This complaint is without merit by virtue of the "save harmless" statute, N.J.S.A. 18A:16-6, indemnifying petitioners against civil actions. The statute, N.J.S.A. 18A:16-6, provides as follows:

> Whenever any civil action has been or shall be brought against any person holding any office, position or employment under the jurisdiction of any board of education, including any student teacher or person assigned to other professional pre-teaching field experience, for any act or omission arising out of and in the course of the performance of the duties of such office, position, employment or student teaching or other assignment to professional field experience, the board shall defray all costs of defending such action, including reasonable counsel fees and expenses, together with costs of appeal, if any, and shall save harmless and protect such person from any financial loss resulting therefrom; and said board may arrange for and maintain appropriate insurance to cover all such damages, losses and expenses.

As a consequence of the Board assigning the school secretaries with the responsibility to provide pupil care and attention in the event of injury or illness, the petitioners are protected. Case law has fully supported such protection. See, Cobb v. City of Cape May, 113 N.J. Super. 598 (Law Div. 1971); Hartmann v. Maplewood School Transportation Co., 106 N.J. Super. 187 (Law Div. 1969), aff'd 109 N.J. Super. 497 (App. Div. 1970).

Based upon the foregoing, I **FIND** and **CONCLUDE** that petitioners have failed to demonstrate, by a preponderance of the reliable evidence, that the Board's actions to assign school secretaries certain duties in the absence of a school nurse was either illegal, arbitrary, capricious or unreasonable. Accordingly, petitioners' motion for summary disposition is **DENIED** and, therefore, summary judgment is hereby **ENTERED** and **GRANTED** in favor of the Board of Education of the City of Long Branch.

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

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

29 September 1986
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

SEP 30 1986
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

OCT 2 1986
DATE

Mailed To Parties:

Ronald I. Parker/t.s
OFFICE OF ADMINISTRATIVE LAW

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EXHIBITS

A. Nurse's Assignment - Elementary Schools

B. Schedule of Elementary Secretaries

C. School Health Department Standing Orders

D. Procedure for Handling Accidents or Illness

E. Students Accidents: Procedures - Standing Orders

F. Draft: Grade 3 - Administrative Secretary

G. Memo to County Superintendents, re: School Health Aides, from Gustav H. Ruh, Acting Commissioner, dated April 30, 1982

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BARBARA CREED ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF LONG BRANCH, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by petitioners within the time prescribed by N.J.A.C. 1:1-16.4a, b and c.

Petitioners note initially that there is "no definitive presentation of the facts which the Administrative Law Judge relied upon, in order to reach his decision." (Exceptions, at p. 1) The attention of the Commissioner is directed to petitioners' memorandum dated September 4, 1986 wherein they set forth their statement of the facts and to which, they aver, no meaningful response was forthcoming from the Board. Petitioners suggest that "[a]pparently, this analysis was accepted by the Administrative Law Judge, although no specific acknowledgement is contained within the appropriate section of his decision." (Exceptions, at p. 1) Petitioners ask the Commissioner to review the factual pattern detailed at pages 2-4 of their memorandum and to "formally acknowledge the compelling factual pattern which is referenced in the foregoing analysis, and apparently accepted by the Administrative Law Judge***." (Exceptions, at p. 2)

Petitioners' Exception No. 1 refers to page 10 of the initial decision, wherein the ALJ relies on N.J.S.A. 18A:11-1 to conclude that, as a result of the broad discretionary power of the Board, it may make rules for the government and management of its schools. "This conclusion begs the issue raised by the Petitioners in the Motion for Summary Judgment," petitioners contend. "The question raised by the Petitioners is not whether there is discretionary power to act, but whether the Board has acted properly, and is adhering to the procedure it has set up." (Exceptions, at p. 2) Petitioners find that the ALJ's conclusion is inappropriate wherein he found that placing the school secretary first in priority of responsibility "in the absence of the school nurse" is a legitimate policy consideration on the part of the Board. (Exceptions, at p. 2, quoting Initial Decision, ante) (emphasis in Exceptions) Petitioners contend that although Exhibit D states that other people should perform the task of supplying nursing care in the nurse's absence, secretaries are the primary employees performing the duties. Additionally, petitioners note that:

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> [T]he situation presented does not deal with "absences" of the school nurse as a result of an emergency or problem. The "absences" relative to the instant situation involve planned, programmed, and deliberate non-utilization of nursing help. To confuse this situation with one where a Board promulgates rules to govern emergency situations is to graphically misunderstand the facts presented. (emphasis in text) (Exceptions, at p. 3)

Petitioners argue that the certifications filed indicate that the secretaries are "being compelled to perform nearly all health related duties, despite apparent direction to the contrary." (emphasis in text) (Exceptions, at p. 3)

Exception No. II expounds on petitioners' contention that the enforced nursing requirements herein may give rise to exposure on the part of the Board, without concomitant indemnification from its liability carrier. Petitioners argue that:

> An issue of this consequence should have been resolved by mandating the Board to produce proof of coverage in this circumstance, or the taxpayers of the City of Long Branch may ultimately bear the burden for the Administrative decision being justified herein. (Exceptions, at p. 3)

The essence of the issue presented, petitioners advance, is whether the secretaries are performing the duties of their office when they are providing nursing care. The job description submitted does not support this conclusion, nor does the legal argument presented in the Board's brief originally filed, contend petitioners. Neither does the case law relied upon by the ALJ shed "***compelling light" on the issue presented in petitioners' opinion. (Exceptions, at p. 4) Petitioners argue that the issue "is not thoroughly analyzed and addressed by the Initial Decision, other than to point out the potential exposure of the Respondent if the coverage is not synonymous with the indemnification mandated by N.J.S.A. 18A:16-6." (Exceptions, at p. 4)

In Exception No. III, petitioners submit that the ALJ erred in analyzing the instant matter as one which results from the absence of the school nurse. They avow that "[t]he word 'absence' implies the act of being away, from a place from where one normally is or is required to be." (Exceptions, at p. 4) Petitioners suggest in the matter before the Commissioner, "it is patently clear that the secretaries are being asked to act both during the absence of a school nurse for emergent reasons, and the unavailability of the nurse due to another assignment. *** The compelling significance of the distinction should be considered by the Commissioner, in resolving the philosophical questions presented." (Exceptions, at p. 4)

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Finally, petitioners aver that if the initial decision is adopted in this case, the Commissioner would be endorsing a broad-based acceptance of non-health care personnel performing nursing duties, on a scheduled and deliberate basis. By affirming this decision, petitioners contend, the Commissioner would also sanction and approve the factual pattern which has resulted in the substantial abdication of nursing responsibility by the Board. Petitioners pray the Commissioner disapprove this situation and rectify it.

Upon review of the initial decision and the record in this matter, the Commissioner rejects the initial decision which grants summary judgment to the Board for the following reasons.

The ALJ indicates in the initial decision, ante, "There being no facts in dispute, it is thereby determined that the instant matter is now ripe for summary decision." Notwithstanding this conclusion, the initial decision contains no recitation of the specific, uncontested facts upon which the ALJ relied in arriving at summary judgment. Indeed, the only facts present in the record are those presented by petitioners in their September 4, 1986 Memorandum in Response to the Notice of Motion and Letter Memorandum filed by the Board. Were the Commissioner to base his determination solely upon those facts as alleged by petitioners, he could not reach the conclusion arrived at by the ALJ in the initial decision submitted herein.

Further, the Commissioner's conclusion above is dictated by the argument asserted by the Board in which it sets forth two well-established principles of New Jersey law:

> First, there is no requirement that a nurse be in each school of the district at all hours of the school day. N.J.S.A. 18A:40-1 and Smith vs. Board of Education of the Borough of Caldwell - West Caldwell, Essex County, 1972 S.L.D. 232. Secondly, a board of education has the discretion to require that other school employees substitute for a nurse in the nurse's absence. Smith, supra. (Board's Letter Memorandum, at pp. 1-2)

While such may be the case, clearly it cannot be argued that in the absence of a nurse, a non-certificated individual may carry out any and all duties which must be performed by a properly certificated school nurse. Consequently, it becomes absolutely necessary that there be a careful recitation of the exact duties being carried out by staff in the district in the absence of the certified school nursing staff herein.

Accordingly, the instant matter is remanded for findings of fact and law consistent with this decision.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

November 10, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
MOTION FOR SUMMARY DECISION
OAL DKT. NO. EDU 3756-86
AGENCY DKT. NO. 159-5/86

SCHOOL DISTRICT OF THE TOWN OF PHILLIPSBURG, WARREN COUNTY.
Petitioner,
v.
RUTH A. HAMLEN,
Respondent.

Boyd Harbourt, Esq., for petitioner/respondent to motion to dismiss complaint

Stephen B. Hunter, Esq., for respondent/movant
(Klausner and Hunter, attorneys)

Record Closed: September 26, 1986 Decided: October 10, 1986

BEFORE SYBIL R. MOSES, ALJ:

The Board of Education of the Town of Phillipsburg, Warren County (Board), considered charges of conduct unbecoming a teacher, incapacity and other just cause against Ruth A. Hamlen on April 10, 1986. It determined that the charges, if true, were sufficient to warrant her dismissal or reduction in salary, pursuant to the Tenure Employees Hearing Act, N.J.S.A. 18A:6-10 et seq. On May 5, 1986, the Board of Education certified the charges to the Commissioner of Education. Ms. Hamlen was suspended without pay, effective May 6, 1986, for a period of 120 days pending resolution

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of the tenure charges. On June 6, 1986, respondent filed her answer with the Commissioner, denying the charges and raising affirmative defenses, including an assertion that the charges were procedurally insufficient. The Commissioner forwarded the matter to the Office of Administrative Law on June 9, 1986 for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on August 25, 1986. Legal issues were established, and respondent was given leave to move to dismiss the tenure charges for failure to comply with N.J.S.A. 18A:6-11.

On September 10, 1986, counsel for respondent, Ruth A. Hamlen, filed a motion to dismiss the complaint on the jurisdictional grounds that the Board failed to supply the required statement of evidence mandated by N.J.S.A. 18A:6-11. The Board filed its answer in oppositon to the motion to dismiss on September 26, 1986. The record closed on that date.

The procedural facts in this matter are undisputed. On April 10, 1986, the Board considered proposed charges against Ruth Hamlen for incapacity, incompetence and conduct unbecoming a teacher. The charges were proposed by Peter Merluzzi, superintendent of schools, and did not contain a statement of evidence under oath. The Board certified the charges to the Commissioner on May 5. The Board does not dispute that no separate document entitled "Statement of Evidence" was ever filed with Ms. Hamlen, nor does the Board dispute that neither the proposed charges nor any information concerning them indicated to Ms. Hamlen that she had 15 days to respond to the charges or to supply a statement of evidence with respect thereto. There is no indication that Ms. Hamlen had notice of the May 5 meeting of the Board.

Counsel for Ms. Hamlen argues that the most significant jurisdictional defect in the certification of tenure charges filed by the Board was its failure to supply Ms. Hamlen with a written statement of evidence under oath, in accordance with N.J.S.A. 18A:6-11. Since it is uncontroverted that such written statement of evidence was never submitted to Ruth Hamlen and since the Board did not provide Ms. Hamlen with 15 days within which to respond to the charges and to provide any statement of evidence with respect thereto, the

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Board could not certify tenure charges to the Commissioner. Even though the tenure charges, absent any statement of evidence, were received by Ms. Hamlen, she was never told she had a right to respond, nor was she told when the Board would meet to consider the charges.

The Board argues that there is no need in this case to have a separate written statement of evidence under oath because the certification of charges, signed by Superintendent Merluzzi on April 10, 1986, lists items contained in Ms. Hamlen's file and refers to a video tape recording, all of which were available to her and which constitute the evidence in this case. Since all evidence of a documentary nature was available to the teacher and her representatives, counsel argues Ms. Hamlen was fully aware of the evidence against her and therefore the separate statement of evidence was not required.

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

> Any charge made against any employee of a board of education under tenure during good behavior and efficiency shall be filed with the secretary of the board in writing, and a written statement of evidence under oath to support such charge shall be presented to the board. The board of education shall forthwith provide such employee with a copy of the charge, a copy of the statement of the evidence and an opportunity to submit a written statement of position and a written statement of evidence under oath with respect thereto. After consideration of the charge, statement of position and statements of evidence presented to it, the board shall determine by majority vote of its full membership whether there is probable cause to credit the evidence in support of the charge and whether such charge, if credited, is sufficient to warrant a dismissal or reduction of salary. The board of education shall forthwith notify the employee against whom the charge has been made of its determination, personally or by certified mail directed to his last known address. . .

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It is clear and uncontroverted in the case at bar that there was no written statement of evidence under oath to support the charges filed with the Board's secretary by Mr. Merluzzi, superintendent of schools. It is further clear and uncontroverted that the Board did not provide Ms. Hamlen, the employee against whom the charges were filed, with a copy of such a statement of evidence. Thus, she did not have an opportunity to submit a written statement of position and a written statement of evidence under oath with respect thereto which the Board could consider at its May 5 meeting before voting on whether there was probable cause to credit the charges.

In the Matter of Tenure Hearing of Marilyn Feitel, 1977 S.L.D. 451, aff'd, State Board, 1977 S.L.D. 458, is dispositive of the issues raised here. It points out certain procedural requirements a board must follow pursuant to N.J.S.A. 18A:6-11. A charge must be in writing and must be accompanied by a written statement of evidence under oath to support it. It is not enough simply to allege that the respondent/teacher has the opportunity to review her file and/or to review a videotape before responding to the charges. The proposed charges against Ms. Hamlen do not list the evidence which gives rise to the conclusions contained within them. Failure to provide the written statement of evidence supporting the charges, and thus failing to provide Ms. Hamlen with the opportunity to submit a written statement of position and a written statement of evidence under oath with respect thereto, mandates a dismissal of the complaint and a finding that jurisdiction does not inhere at the present time.

The Board may determine whether there is probable cause to credit the evidence in support of charges and whether the charges, if credited, are sufficient to warrant dismissal or reduction of salary only after it considers the charges, the statement of evidence under oath supporting the charges, and the statement of position and of evidence presented to it by Ms. Hamlen, after she has received and has had the opportunity to review the Board's statement of evidence. The Board has not complied with its statutory duty. In failing to so comply, it has deprived respondent, Ruth Hamlen, of a fair and adequate opportunity to be made aware of the specific charges against her and to be able to respond in an appropriate and meaningful fashion. There are no cases holding that the fact that her file and a videotape may contain the evidence upon which the Board will rely relieves the Board of its statutory duty.

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In addition to its failure to supply a statement of evidence under oath, the Board also failed in its duty to tell Ms. Hamlen that she had a right to respond to the tenure charges when she received them. It appears uncontroverted that she was not told when the Board would meet to consider the charges. This is completely contrary to the 15-day rule of Feitel, as well as to the holdings of In re Tenure Hearings of Salvatore Verga, OAL DKT. EDU 0215-83 (June 3, 1983), affirmed, Comm'r. of Ed. (July 21, 1983), and In re Tenure Hearing of Barry Hamlin, OAL DKT. EDU 1943-82 (May 26, 1982), rev'd, Comm'r. of Ed. (July 12, 1982). See also, N.J.A.C. 6:24-5.1, which sets forth the specific procedures and time limits which must be observed by boards of education when a charge is preferred against an employee of a board. In accord, In the Matter of the Tenure Hearing of Carolyn Edwards, School District of the City of East Orange, Essex County, OAL DKT. EDU 6760-81, aff'd, Comm'r of Ed. (March 9, 1982).

In light of the uncontroverted facts here and the clear state of the law, I must reject the argument of the Board that a separate written statement under oath is not required just because the April 10 certification of Mr. Merluzzi contains a list of the items upon which the Board intended to rely in support of the charges. Failure to furnish respondent with a written statement of evidence under oath to support the proposed tenure charges and failure to provide her with at least 15 days to submit a written statement of position and a written statement of evidence under oath with respect thereto makes the instant charges procedurally deficient, contrary to and in violation of N.J.S.A. 18A:6-11.

Accordingly, it is hereby **ORDERED** that the motion to dismiss the tenure charges filed against Ruth A. Hamlen in School District of the Town of Phillipsburg, Warren County v. Ruth A. Hamlen, be, and is, hereby **GRANTED**, without prejudice, howevever, to reconsideration by the Phillipsburg Board of Education, consistent with the appropriate statutory and regulatory requirements; and

It is further **ORDERED** that Ms. Hamlen be reinstated to active service and compensated at full salary as of, and from, the date of her suspension without pay, May 6, 1986; and

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It is further **ORDERED** that the Board of Education of the School District of the Town of Phillipsburg inform the Commissioner of Education within 60 days of the date of final decision in this matter of any action in regard to the disposition of certification of charges against Ruth Hamlen.

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

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

Oct. 10, 1986
DATE

SYBIL R. MOSES, ALJ

OCT 10 1986

DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

OCT 16 1986
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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requirement given that (1) the charges were filed on April 10, 1986 but not certified until May 5, 1986 and (2) nowhere is it argued that respondent sought and was denied the opportunity to submit a response to the tenure charges and purported statement of evidence. Moreover, there is no legal requirement that would have compelled the Board to notify respondent of the date it was considering action on the tenure charges. N.J.S.A. 18A:6-11 specifically prohibits consideration and action by a board as to any tenure charges at a public meeting.

Accordingly, the initial decision is modified as indicated above; however, the recommended orders of the ALJ are adopted as contained therein.

COMMISSIONER OF EDUCATION

November 17, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 3377-86
AGENCY DKT. NO. 92-4/86

JOHN A. GRINGERI,
Petitioner,
v.
BOARD OF EDUCATION OF THE RAMAPO-INDIAN HILLS REGIONAL HIGH SCHOOL DISTRICT
Respondent.

John A. Gringeri, petitioner, pro se

Allan P. Dzwilewski, Esq., for respondent
(Green and Dzwilewski, attorneys)

John F. Whitteaker, Esq., for participant, Syd Salt
(Orbe, Nugent & Collins, attorneys)

Record Closed: September 25, 1986 Decided: October 10, 1986

BEFORE **EDITH KLINGER**, ALJ:

On April 2, 1986, petitioner filed a petition of appeal before the Commissioner

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of Education for decision of a dispute arising under the school laws between him and the respondent. The petition alleges that respondent Board failed to give serious consideration to charges by petitioner of the incompetence of Syd Salt, Superintendent of the Ramapo-Indian Hills Regional High School District. On May 20, 1986, the Department of Education, Bureau of Controversies and Disputes, transmitted this dispute to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. After notice to all parties, a prehearing conference was held on July 7, 1986. On August 19, 1986, respondent brought a motion for summary decision on the grounds that petitioner failed to file his petition of appeal no later than the 90th day from the date of the respondent's action which is the subject of the requested contested case hearing, as required by N.J.A.C. 6:24-1.2(b).

N.J.A.C. 6:24-1.2 provides in relevant part:

> (b) The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education which is the subject of the requested contested case hearing.

For purposes of this motion, it will be assumed that the facts as presented by petitioner are true. The following facts are taken from the petition of John A. Gringeri dated March 31, 1986 and received in the Office of the Commissioner of Education on April 2, 1986:

John A. Gringeri is a parent of a student at Ramapo High School and is a citizen of the township of Wyckoff, a municipality which is served by the Ramapo-Indian Hills Regional High School District Board of Education. Syd Salt is the superintendent of the district. Judicial decisions against Superintendent Salt show that probable cause exists for Superintendent Salt's dismissal or a reduction in salary for incompetence. The Ramapo-Indian Hills Regional High School District Board of Education considered the charges and failed to certify tenure charges against Superintendent Salt. Petitioner

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requested that the Commissioner of Education investigate the facts in this case and order that the Ramapo-Indian Hills Regional High School District Board of Education certify charges against Superintendent Salt for incompetence and grant such other relief as the Commissioner deemed fair and equitable.

It is undisputed by the parties that at its meeting of August 7, 1985, the respondent Board voted not to certify to the Commissioner of Education the charges filed by petitioner against Dr. Salt. Petitioner was informed of this determination by letter dated August 9, 1985. On October 10, 1985, Walter J. McCarroll, Assistant Commissioner of the Department of Education, sent a letter to petitioner informing him that he had the right to file a formal petition with the Commissioner of Education contesting the Board's denial of his request.

Mr. Gringeri alleges that the Board of Education failed to inform him of this right when it denied his request to certify charges of incompetence against Superintendent Salt.

This case is not a controversy involving an absolute statutory entitlement or right which will render inapplicable the limitation period set forth in N.J.A.C. 6:24-1.2, nor does petitioner claim such entitlement or right. He argues that the 90-day limitation should be relaxed and cites N.J.A.C. 6:24-1.19 (now N.J.A.C. 6:24-1.17), which states in relevant part:

> They [the rules] may be relaxed or dispensed with by the commissioner, in his or her discretion, in any case where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice.

Respondent relies on Kulik v. Montclair Board of Education, OAL DKT. EDU 233-83 (August 8, 1983), affirmed, Comm'r. of Ed. (September 26, 1983), affirmed, State Board of Ed. (February 1, 1984). Kulik sought to appeal the Montclair Board of Education's failure to certify charges of harassment against his principal to the Board of Education. Kulik was notified by letter dated October 28, 1981 that the local board would not certify the

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charges, but he did not file his petition of appeal before the Commissioner of Education until November 8, 1982. The final determination was that the petition was barred because Kulik failed to file in a timely manner.

Petitioner argues that Kulik should not apply in the instant case because he has shown good cause why his claim against the Board should be heard, implying by his citation of N.J.A.C. 6:24-1.17 that strict adherence to the 90-day limitation would be inappropriate, unnecessary or result in injustice in this case. In his memorandum submitted in opposition to respondent's motion for summary decision, petitioner states two reasons for relaxing the rule. The first is that the Board failed to inform him of his right to appeal from its decision. The second is that his charges against Superintendent Salt are true.

I cannot agree that he is entitled to relaxation of the 90-day limitation because he was not informed of his right to appeal by the Board. Even if he were entitled to such notice, by his own admission he was informed of his right to appeal by Assistant Commissioner W. J. McCarroll in a letter dated October 10, 1985. Mr. Gringeri's petition of appeal before the Commissioner of Education is dated March 31, 1986, which is not even within 90 days of the time he learned of his right to appeal, let alone within 90 days of the time he learned that the Montclair Board of Education took its action in regard to Salt.

Even assuming that the charges which Mr. Gringeri wanted the Board to certify to the Commissioner were true, the appeal from the Board's denial of his request for certification was filed out of time. N.J.A.C. 6:24-1.2(b) requires that a petition be filed no later than the 90th day from the action by the district board of education. The regulation does not refer to the merits of the board's decision from which the appeal is to be taken. An appeal filed out of time is barred by the regulation, whatever its merit.

N.J.A.C. 6:24-1.2(b) is read strictly and applied almost without exception. Riely v. Board of Education of Hunterdon Central High School District, 173 N.J. Super. 109 (App. Div. 1980); Baley v. Board of Education of Mansfield, OAL DKT. EDU 4997-79

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(February 6, 1980) rev'd, Comm'r. of Ed. (June 19, 1980), affirmed, State Board of Ed. (February 4, 1981); Kallimanis v. Board of Education of Carlstadt, OAL DKT. EDU 868-80 (August 8, 1980), adopted, Comm'r. of Ed. (September 26, 1980), affirmed, State Board of Ed. (March 4, 1981).

I **FIND** that Mr. Gringeri has failed to present any reason for not filing his petition in a timely manner. I further **FIND** that he has made no showing that a strict adherence to N.J.A.C. 6:24-1.2(b) would be inappropriate, unnecessary or result in injustice in this case, nor has he shown that there would be no substantial prejudice to respondent by the relaxation of the rule. I therefore **CONCLUDE** that petitioner has shown no good reason to apply N.J.A.C. 6:24-1.17 in order to relax the requirements of N.J.A.C. 6:24-1.2(b).

Based upon the foregoing, I **CONCLUDE** that petitioner did not file his petition of appeal within 90 days following respondent's decision on the charges he filed before it, nor did he file his appeal within 90 days of being notified of his right to appeal. Therefore, his appeal is barred by N.J.A.C. 6:24-1.2.

It is therefore **ORDERED** that summary decision be granted for respondent and that petitioner's appeal be and hereby is **DISMISSED WITH PREJUDICE.**

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

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

DATE — EDITH KLINGER, ALJ

OCT 14 1986

Receipt Acknowledged:

DATE — DEPARTMENT OF EDUCATION

Mailed To Parties:

OCT 16 1986

DATE — FOR OFFICE OF ADMINISTRATIVE LAW

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JOHN A. GRINGERI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RAMAPO INDIAN HILLS REGIONAL HIGH SCHOOL DISTRICT,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Both petitioner's exceptions and the Board's reply exceptions thereto were filed within the time prescribed by N.J.A.C. 1:1-16.4a, b and c.

Petitioner advances the following three exceptions.

POINT I: RESPONDENT VIOLATED N.J.A.C. 6:24-1.16.

Petitioner avers that the Board failed to meet the deadline for filing its motion for summary judgment, submitting it on August 18, 1986 instead of on July 21, 1986 as agreed upon by prehearing order. In comparing the number of days the ALJ allotted for filing, petitioner avers, "I was given only the 21 days originally scheduled for me at the prehearing conference while the respondent was permitted a total of forty-two (42) days." (Exceptions, at p. 1) Petitioner suggests that he was not told that respondent was in violation of N.J.A.C. 6:24-1.16 and queries whether there are "rules for the respondent and others for the pro se petitioner." (Exceptions, at p. 1) Because the motion is time-barred and prejudicial to him, the initial decision is null and void, petitioner argues, and should be vacated.

POINT II: PETITIONER'S APPEAL TO THE COMMISSIONER WAS FILED IN A TIMELY MANNER.

Petitioner avows that his letter addressed to the Commissioner dated September 28, 1985, a copy of which was mailed to the Ramapo Indian Hills Regional High School Board of Education, was sent exactly 52 days after the Board's decision, and that the substance of that appeal is equal to the Petition of Appeal herein. Petitioner argues that form should not prevail over substance, and that "N.J.A.C. 6:24-1.17 is to be applied to avoid the blind adherence to a rule when it is inappropriate or unnecessary." (Exceptions, at p. 2)

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POINT III: THERE IS GOOD REASON TO APPLY N.J.A.C. 6:24-1.17.

Petitioner avers:

> It is UNJUST and PREDJUDICIAL (sic) to our community to have to tolerate an incompetent superintendent when there are many competent persons available. *** A full hearing is required to determine whether or not the Ramapo Indian Hills Regional District Board of Education was biased in favor of the superintendent. Isn't the intent of N.J.A.C. 6:24-1.17 to prevent the continuance of injustice by the blind adherence to rules of form? (Exceptions, at pp. 2-3)

In reply to petitioner's exceptions, the Board argues that petitioner's Point I is neither relevant to the decision nor timely. "At no time prior to the Initial Decision did Petitioner express any concern or object to the extension of time utilized in filing the Motion and supporting brief." (Reply Exceptions, at p. 1) Further, the Board contends that the fact that petitioner requested until September 23, 1986 to reply to the Motion and was given until September 23, 1986 has nothing to do with the initial decision. "***Petitioner does not claim a prejudice in such a time schedule and he did in fact file the response on September 22, 1986," the Board avows. (Reply Exceptions, at p. 1)

In response to Point II of petitioner's exceptions, the Board suggests that the letter petitioner filed on September 28, 1985 is not a petition of appeal nor does it comply with the various State Board regulations. As a result of the letter sent to petitioner by Assistant Commissioner McCarroll on October 10, 1985, the Board submits:

> [Petitioner] knew then that his September 28, 1985 letter did not serve such a purpose. Being notified of this, he still did not proceed within 90 days of even the October 10, 1985 letter. Utilizing this latter date still shows the Petition to be filed 165 days thereafter rather than the 235 days that elapsed between the Board's notification to him in August, 1985 and March, 1986." (Reply Exceptions, at p. 1)

The Board further avers that since petitioner has not offered any factual explanation to excuse this 165-day gap, no relaxation can be justified or considered.

Finally, in response to Point III of petitioner's exceptions, the Board posits that petitioner is asking the Commissioner to make a substantive decision on the merits of the case, but offers no facts in support thereof. Asking that both its August 18 and September 29, 1986 submissions to the ALJ be incorporated into the record, the Board seeks a decision affirming the initial decision.

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Upon review of the record in this matter, the Commissioner is unpersuaded by petitioner's exceptions that the ALJ erred in determining that the instant Petition of Appeal is time-barred pursuant to N.J.A.C. 6:24-1.2 for the reasons that follow.

Initially, the Commissioner observes that the language upon which petitioner relies in Point I of his exceptions is taken from 6:24-1.15(a) wherein it states:

> (a) Should the commissioner determine to decide a motion for summary judgment prior to transmission to OAL such motion shall be subject to the following process:
>
> 1. *** Such briefs shall be submitted within the time fixed by the Commissioner in consultation with the parties and confirmed by a written directive.***
>
> 2. *** Applications for summary judgment made after transmittal to the OAL shall be subject to the provision of N.J.A.C. 1:1-13.***

The instant matter was transmitted to the Office of Administrative Law on May 20, 1986. (See Initial Decision, ante) Thereafter, by petitioner's own admission, the Board moved for summary judgment on July 7, 1986. (Exceptions, at p. 1) Thus, N.J.A.C. 1:1-1.1 et seq., OAL Rules, are controlling in the instant matter, not N.J.A.C. 6:24-1.15. N.J.A.C. 1:1-3.9 - "Judge's Powers," states:

> A judge shall have full power, jurisdiction, and authority to call and examine witnesses and to issue all orders necessary for the proper and expeditious handling of contested cases assigned for disposition.

The Commissioner finds no basis in the record to dispute the ALJ's handling of the initial decision process herein and, thus, finds no merit in Point I of petitioner's exceptions.

As to Point II of petitioner's exceptions, wherein he avers that his petition to the Commissioner in the form of a letter dated September 28, 1985 was timely and substantially adequate as a petition of appeal, the Commissioner disagrees. Were the Commissioner to relax the requirements of N.J.A.C. 6:24-1.2 in the instant matter, he would, in essence, be establishing different rules for the pro se petitioner than those required for others. The requirements of N.J.A.C. 6:24-1.2 are specific. Relaxation of those requirements under N.J.A.C. 6:24-1.17 is an extraordinary circumstance not warranted under the facts averred herein. See Frank D'Alessandro et al. v. Board of Education of the Township of Middletown, Monmouth County, decided by the Commissioner October 20, 1986.

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Consequently, the initial decision is affirmed for the reasons expressed therein as supplemented above. Accordingly, the instant Petition of Appeal is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NOS. EDU 6258-85,
EDU 7165-85 and EDU 2001-86
AGENCY DKT. NOS. 329-9/85,
335-10/85 and 329-9/85
(CONSOLIDATED)

HAMILTON TOWNSHIP BOARD OF EDUCATION,
Petitioner,
v.
LINDA KURTS,
Respondent,
and
LINDA KURTS,
Petitioner,
v.
HAMILTON TOWNSHIP BOARD OF EDUCATION,
Respondent.

Louis C. Rosen, Esq., for petitioner-respondent (Aron, Salsberg & Rosen, attorneys)

Arnold M. Mellk, Esq., for respondent-petitioner (Katzenbach, Gildea & Rudner, attorneys)

Record Closed: August 25, 1986 Decided: October 9, 1986

BEFORE BRUCE R. CAMPBELL, ALJ:

The Hamilton Township Board of Education (Board) filed charges of conduct unbecoming a teaching staff member against Linda Kurts (respondent) as well as charges of unbecoming conduct and/or insubordination based on excessive absenteeism and

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tardiness. (OAL DKT. NOS. EDU 6258-85 and EDU 2001-86). Kurts filed an appeal against the Board alleging that it had improperly, arbitrarily and capriciously withheld her salary and adjustment increments for the 1985-86 school year (OAL DKT. NO. EDU 7165-85).

The first matter was transmitted to the Office of Administrative Law on October 1, 1985, as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F- 1 et seq. A prehearing conference was held on October 23, 1985. The matter was set down for hearing in January 1986.

As petitioner, Kurts filed her appeal of the increment withholdings on October 3, 1985. Thereafter, the Board sought to amend the tenure charges. I advised that new charges would have to be filed and all procedures attendant to the filing of tenure charges would have to be observed. The original hearing dates were adjourned.

On March 24, 1986, the supplemented tenure charges were transmitted to the Office of Administrative Law. On April 24, 1986, I issued an order finding that the interests of judicial economy required these matters to be consolidated. The matters were consolidated for all purposes including disposition. The matter was heard on June 3 and 14, July 9 and 17, 1986, at the Office of Administrative Law, Quakerbridge Plaza, Trenton. All posthearing submissions were timely made and the record closed on August 25, 1986.

SPECIFIC CHARGES

Preliminarily, it is noted that there is no allegation of deficiency in the preferment, consideration and certification of the tenure charges.

The Board first charges that the petitioner has engaged in conduct unbecoming a teaching staff member by virtue of her failure to act appropriately within the school building, by her lack of self-control within the school building, and by her lack of good judgment. The specific incidents relating to the charge are:

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1. On December 17, 1982, the petitioner reported to the school nurse's office crying uncontrollably. She had little control or coordination and a strong odor of alcoholic beverage was noted on her breath.

2. On June 5, 1984, the petitioner was observed by staff members at Grice Middle School as having difficulty talking, carrying on a conversation, walking straight or remembering. She was relieved of duty and driven home, although she stated she could drive. The Board took appropriate procedures to suspend her, with pay, through June 30, 1984, until approval of the school medical examiner was obtained for her return to work. The suspension continued until October 9, 1984. During the suspension, the petitioner was examined by the school medical inspector and by a psychiatrist.

3. On June 15, 1984, the petitioner demonstrated poor judgment by mixing medications, taking them on an empty stomach and then attempting to work while in questionable physical condition.

4. On April 3, 1985, the petitioner left a class of physical education pupils unattended outside the school building.

Second, the Board charges the petitioner with excessive tardiness since September 6, 1983, and excessive absenteeism. It is stipulated that at all times in question, the petitioner was expected to report to school at 7:55 a.m. Records for the 1983-84 and 1984-85 school years (up to February 26, 1985) show 46 instances of tardiness in which the petitioner was late from two to 24 minutes. Over the course of her 14 years in the district, the petitioner was absent 174.5 days, of which 138.5 days were taken as sick leave.

Third, the Board charges the petitioner has refused to do assigned duties:

1. Preparations for the Volleyball Playday on February 27, 1985, were to be made by the petitioner. Other staff members had to discharge those responsibilities.

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2. Late arrival or failure to arrive for outside coverage of the school bus ramp in the mornings.

3. Refusal to assist with assembly and set-up of gymnasium equipment prior to classes.

The additional charges are, fourth, that the petitioner engaged in conduct unbecoming a teaching staff member by failure to act appropriately within as well as outside the school building, by displaying a lack of self-control within the school building and by displays of lack of judgment. Specific incidents are:

1. In March 1985, the petitioner placed the arms of a male student around her waist and requested him to lift her to the chinning bar although she could reach same.

2. During a class period, the petitioner sat in the center of the gymnasium or in bleachers, reading, while inappropriate activity went on around her.

3. On March 27, 1985, the petitioner disappeared from class for the entire second period.

4. On March 27, 1985, during the fourth period, the petitioner engaged in inappropriate exercises on a mat in which she, not for the purpose of any class demonstration, performed scissor exercises which resulted in the exposure of much of her pubic area.

5. On the evening of March 27, 1985, the petitioner appeared at the place where a coworker was employed during the evening in order to supplement his income. The petitioner was unstable on her feet and mentioned that she had been drinking. The coworker smelled liquor on her breath. He offered to drive her to her home because of her condition, however, she insisted on driving. The coworker followed her and observed her automobile cross the center of the road and jump a cement median strip. The petitioner got out of her automobile, fell into the street and struck her head on the ground. Her coworker attempted to come to her assistance

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and offered again to drive her home. Petitioner refused and drove away. The coworker continued to follow her and shortly thereafter, the petitioner stopped her car and the coworker drove her home.

6. On March 28, 1985, at the end of first period, several female pupils complained of the petitioner performing scissor kicks with legs widespread. Pupils also commented that the petitioner had alcohol on her breath.

7. On March 28, 1985, at the end of second period, the petitioner engaged in inappropriate behavior by arm-wrestling eighth grade boys on the weight bench.

8. On May 1, 1984, the petitioner was observed in a close embrace with a student in which the student performed sexually suggestive movements.

9. On May 11 and 25, 1985, the petitioner publicly talked about committing suicide.

CHARGE ONE
RELEVANT EVIDENCE

The Board adduced the testimony of its chief medical inspector. In December 1982, he was called and asked to look into an incident of aberrant behavior on the part of the respondent (P-1). He contacted the respondent's personal physician. After consideration, he wrote to the Board stating he believed the incident was a result of an idiosyncratic reaction to medication. He cautioned, however, that if any further incident should occur, the respondent should be seen by an emergency room physician immediately (P-2).

He received a report of the June 1984 incident (P-4) and recommended complete physical and mental evaluations. He had concerns about the respondent's ability to handle her job and the safety of children in her care. The medical inspector saw the petitioner in August 1984. Before examining her, he received additional correspondence from her personal physician suggesting a leave of absence. Her physician also suggested that her behavior might be a result of taking prescription drugs on an empty stomach and anxiety.

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The medical inspector's report of the examination (P-12) recommended a psychological examination and blood screening.

The medical inspector received and reviewed the psychiatrist's report (P-13) discussed below. He was concerned about the psychiatrist's recommendations that the respondent should be under close observation. The psychiatrist's mention of "maladaptive coping mechanisms" indicated a need to observe the respondent for inappropriate behaviors. The medical inspector also testified that during the 1982 and 1984 incidents, the petitioner was probably disabled.

The examining psychiatrist also testified. In September 1984, he was requested by the Board's personnel director to evaluate the respondent's ability to return to work. He reviewed a number of documents, spoke to the personnel director, spoke to the medical inspector, interviewed the respondent and evaluated her mental status. The June 15, 1984 incident was the specific impetus for the examination, but the psychiatrist believed there was a prior history of inappropriate behavior in this case.

The psychiatrist produced exhibit P-13 on September 26, 1984. He testified, and the exhibit states, that at the time of his interview, he did not believe there was any psychiatric impairment to the degree sufficient to prevent the respondent from resuming her duties. He did, however, express the opinion that the petitioner has psychiatric difficulties per se. They are non-psychotic, and she is not a danger to herself or others. Nevertheless, the psychiatrist did highly recommend that she immediately seek outpatient psychiatric care to address what he saw as a recurring maladaptive coping pattern.

The psychiatrist further recommended that the Board consider a type of observational or probational period during which the petitioner would be reviewed with more scrutiny than other teachers, for the purpose of evaluating whether any maladaptive behavior patterns recurred.

The psychiatrist also testified that the respondent has a long history of inability to deal with people. The respondent stated she was having problems going into school, but that the problems all came from other persons, not herself. The psychiatrist carefully reviewed the prescription drugs that the respondent was taking. He formed the opinion that these drugs, in combination, could result in disorientation. The respondent denied

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drinking while taking these drugs. She specifically denied drinking before either incident referred to above.

The principal of Grice Middle School testified that she was called into the school nurse's office on December 17, 1982. She there observed the respondent in the outer office crying hysterically. The contents of the respondent's pocketbook were spread over the floor. The principal as well as the school nurse tried to ascertain from the respondent what was wrong. The respondent's replies did not make any sense. At times, she appeared to talk about her father's death and to become giddy.

The principal also testified that she was able to ascertain a very strong smell of alcohol on the respondent's breath (T2, 149). The principal notified the director of secondary education, her immediate supervisor. He instructed the principal to make sure that the respondent's mother came to school to take the respondent home. He further directed the principal to document what she had seen in the nurse's office (P-1). The respondent, upon her mother's arrival, had to be helped out of her chair and assisted in putting on her jacket. She was unable to walk by herself.

Subsequent to the incident, the principal was informed by the respondent's physician that the incident was caused by an idiosyncratic reaction to medication (P-2). The respondent was allowed to return to work thereafter (P-3). The principal stated she had received reports from other teachers, both within and without the physical education department, that the respondent was coming to school with the odor of liquor on her breath (T2, 165). Upon the respondent's return to school, however, the principal was reassured because the respondent appeared to be in good physical condition. The incident was not mentioned in the respondent's annual performance report because the principal believed it was an isolated incident.

A similar incident occurred on June 15, 1984. The principal and the director of secondary instruction testified about the event.

The principal was informed by a teacher that the respondent was in the faculty dining room and had been observed having difficulty talking, carrying on a conversation and walking. The principal immediately went to the cafeteria and observed the respondent for several minutes. When the bell signaling the start of the day's activities

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rang, the respondent attempted to rise from her chair but was unable to do so. At that point, the principal entered the area, concerned that the respondent might spill hot coffee on herself. The principal then walked with the respondent to the end of the main cafeteria. The principal told the respondent that she wanted the respondent to go to the nurse's office and sit there for a while. The respondent was unsteady on her feet. The principal again detected the odor of liquor on the respondent's breath. The principal expressed concern for the respondent's safety at that point (T2, 168).

When the principal got the respondent to the nurse's office, she called the director of secondary instruction to alert him to the fact "that I had another situation with Linda where I felt she was in no condition to go into the classroom." (T2, 169.)

The director immediately came to the Grice School. When he arrived, the respondent was bent over touching her toes and remained in that position while the principal tried to speak to her. The director asked the respondent to stand up, which she refused to do. The respondent said she would not answer any more questions with the principal in the room. The director asked the principal to leave (T2, 169-170). Again, the respondent's speech was slurred. She then indicated she had taken medication on an empty stomach and that the coffee she attempted to drink in the faculty dining room was the first food she had that day (T2, 170). The principal once again put her personal observations of the incident into written form (P-4).

The director testified that because of the principal's concern after the December 1982 incident, he had instructed the principal to call him immediately in any similar event. His testimony of the events in the nurse's office substantiated that of the principal.

The director also testified that the respondent stated her condition would not prevent her from completing her assignments for the day (T3, 16). The director, however, insisted that she would have to leave the school. The respondent insisted on driving herself home. The director threatened to call the local police should she get into her car and attempt to drive (T3, 17). Ultimately, the director drove the respondent home while a vice principal followed in the respondent's car.

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Following this incident, the director drafted a document that summarized his observations (P-6). This, along with statements from the principal and school nurse, was sent to the assistant superintendent for curriculum and instruction. The director discussed his observations and his report with the assistant superintendent and the superintendent (T3, 21).

On June 18, 1984, the superintendent suspended the respondent with pay through the end of the school year, pending physical examination. The school physician and a psychiatrist were involved as set forth in their testimony, above. The school administrators were particularly concerned about the psychiatrist's report (P-13) in which the psychiatrist noted the respondent's denial of both incidents and denial that she was impaired during either. This, coupled with a long history of problems in dealing with other people and the possibility of drug abuse, albeit prescription drugs, were certainly cause enough to keep the administration sensitive to the situation.

As to the fourth specification of charge one, the respondent returned to work in early October 1984, and was closely monitored by the principal. On April 3, 1985, the principal became aware that the respondent left her class unattended at an outside location and went into the locker room in order to discipline a pupil. The principal discussed the incident with the respondent and was told the respondent had gone back into the building in order to ascertain why a female pupil had not come out.

The principal testified she corroborated the incident with another physical education teacher who had a class in the same general vicinity at the same time. The other teacher observed the respondent's pupils roughhousing, going into a wooded area near the school property and being generally unorganized. He could not find the respondent in the area.

The principal reduced her personal observations to an incident report dated April 3, 1985 (P-17). On April 4, the principal completed her annual performance report of the respondent, which detailed many deficiencies as well as the incident of April 3. The principal concluded that the respondent should be denied all salary adjustments for the 1985-86 school year (P-19).

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The director testified that, following receipt of the principal's performance report, all documentation concerning the respondent was reviewed. As a result of discussions among central administration and the building administrator, the superintendent determined to suspend the respondent "to allow us time to make a complete review of your file and discuss your performance with your supervisors with the possibility that further disciplinary action may be instituted" (P-20).

The respondent testified that she has been a physical education teacher in the district for 15 years. She recalls the December 17, 1982 incident but does not recall if she saw the principal on that day. She believes she had an adverse reaction to a mixture of medications. "I don't how to explain it. It was just an adverse reaction. I guess they picked it up more than I did. I couldn't - you know, I really can't - I can't describe it" (T4, 102). The witness also stated she believes she could have taught that day.

The witness recalled the June 1984 incident in the school cafeteria and nurse's office. She recalls seeing the principal. The respondent states she was literally pulled out of the faculty dining room. She recalls that she was in a very good mood that day. She did not feel impaired. She also recalls that the nurse was present when she and the principal entered the nurse's office. The director of secondary instruction came in "two shakes of a lamb's tail," although the central office is approximately 15 minutes away by automobile.

The respondent remembers her conversation with the director. He asked how she was feeling. He stated he did not believe she could teach. The respondent always stretches before class and believes her behavior in the nurse's office was not abnormal. The director insisted that she would have to see a physician. She stated she could teach that day and could definitely drive herself home. She did go home, but not of her own choice. Someone drove her car although she was able to drive and was able to teach.

The respondent was also definite that she does not cry uncontrollably or lack coordination. She may, on occasion, have been upset. There was never an odor of liquor on her breath, only of mouthwash. She may have mentioned her father's death at one time or another and she often giggles. She does not recall making any statements to the effect that her class needed her.

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The respondent remembers that her mother came to the school building on December 17, 1982. Her mother was angry with everyone in the school and with her. "I walked fine, except my mother kept pushing me" (T4, 110).

The respondent did see her physician that day. He gave her "a shot of something." The witness iterated that her behavior that day was normal but that she might have talked about her father. If she cried, it was probably only in relation to her father's death. The witness acknowledged, "I know I babbled because I talk a mile a minute anyhow, so —" (T4, 112). She also stated she doesn't completely recall the day. "To me that was a long time ago. . . . but it's still vague in my mind" (T4, 112-113).

The witness acknowledged that she did take prescription medications on occasion while at work, but only as needed.

DETERMINATION

The overwhelming weight of the parol and documentary evidence supports the Board's charge. The party bearing the burden of proof in an administrative hearing must prove the case by a preponderance of the evidence. This tribunal, therefore, must decide in favor of the party on whose side the weight of the evidence is stronger and according to the reasonable probability of truth. Jackson v. D.L. & W.R.R., 111 N.J.L., 487, 490 (E. & A. 1933). The evidence is found to preponderate if it establishes the reasonable probability of the fact. Jaeger v. Elizabethtown Consolidated Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940). Because the interest, motive, bias or prejudice of a witness may affect his credibility and justify the trier of fact, whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony, I **FIND** a fortiori the testimony of the Board's witnesses to be the reasonable version of the incidents to which they testified. I can detect no element of animus directed toward the respondent. To the contrary, the principal's testimony, particularly, showed great concern for the respondent's welfare.

The evidence presented by the Board in support of charge one is compelling. I **CONCLUDE** that Linda Kurts did engage in conduct unbecoming a teaching staff member as set forth in the specifications of this charge. The charge is **SUSTAINED.**

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CHARGE TWO
RELEVANT EVIDENCE

The Board's proofs concerning charge two rest primarily on documents. Between September 6, 1983 and February 10, 1984, the respondent was late 34 times (P-21). The principal reminded the respondent orally and in writing of her frequent tardiness and the need to be prompt. The observation reports of February 10, 1984 (P-21) and February 26, 1985 (P-22) also address attendance. In P-21, the principal stated:

> Your excessive tardiness also prompted an examination of your attendance record. Your past record reveals that you consistently used all your personal days and depleted your sick time to such a degree that as of February 6, 1984, you have only 1.5 sick days left for the remainder of this school year. . . .
>
> None of these absences were long term. They were mostly of 1, 2, or 3 days' duration. Our major concern, therefore, is for the discontinuity of instruction that this absence pattern caused for our students. The benefit of regular classroom instruction is lost during a teacher's absence and the loss is not regained. The process of education requires continuity of program with the teacher directing the classroom activities and learning experiences in order for individual students to gain maximum benefit from your instruction. The students' contact with their assigned teacher on a regular basis is vital to this process.
>
> Your excessive tardiness and frequent absences interrupts [sic] the effective operation of classes. The burden of assuming your responsibilities at your morning duty post in helping to set up gym equipment falls on your colleagues. Your tardiness also results in frequent absences from the morning Health and Physical Education department meetings.
>
> In light of the above outlined record, the following recommendations are being made as a plan for improvement:
>
> 1. Report daily upon arrival to the office so that your arrival time is duly recorded.
>
> 2. Seek the advice of the District's Curriculum Assistant for Health and Physical Education regarding continuity of the Instructional Program.
>
> You are advised that your arrival and attendance will be monitored closely. If you are experiencing medical problems, it is suggested that you consult a physician. Should the present pattern of tardiness and absence continue, it will requested that

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> you undergo a physical examination by the district's Chief Medical Inspector.
>
> If improvement is not forthcoming, further disciplinary action may be recommended.

A similar warning was issued in the annual performance report of May 4, 1984 (P-23). The observation report dated February 26, 1985 (P-22) concludes:

> Therefore, I am recommending that Mrs. Kurts' increment and salary adjustment for the 1985-86 school year be withheld. Further, unless significant improvement in tardiness and absenteeism is made further disciplinary action will be recommended.

Two months later, the respondent's annual performance report (P-19) notes chronic tardiness and absences. The report notes that the respondent had not met the goal of her 1984-85 Professional Improvement Plan with respect to these areas.

The principal's testimony was unrebutted. The respondent did testify as to the morning sign-in procedure. She stated that the clocks in the building were unsynchronized. Also, if she were the last in line to sign in, her "name was written"; that is, she was reported as late if she were delayed signing in because other staff members were in front of her. The witness acknowledged that 7:55 a.m. was the stated time for teacher sign-in. She could not recall when that time had been changed from 8:00 a.m.

DETERMINATION

The tardiness and attendance records speak for themselves. The petitioner offered virtually nothing to mitigate the evidence against her on this charge. I **FIND** that the number of times the respondent was tardy reporting to her duties was clearly excessive and equally clearly was disruptive of the operation of the school in general and the health and physical education department in particular. I **CONCLUDE** that the Board has demonstrated the truth of charge two by a preponderance of the credible evidence in the record. The charge is all **SUSTAINED.**

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CHARGE THREE
RELEVANT EVIDENCE

Charge three, other just cause, centers on the respondent's failure to carry out preparations for Volleyball Playday on December 27, 1985, being late or failing to appear for morning bus duty and refusal to set up gym equipment. The principal testified to the respondent's late arrival or nonarrival for bus duties in the mornings based on her own observations. The principal similarly testified that she personally observed the respondent's failure to assist with setup of gym equipment prior to classes as a result of her late arrivals (P-22). The principal also stated that the respondent failed to be at her assigned duty post or to report for department team planning meetings to help out with the set-up of physical education equipment in the gymnasium during the weeks that the physical education program was conducted inside (T4, 15).

The principal also testified as to her personal observations of the respondent's failure to perform assigned duties for the Valleyball Playday on February 27, 1985 (T4, 15). And finally, the respondent was absent from her teaching duties on February 8, 1985, and did not have lesson plans available to the substitute teacher (T4, 13-15). See also, P-22.

The respondent testified about the Volleyball Playday. Each teacher was asked for a list of pupils who should participate. The Playday was a "sort of round robin" at various schools. The respondent always told the vice principal the number of pupils who would be participating and what refreshments would be needed.

One of her colleagues assured her that transportation had been arranged for February 27 and that another colleague would pick up refreshments, but he forgot.

The respondent went to the cafeteria and ordered beverages. She also had to get a film for physical education classes to view while the Playday was going on. It took her a long time to choose the film. When the building principal asked if all arrangements for the Playday had been made, the respondent replied that they were. The principal appeared annoyed that the respondent's colleague had to pick up refreshments during his preparation period.

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The respondent testified that she always had lesson plans available for substitute teachers. Her substitute teacher files were spot-checked by a vice principal. Hers were always ready for use. She was, indeed, at home ill on February 8, 1985. She was never informed before that occasion that her plans were not available. On February 8, 1985, she followed the call-in procedures prescribed by the district. She received no call from anyone at her school that day concerning lesson plans or any other question.

The witness denied being late or failing to appear for morning bus duty. She also stated that she never refused to set up gym equipment prior to the day's instruction.

DETERMINATION

The testimony of the Board's witnesses and, particularly, the careful documentation of the principal, clearly overbear the respondent's testimony in mitigation. Having weighed all the evidence presented on the question, I **CONCLUDE** that the Board has demonstrated the truth of charge three by a preponderance of the credible evidence in the record.

CHARGE FOUR
RELEVANT EVIDENCE

The fourth charge deals with conduct unbecoming a teaching staff member and lists nine specifications. Teachers in the physical education department testified with respect to unprofessional and/or abnormal behavior by the respondent in or around physical education classes.

In or about the 1982-83 school year, one colleague became aware that the respondent was not doing her share of the teaching and related assignments (T1, 85). At about the same time, the staff member mentioned to the principal that some department members were concerned and "that we would like everyone in our department to pull their load" (T1, 86). During the last year and one-half of the respondent's service at Grice School, female pupils began to make comments concerning the respondent. On at least one occasion, a female pupil asked this witness if the respondent had been drinking (T1, 94). The staff member attempted to deflect these inquiries (Ibid.).

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This witness testified, however, that during her daily contact with the respondent, she had observed various odors surrounding the respondent. At times, the respondent would come into the physical education office, proceed directly to a small lavatory and come out a few moments later smelling heavily of perfume and/or mouthwash. Most often, however, the respondent would smell of liquor (T1, 95-96).

On May 1, 1984, this witness observed the respondent in a close embrace or bear hug with a male pupil in which the pupil performed, in the opinion on this witness, suggestive movements (T1, 96-99).

In March 1985, this witness observed the respondent being grasped around the waist by a male pupil and helped up to the chinning bar although the witness had observed the petitioner reach the bar by herself on several occasions (T1, 117-118).

Another colleague testified that he observed the respondent reading a magazine or catalog or exercising while pupils in the gymnasium were engaged in circuit training or "general horseplay or fooling around with the equipment" (T2, 62).

Both witnesses testified to an incident of March 27, 1985. The respondent, in what was described as a "giggly mood," engaged in an exercise in the gymnasium in which a considerable portion of her pubic area was left open to view by pupils and teachers (T1, 110-115).

Her male colleague testified that the respondent and male members of her class engaged in an arm wrestling incident that gave him concern (T2, 53-55). He brought this activity to the attention of other department members. This witness also corroborated the testimony of the principal and the respondent's female colleague concerning the smell of liquor surrounding the respondent on many occasions. This witness testified that he was "reasonably certain that it was alcohol" (T2, 79). He stated he smelled liquor on the respondent's breath, usually in the morning. This witness, in addition to his health and physical education training, has worked for an alcohol and drug rehabilitation facility in Pennsylvania. He stated he had extensive experience in caring for and working with patients admitted for alcohol abuse (T2, 78).

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In addition to smelling liquor on the petitioner's breath while she was on the job, this witness testified he had seen the respondent in an intoxicated state while off the school premises. He testified that in late March 1985, the respondent stopped at a gas station at which he worked as a part-time employee. She arrived shortly before 11:00 p.m. She appeared to have been drinking and her gait was uneven (T2, 84-87). He told the respondent he did not believe she could drive home but she refused his advice and began to drive off. The witness followed in his own car in order to ensure that she was capable of driving. The respondent was not staying in the appropriate traffic lanes. She had difficulty negotiating some turns and, at one point, her car crossed a cement median (T2, 89-90).

The witness observed the respondent leave her car, fall backwards and strike her head or forehead on the pavement. She got up and proceeded to walk through the neighborhood, crying.

Once again, the witness asked to drive her home. The respondent again refused and drove off (T2, 91-92). About one-half mile farther down the road, the respondent stopped her car and this witness observed her still crying. He moved her from one side of the car to the other, drove her car the rest of the way to her home and took her inside (T2, 92).

The following day, the witness saw the respondent at work. She apologized about the events of the previous evening and explained that she had not had very much to eat that day and that some drinks had "gone right through her" (T2, 93).

The respondent's own testimony on these matters did not serve to rebut the testimony offered by the Board. Concerning the last incident, she stated that her colleague's testimony was not the truth. However, she had no idea why he would not be telling the truth concerning that kind of activity (T4, 171).

The witness also testified that she recalled the chinning bar incident. She did ask a male pupil to help her to the bar. She stated:

> He was one of the strongest boys in my class, and asking him to assist me to the chin-up bar because I could not reach it, and I did not want to jump to get it because I did not want to get a

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> nose broken, which happened to some girl, another student previously when she made a running leap for the chin-up bar. And I also felt that if I expected my students to do chin-ups then I should be practicing and be quite capable of doing a chin-up myself. And the only way I was going to do that was "practice makes perfect." As far as [C.S.] copping a feel, I don't even know where those words came from. All he did was give me a one-two-three and up I went and that was all (T4, 124).

The respondent testified she had no reason to believe that the principal or the director of secondary education disliked her (T4, 175). The petitioner put forward no reason why the principal, director or her colleagues would either fabricate or mischaracterize events.

The respondent's testimony concerning the allegation that she was, on a certain day, reading in the gymnasium while her pupils were left to their own devices was rambling and inconclusive (T4, 126-127).

The witness exhibited the uniform she wore at the time of the alleged exposure incident. Her testimony concerning the uniform, however, did not cast any light on the incident (T4, 127-128).

The respondent stated she had no recollection of leaving her class unattended during the last week of March 1985. She would only leave her class if someone were sent to get her and another person would take over the class while she went to the school office.

The witness also testified that each teacher set up equipment in his or her own section of the gymnasium. Sometimes larger boys would help put weights in place. She did set up equipment during 12 or 15 minutes in the morning which was part of her preparation time. She also had bus duty every day from 8:00 a.m. to 8:20 a.m.; she always waited until the last child was in the building before returning to the physical education area, and 8:20 a.m. to 8:30 a.m. was supposed to be her preparation time. However, if she took her preparation time, one of her colleagues accused her of not setting up equipment. The colleague did not directly accuse her of this, however, but did so through the principal (T4, 129-132).

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The witness recalled arm wrestling with eighth grade boys in March 1985. She stated:

> I had dismissed my class. My boys had walked — stood along the red line waiting for Mr. Diamond's class to be dismissed, it was time for them to shower and I dismissed my girls and made them stand on the red line and a couple of my boys asked me if I would arm wrestle or if I would arm wrestle them while they were waiting for Mr. Diamond, so on the weight bench, not the wooden bench that was in the center [witness indicating on diagram] underneath this bench we had stacked mats [again indicating] so that our students, even our smaller students would put their feet on the mat, not hurt their back, and, you know, because their feet couldn't touch the floor. So one student — I might be here, or here [indicating] and the other student would be here [indicating].

The witness maintained she was able to keep visual control of the group at all times.

Concerning the bear hug incident, the respondent stated:

> We had brand new stop watches, that whole department, that year. And Miss Geiser kind of took over the department after Miss Frasella left and she was a fanatic about stop watches. . . . Knowing that, what happened was [N.J.] took my stop watch off me when I was coming inside and I tried to retrieve it. And I did. But as far as a bear hug or whatever, I was just retrieving — I just retrieved my stop watch and he messed — he really messed it up, anyhow. And it was brand new too. I knew she would be upset about that. But he was only fooling around (T4, 136-137).

The witness generally denied the testimony of her two physical education colleagues. She stated she had personal difficulties beginning in approximately 1982, but they are now resolved. She lived with her husband until approximately 18 months ago.

The witness iterated her denial that Mr. Diamond had ever seen her in any sort of automobile mishap (T4, 171). She also stated that her class was unattended for approximately three minutes during the incident in which she left the class outside while she sought a pupil within the building (T4, 172).

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Other testimony produced by the Board tended to show that the respondent had, although perhaps not clearly, mentioned suicide on two different occasions.

DETERMINATION

The Board's proofs clearly outweigh and are more convincing than the respondent's on charge four. I **FIND** that each specification has been proven true by a preponderance of the credible evidence in the record and I **CONCLUDE** that charge four must be sustained.

CONCLUSION AND ORDER

In summary, the Board has proven all four charges it preferred against the respondent. The nature of the charges is such that, while sympathy must be felt for the respondent, the inescapable judgment is that the respondent must be removed from contact with pupils. As the Commissioner stated in Tenure of Sammons, 1972 S.L.D. 302, 321:

> [Teachers] are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment. As one of the most dominant and influential forces in the lives of the children, who are compelled to attend the public schools, the teacher is an enormous force . . . .

It is, in human experience, too much to hope that every teacher will set a perfect example for the children in her or his care. The same human experience, however, teaches that a pattern of untoward incidents involving or bearing upon pupils must be interrupted. The unfortunate incidents demonstrated in this record constitute unfitness to hold a teaching position. Tenure of Gaus, 1979 S.L.D. 248, rev'd St. Bd., 1980 S.L.D. 1490.

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For the foregoing reasons, it is ordered that the respondent be dismissed from her employment with the Hamilton Township Board of Education as of the date of final decision in this matter.

The evidence produced by the principal and director of secondary instruction forms a clear basis for the withholding of Linda Kurts' salary and adjustment increments for the 1985-86 school year. I **FIND** her appeal of the withholdings to be without merit and **ORDER** the petition **DISMISSED.**

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

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

9 OCTOBER 1986
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

OCT - 9 1986

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

OCT 10 1986
DATE

Ronald L. Parks/ts
OFFICE OF ADMINISTRATIVE LAW

ds/e

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IN THE MATTER OF THE TENURE HEARING OF LINDA KURTS, SCHOOL DISTRICT OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY.	:	
LINDA KURTS,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	
RESPONDENT.	:	

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

Respondent's exceptions to the initial decision and the Board's reply to those exceptions were filed with the Commissioner pursuant to applicable provisions of N.J.A.C. 1:1-16.4a, b and c.

Respondent argues that the ALJ's recommended penalty of dismissal from tenured employment is disproportionate to the misconduct complained of by the Board, given the mitigating circumstances attendant to such tenure charges. Respondent maintains that the record of this matter clearly establishes that her "maladaptive behavior" occurred prior to her present emotional and psychological rehabilitation and that for the Commissioner to dismiss her from her tenured teaching position would penalize her for actions which were beyond her control.

In connection with the incident related to Charge One, respondent contends that the behavior which she exhibited on December 17, 1982 when she reported to the school nurse's office crying uncontrollably and again on June 5, 1984 when she was observed by staff members having difficulty in speaking, walking or remembering, was due solely to her ingestion of prescribed medication.

Respondent further contends that the reason she left her class unattended outside the school building on April 3, 1985, was because she had to deal with a disruptive student.

Respondent maintains that Charge Two, related to excessive tardiness and absenteeism, is without justification. Although respondent admits being tardy forty-six times over a period of three

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school years, she claims that such latenesses were only a few minutes on these occasions without the necessity of requiring a substitute to act on her behalf. Likewise, respondent claims that there is no cause for her removal from employment for what the Board alleges to be "excessive absenteeism" in connection with the 174.5 days she was absent during 14 years.

Respondent argues that teaching staff members cannot be punished for exercising their contractual rights to sick leave which in her case amounted to 138.5 days. According to respondent, the Board failed to show that there was any disruption of the educational process over the period of time in question.

With respect to Charge Four, respondent claims that she is being held responsible for at least two incidents over which she had no control, namely those which involved a student who had assisted respondent by picking her up around the waist and lifting her to the chinning bar and the alleged inappropriate "scissors" exercise she performed on a mat in the gymnasium observed by other staff and pupils.

However, respondent maintains that the remaining incidents connected with Charge Four, identified in the initial decision as Nos. 2, 3, 5 and 6 (Initial Decision, ante), are irrelevant, unsubstantiated hearsay or denied as being material to the tenure charges against her.

The Board rejects those arguments advanced by respondent in her exceptions as being nothing more than a reiteration of her position taken before the ALJ and addressed at length in the initial decision. The Board in supporting the ALJ's findings and recommendations maintains that:

> ***nowhere has Respondent demonstrated that her actions were the result of serious personal problems, as indicated by *** her attorney. There was some testimony that Respondent had personal difficulties in her life, but there was no testimony from anyone that her conduct emanated or was controlled by those personal problems. Additionally, there is no evidence that whatever personal problems Respondent had have been overcome. Respondent provided no testimony, either from disinterested witnesses or doctors, to indicate or demonstrate that she was a fully functioning and competent individual, capable of returning to a classroom situation.***
> (Board's Reply Exceptions, at pp. 1-2)

The Commissioner has reviewed all the documentation and the testimony of the witnesses, including the testimony of respondent related to each of the incidents set forth in the Board's tenure Charges One through Four. In the Commissioner's judgment the weight of the credible evidence presented by the Board in support of each of the tenure charges against respondent has been established in

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accordance with the criteria relied upon by the ALJ as enunciated by the Court in Jackson, supra, and Jaeger, supra. The Commissioner is not unsympathetic to those problems of a personal nature which apparently affected her physical and mental well-being.

However, respondent's claim that the Board failed to establish that her absences from employment in question caused any disruption in the educational process is clearly without merit. Respondent was informed by her principal on February 10, 1984 (P-21) and again on May 24, 1984 in her performance evaluation (P-23) that her frequent absences had a deleterious effect on the continuity of the educational program of her pupils. The Court has held that the burden of proof in establishing that excessive absenteeism does not disrupt the educational process is placed upon the affected teaching staff member and not the employing Board of Education. See Trautwein v. Board of Education of Bound Brook, 1978 S.L.D. 445, aff'd State Board 1979 S.L.D. 876, rev'd N.J. Superior Court 1980 S.L.D. 1539.

In the Commissioner's judgment, frequent absences of teachers do disrupt the continuity of instruction for the reasons previously stated by the Commissioner in In the Matter of the Tenure Hearing of Catherine Reilly, School District of the City of Jersey City, 1977 S.L.D. 403 wherein it was held:

> ***Frequent absences of teachers from regular classroom learning experiences disrupt the continuity of the instruction process. The benefit of regular classroom instruction is lost and cannot be entirely regained, even by extra effort, when the regular teacher returns to the classroom. Consequently, many pupils who do not have the benefit of their regular classroom teacher frequently experience great difficulty in achieving the maximum benefit of schooling. Indeed, many pupils in these circumstances are able to achieve only mediocre success in their academic program. The entire process of education requires a regular continuity of instruction with the teacher directing the classroom activities and learning experiences in order to reach the goal of maximum educational benefit for each individual pupil. The regular contact of the pupils with their assigned teacher is vital to this process.*** (at 414)

The Commissioner, in reviewing the evidence in support of the tenure charges against respondent, cannot ignore the detrimental effect it had upon her teaching colleagues because of her episodes of unreliable and unpredictable behavior. Of equal concern to the Commissioner is the fact that respondent's poor judgment and unorthodox behavior have caused her students to question her judgment, commitment and motivation as their teacher. It is evident from the record of this matter that respondent's lack of consistency in the performance of her teaching duties and responsibilities

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failed to establish the appropriate standards of acceptable conduct for students who rely upon her guidance and example in the classroom setting.

Accordingly, the Commissioner affirms the initial decision which rejects Kurts' claim for restoration of a salary increment withheld for the 1985-86 school year and finds and determines that the Board has, by a preponderance of credible evidence, established that respondent is guilty as charged of the tenure charges against her.

It is further found and determined that the incidents involved in such tenure charges are deemed to constitute unfitness to hold a tenured teaching position in the Board's employ.

It is therefore ordered that respondent be dismissed from her tenured teaching position with the Hamilton Township Board of Education as of the date of the Commissioner's decision in this matter. It is further ordered that a copy of the final decision in this matter be forwarded to the State Board of Examiners for its review and, in its discretion, further appropriate action.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

November 19, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 4546-86
AGENCY DKT. NO. 195-6/86

BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER,
Petitioner,
v.
MAYOR AND COUNCIL OF THE BOROUGH OF SOUTH RIVER,
Respondent.

Gordon J. Golum, Esq., for petitioner (**Linda Lashbrook**, Esq., and **Steven J. Tripp**, Esq., on the brief) (Wilentz, Goldman & Spitzer, attorneys)

Frank J. Paprota, Jr., Borough Attorney, for respondent

Record Closed: September 15, 1986 Decided: October 14, 1986

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

The South River Board of Education (Board), petitioner, appeals from the action of the Borough of South River (Borough), respondent, taken pursuant to N.J.S.A. 18A:22-37, certifying to the Middlesex County Board of Taxation a lesser amount of appropriations for school purposes for the 1986-87 school year than the amount proposed by the Board in its budget that was rejected by the voters on April 15, 1986.

The matter was opened before the Commissioner of Education on June 3, 1986, by the Board. The Borough filed its answer with the Commissioner of Education on July 8. On July 10, the Department of Education transmitted the matter to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. After notice, a conference of counsel was held on August 21 at

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which the issues in the matter were defined as: (1) Is the budget as fixed by the Borough sufficient to carry out the mandate for a thorough and efficient system of public schools in the district; (2) Did the Borough fail to comply with the requirements of Bd. of Ed., E. Brunswick Tp. v. Tp. Council, E. Brunswick, 48 N.J. 94 (1966), and (3) If so, what are the effect and remedy? The matter was set down for hearing on October 29, 1986.

The Board filed a motion for summary judgment on July 28. The Borough filed responsive papers on September 5 and the Board filed reply papers on September 10, corrected on September 15.

The only ground beneath the motion is the Borough's alleged failure to give reasons for its budget reductions. The Board maintains that the Borough's failure to provide supporting reasons for its reductions at the time of those reductions warrants summary judgment restoring the total amount by which the Borough reduced the budget. The Borough counters that its reduction of the budget was not arbitrary, capricious or unreasonable and was properly related to educational considerations as required by statute.

CONTEXT OF THE CASE

The Board submitted its 1986-87 budget to the voters on April 15, 1986. The amount set for current expenses to be raised by local levy was $5,783,373 and the amount fixed for capital outlay to be raised by local levy was $38,620.

Prior to submission of the budget to the voters, the Board obtained a cap waiver approval from the Commissioner of Education by letter of March 7, 1986. The waiver granted a budget increase of $198,825 above the Board's calculated limit, with the bulk of that amount being dedicated to salaries for librarians and guidance counselors and to textbooks and equipment.

Upon defeat of the budget, the Board submitted the budget to the Mayor and Council of the Borough pursuant to N.J.S.A. 18A:22-37, which, in its entirety, reads:

> If the voters reject any of the items submitted at the annual school election, the board of education shall deliver the proposed school budget to the governing body of the

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> municipality, or of each of the municipalities included in the district within 2 days thereafter. The governing body of the municipality, or of each of the municipalities, included in the district shall, after consultation with the board, and by April 28, determine the amount which, in the judgment of said body or bodies, is necessary to be appropriated, for each item appearing in such budget, to provide a thorough and efficient system of schools in the district, and certify to the county board of taxation the totals of the amount so determined to be necessary for each of the following:
>
> a. Current expenses of schools;
> b. Vocational evening schools or classes;
> c. Evening schools or classes for foreign-born residents;
> d. Appropriations to capital reserve fund; or
> e. Any capital project, the cost whereof is to be paid directly from taxes, which amounts shall be included in the taxes to be assessed, levied and collected in such municipality or municipalities for such purposes.
>
> Within 15 days after the governing body of the municipality or of each of the municipalities included in the district shall make such certificaton to the county board of taxation, the board of education shall notify such governing body or bodies if it intends to appeal to the commissioner the amounts which said body or bodies determined to be necessary to be appropriated for each item appearing in the proposed school budget.

The Borough met and consulted with the Board on May 6 and 11, 1986. On May 11, the Borough adopted a resolution reducing the current expense portion of the budget by $163,700 and the capital outlay portion by $20,000. The resolution does not state a rationale for the reductions. There is no attachment to the resolution or reference in the resolution to any other document that expresses reasons for the reductions.

The Board filed the present petition on June 5, 1986. N.J.A.C. 6:24-7.4 requires, "The governing body shall file an answer with the commissioner not later than 15 days after receiving the district [Board] of Education's petition." In this case the Borough filed its answer on July 8. The Board asserts that it received no copy of the answer, with a statement of reasons for reductions, until July 17. The Board maintains and the Borough denies that a belated statement of reasons submitted in or with the answer to the petition is insufficient to defeat the Board's motion for summary judgment regardless of the content of the answer.

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BOARD'S ARGUMENTS

The Board states that the Borough's failure to provide supporting reasons for reductions at the time it made reductions is sufficient reason for this judge to grant the Board's motion for summary judgment. The Board also asserts that the grant of a cap waiver by the Commissioner, in the absence of admissible evidence from the Borough, also requires an award of summary judgment restoring all reductions made in the budget.

After a board has complied with N.J.S.A. 18A:22-37, above, it may appeal any reduction in the budget to the Commissioner of Education within 30 days of the governing body's decision. In East Brunswick, above, the leading and dispositive case on the issues here, the Supreme Court delineated the governing body's responsibility in acting on a school budget after rejection by the voters:

> 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. 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 under R.S. 18:3-14 [now N.J.S.A. 18A22-37], 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. [emphasis added] [48 N.J. at 105-106]

Thus, the obligation to provide specific determinations and supporting reasons for the reduction in each particular line item goes to the very heart of a governing body's function in reviewing a school budget. The Commissioner consistently has required strict adherence to the standards articulated in East Brunswick.

The Board states it is well settled that the "underlying determinations and supporting reaons" required by East Brunswick must indicate for each line item precisely

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how and why the governing body determined that the reduction was warranted. In Board of Education of the Borough of Union Beach v. Mayor and Council of the Borough of Union Beach, 1973 S.L.D. 231, 232, the hearing examiner summarized the reasons offered by the governing body:

> Council simply made statements with respect to individual line items indicating that it was of the "opinion" that a reduction could be made; that the Borough of Union Beach could not afford the proposed expenditure; that an account be reduced in the "interest of economy;" that "austerity is upon" the school district; that "items seem to be inflated;" that it is of the "opinion" that a position is not needed; that a reduction "works no hardship," . . . .

The hearing examiner concluded and the Commissioner determined that such statements do not constitute reasons as demanded by the New Jersey Supreme Court to show the board how it could economize and continue to operate a thorough and efficient system of public schools. In his decision, the Commissioner held:

> The statements submitted by Council as reported, ante, do not give adequate reasons, but merely indicate conclusions and judgments made by Council which it determined to be better than those reasoned determinations made by the Board. The Commissioner determines, however, that such statements by Council do not meet the Court guidelines in East Brunswick, supra; therefore, they cannot be considered. [Id. at 234]

A similar result was reached in Board of Education of the Borough of Haledon v. Mayor and Council of the Borough of Haledon, 1970 S.L.D. 70.

The Board also maintains it is well settled that a governing body's failure to set forth specific line item reductions with adequate supporting reasons at the time of its decision is arbitrary, capricious and unreasonable and warrants full restoration of the amount of reduction. See, Board of Education of the Township of Union v. Township Committee of the Township of Union, OAL DKT. EDU 2788-81 (June 5, 1981), adopted, Comm'r of Ed. (July 9, 1981); Board of Education of the Borough of Keansburg v. Mayor and Council of the Borough of Keansburg, OAL DKT. EDU 6000-82 (Sep. 17, 1982), adopted, Comm'r of Ed. (Oct. 29, 1982).

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In the present case, the Borough supplied a purported statement of reasons with its answers on July 17, 1986, over two months after its decision, and only in belated response to the Petition of Appeal filed by the Board. Its "reasons" are similar to those found insufficient in Union Beach, above. Therefore, the action of the Borough is per se arbitrary, capricious, unreasonable and void from its inception. The Borough's failure to provide reasons for the reduction at the time it was made is "fatal to the Borough's defense of this appeal." Keansburg, slip opinion at 7.

Based on the standards for granting summry judgment set forth by the Supreme Court in Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58 (1980), summary judgment clearly should be granted to the Board in this case. There are no issues of material fact requiring a hearing. There is no evidence the Borough can produce in defense of its inherently defective act of reducing the budget without simultaneously making underlying determinations or giving supporting reasons. As the Commissioner noted in Union Township, above, "the governing body must have the rationale . . . at the time it acts and shall not be permitted to subsequently construct one in a 'bootstrap' manner." Slip opinion at 5.

The Board also asserts that the Commissioner's grant of a $198,825 cap waiver meant that he had reviewed the entire budget, and that he could find no other areas from which funds could be taken to provide the needed services without impairing a thorough and efficient education. He therefore allowed the 1986-87 budget to exceed the Board's cap by that amount. The $183,000 cut from the school budget by the Borough attempts to undermine the Commissioner's determination that a waiver was necessary in the South River School system. The Commissioner's grant of a waiver meant that, in his view, no further cuts or reallocations in the budget could be made in any items.

The granting of a cap waiver, the reasons given for requesting it and the findings of the Commissioner in granting it, constitute substantial evidence in determining the reasonableness of a governing body's reduction of a school budget. Board of Education of the Borough of Highlands v. Mayor and Council of the Borough of Highlands, OAL DKT. EDU 3947-81 (Nov. 6, 1981), adopted, Comm'r of Ed. (Dec. 17, 1981). The judge in Highlands compared such evidence from the Board with the reasons provided by the governing body for each reduction and concluded in each case that the Board had established its needs for the funds requested.

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If the Borough in the present case had provided specific reasons at the time of its budget reductions, it might be proper for the case to proceed to hearing so that the Board's rationale and its evidence, including the cap waiver materials, could be compared with the Borough's reasons for reduction. However, because the Borough provided no reasons, there is no evidence available from the Borough for such a comparison and the Board's evidence — already compelling because it includes the cap waiver — must stand as undisputed. These grounds for summary judgment are thus based upon evidence rules: there is substantial evidence on one side; there is no evidence on the other.

BOROUGH'S ARGUMENTS

The Borough asserts that the Board's motion for summary judgment raises two separate grounds for relief which involve three separate issues of law:

1. The Borough failed to meet the requirements of East Brunswick in that it failed, at the time it made its reductions, to act conscientiously, reasonably and with full regard for the State's educational standards, and therefore its action is per se arbitrary, capricious and reasonable;

2. The Borough failed to meet the requirements of the New Jersey Administrative Code, specifically N.J.A.C. 6:24-7.5, in that it did not submit with its answer a line item budget stating recommended specific economies together with supporting reasons, and therefore is procedurally defective; and

3. The Commissioner's grant of a cap waiver is conclusive evidence that the budgetary amounts determined by the Board are the minimum amounts necessary to provide a thorough and efficient system of schools within the district, thus eliminating any issue of material fact and requiring full restoration of all reductions.

The Borough argues that the Board confuses the first two grounds for relief by suggesting that the New Jersey Supreme Court in East Brunswick required a governing body to provide supporting reasons for its reductions at the time it resolves to cut the budget and that therefore, this failure is per se arbitrary, capricious and unreasonable. In

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fact, there are two separate obligations imposed upon a governing body in the budget process. First, the governing body is required to have specific and properly motivated reasons for its reductions at the time it makes them. Second, in those instances where the governing body makes significant aggregate reductions, it is required to provide a detailed statement of its reduction and supporting reasons. East Brunswick does not mandate that this statement be provided at the same moment that the governing body resolves to reduce the budget, but rather indicates that it should be provided within such times as to enable the Commissioner to fulfill his function as a reviewing agent.

In point two, the Board discusses its third ground for relief. Its argument is grounded upon the assumption that the Borough has failed to provide any reason for its reductions. This assumption is incorrect. Therefore, while the Commissioner's determination concerning a waiver might be persuasive, it is not dispositive of the issue, and therefore, cannot be the basis for the granting of summary relief.

The Borough also asserts that, although the Board's petition of appeal may have been filed timely, it was not served upon the Borough's attorney until the week of June 9. The Borough thereupon requested and received an extension of time within which to file its answer and affirmative defenses.

The Borough's reduction of the Board's budget was not arbitrary, capricious or unreasonable and was properly related to educational considerations. The Borough complied with the requirements of N.J.S.A. 18A:22-37 and N.J.A.C. 6:24-7.5. The Borough met and consulted with the Board on May 6 and May 11, in conformance with the statutory mandate. Thereafter, it determined the amount which, in its judgment, was necessary to be appropriated for each item appearing in the budget to provide a thorough and efficient system of schools in the district.

The Borough considered and evaluated each line in the budget and determined, with respect to each, whether it could be reduced or eliminated. Upon completion of its deliberations, the Borough approved a resolution certifying to the County Board of Taxation the totals of the amount so determined for each catagory specified in N.J.S.A. 18A:22-37.

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Upon receipt of the Board's petition of appeal, the Borough timely filed its answer. In accordance with N.J.A.C. 6:24-7.5, the Borough submitted with its answer the amount certified for each of the major accounts and a line item budget stating specific economies together with supporting reasons. The Board alleges that the Borough's supporting reasons for its reductions, contained in its affirmative statement attached to its answer, are, as a matter of law, insufficient to meet the requirements of East Brunswick. Therefore, the Board's answer is fatally flawed. However, the Board cites none of the Borough's stated recommended economies and supporting reasons which are set forth in the Borough's answer in support of this allegation. The Borough submits that a careful reading of its answer will show that its stated reasons adequately indicate how and why the Borough determined that a reduction was warranted with respect to each line item and are not merely conclusions and judgment of the type proscribed by the Commissioner in Union Beach, above.

Although the Borough's underlying rationale with respect to a particular line item reduction may ultimately be determined to be inadequate in light of the Borough's mandate to provide a thorough and efficient school system, this is not an issue for determination upon motion for summary judgment.

The Borough complied with the requirements of East Brunswick. The Borough provides a transcript of a meeting of May 6, 1986 which, in its view, shows that the Borough's reductions were directly related to educational considerations and were not determined by voter reaction. When the Board submitted the budget to the Borough, the Borough specifically considered individual budget items to determine whether they could be reduced, deferred or eliminated. (Transcript of meeting of May 6.) The Borough's actions were clearly in accordance with the requirement of East Brunswick that the governing body 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. . . ."

The Borough also complied with the mandate of East Brunswick by providing the Board with a detailed statement of its line item reductions and the rationale for each at a joint meeting held on June 5, at a meeting of committees specially appointed by each body on June 9, and in its affirmative statement attached to its answer to petition.

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The Borough's failure to provide the Board, at the time it made its reductions, with a statement of line item reductions and supporting reasons did not violate the requirements of East Brunswick. The Borough asserts that the issue before the Court in East Brunswick was whether the Commissioner had jurisdiction under R.S. 18:3-14 [now N.J.S.A. 18A:22-37] to decide such a controversy between a local school board and a governing body. Upon deciding the issue in the affirmative, the Court then went on to define the scope of the Commissioner's review. It is only in this context that the Court speaks of the obligation of the governing body to provide a detailed statement for its reductions. The purpose of the requirement is to allow the Commissioner to properly fulfill his function as a reviewing agent, as opposed to an original budget-making body. "The Commissioner in deciding the budget dispute 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." 48 N.J. at 107.

Obviously, in order to accomplish his review function, the Commissioner must have before him not only the aggregate reduction but also the individual line item reductions and the reasons therefor. The Borough invokes Board of Education of the City of Passaic v. Municipal Council of the City of Passaic, 1970 S.L.D. 47, 56:

> [T] he Commissioner would underscore the necessity of a clear, precise, and specific statement of a municipal governing body's "underlying determinations and supporting reasons" for its proposed reductions in a school budget. . . . Absent such a statement, the hearing examiner - and thereafter the Commissioner - are deprived of the opportunity to evaluate the differing appraisals of need with respect to disputed budget items. The Comissioner understands the Court's purpose in the East Brunswick decision to be that the Commissioner shall be in possession of the disputed determinations of both the Board and the governing body before he can make his own determination. Without the full performance of both parties, he cannot carry out his own function as efficiently as he would desire. [emphasis added]

Although the time when the governing body provides the board and Commissioner with its written statement of line item deductions and supporting reasons is not totally irrelevant, East Brunswick did not mandate that such statement be supplied at the same moment that the reductions are adopted by a governing body. The only time element interjected by the Court was in the context of the Commissioner's assumed desire to "know quickly" which individual items were reduced and on what basis. This becomes all

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the more evident in the context of the present statutory and administrative code provisions respecting school budget reductions by a governing body. N.J.S.A. 18A:22-37 has been amended on six separate occasions since the decision in East Brunswick. At no time has the legislature seen fit to require that the governing body provide a written statement of line item reductions and supporting reasons at the time of its reductions.

More importantly, the administrative code provisions respecting budget hearing rules, which were specifically adopted pursuant to the holding in East Brunswick, require submission of this statement at the time of filing of the governing body's answer to the board's petition. N.J.A.C. 6:24-7.1; 6:24-7.5. Had the holding in East Brunswick required submission of this statement at the time the governing body makes its reductions, the applicable administrative code provisions would have so provided.

The Borough also believes the Board's reliance on Union Township, above, is misplaced. The Borough states that unlike the present case, the governing body in Union Township made a lump-sum reduction, without regard to specific budget items and only then attempted to scrutinize the budget to justify its cuts. By contrast, the Borough here knew exactly from which line items its reduction would come and its reasons therefor at the time it made the reductions.

In the Borough's view, this matter is much closer to Board of Education of the Township of Woodbridge v. Township Council of the Township of Woodbridge, 1970 S.L.D. 1, in which the governing body did consider specific line item reductions at the time it made cuts, but failed to set forth its underlying reasons upon submission of its answer to the board's petition of appeal. In that case, the Commissioner held the evidence was not sufficient to establish that the governing body's actions were arbitrary, capricious or unreasonable.

The Borough similarly discounts the other cases cited by the Board. Although it can be argued that it is desirable that a governing body supply a statement of line item reductions and supporting reasons at the time it adopts its resolution, or as soon thereafter as is practicable, both from the standpoint of aiding prompt settlement of the controversy and so as to eliminate any doubt as to whether the governing body is attempting a "boot-strap" operation, that is not at issue here. It is clear that the Borough did engage in a line-by-line analysis of the budget on May 6, 1986, the time at which it

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determined its reductions. The Board has confused whether the governing body actually engaged in a line-by-line analysis of the budget at the time it determined its reductions with the obligation to provide the Board and Commissioner with a written statement detailing the line item reductions and the reasons for each. There is no question that the Borough is required, at the time it determines its reductions, to make a reasoned judgment concerning each. And there is also no question that that was exactly the analysis the Borough engaged in at that time. However, this obligation, which the Borough has fulfilled, is not to be confused with its further obligation to subsequently provide the Board and the Commissioner with the written statement detailing its line item deductions and the reasons for each, pursuant to the applicable administrative code provisions and decisions of the Commissioner.

In the Borough's view, the Board admits its confusion of the two issues when it states, first:

> It is equally well settled that a governing body's failure to set forth specific line item reductions with adequate supporting reasons at the time of its decision is arbitrary, capricious and unreasonable . . .

second,

> Thus, there can be no question that the failure of a governing body to specify each line item to be reduced and of the particular reasons in support of such reduction, at the time of its action, is a fatal defect warranting restoration of the full amount of the reduction. . . .

and third,

> There is thus no question that the failure of the South River Borough Council to provide supporting reasons for its decision to cut the school budget failed to meet the requirements of East Brunswick that the governing body act "conscientiously, reasonably and with full regard for the State's educational stardards."

The one proposition does not follow from the other. There are two separate obligations imposed upon the governing body. The first is the obligation to base its reductions on the proper statutory and Constitutional standards, at the time it makes those reductions. The second is to provide a statement of line item reductions and supporting reasons, in sufficient time to enable the Commissioner to fulfill his function as

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a reviewing agent. These separate obligations have been met by the Borough in this case. Although it may be later determined that the governing body's determinations are not sufficient or acceptable in the Commissioner's judgement, and therefore warrant appropriate corrective action, that is an issue of material fact to be determined by the administrative law judge and the Commissioner. It is not a proper issue for determination by summary judgment.

The Borough also maintains that the Commissioner's grant of a cap waiver does not automatically necessitate an award of summary judgment. N.J.S.A. 18A:7A-25 provides, in pertinent part:

> The commissioner may approve the request of a local board of education for a greater increase, having adjudged that (1) a reallocation of resources or any other action taken within the permissible level of spending would be insufficient to meet the goals, objectives and standards established pursuant to this act, or (2) an increased enrollment may reasonably be anticipated in the district.

The Board alleges that the Commissioner's grant of a cap waiver constitutes a determination that the below cap budget constitutes the minimum amount necessary to fulfill the standard of providing a thorough and efficient system of schools. The Borough submits that both in theory and in practice the threshold determination required by the statute is similar, yet substantively distinguishable, from the standard established in East Brunswick.

The cap waiver process does not involve a determination that the below cap budget constitutes the minimum amount necessary for a thorough and efficient system of schools. The determinations of the board with respect to the below cap items are not scrutinized in the same manner, or with the same standard, as set forth in East Brunswick. Rather, the Commissioner assumes, to a certain degree, that the below-cap determinations for line item allocations are necessary and proper. He does not question the need for all line item expenditures. Rather, he determines whether the amounts budgeted are necessary for the accomplishment of the below-cap programs.

Further, the Commissioner's inquiry is primarily aimed at educational programs and does not include a determination that all other expenditures are absolutely necessary.

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More importantly, even if the Commissioner determines that a reallocation of resources would be insufficient, this determination would not justify the grant of summary relief. As the Board correctly points out, the cap waiver process does not involve adversary hearings, nor was the Borough permitted an opportunity to be heard. Although the granting of a cap waiver may constitute substantial evidence in determining the reasonableness of the Borough's reduction, it does not constitute sufficient evidence of the absence of any issue of material fact, which is necessary to the granting of a motion for summary judgment.

DISCUSSION AND DETERMINATION

The requirement of cooperation and consultation between the board of education and governing body is well established. Board of Education of the Lower Cape May Regional School District v. Mayor and Committee of the Township of Lower, Mayor and Council of the City of Cape May and Mayor and Committee of the Borough of West Cape May, 1978 S.L.D. 170; Branchburg Board of Education v. Township Committee of Branchburg, 187 N.J. Super. 540 (App. Div. 1983). The Commissioner's broad powers in budget matters are equally clear. Board of Education of the City of South Amboy v. City Council of the City of South Amboy, 1976 S.L.D. 156.

Under the clear provisions of N.J.S.A. 18A:7A-25, those items granted specific cap waivers by the Commissioner to meet the goals, objectives and standards established by the Public School Education Act of 1975, N.J.S.A. 18A:7A-1 et seq., may not be reduced. It does not automatically follow, however, that because the Commissioner has determined that a reallocation of resources within the permissible level of spending would be insufficient to accomplish these purposes, the entire budget is cast in stone. The Borough's argument that the Commissioner makes certain assumptions and does not scrutinize every line item in a budget in reaching cap waiver determinations is compelling.

A cap waiver certainly is strong evidence in a hearing of this type. However, it is not conclusive except as to the specific line items for which it was granted.

But this is not central to the present motion. As the Board correctly asserts, the narrow issue before the Commissioner and, hence, this judge, is whether the Borough's

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failure to give reasons for its reductions at the time it made those reductions requires their restoration. I **FIND** for the Board on this point for the reasons set forth below.

I do not read East Brunswick as does the Borough. In the citation from pages 105-106 above, it is clearly stated, "Where its actions entail 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." The ordinary meaning of the word "accompany" is "to go with." This necessarily implies going at the same time.

The decisions of the Commissioner are well settled in this regard. A governing body must submit adequate supporting reasons for specific line item reductions at the time of its decision. Board of Education of the Tp. of Old Bridge v. Mayor and Council of the Tp. of Old Bridge, OAL DKT. NO. 4026-85 (September 9, 1985). In that case, the Commissioner adopted, inter alia, the following language:

> The case law . . . admits no question that the failure of a governing body to specify each line item to be reduced or eliminated and the particular reasons therefore, at the time of its action, is a defect fatal to the reduction.

and:

> Summary judgments are perhaps not as common in the administrative adjudicative process as they are in the judicial courts. Nevertheless,
>
> > A motion for summary judgment is a means for the efficient disposition of a cause of action where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. R. 4:46-2. Of course, courts should exercise appropriate caution in deciding issues involving policy considerations. Jackson v. Muhlenberg Hospital, 53 N.J. 138, 142 (1969). However, excessive caution would undercut the purposes of a motion for summary judgment which provides a means for piercing the allegations of the pleadings to determine whether there are issues requiring a disposition at trial. Judson v. People's Bank and Trust Co. of Westfield, 17 N.J. 67, 73-75 (1954). If, after drawing all inferences of doubt against the movant, a court finds that there is no genuine issue of material fact, it should enter summary judgment. Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 65 (1980). [Id. at 9.]

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Although the facts here are not as glaring as in Keansburg, above, they are certainly so close to Union Township that restoration must be made for the same reasons. In Union Township, the governing body did not submit supporting reasons until it answered the petition of appeal. The Commissioner read N.J.S.A. 18A:22-37 and East Brunswick strictly, deemed it proper that such decisions be made at the time of the reduction, and noted that the schedule for determination by the governing body when items are rejected by the voters at the annual school election is set down by the Legislature. Id. at 7-8.

The present case is on all fours with Old Bridge Township. If the Borough in this matter did form its rationale for each reduction in a timely manner, it did not communicate that information to the Board in a timely manner. If for no other reason, the Board must have that information - in full - contemporaneously, so that it can decide whether to appeal. I so **FIND**.

I further **FIND** that the Borough still was posing questions to the superintendent on the date it supposedly made its determinations. (Appendix C.)

The Borough has argued that although the Board's petition may have been filed timely, it was not served on the Borough's attorney until the week of June 9. There is no requirement that the petition be served on the governing body's attorney. What is required and what happened in this case is that the petition was timely served upon the governing body itself. Certification of Robert Thomas; acknowledgment of William A. Reichenbach, Jr., Borough Clerk, both of June 3, 1986. The record shows a request for an extension of time to answer the petition and the answer was, in fact, received by the Board on July 17. Although the Board has not moved for dismissal on the grounds of timeliness, it clearly could have argued the question and might well have prevailed. Riely v. Hunterdon Central High Bd. of Ed., 173 N.J. Super. 109 (App. Div. 1980). So far as this judge knows, the Commissioner is no less stringent in budget matters than he is in other matters that come before him, under the school laws, by petition.

Having carefully read and considered the arguments of both parties, I **CONCLUDE** that the Borough's view of the school law decisions concerning budget review by governing bodies is incorrect. Reasons for each reduction must be given at the time each reduction is made. Even if that requirement could be relaxed, the Borough in the present matter gave no reasons for its reductions to the Board prior to its answer to the

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petition herein. The Borough relies heavily on the events of the meeting of May 6. However, I have reviewed the transcript provided by the Borough and do not find in it, either expressed or implied, sufficient reasons to satisfy the requirements of the statutes and case law already discussed.

Accordingly, summary judgment in favor of the South River Board of Education is **GRANTED.** It is **ORDERED** that the amount of $163,700 be restored forthwith to the current expense portion of the 1986-87 budget, and the amount of $20,000 be restored forthwith to the capital outlay portion of the 1986-87 school budget so that the total amount of tax levy for current expense purposes for 1986-87 shall be $5,783,376, and the total amount for capital outlay shall be $38,620.

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

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

14 October 1986
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

OCT 15 1986
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

OCT 17 1986
DATE

Ronald L. Parker /rs.
OFFICE OF ADMINISTRATIVE LAW

ds/e

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BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER,

PETITIONER,

V.

MAYOR AND COUNCIL OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon review of the record in this matter, the Commissioner agrees with the findings and the conclusion of the Office of Administrative Law that a written statement of reasons for each reduction in a budget made by the governing body must be given at the time each reduction is made, and that the Council herein failed to provide adequate reasons for its reductions to the Board before its answer to the instant petition was filed. See, Bd. of Ed., E. Brunswick Tp. v. Tp. Council, E. Brunswick, 48 N.J. 94 (1966); see also, Board of Education of the Township of Old Bridge v. Major and Council of the Township of Old Bridge, decided by the Commissioner September 9, 1985.

Accordingly, summary judgment in favor of petitioner is granted for the reasons expressed in the initial decision. It is ORDERED that $163,700 be restored forthwith to the current expense portion of the 1986-87 budget, and the amount of $20,000 be restored forthwith to the capital outlay portion of the 1986-87 school budget. The Middlesex County Board of Taxation is hereby directed to make the necessary adjustment set forth above to reflect a total amount of $5,783,376 to be raised for current expense purposes for the 1986-87 school year; the total amount to be raised for capital outlay shall be $38,620.

COMMISSIONER OF EDUCATION

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BOARD OF EDUCATION OF THE SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION
RESPONDENT.	:	

This matter was opened before the Commissioner on Tuesday, November 18, 1986 by way of a telephone request for an emergency hearing emanating from the Board of Education of South Orange-. Maplewood (Board) seeking reversal of a determination of the New Jersey State Interscholastic Athletic Association (NJSIAA) suspending the Columbia High School Varsity Soccer Team from participation in the State Championship Soccer Tournament. The aforesaid suspension was issued by the NJSIAA Executive Committee on November 17, 1986 due to alleged violations by Mr. Kevin Kelley, Freshmen Soccer Coach at Columbia High, of several NJSIAA rules which prohibit instruction of student-athletes or conduct of practice sessions by their coaches during the off season. The pertinent rules governing out-of-season play are set forth in their entirety below:

OUT-OF-SEASON GUIDELINES

Section 2. Out-of-Season Period. The out-of-season period shall be from the end of the season as defined in Rule 2, Section 10 until the next official starting practice date for that sport, excluding the Summer Recess, that period from the last day of school until the first day of the next school term for a member school.*

Section 3. Intramurals. Student-Athletes are permitted to participate in all intramural activities during the out-of-season period, except those in which they have attained team status.

Article 2. Coaches may supervise or serve as directors, including officiating of intramurals, recreational, club, camp, or open-gym programs;

---

* Rule 2, Section 10, together with Rule 14 (see Handbook, p. 67, 77, 78 provides that the "out-of-season" period for soccer is from November 30th to the end of the school year.)

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but they may not perform coaching duties when their Student-Athletes are involved in that specific phase of the program during the out-of-season period....

Section 5. Recreation and Club Programs. The NJSIAA does not have any jurisdiction over these programs conducted by outside organizations even though school facilities are used; however, school uniforms and other equipment may not be used by Student-Athletes and coaches may not instruct their Student-Athletes during the out-of-season period.

Section 6. Camp or Clinics. The NJSIAA does not restrict an individual's choice to attend camps or clinics; however, schools, school organizations or school-related groups such as Booster Clubs may not assist the Student-Athlete's attendance at any camp or clinic during the out-of-season period; this includes providing uniforms, equipment, and funds related to the camp or clinic, including transportation; and coaches may not instruct their Student-Athletes.

...

CL* DURING THE OUT-OF-SEASON PERIOD, the NJSIAA does not restrict an individual's choice to attend a participatory camp or clinic; however, schools, school organizations, or school-related groups such as Booster Clubs may not assist the Student-Athlete's attendance at any camp or clinic, this includes providing uniforms, equipment, and funds related to the camp or clinic, including transportation; and coaches may not instruct their Student-Athletes....

Section 8. Non-School Participation. A Student-Athlete may compete as follows:

Article 1....During Season - Local Option.

Article 2....Out-of-Season period - A Student-Athlete may compete on a non-school team with the approval of the school so long as the school equipment, coaching, or other school services are not provided. (NJSIAA Handbook, pp. 64-66, emphasis supplied)

---

* "CL" in the NJSIAA Handbook denotes "Clarification" of the Rules, as adopted by the NJSIAA Executive Committee pursuant to Article II, Section 1 of the Bylaws (See NJSIAA Handbook, p. 33)

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Rule 2, Section 11 explicitly provides that no out-of-season practice is permitted under the direction of a coach and that the minimum penalty of at least a one year probation and the removal of the involved school team from championship competition:

Section 11. Out-of-Season Period. Out-of-Season practice is not permitted under the direction of an instructor or coach, or student leaders. This eliminates any kind of equipment, except shoes as noted, under any form of instruction. The object of this explanation is to make clear the point that there shall be absolutely no practice during the out-of-season period for a particular sport. Any subterfuge or "sharp practice" shall be construed as of violation of this rule.

Penalty - Any school proved guilty of violating the above rules shall be placed on probation by the Association for not less than one year from the date of violation, and shall not receive championship recognition from this Association in that sport, or enter annual championship games, matches, meets or tournaments sponsored by the Association in that sport. Conditions of probation are outlined by the Bylaws, Article X, Section 1.

To make absolutely clear that all schools and their coaching staffs were aware of the prohibitions of the "out-of-season rule", the NJSIAA set forth a clarification to Rule 2, Section 11 as follows:

CLl...During the out-of-season period, the school, a school's organizations such as Booster Clubs, Father's Club, Varsity Club and the like may not assist the student-athlete during the out-of-season period or provide equipment, uniforms, transportation or funds related to camp or clinic attendance when same is of a participatory nature.

Coaches may not instruct student-athletes during the out-of-season period, neither may they hold meetings nor any other way be involved with the student-athlete.... (Handbook, pp. 69-70, emphasis supplied). (emphasis in text)
(Respondent's Brief, at pp. 1-4)

Specifically, Mr. Kelley is alleged by the NJSIAA to have violated Rule 1, Section 5 and Rule 2, Section 11 both of which essentially prohibit "coaching" and/or instructional activity involving students whom they coach. The alleged rule violations

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arose from voluntary participation by Mr. Kelley in an out-of-season community recreational soccer program, the exact nature of that participation being the essential subject matter of the dispute presently before the Commissioner.

At approximately 11:00 a.m. on Tuesday, November 18, 1986 a hearing was conducted by a representative of the Commissioner, an audio tape of which has been made part of the record in this matter. By agreement, each of the parties to the controversy agreed to file papers setting forth in written form the essentials of their argument. Additionally, the record in this matter is supplemented by a transcript of the proceedings of November 17, 1986 before the Executive Committee of the NJSIAA, the one year suspension from post-season play directed by the Committee being the basis of the appeal herein.

By way of factual recitation of the background to the matter, the Principal of Columbia High School, Dr. Richard Willett, received notification from the Athletic Directors of Livingston, Morristown and West Essex High Schools that they each had received anonymous letters alleging that Kevin Kelley had coached Columbia soccer players during the spring of 1986 in violation of NJSIAA rules. Dr. Willett wrote to the NJSIAA on November 12, 1986 setting forth the possibility that a violation of the rules had possibly taken place. Accordingly, he requested the Executive Committee of the NJSIAA to conduct a full review of the matter to "...determine if a rule violation has occurred, the extent of the violation.and appropriate sanctions." (R-1) The review and the determination of the Executive Committee are the subject matter of the controversy herein.

By way of argument, petitioner contends that Mr. Kelley was requested to assist in the community soccer association (Cougar Association) as a volunteer and responsible adult not as a coach. It is contended that he was not asked to, nor did he, provide any coaching since the team already had a paid coach. Mr. Kelley's primary purpose it is alleged was

> ...to lend his presence as a respected member of the adult community at the game in order to insure safety and good order.
> (Petitioner's Brief, at p. 3)

In that capacity it is alleged that he attended seven or eight games in which he

> ...sometimes played a role collaboratively with the parents, in making substitutions to assure that all team members had an opportunity to play.
> (Petitioner's Brief, at p. 4)

It is noted that the aforesaid substitutions allegedly were not strategic in nature but merely to carry out the policy of the soccer association that all players be permitted to play 25% of the game.

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Petitioner contends that no violation of Rule 1, Section 5 took place since Mr. Kelley provided no instruction to the members of the Cougar Association soccer team. Further, petitioner contends that Mr. Kelley had no contact with his student-athletes since he coached ninth grade and no ninth graders were on the team voluntarily assisted by Mr. Kelley. Petitioner makes a particular point that the rule provides that coaches may not instruct "their" student-athletes. Petitioner also avers that no evidence exists that Mr. Kelley "instructed" the soccer players since he never attended any of their practices.

Petitioner likewise disputes any contention that Mr. Kelley violated Rule 2, Section 11 which prohibits out-of-season practice under the direction of a coach or student leader. It is the position of petitioner that, since Mr. Kelley never participated nor was present at any practice sessions, he could not possibly have violated this rule.

Petitioner's final arguments go to the adequacy of the due process accorded to Columbia high School in this matter. Petitioner contends that the NJSIAA violated its own rules on due process set forth in Article XIII of the Bylaws of the Association which is incorporated herein by reference.

Petitioner contends that no referral was made to the Controversies Committee as required by the aforesaid article. The alleged failure of the NJSIAA to abide by its own hearing procedures as well as its alleged failure to "...[articulate] a charge against Columbia High School, informing it precisely of the rules it is alleged to have violated, and fixing a date for hearing on proper written notice..." (Petitioner's Brief, at p. 12) represented serious due process flaws. In light of the above-cited alleged violations, petitioner's request that this matter be remanded back to NJSIAA for the conduct of a hearing in conformity with its own rules.

Respondent NJSIAA for its part relies upon the recitation of the rules as set forth earlier in this decision. Further, NJSIAA placed into the record (R-2) a copy of an agreement signed by the coaches, Athletic Director and the Principal which attest to the fact that they are familiar with the rules of the NJSIAA and that they agree to abide by them.

Respondent NJSIAA argues that, given the fact that specific rules exist barring participation by coaches in non-school, out-of-season activities and that there exists evidence that Mr. Kelley has violated those rules, the Commissioner should not stray from his of oft-expressed determination not to set aside the actions of the NJSIAA where there has been a violation of the rules and due process has been accorded. Respondent cites the following in support of such position. See Board of Education of Northern Highlands Regional High School District v. New Jersey State Interscholastic Athletic Association; Board of Education of the Northern Highlands Regional High School District v. New Jersey State Interscholastic Athletic Association, New Jersey Superior Court, Appellate Division, Docket No. A-5857-82T2; Board of Education of the Greater Egg Harbor Regional High School District, Atlantic County v. New Jersey State

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Interscholastic Athletic Association, OAL DKT. NO. EDU 88-83; Northern Burlington Regional High School Board of Education v. New Jersey State Interscholastic Athletic Association et al., Docket No. 359-84; Cliffside Park Public High School District, Bergen County v. New Jersey State Interscholastic Athletic Association, Docket No. 360-84; Hunterdon Central High School Board of Education v. New Jersey State Interscholastic Athletic Association et al., Docket No. 370-85.

As to the alleged violations of procedural rights, NJSIAA denies such violations took place. Citing Article VII, Section 4 of the Association's Constitution, NJSIAA contends that its Executive Committee enjoys the right to initiate proceedings on its own or has the discretion of referring such matters to the Controversies Committee. In the instant matter insofar as notice of the alleged violation was not received until November 12, 1986, it was impractical to call the Controversies Committee into session. Further, contends NJSIAA, since the Controversies Committee cannot impose a penalty, the Executive Committee would have had to have been convened to have established the penalty prescribed by the rules. Finally, NJSIAA denies categorically that Columbia High School was in any manner denied full opportunity to place upon the record whatever it wished to present in its own defense.

The Commissioner has carefully reviewed the total record in this matter including the transcript of the proceedings before the Executive Committee of NJSIAA. Based upon such review, the Commissioner is convinced that violations of the rules relating to the prohibition of coaching and involvement of coaches with student-athletes have occurred. Based upon the limited role played by Mr. Kelley in "sideline coaching" as he did by his own admission in the transcript and as defined therein, the Commissioner is likewise convinced that the violations did not result in extraordinary athletic advantage either to the students who were the recipients of that coaching or the soccer team of Columbia High School. Notwithstanding such determination, the Commissioner must recognize that even though the particular violations in this matter did not result in providing Columbia High School with the kind of advantage the rule is designed to prevent, the mere breach of that rule by two members of the district coaching staff is deserving of extreme censure. It is abundantly clear that the two coaches, particularly the highly experienced head soccer coach, Mr. Chyzowych, were aware of the rules and regulations of the NJSIAA and yet deliberately took such a narrow interpretation of those rules as to jeopardize the eligibility of the Columbia High School soccer team to eventually play in State competition.

In reviewing the arguments of petitioner that there was no rule violation in that Rule 1, Section 5 prohibits coaches from instructing their athletes because Mr. Kelley did not attend practices and in any event did not instruct his students because he was the freshmen coach, the Commissioner finds such argument to fly in the face of what the rules on out-of-season instruction and coaching are designed to prevent. Even were the Commissioner to accept such argument, Respondent NJSIAA correctly points out as follows:

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First, the source rule proscribes "out-of-season practices" of any kind of sports activity under the direction [of] an instructor or coach. Plainly, control of substitution in games in an organized league falls squarely under this rule, since "practice" plainly encompasses more than just scrimmages or warm-ups. So too, working on game "strategies" constitutes coaching.

In this respect, the school's argument that it has committed no infraction because what was involved here was a game situation, and not "practice," is completely unconvincing. The explicit language of the rule itself prohibiting as it does "any form of instruction," makes it plain that the admitted "coaching of Columbia Varsity Soccer players during the spring recreation league program" is a facial violation of the rule. (Exhibit A).

Second, the various sections of the rules and regulations which interpret and expand upon the basic rule also make clear that the school's arguments are completely without merit. For example, it is noted that under this very "out-of-season" practice rule, "Coaches may not instruct Student-Athletes during out-of-season period, neither may they hold meetings nor any other way be involved with the Student-Athlete." (NJSIAA Handbook, p. 70) This then only underscores that it is not a certain type of coaching or a certain type of instruction that is proscribed; it is all coaching, all instruction and all involvement. Again, involvement of some sort--indeed, involvement of a major sort is admitted here.

Third, the Out-of-Season Guidelines (pp. 64-66) make crystal clear that these rules apply with full force to the type of program involved here -- that is, recreation clubs and programs. Rule 1, Section 5, provides:

> ***The NJSIAA does not have any jurisdiction over [the] programs conducted by outside organizations even though school facilities are used; however, school uniforms and other equipment may not be used by Student-Athletes and coaches may not instruct their Student-Athletes during the out-of-season period.

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> Fourth, Rule 1, Section 6 of the same guidelines provides that the Schools may not provide transportation services to the athletes, which, as we disclosed only yesterday, this school's coach did. This then is an additional facial violation of the rule. (Respondent's Brief, at pp. 13-15)

Having established to his satisfaction that a violation of Association rules has occurred, the Commissioner must address himself to a review of the arguments made by petitioner as to the nature of the due process proceedings provided by the NJSIAA. Based upon an examination of the Constitution and Bylaws of the Association, as well as taking into consideration the extremely emergent nature of the situation which required a determination on the day immediately preceding the playoff game, the Commissioner finds and determines that petitioner was afforded full opportunity to present its case. All principals to the matter were present and were in no way impeded from expanding the record to the fullest degree which they deemed necessary.

Finally, the Commmissioner must address himself to the question of the appropriateness of the penalty imposed by the NJSIAA in this matter. In a long line of cases, the Commissioner has consistently upheld the principle that he will not substitute his judgment for that of the NJSIAA. When a rule has been violated, that rule has been designed to achieve a desired purpose, and the action of the NJSIAA in enforcing that rule has neither been arbitrary, capricious or lacking in consistency, and the parties involved have been afforded an opportunity to be heard, the Commissioner has supported the action of that Association. (For recitation of those cases supporting that position see this decision, ante.)

In the current circumstances, however, the Commissioner cannot in just conscience support such an outcome. While the Commissioner, as indicated above, believes the rules in question in this matter are reasonable rules designed to ensure that school districts do not acquire advantage and the Commissioner is likewise in agreement that the rules were violated, he cannot enforce a rule which arbitrarily prescribes an automatic penalty of one year probation and consequent disqualification from post-season play without consideration of the specific nature of the violation and the degree to which the violation resulted in an outcome the rule was designed to prevent. To the degree that the specific rule (Rule 2, Section 11) is the Commissioner's own rule by virtue of his "approval" in conformity with the provisions of N.J.S.A. 18A:11-3, he assumes equal responsibility with NJSIAA for the unfortunate arbitrary consequences it appears to dictate. Notwithstanding the existence of such a rule and his own "acquiescence" in its presence in the NJSIAA's Constitution, Bylaws and Rules and Regulations, the Commissioner will not continue to personally enforce such a rule when its automatic application dictates, as in this matter, a result which is both unjust and illogical. Unjust because the violations which occurred in this matter were essentially indiscretions of members of the coaching staff over which the varsity team members who participated in the recreational program had no control nor

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could they be aware that they were parties to a rule violation. Illogical because, as the Commissioner indicated in his conclusion, ante, the rule violation that occurred being so inconsequential in scope clearly did not result in any athletic advantage to the Columbia High School soccer team which is precisely what the out-of-season rules are designed to prevent. To acknowledge that the consequence of what the rule is designed to prevent did not occur and then to proceed to extract the extreme penalty required by Rule 2, Section 11 is, in the Commissioner's view, insupportable.

Consequently, while fully acknowledging the sincerity of the NJSIAA and its Executive Committee in striving to vigorously support its own rules and while supporting without reservation the intent of out-of-season rules, the Commissioner hereby reverses the penalty of the one year probation of the Columbia High School soccer team imposed by the NJSIAA for the reasons contained herein.

Additionally, the Commissioner affirms without reservation the determination of the NJSIAA Executive Committee to impose sanctions against Mr. Kelley and Mr. Chyzowych for their knowing violation of the rules governing out-of-season coaching and directs that the NJSIAA officially inform him of the exact nature of the sanctions imposed.

Further, the Commissioner directs that the NJSIAA review Rule 2, Section 11 and its automatic requirement for the imposition of a one year penalty of probation for the purpose of revising said rule to permit the NJSIAA to consider the individual circumstances which may prevail in any given violation of out-of-season rules.

Finally, in light of the fact that the State Championship Soccer Tournament game which petitioner in this matter is scheduled to play is to occur at 2:00 p.m. on this date and in order to provide opportunity for any possible appeal which may be sought by the NJSIAA, the Commissioner directs that the aforesaid tournament game be stayed until Saturday, November 22, 1986.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 20, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5734-85
AGENCY DKT. NO. 222-7/85

MYRA STERNBERG,
Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF HIGHLAND PARK, MIDDLESEX COUNTY,
Respondent.

Stephen E. Klausner, Esq., for petitioner
(Klausner & Hunter, attorneys)

James F. Clarkin, III, Esq., for respondent
(Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, attorneys)

Record Closed: May 29, 1986 Decided: October 9, 1986

BEFORE **ELINOR R. REINER**, ALJ:

On July 15, 1985, Myra Sternberg, employed by respondent as a teaching staff member, filed a petition of appeal with the Commissioner of Education, claiming that respondent refused to recognize her seniority rights and, thus, deprived her of her right to a teaching position for the school year 1985-86. Respondent filed its answer on September 5, 1985, admitting that petitioner is a tenured teaching staff member, but denying that it had violated petitioner's tenure and seniority rights.

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On September 11, 1985, the matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

A prehearing conference was held in this matter on November 6, 1985, and the issues were isolated. With the addition and modification made at the hearing, they may be summarized as follows:

A. What periods of time did petitioner serve as a teacher with respondent and in what capacities did she serve?

1. What seniority does petitioner have to the position of: (a) elementary teacher; (b) teacher of the handicapped; (c) mathematics teacher, grades 7 and 8; (d) secondary school compensatory math teacher; (e) reading teacher grades 9-12?

B. If petitioner is successful, to what relief is she entitled?

Thereafter, the case was heard on January 27, 1985. Witnesses who testified and exhibits marked into evidence at the time of hearing are listed in the appendix attached hereto.

A number of the essential facts necessary for a determination have been stipulated. The stipulation of facts filed by the parties subsequent to the hearing is incorporated by reference herein and constitutes a portion of this tribunal's findings of fact. (J-1) In addition, a review of the testimony in this matter indicates that the remainder of the facts necessary for determination are essentially undisputed. They concern, in the main, those capacities in which petitioner worked in September 1977, November 1981 and for the second semester of the school year 1981-82. Petitioner's functioning during those relevant periods of time is found as fact and summarized as follows:

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1. In September 1977, after having received her teacher of the handicapped certification, petitioner was assigned for the first semester by Dr. Ralph, guidance counsellor and chairman of the Department of Alternative Education, to teach a special education class (one period a day) comprised solely of four classified handicapped students at the high school. The group consisted of very low-level functioning students in the math area. Petitioner's job was to teach the group basic math skills; i.e. addition, subtraction, working with making change, and working out examples that dealt with reading a menu. No textbook was used. Petitioner determined how instruction was delivered to the pupils, prepared the materials and planned for the class. Petitioner evaluated and graded the students' work. Although petitioner received the students' classifications from the Learning Disabilities Teacher-Consultant (LDTC); petitioner did not work with the child study team nor did the LDTC observe the students or receive reports from her. The four students had no other math teacher during that semester nor was a supplemental teacher (who would supplement instruction given to them) assigned to them.

2. For the second semester of 1981-82 school year, petitioner was assigned to work with a group (the precise number was unidentified) of classified students at the high school who had failed their regular math class. In this math class ("Pre-Consumer Math Class"), there was no established curriculum. Petitioner prepared the course materials for basic math skills (addition, subtraction, multiplication, division, fractions, decimals and word problems), evaluated the students, and formulated the lesson plans. Petitioner, who was the sole instructor (there was no supplemental instructor), determined the manner in which instruction was delivered to the pupils. It was intended that petitioner, who was evaluated in this capacity (P-2), would serve as a special education teacher.

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3. At the end of November 1981, petitioner was assigned to work with a classified deaf student at the high school named J.D. From November to March 1982, petitioner taught J.D. for one class period. From March to June petitioner taught J.D. for two class periods. In the capacity of a "special ed teacher," petitioner taught the student math, English and history. Petitioner worked in conjunction with his regular (not special ed teachers), had contact with the child study team (the LDTC, the social worker) and the guidance counsellor. On one occasion, the complete child study team met with the parents, petitioner and members of the State Department of Education. In general, petitioner prepared additional materials for J.D., formulating his curriculum along with his regular teachers. More specifically, in conjunction with the reading teacher, petitioner got materials for J.D. and developed a program for him on the fifth grade reading level. She evaluated him. In history, petitioner received an easier book from the learning disability consultant and also got materials from the regular history teacher. For math, he used the prealgebra book from his regular math course. However, since he had difficulty in basic skills, petitioner planned work for him and evaluated his work. During the second semester (third marking period) J.D. was removed from his regular English class, and petitioner planned his complete program for English.

4. If classified students were taken out of a regular math class and assigned to a teacher, that teacher would be functioning under a K-12 certificate of the handicapped, all subjects. However, if the students also remained in a regular math class, the teacher would be functioning as a supplemental teacher.

5. In regard to her function with J.D., petitioner was assigned as both a special education teacher and a supplemental teacher. She was supplementing his instruction when she helped J.D. with history and

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> algebra. However, when she served as J.D.'s only English teacher, she was functioning as a special education teacher, which required a teacher of the handicapped certificate.

At issue in the instant case, given the above essentially undisputed facts, are those seniority rights to which petitioner is entitled. In resolving this question, the concept of seniority deserves attention. Seniority applies to the rights of tenured personnel when a reduction in the employment force is necessary. N.J.S.A. 18A:28-10 provides in relevant part that "[d]ismissals resulting from any such reduction . . . shall be made on the basis of seniority according to standards to be established by the commissioner with the approval of the state board." The standards for determining seniority are set forth in N.J.A.C. 6:3-1.10 which establishes the specific categories in which seniority may be accrued. See, N.J.A.C. 6:3-1.10(l). It should be noted, in this context, that the current regulations control the resolution of the instant case. The prior regulations have no applicability nor do they provide a vested right for any individual who was not subject to a reduction in force prior to September 1, 1983. See, Camilli v. Bd. of Ed. of North Highlands Regional High School District, OAL DKT. NO. EDU 5752-84 (Nov. 14, 1984), adopted, Commissioner of Education (Jan. 3, 1985). Against this backdrop this tribunal has considered petitioner's seniority rights in the categories claimed.

(a) Elementary Teacher

It is undisputed that petitioner holds an elementary endorsement on her instructional certificate. Recent decisions by the Commissioner of Education, however, have denied seniority rights in the elementary category to an individual who never worked in that position, but simply possessed elementary certification. See, Greiner v. Bd. of Ed. of Shamong Tsp., OAL DKT. NO. EDU 7590-82 (Feb. 23, 1983), rev'd in part, Comm. of Ed. (April 7, 1983). See also, Salierno v. Bd. of Ed. of Passaic County Regional High School Dist. No. 1, Comm. of Ed. (Aug. 25, 1981), wherein it was held that seniority may be accrued only from the point at which the teacher actually began teaching under such

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endorsement. Similarly, in Dullea v. Northvale Bd. of Ed., 1978 S.L.D. 638, 641, it was determined that a teacher certified with an elementary endorsement who never served as an elementary teacher was not entitled to seniority in the elementary category. In view of the above, actual service as an elementary teacher would be required in order for petitioner in the instant case to accrue seniority as such.

Clearly, employment in one of the various categories set forth in N.J.A.C.6:3-1.10(l) entitles one to the accrual of seniority. The definition of the "elementary" category provides (in relevant part) as follows:

> 16. Elementary. The word "elementary" shall include Kindergarten, grades 1-6 and grades 7-8 without departmental instruction.

Petitioner never taught any of the above classes of students. Therefore, she is not entitled to accrue seniority as an elementary teacher. Further, since petitioner did not teach eighth grade students prior to September 1, 1983, N.J.A.C.6:3-1.10(l)16iv is inapplicable. That section provides:

> iv. Persons serving under elementary endorsements in departmentally organized grades 7 and 8 prior to September 1, 1983 shall continue to accrue seniority in the elementary category for all such services prior to and subsequent to September 1, 1983. In addition, such persons shall accrue seniority in the secondary category but limited to the district's departmentally organized grades, 7 and 8 and the specific subject area actually taught in such departmentally organized grades, subsequent to September 1, 1983.

Inasmuch as petitioner did not function in the elementary category under either the general definition of "elementary" or the provision covering services rendered prior to September 1, 1983, petitioner's claim for seniority in the elementary category must be denied.

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(b) **Teacher of the Handicapped**

Petitioner's claim for entitlement as a special education teacher is based on her possession of a certificate as a teacher of the handicapped and her actual service teaching classified students. It is clear that seniority may be accrued simultaneously in two categories. See, In the Matter of Seniority Rights of Certain Teaching Staff Members Employed by the Old Bridge Tp. Bd. of Ed and the Edison Tp. Bd. of Ed., Declaratory Judgment, Comm. of Ed. (Aug. 6, 1984), aff'd State Board (Jan. 2, 1985), aff'd (N.J. App. Div., June 17, 1986, A-2241-84T6, A2531-84T6) (unreported).

The facts as set forth above establish that petitioner, while working as a classroom teacher, performed services as a special education teacher. A review of the facts clarifies that in September 1977, petitioner taught a special education class (one period a day), comprised solely of four classified handicapped students at the high school. The group consisted of very low level functioning students in the math area. Petitioner, who was their only math teacher during that semester, taught them basic math skills. Similarly, for second semester school year 1981-82 petitioner was assigned to teach pre-consumer math to a group of classified students at the high school, who had failed their regular math class. Petitioner, who was the sole instructor, in essence functioned as a special education teacher. In addition, at the end of November 1981, petitioner was assigned to teach a classified deaf student, J.D. In the capacity of a "special ed teacher," petitioner taught the student math, English and history, formulating his curriculum along with his regular teachers. For the third marking period, J.D. was removed from his regular English class, and petitioner was his only English teacher.

It is undisputed that in regard to her experience in September 1977 and the second semester 1981-82 and in regard to some of her interaction with J.D., petitioner was the sole teacher in a particular subject area for classified students. That being so, the result is apparent. If a teacher is the only one providing instruction in a given subject area, said teacher is not supplemental and would be required to possess a teacher of the handicapped certificate if the nature of the program comes within the special education program. See,

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Teaneck Education Association v. Teaneck Bd. of Ed., OAL DKT. NO EDU 3523-83 (July 19, 1983), affirmed, Comm. of Ed. (Sept. 30, 1983). Since in each of the instances noted above students who were classified as handicapped were assigned to petitioner and she was their sole teacher in a given subject area, petitioner's certification as a teacher of the handicapped was necessarily relied on.

It is well established that the duties performed in a position, rather than the name given to a particular position, controls as to the determination of seniority rights. Boeshore v. North Bergen Bd. of Ed., 1974 S.L.D. 805; Rudolph-Nachtman v. Bd. of Ed. of Middletown Tsp., OAL DKT. NO. EDU 9379-82 (Aug. 15, 1983), rejected, Comm. of Ed. (Sept. 29, 1983). See also, Teaneck Education Association, wherein the Commissioner concluded that the certification required for staff members assigned instructional responsibility to special education pupils is determined by the nature of the instructional services rendered; the titles afforded teaching staff members are irrelevant. In view of the above, it is clear that the nature of petitioner's instruction determines the appropriate category of seniority. The description of petitioner as a supplemental teacher would not be dispositive. Since petitioner actually dealt with classified students other than in a "supplemental role" in at least three circumstances, her accrual of seniority as a special education teacher is appropriate.

(c) **Mathematics Teacher Grades 7 and 8**

Petitioner claims to have accrued seniority as a mathematics teachers for grades 7 and 8. It is undisputed that eighth grade students in the school district were transferred to the senior high school in September 1983. Thereafter, in the 1983-84 and 1984-85 school years, petitioner taught several classes which contained eighth grade students. Although petitioner contends that she accrued seniority as a mathematics teacher for grades 7 and 8, the secondary category defined in the seniority regulations seems to include the instruction of grades 8 through 12. More particularly, N.J.A.C. 6:3-1.10(l)15 provides:

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15. Secondary. The word "secondary" shall include grades 9-12 in all high schools, grades 7-8 in junior high schools, and grades 7-8 in elementary schools having departmental instruction.

A review of the definition of "secondary" supports the inference that petitioner would be entitled to accrue seniority in the actual subject taught in the departmentally-organized grades 7 and 8. Although the rules are unclear as to whether there is a distinction between the services rendered before and after the addition of the eighth grade students to the senior high school, since the category is "secondary" under both circumstances, it appears that seniority for grades 7 and 8 mathematics is unavailable. In addition, it is to be noted that petitioner only taught grades 9-12 prior to September 1983. Thus, she is not entitled to elementary seniority as provided for in N.J.A.C. 6:3-1.10(l)16.iv. However, a review of that regulation, while not applicable to petitioner's actual service, lends support to the conclusion that petitioner did not accrue seniority as a mathematics teacher, grades 7 and 8. Subsequent to September 1, 1983 seniority is accrued in the secondary category, limited to the district's departmentally-organized grades 7 and 8 and the specific subject area actually taught in such departmentally-organized grades. In view of this, it appears to follow that the instant situation is akin to what is now generally recognized as secondary.

(d) **Secondary School Compensatory Math**

and

(e) **Reading Teacher Grades 9 through 12**

Respondent does not dispute the fact that petitioner accrued seniority as a secondary compensatory mathematics teacher.

Although petitioner held only an elementary endorsement on her instructional certificate upon her initial employment with the school district, this entitled her to teach the common branch subjects, including mathematics and reading in grades 7-12. See, N.J.A.C. 6:11-6.1(b). It is undisputed that petitioner served as a compensatory education - mathematics instructor at the secondary level between December 1976 and June 1985.

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Thus, appropriately seniority credit has been given to petitioner according to the number of calendar years or fractions thereof of employment in this category. This is consistent with N.J.A.C. 6:3-1.10(b) which provides (in relevant part):

> (b) Seniority, pursuant to N.J.S.A. 18A:28-9 et seq., shall be determined according to the number of academic or calendar years of employment, or fraction thereof as the case may be, in the school district in specific categories as hereinafter provided.

Petitioner, also served as a compensatory education, reading instructor for grades 9-12 from September 1978 to June 1979. Seniority credit must, therefore, be given to petitioner on the same basis as was given to her for her compensatory education, mathematics. This is appropriate even though there was an overlap in the periods during which petitioner taught these two courses. For it is well-established that seniority may be accrued in two or more categories simultaneously. N.J.A.C.6:3-1.10(f) provides:

> (f) Not more than one year of employment may be counted toward seniority in any one academic or calendar year. Whenever a person shall hold employment simultaneously under two or more subject area endorsements or in two or more categories, seniority shall be counted in all subject area endorsements and categories in which he or she is or has been employed.

See also, in In the Matter of Seniority Rights of Certain Teaching Staff Members Employed by the Old Bridge Tp. Bd. of Ed. and the Edison Tp. Bd. of Ed., where the Commissioner held that the seniority entitlement of persons serving simultaneously in two categories was entirely supported by the language of the regulations and by the fundamental principle by which both the Commissioner and the State Board were guided in their adoption of revised seniority regulations.

In sum, applying the facts to the applicable law, supports the conclusion that petitioner accrued seniority in both the categories of secondary school compensatory mathematics and compensatory reading teacher by virtue of her service in these specific categories. In addition, petitioner accrued seniority in the position of teacher of the

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handicapped because the duties she performed required the special education endorsement on her instructional certificate which she held. Petitioner has not accrued seniority as an elementary teacher since she has never served as such, nor is she entitled to seniority for teaching mathematics to grades 7 and 8, as this service fell within the secondary school compensatory mathematics category.

In light of the above discussion, it is hereby **ORDERED** that the Board adjust its records to reflect petitioner's correct seniority for assignments in the current 1986-87 school year. It is further **ORDERED** that petitioner be accorded those seniority rights in the categories as outlined above in accordance with her status relative to the seniority of others in the applicable categories. Further, although back pay is not an issue, it is **ORDERED** that petitioner be accorded appropriate benefits and emoluments to which she was entitled based on her seniority status.

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

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

October 10 1986
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

OCT 14 1986
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

OCT 16 1986
DATE

Mailed To Parties:

Ronald L. Parke /s S.
FOR OFFICE OF ADMINISTRATIVE LAW

jrp

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MYRA STERNBERG,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HIGHLAND PARK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon careful examination of the record, the Commissioner essentially concurs with the conclusions reached by the ALJ with the following modifications. First, petitioner has accrued seniority in only one category, namely the secondary category. Further, within that particular category, seniority is limited to (1) the specific common branch subjects taught by virtue of her elementary endorsement, namely, compensatory mathematics and compensatory reading. (N.J.A.C. 6:3-1.10(l)15; In re Old Bridge, supra; Old Bridge Education Assoc. et al.v. Bd. of Ed. of Old Bridge: Jaclin et al. v. Bd. of Ed. of Old Bridge, decided August 8, 1985) and (2) special education as authorized by her teacher of the handicapped endorsement. Thus, petitioner would have entitlement for any position of teacher of the handicapped, compensatory reading and compensatory mathematics in any grade falling within the secondary category pursuant to N.J.A.C. 6:3-1.10(l)15 as her actual number of years of seniority dictates.

Accordingly, the decision of the ALJ is adopted as clarified above. The Board is directed to comply with the orders contained in the initial decision and consistent with the clarification provided herein.

COMMISSIONER OF EDUCATION

November 21, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2244-86
AGENCY DKT. NO. 81-3/86

BOARD OF EDUCATION OF THE
BOROUGH OF SADDLE RIVER,
BERGEN COUNTY,
Petitioner,
v.
EDWARD J. AND IRENA M. HOLIAT,
Respondents.

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

Irving C. Evers, Esq., for respondents (Schwartz, Pisano, Simon & Edelstein, attorneys)

Record Closed: September 30, 1986 Decided: October 16, 1986

BEFORE **ARNOLD SAMUELS**, ALJ:

This matter was initiated on March 20, 1986, when the petitioner, Board of Education of the Borough of Saddle River, filed a verified petition with the Commissioner of Education seeking to recover tuition payments from the respondents. The Board alleged that the respondents' children, who are attending school in the district, were not residents of the district and therefore not entitled to attendance at school free of charge pursuant to N.J.S.A. 18A:38-1. The respondents filed an answer on March 26, 1986, denying

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the allegations of the petition and asserting affirmative defenses. On April 1, 1986, the matter was transmitted to the Office of Administrative Law for hearing and determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

A prehearing conference was held on May 28, 1986, and a Prehearing Order was filed, defining and limiting the issues to be decided, fixing hearing dates, providing for discovery and regulating other procedural aspects of the forthcoming hearing.

The issues, as stated in the Prehearing Order, are as follows:

A. Did the respondents' children become entitled to attend the petitioner's schools in the 1985-86 school year, free of tuition, pursuant to the above statute (N.J.S.A. 18A:38-1), by virtue of residence in the district?

B. If Issue A is answered in the negative, is the Board entitled to receive tuition, and if so, how much?

C. Is the petition time-barred under the 90-day filing limitation?

The nexus of the respondents' defense is that the Board is not entitled to the tuition sought because their children were bona fide domiciliaries of the Borough of Saddle River at all times during the period in question (the first months of the school year, beginning in September 1985). Issue C, as to whether the petition is time-barred, was never addressed by the parties and is therefore not considered in this decision.

A hearing was held at the Office of Administrative Law in Newark, New Jersey, on September 8, 1986. The respondents and the Superintendent of Schools testified. Six exhibits were marked in evidence, and they are itemized in the Appendix attached to this decision. The record closed on September 30, 1986, the last day permitted for the filing of post-hearing briefs or memoranda (which were not filed).

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Robert E. Collins, Superintendent of Schools of the Borough of Saddle River, testified to events that took place late in the summer of 1985 and during the early part of the 1985-86 school year that followed. In August 1985, before school opened, the respondents spoke to him about their daughter's special needs in the classroom, due to her unusually severe allergy problems. Two Holiat children were registered to attend Borough schools. According to Mr. Collins, the respondents informed him that they were not living in their house in Saddle River at that time, but they would move into it as soon as construction of an "environment-free" (exceptionally clean and easy to keep clean) room was finished. There were several communications in late August between the superintendent and the Holiats, and according to Mr. Collins, he was never told that they had moved to Saddle River. Mr. Collins was certain that, during conversations on or about August 20, 1985, the Holiats informed him that they were not living in Saddle River, but in Ridgewood, and they would move to the Saddle River house after the "environment-free" bedroom was built. However, Mr. Collins testified that in early January 1986, he was informed by one of the children's teachers that they were moving in on that day.

The Board policy dealing with children moving into the district at the beginning of a school year allows a 30-day grace period for a family who will become residents of the Borough prior to January 1. If residence does not begin within 30 days from the beginning of school, tuition is then charged for the period of time from the 31st day after school begins until the child becomes a resident.

According to Mr. Collins, the tuition bill is computed from the most current State Board of Education audit of annual costs per pupil, divided by 180 days (the number of school days in a year). This formula was used by the petitioner for the school year in question. The result was $29.21 per day per child. The Holiats were billed at that rate from the 31st day after school began until the date that the Board believed they moved into their Saddle River home. No payment has been received.

Mr. Collins referred to a letter he received in August 1985 from Mr. Holiat saying that he considered himself to be a resident and a domiciliary of Saddle River, even

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though his family was absent from it. In that letter, dated August 27, 1985 (Exhibit P-1), Mr. and Mrs. Holiat attempted a technical argument dealing with the legal concept of domicile. Most of the letter argued that point, but at no time did the respondents state that they or their children were actually occupying the Saddle River house. (Without commenting on the accuracy or appropriateness of the legal analysis contained in Exhibit P-1, it is noted that the argument in this case did not turn on the fine points of differentiation between residence and domicile. The ultimate issue was factual, concerned only with whether or not the Board could prove that the children did not live in Saddle River during the time in question. There also was no indication given that either Mr. or Mrs. Holiat are attorneys who might be capable of accurately arguing the fine differences between residence and domicile.)

When he was cross-examined, Mr. Collins acknowledged that he did not know if the Holiat family moved into their Saddle River home after the children began school in September. He did not investigate the matter or make any personal effort to find out when they moved in. He only assumed they did not do so, believing that they remained in their former house in Ridgewood during those months. Mr. Collins also recalled a conversation he had with the Holiats, when it was disclosed that they had homes in Ridgewood, Saddle River, upstate New York and an apartment in New York City.

Respondent Edward J. Holiat testified that he and his wife had purchased a home in Ridgewood in March 1982, which they still own, but have been attempting to sell. The family lived in that residence, and then took title to their Saddle River home in January 1985. That house was not used as a residence for the entire family until mid-August 1985, when the children were moved to Saddle River, after completing the prior school year in Ridgewood. Soon thereafter, the respondents decided that it was necessary to build an addition onto the Saddle River house in order to provide an "environment-free" bedroom for their daughter. Because of the dust and disarray that would be caused by the construction, the family moved back to the Ridgewood house, which had not been sold, in the third week of September. The construction took approximately three weeks, and Mr. Holiat testified that the entire family then moved back into the Saddle River house, on approximately August 20, 1985. Mr. Holiat stated that the children have resided

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continuously in Saddle River since mid-August 1985, except for the three weeks in September and October when they temporarily used their former Ridgewood home while the addition was being constructed. They still have not sold the Ridgewood house, and some of their furniture has been left there, to help attract potential buyers.

Several documents were offered by Mr. Holiat to corroborate his claim of residence in Saddle River since before the beginning of school in September 1985. R-1 is an application for membership in the Saddle River Volunteer Fire Department. It is dated October 8, 1985. (The application shows a physical examination by a physician on January 27, 1986, and Mr. Holiat's signature on the application was acknowledged on January 27, 1986.) The application for membership states that the applicant must be a resident of the town or jurisdictional district for six months, presumably before filing it.

Exhibit R-2 is a letter from the Borough Engineer of Saddle River to a councilman indicating that Mr. Holiat applied for a fill permit during the week of October 7, 1985, relating to 190 cubic yards of fill that had already been placed on the property without a permit.

Exhibit R-3 is a copy of Mr. Holiat's telephone bill at the Saddle River address, showing connection of service on September 3, 1985.

Exhibit R-4 is a copy of the Holiats' deed to the Saddle River property, dated January 15, 1985. (There is no indication on the deed as to whether or not a house was on the land at the time of the conveyance.)

Irena M. Holiat also testified. She stated that the entire family moved into the Saddle River home in mid-August 1985 from Ridgewood. Her husband moved in earlier in order to prepare for their arrival. Mrs. Holiat unequivocally stated that all three of their children resided in Saddle River from mid-August to September 20, 1985, when they temporarily moved back to the unsold Ridgewood house while construction progressed on the addition. She stated that the family returned to Saddle River after approximately three weeks.

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Mrs. Holiat testified that, except for the temporary three-week period of time in Ridgewood, the family has had no other home as a primary residence from mid-August to date. Her daughter presently lives in the newly constructed addition, where she remains for most of the time because of a severe allergic reaction to petroleum materials. The house is oil-heated, except for the new "environment-free" room, which has its own hot water, electric-fired heating system.

Having heard the testimony and observed the witnesses, and having reviewed the exhibits and considered the argument of counsel, I **FIND** the following **FACTS** by a preponderance of the credible evidence:

1. The respondents and their three children (including the two children for whom tuition is sought) moved into their home in the Borough of Saddle River on or about August 25, 1985, which location became their permanent residence at that time.

2. The family temporarily left the Saddle River home for a period of approximately three weeks from the end of September through the middle of October 1985, while an additional room was being added to the Saddle River house.

3. Since the children were compelled to commute to school in Saddle River during the above-mentioned three-week period, school officials became understandably confused about the children's true place of residence or domicile.

4. The three-week temporary period of hiatus described above did not constitute an abandonment of Saddle River by the family, which is their permanent residence.

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> Attendance at school free of charge.
>
> Public schools shall be free to the following persons over five and under 20 years of age:
>
> (a) Any person who is domiciled within the school district.
>
> N.J.S.A. 18A:38-1.

A domicile has been defined as that place where a person has his or her true, fixed and permanent home and principal establishment and to which, whenever he or she is absent, he or she has the intention of returning. It is the permanent residence of a person or the place to which he or she intends to return even though he or she may actually reside elsewhere. A person may have more than one residence, but only one domicile. The legal domicile of a person is important since it, rather than the actual residence, often controls the jurisdiction of the taxing authorities and determines where a person may exercise the privilege of voting and other legal rights and privileges. It is a person's legal residence, as distinguished from his or her temporary place of abode; or his or her home, as distinguished from a place to which business or pleasure may temporarily call him and her. See Black's Law Dictionary 435 (5th ed. 1979).

> Attendance at school by nonresidents.
>
> 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. N.J.S.A. 18A:38-3.

Based upon the foregoing, it is **CONCLUDED** that the Holiat children in question were domiciled within the Saddle River district beginning at the end of August 1985 and continuing without interruption (despite the three-week construction period) during the time for which tuition is sought by the Board. The demand for tuition is therefore unjustified, and the Board has not proven that it is entitled to tuition under the circumstances. The Holiat children were therefore entitled to attend the Saddle River schools free of charge at all times involved in this dispute, pursuant to N.J.S.A. 18A:38-1.

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It is therefore **ORDERED** that the petition be **DISMISSED.**

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

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

October 16, 1986
DATE

ARNOLD SAMUELS, ALJ

OCT 2 1986
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

OCT 2 1 1986
DATE

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APPENDIX

P-1	Letter from Irena M. Holiat and Edward J. Holiat to R. E. Collins, Superintendent of Schools, August 27, 1985
R-1	Application for membership, October 8, 1985 (acknowledged January 27, 1986)
R-2	Letter to Councilman Kleinknecht from Borough Engineer, October 21, 1985
R-2A	Envelope containing R-2
R-3	New Jersey Bell Telephone bill, September 29, 1985
R-4	Copy of Deed, January 15, 1985

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BOARD OF EDUCATION OF THE BOROUGH OF SADDLE RIVER, BERGEN COUNTY, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
EDWARD J. AND IRENA M. HOLIAT, RESPONDENTS.	:	DECISION

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful review of the record of this matter the Commissioner agrees with the findings and the conclusion of the Office of Administrative Law that respondents' children were domiciled within the Saddle River district beginning at the end of August 1985 and continuing during the time for which tuition is sought by the Board. The Commissioner is also in accord with the ALJ that, therefore, respondents' children were entitled to attend the Saddle River schools free of charge at all times involved in this dispute, pursuant to N.J.S.A. 18A:38-1.

Accordingly, the Commissioner accepts the recommendation of the Office of Administrative Law dismissing the Petition of Appeal and adopts it as the final decision in this matter for the reasons expressed in the initial decision.

COMMISSIONER OF EDUCATION

November 25, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2294-86
AGENCY DKT. NO. 82-3/86

BOARD OF EDUCATION OF THE
BOROUGH OF SADDLE RIVER,
BERGEN COUNTY,
Petitioner,
v.
EDMUND AND DEBORAH MEI,
Respondents.

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

Thomas J. Gallahue Jr., Esq., for respondents

Record Closed: September 24, 1986 Decided: October 21, 1986

BEFORE **ARNOLD SAMUELS,** ALJ:

This matter was initiated on March 20, 1986, when the petitioner, Board of Education of the Borough of Saddle River, filed a verified petition with the Commissioner of Education seeking to recover tuition payments from the respondents. The Board alleged that the respondents' child, who is attending school in the district, was not a resident of the district and therefore not entitled to attendance at school free of charge pursuant to N.J.S.A. 18A:38-1. The respondents filed an answer on April 2, 1986, denying

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the allegations of the petition and asserting affirmative defenses. On April 3, 1986, the matter was transmitted to the Office of Administrative Law for hearing and determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

A prehearing conference was held on May 28, 1986, and a Prehearing Order was filed, defining and limiting the issues to be decided, fixing hearing dates, providing for discovery and regulating other procedural aspects of the forthcoming hearing.

The issues, as stated in the Prehearing Order, are as follows:

A. Did the respondents' child become entitled to attend the petitioner's schools in the 1985-86 school year, free of tuition, pursuant to the above statute (N.J.S.A. 18A:38-1), by virtue of residence in the district?

B. If Issue A is answered in the negative, is the Board entitled to receive tuition, and if so, how much?

C. Is the petition time-barred under the 90-day filing limitation?

The respondents' primary defense is that the Board is not entitled to the tuition sought because their child was a bona fide domiciliary of the Borough of Saddle River at all times during the period in question (the first months of the school year, beginning in September 1985). Issue C, as to whether the petition is time-barred, was never addressed by the parties and is therefore not considered in this decision.

A hearing was held at the Office of Administrative Law in Newark, New Jersey, on September 24, 1986, and the record was closed on that date.

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Robert E. Collins, Superintendent of Schools of the Borough of Saddle River, testified regarding the Board policy dealing with the admission of new students who expect to begin residence in Saddle River no later than January 1. The Board will accept such a student for attendance in the Borough schools at the beginning of the school year in September, but tuition will be charged if his or her residence does not commence within 30 days following the first day of school. Such tuition is billed on a per diem basis, beginning with the 31st day after school begins, until the day that the child actually moves into the Borough, assuming that such residence occurs prior to January 1. The tuition is calculated on a per pupil cost for the school year, as obtained from the State Department of Education, for the last available year. That amount is then divided by the number of school days in the year to obtain the per diem tuition cost.

Mr. Collins testified that the respondents registered their son in the Saddle River district, where he began school at the beginning of the year in early September 1985. Several days thereafter, on September 11, Mr. Collins called the parents at home about a problem. He said that the telephone was answered by a construction worker who said that no one was living there at the time. Mr. Collins wrote a letter to Mr. and Mrs. Mei, explaining the Board's policy. They did not respond.

The Board secretary subsequently sent tuition bills to the respondents for a period of 26 days, beginning October 17 and ending November 27. Weekends and holidays were excluded. The calculated rate of tuition based upon advice from the Department of Education was $29.21 a day. The bills were not paid.

When questioned further, Mr. Collins acknowledged that he did not know when the Mei family actually began residence in their Saddle River home. However, he produced a copy of a temporary Certificate of Occupancy, Exhibit P-1, issued by a construction official of the Borough of Saddle River on November 27, 1985. That certificate was used to fix the November 27 date, after which no charge was made for tuition.

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Respondent Deborah Mei testified that she and her husband acquired title to their Saddle River property on August 24, 1984, and began construction of a home soon thereafter. Her husband acted as the general contractor. Their previous home in Wycoff, New Jersey, was sold on July 26, 1985, and on that date furniture was moved into the almost completed Saddle River residence.

Ms. Mei testified that they could not occupy the new house in September 1985 because it was not ready. However, the house was substantially completed on October 15, 1985, at which time they actually moved into the house. The first night that they slept in the dwelling was on October 15. Prior to that, during the interval between July 26 and October 15, they lived in various temporary locations, such as with parents and relatives and in a hotel. Ms. Mei testified that after she received Mr. Collins's letter about the tuition policy, she called the Board secretary and assured her that the family would be moved into the Saddle River home by October 17. They were there two days earlier. Ms. Mei testified that her son was picked up by the Saddle River school bus from the Saddle River house on every school day beginning on October 15.

When questioned about the temporary Certificate of Occupancy which was issued on November 27, 1985, Ms. Mei stated that they were aware of the fact that they did not have a Certificate of Occupancy when they began residing in the house on October 15. However, she stated that neighbors informed her that they also had moved into their new homes before a certificate was issued, particularly when they had nowhere else to go.

Having heard the testimony and observed the witnesses, and having reviewed the exhibit and considered the argument of counsel, I **FIND** the following **FACTS** by a preponderance of the credible evidence:

1. Respondents and their son moved into their home in the Borough of Saddle River on or about October 15, 1985, which location became their permanent residence at that time.

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2. Less than 30 school days elapsed between the time the respondents' son began attending school in Saddle River (in September at the beginning of the school year) and October 15, 1985, when the family began residing in the Borough.

Attendance at school free of charge.

Public schools shall be free to the following persons over five and under 20 years of age:

(a) Any person who is domiciled within the school district.

N.J.S.A. 18A:38-1.

A domicile has been defined as that place where a person has his or her true, fixed and permanent home and principal establishment and to which, whenever he or she is absent, he or she has the intention of returning. See Black's Law Dictionary, 435 (5th ed. 1979).

Attendance at school by nonresidents.

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. N.J.S.A. 18A:38-3.

Based upon the foregoing, it is **CONCLUDED** that the child in question was domiciled within the Saddle River School District as of October 15 and such status continued thereafter. Residence in Saddle River began before a period of 30 school days had expired following the first day of school. Therefore, the application of Board policy, as stated above, would preclude any charge for tuition.

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The demand for tuition is therefore unjustified, and the Board has not proven that it is entitled to tuition under the circumstances. The child was therefore entitled to attend the Saddle River schools free of charge at all times involved in this dispute, pursuant to N.J.S.A. 18A:38-1.

It is therefore **ORDERED** that the petition be **DISMISSED.**

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

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

October 21, 1986
DATE

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

OCT 22 1986
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

OCT 24 1986
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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BOARD OF EDUCATION OF THE BOROUGH OF SADDLE RIVER, BERGEN COUNTY, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
EDMUND AND DEBORAH MEI, RESPONDENTS.	:	DECISION

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were received from the parties.

Upon review of the record in this matter, the Commissioner concurs with the findings and conclusion of the ALJ and adopts the initial decision as his own.

Accordingly, the Petition of Appeal is dismissed with prejudice.

COMMISSIONER OF EDUCATION

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6625-85
AGENCY DKT. NO. 349-10/85

EAST AMWELL TOWNSHIP
BOARD OF EDUCATION,
Petitioner,
v.
PATRICIA ACKEN,
Respondent.

Stephen R. Fogarty, Esq., on behalf of petitioner, East Amwell Board of Education (Fogarty & Hara, attorneys)

Stephen E. Klausner, Esq., on behalf of respondent, Patricia Acken (Klausner & Hunter, attorneys)

Record Closed: September 16, 1986 Decided: October 29, 1986

BEFORE **WILLIAM B. PALLERIA,** ALJ:

The petitioner, East Amwell Township Board of Education (Board) seeks the suspension of respondent's Teaching Certificates for a period of one year based upon its assertion that Ms. Acken is guilty of unprofessional conduct in that she allegedly (1) failed to provide the Board with 60 days written notice before relinquishing her employment, in violation of N.J.S.A. 19A:28-8 and, (2) without Board approval, ceased to perform her duties before the expiration of her term of employment, in violation of N.J.S.A. 18A:26-10.

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PROCEDURAL HISTORY

On September 16, 1985, the Board filed a Verified Petition and an Order to Show Cause with the Commissioner of Education seeking an order suspending the teaching certificates of Ms. Acken for a period of one year (Exhibit C-1). Respondent's Answer and Affirmative Defenses were filed with the Commissioner on October 15, 1985 (Exhibit C-2). Thereafter, on October 17, 1985, the matter was referred to the Office of Administrative Law for consideration as a contested case, in accordance with N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14B-1 et seq. A prehearing conference was held on November 22, 1985 and on November 26, 1985 a Prehearing Order was executed setting forth the scope of the dispute (Exhibit C-3). On December 30, 1985, petitioner made application for the issuance of an Order directing Ms. Acken to be present during the course of the hearing. Respondent's counsel responded on January 7, 1986 and on January 15, 1986, the Administrative Law Judge denied the request by Letter Ruling (Exhibit C-4). The matter was originally scheduled for hearing on January 29 and 30, 1986. On the first scheduled hearing date, the parties represented that a tentative settlement of the matter had been reached and thus, the hearing was adjourned. The proposed settlement was not finalized and on May 5, 1986, the case proceeded to hearing. Due to inordinate delays in the preparation of a hearing transcript, post-hearing submissions were delayed to August 11, 1986 for respondent and September 16, 1986 for petitioner, at which time the record closed.

FACTS

The facts in this matter are partially in dispute. A large portion of the testimony and evidence is uncontroverted. While the parties may disagree, in part, concerning a limited number of factual issues, they surely place different degrees of weight and significance on certain factual material. Thus, a brief summary of the testimony and evidence is provided.

The first witness called by the petitioner was Ms. Alyson Lilard who has held the position of Board Secretary for approximately one and one-half years. She testified that the Board passed a resolution at the September 4, 1985 meeting, (1) accepting Ms. Acken's resignation with prejudice, and (2) seeking the Board attorney to initiate action seeking the suspension of Ms. Akcen's teaching certificates for one year. It was her testimony that the Board took the action based, in large part, upon a letter it had

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received from Ms. Acken, dated August 20, 1985 (Exhibit P-6) and a second letter, dated August 30, 1986 (Exhibit P5).

Ms. Judith Harvery, the Board President, was also called and testified. She stated that she was President of the East Amwell Township Board of Education for approximately one year. She testified that although she knew Ms. Acken as a teaching staff member, she did not know her well. It was her testimony that Ms. Acken's letters of August 20 and August 30 were read at the Board meeting on September 4, 1985 and, after discussion, the Board accepted Ms. Acken's resignation with prejudice, resolved to remove her tenure and seniority rights, and to request the Commissioner of Education to revoke Ms. Acken's teaching certificates. It was also her testimony that, on the first two scheduled days of school (September 3 and 4), Ms. Acken did not report. In her absence, a substitute teacher filled in. This substitute teacher was a former student teacher in the district in the 1984-85 school year. Ms. Harvey testified that during the September 4, 1985 meeting, the Board hired the former student teacher who had substituted for Mrs. Acken on September 3 and 4 and made her position full-time retroactive to September 1, 1985 (the district contract date). It is also Ms. Harvey's testimony that Ms. Acken's failure to provide the school district with the required 60-day notice limited the opportunity of the Board to obtain a replacement. She explained Ms. Acken's failure to provide the Board with the 60 day notice prejudiced the school and the students because the teacher who was considered the first choice as a replacement would not accept the post unless the Board guaranteed that she would be employed full-time beginning in September. Since Ms. Acken had not given the 60-day notice and was instructed to report for work on September 3, 1985, the administration was uncertain if she would be there or not, and thus, could not guarantee the first choice candidate that her employment would be certain. Ms. Harvey explained that, if the school had received Ms. Acken's resignation letter prior to July 1, 1985, the Board and its representatives would have had sufficient time to hire a replacement and probably would have hired a teacher other than the one ultimately employed. She did concede, however, that the replacement teacher was rehired for the 1986-87 school year.

Mr. Samuel Mendelson, the Chief School Administrator of the East Amwell School was also called and testified. He serves as Superintendent and Principal of the one-school district. He testified that he has held the position of Acting Chief School Administrator since August 1985 and in December 1985 he was appointed on a permanent basis. Prior to holding the position of Chief School Administrator, he was the Assistant

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Principal at East Amwell since September 1983. It is Mr. Mendelson's testimony that on August 8, 1985, he telephoned Ms. Acken in Florida to determine if she would be returning in September. He testified:

> I explained to her the situation where I had been named acting chief administrator just about a week prior to that and indicated to her that I was trying to fill all the positions and indicated a number of other positions that were vacant and, therefore, was asking her whether or not she was going to be returning so that I would know whether or not I had another position to fill. (Transcript page 88, lines 15 through 22).

Mr. Mendelson's testimony is that on August 8, 1985, Ms. Acken indicated that it was unlikely that she would be returning; but that she was still undecided.

Mr. Mendelson testified further that the next communication he received from respondent was Ms. Acken's letter to the Board of Education dated August 20, 1985 (Exhibit P-6) which was received by him on August 23, 1985, resigning her position effective September 1, 1985. He stated that, upon receiving the letter, he immediately called Ms. Harvey, the Board President, and subsequently spoke with the Chairman of the Personnel Committe of the Board of Education. Based upon these communications Mr. Mendelson sent a letter to Ms. Acken on August 26, 1985 (Exhibit P-7). Mr. Mendelson states that his next communication with Ms. Acken was on Friday, August 30, 1985. This is the Friday of the Labor Day weekend and teachers were required to report to the school on Tuesday, September 3, 1985, the day following Labor Day. Mr. Mendelson states that on August 30, 1985, Ms. Acken telephoned Mr. Mendelson and they discussed his letter of August 26, 1985. It is Mr. Mendelson's testimony that Ms. Acken indicated to him in this telephone call that it was unlikely that she would be returning to the school on September 3, 1985. It is also Mr. Mendelson's testimony that he received a message on September 3, 1985 from his secretary that Ms. Acken had called and informed Mr. Mendelson's secretary that:

> They had sustained hurricane damages, and because of the hurricane they couldn't obtain a flight back Tuesday or Wednesday; thus, she wouldn't be returning nor would she be returning for 4th grade. (Transcript page 112, lines 3 through 8).

Mr. Mendelson also testified that because his predecessor unexpectedly left the school in late July, Mr. Mendelson was temporarily appointed as Chief School

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Administrator. Because his predecessor had been conducting the interviews for vacant positions, the process had to be reopened. Since there were vacancies that teachers had previously applied to fill, he bootstrapped Ms. Acken's possible resignation onto the others by considering the same candidates for Ms. Acken's teaching post. It is his testimony that, had Ms. Acken given the required notice on or about June 1, 1985, a more acceptable replacement could have been found and hired with fewer complications.

The respondent, Ms. Patricia Acken, testified. She stated that she resided with her husband in Florida during the summers of 1984 and 1985. She worked for the East Amwell Board of Education as a teacher for approximately 14 years. She was a member and held the positions of President, Vice-President and Negotiation Chairperson of the East Amwell Education Association.

Ms. Acken testified that on August 8, 1985, Mr. Mendelson spoke with her by phone. On direct examination she stated that, after exchanging ammenities, Mr. Mendelson asked her if she was interested in transferring from her fourth grade teaching position to eighth grade, math and science in 1985-86. She stated that she did not accept the position.

On cross-examination Ms. Acken stated that she knew a 60-day notice was required and then the following colloquy between counsel and Ms. Acken occurred:

Q. Now, you said you spoke to Mr. Mendelson he called you in Florida; didn't he?
A. The beginning of August, correct.
Q. What did he talk to you about on August 8th? You said to Mr. Klausner he asked you to take a transfer?
A. That's correct.
Q. That would mean coming back in September and teaching in the eighth grade?
A. That's correct.
Q. In the math and science curriculum areas?
A. That's correct.
Q. And you said, no, you didn't want to transfer?
A. That's correct.
Q. Why did you tell him you weren't coming back?

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A. I said, first of all, I'm not going to be able to take that position and then I'm not coming back.

Q. You told him on August 8th —

A. I told him most likely I won't come back. My husband's company went bankrupt and I told him that I would let him know as soon as we could get my husband a position.

(Transcript at pages 164 lines 10 through 25; page 165 lines 1 through 10)

Shortly thereafter, Ms. Acken stated that she assumed she would not be returning to the school district, but her husband was unemployed and, in effect, she did not wish to sever her relationship with the East Amwell School District until she was financially able to do so. She also testified that it was her intention to resign in June, but she could because it was not "financially feasible". (Transcript p. 166 line 9).

Ms. Acken also testified that on August 29, she received Mr. Mendelson's August 26 letter. She stated that the substance of the letter upset her and, therefore, she called Mr. Mendelson the next day (August 30, 1985) to obtain a clarification of the August 26 letter (Exhibit P-7). It is her testimony that during the August 30 1985 telephone conversation with Mr. Mendelson he stated that the Board was upset when they received her resignation letter and that they wanted her to return until they could act on the issue of the vacancy created by her resignation. She testified that they discussed replacement personnel and she got the impression that Mr. Mendelson had already found a candidate to fill her position.

It is also Ms. Acken's testimony that during this August 30, 1985 telephone conversation Mr. Mendelson mentioned the existence of an impending hurriance (off the Florida Coast). She stated that in anticipation of returing to New Jersey before school opened, she made attempts to obtain a flight, but because of the hurricane and resultant damage she was unable to fly out of Florida. She testified and produced documents reflecting the extent of the hurricane damage in the region of her reisdence. (Exhibits R-4 and R-5). She stated as well, that she drafted and sent a letter to the Board on August 30, 1985. (Exhibit P-5).

It is her testimony that on September 3, 1985 she telephoned the East Amwell School and spoke with Mr. Mendelson's secretary, Mary Tereshko and informed her that she would not be at the school on September 3 or 4 because of the hurricane and

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communicated something to the effect that "if the Board accepted her resignation she probably wouldn't be seeing her", or "if I should not return because they accept my resignation, to say hello to everybody and that I would see them." She states, however, that she never told Mary Tereshko that she would never be reporting to the fourth grade class again.

FINDINGS OF FACT

Based upon the testimony of the witnesses, my assessment of their credibility and a view of the evidence presented by the parties, I make the following factual findings:

Ms. Acken, who presently lives in Bel-Aire, Florida, holds a New Jersey teaching certificate for elementary school and a corresponding certificate as teacher of the mentally retarded. Pursuant to her elementary certificate respondent was employed under tenure status as an elementary teacher in the East Amwell School district. The East Amwell School district is composed of a one-house school serving grades kindergarten through eight. Ms. Acken taught for 14 years in the East Amwell grade school. Her last year of complete service and employment was September 1984 through June 17, 1985 (contract year September 1, 1984 through August 31, 1985), during which time she taught fourth grade. She was a member of the East Amwell Education Association, during which time she served as negotiations chairperson for approximately eight years until 1980. She also held the posts of president and vice-president of the Association. Ms. Acken also served as a consultant to the Association's Negotiation Committee during the last contract negotiations.

It is also uncontroverted and I **FIND** that Ms. Acken's husband was transferred to the State of Florida in June 1984. Although her husband was transferred to Florida, Ms. Acken remained employed by the Board through the 1984-85 school year and she spent the summers of 1984 and 1985 in Florida. Mr. and Mrs. Acken's residence in New Jersey remained unsold until the closing date which was some time in late September 1985. The date of the sales contract is not in evidence. It is also uncontroverted and I **FIND** that Mr Acken's husband was not employed in or about early August of 1985 (T-165, 166).

I **FIND** that on August 8, 1985, during a telephone conversation initiated by Mr. Mendelson, Ms. Acken was asked if she would agree to assume the functions of the eighth grade math/science teacher instead of fourth grade teacher in September 1985.

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Ms. Acken refused and intimated to Mr. Mendelson that, although she was not sure, she thought she would not be returning to the school.

I find also that by letter, dated August 20, 1985 and received by Mr. Mendelson on August 23, 1985, Ms. Acken asked the Board to accept her resignation as a teaching staff member effective September 1, 1985. I **FIND** further that by letter dated August 26, 1985 and received by Ms. Acken on August 29, 1985, Mr. Mendelson informed Ms. Acken that she must fulfill her contractual obligations and return to work on September 3, 1985. I also **FIND** that, on August 30, Ms. Acken telephoned Mr. Mendelson and spoke with him concerning the necessity for her returning to her post. On the same day, Ms. Acken drafted and forwarded a letter to the Board (Exhibit P-5). I **FIND**, as well that between August 31 and September 4, 1985, Hurricane Elena crippled Northwest Florida. I also **FIND** that Ms. Acken called the East Amwell School on September 3, 1985, spoke with Mary Tereshko and explained that she would not be returning to the school on that date or the next because of the hurricane and further, that Ms. Tereshko should say "hello" to everyone for her. I **FIND** that on September 4, 1985, at a meeting of the East Amwell Board of Education, Patricia Acken's resignation effective September 1, 1985, was accepted by the Board with prejudice and the Board voted to petition the Commissioner of Education to suspend Ms. Acken's teaching certificate for one year as a result of her alleged failure to provide the Board with 60 days written notice of her intent to relinquish her position and because she allegedly ceased to perform her duties before the expiration of her term of employment and thus, was guilty of unprofessional conduct. I **FIND**, too, that the Board hired a replacement for Mrs. Acken at the September 4, 1985 Board meeting. Ms. Acken's replacement was a student teacher in the 1984-85 school year and substituted for Ms. Acken on September 3 and 4, 1985. The replacement teacher was hired as a full-time replacement for Ms. Acken retroactive to September 1, 1985 (the contract date). I **FIND** that the Chief School Administrator had only five working days between the receipt of Ms. Acken's August 20 letter and the first day of school to find a replacement for Ms. Acken (August 26, 27, 28, 29 and 30). I **FIND** too that the Board, through its representative Mr. Mendelson, was compelled to choose a candidate as a replacement for Ms. Acken who was not the first choice and that the replacement teacher was rehired for the 1986-87 school year. I **FIND** that Ms. Acken's equivocation and delay in tendering her resignation directly contributed to a hurried and limited teacher replacement selection process.

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DISCUSSION

The Board seeks the suspension of Mrs. Acken's teaching certificates for a period of one year based upon their assessment that her cessation of employment and failure to provide statutory notice, under the present circumstances, constitutes unprofessional conduct. They rely upon N.J.S.A. 18A:26-10 and N.J.S.A. 18A:28-8 which respectively provide:

> N.J.S.A. 18A:26-10:
>
> Suspension of certificate for wrongful cessation of performance of duties:
>
> Any teaching staff member employed by a board of education, who shall, without the consent of the board, cease to perform his duties before the expiration of the term of his employment, shall be deemed guilty of unprofessional conduct, and the commissioner may, upon receiving notice thereof, suspend his certificate for a period not exceeding one year.
>
> N.J.S.A. 18A:28-8:
> Notice of intention to resign required:
>
> Any teaching staff member, under tenure of service, desiring to relinquish his position shall give the employing board of education at least 60 days written notice of his intention, unless the board shall approve of a release on shorter notice and if he fails to give such notice he shall be deemed guilty of unprofessional conduct and the commissioner may suspend his certificate for not more than one year.

With regard to the allegation that Mrs. Acken violated N.J.S.A. 18A:26-10, respondent argues that it cannot be determined that she ceased to perform her duties before the expiration of her employment because she ceased to perform them before they began. However, Mrs. Acken's duties for the 1985-86 school year actually began on September 3, 1985 and she failed to be present at the school on September 3 and 4, 1985. If it is determined that her failure to be present was inadvertant, excusable, and caused, in effect, by an act of God, then her argument may have merit. On the other hand, if it is determined that her failure to attend the first two days of school were inexcusable and intentional, then the opposite conclusion may be drawn, i.e., her conduct may be unprofessional as described by N.J.S.A. 18A:26-10.

Counsel for Mrs. Acken also argues that N.J.S.A. 18A:28-8 is a discretionary, permissive statute and that, in addition to proving failure to provide 60 days written

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notice, the Board must also show prejudice. Thus, the factual circumstances underlying the failure of the 60-day notice and the selection process for a replacement are relevant. I agree. As counsel has pointed out, the statute is framed in permissive terms which gives the Commissioner of Education the authority and discretion to find unprofessional conduct and set a penalty of certificate suspension for up to one year. In the Matter of the Suspension of the Teaching Certificate of Robert J. Burgess, Township of Clinton, 1983 S.L.D. _____ (Commissioner of Education March 17, 1983).

The purpose of N.J.S.A. 18A:28-8 is clearly set forth in Evaul v. Camden Board of Education, 1959 S.L.D. 60 and 62, aff'd 65 N.J. Super. 68 (App. Div. 1961) rev'd on other grounds 35 N.J. 244. Judge Price, writing for the Appellate Division at page 76 states:

> . . . The Commissioner in his opinion noted that the obvious intent of the statute "is to guarantee the employing Board sixty days in which to arrange for suitable replacement." Its provisions are for the benefit of the board and the public, not the teacher. . . .

And, while I adopt with Judge Price's language in Evaul, it must be accepted with the caveat that, in determining unprofessional conduct and a penalty, the conduct of the teaching staff member must be reviewed in terms of the impact it has on the school district, the administration, the Board, other teachers and/or the pupils.

The facts of the present case clearly reflect that Mrs. Acken tendered her resignation only days before the school year was to begin. The resignation, although couched in the terms "please accept my resignation" is similar to the letter of resignation in Evaul the operative language of which read: "I hereby offer my resignation." Ms. Acken argues that such language constitutes an offer which must be accepted. But, in her case, the Board changed the terms and accepted her resignation "with prejudice" while seeking suspension of her certificate. I disagree with Ms. Acken. By letter dated August 20, received August 23, 1985 she clearly resigned effective September 1, 1985. Although the resignation sentence opens with the phrase "Please accept" it is salutary and does not constitute anything like an offer. It is a resignation plain and simple.

In addition, Ms. Acken's failure to provide the Board with any written notice until August 23, 1985 and her failure to provide unequivocal oral notice of her intention

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to relinquish her position appears to be based purely and simply upon personal motives. Her husband and she were living in Florida, he was unemployed, their house in New Jersey had not sold and her uncertainty as to their future continually delayed her decision. By her testimony, Ms. Acken makes this clear. Thus, while it is apparent that Ms. Acken wished to resign her teaching post, she considered herself financially unable to do so. In effect, she kept her irons in the fire right up to the week before school was to begin, thus guaranteeing herself employment in East Amwell, if nothing else became available in Florida or her husband remained unemployed. Ms. Acken also suggests that her resignation was tendered so late and without the 60-day notice because of her concern for the students. She suggests that she wished the students to have one teacher for the year instead of switching teachers in midstream. While the concern she expreses may be genuine, the purpose of the notice requirement is to provide the School and the administrator with sufficient time to locate and hire an acceptable replacement so that the students are not switched from substitute to substitute until a replacement is hired.

CONCLUSION

Based upon the above findings and discussion, I **CONCLUDE** that Patricia Acken provided only 11 days written notice of her intention to resign her position as a tenured teaching staff member in the East Amwell School District. I **CONCLUDE,** as well, that her failure to provide the statutorily mandated notice adversely impacted on the Board and its agents by placing them in a position of hiring a replacement teacher in a period of five working days. The fact that Mr. Mendelson satisfactorily accomplished that task on such short notice should not weigh in favor of Mrs. Acken. I **CONCLUDE** further that Mrs. Acken, although certainly a dedicated professional member of the teaching staff while at East Amwell School, avoided tendering her notice of resignation until approximately one week before beginning the school year, based upon personal reasons that do not constitute mitigating circumstances. If on August 20, 1986 Mrs. Acken's personal circumstances changed sufficiently to permit her financially to resign, she should have given the district the 60-day notice required by law and returned to the district for the statutory period. She did not do so and thus, I **CONCLUDE** that she has violated N.J.S.A. 18A:28-8 and is guilty of unprofessional conduct. I also **CONCLUDE** that, after tendering her resignation, Mrs. Acken never intended to return to the East Amwell School District. She was made aware of the impending hurricane by Mr. Mendelson on Friday August 30, 1985. Had she a genuine interest and desire to return to New Jersey she oould have immediately attempted to obtain transportation in the form of automobile, bus or

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train. She did not indicate in any way that she did so. Her letter of August 30, 1985 also depicts her clear intent not to be present at the September 4, 1985 Board meeting. Thus, I also **CONCLUDE** that Mrs. Acken ceased to perform her duties on September 3 and 4, 1985 and has violated N.J.S.A. 18A:26-10.

I recognize that both N.J.S.A. 18A:28-8 and N.J.S.A. 18A:26-10 set a maximum period of suspension at one year. I **CONCLUDE** that, although Mrs. Acken has violated both statutory provisions, a single one-year suspension period shall be considered the maximum term since the conduct which forms the basis of the unprofessional conduct is identical.

Mrs. Acken is certified as an Elementary School Teacher and Teacher of the Mentally Retarded. At East Amwell she was performing pursuant to the Elementary School Certification. She argues that the suspension should be limited to the certificate under which she was teaching when the unprofessional conduct occurred. Thus, if a suspension is imposed, it should prohibit her from teaching elementary school only. I **FIND** this argument entirely without merit. The clear intent of the Legislature in enacting N.J.S.A. 18A:28-8 and N.J.S.A. 18A:26-10 is to penalize those who breach their professional obligations. To accept respondent's argument would render the sanction nugatory.

ORDER

For the reasons expressed hereinabove, I **ORDER** that the charges of unprofessional conduct arising out of Mrs. Acken's failure to provide a 60-day written notice of the relinquishment of her employment and her premature cessation of employment in violation of N.J.S.A. 18A:28-8 and N.J.S.A. 18A:2610, repsectively, are sustained; and I further **ORDER** that Mrs. Acken's New Jersey Teaching Certificates be suspended for a period of one year from the date of the final decision herein.

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

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

10/29/86
DATE

WILLIAM B. PALLERIA, ALJ

OCT 31 1986
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

NOV 3 1986
DATE

OFFICE OF ADMINISTRATIVE LAW

bc

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IN THE MATTER OF THE SUSPENSION	:	
OF THE TEACHING CERTIFICATE OF	:	
PATRICIA ACKEN, SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE TOWNSHIP OF EAST AMWELL,	:	DECISION
HUNTERDON COUNTY.	:	
	:	

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

It is observed that the exceptions to the initial decision filed by respondent and the Board's reply to those exceptions were filed with the Commissioner pursuant to the applicable provisions of N.J.A.C. 1:1-16.4a, b and c.

Initially, respondent argues that the ALJ's description of the testimony of the former Board President Judith Harvey was inaccurately stated in the initial decision, ante, and thereafter it was erroneously incorporated into his Findings of Fact in the initial decision.

Respondent by way of her exceptions specifically points out the seriousness of the ALJ's error:

> At page 3 of the Initial Decision, the ALJ states:
>
> > In her absence, a substitute teacher filled in. This substitute teacher was a former student teacher in the district in the 1984-85 school year. Ms. Harvey testified that during the September 4, 1985 meeting, the Board hired the former student teacher who had substituted for Mrs. Acken on September 3 and 4 and made her position full-time retroactive to September 1, 1985 (the district contract date).
>
> This statement is repeated by the ALJ as a Finding of Fact (page 8).
>
> Neither is accurate. The record disclosed that the Board's first choice to replace Patricia Acken was a former student teacher who had no other experience. The actual replacement was Lynne Bocchiaro, an experienced teacher.***
>
> (Respondent's Exceptions, at p. 1)

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A review of the transcript of these proceedings reveals that respondent's exceptions to the above findings are substantiated.

Also excepted to by respondent are those conclusions of the ALJ which read as follows:

The ALJ also found that:

> I also CONCLUDE that, after tendering her resignation, Mrs. Acken never intended to return to the East Amwell School District. She was made aware of the impending hurricane by Mr. Mendelson on Friday August 30, 1985. Had she a genuine interest and desire to return to New Jersey she could have immediately attempted to obtain transportation in the form of automobile, bus or train. She did not indicate in any way that she did so. Her letter of August 30, 1985 also depicts her clear intent not to be present at the September 4, 1985 Board meeting. (At pp. 11-12)

It is respectfully suggested that this statement is not grounded in either the record or reality. One does not drive in a car or in a bus or take a train when an erratic, unpredictable hurricane is bearing down.

Further, it ignores the destruction and devastation that was brought upon Florida (see T 154-156). (Respondent's Exceptions, at p. 2)

A further review of respondent's arguments presented in her post-hearing brief reveals that they have been addressed at length on pages 9-11 of the initial decision. In post-hearing brief she argues that the provisions of N.J.S.A. 18A:26-10 are inapplicable to these proceedings inasmuch as she did not, by virtue of her resignation of August 23, 1985, cease to perform her duties during the period of her employment, but rather such resignation was tendered to the Board prior to the beginning of the 1985-86 school year.

Respondent further contends that the 60-day notice provision contained in N.J.S.A. 18A:28-8 is discretionary and that the statutory scheme is permissive. Consequently, she argues that the Board may not invoke the 60-day notice provision without showing that it has been prejudiced by virtue of her having given 11 days (August 23 through September 2, 1985) notice of her decision to resign from its employ.

Finally, respondent argues that the Commissioner is without authority in law to suspend the certificate she holds as a teacher of the mentally retarded. She bases her argument on the fact that

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she was never employed by the Board under that certificate but rather her employment relationship with the Board was effected through the certificate she held as an elementary teacher.

The Board urges the Commissioner to affirm those findings and recommendations set forth by the ALJ in the initial decision.

The Board maintains that the record of this matter clearly establishes that respondent's equivocation and delay in tendering her resignation until August 23, 1985 clearly compromised its ability to employ a replacement teacher who had done her student teaching in East Amwell during the 1984-85 school year. The Board further maintains that respondent's failure to submit a timely resignation was dilatory and thereby resulted in the employment of a person to replace respondent who was not its first choice.

The Board also relies on the pertinent language of the Appellate Court in Evaul wherein it stated:

> ***The Commissioner in his opinion noted that the obvious intent of the statute [N.J.S.A. 18A:28-8] "is to guarantee the employing Board sixty days in which to arrange for suitable replacement." Its provisions are for the benefit of the board and the public, not the teacher.***
> (65 N.J. Super. 76 (App. Div. 1961); 1960-61 S.L.D. at 226)

It is the Board's position that the facts of this matter, when viewed in the context of the Appellate Court's construction of N.J.S.A. 18A:28-8, clearly establish that respondent's submission of her 11-day written notice of her intention to resign adversely impacted on the Board, the administration and the pupils, by placing the Board in a position of having to hire a suitable replacement within 5 working days.

In its reply to respondent's exceptions, the Board maintains that the ALJ correctly concluded that respondent, after tendering her resignation, never intended to return to the East Amwell School District. In support of its contention the Board states:

> [The ALJ's] conclusion was based on several noncontroverted facts, including: respondent's awareness of the impending hurricane as early as August 30, 1985, and, her failure to even attempt to obtain transportation back to New Jersey; her letter of August 30, 1985, written after speaking with Mendelson, which depicts her clear intent not to be present at the September 4, 1985 Board meeting; and, her failure to do or say anything to Mendelson or the Board, consistent with an intention to return to the East Amwell School District. To suggest, as respondent does, that the inference drawn by the administrative law

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> judge in this regard could not reasonably have been reached on the evidence present in the record belies credulity.
>
> Moreover, the administrative law judge's conclusion in this regard, was based upon respondent's testimony, and, his assessment of her credibility (Initial Decision at 7). The Commissioner should defer to the administrative law judge on such questions of credibility where his findings are, as here, reasonably supported in the record. Campanile v. Middletown Tp. Bd. of Ed., 1982 S.L.D. ____ (Comm. Ed. 1982), slip op. at 20; In the Matter of the Tenure Hearing of Walter Driscoll, 1982 S.L.D. ____ (Comm. Ed. 1982) slip op. at 39-40, aff'd State Board 9/8/82, aff'd unpublished opinion, App. Div. (Docket No. A-798-82T2, decided 10/28/83).
>
> (Board's Reply Exceptions, at pp. 2-3)

The Commissioner further notes that the Board also relies on those arguments presented in its post-hearing brief which are incorporated by reference herein.

Upon review of the entire record of this matter, including the submissions of the parties advancing their respective positions to the initial decision, the Commissioner does not agree with respondent that a reversal of the ALJ's findings and conclusions is warranted.

In the Commissioner's judgment, there is ample documentation and testimony in the record to support the Board's contention that respondent's failure to comply with the provisions of N.J.S.A. 18A:26-10 and N.J.S.A. 18A:28-8 is sufficiently flagrant to warrant the suspension of her teaching certificate for a period of one year.

Although respondent maintains that the provisions of N.J.S.A. 18A:26-10 are inapplicable to these proceedings by virtue of the fact that she tendered her resignation during the month of August 1985, which was outside the expiration term of her employment period with the Board, the Commissioner finds and determines that respondent's failure to report to her assigned teaching position on September 3 and 4, 1985 triggered the provisions of N.J.S.A. 18A:26-10.

Similarly, respondent's attempts to overcome the Board's claim that she violated the 60-day provision of N.J.S.A. 18A:28-8 are equally without merit. In this regard, the Commissioner observes that it is respondent's own testimony which reveals that her decision not to comply with the provision of N.J.S.A. 18A:28-8 was motivated by personal considerations rather than her professional obligation and duty to provide adequate notice of her resignation to the Board.

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During cross-examination by Board counsel, respondent was asked whether or not she considered resigning before August 1985; she replied in pertinent part as follows:

> I would have resigned in June, that was my intention to resign in June, but I couldn't resign because of my personal life. (Tr. 197-198)

The record of this matter establishes that respondent's husband who resided in Florida was not employed "in or about early August of 1985." (Initial Decision, ante) As a matter of clarification respondent was then asked the following by the ALJ:

> THE COURT: But you knew you were supposed to resign in June. You knew you were supposed to give 60-day notice; that's what I'm saying.
>
> THE WITNESS: I knew that that would be the best way to do it, yes.
>
> ***
>
> THE COURT: But do you have an understanding? Do you understand the reason behind the requirement? That's what I'm trying to find out.
>
> THE WITNESS: Yes. I understand the reason for a notice. I don't understand a 60-day notice would be required.
>
> THE COURT: What is the reason behind the notice requirement?
>
> THE WITNESS: It gives the Board and administration sufficient time to select a replacement." (Tr. 197-199)

It is noted that respondent's defenses for not complying with the provision of N.J.S.A. 18A:28-8 relate to what she contended was the Board's past practice of allowing a waiver of the 60-day provision with teaching staff members who had previously resigned their teaching positions in the East Amwell School District.

The Commissioner finds no merit in the position taken by respondent in this regard precisely for the reasons that he articulated in In the Matter of the Suspension of the Teaching Certificate of Michael S. Fox, School District of Black Horse Pike Regional, decided November 21, 1983 and Black Horse Pike Regional School District Board of Education v. Barbara Cohen, decided by the Commissioner January 24, 1983. In Cohen and in Fox the Commissioner adopted as his own the findings of the ALJ wherein it was held as follows:

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> Even if it has been established that previous Boards have not enforced the 60-day provision in N.J.S.A. 18A:26-10, this Board is not estopped from exercising its statutory right absent a showing of discrimination.
>
> (Cohen, Slip Opinion, at p. 16)
> (Fox, Slip Opinion, at p. 6)

Similarly, respondent's contention that the facts of this matter reveal that the Board did, in fact, hire a suitable replacement for her as of the 1985-86 school year is also without merit. While it is true that the Board hired an experienced teacher to replace respondent, nevertheless had the Board been given more than the 11-day notice of respondent's resignation, it is unrefuted that it would have hired Jean Lewis to replace respondent for the year in question. Ms. Lewis was a student teacher in East Amwell during the 1984-85 school year. However, given the time constraints occasioned by respondent's untimely notice of resignation, Ms. Lewis accepted a full-time teaching position in another school district.

Moreover, even assuming respondent was able to demonstrate to the Commissioner that the Board did, in fact, find a suitable teacher to replace her in less than 60 days, she is still deemed guilty of unprofessional conduct by virtue of her failure to have obtained the Board's consent to terminate her employment in a shorter period of time. (N.J.S.A. 18A:26-10, 28-8)

The Commissioner remains unpersuaded by respondent's efforts to create a cause and effect relationship between the weather conditions which prevailed in Florida on or about August 30, through September 3, 1985 and the reasons she was unable to report to her teaching assignment which was prior to the time the Board acted on her resignation on September 4, 1985.

It is undisputed that respondent was aware of the 60-day notice provision in N.J.S.A. 18A:28-8 in June of 1985 when she contemplated terminating her employment relationship with the Board. The record of this matter further reveals that respondent was contacted by the school administration during the months of July and early August 1985 in an effort to determine whether or not she was going to resign her teaching position and remain in Florida where her husband resided. Had respondent complied with N.J.S.A. 18A:28-8 as of June 1985, both the 60-day provisions of N.J.S.A. 18A:28-8 and N.J.S.A. 18A:26-10 would have been satisfied and the Board would have had an opportunity to employ a teacher of its choice to replace respondent. The Commissioner, upon review of the relevant facts in this matter, can only conclude that respondent's decision not to notify the Board until August 23, 1985 that she intended to resign on September 1 was motivated by personal considerations rather than a compelling sense of professional obligation to the Board, the administration or her pupils.

Consequently, the Commissioner cannot accept respondent's representation that the prevailing weather conditions in Florida

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prevented her return to her teaching position on September 3 or 4, 1985. Respondent knew prior to August 20, 1985 when she prepared her untimely resignation that she had not satisfied the provision of N.J.S.A. 18A:28-8. Respondent's failure to return to her teaching duties by virtue of her unlawful resignation thereby triggered the provision of N.J.S.A. 18A:26-10.

The factual circumstances in this matter are also distinguishable from the Commissioner's earlier determination in Burgess supra. In that matter the Board sought the suspension of Burgess' teaching certificate because he gave less than 60-days notice of his intention to resign from the Board's employ. The Commissioner, in affirming the initial decision, determined that the suspension of Burgess' certificate was inappropriate because he left carefully made lesson plans and offered assistance to his successor during a transition period. In the instant matter, respondent cannot claim that her action was predicated upon those conditions prevailing in Burgess.

Finally, it is noted that respondent argues that while the Commissioner may suspend her elementary teaching certificate, he is without authority to suspend her certificate endorsed for teaching the mentally retarded. The Commissioner does not agree. In the Commissioner's judgment, he is authorized to suspend teaching certificates for a period not to exceed one year under the provisions of N.J.S.A. 18A:26-10 and 18A:28-8.

The Commissioner views the intent of the above-cited statutory provisions as a means by which to invoke disciplinary action against teachers who violate the law by suspending their right to be employed under any teaching certification they possess for a period not to exceed one year. Any other interpretation limiting the Commissioner's authority in such matters would nullify the legislative provisions and render such statutes meaningless.

Accordingly, the Commissioner hereby affirms the findings and conclusion in the initial decision as his own for the reasons stated above.

It is hereby directed that respondent's New Jersey Teaching Certificates be suspended for a period of one year from the date of the Commissioner's decision.

IT IS SO ORDERED this 8th day of December 1986.

COMMISSIONER OF EDUCATION

December 8, 1986
Pending State Board

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2003-86
AGENCY DKT. NO. 55-2/86

DR. JENNIFER FIGURELLI,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,
Respondent.

Jeffrey A. Bartges, Esq., for petitioner

William A. Massa, Esq., for respondent

Record Closed: September 18, 1986 Decided: October 28, 1986

BEFORE **STEPHEN G. WEISS**, ALJ:

This is an appeal by Dr. Jennifer Figurelli, formerly director of the Bureau of Pupil Personnel Services for the Board of Education of Jersey City (hereinafter "Bureau"). She alleges that her removal by respondent (hereinafter "Board") from that position, when it was abolished in December 1985, violated her tenure and seniority rights, as well the provisions of a September 1985 settlement agreement. The settlement agreement disposed of prior litigation between the parties and included petitioner's reinstatement as director. Dr. Figurelli also asserts that even if the abolition of the position of director is upheld, she is entitled to be appointed to the substantially similar position of "assistant superintendent in charge of pupil personnel services" which the Board filled with an individual who did not enjoy tenure in the school district.

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Figurelli filed her petition in February 1986 and the Board filed an answer which denied her allegations and set forth various separate defenses. On March 24, 1986, the matter was transmitted by the Commissioner of the Department of Education to the Office of Administrative Law as a contested case pursuant to the provisions of N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. A prehearing conference was conducted by the undersigned on April 25, 1986. The parties agreed that the two issues to be decided were:

(A) Was the abolition of the petitioner's position of director arbitrary, capricious, unreasonable or otherwise the product of bad faith?

(B) If the abolition of petitioner's position was proper, was the failure to appoint her as assistant superintendent in charge of pupil personnel services a violation of her tenure and/or seniority rights?

Hearings took place before the undersigned on August 4 and 5, 1986. Thereafter, in accordance with the agreement of counsel, posthearing briefs were submitted and the record closed on September 18, 1986.

At the outset of the hearing, a variety of documents was introduced in evidence as joint exhibits for the purpose of providing background information. They included the following:

1. A resolution of the Board, dated February 23, 1982, assigning Figurelli to the office of the deputy superintendent of schools "to oversee management and supervision of the Bureau of Pupil Personnel Services effective January 26, 1982. . . ." (Exhibit J-1).

2. A resolution of the Board, dated August 24, 1983, wherein petitioner was transferred from the position of director, at a salary of $38,900, to the position of school psychologist, at a salary of $36,500 (Exhibit J-6).

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3. A copy of a stipulation of dismissal, dated November 15, 1985, in a case entitled Jennifer Figurelli v. Board of Education of the City of Jersey City, (N.J. App. Div., Dec. 18, 1985, A-2034-84T7) (unreported) (Exhibit J-4).

4. A resolution of the Board, dated September 18, 1985, wherein petitioner was:

> [R]einstated to her position as Director of the Bureau of Pupil Personnel Services with the proviso that the time during which she was removed be credited to her as though she actually served in said position and that she be placed on the 8th step of the current salary guide for directors, and . . . that the Board pay Dr. Figurelli the sum of $16,047.00 in full payment for any and all claims including salary loss that the said Jennifer Figurelli may have had in connection with this litigation and that this Resolution be effective immediately (Exhibit J-3).

5. A resolution of the Board, dated December 27, 1985, wherein the Board ratified, confirmed and authorized certain personnel actions which included the transfer of petitioner from the position of director/Bureau of Pupil Personnel Services, which was abolished, to the position of school psychologist at a reduced salary (Exhibit J-2).

6. A letter dated December 31, 1985, from Louis Lanzillo, assistant superintendent/personnel, to petitioner advising that at a meeting of the Board a resolution was adopted whereby petitioner was transferred from the position of director of the Bureau at a salary of $47,219 to the position of psychologist at a salary of $43,424, effective January 6, 1986 (Exhibit J-5; see also, Exhibit J-2, supra).

Pertinent events which took place before and during the time period covered by the above exhibits were addressed at length during the course of the testimony. Suffice it to say that the previous litigation between the parties, which culminated in the stipulation of dismissal (Exhibit J-4), plays a significant role in the consideration of the appropriate disposition to be made in this matter.

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TESTIMONY FOR PETITIONER

Dr. Figurelli testified that she presently is eligible to be certified as a "school administrator" (Exhibit P-1) and is currently employed as a school psychologist. She was first hired full time in September 1970. In early 1982 she was "put in charge" of the Bureau (see, Exhibit J-1). Previously, the Bureau had been under the direction of an assistant superintendent in charge of pupil personnel services—Dr. Charles Williams.* Figurelli headed the Bureau until August 1983, when she was transferred involuntarily to the position of school psychologist (Exhibit J-6). Another individual, Dr. Henry Przystup, was then appointed in her place as "principal assigned to the Bureau of Pupil Personnel Services." Thereafter, Przystup was succeeded by Ms. Norma Chrisomalis, who herself was succeeded in August 1985 by the person now serving as assistant superintendent in charge of pupil personnel services, Mr. Francis Falcicchio.

Figurelli identified two job descriptions relating to the position of director/Bureau of Pupil Personnel Services (Exhibits P-2 and P-4) and identified one job description for assistant superintendent/Bureau of Pupil Personnel Services (Exhibit P-5). The first job description for director, Exhibit P-2, was in effect at the time Figurelli took over in early 1982. She pointed out that although by its terms it requires the director to report to the "Assistant Superintendent of the Bureau of Pupil Personnel Services," there was no person in that position. This job description, which had been adopted in December 1979, was modified in February 1982 as described in a memorandum from the then superintendent of schools, Dr. Michael Ross, to the then Board president, Nicholas Introcaso (Exhibit P-3). In that memorandum, Ross advised Introcaso that the existing job description had to be changed because there was no assistant superintendent, and "the Director now occupies the top position in the department." Accordingly, in March 1982, the Board approved a new job description for the position of "Director of Pupil Personnel Services" which required the Director to report to the Deputy Superintendent of Schools (Exhibit P-4).

Dr. Williams' title was variously "assistant superintendent" and "acting director." He actually held the latter title when petitioner took over in 1982. See, Przystup v. Bd. of Ed. of the City of Jersey City, OAL DKT. EDU 7053-86 (May 8, 1986), affm'd, Comm'r of Ed. (June 23, 1986), p. 16.

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The job description for the position of "Assistant Superintendent Bureau of Pupil Personnel Services" (Exhibit P-5) required the person in that position to report to the superintendent of schools. That job description, dated December 1979, was, according to petitioner, the first one created for that position. However, in August 1981, that position, which had been held by Dr. Charles Williams, was abolished, leaving the director as the person responsible for exercising supervision over the Bureau on a day-to-day basis.

Beginning in early 1982, when she first took over the Bureau, and continuing thereafter until September 1, 1983 when she was transferred to the position of school psychologist, Figurelli was in charge of the various activities and personnel of the Bureau (see, Exhibit P-7). She held monthly staff meetings in order to make sure that the Bureau was operating in an appropriate fashion, and she identified representative minutes of meetings held between October 1982 and June 1983 to buttress this assertion (Exhibit P-8). These meetings were, as she put it, "district-wide" in nature. Moreover, according to petitioner, it was her responsibility to prepare reports concerning the activities of the Bureau and to submit them to Mr. Franklin Williams, then the deputy superintendent of schools. She stressed that her responsibilities in this respect, too, were "district-wide" in nature. In addition, as director, petitioner was involved with the medical arm of the Board, since the medical department was within the Bureau. To that end, she identified memoranda to her from Dr. Ross and from her to a Dr. Skrypski, which further evidenced her supervisory authority in this area (Exhibits P-9, P-10 and P-11). In fact, since certain difficulties were being experienced with regard to Dr. Skrypski and child study team activities, petitioner had to step in and resolve the matter as part of her supervisory role (Exhibits P-11 through P-13).

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The Board terminated Figurelli as Director in August 1983 and transferred her to a school psychologist position. The resolution which implemented that transfer set forth that the Board acted "to improve administrative procedures and to achieve more successful programs" (Exhibit J-6). However, aggrieved over what she believed to be the illegal nature of her transfer, petitioner soon brought suit before the Commissioner to challenge the action. Following a hearing in March 1984, Administrative Law Judge Ken R. Springer issued an initial decision, dated June 6, 1984, in which he described the background circumstances leading to petitioner's transfer as follows:

> Jennifer C. Figurelli holds a doctorate degree and is certified by the State Board of Examiners as a school psychologist. Additionally, she is certified as a principal/supervisor and as a director of student personnel services. Figurelli began working for the Jersey City Board of Education during the summer of 1969 as a consultant. Starting with the 1970-71 school year, Figurelli was hired by the Board as a full-time school psychologist. She continued in that capacity for 11 consecutive years until the end of the 1980-81 school term. Between September 1979 and June 1980, she temporarily assumed the role of chief school psychologist during the absence of the person who normally occupied that position. In September 1980, Figurelli resumed her regular duties. The Board acknowledges that Figurelli has attained tenure in the position of school psychologist.
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> At the commencement of the 1981-82 school year, Figurelli received permission from the Board to take a one-year sabbatical leave. Due to the sudden departure of the individual who had been serving as the director of pupil personnel services, in January 1982 the Board asked Figurelli to cut short her sabbatical leave and return to fill the vacant position. Franklin Williams, deputy superintendent of schools who made the offer to Figurelli, testified that she was selected because of her proven "skills and accomplishments" and her prior experience in the field of special education.
>
> Originally, Figurelli's appointment was only as interim head of the Bureau of Pupil Personnel Services until a permanent director could be chosen. By resolution adopted on February 23, 1982, the Board assigned her "to oversee management and supervision of the Bureau of Pupil Personnel Services effective January 26, 1982 at an annual salary of $34,700." A search of its own records by the Board failed to

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disclose any resolution conferring upon Figurelli the official title of "acting director" of pupil personnel services. Nonetheless, the parties agree that Figurelli actually functioned in that capacity for the remaining five months of the 1981-82 school year.

Meanwhile, the Board initiated the procedures established by contract for the filling of vacant supervisory positions. Under Article 16 of the agreement in effect between the Board and the Jersey City Education Association, promotions were to be made "in order of numerical ranking from appropriate eligibility lists" determined through a competitive examination. Figurelli took the written examination on May 22,1982 and the oral interview on June 23, 1982. By letter dated August 19, 1982, she was notified that she had achieved the highest score on the competitive examination. Five other candidates also successfully completed the competitive examination, but received scores lower than her score. On August 25, 1982, the Board passed a resolution reassigning Figurelli to the new title of "director of the Bureau of Pupil Personnel Services" effective as of September 1, 1982. This resolution also purported to increase Figurelli's salary from $31,328 to $34,700. Later, on September 22, 1982, the Board adopted a second resolution clarifying that Figurelli's salary was already $34,700 and her salary in the new title of "director" remained unchanged.

As director of pupil personnel services, Figurelli was in charge of a staff of 620 employees and a budget in excess of $12 million. Her responsibilities, as set forth in a job description approved by the Board on March 23, 1982, included: coordinating the daily activities of the Bureau's staff; aiding in identifying and satisfying unmet pupil needs; assisting in the preparation of budgetary requests; helping to develop policy recommendations in her area of expertise; and assisting in the preparation of federal and state reports. Chain of command called for the director of pupil personnel services to report to the deputy superintendent of schools. Further, the job description specified that evaluation of job performance would be done by the deputy superintendent "in accordance with the provisions of the Board's policy on evaluation of professional personnel." This written policy provided that nontenured supervisory personnel must be evaluated at least three times annually.

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Evaluations of Figurelli's job performance as director of pupil personnel services were highly favorable. Deputy superintendent Franklin Williams indicated that he had the opportunity to observe Figurelli's performance on numerous occasions and that in his words, "the only change I saw was growth." Three written evaluation reports prepared by Williams were entered into evidence. Each noted the substantial progress Figurelli was making and gave her a rating of "excellent." An annual performance report signed by Williams on June 23, 1983 also praised Figurelli's abilities and recommended her for reemployment and salary increment during the coming year. Nobody consulted with Williams prior to Figurelli's transfer.

Despite such positive comments from her immediate supervisor, on August 24, 1983 the Board resolved to transfer Figurelli back to her former position as school psychologist and to reduce her salary from $38,900 to $36,500. Both sides stipulate that Figurelli had not attained tenure in the position of director of pupil personnel services at the time of her transfer by the Board. Contemporaneously, the Board also voted to appoint one Henry Przystup to a position described as "principal assigned to Bureau of Pupil Personnel Services." Until then, Przystup had been employed by the Board as an elementary school principal. Regardless of the Board's choice of words, Przystup preferred to use the title "chief administrator" of the Bureau of Pupil Personnel Services to describe his new position. All of the evidence, including the testimony of Przystup himself, suggests that his duties in the position were indistinguishable from those performed by Figurelli in her capacity as director of pupil personnel services. No job description exists for the position currently held by Przystup. Unlike the position of director which has a contract year of 11 months, the position of principal has a contract year of only 10 months. Nonetheless, Przystup intends to work an extra month during the summer of 1984 and apply to the Board for additional compensation beyond his regular salary. See, Figurelli v. Bd. of Ed. of the City of Jersey City, OAL DKT. EDU 9411-83, (June 6, 1984), pp. 2 through 5 [footnote citations have been omitted].

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Following his recitation and review of the background circumstances, Judge Springer found that Figurelli's transfer in August 1983 constituted an act of discrimination against her in her employment on the basis of her sex. As he put it:

> What happened was that the Board removed a fully qualified female from a supervisory position [Figurelli] and replaced her with an unqualified male [Przystup]. . . . Significantly, the outcome of the Board's action was to remove the only female upper-level supervisor of a work force which is predominantly female. These factors amply support the determination that Figurelli's transfer was based on irrelevant considerations of gender rather than appropriate criteria related to suitability for the job and quality of performance. Figurelli, at 9.

Judge Springer expressly rejected the Board's claim that its action in Figurelli's case was based upon her alleged poor performance and found, in addition, that the procedure followed by the Board violated the Open Public Meetings Act. His conclusion, based upon what he had observed during the course of the hearing and upon his review of applicable law, was synopsized as follows:

> Without belaboring the point, this case involves a qualified female with excellent job evaluations who was paid less than her male counterpart for equivalent work. She was summarily removed from her supervisory position by the Board, which replaced her with a male lacking the required qualifications for the job. As a result, there are no longer any female directors in a school system where the vast majority of the instructional staff is female. In accomplishing its objective, the Board breached its own contractual provisions for promotions and violated the notice requirements of the Open Public Meetings Act. It is difficult to imagine a more clear-cut example of sex discrimination contrary to the State policy embodied in N.J.S.A. 18A:6-6. Figurelli, at 15.

Judge Springer ordered the Board forthwith to reinstate Figurelli to her position as director and to pay her any difference in salary between the amount she would have received in that position and the amount she actually earned from August 24, 1983 to the date of her reinstatement. The initial decision thereafter was adopted by the Commissioner of Education. Decision on Figurelli v. Bd. of Ed. of Jersey City, Commissioner of the Department of Education (July 23, 1984).

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Following the decision of the Commissioner, the Board appealed to the State Board of Education, which also affirmed the decision below. The Board then appealed to the Superior Court, Appellate Division. The litigation formally ended in December with the filing of the stipulation of dismissal that memorialized a settlement agreement previously entered into by the parties (Exhibit J-3). Specifically, on September 18, 1985, the Board adopted the resolution that reinstated petitioner to her position as director, together with the payment of back salary and damages (Exhibit J-3).

However, less than one month prior to the Board's reinstatement of Figurelli as director, it hired Falcicchio as assistant superintendent of the Bureau of Pupil Personnel Services. Thus, as petitioner put it, when she returned to work in September 1985, she looked at the job descriptions relating to the two positions in order to determine what she was now expected to do. Since there seemed to be a "significant overlap," she left it up to Falcicchio to take the initiative in discussing with her their respective duties. After about two weeks of waiting for Falcicchio to communicate with her, Figurelli approached his secretary in order to schedule a conference to discuss their responsibilities. According to petitioner, no "face-to-face" discussion on this particular subject ever took place.

During the period between her reinstatement as director in September 1985 and the abolition of that position and her transfer to school psychologist at the end of December 1985, petitioner spent much of her time attempting to help an individual whom the Board had been put in charge of pupil suspensions. According to petitioner, this person knew nothing about the suspension policy of the Board, the rights of pupils, etc. Also, in October 1985 the budget for the Bureau was, as petitioner put it, "thrown on my desk" without any prior communication from Falcicchio about it. This also took up much of her time since it was due at the end of October.

At no time, according to Figurelli, was she ever advised that the duties and responsibilities set forth in the existing job description for director had changed or that she would be required to undertake any different activities. In other words, she understood that she was still to report directly to the deputy superintendent and not to an

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assistant superintendent. She concluded her testimony with the observation that as far as she could determine, none of the activities carried out by Falcicchio differed from her duties as director in any meaningful way.

Petitioner's next witness was Franklin Williams, who presently serves as superintendent of schools. He has been employed in the district for over 30 years as a teacher, assistant principal, assistant superintendent and deputy superintendent of schools. He recalled that Dr. Charles Williams served both as assistant superintendent in charge of the Bureau of Pupil Personnel Services and as acting director of the Bureau. In that latter capacity, he reported directly to Mr. Williams, who was then the deputy superintendent of schools. As far as Mr. Williams could recall, he does not believe that the Board ever sought the approval of the county superintendent for the job descriptions for assistant superintendent or director.

With regard to the situation in the district vis a vis administration of pupil personnel services activities, Mr. Williams said he interviewed Falcicchio in August 1985, concerning the anticipated reinstatement of the position of assistant superintendent. The interview with Falcicchio, however, was the only "formal" one he held with any candidate--all the others were informal. Falcicchio, he said, met his requirements for the job--he came from outside the district and seemed to be "highly compatible" with Williams' own personality. It did not occur to Williams that the position of director overlapped with that of the assistant superintendent since the person holding the latter position, not the Director, was to be in charge of the administration of pupil personnel services.

In the fall of 1985, even before the Board had a chance to accommodate the reinstatement of Figurelli into its overall scheme, it was presented with the need for a huge budget cut, and that problem had to be addressed as a matter of utmost priority. Discussions took place regarding the problem and recommendations were received by Williams from the several assistant superintendents respecting deletion of subordinate supervisory positions. Falcicchio recommended that the position of director, among others, be abolished.

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Williams also addressed the relevant job descriptions in existence in September 1985 following petitioner's reinstatement (Exhibits P-4 and P-5). According to the superintendent, the difference between the two positions, aside from the person to whom they reported, could be found in the language of item 17 on page two of the assistant superintendent's job description: "Performs such other job related tasks as assigned by the Superintendent." Although the assistant superintendent's job description also refers to a relationship to the deputy superintendent, the deputy superintendent is not the supervisor and the assistant superintendent reports directly to the superintendent. Williams conceded that at no time prior to Figurelli's reinstatement in September 1985 did the two positions of director of the Bureau of Pupil Personnel Services and the assistant superintendent of the Bureau of Pupil Personnel Services ever have different persons serving in each title at the same time. Although the two job descriptions did exist simultaneously, at least since 1979, there simply never was a time prior to petitioner's reinstatement when each was filled by a different person since "[i]t would have been duplication."

The last witness called by petitioner was Falcicchio. He previously was employed as a teacher, guidance counselor and principal in other school districts and is certified in a variety of professional areas including supervisor, principal and school administrator. Falchicchio, who lives in Jersey City, said he first learned about an opening for the assistant superintendent's job as a result of reading about it in the local newspaper in June 1985. He applied for the position, was interviewed by a previous superintendent (James Jencarelli) in July and by the present superintendent, Franklin Williams, in August, and was appointed on August 26, 1985. Following his appointment, Falcicchio met with various staff members to familiarize himself more directly with the activities of the Bureau. He was already aware generally of the job responsibilities and the jurisdiction he would exercise over child study team personnel, guidance personnel, special education teachers, the Regional Day School, etc. Jennifer Figurelli was never mentioned to him. However, in early September 1985, he learned about the litigation involving Figurelli and was told that the Board was in the process of attempting to work out a settlement with her. When she was reinstated as director, the specific parameters of her duties were then left up to Falcicchio to determine. He said he met with her

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several times during September 1985 about her areas of responsibility and told her that she would be in charge of working on the budget and supervising the school psychologists.

Falcicchio confirmed that he recommended abolition of the director's position when it was learned in the fall of 1985 that at its then current level of expenditures the Board faced a potential $4,000,000 budget deficit that had to be cured before the end of the 1985-86 school year. Thus, many supervisory and child study team jobs had to be eliminated. With respect to the position of director, in particular, he felt that its elimination would not have a substantial adverse impact on the activities of the Bureau. Indeed, having taken a look at the Bureau during September and October 1985, he found overlap in the area of supervision of disciplines, as well as in the child study teams. Falcicchio said that most of the time during September through December 1985 was spent by him in reviewing the needs of the pupil personnel service area in order to determine where economies could be effected. The result was, as noted, a decision to eliminate certain child study team personnel, guidance counselors and the director's position held by Figurelli. Although he devoted a good deal of time to this critical area, Falcicchio said he also carried out his regular duties. He insisted that he had frequent meetings with petitioner and, despite her protestations to the contrary, there was communication between them. He particularly recalled their discussing the Regional Day School, especially since they agreed philosophically about the function and role it played.

TESTIMONY FOR RESPONDENT

Although the testimony of Williams and Falcicchio was offered on behalf of petitioner, much of it, of course, was intended by them to support the action of the Board in this matter. The only witness formally called by the Board was Mr. Louis Lanzillo, presently assistant superintendent in charge of personnel. With respect to the $4,000,000 budget deficit which the Board faced in the fall of 1985, he noted that the Board immediately froze various line item accounts and began promptly to arrange for reductions in force. Approximately 100 people were impacted by transfers and reductions, 35 to 40 of whom actually lost their jobs.

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Lanzillo also testified about the contractual requirements for promotional examinations, a matter which surfaced throughout the course of the testimony of other witnesses. He stressed that unlike the position of director, there is no contractual requirement for an assistant superintendent to take a competitive examination to qualify for the position (see, Exhibit R-1, Article VII(B)).

REBUTTAL TESTIMONY FOR PETITONER

Petitioner was recalled in rebuttal for the limited purpose of denying Falcicchio's assertion that he met "often" with her during the period between her reinstatement in September 1985 and the abolition of her position at the end of that year. As far as she could recall, they did not meet more often than once a week, and their discussions centered upon the goals and objectives of the pupil personnel services area generally. In addition, she insisted that at no time did she ever see any advertisement or newspaper reference to, or posting of a notice respecting, the position of assistant superintendent of Pupil Personnel Services and the solicitation of candidate applications for that position.

DISCUSSION AND FINDINGS OF FACT

A threshold issue in this case is whether petitioner obtained tenure in the position of director. She argues that this question must be answered in the affirmative since she was unlawfully deprived of the right to continue in that position during 1983, as ultimately found by the Commissioner and State Board of Education. She argues that the circumstances surrounding her reinstatement in 1985, including the wording of the settlement of the Board's appeal, clearly reveal that the time which had elapsed between August 1983 and her reinstatement was to be credited toward her obtaining tenure. To hold otherwise, she argues, would fly in the face of the background circumstances, including the Commissioner's decision, her understanding of the proposed settlement of the lawsuit, the clear language of the settlement, and, in general, all notions of fundamental fairness.

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The Board, on the other hand, maintains that no tenure can attach unless the precise conditions laid down in the statute are met, and that in petitioner's case it is plain that she simply did not actually serve the requisite period required.

A case cited by petitioner in support of her claim is Amato v. Bd. of Ed. of the Hudson County Area Vocational and Technical Schools, OAL DKT. EDU 10125-83 (Sept. 20, 1984), reversed, Comm'r of Ed (Nov. 8, 1984). In that case, the petitioner claimed tenure in the position of "job placement coordinator" from which he had been terminated on the basis that he lacked certification. In his decision, the Commissioner determined that since Amato was eligible for an emergency certificate as of the date of his initial employment, his entire service had to be considered to be continuous for purposes of construing the applicable provisions of the tenure statute and therefore had to be counted toward the time for tenure accrual. In reaching that result, the Commissioner pointed out that the Board, not Amato, failed to take certain steps to see to it that his certification was obtained, and that, "as a matter of fundamental fairness," the Board's failure to act should not be allowed to deprive petitioner of tenure protection. Amato, at 16-17. Thus, although Amato did not actually hold a certificate during the entire period of his employment as job placement coordinator, the Commissioner determined that it was through no fault of his own and he therefore should be treated as having been so certified.

Although the specific facts in the instant matter are distinguishable from those in Amato, I believe that the thrust of that decision is applicable in this case. As set forth in detail in Judge Springer's initial decision in petitioner's earlier case, the Board's action in terminating her as director in August 1983 was predicated upon spurious grounds and she should not have suffered that fate. The Board then continued to employ various persons to perform the same functions that Figurelli carried out as director, even though different titles were used. Had the Board not acted improperly in August 1983, Figurelli would have served, as far as the record in this case reveals, continuously for a period of time sufficient to entitle her to claim tenure. Here, as in the Amato case, "funadamental fairness" dictates no less a result. The Board claims, however, that since a final decision in petitioner's case was pending appeal and a stipulation of dismissal resolved the case, no

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reliance can be placed on the opinions, as such, of the Commissioner or the State Board. Rather, scrutiny must be made of the precise terms of the settlement where, according to the Board, Figurelli's reinstatement specifically excluded any claim that she could "tack on" to any tenure claim the period between her involuntary transfer and her reinstatement.

The testimony at the hearing was somewhat sparse with regard to this aspect of the case. It seems to me, however, that either expressly or by clear implication petitioner certainly was of the opinion that the terms of the settlement, insofar as they anticipated her reinstatement to the position of director, included the fact that she would be treated as if she had actually been functioning continuously in that position. Although the language of the actual agreement itself, which is contained in the Board resolution, arguably is susceptible to varying interpretations, it makes specific reference to the fact that Figurelli would be reinstated to her position and that "the time during which she was removed be credited to her as though she actually served in said position."

On balance, I am convinced that the parties intended petitioner's reinstatement to be accompanied by an agreement on the Board's part that petitioner be treated as if she had never been transferred involuntarily. To resolve the ambiguity contrary to that conclusion would, in my judgment, fly in the face of the reasonable expectations the parties had in the matter. While petitioner or someone on her behalf could have insisted upon a more direct expression of this notion than the language actually used, by the same token the absence of exclusionary language on the Board's part is equally to be criticized. In short, while no Appellate Division decision was ever rendered, the language of Judge Springer's initial decision and the Commissioner's and State Board's affirmances, together with consideration of the underlying circumstances described in those decisions, cannot be ignored. Thus, I **FIND** that petitioner must be treated as having continuously been employed as director since early 1982 through the end of December 1985 and this continuous service is more than enough to qualify her to claim tenure.

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The next issue, then, is whether the Board's abolition of the director's position in December 1985 was proper and, even assuming that it was, whether petitioner has a claim to the position of assistant superintendent which is superior to Falcicchio's because of her tenure and seniority in the school district. This latter issue relates to the question of whether the two positions are substantially identical.

The Board's decision to abolish the position of director came practically on the heels of its settlement with Figurelli wherein, following almost two years of litigation, it agreed to reinstate her and to make her whole with respect to lost salary. The settlement agreement, although formally executed in November or December 1985, actually had been unofficially implemented earlier. At or about the very time this took place, the Board was also in the process of looking for ways to reduce expenditures in order to overcome an anticipated 1985-86 budget shortfall of about $4,000,000. Falcicchio, in particular, had been requested to look closely at the needs of the pupil personnel services area, and he devoted much of his time to that task. Thus, in late November 1985, he recommended to Superintendent Williams that Figurelli's position of director, among others, be abolished. This was carried out by the Board in late December.

On the one hand, then, the Board's agreement to reinstate Figurelli as director was a "Pyrrhic victory," and arguably there was a lack of good faith on the Board's part which should not be tolerated. On the other hand, the evidence demonstrated that the Board faced a substantial potential budget deficit that had to be met through a variety of means, including reduction in personnel. On balance, I am convinced from the evidence that the elimination of the position as an economy measure is supported by the record. Clearly, the Board did not need both a director and an assistant superintendent in the pupil personnel services area. However, this still leaves for consideration the question of whether it was proper for the Board to have transferred Figurelli back to the position of school psychologist or, on the other hand, whether following abolition of her position she should have been given the job held by Falcicchio if his duties and responsibilities were substantially identical to those she performed as director.

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During the hearing, there was, of course, testimony with respect to the similarities and/or differences between the position of director and that of assistant superintendent. According to petitioner, there was, as far as she could see, no real difference between the two jobs, except that the assistant superintendent had responsibility for the Regional Day School, which was created after she was removed as director in August 1983. Neither Williams nor Falcicchio were particularly specific with respect to where any real differences existed. Thus, it seems to me that the decision of the Commissioner in Przystup has particular relevance to the instant issue. In that decision, the Commissioner affirmed an initial decision by Administrative Law Judge Young that Przystup, who succeeded Figurelli, had no claim to tenure in the position known as "Chief Administrator of Bureau of Pupil Personnel Services" since it was an unrecognized title and was essentially the same position variously known as "Assistant Superintendent, Bureau of Pupil Personnel Services," "Acting Director" and "Director." Although in his affirmance in Przystup the Commissioner specifically determined that he would not address the question of whether the duties of director were the same as those of the assistant superintendent, he nevertheless went on to make the following pertinent observation:

> Upon examination of the instant matter and other cases pertinent to it involving Jersey City, the Commissioner cannot but express his grave concern and displeasure over the long history of litigation arising out of the disputed position herein, a position apparently known by a variety of titles. The ALJ determined in the present matter that the testimony of the witnesses was credible that the title "chief administrator" was created because of litigation concerning the tenure status of former assistant superintendents Charles Williams and Margaret DiNardo. . . . The position was also known as director (. . . Figurelli, supra) and acting director (Charles Williams v. Board of Education of Jersey City, decided by the Commissioner August 30, 1984, filed October 19, 1981).
>
> Thus, it would appear that since July 1981 the position has been filled by at least five different people under four titles . . . .

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> Meanwhile in July 1984, Figurelli was ordered by the Commissioner to be reinstated to the position as director. Her reinstatement apparently did not occur until the beginning of the 1985-86 school year with the position being abolished a matter of weeks after her reinstatement. . . . A petition of appeal was filed with the Commissioner with respect to this and is currently before the Office of Administrative Law, ... wherein Figurelli alleges violation of her tenure and seniority rights in the appointment of Falciccio and that the duties he performs are identical to those of the director position she previously filled and to which she was ordered to be reinstated by the Commissioner. Przystup, at 16-17, emphasis added.

Accordingly, even though the Commissioner avoided addressing the very issue involved in this case, since he was aware of the pendency of the instant matter, it seems to me that his language in Przystup and his particular analysis of the history of events in the Bureau surrounding the disputed position, leads to the conclusion that there are no meaningful differences between the positions of director and assistant superintendent.

Petitioner testified, and I agree, that she performed essentially all of those duties listed in the assistant superintendent's job description. The minor differences between them do not make these two positions different for purposes of this case. From the testimony it was clear that despite the simultaneous existence of two job descriptions, prior to petitioner's reinstatement only one person was in charge of the pupil personnel services area on a day-to-day, district-wide basis. There is, then, at the core of this controversy an irresistible set of facts which dictates no other conclusion except that the position of the director, both as set forth in the job description and in actual practice, is so substantially similar to that of the assistant superintendent that no lawful distinction can or should be drawn between the two jobs. Williams admitted that there was duplication and could only point to an amorphous "catch-all" provision at the end of the assistant superintendent's job description when asked to point directly to where any differences might be. I do not find this difference in language to be at all meaningful in the context of this litigation, particularly in light of the Przystup case previously discussed.

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I find then that petitioner was tenured as the director upon being reinstated in September 1985 and that the Board's action in keeping Falcicchio as assistant superintendent to perform essentially the same functions as petitioner was to perform as director must be set aside. In reaching this conclusion, I note that the process by which the Board "advertised" for candidates for the position of assistant superintendent was suspect. Although both Williams and Falcicchio made reference to newspaper articles and a classified advertisement, none were produced. In addition, Figurelli denied ever having seen them. So, too, although Williams alluded to the fact that Figurelli was aware that the position of assistant superintendent was to be filled, she denied having any knowledge of it. Finally, Falcicchio, as it turns out, was the only person who was ever formally interviewed for the job.

I recognize that under Article VII B (Exhibit R-1) the position of director requires a competitive examination for appointment while the position of assistant superintendent does not. This does not stand in the way of petitioner's prevailing in this matter given the particular background circumstances in this case. Simply put, Figurelli was again deprived by the Board of the tenure and seniority rights to which she is entitled.

In view of the foregoing discussion, I herewith make the following **FINDINGS OF FACT:**

1. Jennifer Figurelli holds a doctorate degree and was hired as a full-time school psychologist for the Board in September 1970. She served as school psychologist until June 1981. She began a sabbatical leave in September 1981 but was recalled in January 1982.

2. After being recalled from sabbatical, Dr. Figurelli served as acting director of the Bureau of Pupil Personnel Services from January 26, 1982 through the end of the 1982 academic year.

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3. On August 25, 1982, Dr. Figurelli was appointed director of the Bureau of Pupil Personnel Services and held that position until August 30, 1983, when she was demoted to the position of school psychologist.

4. Dr. Figurelli challenged this demotion as sex discrimination in employment in a petition to the Commissioner of Education. She was ordered reinstated by the Commissioner in a decision dated July 23, 1984, later affirmed by the State Board of Education.

5. The Board appealed the decision to the Superior Court, Appellate Division. However, a settlement of the dispute was reached and the Board passed a resolution reinstating Dr. Figurelli to the position of director of the Bureau of Pupil Personnel Services, effective September 18, 1985, with the proviso that ". . . the time during which she was removed be credited to her as though she actually served in said position and that she be placed on the 8th step of the current salary guide for directors. . . ."

6. On December 31, 1985, Dr. Figurelli was notified that due to budget constraints her position of director had been abolished and that she had been transferred to the position of school psychologist at a reduced salary.

7. In late August 1985, the Board had hired Francis Falcicchio to a position entitled "Assistant Superintendent of Pupil Personnel Services." Falcicchio, a lifelong resident of Jersey City, had not served previously in the school district and had no tenure or seniority rights there. Falcicchio had not taken any competitive examination prior to his appointment and the title had not been reviewed or approved pursuant to N.J.A.C. 6:11-3.6.

8. The duties performed by Falcicchio as assistant superintendent were substantially similar to the duties performed by Figurelli as director of the Bureau. At no time prior to Figurelli's reinstatement as director did two

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persons ever serve simultaneously in the two positions even though both existed simultaneously.

9. Dr. Figurelli possesses the requisite experience, certification and degrees for appointment to the position of assistant superintendent of the Bureau of Pupil Personnel Services.

CONCLUSIONS OF LAW

In view of the foregoing discussion and Findings of Fact, I herewith reach the following **CONCLUSIONS OF LAW:**

1. Petitioner's reinstatement in or about September 1985 to the position of director of the Bureau of Pupil Personnel Services was with tenure.

2. The duties of the positions of director of the Bureau of Pupil Personnel Services and assistant superintendent of the Bureau Pupil Personnel Services were substantially similiar in nature as evidenced by the job descriptions together with the testimony provided at the hearing. Moreover, strong evidence of the similarity is found in the fact that although the two positions existed simultaneously, at no time prior to September 1985 did separate individuals hold them at the same time.

3. The Board's decision to implement economies during the fall of 1985 was appropriate in view of a threatened budget deficit, and the Board was thereby entitled to abolish positions in the pupil personnel services area. However, its determination to abolish the position of director, to transfer petitioner to the position of school psychologist, and to retain Falcicchio as assistant superintendent, was a violation of petitioner's rights in view of her tenure and seniority in the district. Her right to claim the remaining position was superior to that of Falcicchio, who enjoyed no tenure.

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Accordingly, it is **ORDERED** that the respondent immediately appoint petitioner to the senior administrative position in the pupil personnel services area and pay her the difference in salary between the salary actually earned and such salary as she would have received in that position from the date of her transfer to the position of school psychologist to the date of her reinstatement.

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

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

October 28, 1986
DATE

STEPHEN G. WEISS, ALJ

OCT 30 1986
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

OCT 31 1986
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

md

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DR. JENNIFER FIGURELLI, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

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

RESPONDENT. :

:

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions and reply exceptions were filed by the parties within the time prescribed by N.J.A.C. 1:1-16.4a, b and c.

The Board excepts to the ALJ's determination that petitioner acquired tenure upon her return to employment after the settlement of her litigation with the Board in September 1985. It argues that one cannot achieve tenure within the intendment of N.J.S.A. 18A:28-5 and 6 without meeting the precise statutory requirements. Further, the Board urges that Amato, supra, is markedly and substantially different from the issue presented in the instant matter which renders it inapposite. In support of its position, the Board points to Helen Boor v. Bd. of Ed. of Newark, 1979 S.L.D. 517 as standing for the proposition that the execution of a contract between a board and teaching staff member is not sufficient to acquire tenure; rather, one must actually serve in the position the requisite period of time.

Petitioner rebuts the Board's position arguing that Boor, supra, is inapplicable because it dealt with a teacher who refused to report to her teaching assignment in her fourth year of employment, while she herself has never refused to report to her assigned post nor has she claimed credit for time during which she has not served/been employed in the district. Further, petitioner stresses that both the Commissioner and State Board ordered her reinstatement, orders which the Board flatly chose to ignore having never filed for a stay. Of this she states, inter alia:

> In a situation offending the principles of fundamental fairness even more than the situation in Amato, supra, Dr. Figurelli was not assigned to her proper post in spite of prevailing at all levels of judicial review. The principles of equity set forth in Martindell v. Fiduciary Counsel, 133 N.J. Eq. 408, 414 (E. & A. 1942) state, "Equity regards that as done which ought to be done." As early as 1916, it was held that where an obligation rests on a party to perform a certain act, a court . . . will treat the party in whose favor the act should have been performed

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> as having the same interest and right as if the act had actually been performed. Goodell v. Munroe, 87 N.J. Eq. 328, 335 (E. & A. 1916). (See also: 2 Pomeroy sec. 420-422). Thus, when the Board of Education passed a resolution reinstating the petitioner to her position, it was merely fulfilling an obligation incurred upon the date of the Commissioner of Education's Order of July 23, 1984.
>
> To allow the Board to use its own inaction, in flat disregard of the orders of the Commissioner and the State Board of Education, to deprive the petitioner of the tenure she earned would be to diminish the authority of the Commissioner to a simple suggestion rather than an Order of an administrative agency. It would further endorse the breach of agreements made to settle and end litigation on an issue.... (emphasis in text)
>
> (Reply Exceptions, at p. 2)

Upon review of the record, including the parties' exceptions, the Commissioner concurs with and adopts as his own the ALJ's conclusion that petitioner acquired tenure in the Director position. On July 23, 1984, the Commissioner specifically ordered petitioner reinstated to the Pupil Personnel Director position, having found, inter alia, that petitioner had been subject to an illegal transfer. The Board chose to ignore this order, having neither sought nor obtained a stay during the pendency of its appeal to the State Board. On December 5, 1984, the State Board likewise ordered petitioner's reinstatement which the Board also chose to ignore, having never obtained a stay during the pendency of its appeal to Appellate Court. As a result, petitioner was prevented from serving in the position to which she was entitled by law until September 1985. Moreover, she remained at all time in the employ of the Board. As such, it is concluded that the Board's improper and unlawful actions preventing petitioner from performing her director duties may not work to her detriment in acquiring the legislative status of tenure. Rockenstein v. Bd. of Ed. of Jamesburg, 1974 S.L.D. 260, 1975 S.L.D. 191, aff'd State Board 1975 S.L.D. 195, aff'd Superior Court (App. Div.) 1975 S.L.D. 1167; Mary C. Schoeler v. Bd. of Ed. of Clayton, decided May 14, 1984

The Commissioner likewise concurs with and adopts the ALJ's conclusion that the duties of the two controverted positions, Director of the Bureau of Pupil Personnel Services and Assistant Superintendent of the Bureau of Pupil Personnel Services, are substantially similar, essentially for the reasons stated in the initial decision and upon review of the transcripts and evidence. In the Commissioner's judgment, the record amply supports the ALJ's statement that the two positions are so substantially similar that no lawful distinction can or should be drawn between the two jobs.

Exhibit P-3, a memo from the Superintendent to the Board President, clearly indicates that "without an Assistant

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Superintendent, however, the Director now occupies the top position in the department." Exhibit J-1, the Board resolution of February 23, 1982, appointed petitioner "to oversee management and supervision of the Bureau of Pupil Personnel Services effective January 26, 1982***." Differences between the positions appear to be in terms of reporting and status as opposed to substantive differences in duties as exemplified below through the testimony of Franklin Williams, former Deputy Superintendent who was appointed Superintendent in August 1985.

1. With respect to the abolishment of the Assistant Superintendent position, Charles Williams' subsequent demotion to Acting Director, and petitioner's assumption of his duties, the Superintendent testified:

> ***When I made the appointment of Acting Director [Petitioner], I was Deputy Superintendent at that time *** I let the Board know I had to have some help because I didn't have any help in that particular area. At that time I was handling the positions of five Assistant Superintendents, because they had abolished all of the Assistant Superintendents, so I ran everything on a 31,000 student District and I took the duties of, I said, five Assistant Superintendents and with the Special Education Department [Pupil Personnel Services], I had nobody in place after Dr. Williams left the district.
>
> They demoted him to Acting Director and they decreased his salary, so he said, I'm getting out of Jersey City and that left me without anybody who could be there on the spot to handle the day-by-day things so I had to make a quick move and I pulled in the Board President who was Mr. Introcaso at the time and said, hey, something has to be done. He said, go ahead and I'll support you and that's when I appointed an Acting Director [Petitioner]. (Tr. I-153-154)

It is to be remembered that this Director position was characterized by the then Superintendent as "the top position in the department." (P-3)

2. When questioned about the difference in the title "Assistant Superintendent" and "Chief Administrator" of the Pupil Personnel Services Bureau, the title assumed by Henry Przystup, petitioner's successor, when she was impermissibly transferred, the superintendent testified:

> Q. Would it [demotion through transfer from Assistant Superintendent to Chief Administrator of the department] take away from their duties?

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A. Not necessarily. It wouldn't necessarily take away from their duties, because they could be called Chief Administrator of the Department. (emphasis supplied) (Tr. I-155)

3. When questioned about the title "Chief Administrator," the Superintendent testified:

Q. Mr. Williams, you've been in the courtroom and you've heard us refer to the Henry Przystup case. Do you recall testimony in that case that the title of Chief Administrator was created because of litigation concerning the tenure status of the former Assistant Superintendent?

A. I don't recall that, but I assume that that's one of the reasons that they did establish that title. It was established, of course, before I assumed the Superintendency.

Q. Correct. You were still, I believe, Deputy Superintendent. Would it be reasons like that that would cause the Board of Education to create different titles at different times?

A. Yes.

Q. For reasons that a title was in litigation?

A. Yes. That would be one of the reasons that they would establish such a title, because what they don't do is change the person's actual title. Przystup was actually only a Principal. They never changed his title as Principal. His real title was Principal assigned to -- you see, but he was called the Chief Administrator because he was the top Administrator in that Department, meaning that he would have the full responsibility of that Department. (emphasis supplied) (Tr. I-159-160)

4. When questioned by the ALJ about the differences in the duties of Director and Assistant Superintendent, the Superintendent provided no substantive differences, only a "catch-all" item as follows:

THE COURT: Now, my question, again, is, in what respects did the duties and responsibilities of the position differ?

Now, you did start to tell me one. There was a reporting difference.

THE WITNESS: Your Honor, in every Job Description in the Jersey City Board of Education

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we put a caveat at the end and *** [w]hat that says is that leaves it open for the supervisor to make assignments other than what the duties that the person is holding. It's open on every resolution. Appointing someone we say that, you know, it's the assignments are up to the Assistant Superintendent or the Supervisor and this is what you'll find in every one of our job specifications.

THE COURT: And that's the difference between these two jobs?

THE WITNESS: Right. [Tr. I-172-173]

6. When questioned by the ALJ as to whether two persons simultaneously filled the disputed positions, the Superintendent testified:

THE COURT: ***[B]etween 1978 and September, 1985, at no time did you ever have two persons functioning simultaneously, one as the Assistant Superintendent and one as the Director or Acting Director in this?

THE WITNESS: No, your Honor.

THE COURT: In the Pupil Personnel Services area?

THE WITNESS: It would have been duplication, no. (emphasis supplied). (Tr. I-180-181)

Thus, it appears clear that irrespective of the changes in titles and various persons filling "the top position" for Pupil Personnel Services, and despite the "demotion" of the position from Assistant Superintendent to Director/Chief Administrator, the duties were substantively the same. While the Deputy Superintendent may have been the titular head of Pupil Personnel Services when the Assistant Superintendent position was abolished in 1981, the management and supervision of the Pupil Personnel Services Department rested only with one "top person," the title of which was known by a variety of names.

Accordingly, the Commissioner adopts the initial decision of the Office of Administrative Law. Petitioner is to be reinstated forthwith to the senior administrative position for Pupil Personnel Services whose duties were transferred to the Assistant Superintendent position occupied by Mr. Falcicchio. Further, she is to be provided all back pay and emoluments due her.

Notwithstanding the above, the Commissioner must express his consternation regarding the Superintendent's testimony describing the manner in which he filled the Assistant Superintendent position disputed herein. Particular note is made of the following portion of that testimony which appears to describe a

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procedure devoid of even minimal attention to posting/advertising an opening to assure equal employment opportunity. When questioned if there were anything in writing as to an opening for the Assistant Superintendent position, the Superintendent responded:

> It was in the paper in the spring of .'85 that this was being one of the considerations of the District. Newspaper clippings would have pointed to that and then also, once it was known that the Board was willing to reinstate the Assistant Superintendents, it became known that that would have been one of the positions that was going to be reinstated.
>
> Q. Now, you've made reference to newspaper clippings. Despite the fact that that may be an untraditional way of posting job vacancies, is it in your estimation, fair to rely upon newspaper clippings for a basic understanding of what's going on within and without of the Board of Education?
>
> A. Well, when it comes to the level of Assistant Superintendency, this isn't a position that we have to -- it's an appointed position directly from the Superintendent and usually when the Superintendent is going to appoint anyone in a position of Assistant Superintendent, he uses -- he does that with a great deal of discretion because, as in Jersey City or any other community, once you say too much about it, you'll have people on you like bees on honey, you see.
>
> So, you have to move about with discretion and that's what I considered myself when I sought the Assistant Superintendency. It didn't become a public thing because I would have had 200 candidates throughout the State, so I just questioned people on my own, people who I knew had certain skills***. (Tr. I-132-133)

As noted by the ALJ, further testimony of the Superintendent elicited the fact that only one interview, other than "just talking to people as [he] would see people," was conducted (that of Mr. Falcicchio) before filling the position. (Tr. I-143-145)

While N.J.S.A. 18A:17-16 vests a superintendent with the authority to nominate assistant superintendents, this does not make such positions "appointed" as characterized by Mr. Williams nor are such positions exempt from equal opportunity practice/procedures. In the Commissioner's judgment, it is unconscionable that (1) there was not even an internal posting to officially announce a vacancy for the Assistant Superintendent position and that (2) a major administrative position could be "made known" and filled through word of mouth, informal conversations, alleged newspaper articles

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reporting on the Board's possible reinstatement of the position and only one interview.

If the foregoing testimony of Superintendent Williams, as well as the testimony of the ultimately "successful appointee" to the challenged position of Assistant Superintendent for Pupil Personnel Services, is reflective of the district's procedures for recruiting and hiring high level administrative personnel, the Commissioner emphatically rejects such practices as suggestive of a philosophy which rewards friends, neighbors and political insiders to the total detriment of the principles of merit.

Therefore, the Commissioner admonishes the Board and the Superintendent that all positions must be filled consistent with all state and federal laws related to equal employment.

COMMISSIONER OF EDUCATION

December 11, 1986

Pending State Board

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3448-85
EDU 5046-85
CONSOLIDATED
AGENCY DKT. NOS. 155-6/85
233-7/85

MYRNA ARNOLD AND HELEN PAPPAS,
Petitioners,
v.
BOARD OF EDUCATION
OF THE BRIDGEWATER-RARITAN
REGIONAL SCHOOL DISTRICT,
SOMERSET COUNTY,
Respondent,
AND
DOLORES HUDEC,
Intervenor

Stephen E. Klausner, Esq., for petitioner Arnold (Klausner & Hunter, attorneys)

Richard A. Friedman, Esq., for petitioner Pappas (Ruhlman, Butrym & Friedman, attorneys)

Daniel C. Soriano, Jr., Esq., for respondent (Soriano & Gross, attorneys)

Peter Wint, Esq., for intervenor (Katzenbach, Gildea & Rudner, attorneys)

Record Closed: September 26, 1986 Decided: November 10, 1986

BEFORE **LILLARD E. LAW**, ALJ:

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STATEMENT OF THE CASE

The Board of Education of the Bridgewater-Raritan Regional School District (Board) took an action, pursuant to N.J.S.A. 18A:28.9, to abolish a reading specialist teaching position which resulted in a reduction in force (RIF), effective June 30, 1985. Petitioner Myrna Arnold, a tenured teaching staff member in the Board's employ, requests the Commissioner of Education to render a Declaratory Judgment concerning her seniority status and rights under N.J.S.A. 18A:28-11 and as provided by N.J.S.A. 52:14B-8 and N.J.A.C. 6:24-2.1. Petitioner Helen Pappas, a tenured teaching staff member in the Board's employ subject to its RIF action, alleges by way of a Petition of Appeal that she possesses more seniority in reading specialist teaching position than those individuals assigned by the Board and requests the Commissioner to enter an order directing the Board to recognize her tenure and seniority rights to a full-time position as reading specialist, among other things.

Intervenor, Dolores Hudec, a tenured teaching staff member in the Board's employ currently assigned to the to the position as reading specialist, was granted leave to intervene, pursuant to N.J.A.C. 1:1-12.1 et seq.

PROCEDURAL HISTORY

On or about February 25, 1985, petitioner Arnold filed a Petition for Declaratory Judgment before the Commissioner of Education (Commissioner). On June 6, 1985, the Commissioner transmitted the matter to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. A prehearing conference scheduled for July 19, 1985, before Administrative Law Judge (ALJ) Daniel McKeown was adjourned at the request of petitioner Arnold's attorney, Stephen E. Klausner, Esq. and the matter was then assigned to the undersigned. A prehearing conference was held on August 26, 1985, at which, among other things, it was recognized that other teaching staff members in the Board's employ might be affected by the outcome of this litigation and, therefore, such subsequent Petitions of Appeal filed before the Commissioner dealing with the identical subject matter should be consolidated with the instant case.

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Petitioner Pappas perfected her petition before the Commissioner on or about July 19, 1985, which was subsequently transmitted to OAL on August 14, 1985, and assigned to ALJ McKeown. On September 26, 1985, Judge McKeown conducted a telephone prehearing conference at which counsel for the parties alerted Judge McKeown of the pending Arnold matter regarding the same subject matter and the potential for consolidation. The Pappas matter was subsequently assigned to the undersigned for the purpose of consolidation with the Arnold matter, pursuant to a prehearing conference held on October 28, 1985.

The October 28, 1985 prehearing conference revealed that other teaching staff members in the employ of the Board would be affected by the outcome of these consolidated proceedings. As a consequence, this tribunal ordered the Board to post notice of the herein actions to alert all parties in interest of the right to intervene. Any and all parties in interest were required to file their respective motions to intervene with the Clerk of the OAL on or before December 31, 1985.

By letter dated January 30, 1986, Peter Wint, Esq., requested leave to intervene on behalf of Dolores Hudec. Although counsel's request was not in motion form nor made within the time contraints set forth in the October 28, 1985 prehearing order, or the Board's posted notice, this tribunal granted Hudec's request to intervene with all of the rights and privileges thereto, pursuant to N.J.A.C. 1:1-12.1 et seq.

The hearing was conducted on March 4 and 5, 1986, at the Branchburg, New Jersey, Township Municipal Court. The parties requested and were granted leave to submit post-hearing briefs of law. The schedule for the post-hearing submissions was established on the record, with allowance for the parties receipt of the stenographic transcripts of the proceedings. The last submission was to be received by this tribunal on or before May 12, 1986. The transcripts are dated July 18, 1986. The parties were, therefore, granted extensions with the last submission received on September 26, 1986, which constitutes the closing date.

STATEMENT OF THE ISSUES

Pursuant to the Prehearing Order dated October 28, 1985, the following issues for determination were agreed upon by counsel for petitioners and the Board:

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1. Where, on the Board's Reading Specialist preferred eligibility list petitioners should be placed for the purposes of their seniority?

2. Whether petitioner Arnold should be placed on the Board's Reading Teacher preferred eligibility list and, if so, where for purposes of seniority?

3. Whether petitioner Arnold is entitled to be placed on the Board's elementary teaching seniority list and, if so, where?

4. Whether there is a teaching position presently held by a less senior Reading Specialist than petitioner(s)?

5. Whether petitioners are entitled to be placed in a full-time Reading Specialist position and/or advanced on the Board's seniority list?

BACKGROUND FACTS

A careful review and examination of the evidence proffered by the parties demonstrates that the following facts are neither controverted nor in dispute. I, therefore, hereby adopt, by reference, the following as **FINDINGS OF FACT:**

The Board has, throughout the years and at least since 1972, created certain job titles and job descriptions concerned with its district-wide reading programs in grades kindergarten through twelve and as applied to certain reading teachers in its employ. These job titles, and job descriptions include the following with the year it was adopted or revised: Reading Resource Teacher, 1972[1] (H-1); Reading Resource Teacher, Revised 1974[2] (H-2); Reading Resource Teacher, Revised 1975[3] (H-3); Curriculum Reading Specialist 1976[4] (H-4); Curriculum Reading Specialist, Revised 1979 (H-5). None of the aforementioned job descriptions (H-1 through H-5) indicates nor specifies the teaching certificate, or endorsement, required of the teaching staff member to hold the job title. Nor was there any evidence produced at hearing to demonstrate that the Somerset County Superintendent of Schools had approved any of the job titles or job descriptions for use by the Board, pursuant to N.J.A.C. 6:11-3.6.

Note: The job descriptions make reference to certain other reading job titles which are not at issue in the instant matter.

1 Reading Supervisor
2 Reading Helping Teacher
3 Reading Coordinator
4 Communication Arts Coordinator, Reading Coordinator, Language Arts Coordinator.

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The employment and certification history of the litigants, but not the duties performed, is set forth below as follows:

Intervenor Hudee

Years Assigned	Position
September 1964-June 1968	Teacher-Sixth Grade
September 1968-June 1970	Corrective Reading-Elementary
September 1970-June 1972	Corrective Reading-Middle School
September 1972-August 1976	Reading Resource Teacher
September 1976-June 1985	Curriculum Reading Specialist

Certificate	Date Issued
Elementary Teacher(Provisional)	January 18, 1965
Elementary Teacher(Permanent)	May 19, 1967
Reading Specialist	February, 1981 (J-1)

Petitioner Arnold

Years Assigned	Position
September 1974-August 1976	Reading Resource Teacher
September 1976-June 1986	Curriculum Reading Specialist

Certification	Date Issued
Elementary Teacher	December 12, 1966
Teacher of Reading	November, 1967
Reading Specialist	August, 1974
Supervisor	October, 1980 (J-1)

Petitioner Pappas

Years Assigned	Position
September 1965-June 1966	Elementary Teacher
September 1966-June 1973	Developmental Reading Teacher

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Petitioner Pappas (cont'd)

September 1973-June 1974	Sabbatical Leave
September 1974-June 1975	Reading Resource Teacher
September 1975-June 1981	Reading Coordinator
September 1981-June 1985	Curriculum Reading Specialist

Certification	Date Issued
Elementary Teacher	August 19, 1983
Reading Specialist	May, 1975
Supervisor	November, 1976
Teacher of Reading	June, 1983
Teacher of English	November, 1984 (J-1)

Subsequent to its action to abolish a reading specialist position the Board assigned the litigants to this action to the following teaching positions in its employ:

Intervenor Hudec was not riffed and, therefore, continued in the position of Curriculum Reading Specialist for the 1985-86 school year. Hudec admits she was not eligible for a Reading Specialist certificate on June 20, 1978,[5] however, she was issued such a certificate in February, 1981.

Petitioner Arnold was assigned as a half-time kindergarten teacher under her elementary certificate and served one half-time as Curriculum Reading Specialist for the 1985-86 school year.

Petitioner Pappas, pursuant to an agreement with the Board (P-1), was assigned as a teacher of English at the Board's High School-West for 1985-86 school year.

This concludes the recital of the undisputed facts in this matter.

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[5] The effective date of the Reading Specialist certificate is in dispute and, therefore, will be addressed, post.

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AMENDED ISSUE

An issue not advanced in the pleadings nor in the prehearing orders; however, raised at hearing and argued in the parties briefs needs to be examined here. The issue is; whether the possession, or the lack thereof, of a Reading Specialist certificate is germane to the crediting of seniority to the Board's identified and described reading teacher positions?

In consideration of this issue, resort is given to R.4:9-2, N.J. Court Rules, where it provides, in pertinent part, that "When issues not raised by the pleadings and pretrial order are tried by consent or without objection of the parties, they shall be treated in all respects as if they had been raised in the pleadings and prehearing order..." Applying the Rule, Superior Court Judge Gaulkin held that a legal theory advanced neither in the pleadings nor pretrial order may nevertheless be resorted to in the ultimate determination of the controversy where it has been fully aired at trial and in post-trial briefs. 68th St. Apts., Inc. v. Lauricella, 142 N.J. Super. 546, 561 (Law Div. 1976), aff'd. o.b. 150 N.J. Super. 48 (App. Div. 1977). Consequently, the issue is hereby adopted and incorporated in these proceedings as though the pleadings and prehearing orders had been amended.

The rule governing the Reading Specialist certificate is found at N.J.A.C. 6:11-12.20 and was first proposed on December 7, 1972 by notice and for comment at 4 N.J.R. 301. The full text of the then proposed new rule provided as follows:

> 6:11-12.20 Reading specialist; certification
>
> (a) This certificate is required for services as a reading specialist in public school district,
>
> (b) A reading specialist is one who conducts in-service training of teachers and administrators, coordinates instruction for individuals or groups of pupils having difficulty learning to read, diagnoses the nature and cause of individuals' programs in reading for all pupils, recommends methods and material to be used in the district reading program, and contributes to the evaluation of the reading achievement of pupils.
>
> (c) The requirements, effective for new applicants after July 1, 1975, are:

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1. A standard New Jersey certificate in any instructional area;

2. Two years of successful teaching experience;

3. Successful completion of a graduate degree program in reading approved by the New Jersey State Department of Education; or

4. A program of graduate studies of 30 semester hours or equivalent consisting of the following:

   i. Reading foundations;

   ii. Diagnosis;

   iii. Correction of reading problems;

   iv. Supervised practicum in reading; plus

   v. Study in at least three areas from the following:

      (1) Children's or adolescent literature;

      (2) Measurement;

      (3) Organization of reading programs;

      (4) Psychology;

      (5) Supervision;

      (6) Linguistics.

On January 5, 1973, the State Board adopted the rule on the certification for reading specialist, N.J.A.C. 6:11-12.20, effective January 10, 1973, as R. 1973 d. 20. See: 5 N.J.R. 36. Subsequently, by published notice of July 16, 1984(16 N.J.R. 1842), and pursuant to Executive Order No. 66 (1978) which provided for the expiration of the rules under Chapter 11, subchapter 12 of Title 6 of the Administrative Code within five (5) years of adoption or amendment, the State Board on September 5, 1984, readopted N.J.A.C. 6:11-12.20 with two (2) amendments. (16 N.J.R. 2528). The amendments were technical in nature which did not alter the substance of the rule. Under subsection (a) the word "endorsement" was substituted for the word "certificate", while under subsection (c) the phrase "effective for new applicants after July 1, 1975" was omitted. With the exception of these two technical amendments, the remainder of the text is identical to that as adopted by the State Board on January 5, 1973, effective January 10, 1973.

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A SUMMARY OF THE RELEVANT TESTIMONY AND THE POSITIONS OF THE PARTIES

A primary witness for petitioners, intervenor and the Board was Maxine I. Pearce-McElroy (Pearce), the Board's Supervisor of Instruction, who was called upon for direct testimony by all of the parties to this controversy. First called by Petitioner Arnold, Ms. Pearce testified, among other things, as to her employment history with the Board, her educational background and the certificates issued by the Board of Examiners held by her. Briefly stated, Ms. Pearce was employed by the Board as a substitute corrective reading teacher in the 1968-69 school year. In the 1969-70 school year, Ms. Pearce was employed at the Board's Eisenhower School where she developed the Board's reading resource teacher position in conjunction with her doctoral studies program at the Lehigh University. During the 1970-71 school year, Ms. Pearce was employed by the Board under the title of reading supervisor and remained in that position until 1975 when the title was changed to supervisor of communication arts. Subsequently, in or about July 1978, Ms. Pearce was given the title of Supervision of Instruction; the position she held at the time of hearing. Ms. Pearce is the holder of certificates or endorsements in the area of elementary teacher, reading teacher, teacher of English, Supervisor, Principal and, Superintendent.

Ms. Pearce asserts and opines there is no present position or job title as Reading Specialist under the Board's job descriptions. Rather, she contends, the proper designation is Curriculum Reading Specialist which, in her opinion, is broader in scope of duties and responsibilities than those as defined by the Administrative Code at N.J.A.C. 6:11-12.20. The present job description of Curriculum Reading Specialist evolved over the years through various job title changes together with concomitant broader duties and responsibilities for the Board's district-wide communication arts program. In the 1968-69 school year the Board employed reading teachers under the titles of Developmental Reading Teacher and Corrective Reading Teacher, distinguished by their respective duties. The Developmental Reading Teacher instructed an entire class of pupils in reading skills while the Corrective Reading Teacher worked with a small group of pupils who had been removed from a regular classroom setting for remediation of identified weaknesses. Ms. Pearce opined, as a matter of substance, the Board's position of Corrective Reading Teacher was substantially the same as the Administrative Code definition of Reading Specialist is today. The title of Corrective Reading Teacher was changed in August 1972

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and subsumed under the then new title of Reading Resource Teacher. Ms. Pearce contends that the position of Reading Resource Teacher was much broader in scope of duties, responsibilities and performance than the present regulation under N.J.A.C. 6:11-12.20, because the Administrative Code deals primarily with reading while the then job description of Reading Resource Teacher dealt with the entire spectrum of the Communication Arts. The duties of the Reading Resource Teacher differed between the elementary and middle schools although both levels operated under the same job description. At no time during the existence of the job title of Reading Resource Teacher was there a Board requirement that the teacher assigned to the position was to be the holder of the Reading Specialist certificate. Subsequently, in September 1976 the title of Reading Resource Teacher was abolished and in its stead the job title of Curriculum Reading Specialist was created; with the added requirement, a time not specified, that the individual assigned shall possess the Reading Specialist Certificate.

Ms. Pearce testified extensively concerning the job assignments, duties and responsibilities performed by Petitioners Arnold, Pappas and Intervenor Hudec during the course of her tenure and association with each.

PETITIONER ARNOLD

Petitioner Arnold seeks a declaratory judgment and order issued by the Commissioner awarding her seniority rights and credits as a reading teacher and as an elementary teacher in the Board's employ retroactive to September 1, 1974, her initial date of employment. Ms. Arnold relies, in part, upon the testimony of Ms. Pearce who asserted, among other things that Ms. Arnold functioned and performed under the Board's Reading Resource Teacher Job Description during the 1974-75 and 1975-76 school year at the John F. Kennedy Elementary School (H-1,H-2,H-3). Ms. Arnold's duties included, among other things, a diagnosis of pupil reading skills together with the preparation of a reading prescription for each pupil, followed by regularly planned and scheduled classroom instruction in the contained classroom with the grade-level teacher in attendance and assisting Arnold. The individualized diagnostic prescription reading program involved the entire elementary school curriculum; i.e., reading as applied to the skill and content areas of the curriculum.

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Commencing with the 1976-77 school year, Ms. Arnold functioned and performed under the Job Description of Curriculum Reading Specialist (H-4). The major and significant change in duties and responsibilities involved the emphasis upon the school district's total communication (language) arts program (H-4) as distinguished from the former emphasis upon the reading program alone. Under this revised job title and job description, Ms. Arnold continued to instruct classes on a regularly scheduled basis and performed diagnostic, prescriptive and remediation services for pupils. When asked by Ms. Arnold's attorney whether Ms. Arnold had performed dual functions for the Board over the course of the 12 years of Arnold's employment, Ms. Pearce answered "No." (1T33).

Ms. Pearce further testified that Ms. Arnold's duties involved her in the Board's kindergarten learning alphabetic instructional program, a learning and reading readiness program; the Quill Program in which pupils use the Apple computer to be more fluant in writing compositions; the Young Author's Writing Program, working with teachers and pupils where the pupil writes the equivalent of a book to be read by other pupils and is submitted to Young Author Festivals. Ms. Pearce asserted that Ms. Arnold was also assigned to work with the Board's Gifted and Talented Program as a regular part of her duties.

Ms. Arnold testified on her own behalf, cooroborating Ms. Pearce's testimony concerning her teaching duties and assignments. In addition to her conducting reading tests, analyzing the results and prescribing a reading program for pupils, Ms. Arnold was assigned a regular schedule of classroom visitations where she remained an entire period in a self-contained classroom with the teacher and pupils for reading and language arts instruction. Ms. Arnold asserted that she did not teach the content areas in mathematics and science, however, she did instruct pupils in how to apply their reading skills to mathematic problems.

The herein record demonstrates that at the time of Arnold's employment with the Board in September 1974, she was in possession of teaching certificates issued by the Board of Examiners which qualified her for positions as Elementary Teacher grades K through 8; Teacher of Reading; and, Reading Specialist. Based upon these facts together with the services she purportedly performed, Ms. Arnold contends she is entitled to seniority in the two categories of elementary school teacher and as a reading teacher computed from September 1, 1974.

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Petitioner Arnold grounds her claims on the language of N.J.A.C. 6:3-1.10(f), as amended by the State Board of Education, effective September 1, 1983, and which provides:

> Not more than one year of employment may be counted toward seniority in any one academic or calendar year. Whenever a person shall hold employment simultaneously under two or more subject area endorsements or in two or more categories, seniority shall be counted in all subject area endorsements and categories in which he or she is or has been employed.

In support of her contention she is entitled to seniority credit as an elementary teacher as well as seniority as a reading teacher, Petitioner Arnold relies upon the Commissioner's interpretation of N.J.A.C. 6:3-1.10(f) In the Matter of Seniority Rights of Certain Teaching Staff Members Employed by the Old Bridge Township Board of Education and the Edison Township Board of Education, Middlesex County, 1984 S.L.D. ___ (January 2, 1985), aff'd. Appellate Division of Superior Court (Docket No. A-2241-84-T6). There, the Commissioner articulated the distinctions between the former and amended Administrative Code regulations which provides for seniority entitlement where he said, in part, that:

> . . .the clear intent of the regulations... as to the seniority entitlement of persons serving simultaneously in two categories are entirely supported by the language of the regulations themselves and by the fundamental principle by which both the Commissioner and the State Board were guided in their adoption of revised seniority regulations. That significant principle which was involved in the aforesaid revision was that seniority would be based solely upon actual experience in a subject area or category and would no longer be awarded upon the mere possession of a certificate endorsement.

The Commissioner continued, In re the Matter of Seniority Rights, to distinguish the prior and present language of N.J.A.C. 6:3-1.10(1) where the former regulation limited seniority entitlements to the category in which the individual spent the greatest portion of his or her time as compared with the present amended rule which grants seniority to persons serving simultaneously in two categories. The Commissioner further adopted petitioner's reasoning as it related to the acquisition of a full year's seniority in each category or subject area endorsement taught by an individual, provided that such individual was a full-time teaching staff member. The Commissioner agreed with petitioner's reasoning that under subsection (f) the limitation of "(n)ot more than one

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year of employment may be counted toward seniority in any one academic or calendar year" was meant to assure that no more than one year's seniority in any category was acquired in any one year.

Petitioner Arnold contends, as a consequence of her regularly scheduled contact with elementary school classrooms while serving under the titles and job descriptions as Reading Resource Teacher and Curriculum Reading Specialist, she is entitled to seniority credits as an elementary teacher.

One of the claims asserted by Petitioner Arnold is that by virtue of her tenure and seniority as a reading specialist, she is entitled to tenure and seniority as a reading teacher as well. Petitioner Arnold asserts that even if one assumes that she was never assigned to teach reading nor had she ever taught reading to pupils, by virtue of her reading specialist certificate she is entitled to tenure and seniority as a reading teacher. Petitioner Arnold places reliance of her claim upon the opinion by the Appellate Division of Superior Court in the matter of Schmidt v. Weehawken Board of Education, 1982 S.L.D. (decided August 19, 1982), aff'd. State Board of Education 1983 S.L.D. ___ (decided May 4, 1983), remanded Appellate Division February 1, 1984, (Docket No. A-4842-82T5), supplemental opinion June 4, 1984. There, the Court compelled the Commissioner to change his position that a holder of a reading specialist certificate could not teach reading where it observed that the education, experience and training required for a reading specialist certificate were more extensive and more rigorous than those required for a reading teacher certificate and, therefore, it appeared that a person holding a reading specialist certificate would be automatically entitled to endorsement as a reading teacher on his instructional endorsement. The Court concluded that a reading specialist certificate is the functional equivalent of a reading teacher endorsement.

Based upon the Schmidt holding, Petitioner Arnold claims tenure and seniority as a reading teacher retroactive to September 1, 1974.

PETTTIONER PAPPAS

Petitioner Pappas asserts she has acquired tenure and seniority as a reading specialist in the Board's employ by virtue of her assignments and certification and claims seniority from the commencement of her employment on September 1, 1965 to the present, with the exception of the 1965-66 school year when she was assigned solely as an

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elementary teacher. Petitioner Pappas testified extensively concerning her educational background, graduate and in-service course work completed, certificates issued by the Board of Examiners and the degrees she had earned, including a Ph.D. from Lehigh University. She testified at length concerning her work assignments with the Board from September 1966 through June 1985, which is set forth in the Background Facts, supra.

Petitioner Pappas was assigned to the Board's Hillside intermediate/middle school for the school years 1966-67 through 1972-73 as a Developmental Reading Teacher. The Hillside school enrolled, at various times, grades five through eight, with the fifth grade having been removed at some unspecified point in time. During this period between 1966-73, she served as a classroom developmental reading teacher assigned to five daily classes of eighth grade pupils. She performed her duties under an elementary teacher certificate with no job description for the title of Developmental Reading Teacher.

Although the Board's job description for the title Reading Resource Teacher (H-1) was not promulgated until July 1972, Petitioner Pappas testified that she performed most of the responsibilities contained therein during the period (1966-1973) she performed under the job title of Developmental Reading Teacher. Those duties and responsibilities she did not perform under the Reading Resource Teacher job description included; (1) did not formally act as a liaison person between the Principal and teachers in a building and the Reading Supervisor (Item no. 4, H-1), (2) did not test pupils entering the Board's school from another school district to determine reading needs and groups (Item no. 8, H-1), (3) worked with psychological, guidance, and health services pertaining only to pupils assigned to her classrooms (Item no. 13, H-1), (4) only worked with pupils assigned to her classrooms in a corrective reading laboratory program (Item no. 14, H-1) and, (5) does not recall whether she trained teacher-aids and student-helpers to function as tutors (Item no. 15, H-1).

Ms. Pearce, the Board's present Supervisor of Instruction, testified that Petitioner Pappas did not perform the duties of a reading specialist between 1969 and 1973. On cross-examination, however, Ms. Pearce acknowledged that she had no personal knowledge of the duties performed by Petitioner Pappas while Pappas performed under the job title of Developmental Reading Teacher during the 1969-1973 term.

Subsequent to a sabbatical leave approved by the Board for the 1973-74 school year, Petitioner Pappas returned to full-time duty in September 1974 where she

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performed under the job title of Reading Resource Teacher for the 1974-75 school year. In May 1975, Petitioner Pappas acquired the Reading Specialist certificate. From September 1975 to June 1981, Petitioner Pappas functioned under the job title of Reading Coordinator. Thereafter, from September 1981 through 1985, Petitioner Pappas served under the title of Curriculum Reading Specialist. In or about June 30, 1985, the effective date of the Board's action to abolish her position, Petitioner Pappas was the subject of the Board's RIF as a Curriculum Reading Specialist. Petitioner Pappas now claims seniority as a reading specialist in the Board's employ, commencing with the 1966-67 school year.

The record demonstrates that in 1970, while Pappas served under the job title of Developmental Reading Teacher, she was rejected, by an agent of the Board, for a position as a corrective reading teacher (J-1).

INTERVENOR HUDEC

By way of testimony by the Board's Supervisor of Instruction Pearce and Intervenor Hudec, the record demonstrates that Ms. Hudec commenced her employment with the Board in September 1964, as a teacher of the sixth grade and continued in that position until June 1968. In September 1968, Ms. Hudec was appointed to the position as Elementary Corrective Reading Teacher and performed her duties under her elementary teacher certificate. In September 1970, Ms. Hudec replaced Ms. Pearce who was then the corrective reading teacher at the Board's Eisenhower Middle School, where Ms. Hudec continued to function pursuant to her elementary teacher certificate. Ms. Pearce testified that as a result of Ms. Hudec's changed position, Ms. Hudec's duties and responsibilities expanded where she aided Pearce to develop a model to change the position of corrective reading teacher to that of reading resource teacher. Among Hudec's expanded duties were those that included her grouping of pupils for reading instruction; conferring with classroom teachers of subject areas other than reading with regard to pupils' reading abilities and how to apply reading instruction to the content areas; working with teachers to help them plan their classroom instruction; aid Pearce with teacher in-service programs to train classroom teachers in reading instruction; and, assist the building principal in budgeting for reading materials for use in the school. From September 1972 through June 1976, Ms. Hudec served in the position as reading resource teacher under her elementary teacher certificate. The Board's Reading Resource Teacher Job Descriptions, promulgated between July 1972 through July 1975 and under which Hudec performed, did not specify which teaching certificate or endorsement was required

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for an individual to hold the position (H-1, H-2, H-3), although Ms. Pearce testified that an elementary teacher certificate was all that was required. Ms. Pearce also testified that the title of Reading Resource Teacher was not a recognized title under the New Jersey Administrative Code, In or about August 1976, the job description of Reading Resource Teacher was changed to Curriculum Reading Specialist (H-4) which contained the identical duties and responsibilities found in the former job descriptions. It was also in September 1976 that Ms. Hudec's title was changed from Reading Resource Teacher to Curriculum Reading Specialist, a position she continued to hold up to the time of the present hearing.

At some point in time subsequent to the promulgation of the Curriculum Reading Specialist Job Description, a Reading Specialist certificate or endorsement was required to hold the position of Curriculum Reading Specialist. Ms. Pearce was uncertain as to when the requirement for the Reading Specialist certificate came into existence. The record demonstrates that subsequent to August 1976, the original date of the Curriculum Reading Specialist Job Description, the job description was revised in September 1979. The record also shows that Ms. Hudec did not acquire her Reading Specialist endorsement until February 1981, although she performed in the position of Curriculum Reading Specialist from September 1976. Ms. Hudec contends, moreover, that during the entire period she functioned as a Curriculum Reading Specialist, no official of the Board ever informed or advised Hudec that she was under an obligation to acquire a reading specialist certificate or endorsement in order for her to continue in the position. Ms. Hudec further contends that notwithstanding the language in N.J.A.C. 6:11-12.20, as promulgated by the State Board which set forth the effective date of January 10, 1973 for persons meeting the standards and July 1, 1975 for new applicants, that a subsequent action by the State Board of Examiners approved the following policies with respect thereto:.

> 1. All persons currently employed under the title of Reading Specialist may remain in the position in the same school district until June 30, 1978, at which time the full certification requirements for Reading Specialist certificate must be met.
>
> [H-6]

Based, in part, upon the above-stated policy, together with the fact that Ms. Hudec continued in the position as Curriculum Reading Specialist beyond June 30, 1978, it was Hudec's belief that a reading specialist's endorsement was not required of her to

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remain in the position. Consequently, Intervenor Hudec argues, among other things, that she has accrued seniority as a reading specialist from 1968 to the present under the theory of estoppel based upon her contention that the Board did not require a reading specialist endorsement for the positions of Corrective Reading Teacher or Reading Resource Teacher under which she served and, further, the Board was aware at all time during her employment of her educational qualifications and continued to assign her to the position as Curriculum Reading Specialist.

FINDINGS, DISCUSSION AND CONCLUSIONS

Ms. Pearce testified with respect to the evoluation of the various titles and job descriptions employed bv the Board and its agents concerned with its reading and curricula programs. Ms. Pearce opined that the position of Corrective Reading Teacher and the job description for the position of Reading Resource Teacher, which was first promulgated in July 1972 and subsequently revised in 1974 and again in 1975, substantially conformed to the definition of Reading Specialist under N.J.A.C. 6:11-12.20. There was no testimony or other evidence to indicate whether the prior job title of Developmental Reading Teacher conformed to the Administrative Code definition. It has been established, moreover, that the Board has not identified, used or prescribed a job title or job description employing the term "Reading Specialist." Rather, the Board has defined its most recent job title as Curriculum Reading Specialist which, Ms. Pearce opines, has broader duties and responsibilities than those under the definition of Reading Specialist, pursuant to N.J.A.C. 6:11-12.20. Ms. Pearce further asserted that at sometime subsequent to its use of the job description of Curriculum Reading Specialist and the adoption of N.J.A.C. 6:11-12.20 by the State Board of Education, the Board required the Reading Specialist certificate or endorsement for persons occupying the position of Curriculum Reading Specialist.

The herein record is devoid of any Board action, by way of resoltuion or Board minutes, to establish that the Board did, in fact, approve the use of the various job titles or job descriptions. Similarly, there is nothing in this record to demonstrate that the Board required the Reading Specialist certificate to occupy the position of Curriculum Reading Teacher. Moreover, no evidence was produced to establish that any of the unclassified job descriptions for the positions of Reading Resource Teacher or Curriculum Reading Specialist were submitted and approved by the Somerset County Superintendent of Schools, pursuant to the provisions of N.J.A.C. 6:11-3.6(b).

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Given these facts and circumstances notwithstanding, the Board has ascribed seniority status in the category of "Reading Specialist" to certain individuals in its employ (J-1, J-2). Based upon these considerations, I now arrive at the following FINDINGS OF FACT and CONCLUSIONS with regard to the litigants to this controversy:

PETITIONER ARNOLD

Petitioner Arnold was originally employed by the Board in September 1974, under the title as Reading Resource Teacher and performed her duties, pursuant to a Reading Specialist certificate issued to her in August 1974. Relying upon the opinion testimony of Ms. Pearce that the Board's Reading Resource Teacher position substantially conformed to the definition of Reading Specialist under N.J.A.C. 6:11-12.20, together with Ms. Pearce's assertion that Arnold did not perform in a dual capacity as an elementary teacher, I **FIND** and **CONCLUDE** that Petitioner Arnold has only acquired a seniority status as Reading Specialist in the Board's employ commencing in September 1974 and continuing to her present position. Given the nature of her duties and assignments as a Reading Resource Teacher and subsequently under the title and job description of Curriculum Reading Specialist, it cannot be fairly said that Arnold performed the duties of a contained classroom teacher under the Board's organizational structure of its elementary schools. To the contrary, the record demonstrates that Arnold was assigned to elementary classrooms, on a regular basis, to provide reading instructional services to pupils and teachers rather than to instruct in the prescribed content areas of the various grade levels.

Having considered Petitioner Arnold's legal arguments and her assertion that N.J.A.C. 6:3-1.10(f), as amended, applies to her circumstances, I **FIND** and **CONCLUDE** that they do not. Accordingly, it is hereby **DECLARED** that Petitioner Arnold has acquired seniority with the Board as a Reading Specialist commencing with September 1974 and continuing to the present point in time.

PETITIONER PAPPAS

The parties to this dispute stipulate that as of May 1975, Petitioner Pappas has acquired seniority as a Reading Specialist in the Board's employ by virtue of her acquisition of the Reading Specialist certificate coupled with her assignment as a Reading Resource Teacher. Her claim and assertion that she is entitled to seniority as Reading

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Specialist commencing with September 1966, is not supported by the record. There is no showing that the position Pappas occupied as Developmental Reading Teacher from September 1966 through June 1973 comported with the Administrarive Code definition of Reading Specialist. N.J.A.C. 6:11-12.20. By her own testimony, Pappas admitted that she did not perform all of the duties and responsibilites as defined under the Reading Specialist certificate when assigned as a Developmental Reading Teacher. The record demonstrates that at most, Pappas performed and functioned as a reading teacher or, at least, as an elementary teacher from September 1966 through June 1973, not including her approved sabbatical leave for the 1974-75 school year. Consequently, I **FIND** and **CONCLUDE** that Petitioner Pappas cannot acquire seniority status in a category in which she did not perform.

I concur, in part, with Petitioner Pappas' legal argument with respect to the applicability of the matter in in Hausser v. Bd. of Ed. of the Twp. of Ewing, 1983 S.L.D. (decided June 30, 1983) to the instant matter. To the extent that Pappas functioned under the title and job description as a Reading Resource Teacher commencing with September 1974, I **CONLUDE** that her seniority credit as a Reading Specialist in the Board's employ commences with that date.

INTERVENOR HUDEC

The record herein clearly demonstrates that Intervenor Hudec commenced the assignment as a Corrective Reading Teacher under an elementary teacher certificate in or about September 1968, and continued with that position until June 1970. It has been shown that the job description of Corrective Reading Teacher comports with the Administrative Code definition of Reading Specialist. Hudec's subsequent assignment as a Reading Resource Teacher and Curriculum Reading Specialist from September 1972 to June 1985 is, at minimum, in compliance with N.J.A.C. 6:11-12.20.

The record demonstrates that subsequent to the abolition or change in job title from Reading Resource Teacher to Curriculum Reading Specialist, an individual holding the position as Curriculum Reading Specialist was required to possess the Reading Specialist certificate. There is, however, nothing in this record to demonstrate when such certification was required or whether the Board, in fact, took affirmative action to impose such a requirement. The record further discloses that Hudec was never advised during the period she occupied the positions described as Reading Resource Teacher and

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Curriculum Reading Specialist that she was required to possess the Reading Specialist certificate. The fact that Hudec was continued in the position and performed as a Curriculum Reading Specialist subsequent to the State Board's enactment of N.J.A.C. 6:11-12.20, gives credence and support to her argument.

Under these circumstances, Intervenor Hudec advances the argument that she has accrued seniority from 1968 to the present under the theory of estoppel, citing the matter in Bordentown Twp. Bd. of Health v. Interstate Waste, 191 N.J. Super. 128, 139 (Law Div. 1983), where the Court quoted from West Jersey Title Co. v. Industrial Trust Co., 27 N.J. 144, 153 (1958) which defined the principle of estoppel as:

> Estoppel in pais is a preclusion by law against speaking contrary to one's own act or deed; one may not take a position inconsistent with that previously assumed and intended to influence the conduct of another, if such repudiation "would not be responsive to the demands of justice and good conscience," in that it would work prejudice and injury to others.
>
> [Citation omitted].

Hudec further contends that the New Jersey courts have applied the doctrine of estoppel ". . .against public bodies 'where the interest of justice, morality and common fairness clearly dictate that course.' Gruber v. Raritan Township, 39 N.J. 1, 13 (1962)." Bordentown Township Board of Health, supra, 191 N.J. Super. at 140 [Emphasis supplied]. Moreover, the conduct of

> . . . [p]ublic officials may ratify the action of private parties, and that ratification can effect an estoppel. Board of Educ. v. Hock, 38 N.J. 213, 241 (1962). Before ratification will result in an estoppel of public officials, however, it must be shown that the officials knew or should have known of the material facts. Id. State, Department of Environmental Protection v. Ventron Corp., 94 N.J. 473, 499 (1982).

These principles are to be applied upon an objective basis. Dambro v. Union County Park Commission, 130 N.J. Super. 450, 457 (Law Div. 1974).

Given the facts and circumstances of this issue, together with Intervenor's legal arguments, I **FIND** and **CONCLUDE** that the equitable doctrine of estoppel is applicable in this matter. The application of the doctrine is limited to the extent that Hudec performed in positions that comport with the Administrative Code definition of Reading Specialist, i.e., Corrective Reading Teacher and Reading Resource Teacher,

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notwithstanding her lack of a Reading Specialist certificate, pursuant to N.J.A.C. 6:11-12.20.

Consequently, I **CONCLUDE** that Intervenor's seniority as a Reading Specialist is credited commencing on September 1968 and running forward to the present. To conclude otherwise would be a miscarriage or justice and leave Hudec in a state of limbo with respect to her seniority status with the Board.

ORDER

Accordingly, the Board of Education of the BridgewaterRaritan Regional School District is hereby **ORDERED** to apply the seniority credits to Petitioners and Intervenor as outlined and prescribed in this initial decision.

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

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

10 November 1986
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

NOV 1 [illegible]
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

NOV 14 1986
DATE

Ronald L. Parker /ts
OFFICE OF ADMINISTRATIVE LAW

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MYRNA ARNOLD AND HELEN PAPPAS,	:	
PETITIONERS,	:	
V.	:	
BOARD OF EDUCATION OF THE BRIDGE-WATER-RARITAN REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY,	:	COMMISSIONER OF EDUCATION
RESPONDENT,	:	DECISION
AND	:	
DOLORES HUDEC,	:	
INTERVENOR.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The exceptions and replies thereto of the parties and of Intervenor Hudec were filed within the time prescribed by N.J.A.C. 1:1-16.4a, b and c.

Petitioner Arnold refers the Commissioner to her post-hearing brief, incorporated herein by reference, for a detailed exposition of her case and reiterates her position that the Board erroneously failed to give her seniority credit as a reading teacher and as an elementary teacher. She also asserts that the Board erred in giving Intervenor Hudec seniority credit. Petitioner Arnold again posits that she is entitled to seniority credit as a reading teacher in the Bridgewater-Raritan School District from the date of her initial employment. She bases her claim upon the duties that she actually was assigned and performed in the district and refers to her brief at pp. 2-17 for support of her position. She further contends that the ALJ did "not really" address this issue. (Arnold's Exceptions, at p. 1)

Petitioner Arnold further argues in exceptions that she also seeks credit for seniority purposes as an elementary teacher. She avers that the record supports her contention that she performed the duties of an elementary teacher. She suggests that the ALJ ignored the testimony of Dr. Pearce at Tr. I-37-40 as to the additional duties she assumed beyond the teaching of reading and also ignored the testimony of Dr. Helen Pappas, who, petitioner advances, testified that Petitioner Arnold "'taught all of the subjects on a regularly scheduled basis to elementary school classes.' (1T36)." (Arnold's Exceptions, at p. 3) Further, she suggests that the ALJ ignored her own testimony cited in her brief at pp. 8-15, which, she asserts, supports the proposition that she performed the duties of an elementary teacher on a regularly scheduled basis and is entitled to seniority credit as an elementary teacher.

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Finally, Petitioner Arnold excepts to the ALJ's use of the doctrine of equitable estoppel in the instant matter, citing Lois Geiling-Hurley v. Edison Township Board of Education, decided by the Commissioner May 24, 1985, State Board aff'd in part/rev'd. in part November 5, 1986. Petitioner Arnold contends that Intervenor Hudec's conduct, not the Board's, places her in the position that she is in and, thus, that the Board did nothing that Mrs. Hudec could have relied upon to her detriment.

Petitioner Pappas' exceptions aver that the ALJ improperly denied her seniority credit as a reading specialist retroactive to the 1969-70 school year. In support of this exception, she relies upon her post-hearing brief and refers the Commissioner specifically therein to the recitation on pp. 8-13 of the actual duties performed by her prior to September 1974 to determining whether she accrued reading specialist seniority, since the Board neither adopted a reading specialist job description before September 1974 nor obtained permission from the County Superintendent to use unrecognized titles. Petitioner Pappas further avers that she substantially performed the duties of a reading specialist from at least 1969 in her position as a developmental reading teacher.

As to Intervenor Hudec's seniority as a reading specialist, Petitioner Pappas excepts to the ALJ's conclusion that Hudec has seniority as a reading specialist retroactive to September 1968. Petitioner Pappas avers that since Hudec served under a teaching job description, she does not acquire reading specialist seniority; her seniority is accrued as a teacher. She cites Dedrick v. Hammonton Bd. of Ed., 1977 S.L.D. 1043 for this proposition. Further, Petitioner Pappas argues that the ALJ erred in granting Intervenor Hudec seniority as a reading specialist prior to September 1981, the date when she actually obtained reading specialist certification, and cites to pages 15-19 of her brief in support of this exception. Petitioner Pappas suggests that although the ALJ stated that the Board never advised Hudec that she must hold a reading specialist certification, that conclusion is unacceptable, since all other parties and every other reading specialist in the district knew they had to obtain reading specialist certification. Additionally, Petitioner Pappas advances that "it is absurd to suggest that a Board must adopt a formal requirement that a person hold reading specialist certification to hold a position entitled curriculum reading specialist." She adds, "The job title was sufficient to put any party on notice that certification was required." (Pappas' Exceptions, at pp. 2-3)

Finally, Petitioner Pappas avows that it is factually clear that Intervenor Hudec has not made a claim for estoppel since she did not act in reliance upon any advice from any party in this case. Petitioner Pappas also finds Hudec's assertion that she did not think reading specialist certification was required because her position included reading specialist and broad duties is unworthy of belief.

The Board's exceptions take the position that no one should receive seniority credit in the category of reading specialist prior

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to the creation of the position of reading resource teacher in July 1972 and cites Point I of the its brief for this proposition. The Board avows that neither Intervenor Hudec nor Petitioner Pappas should receive seniority credit in the category of reading specialist before September 1972. "This would obviate the necessity of determining whether the duties of Corrective Reading Teacher performed by Hudec and the duties of Developmental Reading Teacher performed by Pappas were substantially equivalent to the Administrative Code definition of Reading Specialist (N.J.A.C. 6:11-12.20)." (Board's Reply Exceptions, at p. 1) Alternatively, the Board agrees with the analysis of the ALJ and his determination that "there was 'no showing that the position Pappas occupied as Developmental Reading Teacher from September 1966 through June 1973 comported with the Administrative Code definition of Reading Specialist' (I.D., 13-15, 18 & 19)." (Board's Reply Exceptions, at p. 1)

However, contrary to the determination of the ALJ "that the parties stipulated that Pappas acquired seniority as a Reading Specialist 'as of May 1975 (I.D. 18)," the Board argues that "the parties stipulated that Pappas' seniority in the category of Reading Specialist began accruing in September of 1974." (Board's Reply Exceptions, at p. 2)

The Board agrees with the analysis of the ALJ regarding the claims of Petitioner Arnold as expressed in the initial decision, ante. The Board advances that she should not acquire any seniority in the position of reading teacher and should only begin accruing seniority under her elementary certification from the time she was assigned as a half-time kindergarten teacher in 1985-86.

Intervenor Hudec submitted reply exceptions to Petitioner Pappas' exceptions and also reply exceptions to the cross-exceptions filed by the Board.

In responding to Petitioner Pappas' exceptions, Intervenor Hudec argues that they are nothing more than a recapitulation of the arguments that were made in her post-hearing brief, which were rejected by the ALJ. Intervenor Hudec relies on and incorporates herein the ALJ's analysis in this regard and prays the initial decision be affirmed.

As to Intervenor Hudec's reply to the cross-exceptions of the Board to the initial decision, she suggests that the Board offers no support, other than Point I of its post-hearing brief, for its cross-exception that she should not receive any seniority credit in the category of reading specialist before September 1972. Intervenor Hudec relies on and incorporates herein the arguments raised in her post-hearing brief at pp. 1-12. Intervenor Hudec proffers that in this instance, too, the Board's arguments were considered and rejected by the ALJ and prays that the initial decision be affirmed.

Having carefully perused the voluminous record herein, the Commissioner remands the instant matter for the following reasons.

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The Commissioner finds that notwithstanding the copious summary of the testimony taken in this matter and the careful exposition of petitioners' and intervenor's credentials and positions held, it is still unclear from the record exactly what duties each of the parties herein performed year to year under what certification endorsement and with which job title. It is observed that the ALJ makes mention of five job titles and accompanying job descriptions (H-1 through H-5) that are in dispute in this matter, and he footnotes reference to four others that he concludes are not at issue herein. (Initial Decision, ante) Yet the distinction in duties among all nine of these job titles for any given year is not explained. Neither is it specified, as noted by the ALJ at p. 4 of the initial decision, the certificate and/or endorsement required of the teaching staff member to hold the job title.

Moreover, there appears to be a dispute even as to the stipulated facts submitted by the parties to the ALJ. See initial decision, ante, as well as Board's Reply Exceptions at p. 12 regarding when, precisely, Petitioner Pappas acquired seniority as a reading specialist.

Consequently, the Commissioner hereby directs that this matter be remanded to the Office of Administrative Law for a careful and thorough determination by the Board of Education as to the exact nature of the duties and job titles required for all nine of the reading positions that have existed in the Bridgewater-Raritan district since 1964. Upon completion of its compilation of this data, it is to be directed to the Somerset County Superintendent of Schools for his determination as to the appropriate endorsement and/or certificate required for each position, pursuant to N.J.A.C. 6:11-3.6. Thereafter, it is hereby directed that the Office of Administrative Law proceed to a resolution of the matters set forth in the instant Prehearing Order, as amended.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4441-86
AGENCY DKT. NO. 212-6/86

ANN MORAN,
Petitioner,
v.
SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT BOARD OF EDUCATION,
Respondent.

Robert P. Glickman, Esq., for petitioner

Sidney A. Sayovitz, Esq., for respondent (Greenwood & Sayovitz, attorneys)

Record Closed: October 20, 1986 Decided: November 13, 1986

BEFORE **DANIEL B. MC KEOWN,** ALJ:

Ann Moran (petitioner), formerly employed by the South Orange-Maplewood School District Board of Education (Board) as a teacher who had not acquired the legislative status of tenure, claims that a determination of the Board not to continue her employment for 1986-87 during which year she would have acquired tenure is arbitrary, capricious and unreasonable because her performance was evaluated by a technique not otherwise approved by the Board, that the Board failed to afford her minimal due process, and that the Board failed to afford her reasons why she was not reemployed. After the Commissioner transferred the matter to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq., a prehearing conference was scheduled and conducted August 18, 1986 and the matter proceeded to hearing on October 1, 1986 at the Office of Administrative Law, Newark. At the conclusion of the hearing the parties filed letter memoranda in support of their respective positions.

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ISSUES

During the prehearing conference, four separate issues of the case were identified. Petitioner at hearing withdrew two issues with prejudice. Those issues had to do with allegations of a violation of the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq. and with the allegation of unlawful discrimination by the Board against petitioner under the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq. Two issues remain viable:

1. Whether, if petitioner establishes by a preponderance of credible evidence that her performance was evaluated by supervisors exclusively or in part through the use of the so-called "Madeline Hunter" method, such evaluation renders the Board's action not to renew her employment for 1986-87 an arbitrary, capricious or unreasonable act.

2. If petitioner shows the Board failed to afford her a statement of reasons why it elected not to renew her employment, to what relief, if any, is she entitled.

Petitioner's due process argument is anchored upon her assertions that the Board failed to afford her a statement of reasons why her employment was not continued and that an asserted "hearing" afforded her on April 28, 1986 was a sham.

BACKGROUND FACTS

The evidence of record establishes the following background facts which are not otherwise in dispute between the parties.

Petitioner, who had approximately 11 years of prior experience as a public school teacher, began her employment with the Board as a teacher of French and Spanish during January 1984 on a part time basis. She was reemployed full time by the Board for the same assignment in 1984-85 and 1985-86. The Board did not reemploy petitioner for 1986-87.

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During her two and one-half years of employment with the Board, petitioner's performance was observed and evaluated by James Memoli, Chairman of the Foreign Language Department (chairman), and by Joseph Hood, the assistant principal (assistant principal) of the Board's Columbia High School where petitioner was assigned. Between January through June 30, 1984, the chairman observed petitioner's performance on March 2, 1984 and with the assistant principal on April 5, 1984. In each instance the chairman prepared written interim supervisory reports (J-1 and J-2) and discussed each report with petitioner. Based on these two interim supervisory reports the chairman prepared a written evaluation (J-3) of petitioner's performance and discussed it with her on May 30, 1984.

The form of the interim supervisory report is narrative. The observor records the results of a pre-observation conference held with the teacher generally the day before the actual classroom observation; the observor's actual observations made while in the classroom during the teacher's presentation; the teacher's strengths and/or weaknesses as noted by the observor; and, other related matters discussed during a post-observation conference. The form of the year-end teacher evaluation report is part narrative and part check list. The narrative portion addresses the evaluator's judgments concerning the teacher's areas of strength and areas deemed to be in need of improvement, the techniques observed in use by the teacher throughout the year to measure his/her effectiveness against pupil learning, and other significant information. The check list portion of the evaluation report contains a list of 28 items divided into six categories. The items are checked as being rated outstanding, professional, needs improvement, unsatisfactory, or, not applicable. The chairman, in his evaluation of petitioner's performance (J-3) and as discussed with her on May 30, 1984, noted petitioner's strengths and weaknesses. He rated two of the 28 items outstanding; 24 as professional, one in need of improvement, and one not applicable.

During 1984-85 the chairman observed petitioner's performance on October 23 and December 18, 1984, with the assistant principal on January 31, and individually again on March 11, 1985. Each observation was followed by an interim supervisory report (J-4, J-5, J-6, J-7), each of which was discussed with petitioner. The chairman prepared a written evaluation (J-8) of petitioner's 1984-85 performance, with which the assistant principal concurred, and discussed it with her on April 2, 1985. While petitioner's strengths were noted, the chairman identified a lack of pupil discipline and more efficient use of class time as areas in which petitioner's performance required improvement. The

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chairman rated four of the 28 items on the evaluation criteria as outstanding, 23 items as professional, and one area, standards of pupil behavior, as being in need of improvement.

During 1985-86 the chairman observed the petitioner's classroom performance on October 11 and December 4, 1985. The assistant principal observed petitioner's performance on February 26, 1986 and with the chairman on March 12 and April 3, 1986. Each observation was followed by an interim supervisory report (J-10, J-11, J-13, J-14) each of which was discussed with petitioner. The chairman prepared a written evaluation (J-15) of petitioner's 1985-86 performance, with which the assistant principal concurred, and discussed it with her on April 11, 1986. The evaluation instrument recognizes petitioner's strengths as a teacher as well as her participation in various professional organizations and her involvement in pupil cocurricular activities. Nevertheless, the following was said regarding petitioner's perceived weaknesses:

> There are several fundamental areas of [petitioner's] teaching in which sufficient improvement is not discernable:
>
> [Petitioner] needs to involve all students in constructive learning activities and quickly direct them to the tasks to be accomplished, especially at the beginning of class * * * Proper standards of student behavior need to be established, and [petitioner] needs to be consistent in reinforcing them. Students need to pay appropriate attention to both the teacher and their classmates and unwanted behavior must not be allowed to occur whenever there is a change in the classroom activities.
>
> [Petitioner] needs to be more selective in the types of activities or exercises she uses to present basic material. She needs to be sure that they are suited to the purpose of the learning activity. As a result she will not have to rely so much on translation and can provide the appropriate drills and practice in the target langauge geared toward the ability level of a particular class.
>
> [Petitioner] needs to refine her questioning techniques * * *
>
> (J-15)

The evaluation instrument concludes by advising petitioner that in the professional judgment of both the chairman and the assistant principal she " * * * does not give evidence of becoming an outstanding/superior teacher in this district and we therefore do not recommend her for reappointment." Id. It is noted that on the evaluation check list petitioner received three outstanding ratings, 17 professional ratings, and six ratings as being in need of improvement. The chairman discussed the substance of

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the evaluation document with petitioner on April 11, 1986 and the recommendation that her employment not be continued.

The chairman and the assistant principal discussed their observations and evaluations of petitioner's performance with the high school principal, Dr. Richard Willett, who concurred in their recommendation that petitioner not be reemployed. In Dr. Willett's view, petitioner's performance record shows she lacks management skills, lacks a willingness to participate in the supervisory process and fails to demonstrate the potential to be an outstanding teacher in the Board's permanent employ.

Petitioner and her representative from the local teachers' association met with the Board in private session April 28, 1986 to dissuade it from not offering her reemployment or, alternatively, to persuade it to offer her continued employment for 1986-87. The association representative, on petitioner's behalf, appealed to the Board to consider petitioner's demonstrated strengths as a teacher as well as her involvement in cocurricular tasks for pupils. The Board took no sworn testimony nor did any Board member ask questions. After the representative completed his presentation, he and petitioner left the meeting. The Board determined that evening, in public session, not to offer petitioner continued employment for 1986-87.

Thereafter, petitioner retained present counsel of record. By letter (J-18) dated June 3, 1986, counsel demanded, on petitioner's behalf, a statement of reasons why her employment was not continued. The Board, through its director of personnel, replied by letter (J-19) dated June 25, 1986 that a statement of reasons was given petitioner in the form of her evaluation on April 11, 1986 and specifically quoted the evaluation which advises "'In our professional judgment, Mrs. Moran [petitioner] does not give evidence of becoming an outstanding/superior teacher in this district, and we therefore do not recommend her for reappointment.'"

This concludes a recitation of the background facts not in dispute between the parties.

DISPUTED FACT

The disputed fact centers upon the methodology employed by petitioner's supervisors to evaluate her performance between March 1986 through April 11, 1986 as

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compared with the methodology employed from the beginning of her employment with the Board through February 1986.

Petitioner testified that from the time she began her employment with the Board to March 12, 1986, evaluations produced no serious criticisms of her performance. According to petitioner, the school principal announced at a faculty meeting in February 1986 the beginning use of an evaluation method known as the Madeline Hunter evaluation. Petitioner testified that Mr. Memoli, the department chairman, told her on March 12, 1986 that he and Mr. Hood, the assistant principal, were to observe and evaluate her performance that day by using the so-called Madeline Hunter method of evaluation. Petitioner complains that this method of evaluation is less comprehensive than a traditional method of evaluation in that the former emphasizes aims only for that lesson. Petitioner testified she was "shocked" at the use of the Hunter method of evaluation and subsequent to her observation on March 12 she consulted with other teachers and finally reported the matter to the teachers' association. Subsequent to the involvement of the association in the matter, petitioner testified that Memoli and assistant principal Hood apologized to her for using the Hunter method of evaluation.

Petitioner is of the view that the criticisms of her performance set forth in the evaluation on April 3, 1986 (J-14) and in her yearly written evaluation (J-15) discussed with her on Apirl 11, 1986 represent nothing more than retaliation by Memoli and Hood against her for having involved the association in the implementation of the Madeline Hunter method of evaluation. Petitioner claims the criticisms of her performance, particularly in the yearly written evaluation, are not founded in fact.

Department chairman Memoli testified that Madeline Hunter espouses not a methodology of evaluation; rather, she espouses a theory of instruction. Memoli denies using the Madeline Hunter approach in any criticism contained within his evaluation of petitioner's performance (J-13) as he observed it on March 12, 1986. While Memoli admits being disappointed that petitioner referred her perception that the methodology of evaluation was changed on March 12, 1986 to the association without first talking with him as her supervisor, he was not angry. Memoli specifically denies offering any apology to petitioner relative to the use of any theory of Madeline Hunter. Memoli testified that he recommended petitioner not be reemployed for 1986-87 because of the consistent concerns he had of her performance in classroom management and teaching technique. Memoli testified he concluded that petitioner would not be an outstanding teacher in the Board's employ in light of the deficiencies he perceived her to have.

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Joseph Hood, the assistant principal who also identified himself as the secondary supervisor of mathematics, English and foreign language departments, testified during February 1986 he had been sent by the Board to a seminar on supervisory techniques. He explained the seminar as a clinical supervision course to enable supervisors to assist teachers to focus on specific areas of concern in the classroom. The emphasis in the seminar was not on Madeline Hunter per se although her theories, identified by Hood as theories of instruction, were discussed.

Upon his return to school, Hood explained that he was attempting to implement in his observations and evaluations of teachers' performance those techniques discussed at the seminar. He explained to petitioner he had just returned from the seminar and that he wanted to share with her, as part of his observation and evaluation of her performance, those techniques learned at the seminar. He further advised petitioner that department chairman Memoli was to be in attendance with him during the observation in order for Memoli to critique him.

Hood testified that subsequent to the observation the assistant superintendent advised him that petitioner had complained to the association about his use of different observation and evaluation techniques employed. Nevertheless, Hood testified that that complaint played no part in his supporting the recommendation by Memoli not to continue the employment of petitioner for 1986-87. Hood explained that in his view, petitioner is not a poor teacher but that she is weak in classroom management and conveying to pupils "* * * what they are to learn" and "* * * what they are to do * * *" in order to learn. Hood testified he did not offer any apology to petitioner.

The school principal, Dr. Richard Willett, testified that the Madeline Hunter approach is an approach for instruction and is not used in the school. While Dr. Willett never formally observed and evaluated petitioner's performance, he did review all observations and evaluations prepared by department chairman Memoli and assistant principal Hood. Having reviewed those documents, he concurred with the recommendation that petitioner not be reemployed for 1986-87. In the principal's view, petitioner's evaluations demonstrate she lacks management skills, a willingness to participate in the supervisory process, and she lacks the potential to be an outstanding teacher.

This concludes a recitation of the proofs on the disputed fact.

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LAW

The legislative scheme regarding the continued employment, or lack thereof, of nontenure teaching staff members is set forth at N.J.S.A. 18A:27-1 et seq. N.J.S.A. 18A:27-3.1 specifies the number of times a nontenure teaching staff member shall be observed and evaluated each year. N.J.S.A. 18A:27-3.2 provides that a nontenure teaching staff member whose employment is not continued must be provided with a statement of reasons, upon their request within 15 days of the notice of nonreemployment, why their employment was not continued.

Specifically, N.J.S.A. 18A:27-10 provides in full as follows:

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

N.J.S.A. 18A:27-11 provides that if the board fails to give any nontenure teaching staff member either an offer of contract for the next succeeding year or a notice that such employment will not be offered "* * * all within the time and within the manner provided by this act" then that board is deemed to have offered the teaching staff member continued employment for the next succeeding school year. N.J.S.A. 18A:27-12 obligates the affected nontenure teaching staff member, who did not receive notice of nonreemployment "* * * in the manner provided by this act * * *" to notify the board, in writing, on or before June 1 that he/she accepted such offer of employment.

A nontenure teacher who has been notified her employment is not to be continued the subsequent year has no legally enforceable right to an adversarial hearing before the district board of education. While the affected teacher may be granted an informal opportunity to be heard in order to dissuade the board from not continuing her employment, the informal hearing is not to take on the formalities of an adjudicative proceeding. See, Donaldson v. North Wildwood Bd. of Ed., 65 N.J. 236, 246 (1974); Hicks v. Pemberton Twp. Bd. of Ed., 1975 S.L.D. 332; N.J.A.C. 6:3-1.20.

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In short, boards of education have an almost complete right to terminate the services of a nontenure teacher whom the board views as being not worthy of tenure in its employ, Dore v. Bedminster Twp. Bd. of Ed., 185 N.J. Super. 447, 456 (App. Div. 1982), unless as the State Board of Education recently said in Guerriero v. Glen Rock Bd. of Ed., 1986 S.L.D. - (Feb. 7, 1986), "* * * it is established that the real reasons for the board's action is in violation of constitutional or legislatively conferred rights." The State Board also took that occasion, in reliance upon Dore, supra, to state the following:

> We further emphasize that the inquiry in cases where a board has decided not to retain a nontenure teacher is very limited. [citation omitted] Such inquiry does not involve an assessment of whether the individual is a good teacher by objective criteria, as would be the case when a board decides to terminate a tenured teaching staff member.

and

> Thus, where, as here, a non-tenured teacher challeges a board's decision not to reemploy him on the grounds that the reasons provided by [the] board are not supported by the facts, he is entitled to litigate that question only if the facts he alleges, if true, would constitute a violation of constitutional or legislatively conferred rights. [footnote omitted]

FINDINGS OF FACT

The undisputed facts together with the evidence of the parties in support of their position on the disputed fact establishes the following operative facts of the matter:

1. Petitioner, as a nontenure teaching staff member in the Board's employ, was observed and evaluated on three occasions between January 1984 through June 30, 1984, in addition to being evaluated on her total performance.

2. Petitioner was observed and evaluated during 1984-85 on three separate occasions and on another occasion petitioner's total performance was evaluated.

3. During 1985-86 petitioner was observed and evaluated five separate occasions and her total performance was subsequently evaluated.

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4. Petitioner was advised by department chairman Memoli and by assistant principal Hood on April 11, 1986 that she was not to be recommended for reemployment for 1986-87. Both Memoli and Hood further advised petitioner of the reasons for that recommendation in the yearly evaluation (J-15) discussed that day.

5. The Board afforded petitioner an informal opportunity to be heard April 28, 1986.

6. The Board was not persuaded by petitioner's statements nor the statements of her representative that it had made an erroneous decision not to continue her employment into 1986-87.

7. At the same meeting, the Board determined not to offer petitioner continued employment for 1986-87. There is no evidence the Board gave written notice personally served upon petitioner that her employment would not be continued. Nevertheless, petitioner had personal knowledge April 28 that her employment was not to be continued.

8. Petitioner, even if the Board could be seen as having offered continued employment for 1986-87 to petitioner through the absence of a "written notice" specifically addressed to her of its decision not to offer her reemployment, did not accept employment on or before June 1 as required.

9. By letter dated June 3, 1986, petitioner's counsel requested reasons of the Board why it determined not to offer petitioner reemployment.

10. The Board, through its director of personnel, advised petitioner's counsel by letter dated June 25, 1986 that the reason petitioner was not offered reemployment is because petitioner did not give evidence of becoming an outstanding or superior teacher in the district.

11. There is no evidence to show the Board determined not to continue petitioner's employment in violation of any 'constitutional or legislatively conferred' rights of petitioner.

This concludes a recitation of the operative facts of the matter.

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CONCLUSION

Petitioner, as a nontenure teacher, was employed by the Board on yearly employment contracts. When each contract expired, it is within the Board's prerogative whether to continue petitioner's employment. That this Board continued petitioner's employment for two and one-half years does not, standing by itself, create a further obligation upon it to continue her employment thereafter.

Petitioner knew as early as April 11, 1986 she would not be recommended by her supervisors to be continued in employment for 1986-87. Those reasons form the basis for petitoner's informal opportunity to be heard by the Board on April 28, 1986. Petitioner knew that evening she failed in her attempt to persuade the Board to offer her reemployment. Consequently, on April 28, petitioner had knowledge her employment was not going to be continued.

Petitioner's argument that the so-called Madeline Hunter method of evaluation was used to assess her performance and therefore her supervisors unfairly evaluated her is rejected. First, there is no competent evidence in the record before me that there is such a process as the Madeline Hunter method of evaluation. While petitioner persists that she was evaluated under the Madeline Hunter method, each supervisor together with the principal, testified that Madeline Hunter espouses a theory of instruction. Arguably, petitioner was evaluated in March and April 1986 against the Madeline Hunter theory of instruction. Even if she were so evaluated, the evidence in the record before me regarding Hunter's theories shows such theories to be compatible with the aims and goals of teachers in a classroom which include considering each child as an individual.

Petitioner's informal opportunity to be heard as granted her by the Board on April 28, 1986 is consistent with the due process rights to which she is entitled. Petitioner is not entitled to a full adversarial proceeding on reasons why her employment as a nontenure teacher was not to be continued. To grant such a hearing would convert an informal opportunity to be heard into a tenure hearing on charges. Petitioner does not possess the legislative status of tenure; therefore, her reemployment is subject to the sound discretion of the Board.

I **CONCLUDE** petitioner knew the reasons why her employment was not to be continued into 1986-87 on April 11, 1986 and she knew the reasons why she was not to be

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reemployed on April 28, 1986. Had petitioner desired to have a more explicit statement of reasons than what she received in the form of the yearly evaluation, she was obligated within 15 days of April 28, 1986 to request such reasons. Nevertheless, the Board through its director of personnel responded to petitioner's counsel's demand on June 3, 1986 for a statement of reasons on June 25, 1986. Petitioner was granted the process to which she was entitled as a nontenure teacher when she was given reasons for her nonreemployment in her evaluation and when, on April 28, the Board granted her an informal opportunity to persuade it to continue her employment.

Finally, I **CONCLUDE** Ann Moran has failed in her ultimate burden to establish that the Board in any way violated her constitutional or legislatively conferred rights in its determination not to continue her employment for 1986-87 and it is further found that petitioner failed to establish the Board in any manner acted arbitrarily, capriciously or unreasonably.

The petition of appeal is **DISMISSED**.

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

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

November 13, 1986
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

NOV 14 1986
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

NOV 18 1986
DATE

Ronald L. Parks/K.S
OFFICE OF ADMINISTRATIVE LAW

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ANN MORAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon review of the record, the Commissioner concurs with the findings and conclusions of the ALJ and therefore adopts the initial decision as his own for the reasons expressed therein. The matter is hereby dismissed with prejudice.

COMMISSIONER OF EDUCATION

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7108-84
AGENCY DKT. NO. 369-8/84

EAST ORANGE EDUCATION ASSOCIATION ON BEHALF OF JANIS HOSSIC AND LINDA BLOOM,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,
Respondent.

Sanford R. Oxfeld, Esq., for petitioner
(Oxfeld, Cohen & Blunda, attorneys)

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

Record Closed: October 31, 1986 Decided: November 17, 1986

BEFORE **STEPHEN G. WEISS**, ALJ:

This matter was commenced in August 1984 by the petitioner on behalf of Janis Hossic and Linda Bloom, teachers employed by the respondent Board, who claim that the Board acted improperly during the 1984-85 school year by failing to restore salary

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increments withheld from them during the 1983-84 school year. Following the filing of an answer by the Board in which the allegations of the petition were denied, the matter was transmitted by the Commissioner to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

A prehearing conference was conducted before the undersigned administrative law judge on November 2, 1984. At that time two issues were agreed upon: (1) Is the petition barred by virtue of the doctrines of laches, estoppel and/or N.J.A.C. 6:24-1.2?;[1] and (2) Was the Board required to place petitioners on a higher step of the salary guide for the 1984-85 school year? Thereafter, orders of inactivity were entered on February 7, 1985, June 26, 1985 and November 20, 1985, because the parties agreed that a case then pending before the Appellate Division of the New Jersey Superior Court, Angela Cordasco v. Bd. of Ed. of the City of East Orange, Docket No. A-1933-84T7, would be dispositive of the issues.

A decision in Cordasco was rendered on November 22, 1985. The Appellate Division held that when an employment increment has been withheld for "inefficiency or other good cause" under N.J.S.A. 18A:29-14, a local board is not required to restore the teaching staff member to that step on the salary guide to which he or she would otherwise be entitled by virtue of training level and years of employment. To the contrary, advancement on the guide remains a matter for the exercise of discretion by the board following the withholding of an increment.

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[1]These separate defenses were not pursued by respondent at the hearing or in the post-hearing brief. Thus, I will consider them to be abandoned.

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In view of the decision in Cordasco, I was advised by counsel that the instant case likely could be disposed of in summary fashion. However, when no motion was made for such a disposition, I set the matter down for hearing on October 7, 1986 in order to determine the status of the case and to ascertain the precise positions of the parties. On that date, counsel for petitioner noted that although he agreed the Cordasco decision was binding with respect to the discretion of a board to advance a teaching staff member whose increment had been withheld, a question nevertheless persisted in this case with regard to the propriety of the Board's action in placing the two individuals back onto the regular salary guide for the 1984-85 school year at one level below that at which they should have been placed. Although that issue had not previously been highlighted, either at the prehearing conference or at any time prior to the October 7, 1986 hearing date, I determined that the prehearing order was broad enough to encompass the claim and that a record should be made so that the Commissioner could act on the case. Thus, testimony was received from the two teachers, a witness for the Board and by way of stipulation.

Stipulation

At the outset of the hearing, the Board stipulated to the accuracy of certain allegations of the petition of appeal, together with salary data pertaining to the two teachers. Specifically, it was stipulated that the East Orange Education Association (hereafter "EOEA") is the certified majority representative of all teaching staff members employed by the Board, that Hossic and Bloom are employed by the Board as teachers and belong to the EOEA, and that for the 1983-84 school year their salary increments were withheld by the Board. In addition, it was stipulated that with respect to the salaries of Hossic and Bloom for the school years 1982-83 to 1986-87, they received the following amounts and were placed on the following steps of the guide:[2]

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[2]The apparent oddity with respect to the step "progression" will be explained infra. It is this very feature which underlies the reason for the case having to proceed despite the Cordasco decision. Also, the 1982-83 and 1983-84 salaries include a modest extra stipend for each. Beginning in 1984-85, their salaries are exactly as shown on the salary guides (Exhibits J-1, J-2).

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SCHOOL YEAR	HOSSIC	BLOOM
1982-83	$14,391 (Step 4 1/2)	$15,199 (Step 6)
1983-84	14,391 (off guide)	15,199 (off guide)
1984-85	16,796 (Step 3 1/2)	17,588 (Step 5)
1985-86	19,000 (Step 6 1/2)	19,500 (Step 8)
1986-87	20,628 (Step 7 1/2)	21,068 (Step 9)

The remaining issue in the case arises from the fact that the Board and the EOEA negotiated new salary guides for the 1983-84 and 1984-85 schools years (Exhibit J-1), and the 1985-86 and 1986-87 school years (Exhibit J-2), which consisted not only of changes in dollar amounts, but also changes in format whereby the total number of steps was reduced and the reference to steps, as such, was replaced with what the parties now call years of experience. Hossic and Bloom contend that when they were put back on the guide in 1984-85, they actually were placed at a level one below that on which they should have been placed, and since then have lagged one level behind each school year.

Testimony

Testimony with respect to development of the salary guides in question was presented on the Board's behalf by Dr. Kenneth D. King, assistant superintendent for personnel and labor relations. King has been employed in that position for approximately 15 years and since 1979 has been the chief spokesperson for the Board during collective negotiations with the EOEA. He explained that because the number of steps on the teachers' guide was increasing each year, the Board and the EOEA determined during

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1982-83 to change to the format of the guide to avoid the constant addition. Thus, beginning in 1983-84, and continuing in 1984-85, teachers who received increases did not move "up" on the guide. Rather, they moved horizontally across a newly formatted guide and thereby ended up at a "lower" numerical step or experience level in 1983-84 than the year before, but with an increase in salary. Although the same format was followed for the 1985-86 school year under the successor contract, a new factor was introduced at that time stemming from the adoption by the Legislature of the $18,500 minimum starting salary for teachers. See, L. 1985, c. 321. Beginning in September 1985, the Board and the EOEA compressed the first three steps of the guide so that any teacher employed in the district for four years or less received the same $18,500 salary. Adjustments then had to be made throughout the rest of the guide because of that consideration.

As a result of the parties' efforts to avoid annual step additions to the guide, the BA guide for 1985-86 and 1986-87 ends at step 20 (Exhibit J-2). In 1982-83 it had ended at step 19. Thus, the guide increased by only one step in four years. Had the previous practice prevailed, it would likely have ended in step 23 by 1986-87.

With specific reference to Hossic and Bloom, King pointed out that their increments were withheld during 1983-84, and they received the same salary that they received in 1982-83. Since the guide format was changed in 1983-84. both actually were paid "off guide" during 1983-84. In other words, their salaries that school year did not actually match any step or level on the new guide since they were "frozen" at their 1982-83 levels.

With respect to Hossic, in 1983-84 she technically was placed at step 4 1/2 of the salary guide, but because her increment had been withheld she was paid the same salary

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she received in 1982-83, $14,391.[3] For 1984-85, like all other teachers in the district, she moved laterally, but because of the compression of steps and the change in format she was placed on step 3 1/2 of the new guide at an increase in salary to $16,796. Similarly, Bloom, who had been held at a salary of $15,199 for 1983-84, was technically placed on step 6 of the guide that school year,[4] and also moved laterally across the guide in 1984-85 but was placed on step 5 because of the same compression principle. Her salary on step 5 was increased to $17,588. In 1985-86, Bloom and Hossic "jumped" three steps, to steps 6 1/2 and 8, respectively, as did all of their colleagues.

It is the contention of the EOEA on behalf of Hossic and Bloom that when they were moved onto the 1984-85 guide, after having had their increments withheld during 1983-84, they each should have been placed at one step higher than that on which they were placed. Specifically, Hossic claims that in 1984-85 she should have been placed at step 4 1/2, not 3 1/2, and paid $17,324, not $16,796, a differential of $528 for that school year. Bloom claims that she should have been placed on step 6, not step 5, and paid $18,116, not $17,588, a difference for that school year of $528 as well. Both also claim, of course, that for the succeeding school years, 1985-86 and 1986-87, they have continued to lag behind in respect to their proper place on the guide.

Although there was no dispute about the particular years of experience each teacher had, both Hossic and Bloom briefly testified in order to buttress their claims. Hossic commenced her regular employment in East Orange in September 1981 at step 3 1/2 of the guide since she previously had served as a substitute teacher in the district. Bloom commenced her employment a year earlier, in September 1980, at step 4 of the guide since she too had previous teaching experience. Thus, Bloom has one more year of salary guide credit than Hossic, which accounts for the salary differential between the two.

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[3]The actual salary for step 4-1/2 on the new 1983-84 guide was $15,804 (Exhibit J-1).

[4]The actual salary for that step on the new 1983-84 guide was $16,554 (Exhibit J-1).

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Discussion and Findings of Fact

At issue, then, is whether the particular placement of each of the teachers onto the regular salary guide in 1984-85 was proper. Having reviewed the evidence and testimony in this case, together with the posthearing submissions, I believe for the reasons which follow that their placements were proper, the claims for relief should be rejected and the petition should be dismissed.

Hossic and Bloom maintain that even in accordance with King's own testimony, teachers were to move two steps between 1983-84 and 1984-85, and that they were moved only one step for that school year. Thus, Hossic claims she should have gone to step 5 1/2 for the 1984-85 school year because she was at step 4 1/2 for the 1983-84 school year, and Bloom claims she should have gone to step 7 for the 1984-85 school year because she was at step 6 for the 1983-84 school year.

The Board, on the other hand, argues that the proper way to analyze the progress of the two teachers is to compare their movement with that of a teacher whose increment was not withheld in 1983-84. Thus, with respect to the 1984-85 salary guide, every teacher in the district remained on the same step as he or she was on in 1983-84 because of the format change. Thus, since Hossic would have been on step 3 1/2 and Bloom would have been on step 5 in 1983-84 (recalling that they were "off guide" because their increments were withheld), then for 1984-85 they, too, remained on the same step they were on the previous school year — step 3 1/2 in the case of Hossic and step 5 in the case of Bloom. Thereafter, each petitioner moved in the same progression as any other teacher, three units higher on the 1985-86 guide and one unit higher on the 1986-87 guide. Accordingly, each of the two actually lagged only one level or unit behind her colleagues whose increments were not withheld, even though the actual step or level placement did not reflect a normal numerical progression because of the consolidation which took during collective negotiations.

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As the Board aptly observed in its posthearing memorandum, the fact that Hossic and Bloom were moved "back a step" is of no meaningful significance in light of the fact that the 1983-84 and 1984-85 guides were restructured. While the changes in the format of the negotiated salary guide create a propensity for introducing confusion into this case, a close examination of what actually occurred reveals that neither Hossic nor Bloom was doubly penalized as they claim. Each remained during 1983-84 at the salaries they had received in 1982-83. Each was then moved in normal progression up (or across) the new guides during 1984-85 and thereafter, as were their fellow teachers.

Accordingly, I herewith make the following Findings of Fact:

1. Janis Hossic was initially employed on a regular basis by the respondent in September 1981 at a salary of $13,238, plus an $87 stipend for a total of $13,325. She was placed on step 3 1/2 of the then existing salary guide.

2. For the 1982-83 school year, Hossic moved to step 4 1/2 of the guide at a salary of $14,297, plus a $94 stipend for a total of $14,391.

3. Hossic's increment and increase were withheld for the 1983-84 school year and she was paid during that school year at the same rate she was paid during the 1982-83 school year, $14,391.

4. For the 1984-85 school year, the Board and the EOEA restructured the salary guide and it was agreed that teachers would remain on the same step or level in 1984-85 as they were on for the previous year, but at an increase in salary.

5. For the 1984-85 school year, Hossic advanced in a fashion identical to any other teacher in the district, and such advancement has continued to date. Although the actual numerical step or level has differed because of the

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compression in the number of steps on the guide which occurred as a result of collective negotiations, Hossic has still progressed in a manner identical to that of her colleagues and her placement on step 3 1/2 during 1984-85, step 6 1/2 during 1985-86 and step 7 1/2 during 1986-87 was and is correct.

6. Linda Bloom was initially employed on a regular basis by the respondent in September 1980 at a salary of $12,930 plus a $92 stipend, for a total of $13,015. She was placed on step 4 of the then existing salary guide.

7. For the 1981-82 school year, Bloom moved up to step 5 of the guide at a salary of $13,980, plus a $92 stipend for a total of $14,072.

8. For the 1982-83 school year, Bloom was paid a salary of $15,100 plus a stipend of $99 for a total of $15,199. She was placed on step 6 of the then existing salary guide.

9. Bloom's increment and increase were withheld for the 1983-84 school year and she was paid during that school year at the same rate she was paid during the 1982-83 school year, $15,199.

10. For the 1984-85 school year, Bloom was advanced in a fashion identical to any other teacher in the district, and such advancement has continued to date. Although the actual numerical step or level has differed because of the compression in the number of steps on the guide which occurred as a result of collective negotiations, Bloom has still progressed in a manner identical to that of her colleagues and her placement on step 5 during 1984-85, step 8 during 1985-86 and step 9 during 1986-87 was and is correct.

Accordingly, since both Hossic and Bloom were properly placed on the appropriate steps of the salary guides in the school district during all the school years in

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question in this case, it is hereby **ORDERED** that their claims for additional pay because of an alleged double penalty must be rejected and the petition of appeal should be **DISMISSED.**

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

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

November 17, 1986
DATE

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

NOV 2 0 1986
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

List of Witnesses

1. Janis Hossic

2. Linda Bloom

3. Dr. Kenneth King

List of Exhibits

No.	Description
J-1	Teacher salary schedules, 1980-81 through 1984-85
J-2	Teacher salary schedules, 1985-86 and 1986-87

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EAST ORANGE EDUCATION ASSOCIATION, on behalf of JANIS HOSSIC AND LINDA BLOOM,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon review of the record in this matter, the Commissioner concurs with the conclusions of the ALJ and adopts the initial decision as the final decision in this matter for the reasons stated therein.

COMMISSIONER OF EDUCATION

December 19, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2290-86
AGENCY DKT. NO. 59-2/86

PHILLIP T. FLOOD,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,
Respondent.

Robert M. Schwartz, Esq., for petitioner

William A. Massa, Esq., for respondent

Record Closed: October 1, 1986 Decided: November 10, 1986

BEFORE **STEPHEN G. WEISS**, ALJ:

Petitioner, Phillip T. Flood, is presently employed by the respondent in the position of assistant director of Title I/Basic Skills, with tenure. He alleges that by virtue of his tenure and seniority he actually is entitled to the vacant position of director of Title I/Basic Skills. The Board denies Flood is eligible to claim tenure as director since he never had overall supervisory responsibility for the operation of the department, except for a 60-day period during 1982 when he served as acting director. The Board also maintains that petitioner cannot obtain tenure as a director since he has not qualified by competitive examination, a requirement imposed by the collective negotiations agreement between the Board and Flood's negotiating representative with respect to certain designated promotional positions.

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In late March 1986 after the Board filed its answer to the petition, the file was transmitted by the Commissioner to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. A prehearing conference was conducted by the undersigned on May 14, 1986, and a prehearing order was entered on May 19, 1986. That order identified two issues:

1. Was the petition time barred under N.J.A.C. 6:24-1.2?
2. If it was not, did Flood's service in the district entitle him to claim tenure and seniority in the position of director/Basic Skills?

A hearing was held before me on August 21, 1986, and the record closed on October 1, 1986, following the receipt of a reply memorandum from respondent. At the outset of the hearing, the Board withdrew its contention that the petition was time barred pursuant to N.J.A.C. 6:24-1.2. Accordingly, that issue will not be the subject of any further attention.

STIPULATION OF FACTS

A joint stipulation was admitted in evidence prior to the taking of testimony (Exhibit J-1). As modified, it sets forth the following undisputed facts:

1. Petitioner has been employed by the respondent since 1966.

2. Petitioner was appointed acting assistant director of Title I/Basic Skills on December 8, 1980.

3. On August 1, 1982, petitioner was appointed acting director of Title I/Basic Skills and served in said capacity until November 22, 1982, when he was transferred to a teaching position.

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4. A petition of appeal challenging this transfer then was filed by Flood. The Commissioner affirmed an initial decision which recommended that since petitioner had acquired tenure as assistant director, he should be reinstated to that position with back pay. See, Flood v. Bd. of Ed. of Jersey City, OAL DKT. EDU 4453-83 (December 1, 1983), affirmed, Comm'r of Ed. (Jan. 17, 1984) (hereinafter "Flood I").

5. On February 15, 1984, petitioner was reinstated as assistant director of Title I/Basic Skills and has held that title since then.

Pertinent portions of the procedural history and findings of fact made by Judge Springer in Flood I are set forth verbatim below.

> This is an appeal by a teaching staff member who complains that his dismissal from a supervisory position violated his tenure rights under N.J.S.A. 18A:28-6(c). Originally petitioner Philip Flood ("Flood") instituted his claim for relief in the Superior Court, Chancery Division, but on March 23, 1983 the trial judge transferred the tenure issue for determination by the Commissioner of Education. Thereafter, on May 16, 1983, Flood filed a verified petition with the Commissioner of Education, in which he alleged that his transfer to nonsupervisory duties contravened his tenure rights in the position of Assistant Director of Title I/Basic Skills. Respondent Jersey City Board of Education ("Board") denied that Flood had attained tenure in any supervisory position. The Commissioner of Education transferred the matter to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. A hearing was held on September 12, 1983. Upon receipt of memoranda of law, the record closed on October 18, 1983.
>
> . . .
>
> On December 8, 1980, the Board appointed Flood to the position of Acting Assistant Director of Title I/Basic Skills. Despite the designation "acting" in Flood's title, the job of Assistant Director was vacant at the time of Flood's appointment. In other words, Flood was not merely substituting for another person absent for sick leave, maternity leave, or for other reasons. Nobody besides Flood was assigned to the

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position of Assistant Director of Title I/Basic Skills. Among his duties, Flood evaluated the performance of coordinators and staff in the Title I program. His duties also involved preparation of the yearly budget, evaluation of existing policies and procedures, and submission of periodic reports required by the Department of Education. Flood's annual period of employment was the regular school year consisting of ten months. In addition, he performed further services during July of 1981 and 1982, for which he received extra pay each month at the rate of 1/10th of his annual salary. Since this summer employment was clearly above and beyond his regular duties, Flood does not seek to add this time to his total service for purposes of tenure.

Starting on August 1, 1982, the Board promoted Flood to the position of Acting Director of Title I/Basic Skills. Again Flood was the only person assigned to this position, even though his title was "acting" Director. Unlike the assistant directorship, the position of Director of Title I/Basic Skills is an 11-month job. Thus Flood was required to work during August 1982 as part of his regular duties and did not receive any additional remuneration outside of his usual salary. It is this month of summer employment which Flood wants to consider in computing his tenure eligibility. Flood's duties as Acting Director were essentially the same as the duties he had previously performed as Acting Assistant Director, except that he now had overall responsibility for the operation of the Title I and Basic Skills programs. He served as Acting Director of Title I/Basic Skills for approximately three months until November 22, 1982, when the Board removed him from that position and reassigned him to other duties.

Both parties agree that Flood's relevant employment experience may be summarized by the following table:

Academic Year	Position	Dates	Days Worked
1980-81	Acting Ass't Dir.	12/08/80-06/30/81	121
1981-82	Acting Ass't Dir.	09/08/81-06/30/82	180
1982-83	Acting Director	08/01/82-11/22/82	60
		Total	361

Flood I, at 1-4.

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Following his recitation of the background circumstances, Judge Springer analyzed the applicable law and held that Flood's 361 days of employment between December 8, 1980 and November 22, 1982, entitled him to claim tenure in the position of assistant director. In reaching that conclusion, Judge Springer determined that even though petitioner's total service was always in an "acting" capacity, it nevertheless was countable toward tenure acquisition since there was a "true vacancy" in the assistant director's position and Flood therefore was not simply replacing someone else temporarily. Thus, the Board was ordered forthwith to reinstate Flood to the position of assistant director, with back pay, and the Commissioner adopted the findings and conclusions as his own.

TESTIMONY FOR PETITIONER

Flood testified that when he became acting assistant director of Basic Skills, the person holding the position of director was Donald Howard. When Howard's employment was terminated, effective June 30, 1981, no one was appointed to succeed him. However, according to Flood, he took over and performed all of the duties listed in the job description for director. As he put it, although his title was acting assistant director, he no longer "assisted" a director; rather, it was he who actually carried out the essential duties of that position and administered the department's various activities.

On November 22, 1982, Flood was removed and until February 1984, served in a lower position while his litigation was being pursued. When Flood was reinstated, no one was holding the position of director; it was he who again carried out all of the duties of the director. For the remainder of the 1983-84 school year, Flood reported to Mr. Franklin L. Williams, who was then the deputy superintendent of schools. Thereafter, he reported first to Dr. Henry Przystup, who was then the superintendent, then to Mr. James Jencarelli, who briefly took over from Przystup as superintendent; and, beginning in September 1985, to Dr. Pablo Causell, the individual who the previous month had been named assistant superintendent in charge of Basic Skills and Bilingual Education.

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In the spring of 1985, Flood had filed a grievance with respect to a certain salary claim. In a memorandum dated May 16, 1985 from Board counsel to the person in charge of personnel in connection with this claim, it was noted that from September 1981 to the time of the memorandum, Flood ". . . assumed de facto all of the duties of Director, Basic Skills." The petitioner points to this language to support his tenure claim in this case.

In January 1986, Flood was directed to report directly to Causell, and the Board adopted a resolution during that month as follows:

> WHEREAS, the position of Director of Basic Skills has not been filled since September 1, 1983,* and
>
> WHEREAS, the Assistant Superintendent in Charge of Basic Skills and Bi-Lingual Education [Causell] has assumed all duties and obligations of said position since September, 1985, now, therefore,
>
> BE IT RESOLVED, that the Assistant Superintendent in Charge of Basic Skills and Bi-Lingual Education continue to perform all such duties as those of the Director of Basic Skills until further action of this Board of Education (Exhibit P-8).

Despite the language of this resolution, Flood maintained that from September 1985 to January 15, 1986, it was he, not Causell, who carried out the duties of the position of director. His duties included observing the staff, gathering the budget and other information and, in general, doing all of those things listed in the director's job description. Causell, he said, performed none of those duties prior to January 1986.

During his cross-examination, Flood repeated that while he was in the title of assistant director, he was actually carrying out the duties and responsibilities of the director, since no one was filling that title. While he did report to others, this was simply to provide updates as to the activities of the Basic Skills program. In particular, Flood insisted that it was he, not Williams, who evaluated department personnel (Exhibit P-7), and it was he who prepared various resolutions for submission to the Board (Exhibits P-9 through P-12).

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*The record does not reflect the name of the person who presumably succeeded to the director's position after Flood was removed in November 1982 as acting director.

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TESTIMONY FOR RESPONDENT

The Board presented the testimony of two witnesses, James Jencarelli, formerly the superintendent of schools and presently deputy superintendent, and Franklin L. Williams, formerly the deputy superintendent and the person who succeeded Jencarelli as superintendent of schools.

Jencarelli had became deputy superintendent in mid-August 1985, having served as superintendent for about a month and one half prior thereto. Before that, he served in a variety of senior administrative positions in the school district. Flood, he said, briefly held the position of acting director but was required by Board resolution to vacate the position because he had not complied with the promotional examination procedure required for director positions by the collective negotiations contract between the Board and the supervisors' and administrators' unit (Exhibit R-2).* The relationship between the contract and the appointment of persons to various promotional positions has been, according to Jencarelli, the subject of continuing court litigation and contract arbitration. Jencarelli insisted that Flood was the assistant director, never the director, since he constantly had to report to others who were carrying out the responsibilities of director pending a resolution of the arbitration dispute. Jencarelli also noted that although he, himself, has no direct supervision over Flood, at staff meetings he attended since September 1985, it was Causell who reported with respect to all of the items listed on the job description for the director.

The major witness for the respondent was Franklin L. Williams, presently superintendent of schools. According to Williams, Flood never functioned other than as assistant director; either Pryzstup, Jencarelli, Causell or himself were in charge of the Basic Skills area while Flood was assistant director. Williams also said that it was he, not Flood, who evaluated supervisors in the department and that Flood made no critical decisions unless he first came to Williams to discuss or review them. Although Williams

*This and all other Board exhibits were received after the close of the hearing. They will be discussed infra.

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agreed that Flood was the one who developed the department's budget, Flood still had to bring it to Williams for review.

During the course of the hearing, I asked counsel to provide me with certain missing information which I believed would help clarify some of the testimony. To that end I directed counsel for the Board to provide me with copies of any evaluations performed by Williams with respect to personnel in the Basic Skills area during the time petitioner held the title of assistant director, acting assistant director or acting director. Also, since litigation concerning the contractual promotional examination procedure was mentioned throughout the testimony, especially by Jencarelli, I directed Board counsel to provide me with a July 8, 1986 letter decision rendered by Judge Tarleton in the Superior Court, Hudson County. The Board had argued that the decision is directly related to petitioner's contention that he is entitled by virtue of tenure and seniority to be designated as the director even though he has never complied with the contractual procedure. Also, in response to my requests, counsel for petitioner provided me with job descriptions for the positions of "assistant director of Basic Skills" and "director of Basic Skills," together with copies of evaluations performed by Flood. These have been marked by me as Exhibits P-16, P-17 and P-18(a) through P18(e).

Counsel for the Board subsequently submitted the letter decision of Judge Tarleton, dated July 8, 1986, in the case of Jersey City Ed. Ass'n, Inc. v. Bd. of Ed. of Jersey City, Superior Court of New Jersey, Chancery Division, Docket No. C-3215-86 (Exhibit R-19). The Board also attached as exhibits to its posthearing brief, 18 additional items which included the initial decision by Judge Springer in Flood I, Board resolutions and various memoranda by and between administrative personnel in the school district. Counsel for petitioner objected to 13 of those items on the ground that they represented an effort by the Board to reopen the hearing and to submit data not solicited by the court. I agree with counsel for petitioner and will reject all items except those which I requested or to which no objection was lodged. Specifically, then, I will consider as additional evidence in this case the following attachments to the posthearing brief of the Board: Exhibits R-1, R-2, R-3, R-10, R-11, and R-17. Pursuant to the objection made by counsel for Flood, I will reject consideration of Exhibits R-4, R-5, R-6, R-7, R-8, R-9, R-12, R-13,

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R-13a, R-14, R-15, R-16, and R-18.

DISCUSSION AND FINDINGS OF FACT

Not unexpectedly, much of the testimony concerned the duties Flood performed while in the title of "assistant director" and the nature of his relationship to his superiors, especially Williams. However, I believe equal attention must be given to the impact of the ongoing litigation with respect to the requirement of a promotional examination to qualify for various job titles, including director. The Board, of course, submitted Judge Tarleton's July 1986 decision for the express purpose of supporting its contention that the failure by Flood to comply with the contract constitutes a separate and independent basis to reject his claim of tenure.*

In his letter decision, Judge Tarleton made reference to the fact that in Jersey City persons had been appointed to promotional positions without following the dictates of the collective negotiations agreement, and that by virtue of their length of service in those positions, some of those persons had acquired tenure which could not be set aside. As he noted, the Board's refusal to comply with an arbitration decision in August 1982 requiring compliance with the contractual competitive examination procedure "has already caused other promotional applicants the opportunity to achieve those positions." Thus, Judge Tarleton held that employees whom the arbitrator found in a March 1986 decision to have likewise been appointed to a promotional position without a competitive examination should forthwith be removed in order to "avoid a repetition of what has already occurred—persons not entitled to promotions obtaining tenure . . . ." (Exhibit R-19, p. 13). The Board argues that given Judge Tarleton's decision, permitting Flood to claim tenure as director would perpetuate the unfortunate situation which both the arbitrator and Judge Tarleton deplored. I agree.

*The resolution of November 22, 1982 which removed Flood (Exhibit R-2) expressed the Board's concern that he was acquiring time toward tenure as assistant director despite not having qualified according to the contract. Judge Springer's decision that he had such tenure, and the Commissioner's affirmance, revealed that the action came too late. It does not appear from the initial decision that the Board raised the contract question; at least it was not discussed.

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In order to be appointed director of Title I/Basic Skills, a competitive promotional examination procedure established in the collective agreement must be followed. As noted, Flood's removal in November 1982 was precisely the product of the Board's concern that if he continued as acting assistant director or acting director it might give him a claim to tenure without ever having complied with the examination process. Indeed, this was not an imagined "threat" since, as a result of the Commissioner's decision in Flood I, petitioner was held to have obtained tenure as assistant director. It would add insult to injury to allow Flood to now claim tenure as director as well and create another situation wherein a person obtains tenure in a promotional position in contravention of the collective agreement.

In case the Commissioner should determine that my reliance on the letter and spirit of Judge Tarleton's decision to deny tenure as director to Flood is not appropriate and that, irrespective of the contractual requirements, consideration must be given to this issue as well, I will address the issue of whether or not the precise requirements of the statute actually were met by Flood to entitle him to clain tenure (certification and time in service) Based upon my review and consideration of the evidence in the case as to that issue, I must continue to reject Flood's claim to tenure as director.

There is no doubt from the testimony of Williams and, to a lesser extent, Jencarelli, that Flood was subordinate to the deputy superintendent with respect to the operation of the Basic Skills Department. Although Williams was unable to produce any written evidence to support his contention that the Board, or Superintendent Ross, specifically delegated responsibility for the department to him, Williams' testimony still reveals that Flood was not in charge. Preparation of the department's budget, and the performance of evaluations of various departmental personnel does not convert an assistant director into a director. While it is true that in May 1985 a Board attorney referred to the fact that Flood had "assumed de facto all of the duties of Director, Basic Skills" (Exhibit P-5), that statement is not binding on the Board, nor should more be read into it than is deserved. That memorandum stemmed from a limited grievance over a salary claim and should be confined to that context. It is clear that the Board's legal department was not being asked to consider whether Flood's activities in the title of

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assistant director were such as to qualify him by virtue of tenure and/or seniority to the position of director. This is especially apt when one takes into account Flood's removal in 1982 because of concern about the promotional examination requirement, a continuing source of dispute in the school district.

What seems to have happened in this case likely occurs in many circumstances when no one is filling a position directly above that of assistant. The creation of such a vacuum naturally results in the assistant having to be more active in carrying out responsibilities normally carried out by the director. It is often hard to identify for tenure purposes when the assistant "crosses the line" and becomes the de facto director. Only in retrospect, as occurred here, can one attempt to fill in the gaps and attempt to reconstruct what actually took place. In reviewing the evidence in this case, I must conclude that overall responsibility for the operation and administration of the Basic Skills program was never intended to be given to Flood, nor was responsibility exercised by him except for 60 days in 1982. While the Board could have taken more aggressive steps to draw the line of demarcation, that observation is made with the benefit of hindsight. In this case there was always a superior-subordinate relationship established between Flood and those above him sufficient to make plain that despite his various activities in the Basic Skills Department, petitioner should not be considered to have performed the duties of director. While it is not disputed that Flood did engage in the evaluation of subordinate personnel (Exhibits P-7, P-18a through P-18i), was instructed to advertise for bids for a summer instructional program (Exhibit P-9), circulated a request for proposals to develop a computer based system (Exhibit P-10), and submitted a Basic Skills application (Exhibit P-11, P-12, P-13), these activities do not provide an adequate basis to find that Flood was actually performing as director. Indeed, in his initial decision in Flood I, Judge Springer observed that it was only upon his designation as acting director in August 1982 that Flood "now had overall responsibility for the [program]." Flood I, at 3 (emphasis added). Later, Judge Springer referred specifically to the fact that the "major difference" between the two positions was that the director had "more . . . responsibility over the same programs." Flood I, at 7. In short, the jobs were not identical.

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In order to be appointed director of Title I/Basic Skills, a competitive promotional examination procedure established in the collective agreement must be followed. As noted, Flood's removal in November 1982 was precisely the product of the Board's concern that if he continued as acting assistant director or acting director it might give him a claim to tenure without ever having complied with the examination process. Indeed, this was not an imagined "threat" since, as a result of the Commissioner's decision in Flood I, petitioner was held to have obtained tenure as assistant director. It would add insult to injury to allow Flood to now claim tenure as director as well and create another situation wherein a person obtains tenure in a promotional position in contravention of the collective agreement.

In case the Commissioner should determine that my reliance on the letter and spirit of Judge Tarleton's decision to deny tenure as director to Flood is not appropriate and that, irrespective of the contractual requirements, consideration must be given to this issue as well, I will address the issue of whether or not the precise requirements of the statute actually were met by Flood to entitle him to clain tenure (certification and time in service) Based upon my review and consideration of the evidence in the case as to that issue, I must continue to reject Flood's claim to tenure as director.

There is no doubt from the testimony of Williams and, to a lesser extent, Jencarelli, that Flood was subordinate to the deputy superintendent with respect to the operation of the Basic Skills Department. Although Williams was unable to produce any written evidence to support his contention that the Board, or Superintendent Ross, specifically delegated responsibility for the department to him, Williams' testimony still reveals that Flood was not in charge. Preparation of the department's budget, and the performance of evaluations of various departmental personnel does not convert an assistant director into a director. While it is true that in May 1985 a Board attorney referred to the fact that Flood had "assumed de facto all of the duties of Director, Basic Skills" (Exhibit P-5), that statement is not binding on the Board, nor should more be read into it than is deserved. That memorandum stemmed from a limited grievance over a salary claim and should be confined to that context. It is clear that the Board's legal department was not being asked to consider whether Flood's activities in the title of

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Accordingly, for the reasons hereinabove set forth, the petition should be **DISMISSED.**

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

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

November 10, 1986
DATE

Stephen G. Weiss
STEPHEN G. WEISS, ALJ

NOV 12 1986
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

Mailed To Parties:

NOV 14 1986
DATE

Ronald J. Sc. Parker +S
FOR OFFICE OF ADMINISTRATIVE LAW

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PHILLIP T. FLOOD,

PETITIONER,

V.

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

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

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

Petitioner has filed exceptions to the initial decision and the Board, in its reply to those exceptions, argues that they have been untimely filed pursuant to the 10-day filing provisions set forth in N.J.A.C. 1:1-16.4a. The Commissioner does not agree. The 10-day filing requirement for petitioner's exceptions would have expired on Thursday, November 27, 1986. However, that date coincided with Thanksgiving Day which was a State holiday. All State agencies were closed on November 27, as well as Friday, November 28, 1986.

Consequently, the State Department of Education remained closed until Monday, December 1, 1986, the day on which petitioner's exceptions were hand-delivered and received by the Bureau of Controversies and Disputes on behalf of the Commissioner. For the foregoing reason, it is determined that petitioner did comply in a timely fashion with the applicable provisions of law.

In his exceptions, petitioner argues that the facts in the record of this matter clearly support his tenure claim to the position of Director of Basic Skills. He maintains that while he served in the title of Assistant Director of Basic Skills, he nevertheless had performed all the duties of Director for the requisite period of time contemplated by the provisions of N.J.S.A. 18A:28-6.

Also, petitioner continues to rely on those prior decisions of the Commissioner in Boeshore, supra, and Page, supra, which establish that tenure rights are determined by the duties performed and not necessarily by the title given to the position. Petitioner, in his exceptions, relies on the following factual circumstances contained in the record of this matter which he claims were erroneously interpreted by the ALJ in his findings and conclusions:

> ***On July 1, 1981, the then Director of Basic Skills/Title I, Donald Howard, was terminated from his position. No one was appointed to succeed him. Furthermore, Petitioner who served as the Assistant Director effectively took over

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all of the duties listed in the job description for the position of Director. From July 1, 1981 until August, 1982, though having only the title of Assistant Director of Basic Skills/Title I, Petitioner performed the duties of the Director. In August, 1982 his role became more formalized when he was named the Acting Director of Basic Skills. He served in said capacity until November, 1982. In November, 1982 Petitioner was terminated from his position. He contested his dismissal before the Commissioner of Education. As already noted above, the Commissioner found that Petitioner had acquired tenure as an Assistant Director and accordingly, was entitled to reinstatement in this capacity. Consequently, on February 15, 1984 the Respondent Board of Education reinstated Petitioner to the position of Assistant Director of Basic Skills.

When he was reinstated to the position of Assistant Director of Basic Skills there still was no one in the position of Director of Basic Skills. Therefore, Petitioner again carried out all of the duties of the Director. This was in accordance with the job description of Assistant Director duly adopted by the Respondent Board of Education. Paragraph 10 of the said job description authorizes the Assistant Director to "assume responsibility for overall operation of Title I program in the absence of the Director." Said job description was introduced as Plaintiff's Exhibit 1 and was not contradicted by the Respondent Board of Education.

Petitioner has continued to serve in the title of Assistant Director from February, 1984 until the present time. However, from February, 1984 until January, 1986 Petitioner also performed the duties of the Director of Basic Skills.

In his testimony, Petitioner testified that he performed all of the responsibilities found in the job description for Director of Basic Skills. He evaluated most of the personnel within the department. He was the individual designated to meet with parents in preparation for necessary applications to the Department of Education. Petitioner signed off on the applications -- a responsibility normally given to the Director. Petitioner was responsible for posting contracts. Further, evidence was submitted that demonstrated that the Petitioner was viewed by the county office as the administrator in charge of Basic Skills.

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(P-15). Petitioner performed these responsibilities throughout the period between February, 1984 and January, 1986, as well as September, 1981 through November, 1982.

Petitioner's testimony that he performed the duties contained in the job description for the position of Director of Basic Skills was virtually uncontradicted. Respondent attempted to put on its case through its Superintendent, Franklin Williams. While Mr. Williams testified that he performed the duties of the position of Director of Basic Skills, on cross examination he admitted that he did not perform the duties found in the job description for said position. He said he was too busy. He explained that the Respondent School District had abolished all Assistant Superintendent positions. As a result, he was given the responsibility of performing the duties that had previously been performed by no less than four Assistant Superintendents. Whatever involvement he had with the position of Director of Basic Skills, he delegated to Mr. Flood, the Petitioner.***

(Petitioner's Exceptions, at pp. 1-3)

Additionally, petitioner argues that the ALJ erroneously relied on the July 1, 1986 decision (R-19) of Judge Tarleton, Chancery Division, which confirms the arbitration award by Stanley Aiges. Arbitrator Aiges found in March 1986 that employees were appointed by the Board to promotional positions without a competitive examination in violation of the negotiated agreement between the Board and the Association. Petitioner claims that while Aiges determined in March 1986 that those affected persons should be removed from their promotional positions in order to avoid a repetition of claims to tenure in such positions, the ALJ improperly concluded that petitioner, who had previously satisfied the tenure provisions of N.J.S.A. 18A:28-6 for Director of Basic Skills, was to be denied his tenure rights because he had not passed the competitive promotional examination established by contractual agreement.

Petitioner maintains that his tenure rights to the position of Director of Basic Skills is statutorily protected pursuant to N.J.S.A. 18A:28-6 and may not be abrogated as the result of the above-referenced litigation disposing of the contractual issue regarding the requirement to take and pass a promotional examination.

The Commissioner has reviewed the exceptions filed by the parties in the instant matter. It is noted for the record that the title of Assistant Director of Basic Skills in which petitioner has been employed as of the date of the initial decision on November 10,

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1986, has since been awarded to Donald Howard by virtue of the Commissioner's decision in Donald D. Howard v. Board of Education of the City of Jersey City, Hudson County, decided by the Commissioner May 27, 1986, aff'd State Board October 1, 1986.

Consequently, the Commissioner observes that should petitioner not prevail in his tenure claim as Director of Basic Skills, he may not revert to the position he held as Assistant Director of Basic Skills but, rather, his tenure and seniority claim would entitle him to the former position he held as a teacher in the School District of Jersey City.

In rendering his determination herein, the Commissioner finds and determines that petitioner's exceptions to the initial decision warrant a reversal of the findings and conclusions of the ALJ for the reasons discussed below.

In the Commissioner's judgment, the evidence adduced in the record of this matter clearly establishes that petitioner, although employed in the title of Assistant Director of Basic Skills since the time he was reinstated by the Commissioner's earlier decision in Flood I, has actually served as de facto Director of Basic Skills from September 1, 1981 up to the time the Board created the new position of Assistant Superintendent of Bilingual Education and Basic Skills on January 15, 1986 (P-8). This newly created position subsumed all the functions of Director of Basic Skills and then became the overall responsibility of the then Assistant Superintendent of Bilingual Education.

It is clear that, as petitioner claims, all the duties and responsibilities contained in the job description of Director of Basic Skills (P-3) were performed "de facto" by him from September 1, 1981 through January 15, 1986. The aforementioned period of employment service is sufficient to satisfy the statutory provisions of N.J.S.A. 18A:28-6. The Commissioner views the action taken by the Board on June 27, 1984 (R-3) to abolish the position of Director of Basic Skills to be nothing more than a sham intended to deprive petitioner of his statutory claim to tenure as the Director of Basic Skills while at the same time it required him to fulfill the duties of said position. Consequently, the action taken by the Board on June 27, 1984 which purportedly abolished the position of the Director of Basic Skills (R-3) is hereby set aside.

Further evidence of the Board's illegal action in this regard stems from the advice the Board received from its legal counsel (P-5) which prompted its action on May 22, 1985 (P-6) whereby it recognized that petitioner was entitled to the salary differential between the positions of Assistant Director and Director of Basic Skills from September 1981 through May 16, 1985 (P-5). In taking such action the Board agreed with its counsel that petitioner had served as "de facto" Director of Basic Skills during the aforementioned periods of employment.

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The right of petitioner to be reimbursed the differential in salary from Assistant Director of Basic Skills to Director of Basic Skills is embodied in the provisions of N.J.S.A. 18A:16-11 which read:

> A person who holds de facto any office, position or employment in a school district and who performs the duties thereof shall be entitled to the emoluments and compensation appropriate thereto for the time the same is so held in fact and may recover therefor in any court of competent jurisdiction.

In view of the above, the Commissioner finds and determines that petitioner had clearly acquired a tenure status in the position of Director of Basic Skills pursuant to N.J.S.A. 18A:28-6 prior to the time the arbitration award had been rendered in March 1986 and may not now be defeated by the Board's reliance on that decision which was subsequently affirmed by the decision of Judge Tarleton on July 1, 1986.

While entering a finding and determination that petitioner had acquired a tenure status in the position of Director of Basic Skills pursuant to the provisions of N.J.S.A. 18A:28-6, his claim to continued employment service in said position after January 15, 1986 is denied by virtue of the action taken by the Board (P-8) which created a new position subsuming the duties of Director of Basic Skills and assigning them to the Assistant Superintendent of Basic Skills and Bilingual Education.

In arriving at this determination the Commissioner cannot ignore the fact that there is a long history of litigation involving the Jersey City Board of Education's attempts to manipulate administrative and supervisory positions which have worked to its own detriment as well as the detriment of its employees and the public. The Commissioner concludes that the Board's failure to comply with the statutory and regulatory scheme for the employment of appropriately certified persons with unambiguous job descriptions and approved position titles (N.J.A.C. 6:11-3.6) by the Hudson County Superintendent of Schools, has resulted in costly litigation which adversely affected the internal management and operation of the Jersey City School System. See Figurelli v. Board of Education of the City of Jersey City, decided by the Commissioner July 23, 1984, aff'd State Board December 5, 1984; Margaret DiNardo v. Board of Education of Jersey City, decision on remand, January 19, 1984, aff'd State Board August 8, 1984; Howard, supra; Flood v. Board of Education of the City of Jersey City (Flood I), decided January 17, 1984; and Przystup v. Board of Education of the City of Jersey City, decided June 23, 1986.

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In an effort to eliminate the perpetuation and proliferation of unassigned job titles, imprecise and duplicative job descriptions in which the Board has engaged, the Commissioner is compelled to reissue that directive which he laid down in Przystup:

> ***[T]he Commissioner determines it necessary to direct the county superintendent to conduct a comprehensive review of all supervisory and administrative positions in the district, specifically their titles, duties, certification and job descriptions to assure that all are in compliance with relevant statutes and regulations. (Slip Opinion, at pp. 17-18)

Accordingly, in view of the findings and determinations rendered herein, the Commissioner hereby reverses the initial decision and holds that petitioner has acquired a tenure status in the position of Director of Basic Skills pursuant to N.J.S.A. 18A:28-6, notwithstanding the fact that he did not pass the competitive examination for promotion as required by the negotiated contract agreement.

It is further found and determined that petitioner's employment in the tenured position of Director of Basic Skills was effectively terminated as of January 15, 1986 when the Board created the new position of Assistant Superintendent of Basic Skills and Bilingual Education and assigned the duties of said position to Assistant Superintendent Clausell.

Therefore it is directed that petitioner be appropriately compensated for any periods of employment in which he served as Director of Basic Skills up to the date of the Board action (P-8) of January 15, 1986.

In all other respects, however, it is directed that petitioner be reassigned to a position of employment to which he may be otherwise entitled by virtue of his tenure and seniority in the Jersey City School District.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 22, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3395-86
AGENCY DKT. NO. 154-5/86

S.T., ON BEHALF OF HER
MINOR CHILD, N.T.,
Petitioner,
v.
BOARD OF EDUCATION OF
THE CITY OF MILLVILLE,
CUMBERLAND COUNTY,
Respondent.

Joseph F. Shanahan, Esq., for petitioner

Frederick Jacob, Esq., for respondent (Jacob and Robinson, attorneys)

Record Closed: November 17, 1986 Decided: November 24, 1986

BEFORE NAOMI DOWER-LABASTILLE, ALJ:

S.T. petitioned the Commissioner of Education on behalf of her minor child N.T., alleging that the Board of Education of Millville failed to fully excuse N.T., pursuant to N.J.S.A. 18A:35-4.7, from the Family Life portion of her high school health course, failed to provide an appropriate alternative course, and penalized N.T. with onerous requirements, a failing grade and denial of credit. On May 21, 1986, the Commissioner transmitted the matter to the Office of Administrative Law (OAL) for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

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The matter was assigned to Administrative Law Judge (ALJ) August E. Thomas, who held a prehearing conference on June 5, 1986. On June 23, 1986, petitioner filed a motion for disqualification with affidavits, based on the ALJ's involvement as a hearing officer in a 1977 school board election recount case, during which ALJ Thomas refused to permit petitioner's counsel to read a statement and threatened to eject him. ALJ Thomas denied the motion, stating he had no recollection of the incident. Petitioner appealed to the Acting Director of the OAL, Ronald Parker, who upheld the ALJ's determination on August 14, 1986. Subsequently, ALJ Thomas announced his retirement from service and the matter was reassigned to ALJ LaBastille.

The undersigned ALJ held a second prehearing on September 23, 1986, and a hearing on October 27, 1986, in Millville. A list of the exhibits introduced into evidence at the hearing is appended to this decision. The record closed upon receipt of the briefs on November 17, 1986.

THE TESTIMONY

N.T. and her mother, S.T., testified. The Board offered testimony of N.T.'s health teacher, Christie Thompson, the high school librarian, Charles Brozina, and the library aide, Phyllis Smerski. Mrs. Thompson has a Master's degree (1981) and has been a teaching staff member since 1978, teaching Physical Education and Marriage and Family Living (three years). Petitioner expected that the principal, Warren Elliott, would be called by the Board. When he was not called, petitioner requested reopening of her case and called Elliott as a witness. Petitioner called S.T. for rebuttal. While there was a strong difference of opinion between the parties as to the characterization of the facts and the legal issues, the underlying facts testified to by each of the witnesses were not controverted, and all the witnesses were credible.

FINDINGS OF FACT

1. N.T. was a junior at Millville Senior High in the 1985-86 school year and was required to take a course in health education, the third marking period of which dealt with Marriage and Family Living.

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2. Since S.T. had disputed the participation of N.T. in the drug education portion of the health course which was given in the first marking period of her junior year, she was advised by the principal about the course. She was told it was to prepare the students to be good spouses and parents, and to teach them household budgeting, laws pertaining to marriage and divorce and the like. She asked to have the course guidelines and textbook sent to her.

3. N.T. attended about 10 classes in the third marking period before telling Mrs. Thompson that she no longer wanted to be in the class. Mrs. Thompson was aware of the reason since Principal Elliott had told her N.T.'s parents might find some classroom material objectionable. The health teacher had sent copies of the topics and textbook home at the principal's request.

4. Mrs. Thompson had advised N.T. that if she found anything objectionable discussed in class, she could excuse herself at any time and go into a room two doors away. If a student opted out for a day or two, no substitute assignment would be given, but if an entire course were objected to, Thompson would assign independent study.

5. On February 4, 1986, S.T. officially requested that her daughter be excused from the Marriage and Family Living classes on grounds that the teaching of certain material in it violated the family's religious and moral beliefs. The principal consulted the County Superintendent's office but no specific procedure was prescribed for the excusal, and he felt compelled to comply with the statutory requirements to have N.T. take health education in some form.

6. Mrs. Thompson sat down with N.T. and went over guidelines for the alternative independent study she would be carrying out in the school library. N.T. was asked to make a list of eight topics related to marriage and family living which she would research and on which she would write a five-page report with bibliography. N.T. was asked to include something related to money-management and budgeting.

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7. The initial list of topics prepared by N.T. and her teacher included the following, but N.T. was told she could opt for any other health-related topic:

1. Marriage laws and customs in other countries and New Jersey
2. Budgeting - itemized list for a family
3. Child care - birth to age five, stages of development
4. Multiple births
5. Adoption - laws, statistics
6. Comparisons of different religions and their wedding ceremonies
7. Contrast and compare dating trends (past & present)
8. Parenting

8. Although N.T. did not express objection to going to the library or to specific topics, her mother felt that her daughter was being banished to the library and asked to study basically the same things to which she objected. She felt that "the library was probably tainted" since the textbooks were tainted. She gave as an example of unacceptable material certain quotations from Chapter 4 of the textbook "Marriage and the Family," which related Masters and Johnson report items describing kinds of sexual stimulation and activity (Exhibit P-1).

9. Shortly after N.T. was sent to the library for independent study, Mrs. Thompson gave N.T. a list of 15 health-related topics, one of which she was to research and report upon in writing each Friday. These were:

Air Pollution	Allergies
Noise Pollution	The effect of exercise on the cardiovascular system
History of the American Red Cross	Center for Disease Control
Cancer	Food and Drug Administration
Heart Disease	Adoption
Marriage Laws and Customs in other countries	Family Budgets
Emphysema	Hemophilia
	Investing Money

(Exhibit R-2)

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10. Millville High School has had an independent study program for over 15 years. Library aide Phyllis Smerski's job description related that she is the library aide attached to independent study and her duties are to assist students by arranging research materials, coordinating with their classroom teachers and seeing that work was progressing. (See, Exhibit R-7.)

11. The librarian, Charles Brozina, is certified both as a librarian, grades K-12, and social studies teacher, grades 7-12. He is also a homebound instructor and regular tutor for the high school. Brozina supervises independent study while students are in the library, unless their regular classroom teachers are present. Guidance counselors and teachers speak to Brozina and Smerski or send them notes with the study assignments and materials needed, or a student may bring in a study assignment.

12. Independent study assignments are approved for various reasons, including a heavy schedule which precludes a student from attending a particular class period, such as a scheduling conflict between a lab double period and a class of advanced history; advanced study on an individual basis; and need to replace a class due to excusal from regular class if a study period is inappropriate.

13. Study carrels are provided in a glass-enclosed area of the library near the library aide's desk for use of those taking independent study. (See, Exhibit R-6, library floor plan.) Students are not requested to stay in the carrel area at all times since they must use card catalogues and look for materials on the shelves. When an entire class is to be shown video material in the library, a specific area is set aside where lights are dimmed, but students on independent study continue to work in the carrel area.

14. The students in Mrs. Thompson's health class were required to complete the following during the marking period:

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Thirteen classwork or homework assignments, one full-scale research paper, ten knowledge assessment evaluations (four tests and six quizzes), and a notebook including all assignments and test papers, which received a grade.

15. In the same amount of time of five 48-minute periods per week, N.T. was required to research and write eight papers of five pages each, one of which was to be turned in each Friday to be graded. The teacher was of the opinion the work requirements for N.T. were less stringent than those of the other students.

16. N.T. did not turn in any papers during February, although she was asked to do so by the teachers on several occasions before a mid-marking period failure notice was sent out on March 7, 1986.

17. Both the health teacher and library aide asked about N.T.'s work and she gave them the impression that she was working on material at home or had forgotten to bring it with her. The library aide observed that N.T. appeared to be writing and working on her assignments.

18. In fact, N.T. turned in only one paper; it was on the subject of the effect of exercise on the cardiovascular system and she received a grade of 85 on it.

19. While in the library, N.T. viewed a videotape of the movie "Psycho," which was being screened for another class, and was sent an obscene note by another student (Exhibit P-2), both of which incidents N.T.'s mother pointed to as evidential of lack of supervision and exposure to objectionable materials in the library.

20. N.T.'s mother told her daughter that a lawyer was trying to get her excused from the health class and that "any day now" she would be placed in another class.

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21. N.T. knew that she was subject of some legal proceedings and felt confused about what she should do, since her mother told her she would be "excused" from the health class any day.

22. N.T.'s parents did not accept the offer to permit her daughter to turn in a lesser number of reports at a later date. N.T., therefore, received an F for the third marking period, and failed health for the year. (A dispute concerning the first marking period was addressed in another docket.)

DISCUSSION AND CONCLUSION

The legislative mandate for health education is contained in the following statutes and rules:

N.J.S.A. 18A:35-5

> 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. To promote the aims of these courses any additional requirements or rules as to medical inspection of school children may be imposed.

N.J.S.A. 18A:35-7

> Every pupil, except kindergarten pupils, attending the public schools, insofar as he is physically fit and capable of doing so, as determined by the medical inspector, shall take such courses, which shall be a part of the curriculum prescribed for the several grades, and the conduct and attainment of the pupils shall be marked as in other courses or subjects, and the standing of the pupil in connection therewith shall form a part of the requirements for promotion or graduation.

N.J.A.C. 18A:35-8

> The time devoted to such courses shall aggregate at least two and one-half hours in each school week, or proportionately less when holidays fall within the week.

N.J.A.C. 6:8-4.2(c)

> Minimum high school curriculum requirements include the following:

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1. District boards of education providing high school diplomas shall adopt policies and procedures in cooperation with any sending district(s) for defining minimum high school curriculum requirements and locally determined proficiencies therein, pursuant to law and regulation, which shall include but not be limited to:

   i. Requiring the successful completion of a program of study in grades nine through 12 which shall include but not be limited to:

      (1) One credit year of communication for each year of enrollment, up to four credit years;

      (2) Two credit years of computation;

      (3) Two credit years of social studies and history as required by N.J.S.A. 18A:35-1;

      (4) One credit year of natural or physical science;

      (5) One credit year of physical education, health and safety for each year of enrollment as required by N.J.S.A. 18A:35-7;

      (6) One credit year of fine, practical, and/or performing arts; and

      (7) One-half credit year of career exploration or development.

      [Emphasis added.]

In 1980, the State Board of Education, by rule, required each school district to develop and implement a family life education program in the public elementary and secondary curricula. The present rule, in part, is as follows:

N.J.A.C. 6:29-7.1 Family life education

(a) As used in this subchapter, "family life education program" means instruction to develop an understanding of the physical, mental, emotional, social, economic, and psychological aspects of interpersonal relationships; the physiological, psychological and cultural foundations of human development, sexuality, and reproduction, at various stages of growth; the opportunity for pupils to acquire knowledge which will support the development of responsible personal behavior, strengthen their own family life now, and aid in establishing strong family life for themselves in future thereby contributing to the enrichment of the community.

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(b) The family life education curriculum shall be developed through appropriate consultation and participation of teachers, school administrators, parents and guardians, pupils in grades 9 through 12, community members, physicians, members of the clergy and representative members of the community. The district board of education shall demonstrate prior to the initiation of any district board of education program that the above consultation and participation have taken place. The process of consultation shall be continued as the program is revised in future years.

1. The parents and guardians of pupils enrolled in the district shall receive annually an outline of the curriculum and a list of instructional materials for the grade of their child including notification about how to receive a copy of the curriculum. The district shall make available for review in each school the complete curriculum and all instructional materials prior to use in the classroom. Upon the request of parents and guardians, the material shall be made available for their review.

(c) The district's family life education program shall be implemented comprehensively through the coordinate sequential elementary/secondary curriculum with instructional units appropriate to the age, growth and development, and maturity of the pupils.

. . . .

(i) The district board of education shall establish procedures whereby any pupil, whose parent or guardian presents to the school principal a signed statement that any part of the instruction in family life education is in conflict with his or her conscience, or sincerely held moral or religious beliefs, shall be excused from that portion of the course where such instruction is being given and no penalties as to credit or graduation shall result therefrom (N.J.S.A. 18A:35-4.6 et seq).

(j) This subchapter is subject to all of the provisions of N.J.A.C. 6:8-4.2.
(Emphasis added.)

Section (i) of the above rule implements and is virtually identical to N.J.S.A. 18A:35-4.7, which reads:

> Any child whose parent or guardian presents to the school principal a signed statement that any part of the instructions in health, family life education or sex education is in conflict with his

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> conscience, or sincerely held moral or religious beliefs shall be excused from that portion of the course where such instruction is being given and no penalties as to credit or graduation shall result therefrom. L.1979, c. 428 § 2, eff. Feb. 11, 1980.

The family life education rule has been adjudicated to be non-violative of the Free Exercise Clause of the First Amendment because parents can remove their children from any objectionable part of the program. Smith v. Ricci, 89 N.J. 514, 521 (1982).

Petitioner claims that the Board did not grant excusal to N.T. as the statute required and that it therefore violated her constitutional rights. The first aspect of petitioner's argument is that requiring N.T. to complete any work in a subject area related to sex education in order to get credit for the marking period was not an excusal. Petitioner wanted N.T. to be placed in a physical education or science class for the third marking period of the required annual health course. The Board took the position that only a health curriculum could fill the statutory requirement. This issue is expressly answered by the family life education rule, however, because the last section of the rule (section j) states that it is subject to all of the provisions of N.J.A.C. 6:8-4.2, which is the rule that implements N.J.S.A. 18A:35-7, and incorporates in the minimum high school curriculum requirements one credit year of physical education, health and safety for each year of high school enrollment. I **CONCLUDE** that the Board properly required N.T. to complete an alternative health education program successfully in place of such part of the family life course which was objectionable. Other subjects could not be substituted for the mandated health credit graduation requirement.

Petitioner next alleges that the alternative subject topics offered to N.T. were inappropriate because they were related to the same subjects covered in the offending course. While the initial alternative topics discussed with the health teacher did include topics recognizable as within the family life area, although not all were objectionable to S.T., such as budgeting, child care and adoption laws, within two weeks the list was revised to include 15 topics, 12 of which were not specific to a family life course. (Compare Findings nos. 7 and 9, above.) Of these topics, N.T. was to choose eight. I **FIND** that the alternative subject material was not at all the same as the objectionable material complained of, and I **CONCLUDE** that N.T. was not required to study any portion of the course which her mother found objectionable.

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Petitioner also alleges that excusal is not complete unless the Board offers as an alternative regular classroom instruction on acceptable topics to meet her needs rather than library-based independent study, which petitioner alleges is tantamount to "banishing" a child to the library, without adequate supervision, forcing the child to teach herself and punishing her by requiring a heavier burden of work than that required in the regular classroom.

I agree with the opinion of the health teacher that the independent study assigned to N.T. did not include more work than that required of students remaining in the regular classroom. The independent work assignment allowed five class periods to write five pages. Regular classwork included homework and studying for tests and quizzes outside the classroom. It also included keeping a notebook which was graded. I **FIND** and **CONCLUDE** that N.T. was not penalized by the independent study requirements.

As for the appropriateness of independent study, it has a venerable history in educational circles and this Board has taken every step possible to assure its quality. The Board has fully qualified personnel supervising and coordinating independent study in complete library facilities. The fact that N.T. viewed "Psycho," which her mother found objectionable, is not indicative of lax supervision, but of the fact that N.T. chose to do so. She could have remained in the carrel area of the library to read or study. Similarly, the fact that another student wrote an obscenity on a note passed to N.T. is not an example of lax supervision. Logic dictates that it is impossible to prevent all students from passing notes at all times. No administration could prevent occasional note passing in a regular classroom. It could occur anywhere, anytime, outside a library setting.

Another complaint of N.T., related conceptually to the two incidents discussed above, is that the library is tainted because it includes such books as the Marriage and the Family textbook, which contains explicit descriptions of sexual activity. (The teacher never uses this portion of the text for class assignments but admits the book is present and students may avail themselves of it.) Finally, S.T. argues that N.T. has a right to have alternative study in a class with others and presumably the teaching materials in such class would be only those which N.T. did not find objectionable. It is one thing to exercise a statutory right to excusal. It is another to claim that such right includes the right to censor what others may read or be taught.

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In Smith v. Ricci, Justice Clifford suggested legal distinctions which can guide us in dealing with claims grounded in the right to free exercise of religion. In finding the State rule requiring sex education to be constitutional, the court decided only that "[w]here there is no compulsion to participate in this program, there can be no infringement upon appellants' rights freely to exercise their religion." Id. at 521. The court expressly noted it was not necessary to determine whether or not the parents' argument that exposure of their children to attitudes, goals and values that are contrary to their own inhibits their religious practice was a well-reasoned argument. As to the argument that requiring students to assert excusal rights exerts intolerable pressure on them, the court says:

> We do not doubt that the exercise of the right to be excluded may be difficult for some. The Constitution does not guarantee, however, that the exercise of religion will be without difficulty. The Supreme Court repeatedly has upheld neutral laws of general applicability even though such laws have somehow burdened the exercise of some religions. [Ibid.]

What S.T. argues is that excusal within the statutory intendment cannot be found to have been granted unless there is no change in the educational mode for the excused student.

S.T. argues that a "class of one" or independent study in a library or any variation in the study assignments is not an acceptable excusal. I CONCLUDE that it is because:

> . . . accepting the argument that public schools may not offer curricula that offend the religious or moral views of a particular group would be tantamount to enshrining that group's views as state policy, thereby violating the Establishment Clause. [Id. at 522.]
>
> . . . .
>
> 'There is and can be no doubt that the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma.' [Id. at 523, citing Epperson v. Arkansas, 393 U.S. 97 (1968).]

To provide a special class which taught only the material which one parent did not find objectionable would violate the Establishment Clause. To provide a library which offered only books and video material which were not objectionable to one parent would

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be similarly violative of that clause. It is not possible to provide an excusal which shows none of the outward indicia of excusal, such as permitting a student to leave the classroom or giving him or her an alternative assignment.

Petitioner claims that the Legislature, in enacting N.J.S.A. 18A:35-4.7, did not intend to require parents to identify distinct portions of the course which are in conflict with their child's conscience or sincerely held moral or religious beliefs so as to protect against a penalty of loss or credits. Such interpretation is contrary to the plain language of the statute. The Legislature could have said that the child shall be excused from the health, family life education or sex education course, but did not. It said that the child could be excused from "that portion of the course where such instruction is being given," "such" referring to the part which is objectionable.

N.J.A.C. 6:29-7.1(j), which must be presumed valid, together with the interpretation of N.J.S.A. 18A:35-4.7 discussed above, make it abundantly clear that the excused student must fulfill health education requirements. I **CONCLUDE** that N.T. had an obligation to complete the alternative independent study assignment. Since I know of no precedent in which the details of an appropriate excusal under the statute have been adjudicated, and for equitable reasons, I recommend that N.T. be given another opportunity to comply with the alternative study requirements so as to gain credit for the third marking period.

It was quite clear from the testimony and demeanor of N.T. that she was not lazy or disobedient, but rather, that she did not complete the work assignments because her mother kept telling her that legal action would relieve her of the need to do so. She was caught in the middle of a dispute among adults and was receiving confusing directions. Although she now attends a private school, I have no doubt she can find materials in the school or public library which she can use for a report. Since the credit is needed for graduation, she should have the opportunity to comply with the work requirements if she does so within two months of a final opinion in this docket.

It is, therefore, **ORDERED** that the Board give N.T. two months to complete outstanding assignments and remove the F grade from her third marking period; the Board's actions in excusing N.T. pursuant to the statute are **APPROVED.**

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

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

November 24, 1986
DATE

Naomi Dower LaBastille
NAOMI DOWER-LA BASTILLE, ALJ

NOV 25 1986
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

DEC 1 1986
DATE

Mailed To Parties:

OFFICE OF ADMINISTRATIVE LAW

ij/ee

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LIST OF EXHIBITS

FOR THE PETITIONER:

P-1 Passages from textbook
P-2 Note given to N.T.

FOR THE RESPONDENT:

R-1 Proficiency Requirements for Course
R-2 Health teacher's letter of March 18, 1986
R-3 Health class warning notice
R-4 Procedure for Independent Study
R-5 Handwritten notes
R-6 Library floor plan
R-7 Job Description

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S.T., on behalf of her minor child, N.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF MILLVILLE, CUMBERLAND COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by petitioner within the time prescribed by N.J.A.C. 1:1-16.4a, b and c.

Petitioner cites two exceptions to the initial decision which are summarized below.

POINT ONE

THE INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE IS ERRONEOUS AND INCOMPLETE

Petitioner avers that it is erroneous to conclude that N.T. be required to complete an alternative health program because it "presupposes that the provisions of N.J.A.C. 6:8-4.2 take precedence over, 1) the possible infringement of a First Amendment constitutional right to the free exercise of religion and, 2) the provisions of N.J.S.A. 18A:35-4.7 which states in effect that, for reasons of conscience a student shall be excused from that portion of the health course which is objectionable without penalty." (Petitioner's Exceptions, at p. 1) Petitioner further avers the ALJ's conclusion is erroneous because it includes the implication that the local board "has the right to sit in judgment on what decisions of conscience the petitioner is entitled to make by deciding what part of the course is objectional." (Petitioner's Exceptions, at p. 1) Petitioner cites N.A.A.C.P. v. Alabama, 377 U.S. 288, 12 L. Ed. 2d 325, 84 S.Ct. 12021 (1967) for proposition 1) above and contends that there is no mention in the initial decision as to any compelling State interest necessary to override the charge of a limitation of the free exercise of religion which was set forth by her in her petition for declaratory judgment.

As for 2) above, petitioner contends, inter alia, that "aside from the fact that one is a statute and the other an administrative rule, the statute was enacted to be effective in 1980 while the rule has been effective since before 1976. Therefore, under the rules of construction, N.J.S.A. 1:1-1, the one enacted later takes precedence." (Petitioner's Exceptions, at p. 2)

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Petitioner further argues that N.T. should have been transferred to another class with a teacher in charge, the same as any other student, rather than requiring her to complete a program of alternative subject matter. It is suggested that it was impossible for the school authorities to know what the mother found objectionable in the Family Life curriculum because it was only at the hearing that she had an opportunity to particularize on some of the objectionable material. She avows that "[b]efore that, her written request for excusal on constitutional grounds was claim enough that she was objecting to the whole class and that her daughter was entitled to full excusal which meant a transfer to another class." (Petitioner's Exceptions, at p. 3)

Petitioner further excepts to the conclusion of the ALJ that N.T. was not penalized by the independent study requirement because "the claim of penalty is still present and not subject to dispute. She was failed in a class in which she had a constitutional right to be excused." (Petitioner's Exceptions, at p. 4) Petitioner avows that it was "never expected that such excusal would mean that she would not have to fulfill her credit obligations for graduation. But she contends that it is the responsibility of the State and local school board to properly program students who claim such statutory excusals on the basis of what is best for their educational requirements and not what is most convenient for the faculty." (Petitioner's Exceptions, at pp. 4-5) Petitioner finds the "class of one" independent study unacceptable. (Petitioner's Exceptions, at p. 5) Further, she finds inclusion of language from Smith v. Ricci, 89 N.J. 514 (1982) inapposite to the instant matter.

Petitioner objects to the conclusion that N.T. has an obligation to complete the alternative independent study assignment, arguing, inter alia, that the ALJ's discussion concerning the identification of distinct portions of the course which are in conflict with conscience is unnecessary "since the point was already addressed and admitted by respondents in Point 2 of their answer to the petition for declaratory judgment.*** So the objectionable portion of the course was satisfactorily identified pursuant to the statute." (Petitioner's Exceptions, at pp. 6-7)

Petitioner excepts to the conclusion of the ALJ that the passing of an obscene note to N.T. is not an example of lax supervision. She posits that the incident was alleged to show that there was no actual class in session, no teacher present and because of such absences "the girl was an open target for crude comments, gestures and notepassing." (Petitioner's Exceptions, at pp. 7-8)

Petitioner further argues that the decision of the ALJ is "incomplete in that it fails to rule on the issue of the possible violation of a First Amendment right to the free exercise of religion which was raised by petitioner in her petition for declaratory judgment." (Petitioner's Exceptions, at p. 8)

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POINT TWO

N.T. WAS NOT TRANSFERRED TO ANOTHER QUALIFIED REGULARLY SCHEDULE CLASS AS REQUIRED BY THE STATUTE.

S.T. submits that "[s]ince it is not of her doing and she is being mandated out of the class, it is the duty of the school to arrange such program change graciously, privately and to the student's satisfaction." (Petitioner's Exceptions, at p. 9) Petitioner advances that

> Respondents have admitted in item 2 of their answer to the petition for declaratory judgment that the Marriage and Family class was that portion of the Health Curriculum for which such excusal was requested. So that identifies the portion of the course to be excused from as required by the statute. *** It is clear that the school authorities must transfer the student out of the offending class in order to comply with the statute. (Petitioner's Exceptions, at p. 9)

Petitioner claims the independent study assignment required of N.T. was not a transfer to another qualified regularly schedule class with proper teacher instruction.

Petitioner respectfully requests the Commissioner to deny the initial decision and grant the relief sought in the petition for declaratory judgment.

The Commissioner finds that the instant matter can be reduced to the following questions:

1. Did the Board comply with both the letter and the spirit of N.J.S.A. 18A:35-4.7?

2. Did the Board require petitioner to complete work on topics which conflict with her conscience or sincerely held moral or religious beliefs?

3. Did the Board's requirement that there be alternative subject topics assigned and satisfactorily completed to meet the requirements of physical education, health and safety as denoted in N.J.A.C. 6:8-4.2(c)(1)(i) constitute a penalty or an automatic denial of credit?

4. Once N.T. was excused, was the Board's assignment of her to an independent study program consistent with its responsibility to provide her with an appropriate substitute program?

In Smith v. Ricci, supra, all seven New Jersey Supreme Court justices agreed that:

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> Under the excusal policy a pupil will receive instruction in all aspects of the family life education program unless a parent or guardian objects. In such a case, the pupil will be excused, but only from those parts of the program that the parent finds morally, conscientiously, or religiously objectionable. (at 520)

It is the Board's obligation, then, to abide by the stricture of the statute and to not require a student to participate in those portions of a course in health, family life education or sex education which is in conflict with the parent's or guardian's conscience, or sincerely held moral or religious beliefs. In the instant matter, petitioner found objectionable that part of the health program entitled Marriage and the Family, from which she was duly excused by the Board.

Notwithstanding the above, if the Board, whose legal responsibility it is to define the total curriculum within the confines of the law, finds that it is desirable and educationally sound for substitution to be made for those portions of the program that are stated as being offensive, it is not precluded from doing so. The statute in question does not preclude the Board from requiring substitute health topics not found to be violative of conscience or a sincerely held moral or religious belief.

Upon being so required, petitioner in this matter was then obliged to make a determination as to whether or not she found the substituted topics to be in conflict with her conscience or sincerely held moral or religious beliefs. The facts clearly demonstrate that an opportunity existed for her to claim exemption from those further topics presented to N.T. She did not do so. Instead she instructed her daughter not to comply with any part of the program based on her expectation that N.T. would be excused. While the statute provides the right of excusal under its terms, it also requires an affirmative assertion on the part of the party or parties seeking excusal from the portion or portions of the program that offend. When presented with the alternative topics, petitioner had the right and opportunity to invoke the statutory right of excusal. She did not. Such action, to direct non-compliance, was taken at her own peril.

From this conclusion, resolution of all other issues contested herein follow. The Commissioner concurs with the determination of the ALJ that "N.T. was not required to study any portion of the course which her mother found objectionable." (Initial Decision, ante) However, the Commissioner finds that it is the parent or parents' determination, and not that of the Board, to decide whether the substitute topics are violative of her conscience or sincerely hold moral or religious beliefs. To the extent that this finding is inconsistent with the ALJ's determination that "the alternative subject material proffered N.T. was not at all the same as the objectionable material," the ALJ's finding is rejected. While the Board could have permitted other alternatives, it was likewise not prohibited by the statute to require an alternative

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health program any portion of which petitioner had a right to object to on grounds of conscience. She chose not to do so.

Moreover, the Commissioner concurs with the findings and determination of the ALJ concerning the validity of independent study programs as satisfying the requirement of providing alternative assignment for students who have been excused on the basis of the statute contested herein. The Commissioner adopts as his own the reasoning of the ALJ as found on pages 11-13, with one notable exception. Since N.T. was obliged to, but elected, through the directives of her parent, not to complete the course work mandated by N.J.S.A. 18A:35-4.7, the Board is under no compunction to permit N.T. to make up the course, nor is it required to expunge from her record the failing grade that is reflective of the incomplete alternate assignments. Thus, as to the Order of the ALJ that "the Board give N.T. two months to complete outstanding assignments and remove the F grade from her third marking period," (Initial Decision, ante), the Commissioner does not so direct, but instead, leaves it to the Board to decide whether they so wish to accommodate petitioner herein to that extent.

Finally, the Commissioner adopts the finding of the ALJ as it relates to the contention by petitioner that the requirement of an alternative program violated her constitutional rights under the free exercise clause of the First Amendment. The Commissioner agrees that the New Jersey Supreme Court's finding in Smith v. Ricci, supra, is dispositive.

Accordingly, the initial decision is affirmed as modified herein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 24, 1986

Pending State Board

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2778-86
AGENCY DKT. NO. 60-3/86

EILEEN MONAHAN, ROBERTA MORAN,
BARBARA NEBELING, MARIANNE SKIBA,
DIANE SLOTH, GAIL B. STOLARZ,
BETH WESLEY and MICHELLE ZUBATKIN,
Petitioners,
v.
BOARD OF EDUCATION OF THE
CITY OF CLIFTON,
Respondent/Third
Party Petitioner,
v.
STATE OF NEW JERSEY,
DEPARTMENT OF EDUCATION,
Third Party Respondent.

Louis P. Bucceri, Esq., for petitioners
(Bucceri & Pincus, attorneys)

Patrick English, Esq., for respondent/third party petitioner
(Dines & English, attorneys)

Regina A. Murray, Deputy Attorney General, for third party respondent
(W. Cary Edwards, Attorney General of New Jersey, attorney)

Record Closed: October 7, 1986 Decided: November 20, 1986

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BEFORE **ELINOR R. REINER**, ALJ:

On March 5, 1986, petitioners, who are basic skills teachers, filed a petition of appeal with the Commissioner of Education, claiming that they were not properly compensated for the school year 1985-86. Respondent filed its answer to the petition on March 26, 1986, admitting that petitioners were not paid a minimum salary of $18,500, but contending that they were not entitled to that salary. In addition, respondent filed a third-party petition against the Department of Education seeking indemnification. Third-party respondent, Department of Education, answered that petition on April 14, 1986. On April 22, the matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

A prehearing conference was held in this matter on May 22, 1986. At that time, the issues were isolated. It was determined that the parties would agree to a stipulation of the material facts and cross-motions for summary decision would be filed. A stipulation of facts, with necessary attachments, was filed with this tribunal on July 24, 1986. Counsel opined that the stipulation would serve to establish the entire factual record in this case. Petitioners moved for summary decision on August 4, 1986. As a result of a request for an extension of time in which to respond to petitioners' motion for summary decision, which was granted by this judge, the record closed on October 7, 1986. It is clear, based upon the papers filed, that this matter is ripe for determination.

The essential facts necessary for a determination have been agreed upon by the parties through a stipulation of facts. The stipulation filed by the parties is incorporated by reference herein and constitutes this tribunal's findings of fact (J-1). Of particular import are the following facts: Petitioners were employed by respondent as teachers in its remedial instruction program for the 1985-86 school year. Petitioners were not parties to respondent's collective bargaining agreement with the local teachers' union, but

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instead, the petitioners' salary agreement with respondent was contained in various authorizing resolutions adopted by respondent. Those resolutions stated that petitioners were part-time employees who were to be paid a salary equal to 73 percent of the classroom teachers' salary guide, based on length of service and degree attainment on the contractual salary guides. The resolutions also stated that the petitioners' maximum work week was 23 1/3 hours. This amount of time is approximately 73 percent of a full-time teacher's work week.

At issue in the instant case, and as set out in the prehearing order, are:

1.(a) Are petitioners full-time teachers within the meaning of the minimum salary law?

(b) If so, must they be paid $18,500 under the minimum salary law?

2. Is respondent required to pay 73 percent of $18,500 to petitioners due to the minimum salary law and the board's own resolutions?

3. Is the Board of Education entitled to reimbursement from the State of New Jersey Department of Education under the minimum salary law for any monies due hereunder?

The principal issue raised in this case is whether petitioners fall within the ambit of the "Teacher Quality Employment Act" (N.J.S.A. 18A:29-5). Petitioners claim that since respondent has established their maximum employment time, and that of anyone and everyone employed in the position of basic skills instruction (BSI) remedial teacher, at 23 1/3 hours per week, petitioners are full-time teachers by de facto definition of respondent and must be paid a salary of $18,500 for 1985-86. Petitioners argue that the fact that the

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resolutions refer to these petitioners as part-time instructors is irrelevant to their de facto status as full-time BSI employees. Since no one in such a position could ever work more than the scheduled 23 1/3 hours, this maximum constitutes full-time employment. Respondent does not agree. Respondent points out that in the resolution hiring petitioners, petitioners are specifically designated as part-time employees. They were aware of their status at the time that they accepted their positions. Further, respondent notes that this characterization was not a sham since the minimum number of hours worked by full-time teaching staff members was 32 1/2 hours a week. According to respondent, it had the option of passing a resolution for petitioners setting their maximum work week at 32 1/2 hours. It chose not to do so, making the petitioners "part time," both by designation and in fact.

In resolving this issue, I am persuaded by respondents' argument. The applicable statute reads in part as follows:

> The minimum salary of a full-time teaching staff member in any school district . . . shall be $18,500 for an academic year. N.J.S.A. 18A:29-5.

Thus, if petitioners were full-time teachers, they would fall within the ambit of the act and would be entitled to a salary of $18,500.

In determining whether a particular teacher is a full-time employee, the act sets forth the following definition.

> . . . "full-time" means the number of days of employment in each week and the period of time in each day required by regulations of the State board to qualify a person as a full-time teaching staff member. Ibid.

The regulations of the State Board that were in effect during the 1985-86 academic year set forth the following rule for determining what constitutes full-time employment for teachers.

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> The period of time in each day required for full-time employment shall be the number of hours prescribed by the district board of education but shall not be less than four clock hours. N.J.A.C. 6:3-1.13.

It is therefore clear that local school districts are vested with the discretion to define what constitutes full-time employment. See, Hyman v. Board of Education of Teaneck, 1985 S.L.D. ___ (State Bd. of Ed., March 8, 1985), aff'd (N.J. App. Div., Feb. 26, 1986, A-3508-84T7) (unreported).

In the instant case, respondent Board of Education specifically designated petitioners as part-time employees in a duly-authorized resolution setting forth the terms of petitioners' employment. Local public bodies, because of their peculiar knowledge of local conditions, must be allowed wide latitude in their delegated discretion. See Bove v. Bd. of Adjustment of Emerson Borough, 100 N.J. Super. 95, 102 (App. Div. 1968). Petitioners do not claim that respondent acted in bad faith in determining that they were part-time employees. Therefore, it must be concluded that respondent properly exercised its discretion such that petitioners were correctly labeled as part-time employees. This conclusion is buttressed by the fact that the maximum number of hours worked by BSI teachers was 23 1/3 hours per week, while the minimum worked by full-teaching staff members was 32 1/2 hours. The Board had the option of passing a resolution setting the maximum work week for petitioners at 32 1/2 hours. It chose, however, not to do so, instead making petitioners part-time employees. Further support for this conclusion may be gleaned from the fact that during the 1983 negotiations, the Board requested that the NJEA affiliate bargain for the BSI teachers. It refused to do so, not wishing to take "part-time" personnel into its bargaining unit. Apparently, BSI teachers were uniformly thought to be functioning as part-time teachers. In light of the above, it must be concluded that the applicable statute does not apply to petitioners because they were part-time employees. That being so, petitioners are not entitled to receive the $18,500 minimum salary mandated by the act for full-time teachers.

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Petitioners next argue that at minimum they were entitled to a raise in pay to a level equal to 73 percent of $18,500. The basis of their claim is that when the Teacher Quality Employment Act went into effect, it served to modify respondent's existing salary guides contained in the collective bargaining agreement between respondent and the local teachers' union. Petitioners argue that since the language contained in the resolution appointing them made reference to the salary guides, any modification of the guides must necessarily lead to a modification of petitioners' salaries. Thus, petitioners contend that their salaries should have been raised to a level equal to at least 73 percent of the minimum teacher's salary as required by law.

Respondent does not agree. Rather, it contends that petitioners were hired at 73 percent of the contractual salary guide. They knew full well what the guide was when they accepted their positions; hence. they knew the salary they were to receive and did not object. According to respondent, the guide itself was not altered by N.J.S.A. 18A:29-5. Thus, the Board fulfilled its contractual commitment. Further, respondent reminds this tribunal that petitioners were to be terminated at such time as state/federal funding for their positions ran out. It opines that had they received 73 percent of $18,500 they would simply have been terminated prior to the end of this school year once funding ran out.

I have considered the argument espoused by petitioners and cannot agree. The resolution adopted by respondent appointing petitioners for the 1985-86 academic year reads in part:

> It is the superintendent's recommendation that the following personnel be reappointed as part-time instructors in the 1985/86 state/federal funded remedial education programs not to exceed 23 1/3 hours per week at a salary prorated at 73 percent based on length of service and degree attainment on the contractual salary guides based on the length of day and 23 1/3 hour work week designated for remedial personnel. (Exhibit J-1, item 8a.)

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This resolution was adopted on June 26, 1985, and the referenced salary guides were adopted in 1983 as part of the collective bargaining agreement to which petitioners were not parties.

The impact on the salary guides at issue may be determined by reference to N.J.S.A. 18A:29-5.3 which refers to existing salary guides. That statute reads as follows:

> No salary schedule adopted by any board of education shall provide for salaries lower than as prescribed by this amendatory and supplementary act.

The act clearly set forth a minimum compensation schedule from which local boards of education may not deviate. See, Bd. of Ed. of Englewood v. Englewood Teachers, 64 N.J. 1, 7 (1973). However, this compensation schedule clearly applies only to individuals covered by the act; namely, full-time teachers. There is no indication that the purpose of the act was to alter the compensation schedules of part-time employees.

In view of the above, the only conclusion that can be drawn from a review of the act is that the act voided respondents' salary guides insofar as they required that any full-time teacher be paid less than $18,500. The act did not serve to alter the guides as they applied to part-time teachers. Thus, the salary guides referred to in respondents' resolution dated June 26, 1985, were the guides to be used in determining petitioners' salaries. This is not unfair when one considers that petitioners were hired at 73 percent of the contractual salary guide and knew this when they accepted their positions. Petitioners were not entitled to an increase in salary as a result of the passage of the Teacher Quality Employment Act.

It should be noted at this juncture that third-party respondent Department of Education's contention that it is not a proper party to this action must be rejected. Third-party respondent argues that it is not a party to this dispute since the dispute is actually between petitioner teachers and the Board of Education. As such, it agreed to abide by

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any determination made in that regard. However, it did not dispute its responsibility to provide reimbursement to the district pursuant to the provisions of N.J.S.A. 18A:29-5.6. In view of the fact that third-party respondent admits its responsibility to indemnify the board should this tribunal determine that the board is liable for additional salary to petitioners, they are clearly a proper party to the action. Its joinder is necessary for just adjudication. See, R. 4:28-1 wherein it is stated that "[a] person who is subject to service of process shall be joined as a party to the action if (1) in his absence complete relief cannot be accorded among those already parties. . . ." Here, complete relief could not have been afforded to petitioners and respondent should this judge's determination have required additional compensation to be paid to petitioners. However, and as discussed above, third-party respondent is under no obligation to compensate and provide reimbursement to the district pursuant to the provisions of N.J.S.A. 18A:29-5.6.

In light of the above discussion, I **CONCLUDE** that petitioners have been properly classified as part-time employees by respondent. As such, petitioners do not fall within the ambit of the Teacher Quality Employment Act. I further **CONCLUDE** that petitioners are not entitled to annual salaries equal to 73 percent of $18,500 because of the effect of the Teacher Quality Employment Act on the applicable salary schedules.

For the foregoing reasons, petitioners' motion for summary decision is **DENIED** and respondents' motion for summary decision is **GRANTED.**

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

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

November 20, 1986
DATE

ELINOR R. REINER, ALJ

NOV 21 1986
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

NOV 25 1986
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

al/e

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EILEEN MONAHAN ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT/THIRD PARTY PETITIONER,	:	
V.	:	
STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION,	:	
THIRD PARTY RESPONDENT.	:	

The Commissioner has reviewed the record in this matter as well as the initial decision. The Commissioner notes that exceptions were filed by the parties in the above-captioned matter pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Petitioners' exceptions allege that the ALJ erred in determining them to be less than full time. Petitioners contend that the Board mandatorily limited the number of hours petitioners were permitted to work to 23 1/2 per week. Since that number of hours constituted not less than four hours per day which is the minimum number of hours prescribed by State Board regulation in N.J.A.C. 6:3-1.13 which may be considered to be full time, petitioners in this case must be considered "full time" by definition and thus entitled to be compensated at the State minimum salary, $18,500, for full-time teaching staff members as prescribed by N.J.S.A. 18A:29-5. Petitioners seek to buttress said contention through reference to Point 1 in their brief in support of summary judgment which is incorporated herein by reference.

The aforesaid brief cites that portion of N.J.S.A. 18A:29-5 which defines full time as being "***the number of days of employment in each week and the period of time in each day required by regulations of the State board based to qualify a person as a full-time teaching staff member." Petitioners further cite N.J.A.C. 6:3-1.13 which specifies full time as being:

> The period of time in each day required for full-time employment shall be the number of hours prescribed by the district board of education but shall not be less than four clock hours.

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In the alternative, petitioners' second exception contends that petitioners, if it is determined that they are not full time, must be compensated at 73% of the $18,500 State minimum. This position is grounded in their contention that the Clifton Board of Education has bound itself by resolution to compensate petitioners at 73% of the classroom teacher's guide. N.J.S.A. 18A:29-5.3 provides that "[n]o salary schedule adopted by any board of education or any educational services commission shall provide for salaries lower than as prescribed by this amendatory and supplementary act." Petitioners thus contend that the combination of the Board's own resolution and the requirement of the statute mandate that petitioners be paid at no less than 73% of the $18,500 minimum salary.

Respondent Board's reply exceptions dispute petitioners' contention that they are full time since full-time classroom teachers work a 32 1/2 hour week as opposed to petitioners' 23 1/2 hour week. Further, the Board contends that N.J.S.A. 18A:29-5.3 "***excludes part time teaching staff members from its ambit." (Board's Exceptions, at p. 1)

The Commissioner has carefully reviewed the arguments of the parties, as well as the initial decision of the ALJ and the provisions of N.J.S.A. 18A:29-5 et seq. Based upon such review, the Commissioner concludes that petitioners have failed to demonstrate that they are "full time" teachers within the intendment of the above-cited statute. The plain language of the statute provides that the "***minimum salary of a full-time teaching staff member, in any school district***shall be $18,500.00 for an academic year***." (emphasis supplied) Notwithstanding the fact that no remedial teachers in the Clifton Public Schools work longer than 23 1/2 hours per week, it is abundantly clear from the record that petitioners were hired as part-time teachers. (See Exhibit J-1, item 8a) Further, the Commissioner notes that while neither petitioners nor the ALJ make reference to N.J.A.C. 6:20-5.6(b), that regulatory provision specifically explains the manner in which full time is to be defined for purposes of application of the Teacher Quality Employment Act. The aforesaid provision provides as follows:

> (b) For the purpose of the Teacher Quality Employment Act, full-time employment shall mean the number of hours in a day and the number of days in a week the district board of education prescribes for a teaching staff member to receive the full salary designated for their step on the district board of education's salary schedule. (emphasis supplied)

Based upon the foregoing definition of full-time, as well as the clear evidence that petitioners were employed by the Clifton Board of Education and accepted such employment as part-time teachers, the Commissioner determines that they have not met the test of being entitled to the $18,500 minimum salary for full-time teachers.

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Petitioners' second contention, namely that they are at least entitled to be compensated at 73% of $18,500 rather than 73% of the teacher's salary guide negotiated and agreed upon prior to the passage of N.J.S.A. 18A:29-5, is less clear. In reviewing the arguments set forth by petitioners to this effect in both their brief and their exceptions, the Commissioner is unpersuaded that the ALJ's finding relative to N.J.S.A. 18A:29-5 is incorrect. He agrees with her assessment that the aforesaid statute was meant to apply only to those teaching staff members who are full time as defined in statute and regulation. While N.J.S.A. 18A:29-5.3 does provide that "[n]o salary schedule adopted by any board of education or any educational services commission shall provide for salaries lower than as prescribed by this amendatory and supplementary act," such provision must be read by its own terms to apply exclusively to the subjects of N.J.S.A. 18A:29-5 et seq., namely full-time teaching staff members. Petitioners' argument, however, is not to be readily set aside since it does not stem exclusively from the requirements of the statute but from the argument that a portion of that statute, coupled with a freely adopted Board policy resolution to pay remedial teachers 73% of that salary paid to regular full-time classroom teachers of comparable training and experience, mandates that remedial teachers be paid at a 73% proration of $18,500 which, by virtue of the law, has become the new minimum of the district's salary schedule. A careful review of the exact language of the entire Teacher Quality Employment Act, however, makes absolutely clear that its benefits were meant only to be applied to "full-time" teaching staff members and that its terms were not meant to alter the then existing salary status of persons not covered by the act, namely persons earning more than $18,500 and persons who were employed less than full time. Such intent is amply demonstrated by Section 12 of L. 1985 c. 321 which provides that:

> Nothing in this act shall be construed to require the reopening of any signed contract in effect for 1985-86 school year.

Similarly, the Teacher Quality Employment Act specifically prohibits the recomputing of salary guides of teachers earning above the minimum which are indexed to a ratio of the minimum salary. (N.J.S.A. 18A:29-5.5) From the foregoing, it becomes abundantly clear that the purpose of N.J.S.A. 18A:29-5 et seq. was meant to impact only upon full-time teaching staff members earning less than $18,500 for the 1985-86 school year and thereafter.

It is therefore likewise clear that any negotiated agreement which set the 1985-86 salary for part-time teachers at some ratio of the amount paid to full-time teachers would not require the board to pay the part-time teachers that ratio of $18,500 once the new minimum salary law was established. By eliminating the application of any escalator clause and by precluding the requirement to reopen negotiations for contracts already negotiated, the Legislature made clear its intent to leave the impact of the law upon those parties not specifically included within its parameters to the collective bargaining process.

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While the circumstances in this controverted matter differ insofar as those persons herein specifically excluded from the application of the law, namely part-time remedial teachers, were not parties to any collective bargaining agreement, the principles of not requiring the district board of education to alter its previously adopted salary policy for persons not specifically meant to be covered by the act must logically apply. If the law's benefits do not apply to part-time remedial teachers whose salaries may have been set by negotiated agreement, it cannot logically be said to apply to those part-time remedial teachers whose salaries were set by local board policy resolution. Alterations of that salary policy for part-time remedial teachers in subsequent years, 1986-87 and beyond, therefore must be left either to the bargaining process or to subsequent board policy.

Having found that petitioners in this matter are not eligible for salary payment as "full-time" teaching staff members pursuant to N.J.S.A. 18A:29-5 et seq. and as defined by State Board regulation, the Department of Education as third party Respondent is therefore not required to pay any additional State aid to the Clifton Board of Education under the provisions of the aforesaid statute. Consequently, the Commissioner affirms the findings of the ALJ and makes them his own. The Petition is dismissed.

COMMISSIONER OF EDUCATION

December 24, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6440-86
AGENCY DKT. NO. 335-9/86

F.H., BY HIS PARENTS
F.H. and M.H.,
Petitioners,
v.
BOARD OF EDUCATION OF THE
TOWNSHIP OF WASHINGTON,
GLOUCESTER COUNTY,
Respondent.

B. Michael Borelli, Esq., for petitioners (Bullock & Borelli, attorneys)

Kenneth Roth, Esq., for respondent (Davis, Reberkenny & Abramowitz, attorneys)

Record Closed: October 23, 1986 Decided: November 21, 1986

BEFORE NAOMI DOWER-LA BASTILLE, ALJ:

F.H. claims that the Board of Education's interscholastic extracurricular ineligibility policy is arbitrary, capricious and unreasonable facially and as applied to him. The Commissioner transmitted the matter to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

The case was transmitted on September 29, 1986 for disposition of a motion for interim relief. Administrative Law Judge William B. Palleria heard the motion forthwith and issued an order on October 1, 1986 reinstating F.H. to the high school eligibility list

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pending final adjudication. He set down a plenary hearing for October 7, 1986 before the undersigned administrative law judge. On October 7, 1986 during the hearing the parties received notice from the Commissioner that Administrative Law Judge Palleria's interim relief determination had been adopted. Thus, F.H. remains eligible to play on the varsity soccer team during the pendency of plenary hearing and decision. Briefs were filed October 23, 1986, when the record closed.

THE TESTIMONY

The facts concerning F.H.'s scholastic and sports record are undisputed. Nor is there any dispute that the Board of Education adopted written policies concerning eligibility for sports and extracurricular activities. There is some dispute as to whether or not F.H. or his parents had actual notice of the ineligibility policy. Several of the witnesses for F.H. were of the opinion that the eligibility policy, both generally and as it was applied to F.H., does not fulfill its stated goals is counterproductive, inconsistent and punitive.

The three members of Board staff who testified for F.H. were impressive. The coaches (boys' soccer, girls' hockey) clearly possessed stature as educators and exhibited genuine concern for the individual students with whom they interacted. They were not solely interested in school sports and winning teams. They held strong beliefs based upon many years of observation, of what policies would best effectuate educational goals for students interested in sports and other extracurricular activities. Although each had his or her own view of the appropriate way to deal with academic problems of participants in activities, they all agreed that the policy as applied to F.H. was not reasonable.

The Board offered witnesses to show how the relevant policies were adopted and the efforts made to give parents and students notice of the policies in general and as applied to individual students. The Board's basic argument was legal, rather than factual, however. It was that the issue is not the wisdom of a duly adopted Board policy, which must be presumed valid when it bears a relation to a legitimate educational interest. High School Principal David DeGroodt testified concerning implementation of the ineligibility policy and Dr. Rhoda Wittin, Assistant Superintendent for Administrative Services, described the Board's policy adoption procedure.

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FINDINGS OF FACT

1. F.H., aged 17, is a high school senior with an 88 grade average who has chosen soccer as his principal sport and played varsity soccer for the past several years.

2. F.H. has never failed a course for the year, is in the top quarter of his class academically and entered his senior year with 104 of the 117 credits needed for graduation.

3. F.H. did have some difficulty with algebra, failed one quarter of Algebra I and failed both the second and fourth quarters of Algebra II in his junior year, 1985-86.

4. F.H. plans to enter a good college and obtain a soccer scholarship, which he has an excellent chance of obtaining if he can continue varsity play in his senior year. Although he knew Algebra II would be difficult for him and he could have elected an easier course, he felt that an additional year of math might be required by a good college and he felt he could pass the course for the year, which he did with a grade of 72.

5. The Board adopted a revised written policy, number 6152, concerning eligibility for participation in interscholastic extracurricular activities on July 23, 1985, which was applicable for the 1985-86 and 1986-87 school years. In pertinent part it provides:

> A student who receives an "F" in the same subject during any two marking periods will be ineligible to participate for the next marking period." at B, III, Case II.
>
> Fourth marking period grades will be used for Fall eligibility in addition to minimum Washington Township High School credit requirements. Summer school attendance can be applied to remediate the "F" grade in order for a student to become eligible in the Fall and attendance may be necessary to remediate the "F" to earn the necessary credits for eligibility in the second marking period, as well as necessary to attain the required number of credits for graduation. (at B IV.)

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> Ineligibility and eligibility will be determined the fourth school day after the last date of the marking period. (at B V).

5. The Board policy states: "As part of this development [full development of the student], the Board of Education not only recognizes the necessity of all students maintaining academic standards of eligibility, but also the goal of encouraging senior students to take creative and challenging courses which would enhance the student's growth and development."

6. The Board published its policy in the Student Handbook which is given out to each student in homeroom at the beginning of the school year and in the Parent Handbook, which is mailed home. In addition, when a student seeks an athletic permit (Exhibit R-4), a copy of the eligibility policy is attached to the permit package, the first sheet of which must be signed by both student and parent.

7. F.H. and his father signed the first page of his soccer permit dated August 28, 1986; neither F.H. nor his mother remembers reading the policy on the permit, in the handbooks or elsewhere.

8. In addition to the above noted distribution of the eligibility policy, in the spring of 1986, Principal DeGroodt distributed a memo through homeroom classes, urging students to do their best during the last six weeks of the 1985-86 school year. It was entitled "Eligibility: Important Student Reminder" and stated ". . . any student who receives a second "F" as a fourth marking period grade will be ineligible to participate in all activities during the first quarter of the coming school year (86-87)." These words are underlined.

9. The last day of the fourth marking period is the last day of the school year, so that the fourth school day thereafter would be in the beginning of September of the next school year.

10. Students who fail a course for the year (as distinguished from those who fail the fourth marking period) are notified by the guidance counselor before school closes in June, however, so that they can opt for summer school, which begins about a week or so later.

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11. Grades below 70 are failing grades (an A is 93 to 100 in this system). Only failing grades between 60 to 69 are remediable in summer school, however.

12. After F.H. began soccer practice and played one game in the Fall of 1986, the guidance department discovered that he was ineligible to play because he received an F in Algebra II the fourth marking period of his junior year after having received one in the second marking perid.

13. F.H. was notified of his ineligibility by the soccer coach on September 23, 1986 and he immediately appealed but his appeal failed on a 4 to 4 vote of the Board. During the pendency of this appeal, the Board, and subsequently the Commissioner, permitted F.H. to continue playing varsity soccer.

14. F.H. knew the eligibility policy had changed "two or three times" during his sports participation at the high school and had he known he would become ineligible for soccer he would have tried to remediate the F grade in some way although he was unaware of anyone who took a course in summer school after passing the course for the year.

15. In the middle of a marking period, academic deficiency notices are given to students who are in danger of failing for the marking period. The student signs the notice and is supposed to have a parent sign it and return it to the school.

16. F.H. received a deficiency notice in Algebra II on December 16, 1985 for the second marking period. It showed a quiz average of 52, test average of 64 and average of 60, and stated "extra help is available", indicating "need for additional instruction." F.H. came in for extra instruction three times during that marking period.

17. F.H. received a deficiency notice in Algebra II on April 29, 1986 for the fourth marking period. It showed a current average of 68, test average of 67, quiz average of 70 and grade needed in the fourth period to pass the course of 60.6. Need for additional instruction and extra help available after school was noted. F.H. sought extra help on one occasion.

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18. F.H. had been absent due to illness earlier in April 1986 and may have been absent when the principal distributed the memo "Important Student Reminder" concerning eligibility.

19. In the 1984-85 school year, there was a written athletic eligibility policy (Exhibit R-7) which provided that a student who had one F was ineligible for the next marking period. It also provided that a dropped course would count as a failure unless replaced by a passed course. After "one F" ineligibility, a parent/student/committee would be set up to use "all available existing resources" to help the student regain eligibility. The last section is commonly known as the monitoring requirement.

20. The coaches and guidance office generally felt that the one F ineligibility policy was too stringent. Soccer coach Tom Patterson explained his philosophy eloquently to the Board in January 1985 (Exhibit P-1). He believes that academic success and athletic success go hand in hand and that ineligibility rules are counter productive. (Patterson offered his resignation when F.H. was ruled ineligible.)

21. The guidance office felt that the subsequent two F policy was also inappropriate. Their general opinion was that if a student passed a course for the year or obtained the requisite credits he or she should be permitted to participate the following Fall since the new policy permitted a student to withdraw from a failing course (if approvals were obtained) and still remain eligible.

22. Another inconsistency cited in the present two F policy was the provision that if a student failed a course for the year and passed it in summer school, he or she would be eligible for participation in the Fall. F.H. testified some students would actually choose failure for the year with summer school or withdraw from a difficult course rather than risk two F ineligibility.

23. The girls' hockey coach described another aspect of the "coaches" philosophy: she observed that when a teenager is barred from the group and becomes an "outsider" the original enthusiasm never returns. She also

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observed that she could be more effective in monitoring her students academic performance and helping them improve if they remained "insiders" with the team. She favored short "suspensions" rather than any form of ineligiblity ruling.

24. The Board sought committee input when revising its policies, but it did not adopt the coaches' recommendations. It did, however, accept the recommendation of the principal that a high F could be remediated through summer school.

25. The district has a summer school for those who fail required subjects for the year. Algbra II was not offered in 1986. Other summer schools or alternative means of remediation existed, but no one was aware of use of such remediation by a student who had passed the course for the year.

CONCLUSORY FINDINGS

26. The Board did as much as it could to give notice to F.H. and his parents of the eligibility policy short of continuing the monitoring procedure described in its prior written poicy which was not readopted; parents and students cannot be forced to read handbooks or notices even when they sign them.

27. Since grades are calculated at the end of the school year even though report cards are not mailed until a week or two later, any student who is concerned that he or she may have a fourth marking period F is put on notice by the eligibility poicy, to find out his grade and pursue the possibility of summer remediation to maintain Fall eligibility.

28. F.H. suffered no prejudice by notification of ineligibility on September 23 as opposed to the fourth school day in September; on the contrary, he participated in soccer during the delay and would have taken the same steps earlier in September that he took on September 23.

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DISCUSSION AND CONCLUSION

F.H. testified that he knew of students who chose to fail so they could make up the failed course in summer school. This indicates he was aware of the fourth marking period F problem of ineligibility. There was not even a change in the policy in that respect: the prior policy provided for ineligibility if one F was received in the fourth period. F.H. believed he was not in danger of getting an F the fourth marking period. His deficiency notice showed a 68, only one point below passing. He only went in for help once after receiving the notice. The improvement he showed after the first deficiency notice when his average was 60, and after he had sought extra help several times, indicates that if he had sought more extra assistance he could probably have avoided the F. Whether or not he could have is irrelevant, however, since the Board's policy must be considered with respect to all students, not F.H. alone.

Petitioner argues that the Board's policy is inconsistent and unreasonable in that it permits a student receiving an F for the year to remediate the F in summer school, gain credit for the course and thus regain eligibility for Fall sports, whereas a student who gets an F in the fourth quarter but passes for the year is ineligible if he has received an F in the same or any other subject for a prior marking period. A remediable F, however, is 60 to 69. An F with a grade below 60 is not remediable. Thus, we are here talking about borderline failures. There are two rationales for this disparity of result. Both were alluded to by Principal DeGroodt who recommended including summer school remediation in the policy. The first rationale is that which underlies the principal's reminder sent out six weeks before the end of school. The last quarter is spring fever time, especially is the upper grades. The eligibility policy is designed to keep the students working right up to close of school. It is the stick part of the carrot and stick philosophy. For those who are willing to invest in summer school, there is a reward if they apply themselves: eligibility in the fall. This is the carrot approach. Although not articulated very clearly, there emerged a sense that those who receive high Fs for the year should be encouraged to attend the district's summer school by which they could obtain credit and perhaps preclude the possibility that they would need to attend high school an extra year to get enough credits for graduation. The summer school remediation provision is aimed more toward the academic educational aims of the school administration than the sports side. If the administration wants to encourage summer school remediation, it would be counterproductive to adopt an eligibility policy which cuts against the remediation policy. The student who tries hard and just cannot make it gets a chance in summer school.

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Admittedly, the student who cannot get a high F or who cannot pass the course in summer school will be disadvantaged. To that extent, any eligibility policy could be viewed as penalizing some students. Eligibility policies are required by the New Jersey Interscholastic Athletic Association, however, and thus petitioner's argument that Board policy results in penalizing some students does not support a conclusion of unreasonableness.

The Board argues that F.H. could have remediated his fourth quarter F in summer school even though he passed for the year. It is true that this may have been possible, but practically speaking it was not an alternative. The Board's summer school was not available and did not offer Algebra II, thus F.H. would have had to find a summer school that offered the subject and travel outside the district to reach it. The Board's witness admitted that he did not personally know of a student who attended summer school to remediate a subject which he or she had passed. Petitioner argued that even if the possibility existed, he did not find out about the F until too late to make arrangements. Even if F.H. had known in time, I do not believe he would have chosen that course due to its impracticality. I will therefore disregard the possibility of such remediation in considering the eligibility policy.

What we have seen in this case is not proof that the Board's eligibility policy is irrational, but a difference of opinion among those concerned with high school students as to what, if any, ineligibility rule will achieve the desired goal of full development of the child. Coach Patterson persuasively articulates the position that all ineligiblity rules are counterproductive. Coach Shivers does not believe that all such suspensions should be eliminated but equally persausively posits very short term suspensions and a careful individual monitoring system for her team members based on her observations that once a student has been barred from the activity, the feeling is never the same. On the other hand some coaches feel so strongly that team membership is a privilege and an honor that students under disciplinary suspensions should not be permitted to play. (Punko v. Board of Ed. of Rahway, EDU 5701-85 at 5, Mar. 14, 1986, C. 96-86, May 2, 1986). Principal DeGroodt sees an academic rationale for a rule permitting remediation of an F in summer school and regaining of eligibility. Some Board members agree with the present policy; some do not.

Since coaches, students, parents, administrators and Board members cannot agree that one specific eligibility policy best meets the educational goals for all students,

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it is not within the prerogative of the administrative law judge to substitute her opinion for the duly adopted policy of the Board of Education. No one disputes the discretionary authority of the Board to adopt such a policy. Layton v. N.J.S.I.A.A. and Carteret Bd. of Ed., 1984 S.L.D. _____ (March 30, 1984). When a Board acts within its discretionary authority its action may not be upset unless patently arbitrary, without rational basis or induced by improper motives. Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288, 294 (App. Div. 1960). Improper motives are not at issue. No patent arbitrariness appears. The adoption of eligibility rules, although not of this specific one, is required by the Interscholastic Athletic Association (N.J.S.I.A.A.), which has been granted official recognition under N.J.S.A. 18A:11-3, and whose rules are deemed policy of each board which becomes an association member. The Board's policy is more stringent than that of the N.J.S.I.A.A., according to the testimony. Clearly, rational basis for a two F policy can be found: it is an incentive to get help and keep grades up, particularly in the fourth quarter, if the student wants to participate in fall activities. Eligibility after summer school remediation of an F is an incentive for a student to improve his grade and keep up with the credits needed to remain with his or her class. A determination on whether the incentives for some students outweigh the disincentives of some other students to fail for the year so as to obtain summer school remediation and eligiblity in fall is the sort of policy decision which school boards are often required to make. The existence of an arguable disincentive in the balance does not render the Board's policy unreasonable. I **CONCLUDE** the petitioner has not proved that the Board's policy is arbitrary and without rational basis.

It is therefore **ORDERED** that the action of the Board of Education of Washington Township to enforce its eligibility policy is **AFFIRMED**.

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

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

November 22, 1986
DATE

Naomi Dower LaBastille
NAOMI DOWER-LA BASTILLE, ALJ

NOV 24 1986
NOV [illegible] 1986
DATE

Receipt Acknowledged:
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DEPARTMENT OF EDUCATION

Mailed To Parties:

NOV 24 1986
DATE

Ronald L. Parks/as
OFFICE OF ADMINISTRATIVE LAW

bc

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F.H., by his parents, F.H. AND M.H.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioners' exceptions were filed within the time prescribed by N.J.A.C. 1:1-16.4a; the Board's reply exceptions were untimely.

Petitioners in their exceptions agree with the ALJ's findings of fact. However, they disagree with the conclusion of the ALJ that the Board's interscholastic extracurricular ineligibility policy is neither arbitrary, capricious nor unreasonable, although they believe the decision adequately addressed the standards of review in challenging such policies.

More specifically, petitioners aver that the Board failed to carry its burden as to the rationale behind that part of the policy which establishes that a student who fails a course for the year may remediate during summer school and thus may be eligible for fall sports, while one who passes for the year but fails in the last marking period may not be eligible for fall sports if he does not remediate during summer school. Petitioners cite Preston K. Mears et al. v. Board of Education of the Town of Boonton, 1968 S.L.D. 108 for the proposition that the Board failed in its burden of proof as to the reasonableness of the policy. They contend that the Board presented "***no testimony whatsoever showing any legitimate educational goal to be achieved by the inconsistent provisions of the policy nor any explanation or justification for such inconsistency." (Petitioners' Post-Hearing Brief, at p. 4 cited in Petitioners' Exceptions, at p. 2) The court must find, petitioners argue, that "the policy which was specifically developed to achieve an educational goal is achieving such a goal as applied to students." (Petitioners' Exceptions, at p. 2) "Although the Board of Education may have legitimate rational educational goals in mind, they have failed to implement a fair policy to achieve those goals," petitioners argue. (Petitioners' Exceptions, at p. 3) In support of this proposition, petitioners submit, inter alia, that the course in question is not offered in summer school and notice of ineligibility is not provided until three months after conclusion of the course. Thus, petitioners argue, as a practical matter, the

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goal proffered in the initial decision, ante, is not being achieved.

Petitioners request that the Commissioner either reverse the initial decision or modify the decision requiring the Board of Education to revise its policy promptly to resolve the inconsistencies as to remediation and notice of eligibility.

Upon a review of the record herein, the Commissioner is entirely in agreement with the determination of the ALJ. He finds no merit in the arguments advanced by petitioners that the Board's rationale for establishing such eligibility requirements was not clearly articulated. See Initial Decision, ante. There remains no question in the Commissioner's mind that there exists a reasonable basis for such policy, that of fostering academic achievement, and that the policy was not administered in an arbitrary or capricious manner. Beyond such inquiry, it is not the intention of the Commissioner to substitute his judgment as to the merit of a duly adopted policy of the Board of Education. Such discretion lies within the authority of the Board. Long Branch Education Association and Cook v. Board of Education of the Borough of Long Branch, 1975 S.L.D. 1029; Thomas v. Morris Township Board of Ed., 89 N.J. Super. 327 (App. Div. 1965) See also, Marco Leyton v. NJSIAA and Carteret Board of Education, Middlesex County, decided by the Commissioner March 30, 1984.

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

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

December 26, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1858-86
AGENCY DKT. NO. 8-1/86

BOARD OF EDUCATION OF THE TOWNSHIP OF PEQUANNOCK, MORRIS COUNTY,
Petitioner,
v.
JOYCE MALLEY,
Respondent.

JOYCE MALLEY,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF PEQUANNOCK, MORRIS COUNTY,
Respondent.

OAL DKT. NO. EDU 4438-86
AGENCY DKT. NO. 218-6/86

John Fiorello, Esq., for Board of Education
(Feldman, Feldman, Hoffman & Fiorello, attorneys)

Joyce Malley, respondent/petitioner, pro se

Date of Closed: September 26, 1986 Decided: November 19, 1986

BEFORE **JAMES A. OSPENSON**, ALJ:

Under OAL Dkt. No. EDU 1858-86, this matter concerns tenure charges filed against Joyce Malley, a tenured teacher employed by the Board of Education of the Township Pequannock, Morris County, of incapacity, chronic and excessive absenteeism,

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insubordination, inefficiency, conduct in violation of established policies and procedures of the Board and conduct unbecoming a teacher, pursuant to the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10. After consideration of the charges, statements of evidence presented to it in support thereof and respondent's statment of position, the Board determined on January 27, 1986 there was probable cause to credit the evidence in support of the charges, and that, if credited, such charges were sufficient to warrant respondent's dismissal or reduction in salary. Pursuant to N.J.S.A. 18A:6-11, respondent was suspended without pay. The Board secretary certified the Board's determination on February 4, 1986 and caused it to be filed with the Commissioner of the Department of Education on February 14, 1986. Respondent denied the charges in an answer filed in the Bureau of Controversies and Disputes of the Department of Education on March 17, 1986. Accordingly, the Commissioner transmitted the matter to the Office of Administrative Law on March 18, 1986 for hearing and determination as a contested case in accordance with N.J.S.A. 52:14F-1 et seq.

On notice to the parties, a prehearing conference was conducted in the Office of Administrative Law on March 26, 1986 and an order entered.

On April 10, 1986, respondent filed a motion challenging alleged irregularity in giving requisite notice of inefficiency for certification of charges, contrary to N.J.S.A. 18A:6-11. After argument the administrative law judge granted the motion, having found procedural facts concerning inefficiency charges in numbers 12 and 13 betrayed legal insufficiency. The charges in numbers 12 and 13 were dismissed without prejudice to proper procedural reinstitution thereof. Since they were upon their face compound, that is, they also alleged insubordination and conduct unbecoming a teacher, charges and specifications in those respects were permitted to stand, to be tested following completion of plenary hearing on all evidence for final determination of legal sufficiency. The order was reviewable by the Commissioner interlocutorily under N.J.A.C. 1:1-9.7 or at the end of the contested case, pursuant to N.J.A.C. 1:1-16.5. The Commissioner declined interlocutory review and determined to review all determinations of the administrative law judge at conclusion of the contested case in his order of June 11, 1986.

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A series of written decisions on motion by the administrative law judge were issued on May 22, 1986, May 28, 1986, June 4, 1986 and June 20, 1986. The decisions were likewise reviewable interlocutorily or at the end of the contested case.

The tenure hearing matter was heard in the Office of Administrative Law on June 16, 17 and 18, 1986 and August 18, 1986. During pendency of hearing, on June 9, 1986, the Board adopted a resolution to withhold Malley's salary and/or adjustment increment for the 1986-87 school year for reasons advanced in its resolution, pursuant to N.J.S.A. 18A:29-14. On June 16, 1986, Malley filed a petition of appeal with the Commissioner challenging the action. On July 2, 1986, the Board filed an answer to her petition. Accordingly, the Commissioner transmitted to the Office of Administrative Law on July 7, 1986 for hearing and determination as a contested case in accordance with N.J.S.A. 52:14F-1 et seq.

On July 14, 1986, the Board filed a motion for an order, pursuant to N.J.A.C. 1:1-14.1 et seq., consolidating for hearing the tenure charge matter cognizable under OAL Dkt. No. EDU 1858-86 and the salary increment withholding challenge by Malley under OAL Dkt. No. EDU 4438-86. The motion was heard on August 18, 1986. After argument, the administrative law judge determined there was sufficient commonality of issues and fact between the two matters to justify consolidation under standards in N.J.A.C. 1:1-14.3. It was so **ORDERED.** The order of consolidation was reviewable by the Commissioner either upon interlocutory review pursuant to N.J.A.C. 1:1-9.7 or at the end of the contested cases pursuant to N.J.A.C. 1:1-16.5. Malley's request for interlocutory review of that order was denied by the Commissioner on September 3, 1986.

Hearing in the consolidated matters was concluded August 18, 1986. Thereafter, posthearing submissions having been completed, the record closed.

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EVIDENCE AT HEARING AND FINDINGS OF FACT

Evidence in support of tenure charges was elicited by the Board from eight school officials and teachers, including the superintendent, and entailed introduction of fifty-eight documentary exhibits. In defense of charges, Malley called some of the Board's witnesses previously examined and cross-examined and introduced eighteen documentary exhibits. Although Malley chose not to testify herself in defense of charges, the Board on its case introduced into evidence excerpts from her deposition testimony on June 18, 1986. The excerpts were as follows:

Tr. 3-24 to Tr. 5-6
Tr. 5-25 to Tr. 6-25
Tr. 8-19 to Tr. 8-24
Tr. 10-21 to Tr.-12-2
Tr. 15-3 to 9
Tr. 15-10 to Tr. 20-5
Tr. 22-19 to 22
Tr. 23-13 to Tr. 24-11
Tr. 25-15 to 18
Tr. 26-11 to Tr. 27-5
Tr. 33-21 to Tr. 35-13
Tr. 51-3 to 24
Tr. 57-13 to 23
Tr. 60-22 to Tr. 61-25
Tr. 62-12 to Tr. 63-9
Tr. 64-2 to 22
Tr. 64-24 to Tr.65-9

Totality of evidence, therefore, did not include any direct testimonial contradiction at hearing by Malley. Her election not to testify is a circumstance of no small moment. Uncontroverted evidence, it has been suggested by a text-writer, should ordinarily be taken as true, and uncontradicted evidence that is not improbable or unreasonable cannot be disregarded, even if it comes from an interested witness, and, unless shown to be untrustworthy, is conclusive. See, 22A C.J.S., Evidence, sec. 1038 at 727. And generally, it is said, failure of a party to produce before a trial tribunal proof, which, it appears, would serve to elucidate facts in issue, raises a natural inference the party so failing fears exposure of those facts that would be unfavorable to him. The inference is available where the unproduced proof is testimonial in nature from a witness or a party who is a witness. See, for example, State v. Clawans, 38 N.J. 162, 170-1 (1962). It is with such principles in mind, therefore, that I shall adopt as findings of fact herein those proposed by the Board in its post-hearing submission. Malley filed no counter-proposals. Accordingly, there are adopted as **FINDINGS** of **FACT**, the following, with

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modifications, as proposed by the Board:

On January 27, 1986, the Pequannock Board of Education determined to certify tenure charges against Joyce Malley, a tenured teacher employed by the Board of Education of Pequannock, Morris County. The Board charged Malley with incapacity, chronic and excessive absenteeism, insubordination, inefficiency, conduct unbecoming a teacher and conduct in violation of established policies and procedures of the Board. The charges were heard under OAL Dkt. No. EDU 1858-86. When the Board certified charges, it suspended Malley without pay.

On June 9, 1986, during pendency of the hearing on the aforesaid tenure charges, the Board adopted a resolution determining to withhold Malley's salary and/or adjustment increment for the 1986-87 school year for the reasons stated in its resolution, pursuant to N.J.S.A. 18A:29-14. On June 16, 1986, Malley filed a petition of appeal with the Commissioner of the Department of Education challenging the action. By order dated September 6, 1986, the administrative law judge, by written decision, granted the motion of the Board and consolidated the two matters for hearing.

The Board presented the following witnesses: superintendent of schools, Frank E. Kaplan; the high school principal, Ralph M. Rizzolo; the high school associate principal, Dr. Mary E. Tamanini; a high school mathematics teacher and the former high school mathematics department chairman, Robert N. Tilli; a former substitute teacher, Sal Montevago; another district substitute teacher, Angela Sabaday; the middle school principal, Harold F. Veal, Jr. Malley, did not testify on her own behalf at hearing. She

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called as witnesses on her behalf Rizzolo, Veal, Kaplan and Andrew Bourke, secretary/business administrator of the district.

None of the evidence or testimony presented on behalf of the Board was contradicted or refuted by Malley. All witnesses testified as to her excessive absenteeism and incapacity and the deleterious and negative effect that absenteeism had upon her students. All witnesses testified about her uncooperative attitude and poor classroom performance as well as her insubordinate behavior in failing and refusing to follow Board policies and procedures, directives and orders of her building principals and superiors and practices of the mathematics department in which she was a teacher.

In March 1983, the Board adopted a staff attendance policy. In May 1983, the Board adopted regulations including guidelines and procedures to implement the policy. The policy and regulations set up procedures for determining excessive absenteeism. They defined occasions of absence as follows, excluding absences for required court appearances, religious holidays, death in the family and administrative requests: one day absence - one occasion; one full week absence - one occasion: two days in a row - one occasion; Friday and Monday - two occasions. The regulations set forth procedures for advising staff personnel and counseling them regarding excessive absences and occasions of absence. (P-1).

Malley's attendance record (P-2) as well as testimony of witnesses showed that for the nine year period before the 1984-85 school year, she was absent a total of 139 days because of sick leave ranging from ten to forty-four days each year. For the 1982-83 school year she was absent from school a total of forty-five days. In the 1984-85 school year she was absent twenty-four days

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over thirteen different occasions, excluding the time between January 9 and March 26, 1985, when she was absent due to an alleged workers' compensation injury. And, during the 1985-86 school year from the commencement of the school year through December 20, 1985, she was absent a total of thirty seven and one-half days over twenty-seven occasions, after which the Board certified tenure charges and suspended her.

During the 1984-85 school year the average number of occasions of absence for all teachers in the district pursuant to the policy and regulations of the Board was 3.4. During the 1984-85 school year Malley was absent for twenty-four days over thirteen occasions, excluding the period of time January 9 through March 26 when she was absent as a result of the alleged injury. In the 1985-86 school year she accumulated thirty-seven and one-half days of absence over twenty-three occasions from the beginning of the school term in September through December 20, 1985.

Malley received several warnings and advice from administrators in the district over the years concerning the district's concern over her excessive absenteeism and incapacity. Thus, the superintendent of schools warned and/or advised her of the grave concern of the district over her absenteeism in the following correspondence: January 4, 1983, January 23, 1985, October 1, 1985, November 20, 1985. (P-3, 4, 8, 12). A total evaluation report in May 1979, noted her attendance record for the year. (P-17). A total performance evaluation report dated April 1983, indicated her absenteeism for the 1982-83 school year at forty-five days and noted the seriousness and importance of her attendance to success of her students. (P-18).

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In the 1984-85 school year while Malley was teaching mathematics at the high school a conference was held with her on December 17, 1984, concerning her excessive absenteeism and the negative impact upon her classes. At the conference she was advised that for any further absences a physician's certificate would be required by the Board of Education. (P-19). During that school year she received written communications and evaluation reports from principal Rizzolo expressing grave concern over her absenteeism and the negative effect upon her students. See total performance evaluation report dated April 1985 (P-20); letter of May 1, 1985. (P-21).

In the 1985-86 school year when she was re-assigned to the middle school, Malley continued to receive counseling and warning concerning her excessive absenteeism. Her building principal, Harold F. Veal, Jr., wrote to her expressing his concern about her absenteeism on October 2, 1985 (P-33); October 3, 1985 (P-4); October 18, 1985 (P-38); October 18, 1985 (P-39); October 24, 1985 (P-40); October 28, 1985 (P-41); November 4, 1985 (P-42); November 25, 1985 (P-45); December 6, 1985 (P-46); December 16, 1985 (P-51); December 20, 1985 (P-52).

The Board introduced voluminous other evidence contained in observation reports, total evaluation reports and letters to Malley from 1978 until her suspension in the beginning of 1986. In all the Board, through its administrators, expressed concern over her absenteeism and its negative effect on her students.

On January 9, 1985, Malley sustained an alleged injury to her hand when a student slammed a door into it. She was absent from January 10 through March 26, 1985, when the Board's workers'

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compensation physician certified that she could return to work. Malley advised her building principal, Rizzolo, on March 25, 1986, that she would be returning to work immediately. Her principal asked that she obtain a note from her treating physician certifying her ability to return to work. Malley did not supply a physician's note meeting that specification, did not visit her physician to get such a note until April 15, and did not return to work until April 16, thus incurring an additional eight days of absence (March 27, 28, 29, April 1, 2, 3, 4, 15).

On April 25 and 26, 1985, Malley was again absent, despite a strong note on her evaluation report of April 16, 1985, about excessive absences. On April 30, 1985, principal Rizzolo conferred with her about her absences and, on May 1, he wrote to her on the same subject. On May 1, 1985, she took a personal day and on May 28, 30 and 31 she was absent for "illness." On June 4 and 5, 1985, she again claimed illness as a reason for absences. She did not furnish a physician's certification specifying the nature of any illness on those disability days as she was requested to do. Malley failed and refused to supply the Board and administration with her home telephone number during her long periods of absence notwithstanding repeated requests not only in the 1984-85 school year but throughout the 1985-86 school year until her suspension. Thus, she rendered it virtually impossible for administrators and substitute teachers to contact her during her many and lengthy absences. In fact, during the 1985-86 school year, Malley was absent more than 50% of the school days from the beginning of the term through the date of her suspension. And, all during the 1985-86 school year, until her suspension, Malley refused to furnish physicians' certificates as requested for her many absences; she refused to advise her principal of her telephone

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number notwithstanding repeated requests; she refused to acknowledge her absences by signing the employee absence record in her school building when she returned from absences, as required by the district.

The adverse effects of Malley's excessive absenteeism showed up clearly to her superiors and were illustrated statistically by comparisons of grades of students of Malley and those of other math teachers. In the 1984-85 school year first semester examination for general mathematics students, Malley's students had a far larger failure rate than students of other teachers in that course. (P-23). Students taught by Malley in Algebra I in the 1983-84 school year fared much more poorly in the sequential Algebra II course in the first semester of the 1985-86 school year than students of other algebra teachers. (P-56). Further, the testimony of Tilli, a former head of the mathematics department, as well as the testimony of teachers who substituted regularly and often for Malley, Montevago and Sabaday, showed clearly the negative effects not only on the academic well-being of Malley's students but upon their discipline and deportment. Although Malley was requested repeatedly both orally and in writing to provide more detailed lesson plans for her substitute teachers because of her excessive and continuous absences, she failed and refused to do so. During the 1984-85 school year when Montevago substituted for her during her long period of absence as a result of her alleged injury, there were no lesson plans available for him. Montevago and Tilli were compelled to formulate lesson plans on their own without assistance from Malley. During the 1985-86 school year, although Malley did provide her regular lesson plans for the regular substitute, Sabaday, the lesson plans were not satisfactory for a substitute teacher and Sabaday testified that she

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did, in fact, prepare her own lesson plans without assistance from Malley. Again, Malley was repeatedly requested to provide more specific and detailed lesson plans for substitutes but refused to do so.

In the late spring of 1985, parents and students came to Rizzolo, principal of the high school where Malley was assigned, and requested that the students remain with the teacher reassigned to the students because they wanted a teacher who would be there every day. In the 1985-86 school year numerous parents contacted Malley's principal, Harold F. Veal, Jr., to request their children be reassigned to different mathematics teachers as a result of Malley's excessive absences. Many parents wrote to Veal expressing grave concern for the academic well-being of their children as a result of Malley's absences. (P-47). As a result, principal Veal asked Malley to meet with parents in an attempt to allay their concerns. She refused to do so.

There was a longstanding practice in the math department to give quarterly examinations in academic mathematics classes to monitor progress of students. Malley was aware of the practice and had complied with it until the Fall of 1984. Late in 1984, the math chairman, Tilli, came to Malley to obtain November quarterly exam grades for her probability and statistics class. Malley stated that she did not have time to give the examination and there was not enough time to do the work in school and she would not take any work home. In fact, Malley did not prepare or administer the required quarterly examination.

It was testified by the principals, as well as by substitute teachers and the math chairman, Tilli, that due to the nature of the subject, learning mathematics is sequential and cumulative. Loss of

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continuity of instruction hindered students from moving along in courses such as algebra and geometry, so that additional review work had to be built in. Tilli testified that after the incident when he asked Malley for quarterly exam grades and she didn't have time to give an examination, she walked passed him on the way home and lifted her hands up to show "look no papers" while looking at other teachers carrying papers.

After Malley returned to school in April 1985, Rizzolo and Tamanini made additional observations of her teaching because they had received a number of complaints. They found looseness of discipline, students talking, confusion, waste of teaching time. When such matters were brought to Malley's attention, her response was "show me how to become a better teacher." It was said in such a way as clearly to mean that administrators were unable to teach Malley anything. The situation was confirmed by the teacher who had substituted for her in 1985, Montevago. And, in the 1985-86 school year when principal Veal attempted to advise Malley of deficiencies in her classroom performance, her response was "teach a class and videotape it for me to observe." Again, the response was made in such a manner as to indicate she would not accept constructive criticism.

Because of Malley's extended and repeated absenteeism, during the 1985-86 school year, she was requested repeatedly and often to notify her building principal sufficiently in advance of any day when she knew she would be absent from school in order that an appropriate and properly prepared substitute teacher could be obtained. Notwithstanding that, by admission, many of Malley's absences were occasioned by appointments that she made in advance

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to visit physicians, but she only notified appropriate administrators on either the night before or the very day of the absences, thus compounding problems caused by her absences. Fortunately for her students, the Board and administration were able to obtain the services of Sabaday on a virtually regular basis. Sabaday testified that Malley's students came to recognize and accept her, Sabaday, as their regular teacher in the place and stead of Malley. Sabaday often met with Malley's students on an individual basis after school and before school in order to assist them in their mathematics studies. For all intents and purposes, Sabaday was the regular teacher for the students assigned to Malley's classes, since Malley was absent more than 50% of the time in the September 1985 school term.

In June 1985, the Board adopted a resolution withholding Malley's salary increment for the 1985-86 school year because of excessive absenteeism, uncooperative attitude and unsatisfactory performance during the 1984-85 school year. Malley did not even attempt to improve her record in the 1985-86 school year. Her record in the three areas noted in the resolution worsened.

The conduct that resulted in the tenure charges with regard to the 1985-86 school year also impelled the Board to adopt a resolution withholding Malley's increment for the 1986-76 school year. [OAL Dkt. No. EDU 4438-86].

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DISCUSSION AND CONCLUSIONS

The Board argued generally the charges and specifications were sustained in respect of Malley's chronic and excessive absenteeism, absenteeism to so extreme a degree, moreover, it said, that continuity of the instruction process in her classroom was seriously disrupted. Such absenteeism, consistent with a long line of precedential authority, is sufficient for removal, an example of which is In the Matter of the Tenure Hearing of Williamson, Sch. Dist. of the City of Trenton, 1986 S.L.D. — (May 28, 1986). The rationale remains the same, it is said, even where absences were medically legitimate. Trautwein v. Bd. of Ed. of Bound Brook, (N.J. App. Div., Apr. 8, 1980, A-2773-78 unpublished) cert. denied, 84 N.J. 469 (1980). In addition, the Board urged, the proofs adduced substantiated charges of failure to prepare and administer a quarterly examination in accordance with practice, refusal to give a home telephone number to administration, failure to obtain and submit physician certificates in connection with many alleged medically connected absences, refusal to sign attendance records in accordance with practice and in defiance of direct orders from administration, refusal to meet with parents of students concerning complaints about absences, and intransigent defiance of authority generally. Removal in such state of the proofs, the Board urged, is mandatory.

Malley, in her post-hearing brief, argued her absenteeism could only have had disruptive effect on instructional continuity "if the administration had failed to perform the duty of providing adequate substitute coverage for an absent teacher." She argued her many absences were the result of her workers' compensation injury and were allowable to her by statute and negotiated agreement. Any absences not allowed under contract or State law, she said, were "either for visits for medical diagnosis or treatment, or otherwise for pain due to the January 9, 1985 service-connected workers' compensation injury." Any refusal to disclose the nature and extent of her injury and any alleged necessary treatment, Malley said, resulted from advice given her by her workers'

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compensation attorney not to make "premature disclosure of the nature of injury [which] might compromise her case." Malley contended she had complied with all district practices concerning reporting of absences and denied any obligation under "the contract" for a teacher to have a telephone.

From all the evidence, which preponderates overwhelmingly in support of Board charges and specifications, I am compelled to **FIND** none of Malley's arguments supportable and all of them misconceived. The evidence is an unchallenged array of proof of chronic and excessive absenteeism, insubordination, defiant refusal to accede to legitimate supervisory authority, refusal to comply with instructional practice, refusal to give home telephone number to administration, refusal to submit physician certificates in connection with alleged medically-connected absences and refusal to respond appropriately to instances of parental complaint. In face of her many absences alone, the conclusion of disruption in classroom continuity to the detriment of students is inescapable. Under the circumstances, I **CONCLUDE** tenure charges have been **SUSTAINED.** The prospect of Malley's continued employment in the district is unthinkable. She is **ORDERED** removed from her tenure employment position as a member of the teaching staff of the school district of the Township of Pequannock, Morris County, as of date of final agency decision herein.

In the circumstance of removal, Malley's petition of appeal challenging action of the Board in resolving to withhold her salary and/or adjustment increment for the 1986-87 school year, consolidated herein under OAL Dkt. No. EDU 4438-86, is **MOOTED.** The petition, therefore, is **DISMISSED.** See also In the Matter of Tenure Hearing of Cataldo, 1984 S.L.D. — (May 7, 1984); aff'd St. Bd., 1986 S.L.D. — (July 7, 1986) (slip op. at 9) (during suspension after 121st day under N.J.S.A. 18A:6-14, charged teacher is not entitled to salary resumption that includes increment until date of dismissal).

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

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

November 19 1986
DATE

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

NOV 2 [illegible]

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

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FOR OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE TENURE HEARING OF JOYCE MALLEY, SCHOOL DISTRICT OF THE TOWNSHIP OF PEQUANNOCK, MORRIS COUNTY.	:	COMMISSIONER OF EDUCATION DECISION
JOYCE MALLEY, PETITIONER, V. BOARD OF EDUCATION OF THE TOWNSHIP OF PEQUANNOCK, MORRIS COUNTY, RESPONDENT.	:	

The Commissioner has reviewed the record of this consolidated matter including the initial decision rendered by the Office of Administrative Law.

It is observed that Joyce Malley, who is respondent/petitioner in this consolidated case, has filed exceptions to that portion of the initial decision pertaining to the Board's tenure charges against her. The Board has filed replies to those exceptions and also concurs with those findings and conclusions of the ALJ which uphold its action to withhold Ms. Malley's salary increment for the 1986-87 school year.

It is observed that although the record establishes that Ms. Malley had advanced a series of procedural motions before the ALJ pertaining to the tenure charges against her, all motions were denied except for the dismissal of tenure charges nos. 12 and 13. The dismissal of those charges was limited, however, insofar as they alleged inefficiency and not for allegations pertaining to insubordination or unbecoming conduct.

On June 2 and again on August 25, 1986, Ms. Malley attempted to seek interlocutory review by the Commissioner of two of the procedural Decisions on Motion rendered by the ALJ on May 21 and August 18, 1986. On June 11 and September 3, 1986 the parties were notified that Ms. Malley's "Exceptions" were procedurally deficient and that they would not be reviewed interlocutorily at that time. The parties were also advised that such matters were reviewable by the Commissioner at the end of the contested case at the

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Commissioner's discretion pursuant to N.J.A.C. 1:1-9.7(1) or if they were submitted pursuant to N.J.A.C. 1:1-16.4a, b and c.

Two paragraphs of handwritten "Exceptions" to the initial decision were filed by Ms. Malley with the Commissioner on December 8, 1986 which read as follows:

> The wrongful 11/19/86 Initial Decision of James A. Ospenson, ALJ failed to recognize the case of Joyce Malley that the charges were false and that she was being penalized for a workmen's compensation absence and for exercising her rights under statute and contract. Her case was substantiated by documents in evidence and testimoney (sic) of witnesses.
>
> Also, she received the Initial Decision on 11/26/86, and she received both the 11/21/86 Proposed Order of Extention (sic) and the 11/20/86 Order of Extention (sic) on 11/28/86. Since all three were dated and received after the 45 day statutory period, the decision should be voided. (Exceptions, at p. 2)

It is observed that the Board's reply to these exceptions raises essentially the same arguments advanced in its post-hearing brief which was addressed at length in the initial decision by the ALJ.

Upon review of the respective positions taken by the parties herein, the Commissioner cannot agree with those arguments advanced by Ms. Malley, either by way of those procedural motions advanced before the ALJ or by way of her exceptions cited herein, that a reversal of the initial decision which recommends her dismissal from tenured employment is warranted.

The only cognizable issue raised by Ms. Malley in her exceptions which requires further comment relates to the challenge she makes with respect to the Order of Extension requested by the Office of Administrative Law. Said order extended the time for the ALJ to render the initial decision in this matter from November 10 to November 20, 1986. The Commissioner on December 5, 1986 approved this requested Order of Extension which had been signed by the Acting Director of the Office of Administrative Law on November 20, 1986.

Ms. Malley argues that said request for an extension of time by the Office of Administrative Law was untimely inasmuch as the last date for rendering the initial decision had expired on November 10, 1986. She therefore demands dismissal of the entire proceeding against her on these grounds.

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The Commissioner cannot accede to such request. While the factual representations made by Ms. Malley in this regard are correct, it must be noted that the applicable provisions of N.J.S.A. 52:14B-10(c) were invoked by the Office of Administrative Law for "good cause." Moreover, while the 45-day time limit is imposed by law upon both the Office of Administrative Law and the Commissioner in the decision-making process, there is no penalty prescribed in law in the event that such timeline is inadvertently exceeded by the Office of Administrative Law. The only mandate expressed in statute invokes the 45-day time period to be adhered to by the agency head in rendering the final decision in such matters. Consequently, the final decision in this matter is considered to be timely within the 45-day period inasmuch as the Commissioner has not requested an additional extension of time as provided in law.

In the Commissioner's judgment, the findings of fact and the conclusions reached by the ALJ are clearly supported by the convincing testimony of the witnesses reported in the initial decision, as well as those documents admitted in evidence, and establish Ms. Malley's guilt of unbecoming conduct, insubordination and chronic excessive absenteeism, as charged.

Those findings of fact upon which the Commissioner's determination is being rendered herein with respect to the validity of tenure charges against Ms. Malley are documented and appear at length in the initial decision, ante. The Commissioner finds that no useful purpose is served by repeating verbatim herein all of those lengthy findings of fact related to the Board's tenure charges already set forth in the initial decision. The Commissioner hereby affirms and adopts them as his own.

Accordingly, having determined that the Board's tenure charges of unbecoming conduct, insubordination and excessive chronic absenteeism against Joyce Malley have been sustained, the Commissioner hereby orders her dismissal from her tenured position of employment as of the date of this decision.

Moreover, having determined that Ms. Malley has forfeited her tenured employment in the School District of the Township of Pequannock, the Commissioner also concurs with the ALJ's finding and determination that her appeal challenging the Board's action to withhold her salary and/or adjustment increment for the 1986-87 school year is mooted for the reasons set forth in Castaldo, supra.

It is further ordered that a copy of the final decision in this matter be forwarded to the State Board of Examiners for its review and, in its discretion, further appropriate action.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 29, 1986

Pending State Board

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IN THE MATTER OF THE TENURE	:	
HEARING OF ROBERT C. BATES,	:	
SCHOOL DISTRICT OF LOWER CAMDEN	:	STATE BOARD OF EDUCATION
COUNTY REGIONAL HIGH SCHOOL	:	DECISION
DISTRICT NO. 1, CAMDEN COUNTY.	:	
	:	

Decided by the Commissioner of Education, March 28, 1985

For the Petitioner-Respondent, Maressa, Goldstein, Birsner, Patterson and Drinkwater (Robert E. Birsner, Esq., of Counsel)

For the Respondent-Appellant, Eugene P. Chell, Esq.

On February 15, 1983, Robert C. Bates, a tenured industrial arts teacher, suffered an injury to his leg while his class was doing construction work outside of the school. Although he worked the next day, he did not report for work between February 17, 1983, and September, 1984.

During the Spring of 1983, the Board became concerned with Mr. Bates' status and the question of when he would be returning to work. On several occasions it requested that Mr. Bates submit a doctor's certificate specifying when he could return to work. On April 6, June 23, and August 10, 1983, the Board's attorney and/or its Superintendent wrote to Mr. Bates reiterating the request. In the last of his letters, the Board attorney informed Mr. Bates that because of Mr. Bates' failure to respond to his previous letters, he was assuming that Mr. Bates had resigned his position. The Superintendent, in correspondence of September 9, 1983, informed Mr. Bates that he was absent without a doctor's certificate. Mr. Bates responded to the Board's communications on October 31, 1983, indicating that he was unable to respond earlier due to pain and shock, and stating that he would not return to work until his doctor said he could work.

By letter dated November 15, 1983, the Board's attorney informed Mr. Bates that he was absent without leave and suggested that he submit a written request for a leave of absence, a doctor's letter specifying his medical problem and the date on which he could return to work. On December 28, Mr. Bates wrote to the Superintendent, indicating that he was medically able to return to work. At the same time, he wrote to the School Business Administrator/Board Secretary, asking for a retroactive leave of absence to continue until his doctor said he could return to work.

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As a result of Mr. Bates' prolonged absence without leave and his failure to provide a doctor's certificate indicating the nature of his medical condition and when he could return to work, the Board, in January, 1984, certified tenure charges that Mr. Bates had "de facto" abandoned his position. More specifically, the charges, attached to the Board's Certificate of Determination, stated:

> In September, 1983, Mr. Bates did not report to his position for the 1983-84 school year. Over the course of the Summer of 1983, and thereafter, Mr. Bates ignored several letters (attached) forwarded to him requesting his intentions as to when, and if, he would be returning to his employment within the District. A request for a leave of absence was not received from Mr. Bates, and as a Tenure teacher he is required by law to give 60 days notice if it was his intention to resign from his position or to request a leave of absence prior to the commencement of the school year, if he was not able to return to his position in September, 1983. Mr. Bates has violated all of his responsibilities in this regard and has absented himself from the District for nearly six months.
>
> As a result of Mr. Bates' actions, I am filing with your office charges demanding the termination of Mr. Bates from his position of employment with the Lower Camden County Regional High School District Number One, as he has, de facto, abandoned his position in the District.

In her Initial Decision, the Administrative Law Judge (ALJ) concluded that the Board had given Mr. Bates ample opportunity to provide it with a request for a leave of absence and a doctor's letter indicating the nature of his condition and when he could return to work. She found that although Mr. Bates did ask for a leave on December 28, 1983, he ignored the Board's request that it be accompanied by a letter from his doctor. She further found that there was no evidence that Mr. Bates was so incapacitated during the summer and fall of 1983 that he could not respond to the Board's requests.

The ALJ concluded that the facts showed that the Board had made a reasonable request and that Mr. Bates had failed to supply the required information despite numerous requests by various Board representatives. In addition, the Board had established that Mr. Bates' failure to comply with its requests had a detrimental effect on students because the Board was forced to use substitute teachers rather than hire an interim teacher. The ALJ therefore concluded that Mr. Bates' conduct constituted insubordination and improper conduct and that the Board had correctly determined that Mr. Bates had abandoned his position. The ALJ determined that Mr. Bates demonstrated an entitlement to service related disability

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benefits under N.J.S.A. 18A:30-2.1 only for the period of February 17, 1983 through June 21, 1983. She further determined that although service related disability could not thereafter be demonstrated by Mr. Bates, he also was entitled to sick leave and payment for his accumulated sick days for that period because the Board did not dispute that Mr. Bates was unable to work prior to its deadline of January 9, 1984.

On March 28, 1986, the Commissioner adopted the Administrative Law Judge's findings and conclusions, determining that there was ample evidence in support of the Board's tenure charges of insubordination and abandonment. He, however, modified the ALJ's decision to the extent that he found that Mr. Bates' sick leave entitlement ended on the date that the Board determined to certify tenure charges, and that sick days accumulated in 1983-84 should be prorated.

Initially, we emphasize that Respondent was not charged with insubordination, and that the question of whether Respondent's conduct constituted insubordination was not litigated in these proceedings. Accordingly, we find that we can not sustain the Commissioner's decision on the basis of insubordination. We, however, further emphasize that insubordination is not required in order to support a finding of "abandonment" of position. In the Matter of the Tenure Hearing of Lawrence Hayes, 1975 S.L.D. 18.

After careful review of the record, we find that Respondent's conduct does not rise to the level of "abandonment" in the technical sense. The record reveals that Mr. Bates, by his correspondence of June 14, 1983, requesting a position transfer, and by his oral communication with the Superintendent, evidenced a desire, communicated to the Board, to return to work. We therefore, conclude that Mr. Bates did not technically "abandon" his position.

However, although the Board here characterized Respondent's conduct as "de facto" abandonment, the actual charges in this case were that Mr. Bates ignored several letters requesting that he communicate his intentions as to when he would be returning to his employment, and that he failed to obtain a medical leave of absence for the 1983-84 school year. Thus, although we find that Mr. Bates' conduct did not constitute actual abandonment, we are persuaded that the conduct specified in the Board's charges and fully litigated in these proceedings, i.e., absence without medical leave, has been established by a preponderance of the evidence and warrants the penalty of dismissal that was imposed by the Commissioner.

N.J.S.A. 18A:30-1 et seq. provides for the allowance of employee sick leave. However, N.J.S.A. 18A:30-4 provides that a board may require a physician's certificate in order to obtain sick leave. In this case, the Board, beginning in spring 1983, sought from Mr. Bates a physician's medical statement verifying his medical condition and, based on such condition, specifying when it could expect him to return to work. Mr. Bates ignored the Board's April, June, and August requests. On August 23, the Board notified Mr. Bates that its insurance carrier had denied his Worker's

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Compensation claim. The Board then advised Mr. Bates that it would apply his accumulated sick leave credits to the date of his original injury in February 1983.

It is well established in the record that the Board effectively placed Mr. Bates on notice that although it accepted his medical inability to report to work through the end of the 1982-83 year, it would require medical verification if it were to authorize further absence. When, in the fall of 1983, Mr. Bates did not present a request for a leave, accompanied by a physician's certificate, he was notified that he was considered absent without leave. He was further advised that the Board would consider his conduct as a resignation if he would provide the appropriate letter. In the absence of a resignation letter, and because of Respondent's inconsistent letters of intent of December 28, 1983, the Board was required to institute tenure charges to formally terminate Respondent's employment in the District.

Mr. Bates continues to insist that his prolonged absence should be excused because he was initially medically disabled by a service related injury. We, however, can not ignore, notwithstanding the pendency of the Worker's Compensation proceeding and irrespective of the reason for Mr. Bates' medical condition, the Board's right to ascertain the current medical condition of one of its teaching staff members as a condition for continuing authorization of the member's absence from work. We find that the Board's requests in this regard were well within the parameters of N.J.S.A. 18A:30-4, and, in the absence of any documentation concerning Mr. Bates' medical condition at the start of the 1983-84 school year and his refusal to provide such verification, we further find that it was appropriate to treat Mr. Bates' continued absence from work as absence without leave.

We affirm that the tenure charges certified by the Board and fully litigated in these proceedings, specifically Mr. Bates' failure to report to work for over six months after being advised that his continued absence was without authorization and his refusal to provide medical verification of his condition, are supported by a preponderance of the evidence. We further conclude that such conduct, as found by the Commissioner, warrants the penalty of dismissal.

In so concluding, we emphasize that the record in this case shows that Respondent's refusal to specify when he would return to work or to provide medical verification of his condition precluded the Board from hiring an interim teacher and resulted in the use of substitutes for a full school year. We can not ignore the impact of Respondent's course of conduct on the education of the students, and conclude that such conduct is not mitigated by his insistance that his absence was for medical reasons, nor by his previous service in the district.

We further affirm the Commissioner's determination that Respondent's absence from February 17, 1983, through June 1983 was authorized absence. However, because Respondent was absent without

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leave upon the commencement of the 1983-84 teaching year, and because he did not establish that his absence was necessitated by his medical condition, we reverse the Commissioner's determination that Respondent was entitled to accumulate sick leave or utilize accumulated sick leave for the period of September 1983 through January 1984.

Lastly, we turn to Respondent's claim that he is entitled suspension pay pursuant to N.J.S.A. 18A:6-14. Under N.J.S.A. 18A:6-14, if a determination of tenure charges is not made by the Commissioner within 120 days after certification of charges, the employee's full salary must be paid to the teaching staff member beginning on the one hundred twenty-first day. Accordingly, Mr. Bates seeks suspension pay only for the period from May 16, 1984 through March 28, 1985. Although we find that N.J.S.A. 18A:6-14 is applicable to this case, we emphasize that Respondent did not report to work at any time between his original injury and September 1984, and we therefore find that his entitlement to payment of salary pursuant to the statute commenced only when he sought to return to work and was denied the opportunity. In so concluding, we observe that in July 1984, Mr. Bates' attorney informed the Board the Mr. Bates would be able to resume work in September 1984, and that this communication represents the first indication of when Mr. Bates expected to return to work.

The legislative purpose of N.J.S.A. 18A:6-14 is to provide the tenured employee with salary that would ordinarily be due and earned but for the Board's refusal to permit the employee to work. By voluntarily absenting himself from employment in the 1983-1984 school year, Respondent relinquished his entitlement to receive full salary pursuant to N.J.S.A. 18A:6-14 for that year. However, because we have concluded that he did not technically abandon his position, we find that Mr. Bates is entitled to salary pursuant to N.J.S.A. 18A:6-14 for the period between September 1984, and the date of the Commissioner's decision. We therefore direct the Board to compensate Bates full salary pursuant to N.J.S.A. 18A:6-14 from the period of September 1984 through March 28, 1985, during which it prevented Bates from returning to work.

Attorney exceptions are noted.
December 3, 1986

Affirmed N.J. Superior Court November 16, 1987

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CHARLES E. BEDNAR,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE WESTWOOD REGIONAL SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, May 13, 1985

For the Petitioner-Appellant, Bucceri & Pincus
(Louis Bucceri, Esq., of Counsel)

For the Respondent-Respondent, Sullivan & Sullivan
(Mark Sullivan, Esq., of Counsel)

Petitioner-Appellant Charles E. Bednar (hereinafter "Appellant") is a tenured teacher of art who has been employed at the elementary level (K-6) by the Board of Education of the Westwood Regional School District (hereinafter "Board") since September 1967. In April 1984, he was advised that his position would be reduced to half-time for the 1984-85 school year because of a reduction in force. On June 21, 1984, Appellant filed a Petition of Appeal with the Commissioner alleging that, in violation of his tenure and seniority rights, the Board was going to continue to employ individuals with less seniority than Appellant for the 1984-85 school year, and that if part of their work was assigned to him, Appellant's schedule would be full-time.

At prehearing conference, the issues involved in this case were specified to be: 1) whether Appellant had tenure and/or seniority rights as a secondary art teacher and 2) if so, did he have greater rights than any other secondary art teacher in the Board's employ. Through stipulation it was established that, for the 1984-85 school year, the Board had retained one art teacher with experience solely in grades K-6 on a 30 hours a week basis and three art teachers at the secondary level, one of whom was not tenured, on a 35 hours a week basis. Although Appellant had fewer years of service than the individual retained at the elementary level, he had been in the Board's employ longer than any of the individuals serving at the secondary level.

In his Initial Decision, the Administrative Law Judge (ALJ) found that the seniority regulations that became effective on September 1, 1983, applied to seniority determinations made after that date, and that Appellant's rights were therefore governed by

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those regulations. Under the applicable regulations, Appellant did not have seniority over any of the art teachers who had been retained by the Board for a greater number of hours per week than Appellant. Accordingly, the ALJ recommended that the relief requested in this case be denied. The Commissioner adopted the ALJ's determination and dismissed the Petition.

On appeal to the State Board, Appellant renews his arguments that he had accrued seniority under the regulations in effect prior to September 1, 1983, that consequently he had vested rights in that seniority that could not be disturbed and, therefore, he had district wide seniority applicable to assignments at the secondary level. He further argues that his tenure rights were violated by the Board's retention of a non-tenured teacher at the secondary level on a 35 hour a week basis while his employment was reduced to part-time.

We affirm the Commissioner's determinations that the seniority regulations that became effective on September 1, 1983, are applicable to this case and that, under those regulations, Appellant had no seniority in the secondary category since he had taught only at the elementary level. Elsa Hill v. Board of Education of West Orange, decided by the Commissioner, January 20, 1985, aff'd by the State Board May 1, 1985, aff'd, Docket #A-4355-84T1 (App. Div. Feb. 21, 1986). We therefore affirm that Appellant was not entitled by virtue of his seniority to any of the positions at issue in this case.

We further find that Appellant's tenure rights were not violated by his retention, based on his seniority, in a part-time assignment in the elementary category notwithstanding the employment of a non-tenured teacher for a greater number of hours a week in an assignment in a category in which Appellant had no seniority.

Pursuant to N.J.S.A. 18A:28-9, a district board has the authority to reduce the number of its teaching staff members for any of the reasons ennumerated in the statute. When, as here, a board has properly determined that a reduction in force is necessary, dismissals must be made on the basis of seniority according to standards established by the Commissioner of Education with the approval of the State Board. N.J.S.A. 18A:28-10. A reduction of a position from full-time to part-time constitutes a reduction in force. Klinger v. Cranbury Township Board of Education, 190 N.J. Super. 354, 357 (1982). Accordingly, when the Board in this case determined that it was necessary to reduce some, but not all, positions in its art program from full-time, it was required to determine on the basis of the seniority categories established by the regulations which teachers would be retained on a full-time basis. In this case, Appellant had less seniority than other art teachers with seniority in the elementary category who were retained full-time. Therefore, N.J.S.A. 18A:28-10 mandated that he be the individual in this category retained on a part-time basis. We conclude that when the Board properly determined that Appellant's seniority mandated his retention in the part-time assignment and

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retained him in that assignment, it properly accomodated Appellant's tenure rights.

This is not a case involving the reduction from full-time of a position held by a tenured teacher where a non-tenured teacher was retained in an assignment to which the same seniority category would be applicable. See Valinski v. Board of Education of the Borough of Garwood, decided by the State Board, November 8, 1985, appeal dismissed, Docket #A-0738-85T1 (App. Div. March 6, 1985). Nor is this a case involving the abolishment of a position held by a tenured teacher where the Board, while dismissing the tenured teacher, retains non-tenured teachers in assignments for which the tenured teacher is qualified but which are in categories in which he has no seniority. See Capodilupo v. Board of Education of the Town of West Orange, decided by the State Board, September 3, 1986, appeal pending, Docket #A-943-86T7. In such cases, the tenured teacher has no claim to any position by virtue of seniority either because all full-time positions in a program have been reduced or because no position exists in the category in which he has seniority to which he would be entitled based on his years of service. Klinger, supra; Capodilupo, supra. Since such cases cases do not implicate seniority rights, there are no applicable statutory standards by which to judge the propriety of a board's decisions concerning whether a tenured teaching staff member will be retained in preference to a non-tenured member when a reduction in staff is effectuated. Therefore, in resolving these cases, the State Board is called upon to balance the measure of job security conferred on tenured staff members by N.J.S.A. 18A:28-5 against the authority granted district Boards by N.J.S.A. 18A:28-9. See Capodilupo, supra.

In contrast, in cases where positions continue to exist following a reduction in force in a category in which a tenured teacher has seniority, the proper balance between tenure protection afforded by N.J.S.A. 18A:28-5 and the authority of a district board under N.J.S.A. 18A:28-9 to reduce its staff is established by the statutory standard set forth in N.J.S.A. 18A:28-10. Where, as here, that standard is applicable, we may not disregard it. We therefore conclude that where a district board has properly exercised its authority under N.J.S.A. 18A:28-9, and a tenured staff member who is affected by the reduction is entitled by virtue of his seniority to continued employment, whether full or part-time, N.J.S.A. 18A:28-10 controls his entitlement to continued employment. Accordingly, we find that Appellant in this case, whose continued employment was mandated by N.J.S.A. 18A:28-10, had no claim to other assignments in categories in which he had no seniority.

In so concluding, we reiterate that tenure protection, although attaching to all assignments for which a staff member is qualified by virtue of the certification he holds and under which he achieved tenure status, does not confer on a tenured teacher affected by a valid reduction in force the right to claim, based solely on his years of service, an assignment in a category in which he has no seniority. See Capodilupo, supra, at 12-13. As stated, to the extent that tenure status confers the right to claim an

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assignment based solely on years of service, that right is controlled by N.J.S.A. 18A:28-10.

Furthermore, we find that to permit a staff member to claim an assignment based on his years of services in a category in which he has so seniority where N.J.S.A. 18A:28-10 and the applicable regulations mandate his continued employment in an assignment within the category in which he has seniority would render the seniority regulations now in effect meaningless. Contrary to those regulations, it would extend an entitlement based solely on years of service to all assignments within the scope of certification, without regard to whether the staff member had actual experience in the applicable category. See In the Matter of the Seniority Rights of Certain Teaching Staff Members Employed by the Old Bridge and Edison Township Boards of Education, decided by the Commissioner, August 6, 1984, aff'd by the State Board, January 2, 1985, aff'd, Docket #A-2241-84T6 and #A-2531-84T6 (App. Div. June 17, 1986). Moreover, permitting a staff member to claim other assignments where the seniority standards mandate his continued employment in the category in which he has seniority would obviate the seniority system and create in its stead a system controlled by the individual preferences of staff members.

In sum, we affirm the Commissioner's determination that Appellant was not entitled by virtue of his seniority to assignments in which other teaching staff members in the district were retained, and we conclude that the Board did not violate Appellate's tenure rights by retaining him in the part-time position to which his seniority entitled him while employing a non-tenured teacher in a full-time assignment in a category in which Appellant had no seniority.

Attorney exceptions are noted.
December 3, 1986

Pending N.J.Superior Court 1985

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BERGENFIELD EDUCATION ASSOCIATION, CLAIRE M. KINGSLEY, ET AL.,

PETITIONERS/CROSS-APPELLANTS,

V.

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

RESPONDENT-APPELLANT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, May 18, 1981

Decided by the State Board of Education, January 6, 1982

Remanded by the Appellate Division, May 19, 1983

Decided by the Commissioner of Education, January 10, 1985

For the Petitioners/Cross-Appellants, Bucceri and Pincus
(Gregory T. Syrek, Esq., of Counsel)

For the Respondent-Appellant, Greenwood and Sayovitz
(Sidney A. Sayovitz, Esq., of Counsel)

This is an appeal from a Commissioner's decision rendered pursuant to a remand by the Appellate Division. The case was initiated in April 1980, when individual compensatory education and supplemental instructors and Title I teachers in the Bergenfield school district and their collective negotiations representative filed a Petition of Appeal with the Commissioner, claiming tenure rights, benefits, and pro-rata compensation based on the salary guide applicable to classroom teachers. The Commissioner found that the six individual Petitioners still involved in the case when he rendered his decision[1] were not tenure eligible. Bergenfield Education Association, Claire M. Kingsley, et al. v. Board of Education of the Borough of Bergenfield, decided by the Commissioner, May 18, 1981. On January 6, 1982, the State Board rendered its decision on appeal, agreeing with the Commissioner that

[1] The six were the only ones among the larger group initially involved in the litigation who had not withdrawn from the case.

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two of the teachers, who had been employed solely in the Title I program, were not eligible for tenure, but holding that the other four, who had been employed in programs mandated by state law, had acquired tenure.[2]

The matter then was appealed to the Appellate Division. However, before the Appellate Division rendered its decision, the New Jersey Supreme Court decided Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982), holding that public school teachers providing remedial and supplemental instruction to educationally handicapped children may acquire tenure if they meet the specific criteria of N.J.S.A. 18A:28-5. Thus, in considering the case now before us, the Appellate Division found that Spiewak had resolved the major issues in the appeal. Bergenfield Education Association, et al. v. Board of Education of the Borough of Bergenfield, Docket #A-2615-81T2 (App. Div. May 19, 1983). Recognizing that Spiewak was controlling at least to some extent, the court concluded that it needed only to consider the appropriateness of a remedy to be afforded the six teachers.

In its decision, the Appellate Division recognized that three of the teachers were no longer employed by the Board. Slip op. at 2. It further recognized that a literal reading of Spiewak would preclude application of the rule announced in that case to teachers who had not been involved in litigation of the Spiewak case. Id. at 3. However, the Appellate Division concluded that the Spiewak Court had not intended to deprive teachers of the benefit of Spiewak where they, like the Petitioners in this case, had been litigating concurrently the same issue as that involved in Spiewak. Id. The court therefore determined that the teachers involved in the case now before us were entitled to the benefits of the rule announced in Spiewak, both retroactively and prospectively.[3]

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[2] The State Board made the distinction between employment in state mandated programs and federally funded programs in order to reconcile conflicting Appellate Division decisions that applied prior to the New Jersey Supreme Court's decision in Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982).

[3] We note that prior to the New Jersey Supreme Court's decision in Rutherford Educ. Ass'n v. Bd. of Educ., 99 N.J. 8 (1985), the question of whether petitioners who had filed petitions with the Commissioner prior to the decision in Spiewak were entitled to retroactive application of the rule in Spiewak was unsettled and that the Appellate Division had reached conflicting results when considering the question. Compare Epps v. Jersey City Board of Education, Docket #A-3171-79T3 (App. Div. Jan, 3, 1983) (retroactive relief denied) with Maxfield v. Board of Education of the Township of Ridgewood, Docket #A-2046-81T3 (App. Div. April 20, 1983) (retroactive relief granted).

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However, the court, observing that one of the benefits claimed in this case was a right to salary adjustments, found that

> [t]he record before us does not permit an adjudication of disputes between the parties that may remain. Obviously, disputes that may have arisen since Spiewak were not the subject of the petition filed with the Commissioner of Education in this case. With respect to the benefits still in dispute between the parties which were claimed in the petition filed with the Commissioner in this case on April 17, 1980, the matter will have to be remanded to the Commissioner for his consideration based upon such statutes and contracts as may apply.

Slip op. at 4.

As set forth above, the case now before us is an appeal from the Commissioner's decision rendered pursuant to this remand.

I

Following the court's remand, the matter was transmitted to the Office of Administrative Law. A prehearing conference was held on December 4, 1983, and the sole issue to be decided was specified in the prehearing order to be "the definition and calculation of benefits, if any, to which Petitioners are entitled pursuant to and in accordance with the foregoing decision of the Appellate Division."

After hearing and argument, the Administrative Law Judge (ALJ) issued his Initial Decision. The ALJ found that there was no dispute concerning whether Petitioners had achieved tenure status. He further found that the law of the case dictated that Petitioners were to be treated as if they were "before the court" in Spiewak, and thus entitled to benefit from the holding of Spiewak.[4]

The ALJ determined that one of the Petitioners, Mary McEwan, had waived her right to relief subsequent to December 1979, by virtue of abandoning her challenge to the Board's denial of maternity leave and her subsequent failure to pursue reemployment with the Board. He, however, found that she had not waived retroactive claims for the period prior to December 1979, and in that respect was in the same position as the other Petitioners.

The ALJ found it unnecessary to address Petitioners' entitlement to prospective benefits since the Board conceded that proper adjustments had or should have been made in the salaries and benefits of Petitioners still employed after the date of the decision in Spiewak. He then considered what retroactive benefits were owed Petitioners.

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[4] See supra note 3.

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Finding that calculation of retroactive dollars to be awarded for "deficiencies they may have suffered from the time of the attainment of tenure up to the date of the Spiewak decision is required," Initial Decision, at 9, the ALJ recognized that the task was complicated by the fact that Petitioners had entered collective negotiations agreements with the Board beginning in 1979-80, and that those agreements included salary schedules different from the schedules applicable to classroom teachers. He, however, determined that those agreements had to be negated because they failed to recognize Petitioners' years of experience and levels of training. Thus, he found that Petitioners were entitled to equality of salary and benefits at the same rate as other teaching staff members with similar experience and training for the entire period of their employments after each had achieved tenure. Id. at 11-12.

In considering the case, the Commissioner found that he could not ignore the fact that the Board had "failed to accord petitioners the same salary and benefits as other teaching staff members" during the period relevant to the litigation. Commissioner's Decision, at 18. He found it evident that Petitioners were not recognized as tenure eligible prior to 1979 since they were not included in the recognized collective negotiations unit. He therefore found that they were entitled to the same salary and benefits as all other teaching staff members for the period prior to the 1979-80 school year.

He further determined that the negotiated agreements in effect during the period from 1979 through 1983 did not comply with N.J.S.A. 18A:29-6 et seq., which established "the basis upon which clear recognition of petitioners' salary and benefits were to be premised" in order to conform the standard established by the Commissioner's decision in Hyman v. Board of Education of the Township of Teaneck, decided by the Commissioner, August 15, 1983, rev'd by the State Board, March 6, 1985, aff'd, Docket #A-3508-84T7 (App. Div. Feb. 26, 1986). Id. at 18. Specifically, the Commissioner found that because the salary schedules in those agreements were restricted to seven steps based only on years of employment, their scope was "inadequate and contravene[d] the specific purpose and intent of N.J.S.A. 18A:29-6 et seq. Id. at 18-19. He therefore declared the negotiated schedules to be without force and effect.

Finally, based on the parties' representations concerning prospective adjustments, the Commissioner found that further relief did not need to be ordered, provided that prospective adjustment was consistent with his decision. He therefore directed the parties to comply with the relief set forth in the Initial Decision as supplemented by his decision.

The Board appealed the Commissioner's decision on February 4, 1985, arguing that, as part-time teachers, Petitioners had no statutory entitlement to placement on the salary guide applicable to classroom teachers and that Petitioners were bound by the provisions of the negotiations agreements that were applicable to them. The Board further maintained that the Appellate Division's

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decision had not held that Petitioners were entitled to a particular amount of retroactive pay and that retroactive relief for the period prior to 1979-80 should be limited to 90 days prior to the date on which the Petition of Appeal was filed with the Commissioner. In its reply brief, filed after the New Jersey Supreme Court had rendered its decision in Rutherford Educ. Ass'n v. Bd. of Educ., 99 N.J. 8 (1985), the Board further argued that and any retroactive relief awarded in this case should be limited to the six year period prior to the court's decision in Rutherford and that the decision in Rutherford precluded any relief to the three Petitioners who were not still employed by the Board on the date of the Spiewak decision.

Petitioners cross-appealed the denial of full retroactive relief to Petitioner McEwan, asserting that she was entitled to reinstatement and compensation for the period after her termination. Petitioners also sought pro-rata placement prospectively on the salary guide applicable to classroom teachers. In all other respects, Petitioners urged affirmance of the Commissioner's decision and argued that the State Board's decision in Hyman should be reversed.

II

The first question that confronts us in this appeal is the effect of the Appellate Division's determination that Petitioners are entitled to the benefits of the rule announced in Spiewak, both retroactively and prospectively. In resolving this issue, our point of departure is the New Jersey Supreme Court's decision in Rutherford Educ. Ass'n v. Bd. of Educ., 99 N.J. 8 (1985), which was rendered subsequent to the Appellate Division's decision in this case.[3]

In Rutherford, the court clearly established that litigants who, like Petitioners in this case, had filed petitions of appeal to the Commissioner prior to the date of the New Jersey Supreme Court's decision in Spiewak, as determined by the Appellate Division's decision in the case now before us, were entitled to benefit from the rule announced in Spiewak. However, the court in Rutherford placed two limitations on the retroactive application of the Spiewak decision to teachers who had filed petitions prior to Spiewak.

First, Spiewak was not to be applied retroactively to any teacher who was not employed by a board on the date of the Spiewak decision. 99 N.J. at 29-30. Imposition of this limitation was based on the court's

> ...recognition that [the decision's] retroactive application will result in significant administrative confusion if it is applied retroactively to a teacher terminated by a board prior to our Spiewak decision, regardless of

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[3] See supra note 3 and accompanying text.

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> whether that teacher petitioned the Commissioner of Education prior to Spiewak. Permitting the reinstatement of such a teacher would create administrative chaos involving not only that teacher but also other teachers in the system. Such a teacher's right of reinstatement would have to be evaluated in terms of whether he or she had acquired tenure at the time of termination or whether the Board had terminated a teacher while retaining less senior employees. Any decision reinstating such a teacher could engender a challenge by a displaced teacher.

99 N.J. 8, at 29.

The second limitation placed by the court on retroactivity reflected the court's concern with the financial impact on boards if Spiewak was given unlimited retroactivity in its application to those teachers who had petitioned the Commissioner prior to the decision in Spiewak and were still employed by a board on that date. Based on this concern, the court limited retroactivity even with respect to those teachers, holding that, although tenure is to be calculated from the date of their employment, the emoluments of tenure that each teacher is entitled to receive are to be calculated from a date six years prior to the court's decision in Rutherford. Id. at 30.

Application of Rutherford in the instant case would preclude any relief to three Petitioners, specifically, Petitioners McEwan, Katz and Cazazza, who, as the Appellate Division recognized, were no longer employed by the Board on the date of the Spiewak decision. Additionally, any relief to which Petitioners Moore, Nicholas and Kingsley may be entitled would be limited to the period subsequent to April 11, 1979, which is the date six years prior to the court's decision in Rutherford.

Although we are bound by the New Jersey Supreme Court's pronouncements in Rutherford, we must consider whether the Appellate Division's recent decision in Maxfield v. Board of Education of the Township of Ridgewood, Docket #A-453-85T1 (App. Div. June 5, 1986), appeal pending, Docket # 25,852, affects the application of Rutherford to the instant case. In Maxfield, the petitioner, although terminated prior to the date of the Spiewak decision, had petitioned the Commissioner before the court rendered its decision in Spiewak. As in the case before us, the Appellate Division had found the petitioner in Maxfield to be tenure eligible after Spiewak was decided. Before the decision in Rutherford was rendered, the Appellate Division remanded the case to the State Board for determination of when petitioner had achieved tenure and of to what retroactive benefits she was entitled. On remand, the State Board determined that Rutherford precluded retroactive application of Spiewak in the case and that, therefore, the petitioner was not entitled to relief.

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The Appellate Division reversed our determination. Maxfield, supra. In doing so, the court emphasized that it had remanded the case to the State Board on April 20, 1983, following which the New Jersey Supreme Court had denied certification of an appeal from the Appellate Division's decision, and that the State Board had held no hearing, reached no fact findings and rendered no decision until after the New Jersey Supreme Court's decision in Rutherford. Slip op. at 2. The court further emphasized that the factual background of several of the petitioners in Rutherford was distinguishable from the petitioner's background in Maxfield, observing that unlike several of the petitioners in Rutherford, the petitioner in Maxfield had taught in a state funded program.[4]

The court further found that the State Board had chosen without authority to wait until after Rutherford to act on the Appellate Division's remand of Maxfield. The court reasoned that since its decision was the law of the case and since the State Board was obligated to carry out the mandate set forth in the remand within a reasonable time, the petitioner in Maxfield was entitled to relief pursuant to the Appellate Division's decision in her favor. Finally, although recognizing that the New Jersey Supreme Court had expressed apprehension in Rutherford concerning administrative confusion resulting from unlimited retroactive application of Rutherford, the Appellate Division found that significant administrative confusion would not ensue by granting the petitioner in Maxfield retroactive application of Spiewak since petitioner's case was only one case. Slip op. at 5. The court therefore reversed the State Board's decision and remanded the case for a decision ordering that petitioner was a tenured teaching staff member and directing back pay and other benefits from a date six months after the court's original remand of the case in 1983.

After careful consideration of the Appellate Division's decision in Maxfield, we conclude that it is proper in the instant case to follow the mandate of the New Jersey Supreme Court's decision in Rutherford. In so concluding, we emphasize that we are bound by the pronouncements of our Supreme Court and may not set them aside. Furthermore, Rutherford was an effort to arrive at a fair resolution of a question arising from a perceived ambiguity in Spiewak, specifically from the court's determination that the new rule was to apply prospectively to teachers not "before the court." The perceived ambiguity had resulted in conflicting judicial decisions and in confusion and uncertainty that had affected the individuals involved in the cases that were in litigation at the same time as Spiewak, and had potentially affected the administration of the public school system.[5] Rutherford resolved the question in a manner that fairly permits litigants who filed petitions prior to Spiewak to benefit from the rule while assuring

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[4] See supra note 2.

[5] See supra note 3.

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that administrative confusion does not result. By departing in this case from the principles established in Rutherford, the State Board would introduce ambiguity into an area of law now settled and would create the administrative confusion Rutherford sought to avoid.

Moreover, we find that the circumstances presented by the instant case are distinguished sharply from those presented by Maxfield. This case was remanded to the Commissioner, who, following an administrative hearing, rendered his decision. That decision was appealed to us on February 4, 1985. Consideration of this case has not been delayed and, accordingly, the State Board is rendering its decision following the normal course of litigation.[8]

Further, in contrast to Maxfield, there are three individual petitioners in this case who were no longer employed by the Board on the date of the Spiewak decision. Although Petitioner McEwan is the only Petitioner seeking reinstatement, again in contrast to Maxfield, there is a dispute concerning whether McEwan is entitled to reinstatement regardless of her tenure status at the time of her termination.

As stated, we recognize that neither Katz nor Cazazza are seeking reinstatement. However, we find that awarding retroactive benefits in cases where the petitioners are no longer employed by the board would create the anamolous result of affording retroactive relief under Spiewak to individuals no longer employed within the public school system while teachers who did not file their petitions until after Spiewak was rendered but who are still employed by the board are precluded from such relief.

Therefore, we conclude that the mandate of Rutherford applies in this case and precludes retroactive application of the rule announced in Spiewak to the three Petitioners who were no longer in the Board's employ on the date of the Spiewak decision. We further conclude that Rutherford limits any retroactive relief to which the Petitioners still employed by the Board may be entitled to a date six years prior to the court's decision in Rutherford.[9]

III

We now turn to the question of to what, if any, additional compensation the three Petitioners still employed by the Board on the date of the decision in Spiewak are entitled. In considering this question, we first emphasize that, in remanding this case, the

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[8] We note that on February 13, 1985, the Appellant Board requested that the case be held in abeyance pending the State Board's decision in Hyman. However, since the State Board rendered its decision in Hyman on March 6, 1985, it was unnecessary to consider the request and the case was not held in abeyance.

[9] We note that the court in Maxfield did not address this aspect of Rutherford's limitation on retroactive relief.

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Appellate Division made no judgment concerning whether Petitioners were entitled to the salary adjustments claimed. Rather, the court specified that it was remanding the case because it was necessary that the Commissioner resolve these claims based upon the applicable statutes and contracts. Bergenfield, supra, at 4. We further emphasize that, pursuant to Rutherford, Petitioners are entitled to relief only for the period after April 11, 1979.

As set forth above, from 1979 through 1983, Petitioners were compensated at an hourly rate specified in the salary schedule applicable to them pursuant to the collective negotiations agreements in effect during that period. The Commissioner, based on his decision in Hyman, declared these negotiated salary schedules to be without force and effect, finding that Petitioners were entitled to the same salary and benefits as all regular teaching staff members and directing payment accordingly.

However, on March 6, 1985, the State Board reversed the decision of the Commissioner in Hyman, holding that neither the New Jersey Supreme Court's decision in Spiewak nor the education statutes conferred an entitlement on teaching staff members who were not full-time to placement on a salary guide. Hyman v. Board of Education of the Township of Teaneck, decided by the State Board, March 6, 1985, aff'd, Docket #A-2508-84T7 (App. Div. Feb. 26, 1986). The State Board further held that the relevant statutes did not require the placement of full-time teaching staff members on any particular salary guide so long as the applicable schedule conformed to the statutory requirements prescribed by N.J.S.A. 18A:27-7 (repealed 1985), N.J.S.A. 18A:29-8 (repealed 1985) and N.J.S.A. 18A:29-11.[10] In so holding, the State Board recognized that salary schedules consistent with the minimum requirements set forth in the education statutes may be included in collective negotiations agreements and that the negotiations process resulting in such agreements is within the scope of the New Jersey Employer-Employee Relations Act, N.J.S.A. 37:13A-1 et seq.

We emphasize that for purposes of determining retroactive relief to which the three Petitioners still employed by the Board on the date of the Spiewak decision may be entitled, they are to be considered tenure eligible teaching staff members, and we note that

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[10] As indicated above, effective September 9, 1985, N.J.S.A. 18A:29-6, N.J.S.A. 18A:29-7, N.J.S.A. 18A:29-8, N.J.S.A. 18A:29-10 and N.J.S.A. 18A:29-12 were repealed. Teacher Quality Employment Act, N.J.S.A. 18A:29-5,L. 1985, c. 321 sec. 16 (1985). We further note that, in addition to repealing those statutory provisions, the Teacher Quality Employment Act raised the minimum salary for full-time teaching staff members to $18,500. N.J.S.A. 18A:29-5. Although the entitlement to compensation benefits in this case is to be determined under the statutes in effect prior to September 9, 1985, we emphasize that the new statutory minimum, like the predecessor statutes, is applicable only to full-time teaching staff members.

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it is undisputed that each has in fact achieved tenure. However, as set forth in our decision in Hyman, Spiewak did not confer on Petitioners an entitlement to salary guide placement and any such entitlement is to be found in the compensation statutes, N.J.S.A. 18A:29-1 et seq. As indicated by our statutory analysis in Hyman, the application of those statutes is limited to full-time teaching staff members.

Again, as set forth in Hyman, "full-time" is defined by statute as the number of days of employment in each week and the period in each day required by the State Board of Education to qualify any person as a full-time member. N.J.S.A. 18A:29-6 (repealed 1985) (provision now codified at N.J.S.A. 18:29-5). The State Board, in turn, has granted the authority to district boards to define full-time so long as the number of hours required each day is more than four hours. N.J.A.C. 6:3-1.13.

It is stipulated that Petitioners in this case were employed for varying portions of the school year for varying hours up to a maximum of 25 hours per week. Exhibit J-1, in evidence. In contrast, the relevant collective negotiations agreements provided that the maximum work day of classroom teachers was six and one-half hours and, from 1981, specified that, for grades 7-12, the work day included five teaching periods, one operation period, one preparation period and one homeroom assignment. J-12, in evidence. We reiterate that the authority to define full-time employment lies with the district board, and we emphasize that hours of work is a mandatory subject to collective negotiation. In re Byram Township of Education, 152 N.J. Super 12 (1977); Bd. of Education of Englewood v. Englewood Teachers, 64 N.J. 1 (1973). We further emphasize that, throughout the litigation in this case, Petitioners have consistently claimed that their entitlement was to salary adjustment based on pro-rata placement on the salary schedule applicable to classroom teachers, and in the absence of any indication in the record that their status for the relevant period was as full-time teaching staff members, we conclude that Petitioners were not full-time teaching staff members during this period.

We reiterate that, although the education laws prohibit reduction in the compensation of any tenured teaching staff member, N.J.S.A. 18A:28-5, the education laws do not prescribe any standards governing the rate or manner of compensation of teaching staff members who are not full-time. See Hyman, supra. We further emphasize that compensation, like hours of employment, is a term and condition of employment and, within applicable statutory standards, is a mandatory subject of collective negotiation. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978); Bd. of Education of Englewood v. Englewood Teachers, 64 N.J. 1 (1973). We therefore conclude that the education laws provide no basis for directing that Petitioners be compensated on the basis of the salary schedule applicable to classroom teachers and that, since the collective negotiations agreements between the parties providing for compensation at an hourly rate did not contravene the education laws, those collective negotiations agreements control Petitioners' rights to compensation.

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We further conclude that in the absence of any violation of the education laws, the Board's failure to recognize Petitioners' status as tenure eligible teaching staff members during the negotiations resulting in the collective negotiations agreements applicable to Petitioners presents no claim for which the school laws would provide a remedy. In so concluding, we emphasize that the negotiations process is within the scope of the New Jersey Employer-Employee Relations Act, N.J.S.A. 37:13A-1 et seq., and that violations of the Act do not lie within our jurisdiction.

We now turn to the question of whether Petitioners are entitled to prospective relief from 1982-83. In their cross-appeal, Petitioners argue that they are entitled to placements on the salary guide applicable to classroom teachers for 1982-83 that include all their years of teaching experience and that, for 1983-84, at which time Petitioners Moore and Nicholas accepted employment as full-time teaching staff members, they were entitled to salary guide placement that included all their years of experience in the District.

We reject Petitioners' claim that they are entitled to pro-rata placement on the salary guide applicable to classroom teachers for 1982-83. As set forth above, since the record does not indicate that Petitioners were full-time teaching staff members during this year, the education laws do not require that they be placed on a salary guide, for this period and do not prescribe standards governing the manner or rate of their compensation. Therefore, we conclude they have no entitlement under the education laws to pro-rata placements for 1982-83 on the salary guide applicable to classroom teachers and no entitlement under those laws to compensation for that year that includes credit for experience.

However, Petitioners Moore and Nicholas accepted employment as full-time teaching staff members for the 1983-84 school year, and, accordingly, their compensation for that year is subject to the statutory requirements of N.J.S.A. 18A:29-6 et seq. After careful review of the relevant statutes, we conclude that they did not require the District to credit Petitioners with their previous experience when their placement on the applicable salary guide was determined. In so concluding, we emphasize that upon accepting employment as a full-time teaching staff member in a district, an individual's initial place on the applicable salary schedule is at such point as may be agreed upon by the member and the board, N.J.S.A. 18A:29-6 (repealed 1985); N.J.S.A. 18A:29-9, unless superceded by the collective negotiations agreement. Belleville Education Association v. Belleville Board of Education, 209 N.J. Super, 93 (App. Div. 1986). We further emphasize that, although such placement may not result in the reduction in salary of a teacher who has acquired tenure, N.J.S.A. 18A:28-5, nothing in the statutes mandates that credit be given for prior experience so long as the placement meets the minimum salary requirements specified in the statute. cf. Whalen v. Sayreville Bd. of Ed., 192 N.J. Super. 452 (App. Div. 1983). It has not been asserted in these proceedings that the initial placements of Petitioners Moore and Nicholas failed to conform with the applicable statutory minimums or resulted in reduction in their compensation. We therefore, conclude that their

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initial placements on the applicable salary guide do not present any claim for which the education laws would provide a remedy.

IV

In sum, in making its decision in this appeal, pursuant to the Appellate Division's remand of the case, the State Board is called upon to determine, in light of the applicable statutes and contracts, whether Petitioners were entitled retroactively and prospectively to compensation based upon the negotiated salary schedule applicable to classroom teachers in the District. We conclude that, in resolving this question, the State Board is obligated to follow the decision of the New Jersey Supreme Court in Rutherford, which specifies the limitations on retroactive application of Spiewak in cases in which petitioners filed their petition of appeal to the Commissioner of Education before the decision in Spiewak was rendered.

We find that, pursuant to Rutherford, three of the Petitioners in the instant case are precluded from retroactive application of the rule announced in Spiewak since they were no longer employed by the Board on the date of the Spiewak decision. We further find that Rutherford limits any retroactive relief to which the three Petitioners still employed by the Board on that date may be entitled to the period beginning six years prior to the decision in Rutherford.

In considering the substantive claims to salary adjustments of the Petitioners who are entitled to retroactive application of the rule in Spiewak, we reiterate that the decision in Spiewak did not grant to supplemental teachers any entitlement to compensation beyond that conferred on all tenure eligible teaching staff members by the education statutes, and we conclude that, where a collective negotiations agreement is applicable, we may not set it aside unless the terms of the agreement contravene the specific requirements of the education statutes. In so concluding, we recognize that had the status of supplemental and compensatory education teachers as tenure eligible teaching staff members been established at an earlier date, Petitioners' collective negotiations representative possibly may have been able to negotiate terms of compensation that were more favorable to Petitioners. However, we again emphasize that the decision in Spiewak did not confer on us the jurisdiction, in the absence of violation of the education statutes, to redefine rights established through the collective negotiations process. Nor, in the absence of such violation, can these proceedings be substituted for that process, which is governed by the New Jersey Employer-Employee Relations Act.

In conformity with the principles enunciated above, we have determined whether, by virtue of their status as tenure eligible teaching staff members, Petitioners are entitled to pro-rated compensation based on the negotiated salary guide applicable to classroom teachers. As set forth above, we conclude, as we did in Hyman, that teaching staff members who are not full-time have no entitlement under the education laws to placement on a salary

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guide. Since the record did not indicate that Petitioners were full-time teaching staff members during the period relevant to this litigation, we find that they are not entitled either retroactively or prospectively under the education laws to pro-rated compensation based on the negotiated salary guide applicable to classroom teachers.

In considering Petitioners' claims to prospective relief upon their employment as full-time teaching staff members, we find that, upon accepting employment as a full-time teaching staff member in a district, the initial place on the applicable salary guide of a supplemental teacher, like that of all teaching staff members, is at such point as agreed upon between the teacher and the board unless superceded by a collective negotiations agreement, and, although such placement may not result in reduction in the compensation of a tenured teacher, the education laws do not require that credit be given for prior experience. We therefore conclude that Petitioners are not entitled under the education laws to prospective salary adjustments for the period following their employment as full-time teaching staff members.

Finally, we emphasize that the claims involved in this appeal were limited to claims for compensation. We therefore were not called upon in this case to resolve any disputes between the parties concerning other benefits to which, as tenure eligible teaching staff members, Petitioners may have had a specific statutory entitlement under the education laws.

For the reasons set forth above, the State Board of Education reverses the decision of the Commissioner.

Attorney exceptions are noted.
September 3, 1986

Affirmed N.J. Superior Court May 27, 1988

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PHILLIP CAPODILUPO,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT-RESPONDENT,	:	
AND MARGARET SAVAGE AND PATTI VAN CAUWENBERGE,	:	
INTERVENORS-RESPONDENTS.	:	

Decided by the Commissioner of Education, May 3, 1985

For the Petitioner-Appellant, Ruhlman, Butrym and Friedman (Richard A. Friedman, Esq., of Counsel)

For the Respondent-Respondent, Samuel A. Christiano, Esq.

For the Intervenor-Respondent Margaret Savage, Alfred F. Maurice, Esq.

For the Intervenor-Respondent Patti Van Cauwenberge, Bucceri and Pincus (Gregory T. Syrek, Esq., of Counsel)

This case arose when, in February 1984, the West Orange Board of Education acted to reduce its staff and notified Phillip Capodilupo, a tenured physical education teacher who taught in the high school, that his employment would be terminated effective June 30, 1984. On appeal, Mr. Capodilupo, Petitioner-Appellant in this case (hereinafter "Appellant"), challenges the Commissioner's determinations that he was not entitled to positions in which two non-tenured teachers were retained and that he did not have superior seniority over a tenured physical education teacher assigned to an elementary school in the district. Thus, issues of both tenure and seniority are involved.

Prior to his termination, Appellant, who is certified as a teacher of health and physical education K-12, had been employed by the Board for five years at the secondary level. While abolishing Appellant's position, the Board retained two non-tenured physical education teachers, Kevin Reilly, who was employed in an elementary school, and Margaret Savage, who was assigned as an adaptive physical education teacher at the elementary level. A tenured teacher with 3.8 years seniority, who taught at the elementary level, was also retained. On May 10, 1984, Appellant filed a Petition of Appeal with the Commissioner of Education, alleging that

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the Board violated his tenure rights by retaining non-tenured teachers in positions for which he was qualified and challenging the validity of the seniority regulations that became effective on September 1, 1983.

In his Initial Decision, the Administrative Law Judge (ALJ) found that the Board had violated Appellant's tenure rights by retaining the two non-tenured teachers. He reasoned that, under N.J.S.A. 18A:28-5, tenure attaches to the positions of teacher, principal or superintendent, and that because those with tenure have greater job security than non-tenured teachers, tenured teachers may not be dismissed for reasons of economy while non-tenured teachers are retained in positions for which the tenured teacher is qualified. Although the ALJ noted that it may be desirable for teachers of adaptive physical education to be required to hold special certification, he emphasized that no special certification is required under New Jersey law. He therefore concluded that, since Appellant was legally authorized to teach adaptive physical education, as well as physical education at the elementary level, he was entitled to those positions over the non-tenured teachers who had been retained.

The ALJ, however, rejected Appellant's seniority claim, concluding that seniority determinations made after September 3, 1983, are governed by the regulations now in effect and that, under these regulations, Appellant's five years of service were to be credited to the category of secondary physical education teacher. Appellant therefore had no seniority in the elementary category and, thus, less seniority than the teacher with 3.8 years seniority in this category who was retained by the Board.

The Commissioner rejected the ALJ's determination that Appellant, based on his tenure claim, was entitled to reinstatement. Instead, applying seniority standards, he found that Appellant had acquired tenure and seniority in the secondary category only. Because Appellant had never served at the elementary level, the Commissioner found that he was eligible for reinstatement in the secondary category only.

After careful review of the record, we affirm the Commissioner's determination that under the regulations now in effect, Appellant's seniority was properly credited in the category of secondary physical education teacher and that, since he had taught only at the secondary level, he had no seniority in the elementary category. We therefore agree with the Commissioner that Appellant had no seniority entitlement to positions in the elementary category. Elsa Hill v. Board of Education of West Orange, decided by the Commissioner, January 20, 1985, aff'd by the State Board, May 1, 1985, aff'd, Docket #A-4355-84T1 (App. Div. Feb. 21, 1986).

However, we conclude that the Commissioner's application of the categories set forth in the seniority regulations in deciding Appellant's tenure claims was improper. Initially, we emphasize that, although related, tenure and seniority involve distinct

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concepts. As a result, the category, or categories, in which the seniority of a particular teaching staff member is to be credited is not necessarily congruent with the position in which tenure is achieved, and the rights attached to tenure status are not synomous with seniority rights. See Howley v. Bd. of Ed. of the Township of Ewing, 1982 S.L.D. 1328, aff'd by the State Board, June 1, 1983.

We emphasize that tenure is achieved in a position as defined by statute. See N.J.S.A. 18A:28-5. In contrast, seniority is credited in a category or categories established by the Commissioner for seniority purposes. See N.J.S.A. 18A:28-10; -13. The implications of this distinction are apparent in a case where a tenured teacher asserts a claim to an assignment filled by a non-tenured teacher and the tenured teacher has no seniority in the category applicable to the assignment. For example, in the instant case, because they are not tenured, neither individual presently filling the assignments to which Appellant asserts entitlement has any seniority in elementary category, which is the seniority category applicable to those assignments. Likewise, as set forth above, because he has served only at the secondary level, Appellant has no seniority in the elementary category. However, since tenure is achieved in a position and not in a seniority category, see Howley, supra, at 1331, the question of whether Appellant's tenure rights were violated by the Board's action is not resolved by the conclusion that none of the teaching staff members involved have seniority in the applicable category. Rather, we conclude that this question can be resolved properly only by application of the tenure laws.

In the past, lack of precision in the use of the education vocabulary associated with the tenure law resulted in the accumulation of case law that applied the tenure statutes and related regulations in a confusing and inconsistent manner. See Howley, supra, at 1332. Because of this confusion, the Administrative Law Judge, in issuing her Initial Decision in Howley, supra, comprehensively discussed the basic concepts involved in tenure and seniority. Her thorough discussion sets forth the crucial distinctions between tenure and seniority, and we find that it provides excellent guidance in understanding the scope and substance of tenure and seniority. However, confusion and inconsistency have continued to plague this area of the law. Therefore, in order to resolve the tenure claims in the case before us, we find it necessary to revisit some of the basic concepts embodied in the tenure laws.

Tenure is a legislatively conferred status, not a contractual one, Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63, 72 (1982), and an individual achieves tenure status if he meets the precise conditions set forth in the statute. Howley, supra, at 1336. See Spiewak, supra, at 74. Those conditions are set forth in N.J.S.A. 18A:28-5. In addition to specifying the length of time that an individual must serve in order to achieve tenure, N.J.S.A. 18A:28-5 provides that

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> [t]he services of all teaching staff members including all teachers, principals, assistant principals, vice principals, superintendents, assistant superintendents, and all school nurses including school nurse supervisors, head school nurses, chief school nurses, school nurse coordinators, and any other nurse performing school nursing services and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect, shall be under tenure during good behavior and efficiency...

Thus, in order to be eligible to achieve tenure, an individual must be a "teaching staff member" serving either in a capacity specifically designated in the statute or serving in a "position" requiring him to hold an appropriate "certificate."

We note that, although for purposes of tenure eligibility "position" is broadly defined to include "any office, position or employment," N.J.S.A. 18A:28-1, "teaching staff member" is defined by N.J.S.A. 18A:1-1 to be a staff member who holds office, position or employment the character of which requires that he hold a valid certificate in order to be qualified for the position. Additionally, N.J.S.A. 18A:28-4 provides that "[n]o teaching staff member shall acquire tenure in any position ... who is not the holder of an appropriate certificate for such position...." Thus, a statutory prerequisite to the acquisition of tenure is employment requiring the staff member to hold a valid certificate in order to be qualified.

Under the statutory scheme, tenure is achieved in a particular "position", see Howley, supra, at 1337, and we conclude that the scope of the "position" to which tenure protection attaches is initially limited by the scope of the certificate that the teaching staff member must hold in order to fulfill the statutory prerequisite of qualification for his employment. In so concluding, we emphasize that, in contrast to the numerous endorsements that exist, which are enumerated in the Administrative Code and which define the qualifications required for assignment to particular position titles, see N.J.A.C. 6:11-3.6; N.J.A.C. 6:11-6.1, the Board of Examiners issues only three kinds of regular certificates: 1) Instructional, N.J.A.C. 6:11-6.1 et seq. 2) Administrative and Supervisory, N.J.A.C. 6:11-9.1 et seq.; N.J.A.C. 6:10.1 et seq., and 3) Educational Services. N.J.A.C. 6:11.1 et seq.; N.J.A.C. 6:11-12.1 et seq.[1]

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[1] In addition to standard certificates, the Board of Examiners also issues limited certificates to candidates who are not eligible for a standard certificate. N.J.A.C. 6:11-4.2 (Provisional Certificate); N.J.A.C. 6:11-4.3 (Emergency Certificate in specified

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Further definition of the scope of a position in which tenure may be achieved is provided by, N.J.S.A. 18A:28-5, which specifically provides that the services of

> ... all teachers, principals, assistant principals, vice principals, superintendents, assistant superintendents, and all school nurses including school nurse supervisors, head school nurses, chief school nurses, school nurse coordinators, and any other nurse performing school nursing services ... shall be under tenure....

(emphasis added).

We find that by specifying that service in these capacities shall be under tenure if other statutory prerequisites are met, the Legislature defined, for those serving in these capacities, the scope of the "position" in which tenure is achieved and to which tenure protection attaches. We therefore conclude that pursuant to N.J.S.A. 18A:28-5, the position in which an individual achieves tenure is either one of those specifically enumerated in the statute or some other employment with a board for which a certificate is required, either Instructional, Educational Services or Administrative and Supervisory.

This construction is supported by the statutory provision governing the transfer or promotion of teaching staff members. Pursuant to N.J.S.A. 18A:28-6,

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' fields); N.J.A.C. 6:11-4.4 (County Substitute Certificate). We however, emphasize that individuals holding limited certificates cannot acquire tenure. Pursuant to N.J.S.A. 18A:28-4, no teaching staff member can acquire tenure who does not hold an appropriate certificate for a position. An Emergency Certificate is not an "appropriate certificate" for a tenurable position and, therefore, those holding such certificates cannot acquire tenure unless they are eligible for the appropriate standard certificate required for the position. N.J.S.A. 18A:28-4. See Amato v. Board of Education of the Hudson County Area Vocational and Technical Schools, decided by the Commissioner, November 8, 1984; K'Burg v. Board of Education of Lower Alloways Creek, 1973 S.L.D. 636. The regulations applicable to the County Substitute Certificate specifically provide that the holder of such certificate is not entitled to tenure. N.J.A.C. 6:11-4.4(c). Although under the regulations in effect prior to October 15, 1984, it was possible for an individual holding a provisional certificate to acquire tenure, see Anson, et al. v. Board of Education of the City of Brideton, under the current regulatory scheme, the acquisition of tenure by one holding a provisional certificate is precluded. See N.J.A.C. 6:11-5.7.

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

Thus, N.J.S.A. 18A:28-6 limits the right of boards to transfer a teaching staff member without his consent from one tenurable position to another. Accordingly, the court in Childs v. Union Township Bd. of Ed. held that an individual who had served as a guidance counselor for five years and had acquired tenure in her position could not be unilaterally transferred to a position as a classroom teacher without her consent. 1982 S.L.D. 1457. We emphasize that the appropriate certificate for the position of teacher is an Instructional Certificate, while an Educational Services Certificate with the specified endorsement is required in order to serve as a guidance counselor. See N.J.A.C. 6:11-12.13.

We note, however, that although a board may not transfer a teaching staff member from one "position" to another without his consent, a board has the discretion to assign teachers to serve in any capacity in which they are qualified to serve by virtue of their endorsements so long as such assignment is within the scope of the certificate required for the tenurable position. In these

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situations, the staff member's reassignment is within the scope of the "position" and the transfer statute does not apply.

After reviewing the current statutory scheme, we find that it includes no authority for defining tenurable positions by grade level except where the Board of Examiners requires a certificate the scope of which is defined by grade levels. As set forth above, all of the regular certificates currently issued by the Board of Examiners' authorize the holder to serve at any grade level. We therefore conclude that Appellant in the instant case, who was employed as teacher and held an Instructional Certificate, achieved tenure as a teacher, a position that is one of the positions specified in N.J.S.A. 18A:28-5, and for which an Instructional Certificate is required.

In so concluding, we emphasize that possession of an appropriate certificate is a threshold requirement, qualifying an individual for employment in a tenurable position within the public school system. However, under the applicable regulations, each teaching staff member must be assigned a "position title" that either is recognized in the regulations or approved by the county superintendent. N.J.A.C. 6:11-3.6. The titles recognized in the regulations correspond to the endorsements required to fill particular assignments. See, for example, N.J.A.C. 6:11-6.1; N.J.A.C. 6:11-10.4; N.J.A.C. 6:11-10.12; N.J.A.C. 6:11-10.13. Thus, in addition to possessing an appropriate certificate in order to be qualified to hold a tenurable position in the public school system, a teaching staff member also must possess a proper endorsement in order to fill particular assignments within a tenurable position. Because the assignments that a staff member is qualified to fill are limited by the scope of his endorsements, the scope of the position in which such staff member may be entitled to tenure protection is likewise limited by the scope of his endorsements.

However, we emphasize that, like the certificates upon which they are issued, endorsements generally are not limited by grade level. For example, the specific subject field endorsements issued on the Instructional Certificate, which are required in order to be qualified for particular assignments as a teacher, such as that of physical education teacher, qualify an individual to fill those assignments at any grade level, with the exception of the elementary and nursery school endorsements. N.J.A.C. 6:11-6.1. Likewise, the endorsements issued on the Administrative and Supervisory Certificate do not limit by grade levels qualification to fill assignments authorized by the endorsements. N.J.A.C. 6:11-10.4. See also N.J.A.C. 6:11-10.12 (Executive Superintendent); 6:11-10.13 (Assistant Executive Superintendent with Specialization in Supervision and Curriculum). Nor do the endorsements issued on the Educational Services Certificate limit an individual's qualification to fill assignments at all grade levels. N.J.A.C. 11:12.1 et seq. Therefore, although the requirement for proper

[2] See supra note 1.

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endorsement in order to be qualified to fill particular assignments limits the scope of tenure protection within a position, that requirement does not limit such protection to service at particular grade levels.

In this case, Appellant possessed a health and physical education endorsement issued on his Instructional Certificate. As stated, that endorsement is not limited by grade level. Thus, the teaching assignments that he is qualified to fill and the scope of the position in which he has tenure protection includes all assignments K-12 requiring an Instructional Certificate and a health and/or physical education endorsement.

However, although we conclude the Appellant achieved tenure as a teacher and that tenure protection attached to those teaching assignments within the position for which he is qualified by virtue of his endorsement, we reiterate that the protection afforded by tenure status is not the same as seniority rights. Essentially, tenure status protects teaching staff members from dismissal for unfounded, flimsy or political reasons and prevents school boards from abusing their superior bargaining power over teachers in contract negotiations. Spiewak, supra., at 73. Accordingly, N.J.S.A. 18A:6-10 et seq. protects tenured teachers from arbitrary dismissals by specifying disciplinary procedures that must be followed by a board seeking the dismissal of a tenured employee. Additionally, the statutes confer on teaching staff members who acquire tenure such rights as seniority rights on reductions in force, N.J.S.A. 18A:28-10 et seq., and the right to remain on a preferred eligibility list in order of seniority for reemployment purposes. N.J.S.A. 18A:28-12. Thus, although affording teachers significant rights and protections, tenure protection does not confer on a tenured teacher affected by a valid reduction in force pursuant to N.J.S.A. 18A:28-9 the right to claim, based solely on his years of service, an assignment in a category in which he has no seniority and in which a non-tenured teacher has been retained.[1]

We emphasize that Appellant in this case has not challenged the Board's action in reducing the number of teaching staff members employed in physical education assignments at the secondary level. Nor is this a case involving the transfer of the duties performed by Appellant to another position. Rather, the claim in this case is that when a district board reduces the number of teaching staff members it employs pursuant to N.J.S.A. 18A:28-9, it is obligated to reassign a tenured teacher to an assignment for which he is

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[1]We note that earlier cases assumed that a "tenured teacher should have preference over a nontenured teacher when the qualifications of both to teach a particular subject are not in dispute." See, e.g., Miller v. Board of Education of the Township of Mendham, decided by the State Board, February 1, 1983, Slip. op. at 4; Fitzpatrick et al. v. Board of Education of the Township of Weehawken, Docket #A-3279-80T3 (App. Div. June 16, 1982). However, as the State Board recognized in Miller, there is no statutory authority for this proposition. Miller, supra, at 4.

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qualified, but to which he does not have a seniority entitlement, and in which non-tenured teachers not affected by the reduction are serving.

Careful scrutiny of the relevant statutes reveals that they do not impose such an obligation on district boards when they effectuate a valid reduction in force. N.J.S.A. 18A:28-5 mandates that tenured teaching staff members shall not be dismissed or reduced in compensation except for just cause and in accordance with specified procedures. However, N.J.S.A. 18A:28-9 provides that

> [n]othing 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.

Although N.J.S.A. 18A:28-11 requires that determinations concerning which staff members are to be retained following a reduction in force pursuant to N.J.S.A. 18A:28-9 must be based on seniority, the statutes do not prescribe standards that apply when, as here, seniority rights are not implicated. In the absence of any applicable statutory standards, we are called upon to reach a proper balance between the protection afforded tenured teaching staff members by N.J.S.A. 18A:28-5 and the authority granted to district boards of education by N.J.S.A. 18A:28-9.

We first emphasize that although boards of education have great discretion when acting pursuant to N.J.S.A. 18A:28-9, that discretion is not without limits. The tenure provisions of the school laws are important expressions of legislative policy and the rights they confer are accorded vigorous protection. Viemeister v. Prospect Park Board of Education, 5 N.J. 215 (App. Div. 1979). Because reductions in force often necessarily implicate tenure rights, the decision-making process and its consequences are closely scrutinized whenever an allegation is made that tenure rights have been impermissibly compromised by board action taken pursuant to N.J.S.A. 18A:28-9. Vogel v. Board of Education of the Borough of Ridgefield, decided by the State Board, June 5, 1985.

Abridgement of tenure rights is not countenanced if it is found that the duties of a position abolished pursuant to N.J.S.A. 18A:28-9 have in fact been transferred to another position so as to defeat the rights of an employee who is tenured in the abolished position. Viemeister, supra. Moreover, board action under N.J.S.A. 18A:28-9 may not arbitrarily and capriciously abridge the rights conferred on tenured employees by N.J.S.A. 18A:28-5. Accordingly, the Appellate Division has held that abolishment of the position of a tenured teaching staff member and her replacement by others paid

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at a lower rate impermissibly abridged her tenure rights where the need for the services that she had provided had increased. Lingelbach v. Board of Education of the Borough of Hopatcong, A-4783-83T7, (App. Div. May 17, 1985), certif. denied, 101 N.J. 333 (1986). In so holding, the Appellate Division emphasized that

> [in] the final analysis there is a conflict between the legislative policies implicit in N.J.S.A. 18A:28-5 and N.J.S.A. 18A:28-9 .... The tenure statute seems to give some measure of security after years of service, while the RIF statute has a goal of governmental economy. Under such circumstances [where substantial evidence in the record supports more than one result] it is the choice of the State Board of Education that governs and deserves judicial deference.

Id., Slip op. at 4

We emphasize that the instant case is distinguished from the previously cited cases by the fact that, in this case, the legitimacy of the Board's decision to reduce its staff is not at issue. However, because the tenure laws are designed to provide some measure of security in their positions to teaching staff members after years of service, Lingelbach, supra; Veimeister, supra, we conclude that the consequences of a reduction in force must be closely scrutinized where an allegation is made that tenure rights have been impermissibly abridged by the manner in which an otherwise valid reduction in force has been effectuated.

Although the courts have considered the consequences of reductions in force in many cases where the validity of the reduction has been challenged, there are few decisions involving cases where the legitimacy of the reduction has not been questioned and the claim is based purely on the manner in which the reduction has been effectuated. In Klinger v. Cranbury Tp. Bd. of Ed., the Appellate Division considered an appeal from our decision in a case in which neither the validity of the board's decision to reduce its staff nor the legitimacy of its reasons was challenged. 190 N.J. Super. 354 (App. Div. 1982). In that case, the board reduced two full-time physical education positions, one held by a tenured teacher and one held by a non-tenured teacher, to part-time positions and continued to employ both the tenured and the non-tenured teacher in part-time positions. The tenured teacher challenged the reduction of his position from full-time, asserting that his tenure status and his seniority entitled him to retention in a full-time position. In addressing the claim in that case, the Appellate Division affirmed our decision that the tenure rights of an incumbent can not prevail against the authority of a board to reduce its staff when exercised in good faith and with some rational basis. The Appellate Division emphasized that the petitioner had not challenged the board's right to reduce his position for reasons of economy, nor the validity of the reason given for the reduction. The court found that given the history of dual instruction in the

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board's physical education program, the fact that it preferred two teachers to one was of no concern to the courts, and so long as petitioner was not treated inferiorilly upon the reduction in force, he had no legitimate complaint.

Miles v. Board of Education of the Borough of Watchung, decided by the Commissioner, June 14, 1984, aff'd by the State Board, Dec. 5, 1984, aff'd, Docket #A-1903-8477 (App. Div. Dec. 5, 1985), also involved a claim that tenure status entitles a teacher to a full-time assignment of classes when an valid reduction in force results in a reduction of all positions in a program to part-time. In Miles, the board reduced two full-time vocal arts positions to part-time and retained both the tenured teacher and non-tenured teacher in part-time positions. We affirmed the Commissioner's determination that, because, in contrast to Klinger, supra, the program would not be affected by assignment of petitioner on a full-time basis and because there had not been a substantial showing of likely disruption if she were so assigned, the board had acted improperly in reducing her employment from full-time. In affirming our decision in the case, the Appellate Division observed that the Board had never considered the alternative of retaining petitioner full-time, and emphasized that in deciding these kinds of cases, the State Board was exercising its expertise to resolve the policy conflicts between N.J.S.A. 18A:28-5 and N.J.S.A. 18A:28-9.

In Valinski v. Board of Education of the Borough of Garwood, we again were called upon to balance the policies reflected in the two statutes. Valinski v. Board of Education of the Borough of Garwood, decided by the Commissioner, March 11, 1985, rev'd by the State Board, November 8, 1985, appeal dismissed, Docket #A-0738-85T1 (App. Div. March 6, 1985). In that case, the board reduced two physical education teaching positions at the elementary level from full-time to four-fifths time. One position was held by Ms. Valinski, a tenured teacher, the other by a non-tenured teacher. Ms. Valinski asserted that her tenure rights were improperly abridged by the board's action in reducing her position while retaining a non-tenured teacher to teach classes that she was qualified to teach and to which she could have been assigned without any adjustment in pupils schedules.

In considering this case, the State Board concluded that, because of the measure of security afforded to tenured teachers by the tenure statute, a board of education has an obligation to attempt to acknowledge an affected teacher's tenure rights when it exercises is discretionary authority under N.J.S.A. 18A:28-9. Such obligation encompasses the duty to attempt to assign the affected teacher to courses assigned to non-tenured teachers before reducing his position from full-time. We found that this resolution permits boards to achieve their desired result without impairing the underlying purposes of the tenure law in cases where the board does not have an educational policy for retaining the non-tenured teacher and full-time assignment of the tenured teacher would not affect pupil schedules. Since the record demonstrated that the board in Valinski could have retained Ms. Valinski full-time without any disruption to pupil schedules, and since the board failed to put

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forth any justification for reducing her position while retaining a non-tenured teacher, we held that the board had failed to fulfill its obligation to attempt to acknowledge Ms. Valinski's tenure rights.

Valinski, like Klinger and Miles, involved decisions regarding assignment of courses within a program to which the same seniority category would have been applicable.[4] In contrast, in the instant case, a valid reduction occurred in the number of physical education teachers in the physical education program at the secondary level, and the question presented is whether the measure of security confered on tenured teachers by N.J.S.A. 18A:28-5 requires that, in these circumstances, the tenured teacher affected by the reduction be reassigned to the elementary level.

In resolving this question, we reiterate the principle that the public schools were not created for the benefit of the teachers, but for the benefit of the pupils, and the resulting benefit to their parents and the community. Klinger v. Board of Education of the Township of Cranbury, 1982 S.L.D. 1520, 1521, aff'd 190 N.J. Super. 354 (App. Div. 1982); Smith v. Board of Education of Paramus, 1968 S.L.D. 62,67. Further, we emphasize that in cases such as the one before us, where the tenured teacher has no seniority in the category applicable to a particular assignment within a position, the determination that must be made by the local board in effectuating the reduction in force involves a decision concerning the retention of a tenured teacher, who may have greater experience as a teacher but who has no actual experience in the assignment, over a non-tenured teacher, who is less experienced as a teacher, but has actual experience in the particular assignment. In such situations, to which no statutory standards are applicable, we conclude that the board should be able to consider the best educational interests of its students in effectuating the reduction.

We recognize that N.J.S.A. 18A:28-5 was intended to confer some measure of security on tenured staff members. However, the requirement that district boards attempt to acknowledge the tenure rights of affected teachers when effectuating a reduction in force need not infringe upon the board's ability to make determinations that are in the best educational interests of the students. We therefore reaffirm our conclusion that where a board validly determines that a reduction in force is necessary, it has an obligation to attempt to recognize the tenure rights of a teacher affected by the reduction. This obligation does include consideration of the reassignment of the affected teacher to assignments filled by non-tenured teachers for which he is qualified, but which are in categories in which he has no seniority.

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[4]We note that because all full-time positions in the programs had been reduced, the petitioners in these cases did not have a seniority claim to a position. See Klinger, supra.

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We, however, hold that the board has fulfilled this obligation where it provides sound educationally based reasons for its decision to retain a non-tenured teacher, and we will uphold the propriety of the board's decision unless the petitioning teacher has shown that the board's reasons were pretextual. We find that this standard properly recognizes the discretion of local boards when acting pursuant to N.J.S.A. 18A:29-9 while properly accommodating the tenure rights of affected teachers by insuring that tenure status is properly considered.

We emphasize that the principles we have enunciated are applicable only when a district board acts under the authority granted it by N.J.S.A. 18A:28-9. Further, they apply only in the limited circumstances presented when a tenured teaching staff member affected by board action taken pursuant to N.J.S.A. 18A:28-9 has no seniority in categories applicable to assignments for which he is qualified by virtue of his certification and in which non-tenured staff members are serving. In such situations, the principles set forth in this decision properly balance the expectation of continued employment conferred on tenured teaching staff members by N.J.S.A. 18A:28-5 with the district board's responsibility to achieve its educational objectives, which is embodied in N.J.S.A. 18A:28-9.

In this case, as set forth above, Appellant's employment was terminated as a result of the Board's action pursuant to N.J.S.A. 18A:28-9. He is qualified by virtue of his instructional certificate and health and physical education endorsement to fill assignments both as an adaptive physical education teacher and as a physical education teacher at the elementary level. The Board, however, terminated his employment while retaining non-tenured teachers in each of those assignments.

Our review of the record shows that the Board had educationally based reasons for retaining the non-tenured teacher assigned to teach adaptive physical education. Specifically, the Board consistently has maintained that the duties attached to this particular assignment require that the individual filling the assignment have training and experience in the specialized area of adaptive physical education. We emphasize that, in contrast to seniority, which allows distinctions to be made between jobs only on the basis of explicit categories, the tenure laws permit distinctions to be made between particular jobs based on differences in duties, e.g., Lichtman v. Ridgewood Bd. of Ed., 93 N.J. 362 (1983), and we conclude that the record amply demonstrates that the duties attached to the adaptive physical education assignment require specialized training and experience. e.g., J-15, in evidence. Because the Board desired that the individual filling the adaptive physical education assignment have training and experience in this specialized area, it retained the individual then filling the assignment, Margaret Savage, who had strong credentials in the field of adaptive physical education, including a Masters Degree in Adaptive Physical Education, and experience teaching neurologically impaired students, students with diminished motor ability and students afflicted with spina bifida. Respondent's Brief, at 6-7; Respondent's Exception to the Initial Decision, at 2-3. See e.g.,

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Tr. 11/13/84, at 52-55 and 86-115; Tr. 11/13/84, at 148; J-20, in evidence. In contrast to Ms. Savage, Appellant had taken only one undergraduate course in adaptive physical education. We conclude that because the Board had educationally based reasons for its decision to retain the non-tenured teacher in the adaptive physical educational assignment and because those reasons are supported by the record, the Board did not impermissibly abridge Appellant's tenure rights by retaining Ms. Savage, the non-tenured teacher assigned to teach adaptive physical education.[5]

However, the record does not reveal any justification for the Board's decision to retain Kevin Reilly, the non-tenured teacher assigned to physical education at the elementary level. We reiterate that Appellant is tenured in the position of teacher and possesses the endorsement authorizing him to fill the assignment of physical education teacher at the elementary level. In the absence of a sound educationally based reason for retaining a non-tenured teacher in this assignment, we conclude that the Board impermissibly violated Appellant's tenure rights by retaining Kevin Reilly in the assignment, and we would direct Appellant's reinstatement to the position of physical education teacher assigned to the elementary level with full back pay minus mitigation.

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[5]We note that, because the adaptive physical education assignment was at the elementary level, Appellant was not entitled to that assignment by virtue of his seniority. However, we further note that, no separate position title is listed for adaptive physical education and, consequently, no specific endorsement other than one in physical education is required to fill this assignment. Therefore, the applicable seniority category would be elementary physical education unless the Board obtains approval for an unrecognized title for this assignment. See N.J.A.C. 6:11-3.6.

Attorney exceptions are noted.
September 3, 1986

Pending N.J.Superior Court

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IN THE MATTER OF THE TENURE	:	
HEARING OF PATRICK CAPORASO,	:	STATE BOARD OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF BELLEVILLE, ESSEX COUNTY.	:	
	:	

Decided by the Commissioner of Education, October 15, 1985

For the Petitioner-Respondent, Schwartz, Pisano, and Simon
(Lawrence Schwartz, Esq., of Counsel)

For the Respondent-Appellant, Oxfeld, Cohen, and Blunda
(Sanford Oxfeld, Esq., of Counsel)

This is an appeal from the decision of the Commissioner, which adopted the findings and conclusions of the Administrative Law Judge and sustained tenure charges of conduct unbecoming a teacher against a special education teacher who was charged with sexually assaulting a student and maintaining contact with him for approximately six years. The charges involved six specific incidents of sexual assault. Support for the charges was provided by the testimony of the individual who was the object of the alleged assaults. The Respondent's defense was based on his denials and impeachment through collateral testimony. Thus, the case turns on the credibility accorded to the testimony of the individual who testified in support of the Board's charges, and who was the only witness for the Board with direct personal knowledge of the alleged incidents.

The Administrative Law Judge found the witness's testimony to be credible. He further found that the collateral evidence did not show that the incidents never occurred, nor demonstrate inconsistencies or contradictions requiring that the witness be disbelieved. He, however, concluded that Respondent's denials were unpersuasive and unworthy of belief. He therefore sustained the charges. The Commissioner reviewed the record, including the transcripts, and, as stated, adopted the findings and conclusions set forth in the Initial Decision. Accordingly, he directed the Board to remove Respondent from his tenured position as of the date of his decision.

After carefully reviewing the entire record in this case, including the transcripts, we affirm the decision of the Commissioner for the reasons expressed therein. Like that of the Commissioner, our own reading of the record supports the findings of the Administrative Law Judge, who had the opportunity to hear the witnesses to judge their credibility. See Mayflower Securities v. Bureau of Securities, 64 N.J. 85, 92 (1973). We therefore conclude

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that the charges in this case have been proven by a preponderance of the evidence. e.g., In the Matter of the Tenure Hearing of Barry Deetz, decided by the State Board, November 7, 1984, aff'd, Docket #A-1264-84T5 (App. Div. May 10, 1985), certif. denied, 101 N.J. 321 (1986).

May 7, 1986

Reversed/Remanded N.J. Superior Court March 19, 1987

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IN THE MATTER OF THE TENURE	:	
HEARING OF ANTHONY CASTALDO,	:	
SCHOOL DISTRICT OF THE UNION	:	STATE BOARD OF EDUCATION
COUNTY REGIONAL HIGH SCHOOL	:	DECISION
NO. 1, UNION COUNTY	:	
	:	

Remanded by the Commissioner of Education, May 6, 1982

Interlocutory Decision by the Commissioner of Education, June 10, 1983

Decided by the State Board of Education, November 2, 1983

Partial remand by the Commissioner of Education, May 7, 1984

Decided by the State Board of Education, December 5, 1984

Decided by the Commissioner of Education, October 31, 1985

For the Petitioner-Appellant, Weinberg and Kaplow (Richard J. Kaplow, Esq., of Counsel)

For the Respondent/Cross-Appellant, Anthony Castaldo, pro se

On May 7, 1984, the Commissioner of Education sustained tenure charges of unbecoming conduct, which had been certified by the Board on April 15, 1981, against Respondent/Cross-Appellant (hereafter "Respondent"), and ordered Respondent's dismissal as of the date of his decision. The State Board affirmed the Commissioner's decision, and Respondent appealed our determination to the Appellate Division. In the Matter of the Tenure Hearing of Anthony Castaldo, decided by the Commissioner, May 7, 1984, aff'd by the State Board, December 5, 1984, appeal pending, Docket #A2131-84T6 (App. Div.).

However, although rendering his decision on the substantive questions of whether the tenure charges were supported by a preponderance of the evidence and whether the seriousness of the charges warranted dismissal, the Commissioner remanded salary claims that had arisen during the course of the proceedings to the Office of Administrative Law for "...a further fact finding and determination with respect to the merits of the claims of either party." Commissioner's Decision, at 82. Those claims concerned Respondent's asserted entitlement to a salary amount for the period of his suspension that included increments and the Board's claim that it was entitled to deduct from the total of any sums otherwise due and owing Respondent for the period prior to November 3, 1982,

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an estimated amount representing contributory payments that the Board claimed should have been made on a $52,000 lump sum settlement payment that the Board maintained constituted salary. This appeal is from the decision of the Commissioner with respect to these salary claims, which was rendered following completion of the proceedings on remand.

Although the issues before us are limited, their disposition is affected by events that have occurred during the course of the proceedings in the underlying tenure case and related litigation. As indicated above, during the course of the tenure proceedings, the parties reached a tentative settlement, and the Board disbursed $52,000 to Respondent under the terms of that agreement. The Commissioner, however, rejected the settlement and ordered the matter to proceed to a hearing on the merits.[1] In the Matter of the Tenure Hearing of Anthony Castaldo, decided by the Commissioner, May 6, 1982.

Respondent, however, did not return to the Board the money that had been disbursed to him. The Board, in turn, suspended any further accrual of salary to Respondent until such time as the settlement money was repaid, and moved before the Administrative Law Judge (ALJ) for sanctions against Respondent for his refusal to return or account for the $52,000.

Following various motions and orders resulting from Respondent's refusal to return or account for the money, the ALJ ordered suppression of Respondent's affirmative defenses to the tenure charges That order became the subject of an interlocutory appeal and, on June 10, 1983, the Commissioner reversed suppression of Respondent's defenses, but upheld continued denial of Respondent's request that his salary be resumed. Both parties appealed that decision to the State Board, which reversed the Commissioner's decision both on the issue of suppression of Respondent's defenses and on the question of whether Respondent was entitled to the resumption of salary payments after the 121st day of his suspension. In the Matter of the Tenure Hearing of Anthony Castaldo, decided by the State Board, November 2, 1983.

In our decision of November 2, 1983, we found, on the question of whether Respondent was entitled to resumption of his salary payments, that N.J.S.A. 18A:6-14 mandates payment of salary

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[1]We note that one month before rejecting the settlement in this case, the Commissioner had reiterated that he had the responsibility to review settlement agreements in tenure cases. See In the Matter of the Tenure Hearing of Frank Cardonick, decided by the Commissioner, April 7, 1982, aff'd by the State Board, April 6, 1983.

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after the 121st day of suspension and that the only offset authorized by the statute is for sums received for substituted employment. Since that was not the case regarding the $52,000 lump sum payment, we concluded that the Board had no authority to withhold Respondent's salary payments. In sum, since we did not view the lump sum payment as salary within the meaning of the N.J.S.A. 18A:6-14, we concluded that the statute did not authorize offset of salary payment to which Respondent was entitled under N.J.S.A. 18A:6-14 by the amount of the lump sum payment. We therefore directed resumption of Respondent's salary payments as of the date of our decision. We, however, emphasized that the Board was not without remedy for Respondent's refusal to return the $52,000, and that it could seek return of that money by bringing civil action in a court of competent jurisdiction.

As set forth above, subsequent to our decision directing the Board to resume salary payments to Respondent, the Commissioner, on May 7, 1984, rendered his decision in the underlying tenure case, sustaining the tenure charges and remanding the salary claims to the Office of Administrative Law. As stated, those claims included both Respondent's claim that he was entitled to a salary amount that included increments for the period of his suspension and the Board's claim that it was entitled to deduct from the total of any amount otherwise due and owing Respondent for the period prior to November 2, 1983, an amount representing contributory payments that should have been made on the $52,000 lump sum payment.

Following completion of the proceedings on remand, the ALJ issued his Initial Decision. In that decision, the ALJ addressed the salary issues anew and rejected Respondent's claims to a salary amount that included increments for the period since his suspension. Relying on DeMarco v. Board of Education of the Borough of Glassboro, 1981 S.L.D. 1034, aff'd, 1982 S.L.D. 1471, he concluded that the annual salary to which Respondent was entitled to be paid as of the date of his restoration to pay status by the State Board, November 2, 1983, was the amount he was receiving at the time of his original suspension, $26,000 a year.

The ALJ then turned to the question of the propriety of the deductions that the Board claimed that it was entitled to make from any sums due and owing Respondent for the period prior to November 2, 1983. That claim was based on the Board's view that the $52,000 lump sum payment constituted salary payment and that, therefore, deductions had to be taken out of other monies owed Respondent in order to protect the Board from potential claims by governmental authorities arising from its responsibility for contributory payments. Based on this perception of the character of the $52,000 payment, the Board earlier had applied for permission from the ALJ to establish an escrow fund from the salary payments to which Respondent was entitled pursuant to our decision of November 2, 1983, and, as of February 23, 1984, had deposited $6,000, which was the estimated amount of total of the contributory payments that would have been required if the lump sum were considered salary.

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In determining the propriety of the deductions that the Board claimed it was entitled to make, the ALJ first considered the character of the $52,000 lump sum payment, concluding that "...the time has arrived for a decision to be made concerning it." Initial Decision, at 8. He found that this sum should be considered salary since the amount was twice Respondent's annual salary and correlated with the potential cost to the Board of litigating the tenure charges, and because Respondent "was and remained on employee of the Board between the date of the suspension and the date of the Commissioner's final decision...." Id. at 9. The ALJ found further support for treating the sum as salary in the pleadings that had been submitted by the Respondent in a separate proceeding in Superior Court, in which the Board had sought recovery of the $52,000.

Having concluded that the $52,000 should be treated as salary, the ALJ observed that during the course of the proceedings on remand, the Board had proposed to pay Respondent the $6,000 held in escrow, plus interest, provided that Respondent executed an indemnification agreement that would hold the Board harmless from claims arising from its failure to deduct compensatory payments from the settlement money. Noting that Respondent had rejected this proposal, the ALJ recommended that the Board withdraw from escrow the sum of $6,000 with interest accruing from February 23, 1984, and pay that sum to Respondent on condition that he execute an indemnification agreement, limited to the amount paid over to him, i.e., $6,000 plus interest.

The Commissioner adopted the ALJ's determination that Respondent was not entitled to salary increments during the pendency of the tenure proceedings that had resulted in his dismissal from his position. He also adopted the specific finding by the ALJ that Respondent was entitled to be compensated at an annual rate of $26,000. The Commissioner, however, specified that Respondent was entitled to such compensation for the entire period beginning on the 121st day of the tenure proceedings against him and continuing until the date of the Commissioner's decision sustaining the tenure charges.

The Commissioner set aside the ALJ's finding and conclusion that declared the $52,000 lump sum payment to be salary from which appropriate deductions for contributory payments should have been made by the Board. Relying on the State Board's decision of November 2, 1983, the Commissioner concluded that, absent a ruling from a court of competent jurisdiction, the Board could not consider the $52,000 lump sum payment, in whole or in part, to satisfy its statutorily prescribed duty under N.J.S.A. 18A:6-14.

Accordingly, the Commissioner rejected the ALJ's finding and determination that the $6,000 held in escrow represented deductions that should have been made from the $52,000, and set aside his determination that $6,000 plus interest should be paid to Respondent in return for a signed indemnification agreement. It was the Commissioner's view that the State Board decision of November 2, 1983, precluded treatment of the $52,000 payment as salary in these

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proceedings and, therefore, payment of an additional $6,000 plus interest to Respondent and authorization to the Board to deduct that amount from any sums still due and owing Respondent could not be based on characterization of the $52,000 lump sum payment as salary.

In sum, pursuant to the Commissioner's decision, the Board remained responsible for fulfilling its statutory duty under N.J.S.A. 18A:6-14 to pay Respondent his salary at an annual rate of $26,000 from the 121st day of his suspension until the date of the Commissioner's decision sustaining the tenure charges. the Board was not authorized to pay Respondent the $6,000 held in escrow, nor was it authorized to deduct, as representing contributory payments that should have been made on the $52,000 payment, any part of that amount, and the Board remained responsible for resolving with the appropriate governmental agencies all contributory payments that should have been made as a result of the resumption of salary payments pursuant to N.J.S.A. 18A:6-14.

We first consider Respondent's claim that he is entitled to a salary amount that includes increments for the period of his suspension. In considering this claim, we emphasize that N.J.S.A. 18:6-14

> ...does not provide for automatic raises from year to year while litigation is in progress. Such an interpretation is diametrically opposed to the purpose of suspension, which is the imposition of some penalty. The ultimate penalty can be determined by the Commissioner only, and an employee who prevails in the litigation can be made whole....

DeMarco v. Board of Education of the Borough of Glassboro, 1981 S.L.D. 1034, 1037, aff'd, 1982 S.L.D. 1471.
We further emphasize that increments are intended to "...reward only those who have contributed to the educational process thereby encouraging high standards of performance." Bd. of Education Bernards Tp v. Bernards Tp. Ed. Assn., 79 N.J. 311, 321 (1979). We find that this purpose would not be served by conferring on employees suspended pursuant to N.J.S.A. 18A:6-14 an entitlement to automatic raises during the period of suspension.

Therefore, we affirm the Commissioner's determinations that Respondent is not entitled to a salary amount that includes increments for the period of his suspension and that the amount of salary payment to which that Respondent is entitled pursuant to N.J.S.A. 18A:6-14 is $26,000 a year for the period from the 121st day of his suspension until the May 7, 1984, the date of the Commissioner's decision directing Respondent's dismissal from his position. However, our conclusion regarding the amount to which Respondent was entitled under the education laws does not dispose of the Board's claim that it is entitled to deduct from the amount that is otherwise due and owing the Respondent for the period prior to November 2, 1983, $6,000, representing the estimated total of

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contributory payments that the Board maintains should have been made on the $52,000 payment.

The threshold question in determining the validity of the Board's claim is whether, in these proceedings, the $52,000 may be considered salary payment within the meaning of N.J.S.A. 18A:6-14. In our previous decision, we concluded that the lump sum payment disbursed under the terms of the tentative settlement agreement was not salary within the meaning of N.J.S.A. 18A:6-14. Again, since the only offset authorized by the statute is for salary received for substituted employment, we can find no statutory basis upon which, in these proceedings, we can authorize the Board to deduct from the salary to which Respondent is entitled under N.J.S.A. 18A:6-14 the estimated amount of contributory payments that would have been made had the $52,000 lump sum payment been salary within the meaning of N.J.S.A. 18A:6-14.

In so concluding, we recognize that the proceedings in this case have been colored from their inception by the dispursement of the $52,000 lump sum payment, and that the Board's claim in the instant proceedings is a consequence of the dispursement of that lump sum. We further recognize that the various claims involving the $52,000 payment have resulted in fragmentation of the litigation process, and in related proceedings in Superior Court.

The proceedings in Superior Court were a consequence of our decision of November 2, 1983, in which we directed the Board to resume Respondent's salary payments, but indicated that the appropriate course by which the Board could seek return of the $52,000 payment was through civil action in a court of competent jurisdiction. We are aware that the proceedings in Superior Court have resulted in a judgment for $13,000, awarded to the Board after the appeal and cross-appeal in the proceedings before us had been filed. Order Granting Summary Judgment, Docket #L-017859-83 (Law Div. Dec. 20, 1985). The court's order indicates that the judgment represents disposition of all remaining aspects of the complaint and counterclaim in the proceedings before it, which we note included Respondent's claim to a higher salary amount that, as set forth above, also is the subject of the proceedings before us. We have been advised that an appeal from the judgment of the Superior Court has been taken to the Appellate Division.

We emphasize that the question of the amount of salary to which Respondent is entitled pursuant to N.J.S.A. 18A:6-14 properly lies within our jurisdiction, and that we have determined that amount today. By our decision, we have not established, based on that entitlement, the amounts due and owing to either party, nor could we do so on the basis of the record before us. We further emphasize that we are without authority to review the propriety of the judgment awarded by the Superior Court. We, however, note that the court's order does not indicate the basis upon which it awarded $13,000 to the Board.

In sum, by our decision today, we have established only the amount of salary payment to which Respondent is entitled under the

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education laws for the period of his suspension, we have not established the amounts due and owing to either party, and, in the absence of a statutory basis, we decline to authorize the deductions to which the Board claims it is entitled from amounts that may be due and owing. However, although it is our goal to assure that the Board fulfills its statutory duty under N.J.S.A. 18A:6-14, we do not wish by our decision today to add to the fragmentation of the litigation in this case. Nor do we wish the fragmented nature of the proceedings thus far to result in the further receipt of monies by Respondent to which he is not entitled, nor to enable him to keep monies to which he is not entitled. It is our belief that any equitable determination of the amount actually due and owing to either party must consider the monies already disbursed by the Board to Respondent, including both the $52,000 lump sum payment and the additional $6,000 plus interest, which we have been advised has been disbursed to Respondent. We, however, recognize that the limitations of our authority and the fragmentation of the proceedings have created a need for a court of competent jurisdiction over all of the monetary claims in this matter to harmonize the decisions that we have rendered under the education laws and the order resulting from the Superior Court proceedings.

July 2, 1986

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THOMAS C. CONTI AND ERNESTINE CUTLER,	:	
PETITIONERS-RESPONDENTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONTGOMERY, SOMERSET COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, June 10, 1985

For the Petitioners-Respondents, Klausner and Hunter
(Stephen E. Klausner, Esq., of Counsel)

For the Respondent-Appellant, Green and Dzwilewski
(Allan P. Dzwilewski, Esq., of Counsel)

This case arose from the initial placements of two non-tenured teachers on the salary guide, which the Board of Education of the Township of Montgomery later determined conflicted with the placements required by the collective negotiations agreement between the Board and the Montgomery Township Education Association. The essential facts are not in dispute. In September 1983, both individuals, who are the Petitioners-Respondents in this case, were offered and accepted positions with the Board. Following discussions with the Superintendent, it was agreed that each would be placed at particular steps of the applicable salary schedule in recognition of their previous experience in other districts, although such placement did not correspond to their actual years of employment in other districts. The salaries specified in their employment contracts reflect the individual agreements concerning placement on the salary schedules. J-1, in evidence; J-6, in evidence.

Petitioners-Respondents were paid at the level specified in their employment contracts throughout the 1983-84 school year. However, approximately eight months after their initial employment, following a study of personnel practices that indicated that their placements on the salary schedules were not in accord with the collective negotiations agreement, R-2, in evidence, the Superintendent informed Petitioners-Respondents that he was recommending corrective action. J-3, in evidence; J-7, in evidence. On April 23, 1984, the Board resolved to maintain Petitioners-Respondents at the same place on the salary schedules for the 1984-85 school year. J-4, in evidence; J-8, in evidence. However, the Board determined that fairness dictated that they be compensated at the level specified in their employment contracts for the remainder of the 1983-84 school year. Id.

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Following the Board's action, Petitioners-Respondents petitioned the Commissioner, alleging that N.J.S.A. 18A:29-14 had not been invoked and that their increments had not been withheld for inefficiency or other good cause, and that, despite repeated requests, the Board had refused to advance them on the salary schedule for 1984-85. They, therefore, demanded advancement one step on the schedules and reimbursement for any monies wrongfully withheld.

In his Initial Decision, the Administrative Law Judge (ALJ) found that the case involved an initial placement under N.J.S.A. 18A:29-9. He found that, in agreeing to the placements, Petitioners-Respondents had agreed to specific placements that did not reflect their actual years of experience, that they had signed employment contracts reflecting that rate and had performed under those contracts for eight months. Although finding that the case law holds that a board can not reduce the amount of salary set for a particular year at a later date because of administrative error, the ALJ relied on the Commissioner's decisions in Honaker v. Hillside Bd. of Ed., 1980 S.L.D. 898, and Massa v. Kearny Bd. of Ed., 1980 S.L.D. 972, aff'd, 1981 S.L.D. 1465, and concluded that the Board could legally hold Petitioners-Respondents at their present salary until the guide caught up to them. Because he found authority for the Board's action in prior Commissioner's decisions, the ALJ did not find it necessary to address the question of whether the Board's action complied with N.J.S.A. 18A:29-14.

The Commissioner rejected the Administrative Law Judge's findings and determinations. Like the ALJ, the Commissioner found that this case involved an initial placement under N.J.S.A. 18A:29-9. He further found that "decision making with respect to initial salary is solely based upon the agreement reached between the Board and the respective employee, not as the result of a collective bargaining agreement." Commissioner's Decision, at 16. However relying on his decision in Bree v. Boonton Bd. of Ed., decided by the Commissioner, Aug. 6, 1984, aff'd with modification by the State Board, Feb. 6, 1985, aff'd in part, rev'd in part on other grounds, Docket #A-2598-84T7 (App. Div. Jan. 7, 1986), the Commissioner determined that the Board could not freeze Petitioners-Respondents salaries until they conformed with the salary steps of other teachers with the same years of service. He further concluded that such action would conflict with N.J.S.A. 18A:29-14. Finally, the Commissioner distinguished this case from his prior decisions that were relied on by the ALJ on the grounds that none of those cases involved an alleged error in initial placement. Id. at 18.

After carefully reviewing the relevant law, we reject the Commissioner's view that N.J.S.A. 18A:29-9 mandates that an individual agreement concerning initial placement on a salary guide supercedes a collective negotiations agreement. This question specifically was addressed by the Appellate Division in Belleville Education Association v. Belleville Board of Education, 209 N.J. Super. 93 (App. Div. 1986). In that case, a district board of education appealed from a judgment ordering that a teacher be paid at a guide step that credited her with five years' experience in

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another district. The judgment accorded with both the collective negotiations agreement and the arbitrator's award in non-binding arbitration. In affirming the order, the court recognized that its decision conflicted with reported school law decisions that had been rendered by the Commissioner of Education. However, the court found the Commissioner's view "untenable", emphasizing that N.J.S.A. 18A:29-9 was enacted fourteen years before N.J.S.A. 34:13A-5.3 et seq., which effectuated the right of public employees to negotiate collectively. The court further emphasized that where there is a collective negotiations representative, agreements as to terms and conditions of employment are collective, not individual. Because N.J.S.A. 18A:29-9 recognizes that placement on a salary schedule is not a managerial prerogative and because such placement is a term and condition of employment, the court concluded that initial placement on a salary guide is within the scope of negotiability. Thus, where, as here, the collective negotiations agreement governs initial placement on the salary guide, see J-9, in evidence; J-10, in evidence,[1] we find that the collective agreement controls the validity of the initial placement of individuals accepting position or employment as full-time teaching staff members in a district.

This conclusion is consistent with the reasoning of the New Jersey Supreme Court in decisions concerning permissible subjects of negotiation and the affects of collective negotiations. e.g. Claude Wright, Jr., et. al. v. Bd. of Ed. of the City of South Orange, 99 N.J. 112 (1985); In re IFPTE Local 195, 88 N.J. 393 (1982); State Supervisory Employees Ass'n, 78 N.J. 54 (1978); Board of Ed. of the City of Englewood v. Englewood Teachers Ass'n, 64 N.J. (1973). Moreover, it is consistent with the view taken by the

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[1]We note that the collective negotiations agreement in effect when Petitioners-Respondents entered their individual employment contracts specifies a schedule of annual teachers' salaries, Agreement, July 1, 1983-June 30, 1985, Article XIV (A) and Schedule "A," and provides that application of the schedule is subject to the provisions of Article XIV (A), which includes the provision that full certified teaching experience will be recognized for teachers accepting employment. Article XIV (A) (3). The agreement further provides that

> [a]ny individual contract between the Board and an individual teacher, heretofore or hereafter executed, shall be subject to and consistent with the terms and conditions of this agreement. If an individual contract contains language inconsistent with this Agreement, then this Agreement ...shall be controlling.

Article XXII (B).

Thus, in this case, the validity of the initial placements is controlled by the collective negotiations agreement so long as the placements required by the agreement are not contrary to law. See Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63, 76 (1982); Agreement, Article XXII (A).

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Public Employment Relations Commission when it has considered this specific question. Dennis Township Board of Education and Dennis Township Education Association, P.E.R.C. No. 80-157, 6 NJPER 334 (par. 11167 1980). Like our sister agency, we believe that to permit individual agreements to control in an area that is a permissible subject for collective negotiation would be destructive to the negotiations process. Id. See Lullo v. International Association of Fire Fighters, 55 N.J. 409 (1970).

In so concluding, we emphasize that where a board of education allegedly violates a collective negotiations agreement when it places an individual on a salary guide, such controversy is not a school law dispute and, therefore, is not subject to the Commissioner's primary jurisdiction. Belleville, supra, at 98. Therefore, in so far as Petitioners-Respondent's claims turn on the validity of their initial placement under the collective negotiations agreement, we are without jurisdiction to resolve the dispute. See Larsen v. Board of Education of Piscataway, decided by the State Board, Oct. 6, 1982. However, we find that the claims also require that we resolve of the question of whether the school laws confer a right to advancement on a negotiated salary schedule once initial placement has occurred, regardless of the validity of the initial placement under the collective agreement. After careful consideration, we conclude that there is no such entitlement under the school laws.

Pursuant to N.J.S.A. 18A:29-8, (repealed 1985)[2] a full-time teaching staff member is entitled to an employment increment annually until he has reached the maximum salary set forth in the appropriate training column of the salary schedule set forth in N.J.S.A. 18A:29-7 (repealed 1985). Whalen v. Sayerville Bd. of Educ., 192 N.J. Super. 453 (1983). However, the maximum salary contained in that schedule is $8,550.00, and those statutory provisions do not grant an entitlement to an employment increment beyond that maximum. Whalen, supra. The record indicates that Petitioners-Respondents salary levels far exceed the statutory maximum that would entitle Petitioners- Respondents to an increment under the school laws. J-1, in evidence; J-6, in evidence. See Whalen, supra, at 458.

Nor do we find that the Board's corrective action constituted an increment withholding to which N.J.S.A. 18A:29-14 would be applicable. N.J.S.A. 18A:29-6 (repealed 1985) defines an employment increment as an annual increment of a specific statutory amount to be granted each full-time teaching staff member for one "year of employment." That same provision defines "year of employment" to include employment for one academic year in any

[2] As indicated above, effective September 9, 1985, N.J.S.A. 18A:29-6, N.J.S.A. 18A:29-7, N.J.S.A. 18A:29-8, N.J.S.A. 18A:29-10 and N.J.S.A. 18A:29-12 were repealed. Teacher Quality Employment Act, N.J.S.A. 18A:29-5, L. 1985, c. 321 Sec. 16 (1985). However, since this case arose prior to that date, resolution of these claims is not affected by the Teacher Quality Employment Act.

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publicly owned and operated college, school or other institution. We find that the provisions of N.J.S.A. 18A:29-6 through N.J.S.A. 18A:29-16[3] must be read pari materia, see Whalen v. Sayreville Bd. of Educ., supra, and we therefore conclude that N.J.S.A. 18A:29-14 applies only when a board acts to withhold an annual increase to which a staff member is entitled by virtue of years of employment[4] and not to situations such as in this case where there is not an entitlement to the increase based on years of employment.

In so concluding we emphasize that, although not implicating the school laws, such failures to pay an annual increase may constitute an unfair labor practice subject to the jurisdiction of the Public Employment Relations Commission or a breach of contract actionable in the appropriate forum. See Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25 (1978); Larsen, supra. However, we are without jurisdiction to consider such claims, and we conclude that Petitioners-Respondents in this case have not presented any claim for which the school laws would provide a remedy.

We emphasize that our conclusion is consistent with prior Commissioner's decisions concerning actions taken by a board to correct administrative or clerical errors made in the placement of staff members on a salary guide. In such cases, the Commissioner has long held that a board does not violate the school laws when it acts to correct its mistake by maintaining a staff member's salary at the same level for the ensuing year so long as no reduction of salary results. Honaker, supra; Massa, supra; Galop v. Hanover Tp. Bd. of Ed., 1975 S.L.D. 358, aff'd, 1975 S.L.D. 366; DeRenzo v. Passaic Board of Education, 1973 S.L.D. 236. We believe that the results in these cases properly recognize that, although an affected teacher is entitled to rely on a board's official action establishing his salary for a one year period, he is not entitled under the school laws to benefit further from the board's mistake by maintaining such favored position beyond that one year period. See Galop, supra, at 364-65.

More recently, the Commissioner held that a board could not take such corrective action thirteen years after initial placement where the error in placement was not the result of fraud or misrepresentation by the staff member. Bree, supra. We affirmed that conclusion, as did the Appellate Division. Id. However, as distinguished from the instant case, where corrective action was taken eight months after initial employment, the board's action in Bree was taken thirteen years later. Moreover, the initial placement in Bree was controlled by the individual agreement between

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[3] See supra, note 2.

[4] We note that the amount of the increment that may be subject to withholding pursuant to N.J.S.A. 18A:29-14 may be higher that the statutory minimum. cf. Galloway Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25 (1978).

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Petitioner Bree and the board because no collective negotiations agreement was applicable at the time of the initial placement. Therefore, in contrast to Bree, we do not find that the Board in the instant case was estopped from taking corrective action. See Bree, supra, at 13.

Finally, in concluding that the corrective action taken by the Board in this case was not in violation of the school laws, we emphasize that when such correction is necessary, it must be effectuated, as here, by official act of the board, with reasonable notice given to the affected teacher. Massa, supra, at 978.

For the reasons set forth above, we reverse the decision of the Commissioner.

July 2, 1986

Affirmed N.J. Superior Court October 13, 1987

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IN THE MATTER OF THE TENURE	:	
HEARING OF ROBERT E. DOYLE,	:	STATE BOARD OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION ON REMAND
TOWNSHIP OF PEMBERTON,	:	
BURLINGTON COUNTY.	:	
	:	

Decided by the Commissioner of Education, March 15, 1984

Decided by the State Board of Education, November 7, 1984

Remanded by the Appellate Division, May 14, 1985

Decision on Motion by the State Board of Education, August 9, 1985

For the Petitioner-Appellant, Sever and Hardt
(Ernest N. Sever, Esq., of Counsel)

For the Respondent/Cross-Appellant, Selikoff and Cohen
(Joel S. Selikoff, Esq., of Counsel)

On November 7, 1984, the State Board of Education reversed the decision of the Commissioner in this case and adopted the decision of the Administrative Law Judge (ALJ), which had found Robert E. Doyle guilty of conduct unbecoming a teacher, and ordered his dismissal for the reasons expressed in that decision. On appeal from the decision of the State Board, the Appellate Division held that, although substantial credible evidence in the record supported the State Board's conclusion that Dr. Doyle violated N.J.S.A. 18A:6-1 on four occasions, the State Board, in adopting the Administrative Law Judge's conclusions, had failed to consider the two other charges, specifically Counts 4 and 6. In light of the Commissioner's reasoned rejection of the ALJ's findings and conclusions with respect to those charges, the Appellate Division concluded that it could not "fairly say whether the findings and conclusions of the State Board as to Counts 4 and 6 and [the] penalty are in fact supported by substantial credible evidence." In the Matter of the Tenure Hearing of Robert E. Doyle, Docket #A-1242-84T7, Slip. op. at 4 (App. Div. May 14, 1985). Therefore, while affirming the State Board's conclusions as to counts 1,2,3 and 5, the Appellate Division vacated the State Board's determination concerning Counts 4 and 6 and the penalty, and remanded the case to the State Board.

As stated, the Appellate Division affirmed the State Board's conclusion that on four occasions Robert Doyle had been guilty of conduct unbecoming a teacher because he used unnecessary force against students in violation of N.J.S.A. 18A:6-1. Those

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four occasions involved 1) an incident in February 1983, during which Dr. Doyle bruised a student when he grabbed the student in an attempt to stop him from carrying a chair while walking rapidly through students going in the opposite direction, 2) an incident in May 1982, when he physically pulled a student out of line, 3) an incident in March 1982, when he physically removed a student from a line of students leaving school and 4) an incident in June 1980, when he slapped a student's hands when the student yelled and whistled during class.

Counts 4 and 6 involve two additional incidents: an incident in March 1981, when Dr. Doyle kicked a student's legs to get them out of the way and an incident in January 1980, when Dr. Doyle used his hand to prevent a student from leaving his seat. As to the first incident, the ALJ found that the student had stretched her legs out in front of her, that Dr. Doyle had tripped over her legs and had almost fallen down, that he, without thinking, kicked her legs out of the way, and that she was not hurt by his action. Initial Decision, at 18. As to the second incident, the ALJ found that Dr. Doyle used his hand to prevent a student from getting up after Dr. Doyle had ordered him to remain in his seat, the student had defied Dr. Doyle's order, the student was not physically hurt and that Dr. Doyle did not intend to punish or hurt the student. Initial Decision, at 22. The ALJ concluded that Dr. Doyle had violated N.J.S.A. 18A:6-1 by his actions in both instances. Initial Decision, at 18 and 22.

The Commissioner rejected the ALJ's conclusions regarding both of these incidents. Rather, he found that Dr. Doyle's reaction to tripping and almost falling over the student's legs was instinctual, Commissioner's Decision, at 33, and that, although Dr. Doyle did use his hand to restrain a student during the second incident, his conduct did not amount to corporal punishment because the student had defied Dr. Doyle's directive to remain seated, Dr. Doyle did not intend to punish the student or inflict pain, and the student was not hurt. Commissioner's Decision, at 33-34.

After further reviewing these two incidents, we agree with the Commissioner that Dr. Doyle's conduct in kicking the student's legs out of the way was instinctual and not aimed at maintaining discipline, nor intended to punish or harm the student. We find, however, that, although his conduct in the second incident was not intended to punish or harm, it nonetheless constituted the use of physical force to maintain discipline. While the student was not hurt and Dr. Doyle's use of physical force in that instance is somewhat mitigated by the student's defiance of his directive to remain seated, we nonetheless find the use of physical force in this situation unacceptable, and we note, as did the Commissioner, that Dr. Doyle admitted that he should not have physically restrained the student. We, therefore, conclude that Dr. Doyle's use of force to maintain discipline by physically restraining a student violated N.J.S.A. 18A:6-1.

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In sum, we conclude that Dr. Doyle's conduct in kicking student's legs out of the way did not constitute conduct unbecoming a teacher, but that his conduct in physically restraining a student in his seat was in violation of N.J.S.A. 18A:6-1. When viewed together with our conclusions concerning the other four incidents involving use of physical force, we find that Dr. Doyle's conduct constitutes a pattern of behavior demonstrating conduct unbecoming a teacher. Redcay v. State Board of Education, 130 N.J.L. 369, 371 (Sup. Ct. 1943), aff'd, 131 N.J.L. 326 (E&A 1944). We conclude that this pattern, reflected by Dr. Doyle's use of physical force to maintain discipline on five occasions over a three year period, demonstrates a "disposition to resort to unlawful physical force and to harsh and abusive treatment of those whose conduct [is] found [to be] offensive." In the Matter of the Tenure Hearing of Thomas Appleby, 1969 S.L.D. 159, 172, aff'd, State Board, 1970 S.L.D. 448, aff'd Docket # A-539-7 (App. Div. March 14, 1972).

We emphasize that the prohibition against corporal punishment confers not only the right to be free of bodily harm but also freedom from offensive touching even when there is no actual physical harm, In the Matter of the Tenure Hearing of Frederick L. Ostergren, 1966 S.L.D. 185, 186, and that the prohibition applies to the use of physical force to maintain discipline, as well as to the use of force to punish infractions. In re Fulcomer, 93 N.J. Super. 404, 421 (App. Div. 1967); In the Matter of the Tenure Hearing of Thomas Appleby, supra. We, therefore, find that Dr. Doyle's lack of punitive intent does not justify his conduct, and we conclude that his pattern of conduct is serious enough to warrant disciplinary action.

However, in assessing the proper penalty in this case, we must consider the nature and gravity of Dr. Doyle's offenses, including punitive intent; evidence of provocation, extenuation or aggravation; any harm or injurious effect on the maintenance of discipline and the proper administration of the school system; Respondent's age and nearness to retirement; and the impact on his teaching career and his previous teaching record. Fulcomer, supra, at 421-22.

Here, although Dr. Doyle had been repeatedly warned about using physical force when dealing with students, his conduct was not premeditated; he did not act with punitive intent, and, as set forth above, his conduct regarding Count 6 was in response to the student's defiance of his order to remain seated. Likewise, his conduct in the incident specified in Count 3 was in response to student defiance. Further, while the student involved in the incident of February 1983 received attention from the nurse for minor bruises and contusions, no other physical harm resulted from Dr. Doyle's actions. Additionally, Dr. Doyle had been employed by the Board for 13 years and was 60 years old at the time of the hearing, and the additional proofs arising from his continued employment reveal that there have not been any further incidents involving physical contact with students since his reinstatement in the District as a guidance counselor over a year ago. Since that time, his evaluations have been satisfactory, including assessments

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of his performance in the areas of classroom control and teacher-student relations.

In light of these facts, especially considering Dr. Doyle's performance in the last year, we conclude that dismissal would be an unduly harsh penalty. However, we can not ignore Dr. Doyle's conduct prior to his reinstatement and find that the pattern of the use of force demonstrated by Dr. Doyle's conduct calls for more severe disciplinary action than the 120-day suspension without pay, the loss of an additional 30 days' salary, and the withholding of increment for 1983-84 ordered by the Commissioner.

We emphasize that, even where teacher intervention is warranted, the prohibition against corporal punishment does not leave teachers helpless to control students in situations like those in this case. Rather,

> ...[c]ompetent teachers never find it necessary to resort to physical force or violence to maintain discipline or compel obedience. If all other means fail there is always a resort to removal from the classroom or school through suspension or expulsion. The Commissioner cannot find any justification for, nor can he condone the use of, physical force by a teacher to maintain discipline or to punish infractions. Nor can the Commissioner find validity in any defense of the use of force or violence on the ground that "it was one of those things that just happen...." While teachers are sensitive to the same emotional stresses as all other persons, their particular relationship to children imposes upon them a special responsibility for exemplary restraint and mature self-control.

In the Matter of the Tenure Hearing of Thomas Appleby, supra, at 173, quoting In the Matter of the Tenure Hearing of David Fulcomer, 1962 S.L.D. 160, 162, remanded to the State Board of Education 1963 S.L.D. 251, decided by Commissioner, 1964 S.L.D. 160, aff'd, State Board of Education, 1966 S.L.D. 225, rev'd and remanded, 93 N.J. Super. 404 (App. Div. 1967), decided by Commissioner 1967 S.L.D. 215.

The record establishes that Respondent failed to exercise such restraint and self-control on five separate occasions. While his actions were in response to student behavior and the February 1983 incident called for immediate teacher intervention, we find that the students' behavior did not justify Respondent's loss of self-control. The necessity for a stringent penalty is further demonstrated by the fact that Respondent had been repeatedly advised that his conduct was improper but had persisted in his use of force.

In light of these circumstances, the State Board would be abrogating its responsibility if it did not impose a greater penalty than that imposed by the Commissioner, a penalty which is severe

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enough to permanently impress upon the Respondent the seriousness of his actions, see In the Matter of the Tenure Hearing of Frederick L. Ostergren, supra, and to show that the State Board "hold[s] no brief for [his] conduct...." Fulcomer, supra, at 421. The State Board, therefore, increases the penalty in this case to suspension without pay for one full academic year[1], as well as the withholding of his increments for 1983-84. Since Dr. Doyle has returned to his position as a guidance counselor, we leave him the choice of returning any salary received between the time he returned to work at full salary and one full academic year or accepting additional suspension without pay.

We believe that, despite the fact that Dr. Doyle has not been involved in any further incidents involving physical force since his reinstatement, the seriousness of the charges we have upheld and the danger such conduct poses to students warrants this penalty. However, in light of Dr. Doyle's conduct since his reinstatement, we do not believe that he should be denied his increments for the 1984-85 school year and, therefore, we direct that the Board compensate Dr. Doyle in accordance with the negotiated agreement in effect for the 1984-85 school year retroactively from September 1, 1984.

Maud Dahme opposed.

Attorney exceptions are noted.
June 4, 1986

[1]Suspension without pay for one full academic year represents the loss of a full year's salary, in this case $26,875.

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DANIEL W. GIBSON, JR.,

PETITIONER-RESPONDENT,

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY, : DECISION ON REMAND

RESPONDENT-APPELLANT.

Decided by the Commissioner of Education, March 30, 1984

Decided by the State Board of Education, June 6, 1984

Interim Order by the Commissioner of Education, June 28, 1984

Decided by the Commissioner of Education, January 21, 1985

Remanded by the Appellate Division, October 18, 1985

Decision on Motion by the State Board, December 4, 1985

For the Petitioner-Respondent, Schwartz, Pisano and Simon (Nathanya G. Simon, Esq. of Counsel)

For the Respondent-Appellant, Podvey, Sachs and Catenacci (Robert L. Podvey, Esq. of Counsel)

For the Amicus Curiae New Jersey School Boards Association, Russell Weiss, Jr., Esq.

This appeal is before the State Board of Education on remand by the Appellate Division of the Superior Court of two consolidated cases involving identical parties and similar issues: Gibson v. Board of Education of the City of Newark, decided by the Commissioner, March 30, 1984, appeal dismissed by the State Board, June 6, 1984, rev'd and remanded, 205 N.J. Super. 48 (App. Div. 1985), (hereafter "Gibson I"), and Gibson v. Board of Education of the City of Newark, decided by the Commissioner, January 21, 1985, leave to appeal directly to the Appellate Division, and consolidation with Gibson I, granted, March 20, 1985, remanded to the State Board, 205 N.J. Super. 48 (App. Div. 1985) (hereafter "Gibson II").

Both cases were filed by Daniel W. Gibson, Jr., then a member of the Board of Education of the City of Newark, who sought an adjudication that actions taken by the Board were contrary to legislative scheme set forth in N.J.S.A. 18A:17A-1 et seq., L.1975, c.169. That statutory scheme became effective on August 4, 1975, and was adopted in response to the near chaos that pervaded the Newark school system. It applies only to Newark. It provides for

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the creation of a "unit control" system and for the appointment by the Board of a strong Executive Superintendent, without tenure, for a term not to exceed 5 years. N.J.S.A. 18A:17A-1. Under the statutory scheme, the Executive Superintendent has broad supervisory powers, which consolidate educational, fiscal and management functions, N.J.S.A. 18A:17A-3. Prior to the enactment of N.J.S.A. 18A:17A-1 et seq., these functions had been performed by a tripartite management team, or "troika," with less than satisfactory results. The instant conflict surrounds actions by the Board that allegedly conflicted with the powers granted to the Executive Superintendent by the current statutory scheme.

The specific claims in Gibson I involved the Board's attempt to renew the contract of a lobbyist/consultant, who, it was asserted, was hired to perform some of the functions assigned by statute to the Executive Superintendent; its attempt to remove the Office of Board Affairs, the Executive Director of Board Affairs and the Office of General Counsel from the general supervisory authority of the Executive Superintendent; and the Board's retention of outside counsel to provide it and its individual members with legal services beyond those provided by the General Counsel for the District. The Petition also alleged that the Board had violated the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq., at the meeting at which it acted on the contract renewal for the lobbyist/consultant.

In his Initial Decision, the Administrative Law Judge (ALJ), found the hiring of the lobbyist/ consultant to be invalid because of violations of the Open Public Meetings Act, but sustained the Board on the other issues. Relying on the testimony of Walter Wechsler, who was head of the task force that drafted the original version of N.J.S.A. 18A:17A-1 et seq., he approved the challenged actions as within the Board's policy making function. The ALJ concluded that, as a matter of statutory interpretation, neither the Office of Board Affairs nor the Office of the General Counsel was subject to supervision by the Executive Superintendent. He further concluded that retention by the Board of outside counsel without prior recommendation by the Executive Superintendent was within the Board's inherent authority, and that such counsel appropriately could respond to requests from individual Board members, as well as those from the Board. Finally, he found that it was within the power of the Board to contract with the lobbyist/consultant, although, in this instance, the Board had violated the Open Public Meetings Act when it acted to renew the contract.

The Commissioner adopted the ALJ's conclusions regarding the Open Public Meetings Act violations, but rejected his substantive conclusions. Based on the statutory language, the Commissioner found all of the challenged actions improper and, in order to resolve potential conflicts concerning the jurisdiction of the Board and Executive Superintendent, directed the Board to promulgate rules in specified areas and to revise its organizational chart to comply with his decision. He further directed that the lobbyist/consultant be terminated and that his duties be reassigned through the Executive Superintendent. The Commissioner also awarded counsel fees to Petitioner Gibson. On appeal, the State Board

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dismissed because of the Board's failure to file an appeal based upon a Board resolution within statutory time limits. The Newark Board appealed that dismissal to the Appellate Division.

Gibson II was filed about a year later than Gibson I, and arose from two Board resolutions adopted May 29, 1984. In the first, the Board relieved outside counsel and General Counsel of any obligation to report to the Board through the Executive Superintendent. In the second, the Board appointed a new General Counsel without a prior recommendation from the Executive Superintendent. Petitioner Gibson contended that both of these resolutions violated N.J.S.A. 18A:17A-3 and -5.

The ALJ, relying on Walter Wechsler's testimony in Gibson I, found the resolutions to be within the Board's authority. The Commissioner rejected that conclusion, based upon the language of the statutes and his prior decision in Gibson I. Again, the Commissioner granted Petitioner Gibson's request for counsel fees.

Following the Commissioner's decision in Gibson II, the Appellate Division granted a motion filed by the Newark Board to consolidate Gibson I and Gibson II and the Board's motion for leave to appeal Gibson II directly to it. The Appellate Division granted the Board's motion for leave to appeal on the assumption that the case primarily involved the question of the attorney-client relationship, which, as the court correctly ascertained, it was as well as, if not better, equipped to determine than the State Board of Education. However, after having the opportunity to review the record and to hear oral argument, the court concluded that "the contours of [the] controversy transcend[ed] that issue and indeed involve[d] very basic questions significantly involving the operation of the Newark school system." Slip op. at 8. In the court's view, the issues involved here implicate matters of educational policy and, therefore, on October 18, 1985, it remanded Gibson I and Gibson II as a consolidated controversy to the State Board of Education.

In remanding the case, the Appellate Division retained jurisdiction and directed the State Board to conclude its consideration on an accelerated basis. In its decision, it specifically approved the retention by the Board of outside counsel to conduct this and any future litigation between the Board and the Executive Superintendent over authority issues. On remand, briefs were filed by the parties and by the New Jersey School Boards Association, which has been permitted to appear as amicus curiae on the issue of the propriety of the Commissioner's award of counsel fees to Petitioner Gibson.

I

As recognized by the Appellate Division in its decision remanding this matter, this controversy raises significant and novel questions concerning the relationship and the respective powers of the Newark Board of Education and its Executive Superintendent. We

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find that we can resolve these questions properly only by analyzing the statutory scheme set forth in N.J.S.A. 18A:17A-1 et seq. in the context of both the purpose for which that statutory scheme was adopted and educational policy considerations. In undertaking this analysis, we emphasize that the administrative structure of the Newark school district is unique, but that, within that statutorily mandated structure, it must be able to function in a manner enabling it to meet the challenges that face all urban school districts.

Initially, we stress that the underlying purpose of the statutory framework was to eliminate what was seen at that time to be the major obstacles to the District's ability to provide a quality education[1]: the lack of centralized responsibility for the administration of the Newark school system and the resulting involvement of the Board in the daily operations of the District. See S.3166 (introduced April 17, 1975) (statement); Senate Education Committee Statement on S.3166 with Senate Committee Ammendment (dated May 8, 1975). The statutory framework as enacted was aimed at allocating responsibilities within the District so as to assure that all elements of the District could work in a cooperative, non-adversarial manner to provide a quality education to the District's students.

We, therefore, reject the premise that, under the statutory scheme, the Board and the Executive Superintendent have an adversarial relationship, each representing separate and conflicting interests. That was not the intendment of the statutes. Nor is it something we can condone as a matter of educational policy. Rather, we believe that the Board and the Executive Superintendent share a single paramount interest, that of assuring to each child within the District the provision of a thorough and efficient education. We find that it is incumbent on both the Board and the Executive Superintendent to work cooperatively within the statutory framework in order to fulfill their joint educational responsibility.

We believe that the statutes provide a framework for the establishment of such a cooperative relationship by allocating responsibilities between the Board and the Executive Superintendent, specifically, by placing responsibility for the day to day administration of the District with the Executive Superintendent, thereby enabling the Board to fulfill its primary responsibility to set policy for the District.

II

The specific questions that we have been called upon to resolve are: 1) the proper relationship between the Executive Director of Board Affairs, the Office of Board Affairs and the Board

[1]We note that on July 1, 1975, one month before the effective date of N.J.S.A. 18A:17A-1 et seq., the Public School Education Act of 1975, L.1975, c.212, became effective, establishing our state's clear commitment to the goal of providing a thorough and efficient education to all of New Jersey's public school children. See N.J.S.A. 18A:7A-1 et seq.

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and the Executive Superintendent, 2) whether the Board has the authority to retain consultants and outside counsel, 3) the proper relationship between the General Counsel, the Office of General Counsel and the Board and the Executive Superintendent and 4) the appropriateness of awarding counsel fees in this case. Because of the broad and novel nature of the questions involved and the uniqueness of the applicable statutory framework, we first will review the statutory framework set forth in N.J.S.A. 18A:17A-1 et seq.

N.J.S.A. 18A:17A-1 et seq. establishes a unique structure for school districts in cities of the first class with a population exceeding 325,000. The City of Newark has the only Board of Education that is governed by this statute.

As set forth above, the statutory scheme was enacted in 1975 as a response to the financial and administrative crisis in the Newark school system. The system then was organized as a typical district, with a tripartite or "troika" management team that reported directly to the nine member Board of Education appointed by the Mayor of the City of Newark.[2] This management team was comprised of the Superintendent of Schools, who was responsible for educational matters; the Secretary of the Board, who was responsible for fiscal matters; and the Business Manager, who was responsible for non-fiscal matters. Because of the size and complexity of the District, this standard arrangement did not function properly. As the result of the lack of centralized responsibility for the administration of the District, individual Board members became involved in the day-to-day operations of the school system, and, consequently, the fiscal affairs, operations and management of the Newark school system were marked by disruption and disorganization.

As a response to the crisis in the Newark school system, the Commissioner of Education investigated the problems in the District and on February 4, 1975, issued an order directing the Newark School District to reform its organization and to adopt and implement remedial measures. On February 5, 1975, Governor Brendan Byrne appointed Walter Wechsler, a fiscal affairs consultant and former Director of the Division of Budget and Accounting for the State of New Jersey, as a special agent to oversee the implementation of the Commissioner's order and to reform the fiscal affairs, operations and management of the Newark school system. As part of his responsibilities, Wechsler assembled a task force, recommended specific legislation, which was subsequently enacted as N.J.S.A. 18A:17A-1 et seq., and prepared a report on the implementation of fiscal reforms in the Newark school system. See Report of the Special Agent Appointed by Commissioner Fred G. Burke to Oversee the Implementation of Fiscal Reforms in the Management of the Newark School System (October 30, 1975) (hereafter "Report").

Wechsler proposed to the Legislature a "unit control structure" for the administration of the school district, i.e., a

[2]We note that the Newark School District is now a Type II district and, accordingly, its Board of Education is elected by the voters.

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system of organization under which a chief executive officer would have the general responsibility of directing and coordinating the administration of the District. The "troika" management team would be abolished, and those officers would be replaced by an Executive Superintendent. This principle was ultimately enacted as N.J.S.A. 18A:17A-4:

> The positions of superintendent of schools, assistant superintendents of schools, school business administrator, school business manager, secretary to the board of education and assistant secretary to the board of education in such cities are hereby abolished. The executive superintendent shall perform all the duties and possess all the powers heretofore and hereafter assigned to the superintendent of schools, secretary of the board of education, school business administrator, school business manager, and assistants and clerks thereto, in Title 18A of the New Jersey Statutes.

Another section, N.J.S.A. 18A:17A-3, confers extensive powers upon the Executive Superintendent. Among others, he is "the chief executive office and administrator of the district," who shall have "general supervision over the organization and the educational, managerial, and fiscal operations of the district" under rules prescribed by the local Board and the State Board of Education Pertinent hereto:

> He shall have supervisory authority over all officers and employees, professional and nonprofessional, of the district, all of whom shall report to him, and he shall prescribe their duties.

Id.

Much of the instant controversy arises from differing interpretation of this section and of another section, N.J.S.A. 18A:17A-5, which provides the mechanism for appointment of all officers and employees of the District, both professional and nonprofessional. N.J.S.A. 18A:17A-5 provides, generally, that the Executive Superintendent (a) may appoint or remove the clerks in his immediate office, the exact number of whom is to be determined by the Board; (b) shall appoint and fix the compensation of assistant executive superintendents, subject to Board approval and in statutorily limited numbers and (c) "shall propose to the board of education all other officers and employees, professional and nonprofessional, for employment, transfer and removal." (emphasis added).

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Prior to enactment, confusion and fear about the effect of unit control on the Board's power and authority resulted in the addition of an amendment to the original proposal. The amendment was enacted as N.J.S.A. 18A:17A-7 and provides that the Board:

> shall retain the power to perform all acts and do all things consistent with law and State board rules that are necessary for the proper conduct and maintenance of the public schools in its district and all other powers and responsibilities vested in it under Title 18A of the New Jersey Statutes, including but not limited to appointing, transferring or dismissing employees, fixing the terms and salaries of employees, adopting or altering a course of study, and selecting textbooks.

(emphasis added).

Although the amendment's sponsors thought it necessary to make it clear that the proposed statutory scheme was "not intended to dilute the authority of the school board," they emphasized their view that unit control would "actually strengthen [the] policy making role of the board." Senate Amendments to S. 3166 OCR.

As stated, resolution of the questions with which we are presented requires analysis of the statutory scheme outlined above as it applies to the Offices of Board Affairs and General Counsel, to outside contractors and to outside counsel.

III

The starting point for our analysis of the proper relationship between the Executive Director of Board Affairs, the Office of Board Affairs, and the Board and the Executive Superintendent is the statutes. After carefully reviewing the relevant statutes, we conclude that the language of the statutes clearly requires that the Executive Director of Board Affairs and the Office of Board Affairs function under the direction and supervision of the Executive Superintendent.

First, N.J.S.A. 18A:17A-4 abolished the statutorily defined positions of Superintendent, Assistant Superintendent, School Business Administrator, School Business Manager, Board Secretary and Assistant Board Secretary and specifically assigned the duties and powers of those offices to the Executive Superintendent, to be delegated under his direction and supervision as he deems desirable. N.J.S.A. 18A:17A-6. We conclude that by specifically assigning the powers and duties of those enumerated offices to the Executive Superintendent, N.J.S.A. 18A:17A-4 requires that any of the duties assigned by statute to any of those offices must be performed under the supervision and direction of the Executive Superintendent if he chooses to delegate those duties pursuant to N.J.S.A. 18A:17A-6.

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The record in this case indicates that when the Newark Board established the position of Executive Director of Board Affairs, it assigned to that office responsibility for notifying Board members of meetings of the Board, recording all proceedings at meetings, keeping an account of school expenditures and reporting to the Board, having an annual audit performed and serving as Executive Director of Board Affairs of the Board of School Estimate.[3] P-10 (I), in evidence.[4] These duties correspond to statutorily defined responsibilities of the mandated, see N.J.S.A. 18A:16-1, office of board secretary, which include fiscal responsibilities, N.J.S.A. 18A:17-8, -9, -10, -12, the responsibility for giving notice of meetings and elections, preparing the agenda and recording the minutes and results of elections. N.J.S.A. 18A:17-7. In fact, in creating the position of Executive Director of Board Affairs, the Newark Board specifically relied on the N.J.S.A. 18A:17-5, which grants boards of education the authority to appoint a board secretary, and N.J.S.A. 18A:17-7 through -12, which define the duties of the secretary, as well as N.J.S.A. 18A:22-2, which mandates that the board secretary serve as secretary of the board of school estimate. P-10(I), in evidence. As set forth above, we find that these duties have been assigned by statute to the Executive Superintendent and that, if delegated by him, are to be performed under his direction and supervision.

Our conclusion is reinforced by N.J.S.A. 18A:17A-5(b), which grants to the Executive Superintendent the authority to appoint, with the approval of the Board, assistant executive superintendents of a number equal to those serving in the capacity of Assistant Superintendent of Schools, School Business Administrator, School Business Manager, Board Secretary and Assistant Board Secretary.[5] The language of this provision, viewed in conjunction with that of N.J.S.A. 18A:17A-4, permits the Executive Superintendent, if he choses to delegate those duties that were within the scope of the offices enumerated in the statute, including the office of board secretary, to do so, if the Board approves, by appointing an assistant executive superintendent. We find that the language of this provision further demonstrates the Legislature's intent that the duties previously assigned to the

[3]In addition, the Executive Director of Board Affairs was involved in the preparation of the agenda for Board meetings. However, the Executive Superintendent was actually responsible for preparation of the agenda. P-5(I), in evidence.

[4]Exhibits in evidence in Gibson I are designated by (I), and those in Gibson II by (II).

[5]We note that although the statutes do not preclude the designation of one of the Assistant Executive Superintendents as "Deputy Executive Superintendent," N.J.S.A. 18A:17A-5(b) specifically limits the total number of Assistant Executive Superintendents.

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board secretary, if delegated, must be performed under the direction and supervision of the Executive Superintendent.

Additionally, N.J.S.A. 18A:17A-8 provides that any person who was serving under tenure as an Assistant Superintendent, Board Secretary, School Business Administrator or School Business Manager when N.J.S.A. 18A:17A-1 et seq. became effective would continue to serve under tenure, but that the individuals serving in those positions

> ...shall perform only such administrative duties as are prescribed by the executive superintendent.

Thus, the statute specifies that tenured individuals occupying any of the positions enumerated in the provision at the time the legislation was enacted were to be subject to the Executive Superintendent's supervisory authority and demonstrates the Legislature's clear intent that District employees performing functions within the scope of those positions, such as the Executive Director for Board Affairs, be subject to his supervisory authority.

Moreover, as discussed subsequently in our decision, see Sections IV and V, pursuant to N.J.S.A. 18A:17A-3, all officers and employees of the District are subject to the supervisory authority of the Executive Superintendent. Therefore, pursuant to that provision, the Executive Director of Board Affairs and employees of that Office must function under the supervision of the Executive Superintendent regardless of the particular responsibilities assigned to them.

Consideration of the Report of the Special Agent Appointed by Fred G. Burke to Oversee the Implementation of Fiscal Reforms in the Management of the Newark School System (October 30, 1975), does not alter our view that the words of the statutes require that Executive Director of Board Affairs and his office function under the supervision of the Executive Superintendent. In setting forth the organizational impact of the legislation and the reorganization of the Board's management structure, the Special Agent reported that

> [t]he former Secretary of the Board's functions are redefined so as to provide full-time support directly to the Board, similar to the role the City Clerk performs for the City Council. His title is changed to Assistant Executive Superintendent for Board Affairs, to reflect his realignment of duties. In this capacity, his responsibilities and duties will include:
>
> - Preparation of Board Agenda.
> - General support of Board members and activities.
> - Monitoring correction of External Audit recommendations.
> - Legislative liaison (Trenton and Washington).
> - Ceremonial (PTA's, public ceremonies, etc.).

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- Collecting data and answering inquiries as directed by the Board.

Report, at 32.

In addition to assigning functions previously performed by the Board Secretary to an Assistant Executive Superintendent for Board Affairs, the organization chart accompanying the Report showed the "Assistant Superintendent Board Affairs" reporting directly to the Board of Education, not through the Executive Superintendent. Report, at 34. Wechsler indicated that this was his understanding of the meaning of the implementing statute. Tr. 12/1/83, at 18 - 20.

Although we recognize, as did the Commissioner in his decision in Gibson I, the role played by the Special Agent in assisting in the development of the legislation ultimately enacted as N.J.S.A. 18A:17A-1 et seq., we agree with the Commissioner that neither his Report on the implementation of the reforms nor his testimony at the hearing in Gibson I can be relied on to alter the reporting relationships mandated by the clear language of the statutes.

Moreover, we reiterate that the Special Agent's Report was on the implementation of fiscal reforms and is dated October 30, 1975, two months after N.J.S.A. 18A:17A-1 et seq. was enacted. Although Wechsler reported to the Legislature during the development of the Report, it is not clear which of his recommendations preceded and were incorporated into the legislation and which were made subsequent to enactment. Furthermore, in this instance, the references to "Chapter 169, Laws of 1975" in the relevant section on the organizational impact of reorganization show that this particular section was prepared after the legislation had been enacted. Indeed, the use of the term "assistant executive superintendent" in the Report reflects the language of the enacted version, instead of the term used in earlier versions, assistant chancellor.

Moreover, it was admitted that the original version of L. 1975, c. 169, S. 3166, was actually drafted by "technical staff at the legislature," Tr.12/1/83, at 10, rather than by Wechsler. It contained no organizational structure, but indicated, in Section 3, that the "Chancellor" (later redesignated, the Executive Superintendent) would have "supervisory authority over all officers and employees of the district, all of whom shall report to him, and he shall prescribe their duties." S. 3166 (introduced April 17, 1975). Under Section 4 of the bill, the Chancellor was expected to perform the duties of a secretary of the board of education. Id. Thus, even the earlier version indicates that the Legislature intended that the functions assigned by the Newark Board to the Office of Board Affairs, if delegated by the Executive Superintendent, were to be subject to supervisory authority.

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As shown by our statutory analysis, the functions of board secretary under N.J.S.A. 18A:17-5 et seq., including the secretarial and support functions of that office, were assigned specifically by the Legislature to the Executive Superintendent, to be delegated by him if he deemed necessary. 18A:17A-6. Although the Executive Superintendent may choose, with Board approval, to exercise his authority to delegate by appointment of an Assistant Executive Superintendent for Board Affairs, the statutes do not require that his authority to delegate be exercised by the creation of that specific office. They, however, do require that whatever form the delegation takes, the duties be performed under his direction and supervision. N.J.S.A. 18A:17A-6; N.J.S.A. 18A:17A-3. Despite Wechsler's understanding of the effect of the statutes, and despite administrative practice since 1975, under which that office has drifted from the supervision of the Executive Superintendent, we find that the language of N.J.S.A. 18A:17A-4, -5(b), -6, -8 and N.J.S.A. 18A:17A-3 leads inevitably to this conclusion. Therefore, although we emphasize, as subsequently discussed, see Sections IV and V, that the Executive Superintendent's responsibility to implement policy established by the Board includes the responsibility that he assure that the Board has access to the services necessary for it to fulfill its policy making role, see N.J.S.A. 18A:17A-3, we conclude that the statutes prohibit the Board from using its policy making powers to establish a parallel, independent staff headed by the Executive Director of Board Affairs.

IV

In Gibson I, Petitioner Gibson challenged the propriety of the Board's action in renewing the contract of Alonzo Kittrels to serve as a lobbyist/consultant, and sought a declaration that the Board had exceeded its power in appointing an outside law firm to handle certain matters. As a result of the Commissioner's determination that the Board had violated the Open Public Meetings Act when it acted on renewal of Mr. Kittrels' contract, the reappointment was set aside. Since the Board did not appeal the Commissioner's determination regarding the Open Public Meetings Act and since, pursuant to that determination, Mr. Kittrels no longer is acting as a consultant for the Newark Board, we find the issue of the propriety of this particular Board action to be moot. However, in order to resolve the case before us, we must address the question of whether, under the statutory scheme set forth in N.J.S.A. 18A:17A-1 et seq., the Board has the authority to hire outside consultants and outside counsel.

Undisputed testimony at the hearing shows that, in practice, the Board has hired outside consultants, on advice of the Executive Superintendent, without controversy or objection. Such consultants have included architectural, insurance and self-insurance administration consultants. Tr. 11/28/83, at 36-38; Tr. 11/29/83, at 6. Moreover, the parties concede that the Board may utilize outside consultants to audit the district, to evaluate the performance of the Executive Superintendent and to draft a policy manual. Tr. 11/29/83, at 29. Outside legal counsel has been hired, without controversy, and upon recommendation by the District

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in-house General Counsel and the Executive Superintendent, in areas such as bond issuance, workers compensation and general liability. Tr. 11/29/83, at 7 and 48-49. Even in "selected matters," such as the instant controversy, the retention of outside counsel by the Board, has been approved, and, indeed, made on recommendation of, in-house General Counsel. Tr. 11/29/83, at 49.

However, the parameters of the Board's authority to engage such consultants must be established by analysis of the applicable statutory framework. Again, the statutory scheme established by N.J.S.A. 18A:17A-1 et seq. provides the starting point for our analysis. As set forth above, under the statutory scheme, the Executive Superintendent has supervisory authority over "all officers and employees, professional and nonprofessional," N.J.S.A. 18A:17A-3, and the responsibility for proposing to the Board "all other officers and employees, professional and nonprofessional" for employment, transfer and removal. N.J.S.A. 18A:17A-5(c). We, however, emphasize that, pursuant to N.J.S.A. 18A:17A-7, the authority to actually appoint, transfer and dismiss all employees and officers, other than those specified in N.J.S.A. 18A:17A-5(a) and (b), following recommendation from the Executive Superintendent, lies exclusively with the Board.

The Newark Board's authority to employ individuals in specified capacities and "other officers and employees," like that of other boards of education, is derived from N.J.S.A. 18A:16-1. Pursuant to that statute, in addition to the specified offices, a district board of education "... shall employ and may dismiss ... officers and employees, as it shall determine, and fix and alter their compensation and the length of their terms of employment." Although the statutes do not specifically define "officers", an employee is broadly defined to include the "holder of any position or employment." N.J.S.A. 18A:1-1.

The statutory language of N.J.S.A. 18A:16-1 is identical to that of N.J.S.A. 18A:17A-3 and N.J.S.A. 18A:17A-5(c), and we therefore conclude that the Executive Superintendent's supervisory authority over and responsibility for proposing employment, transfer and removal of those serving the Newark school district extends only to "officers and employees" within the meaning of N.J.S.A. 18A:16-1. Since nothing in the statutory framework further restricts the Board's authority in this area, and since, pursuant to N.J.S.A. 18A:17A-7, the Board retains "all other powers and responsibilities vested in it under Title 18A...", we further conclude that the Board retains such authority as may be granted to boards of education by Title 18A regarding the retention of the services of individuals who are not employees or officers of the Board under N.J.S.A. 18A:16-1.

The retention of services by a board of education that are to be performed by individuals who are not officers and employees of the board is governed by the Public Schools Contracts Law, N.J.S.A. 18A:18A-1 et seq. Since the authority of the Newark Board to engage the services of outside contractors is not limited by N.J.S.A.

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18A:17A-1 et seq. and, therefore, is among the retained powers and responsibilities under N.J.S.A. 18A:17A-7, we find that the Board may contract for the provision of work, including services, so long as it acts consistently with N.J.S.A. 18A:18A-1 et seq. and the regulations thereunder.

Pursuant to the Public Schools Contracts Law, boards of education may contract for the performance of work or hiring of services, and, if the subject matter of the contract is of the kind specified by N.J.S.A. 18A:18A-5, the board may negotiate or award the contract "by resolution at a public meeting without public advertising for bids...." Included in the subject matter falling within this provision are professional services, N.J.S.A. 18A:18A-5(a)(1), extraordinary unspecified services, N.J.S.A. 18A:18A-5(a)(2), the doing of work by employees of the contracting unit, N.J.S.A. 18A:18A-5(a)(3), and insurance, N.J.S.A. 18A:18A-5(a)(10).

Professional services are defined by N.J.S.A. 18A:18A-2(h) to be

> ...services rendered or performed by a person authorized by law to practice a recognized profession and whose practice is regulated by law and the performance of which services requires knowledge of an advanced type in a field of learning acquired by a prolonged formal course of specialized instruction and study as distinguished from general academic instruction or apprenticeship and training. Professional services also means services rendered in the performance of work that is original and creative in character in a recognized field of artistic endeavor.

Extraordinary unspecified services are those

> ...which are specialized and qualitative in nature requiring expertise, extensive training and proven reputation in the field of endeavor.

N.J.S.A. 18A:18A-2(g).

Nothing in N.J.S.A. 18A:18A-1 et seq. limits a board's authority to contract directly for such work or services, nor is there any requirement that the Board delegate responsibility for supervising the services provided or work performed. Thus, the Newark Board may use its retained authority to contract for work and services and to retain, without recommendation from the Executive Superintendent, outside contractors who meet the statutory requirements for qualification to perform work or to provide services in the areas specified by the statute, including professional services.

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We emphasize that we are not called upon in the instant case to judge, in specific instances, the propriety of the Board's exercise of its authority to contract for outside work or services, other than its retention of outside counsel. We, however, caution the Board that in exercising this authority, it must adhere to statutory and regulatory requirements. See, e.g., N.J.A.C. 6:20-8.1.

Furthermore, as a matter of educational policy, we find the Board must utilize its authority to contract with proper regard to the educational and financial needs of the District, and we emphasize that such authority should be used only where appropriate to augment the District's ability to provide services. We further caution the Board not to utilize its authority to contract under N.J.S.A. 18A:18A-1 et seq. as a vehicle to defeat the intent of N.J.S.A. 18A:17A-1 et seq., by establishing a parallel structure to provide services that the statutes require be provided under the administrative supervision of the Executive Superintendent.

After reviewing the statutory framework set forth in N.J.S.A. 18A:18A-1 et seq., we conclude that legal services fall squarely within the statutory definition of professional services, N.J.S.A. 18A:18A-5(a)(1), for which, pursuant to N.J.S.A. 18A:18A-5(a)(1), boards of education, including the Newark Board of Education, may contract. Therefore, as set forth above, we find that the Board properly may retain outside counsel when it determines that such services are required.

However, the Board's authority to contract for the services of outside counsel is as corporate body for the District, see N.J.S.A. 18A:10-1, and, accordingly, we conclude that such services may not be rendered to individual members of the Board. Moreover, although not statutorily mandated, we find that sound educational policy, as well as the intent reflected in N.J.S.A. 18A:17A-1 et seq., dictates that the decision to contract for outside counsel, where appropriate, should be made in consultation with the General Counsel and should include consideration of whether the services could be provided more efficiently or economically by that Office.

V

We now must determine the proper relationship between the General Counsel, the Office of the General Counsel and the Board and the Executive Superintendent. As set forth previously, we emphasize that the Executive Superintendent's supervisory authority and responsibility to make recommendations to the Board regarding personnel matters includes all "officers and employees," other than those specifically considered in other provisions of the statute. The statutory analysis articulated in our discussion concerning the Board's authority to utilize outside contractors is equally applicable to the General Counsel and the Office of General Counsel.

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It is well established that counsel appointed by a board under the authority granted it by N.J.S.A. 18A:16-1 is an officer or employee within the meaning of the statute. e.g., Taylor v. Hoboken Bd. of Educ., 187 N.J. Super. 546, 555 (1983); Fox v. Newark Bd. of Ed., 129 N.J.L. 349, 352 (Sup. Ct. 1943), aff'd o.b. 130 N.J.L. 531 (E&A 1943). In point of fact, the Board's resolution to "employ as a member of its staff a school attorney on an annual basis..." specifically relied upon the authority granted it by N.J.S.A. 18A:16-1. J-6(II), in evidence. Thus, although we reiterate that the Board has the authority to contract for legal services and conceivably could have decided to meet all of its legal requirements on that basis, the Newark Board decided to meet the District's legal needs primarily through employment of a General Counsel in a staff position with a support staff comprised of District employees.[6] Since we find nothing in either the provisions of N.J.S.A. 18A:17A-1 et seq. or the legislative history indicating any intent to carve out an exception removing General Counsel or employees in the Office of General Counsel from the Executive Superintendent's supervisory authority or exempting them from his recommendation responsibility, we conclude that the relationship between the Board and the General Counsel and Office of General Counsel is subject to N.J.S.A. 18A:17A-3 and N.J.S.A. 18A:17A-5(c).

Furthermore, although we recognize that our Supreme Court has the exclusive responsibility as to the practice of law, the conduct of attorneys and the attorney-client relationship. N.J. CONST. art. VI and II, par. 3. See, e.g., Taylor v. Hoboken Bd. of Educ., 187 N.J. Super. 546 (App. Div. 1983); American Trial Lawyers v. N.J. Supreme Court, 66 N.J. 258 (1974), we do not believe that application of N.J.S.A. 18A:17A-3 and N.J.S.A. 18A:17A-5(c) to the General Counsel conflicts with DR 2-110(B)(4), which imposes on an attorney a duty to withdraw from employment when he is discharged by his client. Rather, from an educational policy perspective, we conclude that the statutory scheme recognizes the reality that the nature of the client in this instance is defined by the nature of the school district, of which the Board is not the sole component.

In so concluding, we reiterate that the structure of the Newark School District is unique. Under the statutory scheme, the Executive Superintendent has the authority, and the responsibility, to make recommendations on the employment, transfers and removal of "all other officers and employees" to the Board. Following such recommendation, the power to actually appoint, transfer or dismiss employees is retained by the Board. N.J.S.A. 18A:17A-7. Thus, in

[6]We note that on May 29, 1984, the Newark Board adopted a resolution, which, in addition to relieving the General Counsel from any obligation to report to the Board through the Executive Superintendent, reserved the right to decide whether the General Counsel would be retained as an employee or "consultant upon contract." See Order of the Commissioner, June 28, 1984. Although we reiterate that the Board has the authority to contract for legal services, we find that it would be improper if the Board were to engage the General Counsel as an outside contractor with support provided by a staff of District employees.

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contrast to other districts, the Legislature in this instance has established the procedures by which the Newark Board must exercise its appointment authority and has mandated the involvement of both the Executive Superintendent and the Board in decisions concerning appointment and termination. We find that by mandating the involvement of the key elements of the District, the statutes reflect the nature of the client in this case and properly accommodate the attorney-client relationship.

Moreover, N.J.S.A. 18A:17A-1 et seq. entrusts to the Executive Superintendent a level and scope of responsibility beyond that imposed upon superintendents of any other district. Given the scope of his responsibilities and the size of the District we find it inconceivable that he could function without access to legal advice. At the same time, we recognize that the statutory responsibility of the Board to establish policy requires that it have access to counsel so that it may be advised of the permissible legal perameters as it acts.

As recognized by the parties, the General Counsel and his staff, in fact, do serve the District, providing legal services as required to both the Board and the Executive Superintendent. Tr.11/28/83, at 41-43; Tr. 11/29/83, at 50-51. This reality, viewed in the context of the statutory framework, leads us to conclude that, although the Board, as "a body corporate," see N.J.S.A. 18A:10-1, is the employer, the "true" client is the District.

We again emphasize that under the statutory scheme, the actual power to appoint and to terminate lies with the Board. This stands in sharp contrast to the statute at issue in Taylor v. Hoboken Bd. of Educ., supra, which was held to conflict with DR 2-110(B)(4). That statute, N.J.S.A. 18A:16-1, prohibited termination of employment except for good cause after a fair and impartial hearing and specifically prohibited removal for political reasons. The statutes involved in the case before us in no way limit the substantive ability of the Board to hire or dismiss the General Counsel.

In concluding that N.J.S.A. 18A:17A-3 and N.J.S.A. 18A:17A-5(c) properly apply to the General Counsel and the Office of General Counsel, we stress that, in serving the District, the proper role of the General Counsel and his Office is to render impartial legal opinion to both the Board and the Executive Superintendent. It is not the General Counsel's function to serve as an advocate for either the Board or the Executive Superintendent. Therefore, although we find no inherent conflict in the General Counsel's responsibility to provide legal services to both the Board and the Executive Superintendent, we recognize that conflict might arise where the Board and the Executive Superintendent are in disagreement. In such situations, ethical considerations would dictate that the General Counsel recuse himself from any involvement in the matter. See Ethics Opinion No. 187, 93 N.J.L.J. 649 (Sept. 10, 1970).

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18. Implementation of the reorganization plan commenced in September 1986 and is ongoing at the present time. It is not disputed that the plan is educationally sound and provides cost savings to the Board.

DISCUSSION

As noted, the Board no longer contests the standing of petitioner. Thus, the only remaining issue, as set forth in the prehearing order, is whether the procedures followed by the Board in determining to reorganize its elementary schools, effective September 1986, were arbitrary, capricious or unreasonable. In his posthearing submission, petitioner maintains that the answer to that question should be in the affirmative since the reorganization plan, which had been dormant for many years prior to January 1986, was suddenly rushed to action by the Board during January 1986 in a hasty and incomplete fashion, which process violated the spirit, if not the letter of the Public School Education Act, N.J.S.A. 18A:7A-1 et seq.

There seems to be no question but that the Newton community-at-large was not aware of the Board's renewed intent to implement a reorganization of its two elementary schools until January 10, 1986, when a memorandum was sent home with pupils advising parents of the special Board meeting scheduled for the night of January 13, 1986, and the subject to be discussed. At least 150 members of the public came to the meeting to express their views respecting the proposed reorganization. Although the Board agenda for that night originally anticipated that a vote would actually be taken (Exhibit R-1), through the efforts of either the president or superintendent, the item was discussed, rather than officially moved. At the conclusion of that evening, the meeting was adjourned to be reconvened on January 21, 1986. Between those two dates, another memorandum was sent home to parents by Dr. Selover to which there was attached the question and answer format document that had been made available on the evening of January 13, 1986, to persons who attended the Board meeting that night. That memorandum explored in greater detail the essential aspects of the plan and contained the views of the administration regarding its merits. When the Board met again on the evening of January 21, 1986, substantially fewer members of the public appeared. Those

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context for the Executive Superintendent, in addition to making his own legal assignments to the General Counsel, is to coordinate priorities, to evaluate how well the General Counsel meets his deadlines and supervises his own staff, to judge by results the adequacy of the legal advice provided, and to assess when the volume of work or time constraints dictate that additional staff or outside counsel is required.

VI

Finally, on the issue of whether the award of counsel fees to Petitioner Gibson was proper, the State Board reverses the Commissioner's determination. The basis for the Commissioner's award was that, as a Board member, Gibson petitioned the Commissioner in order to force the Board to comply with the "statutory prescription with regard to the concept of unit control and organization pursuant to the enacted provision of N.J.S.A. 18A:17A-1 et seq." Gibson I, at 43. As legal authority for award of counsel fees, the Commissioner cited Ross v. Board of Education of the City of Jersey City, decided by the Commissioner, March 9, 1981, aff'd by the State Board, October 7, 1981. It should be noted that Ross stands as the single exception to the consistent practice of denying attorney fees to successful litigants in education cases. See, e.g., Fallon v. Scotch Plains Fanwood Board of Education, 185 N.J. Super. 142, 147 (Law Div. 1982). Ross also represents a serious deviation from the general policy that litigants bear their own counsel fees, embodied in both case law, Gerhardt v. Continental Ins. Co. 48 N.J. 291, 302 (1966), and in the rules governing allowance of attorney fees in court cases: R. 4:42-9 limits such awards to certain specific circumstances, none of which apply here.

Although Ross involved issues similar to those in the instant case, i.e., conflicts between a district superintendent and a local board over appointment authority, the case was initiated by a superintendent, not by a board member. Although that fact is not controlling, the State Board believes that the ruling in that case is best restricted to its particular facts. We believe that the possibility of attorney fees in similar cases might encourage litigation in the future between boards and their members over issues of far less merit than those presented here.

In Hogan v. Bd. of Ed. of the Town of Kearny, decided by the State Board, August 4, 1982, the State Board found that, except for indemnification for the costs of defending board employees or office holders pursuant to N.J.S.A. 18A: 16-6, there is no statutory authority for the award of counsel fees for cases arising under the school laws. The State Board added:

> Furthermore, to the extent that Petitioners desired to have alleged statutory violations investigated and pursued, avenues other than private law suits brought by them were available such as referral of the alleged violations to the

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> State Department of Education, the Attorney General's Office or other law enforcement agencies.

Id. at 1.

We follow that rule in our decision today, and reverse the Commissioner's award of counsel fees to the successful litigant below.[8]

VII

In sum, for the reasons stated in this decision, we affirm the Commissioner's conclusions that, in establishing the Office of Board Affairs with an Executive Director and support staff directly responsible to it, the Newark Board of Education violated the statutory scheme set forth in N.J.S.A. 18A:17A-1 et seq., and that the Executive Superintendent's supervisory authority under N.J.S.A. 18A:17A-3 extends to all officers and employees, including the General Counsel. We also affirm the Commissioner's determination that N.J.S.A. 18A:17A-5 requires that the Board exercise its power under N.J.S.A. 18A:17A-7 to appoint and dismiss officers and employees only after a recommendation is made by the Executive Superintendent. We therefore, affirm the Commissioner's conclusion that the Board acted improperly when it dismissed its General Counsel and hired a new General Counsel without any recommendation by the Executive Superintendent. We emphasize that we were not called upon in this appeal to address the propriety of the hiring of any particular consultant or contractor. However, we affirm the Board's right to engage outside contractors, including outside counsel, as set forth in this Report. Finally, we reverse the Commissioner's award of attorney fees to Petitioner Gibson.

We again emphasize that the statutory scheme that we have applied in reaching the conclusions set forth in this decision was designed to enable the Newark school district to provide a quality education to its students. That scheme entrusts to the Newark Board of Education the great responsibility to develop the policy to assure the provision of such education, while, at the same time, imposing on the Executive Superintendent the equally great responsibility to implement that policy. We cannot stress strongly enough the importance of the establishment of a cooperative, non-adversarial relationship between the Board and the Executive Superintendent so that they can fulfill, within the statutory framework, their joint responsibility to insure that the school children of Newark receive the benefits of a thorough and efficient education.

We are not by our decision attempting to legislate the conduct of the Newark Board of Education on a day to day basis. Nor could we possibly do so. Rather, we have attempted to clearly articulate the unique statutory framework that governs the operation of the Newark School District and to apply sound educational

[8]We have been advised that the Newark Board has paid the legal fees awarded by the Commissioner's decisions in this controversy. Given the unique circumstances of this case, our holding on this issue is to be applied prospectively and not to fees already paid.

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principles within that framework to the specific issues that we were asked to address. We believe that our decision resolves the issues that the Commissioner sought to address through his directives in Gibson I. In so far as greater specificity is needed, we direct the Commissioner of Education to explore the advisability of developing regulations in order to provide the Newark Board with sufficient guidance to conform its operation to the requirements of N.J.S.A. 18A:17A-1 et seq.

S. David Brandt opposed. Mateo F. DeCardenas abstained.

Attorney exceptions are noted.

May 6, 1986

Affirmed N.J. Superior Court October 15, 1986

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HAMILTON TOWNSHIP SUPPLEMENTAL TEACHER'S ASSOCIATION, ET AL.,

PETITIONERS-RESPONDENTS,

V.

HAMILTON TOWNSHIP BOARD OF EDUCATION, MERCER COUNTY,

RESPONDENT-APPELLANT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, November 30, 1979

Decided by the State Board, October 1, 1980

Remanded by the Appellate Division, July 10, 1981

Remanded by the Supreme Court, June 23, 1982

Decided by the Commissioner of Education, May 14, 1984

Decision on Motion by the State Board, December 5, 1984

Decision on Motion by the Appellate Division, June 19, 1985

Decision on Motion by the State Board, March 6, 1985

Decision on Motion by the Appellate Division, January 18, 1985

Decision on Motion by the Appellate Division, October 4, 1985

For the Petitioners-Respondents, Katzenbach, Gildea and Rudner (Arnold M. Mellk, Esq., of Counsel)

For the Respondent-Appellant, Aron and Salzberg (Louis C. Rosen, Esq., of Counsel)

In Spiewak v. Rutherford, 90 N.J. 63 (1982), the New Jersey Supreme Court decided the case now before us together with two other related cases involving the question of whether public school teachers who provide remedial and supplemental instruction to educationally handicapped children may acquire tenure. By its decision, the court settled this question, holding that such teachers may acquire tenure if they meet the specific criteria of N.J.S.A. 18A:28-5. The court specifically held that all supplemental instructors involved in the case now before us who met the criteria of N.J.S.A. 18A:28-5 were eligible for tenure. It

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further held that the teachers in this case were entitled to retroactive application of the rule developed as a result of the litigation. Id. at 83. Therefore, as the court noted, these teachers were

> ...entitled not only to tenure but also to retroactive payment of any benefits that they would have received if they had been awarded tenure properly.

90 N.J. 63, at 83 n.2.

The court, however, did not decide to what, if any, additional benefits the teachers in this case were entitled, either retroactively or prospectively. 90 N.J. 63, at 84 n.3. Rather, the court noted that such benefits are

> ...primarily a matter of contract and the relevant collective bargaining agreements are not part of the record. Further, the parties for the most part did not brief this question and the Appellate Division did not address it.

Id.

The court, therefore, remanded this case to the Commissioner of Education, specifically to determine what retroactive benefits were owed the teachers, with further instruction that the Commissioner determine the additional retroactive and prospective benefits the teachers in this case are entitled to in accord with the principles laid down in the opinion.

The appeal now before us is an appeal from the decision of the Commissioner, which was rendered pursuant to the remand and which is the Commissioner's determination of what retroactive benefits Petitioners were entitled to. Thus, in this appeal, we are called upon to address the limited question of to what, if any, benefits the supplemental teachers in Hamilton Township were entitled as a result of the New Jersey Supreme Court's determination that they were tenure eligible teaching staff members.

I

Following the remand by the New Jersey Supreme Court, this case was transmitted to the Office of Administrative Law for a limited hearing based upon the court's directive. When efforts to arrive at a settlement of all the issues involved in the remand were unsuccessful, the remaining issues that required resolution through litigation were determined at a conference of counsel. Those issues were: 1) Did the Petitioners have any entitlement to retroactive pay? 2) Did the Board's 90-day rule governing advancement on the salary guide for regular classroom teachers apply to the Petitioners? 3) Should costs be levied against the Board because of its alleged renunciation of an agreement in the matter? and 4) were

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the Petitioners entitled to interest from the date of the New Jersey Supreme Court's decision in the case?

In his Initial Decision, the Administrative Law Judge (ALJ) determined that, since the teachers in this case were parties to the case decided by the New Jersey Supreme Court, they were entitled to salary compensation consistent with Spiewak and to retroactive application of those benefits. Based upon the Commissioner's view, expressed in his decisions following Spiewak, that Spiewak - type petitioners were entitled to the same pay as all teachers under the terms of the relevant bargaining agreements, pro-rated according to time worked, the ALJ concluded that the Petitioners in this case were entitled to "receive pay for all their years of employment as supplemental teachers on a ratio basis of full-time employment at the appropriate steps of the appropriate teacher salary guides." Initial Decision, at 6.

Having made his determination as to the nature of the retroactive benefits to which Petitioners were entitled, the ALJ turned to the remaining compensation issue. Resolution of that issue - whether the Petitioners were entitled to advance on the salary guide for each year that they had worked 90 days regardless of the number of hours they had worked - would affect the amount of retroactive relief to which Petitioners would be entitled.

The ALJ, again relying on a Commissioner's decision rendered following Spiewak, concluded that since supplemental teachers were entitled to be placed on the annual guides for regular teaching staff members consistently with applicable board policies, practices or provisions in the negotiated agreements, a board was required to consider such experience the equivalent of any other regular part-time and full-time classroom teaching experience when it computed placement on the guide. Id. at 6-7. Because regular classroom teachers in the district were entitled to advance on the guide each year that they worked 90 days or more, the ALJ concluded that the Petitioners in this case were entitled to advancement for every school year in which they had worked 90 days or more. Id. at 7. In so concluding, the ALJ noted that this calculation was consistent with the calculation of tenure acquisition in a part-time capacity. Finally, the ALJ determined that the Commissioner lacked the authority to award either post-judgment interest or attorney fees.

The Commissioner adopted the ALJ's findings and determinations, noting with approval that the ALJ's determination concerning the retroactive compensation to which the Petitioners were entitled was in accord with a joint understanding by the parties of January 1984[1]. Further noting that the joint

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[1] The joint understanding specifies the amount of retroactive money that would be due each individual were Petitioners awarded salary adjustments based on retroactive placement on the salary guide.

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understanding was attached, the Commissioner adopted it by reference, and determined that it formed a part of the Initial Decision in settlement of the matter. Commissioner's Decision, at 11. Finally, the Commissioner directed that payments to the Petitioners listed in the joint understanding be made from the current expense budget for the 1983-84 school year.

The Board appealed the Commissioner's decision to the State Board and sought a stay of the decision, which was granted by the Appellate Division conditioned on setting aside, in a separate interest bearing account, the sums necessary to comply with the Commissioner's directive. Order, Superior Court of New Jersey, Appellate Division, January 18, 1985. In its appeal to the State Board, the Hamilton Township Board of Education maintains that the New Jersey Supreme Court's recognition that the statutory entitlements of tenure extend to supplemental teachers can not be read to include a legal entitlement by those teachers to payment on the regular teachers' salary guide. Consequently, the Board maintains, there are no retroactive salary benefits to which the Petitioners in this case are entitled. The Board further maintains that, even if Petitioners are entitled to retroactive salary guide placement, the Board is not required to credit Petitioners with one year of advancement for each year in which they worked 90 days regardless of the number of hours worked.

In response, Petitioners argue that the principles of Spiewak as interpreted in subsequent decisions entitle them to placement on the salary guide for regular classroom teachers, and that, since they are entitled to receive such benefits retroactively pursuant to Spiewak, they are entitled to payment of the difference between their compensation as supplemental teachers and the salaries accorded regular classroom teachers, pro-rated as to time actually worked from the date of their employment. Petitioners further argue that, based on agreements between the parties reached during efforts to settle all of the issues in the case, the Board has waived its right to contest their entitlement to retroactive compensation, that it is estopped from asserting that position and that denying them compensation based upon a pro-rated placement on the regular teacher's guide at this time would result in a reduction in salary. In addition to renewing their claims to retroactive compensation based upon placement on the salary guide for regular classroom teachers, Petitioners assert that Spiewak mandates equal application, retroactively, of the Board's 90 day rule governing advancement on the guide, and that, therefore, they are entitled to retroactive compensation that reflects advancement on the guide for every year in which they worked 90 days, regardless of the number of hours they worked.

II

As set forth above, because the Petitioners in this case were parties to the litigation that resulted in the New Jersey Supreme Court's decision in Spiewak, "they are entitled not only to

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tenure but also to retroactive payment of any benefits that they would have received if they had been awarded tenure properly."[2] Spiewak, supra, at 83. However, we emphasize, as did the New Jersey Supreme Court in its subsequent decision in Rutherford Educ. Ass'n. v. Bd. of Educ., that the court in Spiewak did not decide what benefits constituted the emoluments of tenure. 99 N.J. 8, 14 (1985). We therefore conclude that the court's decision in Spiewak did not award to Petitioners in this case retroactive compensation based on placement on the salary guide applicable to regular classroom teachers, and we find that the question of whether they were entitled to such relief must be resolved by determination of whether they were entitled under the education laws to placement on the salary guide by virtue of their status as tenure eligible teaching staff members.

In Hyman v. Board of Education of the Township of Teaneck, decided by the State Bard, March 6, 1986, aff'd, Docket #A-3508-84T7 (App. Div. Feb. 25, 1986), the State Board confronted the issue of whether supplemental teachers are entitled under the education laws to placement on the salary guide applicable to regular classroom teachers by virtue of their status as tenure eligible teaching staff members. In our decision, we emphasized that, although affording teacher's significant rights and protections, nothing in the tenure laws confers on teachers the right to placement on a salary guide, slip op. at 7-8, and we concluded that any statutory entitlement to such placement must be found in the compensation statutes, N.J.S.A. 18A:29-1 et seq. Id. at 8.

Our review of those statutes revealed that their application was limited to full-time teaching staff members, N.J.S.A. 18A:29-4.1, and that the statutes did not require that a board adopt a single salary schedule applicable to all full-time teaching staff members, although all schedules applicable to such members must conform to the minimum standards prescribed by the statutes. N.J.S.A 18A:29-4.1; N.J.S.A. 18A:29-7 (repealed 1985);

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[2] We note that, although Petitioners in this case are entitled to full retroactive relief because they were parties to Spiewak, retroactive relief in other cases where the petition of appeal to the Commissioner was filed prior to the decision in Spiewak is limited to those teachers still employed on the date of that decision. Rutherford Educ. Ass'n v. Bd. of Educ., 99 N.J. 8 (1985). We further note that even teachers entitled to retroactive application of Spiewak are entitled to receive the "emoluments of tenure" only from a date six years prior to the court's decision in Rutherford. Id. at 30.

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N.J.S.A. 18A:29-8 (repealed 1985)[3]; N.J.S.A. 18A:29-11. We therefore concluded that, although if a board adopts a salary schedule for one group of full-time members, all full-time members must be included in some schedule and must be placed on the applicable schedule in accordance with N.J.S.A. 18A:29-7, -8, -9, -10 and -11,[4] the statutes did not mandate placement of full-time members on any particular guide and conferred no entitlement on members who were not full-time to placement on any guide. Recognizing that salary guides consistent with the minimum requirements set forth in the education statutes may be included in collective negotiations agreements and that the negotiations process resulting in such agreements is within the scope of the New Jersey Employer-Employee Relations Act, N.J.S.A. 37:13A-1 et seq., we held that the negotiated guide applicable to the auxiliary and supplemental teachers in that case did not contravene the education laws.

We emphasize that, for purposes of determining retroactive relief to which the Petitioners in this case may be entitled, they are to be considered tenure eligible teaching staff members from the time of their initial employment by the District. Spiewak, supra. However, as indicated by our statutory analysis in Hyman, Petitioners are entitled under the educational laws to retroactive placement on any salary guide only if they were full-time teaching staff members.

As set forth in Hyman, "full-time" is defined by statute as the number of days of employment in each week and the period in each day required by the State Board of Education to qualify any person as a full-time member. N.J.S.A. 18A:29-6 (repealed 1985) (provision now codified at N.J.S.A. 18:29-5). The State Board, in turn, has granted the authority to district boards to define full-time so long as the number of hours required each day is more than four hours. N.J.A.C. 6:3-1.13.[5]

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[3] As indicated above, effective September 9, 1985, N.J.S.A. 18A:29-6, N.J.S.A. 18A:29-7, N.J.S.A. 18A:29-8, N.J.S.A. 18A:29-10 and N.J.S.A. 18A:29-12 were repealed. Teacher Quality Employment Act, N.J.S.A. 18A:29-5,L. 1985, c. 321 sec. 16 (1985). We further note that, in addition to repealing those statutory provisions, the Teacher Quality Employment Act raised the minimum salary for full-time teaching staff members to $18,500. N.J.S.A. 18A:29-5. Although the entitlement to retroactive benefits in this case is to be determined under the statutes in effect prior to September 9, 1985, we emphasize that the new statutory minimum, like the predecessor statutes, is applicable only to full-time teaching staff members.

[4] See supra note 2.

[5] We note that hours of work are a mandatory subject of collective negotiations. eg., In re Byram Township of Education, 152 N.J. Super. 12 (1977); Bd. of Education of Engelwood v. Engelwood Teachers, 64 N.J. 1 (1973).

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It is uncontroverted that Petitioners in this case were not full-time teaching staff members during the period relevant to this litigation. Petitioners were initially employed on an "as needed" basis and thereafter notified of their specific hourly schedule. Hamilton Township Supplemental Teachers Association et al. v. Board of Education of the Township of Hamilton, 1979 S.L.D. 715, 717. Their daily schedules did not exceed five hours, id., and their duties included no responsibilities that extended their scheduled hours of work. Id. at 716. They taught classes in periods of one-half hour, with the exception of one teacher at the high school level who taught periods coinciding with the scheduled classes for all students. Id. In contrast, from 1972-74, full-time classroom teachers employed by the Board were required to report for duty twenty minutes before the opening of school and to remain fifteen minutes after the close of the pupils' day. Agreement between the Hamilton Township Education Association and the Hamilton Township Board of Education, 1972-1974 (hereinafter "Agreement"). From 1974 through 1980, the work day for full-time teachers was "no less than that which [was] established for the pupils" up to a maximum of 7 hours and 5 minutes for elementary teachers and 7 hours and 20 minutes for middle and high school teachers. Agreement, 1974-1977; Agreement, 1977-1980. Additionally, the collective negotiations agreement in effect from 1977 through 1980 indicates that, during the work day, full-time teachers were scheduled for six periods a day of teaching assignments or five periods of teaching assignments and one period of duty assignment. Agreement, 1977-1980. Although recognition under the collective negotiations agreement was extended in 1980 to include all certified staff members under contract, the required hours of work remained the same as in the previous agreements and agreement concerning teachers' schedules remained substantially the same. Agreement, 1980-1983.

In the absence of any indication in the record that Petitioners were full-time teaching staff members during the period relevant to this litigation, we conclude that they were not entitled under the education laws to placement on any salary guide. Because we conclude that Petitioners were not entitled under the education laws to placement on any salary guide, we find that they are not entitled to retroactive payments of compensation based upon the salary guide applicable to regular classroom teachers. Furthermore, since Petitioners' claim to additional retroactive compensation based upon advancement on the guide for each year in which they worked 90 days is dependent on their entitlement under the education laws to placement on the guide, and since we have found that Petitioners have no entitlement under the education laws to placement on the guide, we conclude that they are not entitled to retroactive compensation based on advancement on the guide.

We emphasize that compensation is a term and condition of employment and, within applicable statutory standards, is a mandatory subject of collective negotiation. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978); Bd. of Education of Englewood v. Englewood Teachers, 64 N.J. 1 (1973). We reiterate that the education laws do not prescribe any standards governing the rate or manner of compensation for teaching staff

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members who are not full-time.[6] Therefore, we conclude that the contractual agreements between the parties providing for compensation at an hourly rate did not contravene the education laws, and, in the absence of violation of the education laws, those agreements properly control Petitioners' rights to compensation. We further conclude that in the absence of any violation of the education laws, the Board's failure to recognize Petitioners' status as tenure eligible teaching staff members during the negotiations resulting in the collective negotiations agreement presents no claim for which the school laws would provide a remedy. In so concluding, we emphasize that the negotiations process is within the scope of the New Jersey Employer-Employee Relations Act, N.J.S.A. 37:13A-1 et seq., and that violations of that Act do not lie within our jurisdiction.

Further, we find that the Board did not waive its right to contest in these proceedings Petitioners' asserted entitlement to retroactive compensation. The joint understanding incorporated by the Commissioner as part of the Initial Decision and adopted by him specifies that it is an understanding concerning the amount of retroactive money that would be due Petitioners "were the court to award salary adjustments based on retroactive placement on the teachers' salary guide." Joint Understanding, January 10, 1984. Thus, although agreeing to amounts to which petitioners would be entitled if they were awarded the benefits they claimed, the Board did not concede that petitioners were entitled to such benefits, and we observe that the Board has maintained throughout this litigation that Petitioners were not entitled to such relief.[7]

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[6] We note that the application of N.J.S.A. 18A:29-5 (repealed 1985) was not expressly limited to full-time teaching staff members. Although, based on reference to the preceeding provision, N.J.S.A. 18A:29-4.1, we read this provision as applicable only to full-time members, we note that it requires only that members not covered by the statutory schedule be paid a minimum salary of $2,500, and it is not asserted that Petitioners were paid less than this amount during the relevant period.

[7] In rejecting Petitioners' contention that waiver precludes the Board from asserting that they are not entitled to retroactive compensation, we recognize that attempts to settle this case were made prior to the conference of counsel of December 12, 1983, at which the issues still in controversy between the parties were determined. We however emphasize that those negotiations did not result in a settlement agreement, see N.J.A.C. 1:1-17.1, that the issue of whether Petitioners were entitled to retroactive compensation was determined to be in controversy between the parties at the conference of counsel and that this issue has been fully litigated in these proceedings. We therefore do not accept the view that tentative agreements arrived at during the settlement negotiations that occurred prior to the December 12 conference of counsel warrant application of the doctrines of waiver or estoppel. Nor, as set forth above, do we find that the Board's action granting salary adjustments for 1982-83 pursuant to the collective negotiations agreement either alters Petitioners' entitlement under the education laws or precludes the Board from taking the position it has asserted in this litigation.

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Nor do we find that the Board's subsequent action in placing Petitioners not employed full-time on the salary guide on a pro-rata basis entitles Petitioners to further relief under the education laws. We again emphasize that the education laws do not require the placement of teaching staff members who are not employed full-time on any salary guide, nor do they prescribe any standards governing the compensation of such staff members. We therefore conclude that any entitlement to additional compensation based upon the pro-rata placement of supplemental teaching staff members who were not employed full-time, including entitlement to compensation based on credit for each year in which they worked 90 days, is controlled by the applicable agreements and lies outside the purview of the education laws.[8]

Although we conclude that placement of teaching staff members who are not employed full-time on the salary guide lies outside our purview, we have been advised that the only supplemental teachers now employed by the Board are employed as full-time teaching staff members and that they are compensated in accordance with the salary guide applicable to regular classroom teachers. Although the placement of supplemental teachers employed as full-time teaching staff members has not been directly challenged in this appeal, we emphasize that upon accepting employment as a full-time teaching staff member in a district, each supplemental teacher's initial place on the salary schedule properly is at such point as may be agreed upon by the member and the board, N.J.S.A. 18A:29-9, unless superceded by the collective negotiations agreement. Belleville Education Association v. Belleville Board of Education, 209 N.J. Super, 93 (App. Div. 1986). We further emphasize that, although such placement may not result in the reduction in salary of a supplemental teacher who has acquired tenure, N.J.S.A. 18A:28-5, nothing in the statutes mandates that credit be given for prior experience so long as the placement meets the minimum salary requirements specified in the statute. cf. Whalen v. Sayreville Bd. of Ed., 192 N.J. Super. 452 (App. Div. 1983). It has not been asserted in these proceedings that the initial placements of those supplemental teachers who accepted full-time employment with the Board did not conform to the applicable statutory minimums.

III

In sum, we conclude that the New Jersey Supreme Court's decision in Spiewak did not grant to Petitioners any entitlement to compensation beyond that conferred on tenure eligible teaching staff

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[8] We note that, under the education laws, placement of tenured teaching staff members on a salary guide, regardless of whether or not they are full-time, may not result in a reduction in salary. N.J.S.A. 18A:28-5. However, it is not asserted that the pro-rata placements effectuated by the Board in this case resulted in any reduction in the compensation of tenured teaching staff members.

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members by the education statutes. Rather, the court's decision entrusted us with the significant responsibility of determining on appeal the salary benefits to which Petitioners were entitled under the education statutes. In order to fulfill our responsibility in this case, it was necessary that we review the applicable agreements to insure that they were not inconsistent with the education laws. However, we emphasize that the decision in Spiewak did not confer on us the jurisdiction, in the absence of violation of the education statutes, to redefine rights established through contract. Nor, in the absence of violation of the education statutes, can these proceedings be substituted for the negotiations process governed by the New Jersey Employer-Employee Relations Act.

In conformity with the principles enunciated above, we have determined whether, by virtue of their status as tenure eligible teaching staff members, Petitioners were entitled under the education laws to receive retroactive compensation based on placement on the salary guide applicable to regular classroom teachers. As set forth above, we conclude, as we did in Hyman, that teaching staff members who are not full-time have no entitlement under the education laws to placement on a salary guide. Since Petitioners did not assert, nor does the record indicate, that they were full-time teaching staff members during the period relevant to this litigation, we find that they have no entitlement under the education laws to retroactive compensation based upon placement on the salary guide for full-time teachers. Further, because their claim to additional retroactive compensation based on advancement on the guide is dependent on their entitlement under the education laws to placement on the guide, we find that they are not entitled under the education laws to compensation based on credit for each year in which they worked 90 days. Nor, upon their pro-rata placement on the guide by the Board, did the education laws require such credit. Moreover, although not directly presented by this appeal, we emphasize that upon accepting employment as a full-time teaching staff member in a district, the initial place on the applicable salary guide of a supplemental teacher, like that of all teaching staff members, is at such point as agreed upon between the teacher and the board unless superceded by a collective bargaining agreement, and that the education laws do not require that credit be given for prior experience. We, however, emphasize that such placement may not result in reduction in the compensation of a tenured teaching staff member.

In reaching the conclusions set forth in this decision, we reiterate that the only issues involved in this appeal concerned Petitioners' claims to compensation. Therefore, although we emphasize that pursuant to Spiewak, Petitioners, as teaching staff members, were entitled to the statutory benefits attending such status, we were not called upon in this appeal to determine whether the Board had denied to Petitioners benefits, other than compensation, to which teaching staff members are entitled under the education statutes.

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Finally, although we recognize that the Commissioner has the authority to award interest in appropriate cases, Bd. of Educ., City of Newark, Essex County v. Levitt, 197 N.J. Super. 239 (App. Div. 1984), in light of our conclusions in this case, we would deny Petitioners' claim to interest. Likewise, we would deny Petitioners' claim to counsel fees. See Gibson v. Board of Education of the City of Newark, decided by the State Board, May 6, 1986.

Attorney exceptions are noted.
September 3, 1986

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STEPHEN KRATT,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF RANDOLPH, MORRIS COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, October 15, 1985

Decision on Motion by the State Board of Education, January 8, 1986

For the Petitioner-Respondent, Zazzali, Zazzali and Kroll (Robert A. Fagella, Esq., of Counsel)

For the Respondent-Appellant, Rand and Algeier (Ellen S. Bass, Esq., of Counsel)

In July, 1985, Petitioner-Appellant was transferred from his tenured position as a librarian/educational media specialist to the position of social studies teacher at the intermediate school. He filed a Petition of Appeal with the Commissioner, and then, on August 19, 1985, moved for preliminary injunctive relief and/or summary judgment to prohibit the Board from transferring him without his consent to the position of high school social studies teacher. Both motions were denied by the Administrative Law Judge (ALJ). Petitioner-Appellant then sought interlocutory review by the Commissioner. While finding no basis upon which he could grant injunctive relief, the Commissioner granted the motion for summary judgment since he found no genuine issue as to any material fact.

The Commissioner found that N.J.S.A. 18A:28-5 and N.J.S.A. 18A:28-6, when read in pari materia, were designed to prohibit transfer between separately tenurable positions without the consent of the affected individual. Under N.J.S.A. 18A:28-5, tenurable positions are those "which require [the employee] to hold appropriate certificates issued by the board of examiners." Since the position of social studies teacher requires an instructional certificate with an endorsement in social studies and the position of librarian/education media specialist requires an educational services certificate with an endorsement as an educational media specialist, the two positions in question are clearly separately tenurable positions. The Commissioner, therefore, found that moving an individual between these positions constitutes a transfer, requiring the consent of the affected teaching staff member.

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In reaching his conclusion, the Commissioner found that the Appellate Division's decision in Childs v. Union Twp. Bd. of Ed. 1982 S.L.D. 1456, governed. The court in Childs, which is a case markedly similar to the instant case, held that "[w]hat is important is that the certifications for teachers and for guidance counselors are based upon different qualifications." Childs, supra, at 1461. In arriving at its conclusion that a teaching staff member could not be transferred from one of those positions to the other without his consent, the court emphasized that it would be "pure sophistry" to assert that Ms. Childs' transfer was anything less than dismissal from a clearly tenured position. Id. at 1460.

The Commissioner recognized that the Court in Childs disagreed with the earlier decision by the Appellate Division in Stegemann v. Bd. of Ed. of the Twp. of Union, Docket # A-4737-79T2 (App. Div. Oct. 7, 1981), and found that he

> ...likewise disagree[d] with the holding in Stegemann, which is a one-page conclusory decision lacking the extensive analysis the Court provided in Childs and altogether omitting discussion of N.J.S.A. 18A:28-6.

Commissioner's Decision, at 7.

Similarly, he found that O'Hara v. Bd. of Ed. of the Vocational School in the County of Camden, Docket # A-1827-81T2 (App. Div. Dec. 30, 1982),

> ...is not precisely on point. That case involved a teacher, who, upon returning to her librarian's job following an illness, was transferred back to the classroom as a result of a reduction in force.

Id.

The State Board agrees with the Commissioner that Childs is controlling in this case and to the extent that Childs conflicts with O'Hara and Stegemann, in reaching our conclusion today, we follow Childs. Therefore, for the reasons expressed in his decision, we affirm the Commissioner's determination that Petitioner-Appellant was entitled to summary judgment and to immediate reinstatement to his position as an educational media specialist with any emoluments due him.

Maud Dahme abstained.

February 5, 1986

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ARLYNE K. LIEBESKIND,

PETITIONER-APPELLANT,

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH OF BRADLEY BEACH, MONMOUTH COUNTY, : DECISION

RESPONDENT-RESPONDENT.

Decided by the Commissioner of Education, February 22, 1985

For the Petitioner-Appellant, Chamlin, Schottland, Rosen, Cavanagh and Uliano, PC (Thomas W. Cavanagh, Jr., Esq., of Counsel)

For the Respondent-Respondent, Crowell and Otten, Esqs. (Robert H. Otten, Esq., of Counsel)

Petitioner-Appellant Liebeskind is a tenured teacher with eighteen years of teaching experience in the Bradley Beach school district. During 1983-84, she suffered from an illness which required major surgery and necessitated a prolonged absence from school. When her accumulated sick leave benefits were exhausted, she requested extended sick leave benefits from the Board for the sixteen days prior to her return to work on the 27th of February.

In her initial request, dated February 5, 1984, she described the nature of her illness and explained that the complications following her surgery had slowed her recovery. She sought payment of her full salary for the period in question to help relieve the financial hardship imposed by the extended disability. J-1, in evidence. A memo from the Chairperson of the Personnel Committee to all Board members indicates that on February 21, 1984, the Board engaged in preliminary discussion regarding this request. J-2, in evidence. That discussion resulted in the development of a list of options for Board action in the matter. Those options included: 1) payment of full salary, 2) payment of full salary minus the cost of the substitute, 3) granting a specified number of extended benefit days in anticipation of the future need for sick leave or 4) paying no salary benefits or extended benefit days in anticipation of future absence. Id. The memo advised Board members that they could consider any combination of options, that discussion of the matter should take place in Executive Session and that the matter would be listed for discussion at a workshop meeting on March 20. Id. It further advised the Board that Ms. Liebeskind anticipated returning to work on February 27, at which time she would have no benefit days remaining.

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The minutes from the March 20 meeting state that each Board member had received reports on Ms. Liebeskind's request and information on the options. J-4, in evidence. The minutes further state that "it was the personnel committee's recommendation, that after considerable review and research, that no additional benefits be extended to Ms. Liebeskind beyond the three days given to her for the month of January, 1984." Id. The Board members agreed with this recommendation, id., and, on March 21, 1984, the Board informed Ms. Liebeskind that it denied her request. J-5, in evidence.

In denying her request, the Board stated that it had given much thought to her request and had reviewed all the information pertinent to it. Id. Further, in its denial, the Board recognized and appreciated Ms. Liebeskind's years of service and reiterated that it had made its decision following "full and careful consideration of the request." Id.

On April 2, 1984, Ms. Liebeskind made a second request to the Board for payment of extended sick leave benefits in the amount of her regular salary reduced by the cost of a substitute teacher. J-6, in evidence. This request, unlike her first request, conformed with the Board's adopted policy on extended sick leave benefits, which provided that a teacher who had used up her accumulated days could apply to the Board for payment of her salary minus the cost of a substitute. J-13, in evidence. On April 13, the Board informed Ms. Liebeskind that it had decided to deny this request. J-9, in evidence.

Although the Board did not specify any reasons for its decision in its letter to Ms. Liebeskind, the Board minutes state that in considering this request, the Board based its decision on the following factors:

1. Decision regarding extended benefits is solely at the descretion [sic] of the Board of Education which addresses each request on an individual basis.

2. The Board of Education considered the request in terms of options available, and in light of all factors known or provided through legal council [sic].

3. The general picture of staff attendance and the record of accumulated sick leave, with the potential for future absences and use of accumulated sick leave, in many cases, was a factor considered.

4. The Board of Education also considered the economic impact of granting full pay (first letter of request) or the difference between substitute's pay (second letter of request) for the days requested, in light of all information available.

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5. Payment of two (2) days full pay, as granted to complete the January pay period, was determined by the Board of Education to be the extent of benefits granted to Ms. Liebeskind at this time.

J-8, in evidence.

Following the Board's rejection of her second request, Ms. Liebeskind filed a Petition of Appeal to the Commissioner, asserting that the Board had acted arbitrarily by failing to consider her request for extended sick leave benefits on an individual basis and by failing to furnish reasons for denying her application for such benefits. On October 4, 1984, a partial summary decision was entered in her favor and an order issued, directing the Board to furnish reasons for its denial of her request for extended sick leave benefits. The Board did not comply, continuing to maintain that reasons are not required to justify a discretionary decision and that supplying reasons would stifle individual consideration of future requests.

On November 1, 1984, the matter proceeded to plenary hearing to resolve the remaining issues. In his Initial Decision, the Administrative Law Judge (ALJ) found that the record failed to support the Board's assertion that it had considered the individual circumstances of Ms. Liebeskind's request for extended sick leave benefits. He decried the Board's continued refusal to furnish reasons for its decision even after it was ordered to do so, and concluded that the record revealed no legitimate reasons for the Board's decision. He therefore found that the Board's decision was arbitrary and constituted an abuse of discretion. Further, because the Board's conduct throughout the proceedings suggested that a remand would be futile in this case, the A.L.J. declined to remand the matter for further consideration and instead ordered the Board to award Petitioner-Appellant extended sick leave benefits for sixteen days in accordance with N.J.S.A. 18A:30-6 and the Board's policy.

The Commissioner of Education disagreed. Finding that the sole reason urged in support of Petitioner-Appellant's second request for extended sick leave benefits was the favorable action taken on requests by other employees, the Commissioner concluded that Ms. Liebeskind had not demonstrated a valid individual need justifying approval in her case. He further admonished that Board approval of her request as submitted would have been improper because a favorable decision would have been tantamount to blanket approval of requests for sick leave. The Commissioner found that Petitioner-Appellant had not met her burden under the statute authorizing discretionary sick leave benefits and that the Board, therefore, had no obligation to justify its denial of her request. After careful review of the record in this case, we conclude that the Commissioner's selective reading of the record led him to inaccurately conclude that Petitioner-Appellant's request for extended sick leave benefits was not sufficient to enable the Board

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to fulfill its statutory obligation to consider whether to grant benefits in her individual case.

Pursuant to N.J.S.A. 18A:30-2, employees of public school districts must be accorded a minimum of ten paid days leave of absence for illness every school year. Any days not used in the year in which they accrue may be accumulated for use in subsequent years. N.J.S.A. 18A:30-3. When an employee's prolonged absence exceeds the annual and accumulated sick leave period so that his or her benefits have been exhausted, local boards 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...

N.J.S.A. 18A:30-6.

We emphasize that N.J.S.A. 18A:30-6 prescribes no specific legislative standards to govern the exercise of the discretion granted by the statute to local boards to resolve whether to pay teachers beyond their annual and accumulated sick leave. Matawan Regional Teachers Association et al. v. Bd. of Ed. of the Matawan-Aberdeen Regional School District, 202 N.J. Super. 142 (App. Div. 1985). Nor does the statute prescribe standards for the adequacy of requests made pursuant to it. However, we find that this is not a case in which the adequacy of the request is questionable.

The record shows that Petitioner-Appellant outlined the reasons that she felt warranted relief when she first requested extended sick leave benefits: that complications following major surgery for an intestinal blockage had resulted in a two month hospitalization and that her extended illness had caused a financial burden. J-1, in evidence. Ms. Liebeskind reiterated these reasons in her second request, incorporating them by reference, while also noting that the Board had on past occasions approved such requests. J-6, in evidence. We find that the Commissioner, by focusing exclusively on Ms. Liebeskind's reference to the Board's favorable responses to other requests, ignored the reality that in making her requests, she had provided the Board with sufficient information to enable it to consider whether to grant extended benefits in her case. Having concluded that Ms. Liebeskind's request was sufficient to require the Board to consider it, we now must determine whether, in denying her request, the Board fulfilled its statutory obligation to determine whether to grant benefits in her "individual case."

As stated, N.J.S.A. 18A:30-6 prescribes no specific legislative standards to govern the exercise of discretion by boards in resolving whether to grant extended sick leave benefits. Matawan Reg. Teachers Ass'n, supra, at 145. Even so, it is well settled that a contractual provision that would automatically extend such

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benefits would exceed the statutory authority of a board. Piscataway Twp. Bd. of Ed. v. Piscataway Main., 152 N.J. Super. 235, 246 (App.Div. 1977). Thus, that the Board in this case, in the past, had granted all requests made for extended benefits, see J-19, in evidence, does not, as recognized by the Commissioner, provide a proper basis for awarding benefits.

Although the Commissioner has held that a board may adopt policy guidelines for determining eligibility for extended benefits applicable to all persons in substantially similar circumstances so long as specific limitations are communicated to employees in advance, Molina v. Bd. of Ed. of the City of East Orange, decided by the Commissioner, May 3, 1983,[1] we emphasize that the Board's denial of benefits in this case was not based on criteria set forth in such policy guidelines.[2] In the case before us, therefore, we must determine only whether the Board violated its statutory mandate to determine whether to grant benefits in each individual case when it denied Ms. Liebeskind's request. Matawan Reg. Teachers Ass'n, supra, at 148.

Matawan Reg. Teachers Ass'n involved five individuals whose applications for extended benefits had been denied by the local board. Like the Board in this case, the local board did not have policy guidelines specifying the criteria under which such applications would be considered. In assessing requests, however, that board considered an applicant's length of service, the imminence of retirement, the details of the individual application, the nature of the sickness or injury and the number of extra days requested.

All five of the individuals involved in the case had suffered from legitimate medical conditions. Nonetheless, the court found that, in the cases of four of the individuals, the Board's denials were "reasonably based on the record before it," and that the denials were neither arbitrary nor in violation of the Molina standard of uniformity under substantially similar circumstances. 202 N.J. Super. at 148. In so finding, the court cited the facts that all four were relatively junior in service, that none of them were on the verge of retirement and that three had applied for

[1]Although the courts have not addressed the question of whether such policies may be applied without consideration of the circumstances of each individual case, we note that the court in Matawan Regional Teachers Ass'n made specific mention of the fact that the policy approved by the Commissioner in Molina, which limited extended benefits to once in the course of service, made an exception for applications in "special cases." 202 N.J. Super. at 145-46.

[2]As set forth above, although the Board does have a policy permitting a teacher to apply for extended benefits, this policy does not specify any criteria upon which the Board will make its determinations as to whether to grant benefits. See J-13, in evidence.

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benefits in the same month. The request of the fifth individual, a 30-year employee with a serious heart condition, was remanded to the board so that it could review it in light of its previous decision to grant benefits in a particular case that was substantially similar.

Although the court did not specifically address the question of whether a statement of reasons is required when a board exercises its discretion under N.J.S.A. 18A:30-6, we note that it had been established in the record below that, as in the instant case, none of the individuals in Matawan had been given an explanation for the Board's denial of extended benefits. See Matawan Reg. Teachers Ass'n v. Bd. of Ed. of the Matawan-Aberdeen Regional School District, decided by the Commissioner, December 1, 1983. We therefore conclude that, in the case before us, the Board's failure to provide Petitioner-Appellant with the precise reasons for its denial does not necessarily mean that its denial constituted an abuse of the discretion granted it by N.J.S.A. 18A:30-6. Rather, we would uphold the propriety of the Board's decision if it is reasonably supported by the record the Board had before it and if it is not shown that the Board's decision violated the standard of uniformity under substantially similar circumstances. Matawan Reg. Teachers Ass'n v. Bd. of Ed. of the Matawan-Aberdeen Regional School District, 202 N.J. Super. 142, 148 (App. Div. 1985).[1]

We further conclude that, although the decision in Matawan does not set forth the specific factors that a board must consider in exercising its discretion under N.J.S.A. 18A:30-6, it does indicate the kinds of factors that, if considered, would mandate us to uphold a board's determination so long as it was reasonably supported by the record and not in violation of the standard of uniformity under substantially similar circumstances. We emphasize

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[1]In her appeal to us, Appellant apparently assumed that, as determined by the ALJ, the Board was required by law to provide her with a statement of reasons. See Appellant's Brief, at 11. Thus, Appellant did not brief this issue when she appealed the Commissioner's decision. We, however, note that there is no statutory requirement for a statement of reasons under N.J.S.A. 18A:30-6. Furthermore, as indicated above, the courts have not imposed such a requirement, and we decline to do so in the absence of either statutory or judicial direction.

Moreover, although the courts have required that agencies provide a statement of reasons to individuals affected by their decisions in some instances where the applicable statutes did not require it, we emphasize that they have done so only where a statement of reasons for the agency's action would assist the individual in improving himself. See Donaldson v. Board of Education of North Wildwood, 65 N.J. 236 (1974); Monk v. N.J. State Parole Board, 58 N.J. 238 (1971). We note that this consideration is not present when a local board denies a request for extended benefits under N.J.S.A. 18A:30-6.

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that the factors specifically approved by the court in Matawan required consideration of the particular circumstances of the case of each individual requesting benefits. Thus, although the court did not preclude boards from considering generalized factors, such as the financial circumstances of the district, we find that in exercising its discretion in "each individual case," a board must consider the individual circumstances of each applicant in the context of any generalized criteria that it applies.

In this case, the record indicates that in denying Petitioner-Appellant's second request, the Board considered the information provided in both of her requests. J-8, in evidence. The record shows that the Board considered the circumstances set forth in those requests, J-5, in evidence; J-8, in evidence; Tr. 11/1/84, at 63, which included the nature of her illness and the resulting financial burden on her. J-1, in evidence. In addition, the Board considered her years of service, J-5, in evidence, Tr. 11/1/84, at 63, the options available in her case, J-2, in evidence; J-4, in evidence; J-8, in evidence, the economic impact of granting her specific requests, and the fact that she had been granted two days' full salary during her absence.[4] J-8, in evidence. Thus, although the Board considered the generalized factors of overall staff attendance and use of accumulated sick leave, and the potential for future absences and use of sick leave, J-8, in evidence, it did not make its determination based solely on consideration of those generalized factors. We, therefore, conclude that the Board's determination to deny benefits in this case constituted a proper exercise of its discretion so long as its conclusion is reasonably supported by the record it had before it when it made its decision.

After reviewing the record, we find that the Board's determination to deny extended benefits to Ms. Liebeskind was reasonably based on the record before it. Although Ms. Liebeskind's illness was serious and she had been employed by the Board for eighteen years, the record does not indicate any compelling circumstances in her case. In the absence of such compelling circumstances, we conclude that it was within the Board's discretion to conclude that its legitimate educational concerns about staff attendance and the use of accumulated sick leave outweighed the justification given it by Petitioner-Appellant for granting benefits in this case. Since it has not been demonstrated that the Board's decision was in violation of the standard for uniformity under

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[4]We note that this payment, as well as a payment of full salary for a third day, was initially the result of a clerical error. See Initial Decision, at 4. However, we further note that the Board could have required that she repay the amount and had done so in other cases. See J-14, in evidence.

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substantially similar circumstances, see Matawan Reg. Teachers Ass'n, supra, for the reasons stated, we conclude that the Board, in denying extended sick leave benefits to Ms. Liebeskind, properly exercised the discretion granted it by N.J.S.A. 18A:30-6.

Attorney exceptions are noted.
May 7, 1986

Affirmed N.J. Superior Court May 22, 1987

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DOROTHY LYDON,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSBOROUGH, SOMERSET COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, September 19, 1985

For the Petitioner-Appellant, Ruhlman, Butrym and Friedman
(Richard A. Friedman, Esq., of Counsel)

For the Respondent-Respondent, Aron, Salsberg and Rosen
(Louis C. Rosen, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed substantially for the reasons expressed therein. The State Board agrees that N.J.S.A. 18A:27-12, and particularly the June 1 date specified as the deadline for non-tenured employees to accept employment, applies to both N.J.S.A. 18A:27-10 and N.J.S.A. 18A:27-11 and is an absolute, not a directive, deadline. Therefore, Petitioner-Appellant's teaching contract had to be signed and delivered to the Board of Education by June 1. She had been notified by the Superintendent that signed contracts had to be returned by April 25, but she delayed signing her contract in the hope of demonstrating her right to a higher salary. When she delayed past June 1, the Board could properly and reasonably take steps to fill her position.

The State Board does not concur, however, in the reason given by the Commissioner for the dismissal with prejudice of Petitioner-Appellant's unlawful discrimination claim. The E.E.O.C. and the Commissioner have concurrent jurisdiction in these areas. Thus, the ALJ reached the proper conclusion in dismissing this unlawful discrimination claim for failure to present proofs on the assigned hearing date, in accordance with the OAL rules intended to promote orderly management of cases. It is on this basis, therefore, that the State Board affirms the decision below.

James Jones and Robert Marik opposed.

February 5, 1986

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IN THE MATTER OF THE TENURE :

HEARING OF TERENCE D. MC GUIRE, : STATE BOARD OF EDUCATION

SCHOOL DISTRICT OF THE BOROUGH : DECISION

OF HADDONFIELD, CAMDEN COUNTY. :

:

Decided by the Commissioner of Education, October 21, 1985

For the Petitioner-Respondent, Capehart and Scatchard
(Alan R. Schmoll, Esq., of Counsel)

For the Respondent-Appellant, Katzenbach, Gildea and
Rudner (Ezra D. Rosenberg, Esq., of Counsel)

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

February 5, 1986

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THOMAS S. MARSHALL,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, April 8, 1985

For the Petitioner-Respondent, New Jersey Principals and Supervisors Association (Wayne J. Oppito, Esq., of Counsel)

For the Respondent-Appellant, Laird and Wilson (Andrew J. Wilson, Esq., of Counsel)

In April, 1984, the Board of Education of the Township of Neptune abolished one of three Assistant Principal positions at Neptune Senior High School because of budgetary constraints and declining enrollment. One of the three individuals then employed in that position had served as Assistant Principal since 1971, and was unquestionably the most senior. The other two, Thomas Marshall and Daniel Edelson both had begun their service on September 1, 1973.

In order to determine which of these two was entitled to the remaining position, the Board applied its Regulation No. 4001, which provides that when two or more teaching staff members have equal seniority in a category, the first criteria for making a choice between them is total years of experience in Neptune. Mr. Marshall had served a total of 25 years in the District, including his employment as a high school assistant principal, and Mr. Edelson had served a total of 24 years. However, Mr. Edelson had two years of military service prior to his employment in the District. In calculating service in the District, the Board included Mr. Edelson's military service pursuant to N.J.A.C. 6:3-1.10,[1] which gave him a total of 26 years' seniority in the

[1] N.J.A.C. 6:3-1.10 provides that

> In computing length of service for seniority purposes full recognition shall be given to previous years of service within the district and the time of service in or with the military or naval forces of the United States or this State, pursuant to the provisions of N.J.S.A. 18A:28-12. [emphasis added]

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District. The Board therefore assigned Mr. Edelson to the remaining position of assistant principal.

Mr. Marshall challenged the Board's determination by petitioning the Commissioner, alleging that the Board had failed to recognize his superior seniority in the district by assigning Mr. Edelson to the position and, further, that the determination was in violation of N.J.A.C. 6:4-1.1 et seq. and the Board's Affirmative Action Plan. In his Initial Decision, the Administrative Law Judge (ALJ) concluded that Board's seniority calculations were proper and that it had acted in accordance with the law in crediting Mr. Edelson with 26 years' seniority in the District. Initial Decision, at 16. He reasoned that although the Board's policy made no provision for recognition of prior military service, N.J.A.C. 6:3-1.10(c), as construed by the case law then applicable, required such time to be credited in computing length of service for seniority purposes. Initial Decision, at 16-17. The ALJ further concluded that it was of no moment that the Commissioner's decision in Corrado, which was rendered subsequent to the Board's determination, explicitly overruled this requirement, holding instead that credit for military service is to be awarded only where an individual had achieved tenure prior to his military service.[2] Id. at 17. Finally, the ALJ found that Mr. Marshall had not shown that the Board's action was motivated by race, color, creed, religion, sex or national origin in violation of N.J.A.C. 6:4-1.1 et seq., nor that it had acted contrary to its Affirmative Action Plan.

The Commissioner did not adopt the ALJ's determinations. Instead, he applied his decision in Corrado, reasoning that, although the Board had acted prior to the date of that decision, the reduction in force did not take effect until after Corrado had been decided. Commissioner's Decision, at 22. The Board therefore had a "responsibility to reconsider its action when Corrado was rendered",

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[2]On appeal, the State Board modified the decision and held that the acquisition of tenure was not required in order for an individual to be entitled to credit for military service. Rather, an individual was entitled to such credit if he had been employed as a teacher before entering the service. Corrado v. Bd. of Ed. of the Borough of Newfield, decided by the Commissioner, May 24, 1984, aff'd with modification by the State Board, April 3, 1985.

On June 29, 1985, A-3683, amending N.J.S.A. 18A:28-12, became effective. On December 4, 1985, the State Board determined that the statute was prospective, applying only to seniority determinations made after the effective date of the amendment. Corrado v. Bd. of Ed. of the Borough of Newfield, decided by the State Board, December 4, 1985. Therefore, the amendment does not apply to this case. However, we note that pursuant to the statute as amended, all teachers now are entitled to up to four years military service credit for seniority purposes regardless of whether or not they taught before entering the service.

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id. at 22, based on "common sense and the principles of fair play and equity." Id. Because the Commissioner's decision in Corrado required that an individual must have achieved tenure prior to entering the military in order to have his time spent in the service applied to his seniority, the Commissioner found that inclusion of Mr. Edelson's military service in computing his seniority was erroneous. Accordingly, he concluded that Mr. Edelson had accrued only 24 years of seniority in the District, in contrast to Mr. Marshall's 25 years. Id. at 23. He therefore ordered that Mr. Marshall be reinstated to the position of Assistant Principal. Because he had resolved the matter by establishing Mr. Marshall's entitlement based on his tenure and seniority rights, the Commissioner found it unnecessary to determine whether N.J.A.C. 6:4-1.1 or the Board's Affirmative Action Plan had been violated. Id. at 23.

The issue before us in this appeal is whether the Commissioner's decision in Corrado applies so as to require a board to set aside its seniority determination where a reduction in force has occurred and the seniority of the parties determined prior to that decision, but the reduction has not yet been effectuated. After careful consideration, the State Board concludes that it does not, and we therefore reverse the decision of the Commissioner in this case.

We emphasize that the reduction in force in this case occurred in April, 1984. Upon that reduction, the seniority rights of the affected teachers were triggered. In Edison Township Education Ass'n v. Bd. of Ed. of the Township of Edison, we affirmed the Commissioner's determination that where a reduction in force occurred in April, 1983, to be effectuated in September, 1983, seniority determinations were to be made under the regulations then in effect rather than the new regulations that applied to seniority determinations made after September 1, 1983. Edison Township Ed. Ass'n v. Bd. of Ed. of the Township of Edison, decided by the Commissioner, June 18, 1984, aff'd by the State Board, December 7, 1984. As stated by the Commissioner, "... seniority is only triggered by a reduction in force which the Board accomplished at its meeting in April 1983. To claim that seniority determinations may be set aside to some later date ... simply has no authority in law." Commissioner's Decision, at 12.

We agree with the conclusion reached by the Commissioner in Edison. Once a board has properly acted to abolish a position, the reduction in force has been accomplished and seniority rights are triggered. Seniority determinations then properly must be made in accord with the regulations in effect at that time. Those determinations may not be set aside at some later date.

Edison, however, involved the application of regulations that were prospective in nature. The case before us raises the

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issue of whether decisional law should be applied retroactively so as to require a board to revisit its seniority determinations.[3]

Generally, the overruling of a judicial decision is retrospective in nature. e.g., Rutherford Ed. Ass'n. v. Bd. of Ed. of Rutherford, 99 N.J. 8 (1985); Darrow v. Hanover Twp., 58 N.J. 410 (1971). However, because "the basis for the doctrine of retrospective application is pragmatic rather than theoretical", Rutherford, supra at 21, the presumption in favor of retroactivity may be overcome when there is "a clear demonstration in a particular case that there are sound policy reasons for according a judicial decision prospective application only." Id., citing Cogliati v. Ecco High Frequency Corp., 181 N.J. Super. 579, 583 (App. Div. 1981), aff'd, 92 N.J. 402 (1983). Such reasons may be present when a new rule of law has been announced. See, e.g., Rutherford, supra at 21. Accordingly, when delineating to what extent retroactive application should be given where there is a clean break in the law, the following factors must be considered: 1) the purpose of the new rule and whether it would be advanced by retroactive application; 2) the reliance placed on the old rule by the parties and the community; and 3) the effect that retroactive application would have on the administration of justice. Id. at 22.

In Corrado, the Commissioner held that credit for military service could no longer be granted under N.J.A.C. 6:3-1.10(c) unless the employee had acquired tenure before entering the military.[4] Prior to that decision, the law was clear that credit for military service was to be given whether or not an individual had acquired tenure before entering the service. See Howley v. Bd. of Ed. of the Township of Ewing, 6 N.J.A.R. 509 (1982); Lang v. Bd. of Ed. of Princeton Regional School District, 1979 S.L.D. 245. Because the Corrado decision significantly and unambiguously changed the conditions under which military service would be credited for seniority purposes and because such seniority determinations greatly affect the assignment of teachers, thereby impacting the administration of the public schools of this state, we conclude that the Commissioner's decision in Corrado marked a clear and significant change in the law, one that requires us to weigh the factors set forth above in order to determine to what extent if any the decision should be applied retroactively in this case.

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[3]Petitioner-Respondent argues that because his petition was filed after the decision in Corrado was rendered, he is seeking prospective application rather than retroactive. Brief on Behalf of Petitioner-Respondent, at 6. We note that whether retroactivity is involved does not turn on when the petition was filed, but rather on when the cause of action accrued. See Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982). Because Petitioner-Respondent's cause of action accrued in April when the reduction occurred and the Board made its determination, we conclude that he is seeking retroactive application of Corrado.

[4]As previously stated, see supra note 2, the State Board in Corrado modified the decision, holding that under N.J.S.A.

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The rule announced in the Commissioner's decision in Corrado, as modified by the State Board, was intended to insure that military service credited for seniority purposes would be credited in accordance with N.J.S.A. 18A:28-12.[5] By its clear statement of the rule, Corrado attempted to insure that both the seniority rights of teachers entitled to credit for military service and those of other teachers affected by reductions in force would be properly protected. Since seniority rights have meaning only in the context of a reduction in force, and may not be invoked to correct previous errors in the calculation of seniority when no reduction has occurred, see Howley, supra; Lang, supra, we conclude that the purpose of the rule in Corrado would not be furthered by applying it retroactively.

Further, to apply Corrado retroactively would call into question all seniority determinations involving military service credit that were necessitated by reductions in force occurring before the Commissioner's decision in Corrado where the reduction was not effectuated until after the decision. This would be inconsistent with our prior decisions holding that seniority rights are governed by the law in effect when the reduction in force occurs and seniority rights triggered. See, e.g., Edison, supra. Additionally, because seniority determinations affect not only the teacher asserting his right to a position, but other teachers in the system as well, retroactive application would engender challenges by teachers displaced as a result of a board's failure to apply the Corrado decision to determinations made prior to the decision. Moreover, retroactive application would result in one rule governing reductions occurring prior to the Corrado decision but effectuated after and another for reductions occurring at the same time and effectuated before the decision. We do not believe that "fundamental fairness" is served by introducing such inconsistency and uncertainty into the administration of the seniority system and by bringing such "confusion into the administration of statutes and the execution of the law", see Spiewak, supra at 82, especially where, as here, the employee seeking to benefit from the new rule was a "noncombatant bystander" to the proceedings that resulted in the rule. See Rutherford, supra at 28-9.

We emphasize that there is no doubt that the Board in this case acted properly and in good faith in relying on the prior law when it made its seniority determination and the resulting assignments for the coming year. We find that it would be unfair to a board such as this who "acted in reliance on the rules established in prior case law", Spiewak, supra at 82, if it was to be forced to rescind its determination, thereby awarding the positions affected to different individuals, and to absorb the adverse financial

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[4] 18A:28-12, the acquisition of tenure prior to military service is not required in order to be entitled to credit toward seniority.

[5] See supra note 2.

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consequences of its failure to revisit its determination after Corrado was rendered.[6]

In sum, after balancing the interests of all parties who would be affected by retroactive application of Corrado, we conclude that the interests of those teachers who have not served in the military, and who therefore would benefit from the rule in Corrado, are outweighed by the interest in avoiding administrative confusion and by the interests of the boards who relied on the rules established by previous case law and those of teachers who were assigned to positions as a result of seniority determinations made in reliance on the law as it was before the Corrado decision.[7] We therefore decline to grant retroactive application to the Corrado decision to reductions in force occurring before that decision even where such reductions were not effectuated until after Corrado was rendered. Finally, based on our review of the record, we find that the Administrative Law Judge properly found that Mr. Marshall failed to show that the Board's action in this case was in violation of N.J.A.C. 6:4-1.1 et seq., and that he failed to show that the Board acted contrary to its Affirmative Action Plan.

For the reasons stated, we reverse the decision of the Commissioner and adopt that portion of the Administrative Law Judge's decision that found that the Board had violated neither N.J.A.C. 6:4-1.1 et seq. nor its Affirmative Action Plan.

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[6]Although the extent of the financial impact on the Board is not revealed by the record, we note that, pursuant to the Commissioner's decision, the Board must pay Mr. Marshall any differential in salary and emoluments "to which he is entitled as a result of his improper reassignment...." Commissioner's Decision, at 23.

[7]As previously noted, the Legislature has recognized the interest of teachers who have served in the military in being compensated for the fact that their teaching careers were interrupted or delayed by their military service by amending N.J.S.A. 18A:28-12. See supra see id., we note that denying retroactive application of the Corrado decision will produce in this case a result consistent with the will of the legislature as expressed in the new rule.

Deborah P. Wolfe opposed.
Attorney exceptions are noted.

January 8, 1986

Affirmed N.J. Superior Court March 10, 1987

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IN THE MATTER OF THE TENURE	:	
HEARING OF JUDE MARTIN, SCHOOL	:	STATE BOARD OF EDUCATION
DISTRICT OF THE TOWNSHIP OF UNION	:	DECISION
BEACH, MONMOUTH COUNTY.	:	
	:	

Remanded by the Commissioner of Education, December 20, 1985

Decision on Motion by the Commissioner of Education, June 11, 1986

For the Respondent-Appellant, Chamlin, Schottland, Rosen, Cavanaugh and Uliano (Thomas W. Cavanaugh, Esq., of Counsel)

For the Petitioner-Respondent, Yacker and Granata (Louis E. Granata, Esq., of Counsel)

The State Board affirms the decision of the Commissioner of Education for the reasons expressed therein. In light of our decision in this matter, we deny Appellant's motion for a stay of the Commissioner's decision.

August 6, 1986

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JUDITH ELSIE MEYER,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner, October 7, 1983

Decided by the Commissioner, December 20, 1984

Decision on Motion by the State Board, March 6, 1983

For the Petitioner-Appellant, Robert M. Schwartz, Esq.

For the Respondent-Respondent, Fogarty and Hara (Stephen R. Fogarty, Esq., of Counsel)

This appeal involves two cases that were consolidated by the State Board on March 6, 1985. Although the substantive claims are different, both cases arose from a single occurrence -- a reduction in force pursuant to N.J.S.A. 18A:28-9, which resulted in the abolishment of Petitioner-Appellant Judith Elsie Meyer's position as elementary school principal.

The basic facts underlying these cases are not in dispute. Judith Elsie Meyer is a tenured elementary principal who served the Respondent Wayne Township Board continuously in that capacity from October 1968, until June 30, 1980. During the 1979-80 term, she was advised by the Board that an elementary principalship was to be abolished effective July 1, 1980, and that, since she had the least amount of seniority in that category, she would not be reemployed for the 1980-81 school year. She, however, was assured that she would be placed on a preferred eligibility list.

Ms. Meyer was not employed by the Board during the 1980-81 school year. However, on June 29, 1981, she was informed that the Board had appointed her to serve as an acting elementary principal for 1981-82. While serving in that capacity, she received a salary of $23,500, approximately $7,000 less than she received when she served as a principal. Her service as acting elementary principal ended on June 30, 1982. She is not presently employed in the District, but does remain on a preferred eligibility list in the category of elementary school principal.

On September 8, 1982, Ms. Meyer filed a Petition with the Commissioner alleging that the Board had violated her tenure and seniority rights by continuing to employ a principal in a middle school, Mr. Megnin, whose certification was as a secondary principal

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and whose seniority was less than her own. She also claimed back pay for the difference between her salary as acting principal and her salary as principal in 1979-80. Finally, she sought a judgment that her service as acting principal in 1981-82 be added to her seniority.

On March 14, 1983, Petitioner-Appellant moved to amend her Petition to allege that the Board inaccurately and illegally calculated the seniority of two other elementary principals in the District, Mr. Romeo and Mr. Tilli, whom the Board continued to employ, to include military service credit that had already been credited in prior positions or in other districts. The Administrative Law Judge (ALJ) denied this motion on May 18, 1983, pursuant to his discretionary powers under N.J.A.C. 1:1-6.3. On June 6 1983, the Commissioner declined to grant interlocutory review. Petitioner-Appellant did not seek State Board review of this action, but instead waited until the Commissioner had rendered his decision and raised the issue in her appeal to the State Board.[1]

On November 9, 1983, Petitioner-Appellant filed a new Petition with the Commissioner, alleging that, at the time her position was abolished in 1980, two other elementary principals, Mr. Romeo and Mr. Tilli, had been retained because they were improperly credited with military service credit that had been given them either in positions previously held or in districts in which previously employed. Petition, #2. Petitioner-Appellant claimed that the Board was therefore in error when it made her the subject of the reduction in force on July 1, 1980, and that it remained in error by maintaining her on the preferred eligibility list. Id. at #4.

In the first case involving Ms. Meyer (Meyer I), the ALJ found that, despite the fact that her Petition was filed more than 90 days after her position was abolished, Petitioner-Appellant's claim to the middle school principalship held by Mr. Megnin derived from rights given her by statute, the "presumptive violation of which is continuing in nature." Initial Decision, at 6. He therefore concluded that there was no reason why she could not "vindicate those rights whenever she chooses." Id. at 6-7. However, citing Lavin v. Hackensack Board of Education, 90 N.J. 145 (1982), he determined that, if she prevailed on the merits, she was entitled to prospective relief only. Id. at 7.

The ALJ then considered the substantive question of whether Mr. Megnin's seniority as an elementary principal had been improperly computed because his certification was as a secondary principal. He reasoned that because N.J.S.A. 6:11-3.24 provides that when a school reorganization results in inclusion of elementary

[1]We note that in informing Petitioner-Appellant's attorney that the Commissioner declined to review the motion, the Division of Controversies and Disputes advised him that "denial of review in this matter does not preclude petitioner from raising this issue again before the Commissioner should the initial decision be adverse." Letter of Seymour Weiss, dated June 6, 1983.

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grades in combination with higher grades, a secondary certificate issued under the rules in effect before 1969 will be recognized as valid for the reorganized school, which was the situation with which he was presented. He therefore concluded that Mr. Megnin was authorized to serve in the position he held and that such service accrued to seniority as an elementary principal. He further concluded that the Commissioner's previous decision in Liggett v. Board of Education of the Township of Wayne, decided by the Commissioner, March 31, 1983, barred Ms. Meyer's challenge to Mr. Megnin's seniority since that decision specifically held that Mr. Megnin was eligible to serve in the position he held and, accordingly, was eligible to accrue seniority as an elementary principal. After comparing Mr. Megnin's seniority as an elementary principal to Ms. Meyer's, he found that Mr. Megnin's seniority was superior and dismissed the claim. Id. at 9. As to her claim for salary differential for 1981-82, the ALJ found that claim was time barred. Id. at 10-11. Finally, he determined that because N.J.S.A. 18A:16-1.1, which precludes the acquisition of tenure by one acting in the place of another, is silent on the accrual of seniority and because Petitioner-Appellant functioned as a principal in all respects except salary when she served as acting principal, she was entitled to seniority credit for that period. Id. at 11.

The Commissioner affirmed the ALJ's findings and conclusions and ordered recalculation of Ms. Meyer's seniority entitlement to reflect her one year's service as acting principal. Commissioner's Decision, at 16. Ms. Meyer appealed to the State Board, reasserting all of her original substantive claims and, as previously stated, also appealing the ALJ's interlocutory order denying her motion to amend her petition and the Commissioner's failure to take action to reverse the ALJ's determination.

As set forth above, in addition to appealing to the State Board, Ms. Meyer also filed a new Petition with Commissioner reasserting the seniority claim set forth in her motion to amend the Petition in Meyer I. (Meyer II). The ALJ found that Ms. Meyer's claims in this case were barred by the 90 day limitation of N.J.A.C. 6:24-1.2, as well as by laches. Accordingly, the Petition was dismissed. The Commissioner, rejected the ALJ's finding that the Petition was time barred under N.J.A.C. 6:24-1.2. He reasoned that the regulation was inapplicable because seniority protection following a reduction in force is a statutory entitlement the denial of which in future years constitutes a continuing violation. The Commissioner, citing Lavin, supra, held that although Petitioner-Appellant was barred from retroactive relief, she was entitled to seniority calculated prospectively from the date of the filing of the Petition. However, despite his conclusion that military service had been improperly credited to the two other elementary principals, and that, therefore, Ms. Meyer was the most senior principal as of June 30, 1980, when the reduction in force occurred, he found that Ms. Meyer was not now the most senior since both of the other principals had accrued additional seniority by virtue of the fact that they had continued to be employed by the Board as elementary principals from 1980 until December 1984, when

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the Commissioner rendered his decision. The Commissioner therefore dismissed the Petition. Ms. Meyer appealed this decision, arguing that laches did not bar her from relief because she had diligently pursued her claim as evidenced by her motion to amend her Petition in Meyer I, and that she was entitled to relief from the date of the filing of her motion to amend. As previously stated, the State Board consolidated this appeal with that in Meyer I on March 3, 1985.

Although review of the procedural history and substantive determinations in this case presents a seemingly complex and confusing picture, the threshold issues are straightforward: Does the 90 day limitation of N.J.A.C. 6:24-1.2 apply to challenges to a local board's seniority determinations and, assuming it does, when does the cause of action accrue where the petitioner challenges the board's crediting of seniority to other teaching staff members? The Commissioner, in both Meyer I and Meyer II viewed seniority rights as a statutory entitlement within the meaning of North Plainfield Education Association v. Board of Education of the Borough of Plainfield, 96 N.J. 587 (1984). Under this view, the 90 day rule set forth in N.J.A.C. 6:24-1.2 is inapplicable and the only limitation on petitioners asserting violations of their seniority rights is the doctrine of laches as articulated in Lavin v. Hackensack Board of Education. 90 N.J. 145 (1982). As the decision of the State Board in Gordon v. Board of Education of the Township of Passaic, decided by the State Board, March 8, 1985, indicates, we do not accept this view.

In Gordon, the State Board held that petitioners asserting violations of tenure and seniority rights were not excused from compliance with N.J.A.C. 6:24-1.2. The State Board reasoned that tenure and seniority rights, unlike the right to military service credit, are predicated on rendering services as a teacher. Thus, although derived from statute, tenure and seniority rights are not absolute entitlements and therefore are not the kinds of statutory rights that render the 90 day rule inapplicable under the New Jersey Supreme Court's decisions in Lavin and North Plainfield. Accordingly, we conclude that N.J.A.C. 6:24-1.2 governs any and all relief that may be afforded in this case.

N.J.A.C. 6:24-1.2 provides that petitions to the Commissioner to determine controversies arising under the school laws shall be filed within 90 days of notice of the school board's actual ruling. This time limit has been strictly construed to mean that the 90 day period runs from the time the initial cause of action accrued. See Watchung Hills Regional Education Association v. Watchung Hills Regional High School District, 1980 S.L.D. 356. Thus, even a teacher who proceeds to advisory arbitration is not relieved from compliance with the 90 day filing requirement. Bd. of Ed. of Bernards Twp. v. Bernards Twp. Ed. Ass'n, 79 N.J. 311 (1979).

However, a cause of action arises and the 90 day period begins only "after receipt of notice by petitioner" of the action concerning which the hearing is requested. N.J.A.C. 6:24-1.2. As we emphasized in Parisi v. Board of Education of the City of Asbury

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Park, decided by the State Board, October 24, 1984, the notice provided by the board of its action must be specific and definite so that a petitioner is informed both of the action taken by the board and the fact that he was affected by that action.

It is undisputed that, by June 1980, Appellant in this case had notice both that the reduction in force had occurred and that, because the Board had determined that she was the least senior person, it was her position that had been abolished. Thus, by that date, Appellant, as a tenured teaching staff member, knew or should have known that the Board's action had implicated her seniority rights. Weir v. Bd. of Ed., Northern Valley Reg. High School District, decided by the Commissioner, July 25, 1984, aff'd by the State Board, March 6, 1985. However, we emphasize that the challenge here is to the Board's crediting of seniority to other principals retained by the District and not to the Board's calculation of Appellant's seniority. Although it is not required that she have been in possession of all of the pertinent data relating to the staff members who were retained before her cause of action would be deemed to have accrued, we find that, where the challenge is to the propriety of the crediting of seniority to other staff members, in the absence of actual knowledge, the cause of action accrues only upon notice sufficient to alert the teaching staff member who has been adversely affected that the crediting of seniority to the staff members who were retained may have been improper. See Weir, supra, at 7.

Under this standard, we must now determine when Petitioner-Appellant's causes of action accrued. N.J.S.A. 18A:28-11 requires that "[i]n case of any...reduction the board of education shall determine the seniority of the persons affected according to ... standards [established by the Commissioner] and shall notify each such person as to his seniority status." In order to fulfill its statutory obligation, the Board in this case prepared seniority lists for the 1980-81 school year, which were distributed to all building principals during the 1979-80 school year. See Affidavit of Robert Agentero, Director of Personnel. Consequently, by the end of the school year, Appellant had available to her the seniority list reflecting the Board's determinations concerning the seniority of all staff members in her category. See Administrative Seniority Listing, Years of Service, Effective June 30, 1980. We find that this list constitutes sufficient notice of any cause of action challenging the crediting of seniority to others the basis for which is reasonably ascertainable from the list on its face. Thus, any cause of action resting on information set forth in the seniority list clearly enough to alert Appellant that her seniority rights may have been violated accrued at the time the list was available.

The seniority list in this case included for all individuals then serving as elementary school principals: 1) total years of service credited to that seniority category, 2) current position, 3) date of hire by the district, 4) military credit, 5) seniority in other areas, 6) other certificates, and 7) certification for current position. It, however, does not include the date

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an individual was hired for his current position. Nor does it specify how military service credit was calculated or credited.

After carefully examining the list, we find that it clearly and unambiguously shows that Mr. Megnin possessed only certification as a classroom teacher in specified areas and as a secondary school principal, and therefore that he was serving in his current position at Schuyler-Colfax school under his secondary principal's certification. Ms. Meyer's claim to the position held by Mr. Megnin was based on her assertion that he was improperly certified because he possessed only secondary certification. Since this information is apparent from the seniority list, we conclude that this cause of action arose by the end of the 1979-80 school year when the list was available. Thus, her petition filed on September 2, 1982, more than a year after her cause of action as to Mr. Megnin accrued, was not in compliance with the 90 day requirement of N.J.A.C. 6:24-1.2. Since the circumstances do not indicate that relaxation of this requirement under N.J.A.C. 6:24-1.19 is warranted, we find that this claim is time-barred.

We further find that although the seniority list is clear as to under which certification an individual is serving in his current position, it does not indicate how military service is credited. Specifically, the column labeled "military" lists only the number of years and because no date of hire for the present position held by an individual is included in the list, it is not easily ascertainable whether those years were actually applied to seniority in that category. Moreover, the list does not reveal whether or not an individual also was credited for military service in positions previously held or in districts in which previously employed, which is exactly the challenge Ms. Meyer made to the Board's determinations concerning Mr. Tilli and Mr. Romeo. Likewise, the list does not reveal on its face the Board's practice of crediting time spent in the military before tenure was achieved since it does not specify when military service occurred. Thus, we conclude that the list did not provide sufficient notice to enable a staff member to challenge the Board's crediting of military service to others. Since the record does not indicate that the list was accompanied by explanatory memo or that the crediting was pursuant to an officially adopted Board policy, of which Appellant would be deemed to have notice, we conclude that the list did not provide adequate notice concerning Ms. Meyer's claims as to Mr. Romeo and Mr. Tilli. Thus, her cause of action regarding the Board's crediting of military service accrued when she became aware that the Board had given credit for military service in multiple seniority categories and in districts in which an individual was previously employed. The record reveals that Ms. Meyer first became aware of these practices around March 1983, at which time she promptly moved to amend her original petition.[2] We therefore conclude that those claims are not time-barred.

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[2]The Board argues that correspondence from the New Jersey Association of Elementary and Middle School Administrators shows that Appellant was aware of the Board's practices at an earlier

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Nor do we find Ms. Meyer's claims concerning the Board's improper crediting of military service to be barred by laches. In Lavin v. Hackensack Bd. of Ed., supra, the court held that although the six year statute of limitations governing contractual claims did not bar claims asserting statutory rights unrelated to service as a teacher, the doctrine of laches barred retroactive relief where a claim for salary credit for military service was not made until nine years after employment had commenced. 90 N.J. 145 (1982). In that case, the delay resulted from the ignorance of both parties that such credit was mandated by statute. Id. at 153, In limiting relief, the Court acknowledged that were the parties' ignorance of the statute the only circumstance, it "would probably not invoke the doctrine." Id. However, the court found that because of the administrative and financial impact on boards of education that would result from granting retroactive monetary relief in cases involving such claims, equity warranted granting only prospective application of military service credit for salary purposes. Id. at 153-55.

In contrast to that involved in Lavin, the claims in this case are subject to the limitation specified in N.J.A.C. 6:24-1.2. Thus, boards of education are not faced with the potential, present in Lavin, of large number of claims of this nature. See id. at 154. We therefore find that the "bright line treatment" of claims such as the one involved here is not called for. See id. Rather, the question of whether Petitioner-Appellant's claim is barred by laches requires applying the doctrine in an individualized manner.

Laches is an equitable doctrine, under which relief may be barred if there is an inexcusable delay in asserting a right. Atlantic City v. Civil Service Commission, 3 N.J. Super. 57 (App. Div. 1949). If there is such delay, the court must weigh the length of delay, the reasons for delay and changing conditions of either or both parties during the delay. Pavlicka v. Pavlicka, 84 N.J. Super. 357 (App. Div. 1964).

We do not find that Ms. Meyer's claims as to the Board's improper crediting of military service presents an "inexcusable delay in asserting a right." As stated, we have concluded that her cause of action as to these claims arose when she became aware that the Board may have improperly credited Mr. Romeo and Mr. Tilli for their military service. At that time, she moved to amend the Petition in Meyer I, renewed her claim through her appeal to the State Board, and also filed a new Petition of Appeal. Although we recognize that the relief may impact on the individuals currently serving as elementary school principals, we find that such impact does not justify denying relief to a petitioner who has been denied

[7] date. Brief on Behalf of Respondent, at 10. We note that this letter, dated June 27, 1980, was attached to Respondent's letter memorandum in opposition to Petitioner's motion to amend her petition in Meyer I, but was never entered as part of the record in this case.

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a position because of a board's failure to properly credit seniority of its staff members where the petitioner has diligently pursued her claims. However, Ms. Meyer in her appeal to the State Board asks for reinstatement only from the date she moved to amend her petition or, alternatively, from the date she filed her Petition in Meyer II. We find that the interest in stability in the educational system is best served by limiting any relief due her to that which she requests in this appeal.

We must now consider the merits of Appellant's claims that the Board improperly awarded Mr. Romeo and Mr. Tilli military service credit. In addressing these claims, the Commissioner found that pursuant to his decision in Corrado v. Bd. of Ed. of the Borough of Newfield, decided by the Commissioner, May 24, 1984, which held that only those staff members who had achieved tenure prior to entering the service were entitled to military service credit for seniority purposes, the Board improperly credited both Mr. Romeo and Mr. Tilli for their service, which was rendered prior to acquiring tenure in the District.

Although the State Board affirmed the Commissioner's decision in Corrado with modification,[1] we held in Marshall v. Board of Education of the Township of Neptune, decided by the State Board, January 8, 1986, that the Corrado decision constituted a clear break in the law and was not to be afforded retroactive application. As we stated in that decision, the propriety of a Board's seniority determinations regarding the crediting of military service prior to employment by the Board is to be judged by the law in effect when the RIF occurred and the seniority determination was made. In this case, the RIF occurred in April 1980, and the law at that time was clear that an individual was entitled to full credit for military service even if such service had been rendered prior to the acquisition of tenure or prior to his employment as a teacher. See Lang v. Princeton Reg. Bd. of Ed., 1979 S.L.D. 245; Howley v. Bd. of Ed. of the Twp. of Ewing, 6 N.J.A.R. 509 (1982). We therefore conclude that it was proper for the Board to credit Mr. Romeo and Mr. Tilli for military service rendered prior to their acquisition of tenure in the District.

Likewise, we conclude that the Board properly credited Mr. Romeo for his 2 years of military service, which had been credited to him in a district in which he had been previously employed. We find no prohibition on granting such credit in N.J.S.A. 18A:28-12, which at that time provided that for seniority purposes, military service "shall be credited to [an individual] as though he had been regularly employed in such a position within the district during the time of such ... service." We emphasize that seniority rights have meaning only when a reduction in force occurs,

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[1]The State Board held that a teaching staff member was entitled to military service credit for seniority purposes if he had been employed as a teacher prior to entering the military. Corrado v. Bd. of Ed. of the Borough of Newfield, decided by the State Board, April 3, 1985.

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see Howley, supra, and find that the words of the statute clearly mandate that credit for military service be given by the district in which the individual is employed when such reduction occurs regardless of whether credit has been given in other employment, including employment as a teacher in another district. Accordingly, we find that as of June 30, 1980, Mr. Romeo had 12.5 years seniority in the category of elementary principal, in contrast to Ms. Meyer's 10.85. Administrative Seniority Listing, Years of Service, Effective June 30, 1980.

However, the record establishes Mr. Tilli's two years of military service had previously been credited to him by the District in the category of classroom teacher. Such credit, properly attaches only to the seniority category in which an individual first obtains tenure, in this case, classroom teacher. Howley, supra at 27. We find therefore that the Board improperly credited Mr. Tilli with two years military service in the category of elementary school principal and that, as of June 1980, he had 9.2 years seniority in contrast to Ms. Meyer's 10.85. Id. Thus, when the RIF occurred, Ms. Meyer had more seniority in the category of elementary school principal than Mr. Tilli.

In his decision, after calculating the relative seniority of the individuals involved as of June 30, 1980, at which time he found that Ms. Meyer was more senior than either Mr. Romeo or Mr. Tilli, the Commissioner determined the seniority entitlement to the position of elementary principal by calculating relative seniority as of December 1984, when he rendered his decision. We find no authority for the proposition that where a board's seniority determination is challenged and found to be improper, entitlement to the position in question is to be determined by seniority at the time the decision is rendered in the adjudicative proceedings. Rather, the case law indicates where a seniority determination is successfully challenged, entitlement to the position is to be determined by seniority at the time of the RIF. See, e.g., Lascari v. Bd. of Ed. of the Borough of Lodi, 36 N.J.Super. 426 (App. Div. 1955); Gincel v. Bd. of Ed. of the Twp. of Edison, 1980 S.L.D. 943, aff'd Docket #A-1813-80-T3 (App. Div. May 12, 1982). Moreover, the Commissioner's approach guarantees that the teacher who benefits from the Board's erroneous determination would always prevail since he would continue to accrue seniority while the person displaced would not. We therefore find that because Ms. Meyer was more senior than Mr. Tilli when the Board reduced its staff, she is entitled to reinstatement to the position of elementary principal held by Mr. Tilli. As previously discussed, although we conclude that she is entitled to reinstatement, we direct payment of any salary difference between the salary she would have received in the position and any mitigation, only from March 14, 1983, when she moved to amend her original Petition.

In summary, for the reasons set forth above, we reverse the decision of the Commissioner that Ms. Meyer's claims were not governed by N.J.A.C. 6:24-1.2, we hold that her claim as to the position held by Mr. Megnin is time barred, but that her claims

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regarding the Board's practices in crediting military service were timely. We find that the Board properly credited Mr. Romeo's military service, but that it improperly credited Mr. Tilli with two years military service that had been credited him in a position previously held within the district. We hold that for purposes of determining entitlement to the position of elementary principal, seniority at the time of the RIF controls, and therefore, find that Petitioner-Appellant is entitled to reinstatement. Finally, for the reasons expressed in his decision in Meyer I, we affirm the Commissioner's determination that Petitioner-Appellant's claim to differential salary for 1981-82 when she served as acting principal is time-barred, but that she is to be credited with seniority for that year in the category of elementary school principal for purposes of future seniority determinations.

Betty Dean opposed.

Attorney Exceptions are noted.
March 5, 1986

Affirmed N.J. Superior Court September 24, 1987

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ROBERT MONRO,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE RAMAPO INDIAN HILLS REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, July 30, 1984

For the Petitioner-Appellant, Aronson and Springstead
(James P. Gagel, Esq., of Counsel)

For the Respondent-Respondent, Green and Dzwilewski
(Allan P. Dzwilewski, Esq., of Counsel)

This is an appeal from a decision of the Commissioner, which held that the student attendance policy adopted by the Board of the Ramapo Indian Hills Regional School District was not arbitrary and the Board acted properly in removing credits based upon Petitioner-Appellant's unsatisfactory attendance. Petitioner Appellant (hereafter "Appellant") in this case was a senior at Indian Hills High School during the 1983-84 school year. As of January 23, 1984, he had been absent from school fifteen days. J-3, in evidence. Appellant submitted notes from home, but no medical notes, accounting for nine of these days. P-1, in evidence. No notes were submitted for the other six days. Id. In addition, because of lateness to school, Appellant had missed his first period class 22 times, his second period class 21 times, and his third period class 20 times. J-3, in evidence. These missed classes were considered to total an additional seven days' absence. J-5, in evidence.

On January 23, 1984, a Review Committee comprised of two assistant principals and a subject supervisor recommended to the Board of Education that Appellant's credit be removed because of his absenteeism. J-4, in evidence. This action was taken under Board Policy No. 504 and Regulation No. 5040, J-5, in evidence, and, accordingly, Appellant's parents were allowed ten days' from notice of that action to appeal the recommendation. J-5, in evidence.

Appellant's parents did appeal and the matter was placed on the Board's agenda for Executive Session on March 8, 1984. J-6, in evidence; P-3, in evidence. Following consideration of this appeal in closed session, P-3, in evidence, the Board, at its March 12 meeting, authorized the Principal to remove all credits from all of Appellant's courses. J-7, in evidence. Appellant's parents were notified of that action by letter from the Principal dated March 13, 1984. In that letter, the Principal assured Appellant's parents

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that "he will be able to complete his high school requirements by attendance in summer school." J-8, in evidence.

As stated, the Board's actions were taken pursuant to Policy No. 504 and Regulation No. 5040. Policy No. 504 mandates regular attendance at school and specifies that the Board will not grant credit for courses when a pupil has not complied with its attendance regulation. J-11, in evidence. Regulation No. 5040 provides that the awarding of credit shall be dependent upon 170 days of class attendance, that absences beyond ten days must be confirmed by medical excuse, and that parents shall receive notification upon the fifth absence warning them that the next notification they receive will be by certified mail at the time the tenth absence has occurred. J-10, in evidence. The Regulation further provides for the establishment of a Review Committee, to be composed of the assistant principal and such administrative assistants as may be on staff, and specifies procedures for the review of decisions made by the Review Committee. Id. Under the Regulation, students who have insufficient attendance may regain full credit status by:

> A. Fulfillment of such additional requirements for course completion as outlined by the teacher and approved by the subject supervisor and administration;
>
> B. Attendance and successful completion of an approved summer school course;
>
> or
>
> C. Re-enrollment in the course or courses in the succeeding school year or semester as applicable.
>
> The circumstances of each individual situation shall be adjudicated by the teacher involved, together with the subject supervisor and administrator to determine whether A, B, or C should be recommended.

Id. (emphasis added).

In May 1984, Appellant, by Petition to the Commissioner, challenged the Board's policy and regulations as arbitrary, capricious and unreasonable, both on their face and as applied. The Administrative Law Judge (ALJ) concluded that, although the Regulations on their face were valid, the Board had improperly removed Appellant's credits. Initial Decision, at 10. He found that while Appellant had violated Regulation No. 5040 by exceeding ten absences without medical excuse, there was no indication in the initial notice, which alerted his parents that Appellant had been absent five times, that his tardiness to school may have resulted in absences from class. Id. at 7. The ALJ reasoned that even though

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notice of ten days' absence did include class absences, that notice came too late to permit correction of the problem since Petitioner-Appellant's total absences already exceeded the maximum at that point. Id. at 8. The ALJ further concluded that the Review Committee, in determining that attending summer school was the method for credit restoration in this case, violated Regulation No. 5040, which requires that the circumstances of each individual case be adjudicated by the teacher involved and subject supervisor in order to determine which method for restoration should be recommended. Id. at 8-9. The ALJ construed the requirement of summer school attendance as punitive since Appellant would receive the grade he earned during the school year regardless of his performance in summer school. Id. at 9. He therefore concluded that application of the Board's attendance policy was arbitrary and set aside the removal of credit. Id. at 10. After reaching his decision, the ALJ noted that, in light of his decision and time restraints, he had not heard Petitioner-Appellant's claim that the Board discriminated in the application of its policy. He further noted that if the Commissioner rejected this determination, the case would have to be remanded for hearing on that issue. Initial Decision, at 14.

The Commissioner, while affirming the ALJ's admonition that the Board clarify the wording of its attendance policy, set aside the Initial Decision. He found that, pursuant to N.J.A.C. 6:8-4.2(d)(2), a board is required to establish attendance requirements consistent with the 180 day requirement for the provision of instruction. Commissioner's Decision, at 15-16. He concluded that the Board's policy was in compliance with law, id. at 16, and observed that due process safeguards for parents and students were provided, noting that these safeguards were "in the main" followed in the case before him. Id. at 22. The Commissioner determined that Appellant had exhibited a pattern of attendance warranting application of the "action described in the attendance policy" and that the due process requirements for parents were carefully followed. Id. He further noted that any lack of clarity in the policy did not disadvantage Appellant in pursuing his rights, id. at 22, and found that the requirement to attend summer school in order to restore credit was not punitive. Id. at 23. Finally, the Commissioner noted that he had consistently upheld policies that withheld or removed credit for absenteeism from individual classes, as well as for absenteeism for a full day. Id. The Commissioner, therefore, concluded that the Board's action in removing the credits in this case was proper. He, however, did not address Appellant's claim that the Board acted improperly by discriminating in the application of its policy. After careful consideration, we agree with the Commissioner that the Board did not act arbitrarily or unreasonably when it removed Appellant's credits because of his unsatisfactory attendance.

In reaching our decision today, the State Board first emphasizes that adoption of a student attendance policy by a local board is both proper and desirable. Under the laws of this state,

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parents are required to send their children to school regularly, see N.J.S.A. 18A:38-25, -26, and, pursuant to N.J.S.A. 18A:11-1, a board may adopt a policy regarding pupil attendance. We find that such policies, where not arbitrary or unreasonable, further the fundamental principles embodied in our system of education. As stated by the Commissioner in Wheatley et al. v. Bd. of Ed. of the City of Burlington:

> Frequent absences of pupils from regular classroom learning experiences disrupt the continuity of the instructional process. The benefit of regular classroom instruction is lost and cannot be entirely regained, even by extra after-school instruction. Consequently, many pupils who miss school frequently experience great difficulty in achieving the maximum benefits of schooling. Indeed, many pupils in these circumstances are able to achieve only mediocre success in their academic programs. The school cannot teach pupils who are not present. The entire process of education requires a regular continuity of instruction, classroom participation, learning experiences, and study in order to reach the goal of maximum educational benefits for each individual child. The regular contact of the pupils with one another in the classroom and their participation in well-planned instructional activity under the tutelage of a competent teacher are vital to this purpose. This is the well-established principle of education which underlies and gives purpose to the requirement of compulsory schooling in this and every other state in the nation.

1974 S.L.D. 851, at 864.

These principles are reflected in N.J.A.C. 6:8-4.2(d)(2), which requires that boards of education establish attendance requirements appropriate to each particular educational program. Accordingly, so long as an attendance policy adopted by a board is not arbitrary or unreasonable, it will be upheld. Linda Wetherell and Norma Carnivale v. Bd. of Ed. of the Township of Burlington, 1978 S.L.D. 794.

However, in his appeal to the State Board, Appellant challenges only the Board's application of its procedures for student attendance, which are specified in Regulation No. 5040, arguing that contrary to those procedures, none of his teachers were consulted regarding his latenesses or absences, that his individual situation was never adjudicated pursuant to the Board's procedures, that no recommendation was made as to how credit might be regained, that his latenesses and class absences were added to his full days of absence and that therefore notice to his parents came after he had already violated the policy and, finally, that no medical excuse was required for a four days absence upon which the Attendance

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Review Committee based its recommendation. Additionally, Appellant renews his claim that the Board discriminated in the application of its policy, arguing that, if we affirm the Commissioner's decision, this issue must be remanded for hearing. Thus, in considering this appeal, we are not called upon to judge the reasonableness of the Board's attendance requirements nor its review procedures.

We note, however, that under the Board's procedures for student attendance, removal of credit is not automatic Rather the recommendation for removal of credit may be made only after a failure to provide a medical excuse for absences beyond the ten days permitted under the procedures, that the procedures provide for notice to parents before the policy is violated, that they require individualized consideration of the student's situation once the policy has been violated, and that they include an appeals procedure to the Board if there is disagreement with the recommendation of the Review Committee. We find that these particular requirements and procedures are reasonable and that, when followed, would encourage regular attendance at school while assuring that individualized consideration of the student's educational needs occurs in the event the attendance requirement in the policy is violated.

We reiterate that the challenge here is not to the reasonableness of the Board's attendance policy. Rather, Appellant argues that the Board acted arbitrarily, capriciously and unreasonably in applying its attendance procedures. We emphasize that even where a board's attendance policy is reasonable, it may not act arbitrarily, capriciously or unreasonably in applying its policy. e.g., Wetherell, supra. However, as stated, after careful review of the record, we have concluded that the Board of Education of the Ramapo Indian Hills Regional High School District did not act arbitrarily or unreasonably in the application of its student attendance policy.

First, as set forth above, we conclude that the Board sufficiently notified Appellant's parents that their son was in danger of violating the attendance requirement. We emphasize that although early notification to parents of attendance problems is desirable so that such problems may be remedied before the child's absences exceeds those allowed by a board's attendance policy, primary responsibility for assuring regular attendance at school rests with the parent having custody and control of the child. N.J.S.A. 18A:38-5. We find that, in this case, Appellant's parents were notified that their son had an attendance problem in ample time for them to fulfill that responsibility.

On November 15, the Board notified Appellant's parents that their son had been absent from school five days. J-1, in evidence. Although that letter did not indicate that absences from individual classes counted toward total absences, it specifically informed them that if their son accumulated ten absences, a medical excuse would be required for subsequent absences. Furthermore, Appellant's absences from individual classes were not counted in that total, nor in determining the point at which Appellant was absent ten days. J-2, in evidence. Although latenesses were considered by the Review

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Committee in arriving at its recommendation, the recommendation in this case was rests on full days of absences. J-3, in evidence; J-4, in evidence. See Answers to Legal Committee Interrogatories, at 1-2. Likewise, the Board considered Appellant's latenesses but, again, in the context of full days of absence. P-3, in evidence. In sum, although Appellant's parents were not notified that their son had accumulated ten absences until he had, in fact, been absent twelve full days,[1] the five day notice was sufficient to alert them that their son had an attendance problem and that a medical excuse would be required for absences beyond ten days. We conclude that once Appellant's absences exceeded the allowable number of full days' absence, it was proper in this case for the Board to consider latenesses in reaching its decision.

Even so, we recognize that due process requires that when a student is faced with loss of credit arising from excessive absence, he

> ...should be afforded a record review; have prior knowledge of the attendance record upon which the determination will be made; have ample opportunity to rebut or plead mitigation; and present witnesses in his or her behalf...

"L.P.", an infant by her guardians and litem, Francis Polito and Arlene Polito v. Bd. of Ed. of the Township of Jackson, 1980 S.L.D. 1065.

Here, as found by the Commissioner, these due process requirements were met before the Board acted to remove credit. Appellant's parents were notified of their right to appeal the Committee's recommendation, J-5, evidence, and did in fact exercise this right. J-6, in evidence. Appellant's attendance and academic record was reviewed by the Board at the hearing. See P-3, in evidence; Tr.6/12/84, at 23-25. Furthermore, there is no suggestion in the record that Appellant's parents were not aware of their son's record. Rather, Mrs. Monro's comments at the hearing, i.e., that she determined when her son was ill and should not go to school, indicate that Appellant's parents were aware of their son's absences. See P-3, in evidence. Moreover, the Board hearing provided Appellant with ample opportunity to rebut the Review Committee's recommendation or plead mitigation, and the record shows that the Board did consider the views of Appellant's parents in reaching its decision. See id. We emphasize that the Board, not the Review Committee, made the decision to remove credit in this case and, as set forth above, that it did so only after affording Appellant the opportunity to present his case. We, therefore, conclude that there was no violation of due process in this instance.

[1]The ten day letter was sent on December 16. J-2, in evidence. Appellant was absent on December 15 and 16, absences for which he submitted neither a note from home nor a medical excuse. P-1, in evidence.

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We also find unpersuasive Appellant's claim that the Board's action was improper because it was "partially based upon his failure to supply a medical excuse for a four-day absence, when, in fact, no such excuse was required at that time..." Appellant's Brief, at 26. The record reveals that, in its recommendation, the Committee reported that Appellant's parents did not feel it necessary to send in medical notes even though he was absent for a four day period prior to the time when he exceeded ten days of absences. J-1, in evidence. Although we note that medical excuses were not required under the Board's Regulation for these particular absences, we emphasize that Appellant also failed to provide medical excuses after he had been absent ten full days. P-1, in evidence. Specifically, no medical excuse was submitted for his absences on December 16 and 23, nor for those on January 12 and 13.

We find that the requirement for medical excuses after ten absences is a reasonable one and, accordingly, that the Board's consideration of Appellant's failure to comply with this requirement was proper.[2] P-3, in evidence. The feeling of Appellant's mother that such notes were not of value and her position that "she is the mother" and would determine when her child was ill and not able to go to school did not excuse compliance with this requirement. P-3, in evidence. We, therefore, conclude that the Board properly considered Appellant's failures to provide medical excuses for his absences when it determined to remove credit.

Furthermore, we conclude that the absence of one teacher from the Review Committee meeting does not invalidate the Board's decision. Two assistant principals and a subject supervisor attended the meeting, J-4, in evidence, and there is nothing in the record to suggest that the Committee's recommendation would have been altered by postponing the meeting. Moreover, the actual decision to remove credit was made only after the Board hearing, at which time the Board considered Appellant's academic performance and during which Appellant had the opportunity to present the circumstances of his situation, including input from his teachers. See P-3, in evidence.

At the hearing the Board considered not only Appellant's attendance record, but the circumstances of his absences as well. P-3, in evidence. Under the circumstances presented to it, it rejected the option of placing Appellant on probation. Id. Instead, the Board members, with the Principal's assurance that Appellant could make up the work in summer school, decided to recommend removal of credits. Id. Appellant's parents were notified of the Board's action and this alternative by the

[2]We note that it is uncontroverted that the absences upon which the Board based its determination were "unexcused absences," which did not fall within the categories of "excused" absences specified in Regulation No. 5040. Nor does Appellant argue that his absences should be considered to be "excused" absences. We therefore make no judgment concerning the reasonableness of Board's categorization of excused and unexcused absences.

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Principal, J-8, in evidence, and they were informed that they should contact him if they had any questions. Id. Consideration of the various alternatives by which Appellant could regain the credits he needed to graduate is reflected in the Principal's memo to the Superintendent of June 8, 1984, in which he confirmed his assurance to the Board. R-1, in evidence. The Principal stated that he and the review committee realized that Appellant could not take all three subjects he needed to graduate in summer school and that unless an alternative was provided, Appellant would need to attend school another full year. Id. He further stated that the "feeling was that this would cause undue hardship" and, as a result, Appellant would be able to take the two academic subjects in summer school and could make up Physical Education through special work at school, thus enabling him to finish high school that summer. Id.

We find that this alternative, viewed in light of the Board's rejection of probation in this case, demonstrates consideration of Appellant's individual circumstances and educational needs. Given the number of absences, 15 full days and 63 classes at the time the Board acted,[3] it was reasonable for the Board to conclude that summer school was required in order for Appellant to make up the work he had missed, and we emphasize that under the alternative provided, Appellant would have been able to complete the requirements for graduation by the end of the summer. We conclude that summer school combined with special work was a reasonable method by which Appellant could make up the work he missed because of his absences. We further conclude that in light of the amount of work missed, the requirement of summer school attendance was not punitive, but rather provided Appellant with the opportunity to regain the benefit of classroom instruction that he had lost because of his absences.[4] See Wheatley, supra, at 864.

For the reasons stated, we hold that the Board in this case did not act arbitrarily, capriciously or unreasonably in the application of its attendance policy. However, although not alleged in the Petition of Appeal to the Commissioner, the issue of whether Appellant was discriminated against when compared to other students with the same or similar number of absences was set forth at the prehearing conference of June 8, 1984. Since neither the Administrative Law Judge nor the Commissioner considered this issue, we remand the matter to the Office of Administrative Law for hearing

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[3]By the end of the school year, Appellant had been absent 22 full days and missed 192 individual classes. Answers to Legal Committee Interrogatories, Exhibit 1.

[4]In his brief, Appellant, without citation to the transcript, argued that selection of this method did not conform to the Regulation because the Principal testified that he was not aware that the Regulation required the committee to consider three specific options, including making up the work missed. Our review

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on whether the Board discriminated in the application of its policy by enforcing its attendance regulations in his case while not doing so in other cases where students had the same number of unexcused absences as Appellant.

S. David Brandt, Mateo F. DeCardenas, Alice A. Holzapfel, James Jones, and John Klagholz opposed.

June 4, 1986

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[4]of the transcript indicates that the Principal testified that he understood that once credit was removed by the Board, work could be made up only through attending summer school or repeating the year. Tr. 6/12/84 at 40-41. However, he also testified that he had permitted students to make up work where removal of credit was not recommended to the Board, Tr. 6/12/84, at 35, and that he thought that even where credit had been removed by the Board, the Board could suggest other options for regaining credit. Id. at 40.

As set forth above, we conclude that the Board did consider what method for regaining credit would be appropriate in this case when it decided to remove credit and that, under the circumstances, the alternative of Summer School attendance was reasonable. Although the Principal believed that he had the authority to permit work to be made up only where there was not a recommendation to the Board that credit be removed, and that only the Board could initiate this option after the recommendation had been made, we conclude that, in considering probation, the Board did consider the alternative to Summer School and that the Principal's failure to understand the procedural requirements of the Regulations does not negate the reasonableness of the option selected by the Board.

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MONTVILLE TOWNSHIP EDUCATION ASSOCIATION AND MONTVILLE SECRETARIES ASSOCIATION,	:	
PETITIONERS-RESPONDENTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONTVILLE, MORRIS COUNTY,	:	DECISION ON REMAND
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, April 16, 1984

Decided by the State Board, November 7, 1984

Remanded by the Appellate Division, December 6, 1985

For the Respondent-Appellant, Rand and Algeier
(David B. Rand, Esq., of Counsel)

For the Petitioner-Respondent, Katzenbach, Gildea and Rudner
(Douglas B. Lang, Esq., of Counsel)

This case is before us pursuant to a decision rendered by the Appellate Division, reversing our decision in this matter and remanding it to us for the "entry of an order consistent with the decision of the Commissioner of Education". Montville Township Education Association and Montville Township Educational Secretaries Association v. Montville Township Board of Education, Docket # A-1178-84T7. (App. Div. Dec. 5, 1985). The case arose from a challenge to teacher attendance guidelines adopted by the Montville Township Board of Education for the purpose of improving overall teacher attendance. The guidelines added an attendance component to the annual teachers' evaluation. That component correlated the number of days absent with ratings of "satisfactory", "needs improvement" or "unsatisfactory." Although the guidelines required inclusion of narrative explanation for absences in the Summary Evaluation, the assigned rating would not be affected by the narrative explanation. Following permanent restraint of binding arbitration by the Public Employment Relations Commission, the Montville Township Education Association and the Montville Township Secretaries Association petitioned the Commissioner of Education, seeking a declaratory judgment invalidating the guidelines and restraining their implementation.

The Commissioner, rejecting the findings and determinations of the Administrative Law Judge, concluded that the guidelines were not reasonable because they would determine a teacher's attendance evaluation rating based solely on a cumulative number of days absence. In reviewing the case, we found that, although the guidelines did assign a rating based on the number of absences, they

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also required the inclusion of a narrative explanation to be placed in the Summary Evaluation. On this basis, we concluded that the guidelines reasonably considered teacher absences and were not in violation of the standards that we had articulated in Kuehn v. Board of Education of Teaneck, decided by the State Board, June 2, 1983.

As stated, the Appellate Division reversed our decision, finding that the record did not support our conclusion that the evaluation system took legitimate illnesses into proper account. Rather, the court found that, irrespective of the narrative information that could be included, the assigned rating was merely mathematical and was unaffected by the reason for the absence. The court reasoned, as did both the Commissioner and the State Board, that the principles of Kuehn, supra, were fully applicable to this case. The court, however, further emphasized that an unsatisfactory rating adversely prejudices a staff member's legitimate interest in a satisfactory evaluation report and concluded that such prejudicial consequence contravenes the statutory allowance for sick leave. The court therefore concurred with the Commissioner's conclusion that a policy that would determine a teacher's attendance evaluation rating solely upon the basis of the number of days of absence, such as the one in this case, must be deemed arbitrary even if the policy allows for teacher reaction through narrative statements.

Therefore, in conformity with the court's direction to us on remand, the State Board of Education directs the Board of Education of the Township of Montville to revise its rating system to take into account legitimate extended illnesses or confinement to home or hospital by a physician. See Commissioner's Decision, at 10.

Maud Dahme abstained

May 7, 1986

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IN THE MATTER OF THE TENURE HEARING OF CECELIA O'TOOLE, SCHOOL DISTRICT OF THE BOROUGH OF RAMSEY, BERGEN COUNTY, AND CECELIA O'TOOLE,

PETITIONER-APPELLANT,

V.

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

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, March 25, 1985

Decided by the State Board of Education, October 16, 1985

Remanded by the Appellate Division, October 6, 1986

For the Petitioner-Appellant, Bucceri and Pincus
(Sheldon H. Pincus, Esq., of Counsel)

For the Respondent-Respondent, Robert M. Jacobs, Esq.

On October 6, 1986 the Appellate Division of the Superior Court of New Jersey affirmed our decision that Cecelia O'Toole's challenge to the withholding of her salary increment for the 1981-82 school year was untimely and that she had received duplicate payments in the amount of $4,036.50 from the Board of Education of the Borough of Ramsey. The court, however, remanded the matter in order that the State Board of Education direct appropriate restitution.

In accordance with the Appellate Division's remand in this matter, the State Board of Education hereby directs Cecelia O'Toole to pay to the Board of Education of the Borough of Ramsey the sum of $4,036.50 as restitution.

December 3, 1986

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PARENTS FOR STUDENT SAFETY, INC.,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE MORRIS SCHOOL DISTRICT, MORRIS COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, August 24, 1984

Decision on Motion by the State Board, November 7, 1984

Remanded by the State Board, August 7, 1985

For the Petitioner-Respondent Rand & Algeier (David B. Rand, Esq., of Counsel)

For the Respondent-Appellant, Wiley, Malehorn and Sirota (Fredric J. Sirota, Esq., of Counsel)

For the Amicus Curiae, New Jersey School Boards Association, Paula A. Mullaly, Esq., General Counsel (James A. Harkness, Esq.)

In March 1984, parents of nonpublic school students were advised that the Board of Education of the Morris School District would not reverse its previous decision that it would no longer provide courtesy transportation for private school students unless the private school was located within the student's "attendance zone" as established by the District. On March 27, 1984, Parents for Student Safety, a non-profit corporation formed to further the welfare and safety of school children in the District, and individual residents whose children attend private non-profit schools petitioned the Commissioner, contending that the Board's actions were improper, illegal, arbitrary and in violation of the equal protection clause of the United States Constitution. On April 23, 1984, the Board counter-petitioned for a declaratory ruling concerning the application of the New Jersey and United States Constitutions, asserting that a district need not provide courtesy transportation to private school students even if it provides such transportation to public school students and that providing courtesy transportation to private school students is in violation of the law.

On June 11, 1984, the Board amended its transportation policy. Under the new policy, the Board would not provide transportation to any private school students unless the transportation was required by law. Appendix to Initial Decision, at 16. At that time, the Board also adopted a resolution stating

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IN THE MATTER OF THE TENURE :
HEARING OF NANCY SIMONIC, : STATE BOARD OF EDUCATION
SCHOOL DISTRICT OF SOUTH ORANGE- : DECISION
MAPLEWOOD, ESSEX COUNTY. :
:

Decided by the Commissioner of Education, August 23, 1985

For the Respondent-Appellant, Bucceri and Pincus
(Sheldon H. Pincus, Esq., of Counsel)

For the Petitioner-Respondent, Greenwood and Sayovitz
(Sidney A. Sayovitz, Esq., of Counsel)

The State Board of Education affirms the decision of the Commissioner of Education, substantially for the reasons set forth therein. The State Board notes that this single incident, the throwing of a pair of pliers by a metal shop teacher across a classroom at a group of her students, seriously injuring one of them, is of sufficient flagrancy in itself to support the tenure charges brought against her. Redcay v. State Board of Education, 130 N.J.L. 309 (Sup. Ct. 1943), aff'd 131 N.J.L. 326 (E. & A. 1944).

In re Fulcomer, 93 N.J. Super. 404 (App. Div. 1967) next requires a separate inquiry with respect to the appropriate penalty in light of a series of factors. Those factors include: whether there is indication in the record that the teacher's acts were premeditated, cruel or vicious, or done with intent to punish or inflict corporal punishment; the impact of the penalty on the teacher's career and ability to find future employment; her past record of discipline and increment withholding, if any; the nature and gravity of the offenses under all the circumstances involved; any evidence as to provocation, extenuation or aggravation, and any harm or injurious effect which the teacher's conduct may have had on the maintenance of discipline and the proper administration of the school system. Fulcomer, supra, at 421-422. Pertinent hereto, there was no finding that Respondent's acts were premeditated, or intended to inflict corporal punishment; however, there was a finding that Respondent intentionally and without apparent provocation, threw a pair of pliers nearly 40 feet across a metal shop classroom, striking a pupil in his eye and seriously injuring him. This act was grave in its nature and in its violation of school safety regulations intended to protect against such injurious misuse of school equipment. N.J.A.C. 6:29-5.2(c). Respondent had also previously been warned against the throwing of objects in the classroom by her supervisor.

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that it would not provide any courtesy transportation to private school students during the 1983-84 school year, although it would provide such transportation to public school students residing less than remote from their schools. Id. at 17. In considering the case in light of the board's action in amending its policy, the Administrative Law Judge (ALJ) limited himself to the two issues raised in the Board's Counter-Petition and rendered a summary decision in the matter.

The initial decision concluded that it was not unconstitutional for a public school district to provide courtesy transportation to private school students and that it is mandatory on a school district to provide such transportation to private school students if it does so for similarly situated public school students. Initial Decision, at 14-15. In reaching his conclusion, the ALJ, citing West Morris Reg. Bd. of Ed., et al. v. Sills, et al., 58 N.J. 464, cert. denied, 404 U.S. 986 (1971), reiterated that if a district provides transportation for public school students who live remote from school, it must also provide transportation to private school students. He, however, emphasized that the court in West Morris did not deal with the issue of courtesy busing and did not interpret N.J.S.A. 18A:39-1.1, which permits boards to provide transportation to students who do not live remote from school. Accordingly, he did not read West Morris as holding that a board is constitutionally prohibited from providing courtesy transportation to private school students. Rather, he found that a policy under which a district provides courtesy transportation to public school students but not to similarly situated private school pupils is discriminatory on its face and concluded that N.J.S.A. 18A:39-1.1 "does not tolerate a policy which discriminates improperly among and between students." Initial Decision, at 12. Although relying on prior Commissioner's decisions for this proposition, the ALJ's determination rested on his conclusion that treating public and private school students differently in this context violates the fourteenth amendment of the United States Constitution. Id. at 13-14.

The Commissioner accepted the determination of the ALJ that providing transportation to non-remote private school students is mandatory when a district provides such transportation to similarly situated public school students. Commissioner's Decision, at 20. He reiterated that the decision in West Morris did not signify that providing courtesy transportation to private school students was unconstitutional and held that, until the courts rendered a decision to the contrary, he would continue to find any transportation policy that treats similarly situated pupils differently to be discriminatory. Id. at 19-20. He therefore accepted the ALJ's determination and ordered that courtesy transportation be provided on the same basis and under the same criteria to private school students who are similarly situated to the public school students.

The Board appealed the Commissioner's decision, contending that the fourteenth amendment of the United States Constitution does not require a board to provide courtesy transportation to private school students even if it provides such transportation to public

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school students and that providing courtesy transportation to private school students violates the New Jersey Constitution, Art. VIII, Section 4, Paragraph 3. In response, Parents for Student Safety argues that New Jersey law and public policy, as well as equal protection concepts, mandate that courtesy transportation be provided to private school children on the same basis as to similarly situated public school children. Thus, although statutory issues are involved, the claims in this case essentially are constitutional. Even so, we do not find that oral argument is necessary in order to make a fair determination in this case and, therefore, we deny Appellant's request for oral argument.

Initially, we note that controversies arising under the school laws ordinarily must be presented to the Commissioner and, if appealed, to the State Board of Education before resorting to the courts. e.g. Theodore v. Dover Bd. of Ed., 183 N.J. Super. 407 (App. Div. 1982). However, we emphasize that neither the Commissioner nor the State Board has jurisdiction to decide constitutional claims. Paterson Redevelopment Agency v. Schulman, 78 N.J. 378, 388 (1979); Reed By and Through Reed v. Attorney General, 195 N.J. Super. 172 (App. Div. 1984). Thus, when a controversy arising under the school laws presents constitutional issues,

> ...such issues should merely be noted, as is generally done in the municipal court. Factual presentations relevant to the constitutional issues may be made, however, to ensure an adequate record for determination on appeal. In this way both the integrity of the administrative system and the [party's] right to a judicial determination of constitutional issues will be preserved.

78 N.J. at 388

However, before considering the constitutional claims that have been made in this case, it is necessary to determine what is statutorily required when courtesy transportation is provided under N.J.S.A. 18A:39-1.1. The statute provides that

> [i]n addition to the provision of transportation for pupils living remote from any school house, and for handicapped children, 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.
>
> The cost of transporting pupils pursuant to this section shall not be included in calculating the amount of state aid for transportation of pupils.

(Emphasis added).

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Thus, in addition to the authorization to provide transportation to pupils living remote from school set forth in N.J.S.A. 18A:39-1, the Legislature has authorized local boards of education to provide transportation to "other pupils to and from school". The words of N.J.S.A. 18A:39-1.1, like those of N.J.S.A. 18A:39-1, are permissive, authorizing, but not requiring, local boards to provide transportation to students who do not live remote from school.

Although we note that school districts are required to transport students living remote from school, we emphasize that this requirement is not contained in N.J.S.A. 18A:39-1, but has been imposed because districts have a duty to provide "convenience of access" to public schools under N.J.S.A. 18A:33-1. See West Morris Reg. Bd. of Ed. v. Sills, supra at 474; Bd. of Ed. of the Twp. of West Amwell v. State Bd. of Ed., 5 N.J. Misc. 152 (Sup. Ct. 1927). However, convenience of access considerations do not require that the provision of courtesy transportation be mandatory. Unlike students living remote from school, students who do not live remote can be expected to walk to school. See West Morris, supra, at 474. Thus, when a district does not provide courtesy transportation, it is not denying "convenience of access" to its students, and under N.J.S.A. 18A:39-1.1, a district "may, but need not provide transportation to pupils who do not live 'remote' from a schoolhouse...." West Morris, supra, at 475.

Furthermore, we find that in authorizing local boards to provide courtesy transportation to "other pupils to and from school", the statute permits, but does not require, a board to provide such transportation to private school students when it chooses to do so for public school students. As set forth above, unlike transportation provided to students living remote from school, the provision of courtesy transportation is not mandatory and, in contrast to N.J.S.A. 18A:39-1, which explicitly provides that transportation under that provision "include[s] the transportation of school pupils to and from school other than a public school...", N.J.S.A. 18A:39-1.1 does not contain such specific inclusion.[1]

Consideration of the legislative history supports our view that N.J.S.A. 18A:39-1.1 permits, but does not require, a board to provide courtesy transportation to private school students when it provides such transportation to public school students. In 1967, the Legislature amended R.S. 18:14-8, which is now N.J.S.A. 18A:39-1,

[1]Although the issue is not before us, we note that under the statute, it is within the discretion of a local board to distinguish between students on a basis other than whether students attend public or private school so long as its decision is not arbitrary or unreasonable. See e.g., Howard Schrenk v. Bd. of Ed. of the Village of Ridgewood, 1960-61 S.L.D. 185, 188. As discussed subsequently in this decision, we find that the distinction based on whether students attend public or private schools is not unreasonable for purposes of courtesy transportation.

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to specifically provide that transportation under that provision includes transportation to "other than a public school". See L. 1967, c. 74. At the same time and as part of the same piece of legislation, the Legislature amended R.S. 18:14-8.1, which is now N.J.S.A. 18A:39-1.1. Prior to its amendment, that statute authorized boards of education to provide courtesy transportation to children "to and from public school". See R.S. 18:14-8.1 (L. 1963, c. 130). In amending the statute, the Legislature deleted the word "public". See L. 1967, c. 74, Section 3. We find that by deleting the word public but not specifying, as it did in amending what is now N.J.S.A. 18A:39-1, that transportation to "other than a public school" is to be included in the provision of transportation under N.J.S.A. 18A:39-1.1, the Legislature demonstrated its intent to permit, but not to require, a board of education to provide courtesy transportation to private school students when it chooses to provide such transportation to public school students.

Having concluded that N.J.S.A. 18A:39-1.1 permits but does not mandate the provision of courtesy transportation to private school students when a board provides such transportation to public school students, we must now confront the constitutional claims made by the parties in this case. We again emphasize that we do not have jurisdiction to decide those claims. Paterson Redevelopment Agency v. Schulman, 78 N.J. 378 (1979); Reed By and Through Reed v. Attorney General, 195 N.J. Super. 172 (App. Div. 1984). However, in noting the presence of the constitutional issues involved here, we conclude that, although we do not believe that the provision of courtesy transportation to private school students violates Article VIII of the New Jersey Constitution, neither the equal protection clause of the United States Constitution nor the New Jersey Constitution requires the provision of courtesy transportation to private school students when a board provides such transportation to public school students.

As set forth above, the Board has asserted that Article VIII, Section 4, Paragraph 3 of the New Jersey Constitution prohibits the provision of courtesy transportation to private school students. Although we do not purport to ultimately determine the constitutional issue, we do not read Article VIII as prohibiting the provision of courtesy transportation to private school students. Article VIII, Section 4, Paragraph 3 provides that "[t]he Legislature may, within reasonable limitations as to distance, provide for the transportation of children within the ages of five and eighteen inclusive to and from any school." Thus, although the provision does not mandate the Legislature to provide for the transportation of school children, it enables the Legislature to provide transportation to any school, subject to the restriction that the amount provided must be within reasonable limitations as to distance. We do not believe that the restriction on the amount of transportation, which the words of the provision clearly state applies to any transportation provided whether to public or private school, prohibits the Legislature from permitting districts to provide courtesy transportation to private school students, as it did when it amended N.J.S.A. 18A:39-1.1.

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Consideration of West Morris Reg. Bd. of Ed. v. Sills, 58 N.J. 464 (1971), cert. denied, 404 U.S. 986 (1971), upon which the Board relies does not alter our view. That decision, which determined the constitutionality of N.J.S.A. 18A:39-1, did not hold that the New Jersey Constitution prohibits the provision of courtesy transportation to private school students. Rather, the Court stated in a digression that Art. VIII, Section 4, Paragraph 3 of the New Jersey Constitution restricts the amount of transportation that the Legislature may provide to private school students to an amount "within reasonable limitations as to distance..." 58 N.J. 464, at 471. However, because that section of the Constitution did not bear on the case before it, the Court did not define the restriction on the amount of transportation that may be provided constitutionally any further. See id.

Additionally, in finding that Article VIII would preclude the Legislature from providing transportation to private school students who attend school beyond the 20 mile radius,[2] the Court stated that "...the legislative purpose [of N.J.S.A. 18A:39-1] is to extend to the private school student the same benefit that is mandated for the student of his district who attends public school...." Thus, in deciding the issue of whether it is constitutionally permissible for the Legislature to provide for the transportation of private school students who live beyond the 20 mile radius, the Court recognized that the issue involved the extension of a statutory benefit beyond that provided to public school students. In contrast, Appellant seeks a determination limiting the benefit at issue here to public school students. We conclude, as stated above, that the distance limitation of Article VIII applies to transportation provided to both private and public schools. Therefore, if the provision of courtesy transportation to private school students is unreasonable as to distance, then courtesy transportation provided to public school students in the same amount would also be unreasonable.

Having concluded that the provision of courtesy transportation to private school students is not constitutionally prohibited, we turn to the question of whether the provision of such transportation is constitutionally mandated. We believe that the equal protection claim here, like those addressed by the Court in West Morris, supra, comes within the analysis articulated by the United States Supreme Court in Dandridge v. Williams, 397 U.S. 471 (1970). Thus, the constitutionality of the distinction permitted by N.J.S.A. 18A:39-1.1 between public and private school students is to be judged by whether it is "rationally based and free from

[2]The Court noted that the reasonableness of the 20 mile figure was not attacked in the case before it. 58 N.J. 464, at 471 n.3. Likewise we note that the reasonableness of providing transportation to public school students for distances less than remote from school has not been attacked in this case.

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invidious discrimination". 397 U.S. at 486. The question is not whether the Legislature could have required the provision of courtesy transportation to private school students under N.J.S.A. 18A:39-1.1, but whether permitting boards to distinguish between public and private school students for this purpose, thereby permitting receipt of the benefit to depend on the decision of the district in which the student resides, is unreasonable. See West Morris, supra at 481. We emphasize that under this standard, the choice of the Legislature and the district's action taken pursuant to the statute are presumed to be constitutional. McGowan v. Maryland, 366 U.S. 420 (1961).

We conclude that the distinction permitted between private and public school students for purposes of providing courtesy transportation is neither arbitrary nor unreasonable. We emphasize that in contrast to N.J.S.A. 18A:39-1, the cost of courtesy transportation provided pursuant to N.J.S.A. 18A:39-1.1 is not included in calculating the amount of State aid for the transportation of students. The entire financial burden for providing courtesy transportation, therefore, falls on the district. We find that it is entirely reasonable for the Legislature to permit local boards to decide to provide courtesy transportation only to public school students in order to further the legitimate State purpose of conserving limited financial resources. See West Morris Reg. Bd. of Ed. v. Sills, supra. We therefore believe that the distinction permitted by N.J.S.A. 18A:39-1.1 does not violate the Equal Protection Clause of the United States Constitution. We find that the result is the same under the New Jersey Constitution since New Jersey's standard for determining when equal protection has been denied under Article I, Paragraphs 1 and 5 of the New Jersey Constitution parallels that applied to claims under the federal constitution, See Christian Brothers Inst. v. No. N.J. Interschol. League, 86 N.J. 409 (1981); Levine v. Institutions and Agencies Dep't of N.J., 84 N.J. 234, 257 (1980).

Thus, although we believe that the provision of courtesy transportation to private school students is not constitutionally prohibited, we conclude that it is not constitutionally mandated that such transportation be provided when a district chooses to provide courtesy transportation to its public school students. Furthermore, we decline as a matter of public policy to extend the authorization contained in N.J.S.A. 18A:39-1.1 so as to require uniform treatment of private and public school students when a district chooses to provide courtesy transportation.

We believe, as set forth above, that a benefit such as this properly may be extended to private school students, see Everson v. Bd. of Ed. of Ewing Twp., 330 U.S. 1, affirming 133 N.J.L. 350 (E & A 1945), and we recognize that the Legislature has granted educational benefits to private school students in a number of educational areas. See N.J.S.A. 18A:58-59 et. seq. Such benefits have been granted in the areas of remote transportation, N.J.S.A. 18A:39-1, educational services, N.J.S.A. 18A:46-19.1; 18A:46A-1 et.seq. and materials, N.J.S.A. 18A:58-37.1 et. seq. However, we find that the public policy of assuring the right to attend private

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school and assisting parents of private school students through reimbursement and the provision of services and materials in recognition of the role played by private schools in easing the financial burden on the public school system, see N.J.S.A. 18A:58-60, does not support extending the benefit of courtesy transportation to private school students on a uniform basis with public school students. Rather, because the cost of such transportation is borne exclusively by each individual district and because the provision of courtesy transportation is not an essential educational service required in order to insure access to school, we find, in light of each local board's responsibility in providing a thorough and efficient system of free public schools, that the benefits that would accrue to private school students by requiring the provision of courtesy transportation are outweighed by the negative effects of mandating the provision of such transportation on a uniform basis. We believe that the allocation of scarce financial resources required by such mandate would adversely affect public school education by necessarily redirecting limited local resources away from the essential educational needs of the public school students in the district and would impact the public school system administratively as well as financially by requiring a district to transport private school students in every instance where it chooses to provide transportation to public school students. Furthermore, since the decision to provide courtesy transportation is within the discretion of the local board, we believe that the imposition of a duty to provide such transportation equally to private school students would discourage local boards from choosing to provide courtesy transportation to any students. We therefore conclude that the public policy of this State is best served by permitting each local board to assess the educational needs of the district and to evaluate these needs in the context of its financial and administrative constraints, and for each board to decide to what extent, if any, it chooses to provide courtesy transportation to either or both public and private school students.

In sum, we conclude that although a board is not constitutionally prohibited from providing courtesy transportation to private school students, neither N.J.S.A. 18A:39-1.1 nor the United States or New Jersey Constitutions, or public policy, requires that they do so when they provide such transportation to public school students. Rather, we find that the Legislature properly has granted to local boards the discretion to decide to what, if any, extent they will provide courtesy transportation to any students and that the distinction permitted by the Legislature between public and private school students in order to allow local boards to conserve limited financial resources is reasonable. We therefore, find that the local Board's decision in this case was proper, and we reverse the decision of the Commissioner. Finally, the State Board denies Petitioner-Respondent's request, which was included in its exceptions to our Legal Committee's Report, that we stay this decision.

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S. David Brandt, Betty Dean, Anne Dillman, John Klagholz, Robert Marik, James Seabrook and Deborah Wolfe join in the opinion of the State Board.

Maud Dahme abstained.

Attorney Exceptions are noted.
February 5, 1986

Mateo De Cardenas, James Jones, Alice Holzapfel and Nancy Schaenen dissenting.

We agree with the conclusion that N.J.S.A. 18A:39-1.1 permits, but does not specifically require, a board to provide courtesy transportation to private school students when it provides such transportation to public school students. We also agree with the conclusion that providing courtesy transportation to private school students is not constitutionally prohibited.

However, we must agree with the Commissioner that any transportation policy which treats similarly situated pupils in a different manner is discriminatory. If courtesy bussing is provided to public school students for legitimate reasons - safety, for example - then those same reasons are applicable to non-public school students who are similarly situated. Treating private school students differently is tantamount to establishing classifications that are unreasonable, arbitrary and capricious. In numerous decisions the Commissioner has held that a transportation policy which discriminates improperly among and between pupils will not be tolerated. Therefore, we cannot support the conclusions of the majority.

We also don't find the "scarce financial resources" argument persuasive. Since courtesy bussing is not routinely offered and, then, only when based on certain criteria such as for safety, the amount of money involved is limited and not so much as to outweigh the benefits such transportation provides to the student. The fact that districts would have to provide courtesy bussing to non-public students out of local funds if they offered it to their own students might also act as a restraint on districts which could otherwise be more easily pressured into providing bussing when it wasn't justified.

For these reasons, we dissent.

February 5, 1986

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PLAINFIELD EDUCATION ASSOCIATION :
ON BEHALF OF LIZZIE BUTLER ET AL.,

PETITIONERS-RESPONDENTS, :

V. : STATE BOARD OF EDUCATION

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

RESPONDENT-APPELLANT. :

Decided by the Commissioner of Education, September 24, 1984

Decision on Motion by the State Board of Education,
November 8, 1984

For the Petitioners-Respondents, Ruhlman, Butrym and
Friedman (Richard A. Friedman, Esq., of Counsel)

For the Respondent-Appellant, King, King and Goldsack
(Victor E. D. King, Esq., of Counsel)

The State Board of Education has reviewed the negotiated settlement submitted by the parties in this matter and finds it to be in accord with the principles expressed in In the Matter of the Tenure Hearing of Frank Cardonick, School District of the Borough of Brooklawn, decided by the State Board, April 6, 1983. The State Board therefore approves the settlement in this matter.

May 7, 1986

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IN THE MATTER OF THE TENURE :
HEARING OF DONALD ROWLEY, SCHOOL : STATE BOARD OF EDUCATION
DISTRICT OF MANALAPAN-ENGLISHTOWN : DECISION
REGIONAL, MONMOUTH COUNTY, :
:

Decided by the Commissioner of Education, May 23, 1983

Decided by the State Board, May 2, 1984

Remanded by the Appellate Division, October 23, 1985

For the Petitioner-Appellant, Eric Martin Bernstein, Esq.

For the Respondent-Respondent, Chamlin, Schottland, Rosen, Cavanagh and Uliano (Thomas W. Cavanagh, Jr., Esq., of Counsel)

The State Board of Education has reviewed the proposed settlement submitted by the parties in this matter and finds it to be in accord with the principles expressed in In the Matter of the Tenure Hearing of Frank Cardonick, School District of the Borough of Brooklawn, decided by the State Board, April 6, 1983. The State Board therefore approves the settlement in this matter.

October 1, 1986

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IN THE MATTER OF THE TENURE HEARING OF WILLIAM ROYDS, SCHOOL DISTRICT OF THE LOWER CAMDEN COUNTY REGIONAL HIGH SCHOOL: DISTRICT NO. 1, CAMDEN COUNTY.	:	STATE BOARD OF EDUCATION DECISION

Decided by the Commissioner of Education, October 18, 1985

For the Petitioner-Respondent, Maressa, Goldstein, Birsner, Patterson and Drinkwater (Robert E. Birsner, Esq., of Counsel)

For the Respondent-Appellant, Freeman, Zeller and Bryant (Allen S. Zeller, Esq., of Counsel)

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

March 5, 1986

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Thus, although Respondent's otherwise unblemished record since 1980 might suggest a lesser penalty, the nature and gravity of the instant offense, with its violation of safety regulations and of prior warnings, the nature of the injury to the student and the totally unacceptable standard for behavior which the act exemplifies, requires that dismissal be imposed as the appropriate penalty.

January 8, 1986

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KATHERINE SOLOMON, ARLENE ALBALAH, ELAINE PAVON AND PHYLLIS STOLAR,

PETITIONERS-RESPONDENTS,

V.

BOARD OF EDUCATION OF THE BOROUGH OF FAIR LAWN, BERGEN COUNTY,

RESPONDENT-APPELLANT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Eduation, July 20, 1982

Decided by the State Board of Education, December 1, 1982

Remanded by the Chancery Division, June 16, 1983

Remanded by the Appellate Division, January 11, 1984

Decided by the Commissioner of Education, February 21, 1984

Decision on Motion by the State Board, August 7, 1985

Leave to Appeal denied by the Appellate Division, August 28, 1985

For the Petitioners-Respondents, Bucceri and Pincus (Gregory T. Syrek, Esq., of Counsel)

For the Respondent-Appellant, Jeffer, Hartman, Hopkinson, Vogel, Coomber and Pfeiffer (Reginald F. Hopkinson, Esq., of Counsel)

In the decision that is the subject of this appeal, the Commissioner of Education determined that the four tenured Title I and supplemental teachers involved in this case were entitled as a matter of law to pro-rata placement on the salary guide applicable to full-time classroom teachers as of the date of the New Jersey Supreme Court's decision in Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982), such placement to be commensurate with their educational and teaching experience as credited from their date of employment by the District. Thus, this is another case that calls upon us to address the question of whether, by virtue of their status as tenured teaching staff members, Title I and supplemental teachers are entitled under the education laws to compensation based on placement on the negotiated salary guide applicable to full-time classroom teachers.

The procedural posture of this case is, however, unique. The Commissioner's decision from which this appeal was taken was

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rendered following a remand by the Chancery Division of the Superior Court, which resulted from proceedings seeking enforcement of the Commissioner's decision in Fair Lawn Education Association et al. v. Fair Lawn Board of Education, 1982 S.L.D. 70, aff'd, 1982 S.L.D. 731, aff'm in part, rev'd in part and remanded, Docket #A-2023-82T3 (App. Div. Jan. 11, 1984), rev'd on other grounds, 99 N.J. 8 (1985).

In Fair Lawn, the Commissioner determined that the four Petitioners involved in the case now before us had achieved tenure and, although denying relief for the period prior to the New Jersey Supreme Court's decision in Spiewak, he directed that Petitioners be placed "...on the appropriate step of the tenured teachers salary guide as part-time tenured teachers..."[1] 1982 S.L.D. at 728. The Chancery Division found that the Commissioner's decision was insufficiently precise to permit directing compliance, and ordered the matter remanded to the Commissioner for a precise determination of Petitioners' entitlements. Order, Superior Court of New Jersey, Chancery Division, June 16, 1983.

As stated, the Commissioner's decision that is the subject of this appeal is his precise determination of Petitioners' entitlements for the period subsequent to June 23, 1982, the date of the Speiwak decision. However, the decision also is the Commissioner's disposition of the Appellate Division's remand in this matter, which was directed by the court's decision in Rutherford Education Association et al. v. Board of Education of the Borough of Rutherford, Docket #A-2014-82T3, #A-2016-82T3, #A-2023-82T3, #A-2021-82T3 and #A-2023-82T3 (consolidated) (App. Div. Jan. 11, 1984).

In deciding that consolidated case, the Appellate Division affirmed the determinations made in Fair Lawn, supra, that the four Petitioners involved in the case now before us have achieved part-time tenure status,[2] and that the relief to which they were entitled pursuant to Spiewak, was limited to prospective relief for the period subsequent to the date of the Spiewak decision. As indicated above, the court, however, remanded the matter for determination of to what prospective benefits Petitioners were entitled.

In Rutherford Educ. Ass'n. v. Bd. of Educ., 99 N.J. 8 (1985), the New Jersey Supreme Court reversed the Appellate Division's denial of retroactive relief to the Petitioners in this case and remanded the matter to the Commissioner for a determination of when tenure accured and what retroactive benefits each Petitioner was entitled to receive. 99 N.J. at 14. However, the New Jersey

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[1] See infra note 2.

[2] Although the determination that Petitioners had achieved part-time tenure status does not affect the disposition of this case, we note that tenure status is not limited to tenure in a part-time position. Lichtman v. Ridgewood Bd. of Ed., 93 N.J. 362 (1983).

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Supreme Court altered neither the Appellate Division's determination that Petitioner's were entitled to prospective benefits under Spiewak nor its decision to remand to the Commissioner for a determination of prospecitve benefits. Thus, although the issue directly before the Appellate Division in Rutherford was the question of whether Petitioners were entitled to retroactive relief under Spiewak, the Appellate Division's decision in Rutherford delineates the perimeters within which we must consider the propriety of the Commissioner's determination of the prospective relief to which Petitioners are entitled.

I

As indicated above, in remanding this matter, the Appellate Division held that Petitioners were entitled to prospective relief from the date of the Spiewak decision. Specifically, the court held that Title I and compensatory education teachers employed on the date of Supreme Court's decision in Spiewak were entitled to appropriate salary guide placement and benefits as the statutes and contracts may provide.

However, as set forth in our decision in Hyman v. Board of Education of the Township of Teaneck, decided by the State Board, March 6, 1985, aff'd, Docket #A-3508-84T7 (App. Div. Feb. 25, 1986), certif. denied, Docket #25,352 (June 30, 1986), the Appellate Division's decision in Rutherford did not address the issue of whether supplemental teachers are entitled to guide placement as a matter of law. Nor was such right conferred by the New Jersey Supreme Court's decision in Spiewak. Rather, in its subsequent decision delineating the limitations on retroactive relief under Spiewak, the New Jersey Supreme Court emphasized that it had not decided in Spiewak what benefits constituted the emoluments of tenure. Rutherford Educ. Ass'n v. Bd. of Educ., 99 N.J. 8, 14 (1985).

Thus, the question we are called upon to resolve in this appeal is whether, by virtue of the Appellate Division's affirmance in Rutherford that Petitioners were tenured teaching staff members, Petitioners are entitled to compensation for the period subsequent to the decision in Spiewak based on the negotiated salary guide applicable to full-time classroom teachers.

II

In determining the prospective benefits to which the Petitioners in this case were entitled, the Commissioner adopted the Administrative Law Judge's (ALJ) findings and determinations that Petitioners, pursuant to Spiewak, were entitled, as of June 23, 1982, to placement on the negotiated salary guide applicable to classroom teachers based on educational qualifications and years of service "...just like any other tenured teacher in the district." Initial Decision at 8-9. Despite the existence of a separate negotiated agreement applicable to Petitioners, the Commissioner directed that each of the Petitioners be placed on the guide applicable to classroom teachers as of June 23, 1982, based on

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degree level and years of teaching experience from their date of employment by the District, and that each receive pro-rated compensation for the difference between the compensation such placement would have afforded them and that which they had received from the 1982-83 school year.

After careful review of the record in this case and the relevant law, we reverse the Commissioner's decision. First, we reiterate that the New Jersey Supreme Court's decision in Spiewak did not confer on Title I and supplemental teachers such as Petitioners the right to placement on a salary guide. Nor was such entitlement conferred by the Appellate Division's decision in Rutherford. Moreover, as we emphasized in Hyman, supra, although affording teachers significant rights and protections, the tenure laws do not confer on teaching staff members who have achieved tenure status the right to placement on any salary guide. Rather, any entitlement under the education laws to such placement must be found in N.J.S.A. 18A:16-1 and N.J.S.A. 18A:29-1 et seq., which apply to the compensation of teaching staff members.

However, as we concluded after extensive analysis in Hyman, the compensation statutes are applicable only to full-time teaching staff members, and the education laws do not prescribe any standards governing the rate and manner of compensation of teaching staff members who are not full-time. Further, we reiterate the such compensation is, within statutory standards, a mandatory subject of collective negotiations. e.g. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978).

The record in this case clearly indicates that Petitioners were not full-time teaching staff members during the period relevant to this litigation. Fair Lawn, supra. We therefore, conclude that, in the absence of any standards in the education laws that would govern the manner or rate of their compensation for that period, Petitioners' entitlement to compensation is controlled by the collective negotiations agreements applicable to them. In so concluding, we reiterate that where compensation has been agreed to through the collective negotiations process, we may not set aside such agreement unless the terms contravene the specific requirements of the education statutes. e.g., Bergenfield Education Association et al. v. Board of Education of the Borough of Bergenfield, decided by the State Board, September 3, 1986.

III

In sum, we conclude that the Petitioners in this case have no entitlement under the education laws to pro-rata compensation based on the negotiated salary guide applicable to classroom teachers. In so concluding, we emphasize that despite the continued litigation in this matter, there has been no judicial determination of the prospective benefits to which Petitioners were entitled by virtue of the determination that they were tenured teaching staff members. Rather, pursuant to the Appellate Division's remand of the

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matter for determination of such benefits, that task has been entrusted to us. By our decision, we would fulfill that responsibility.

Attorney exceptions are noted.
November 5, 1986

Affirmed N.J. Superior Court December 24, 1987

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DANIEL WOODSIDE,

PETITIONER-APPELLANT,

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY, : DECISION

RESPONDENT-RESPONDENT.

Decided by the Commissioner of Education, August 12, 1985

For the Petitioner-Appellant, Greenberg and Prior (Linda E. Johnson, Esq., of Counsel)

For the Respondent-Respondent, Apruzzese, McDermott, Mastro and Murphy (Merritt T. Viscardi, Esq., of Counsel)

After reviewing the record in this case, including the transcripts, the State Board of Education affirms the decision of the Commissioner for the reasons expressed therein. Additionally, we find that the Commissioner's conclusion that the Board acted properly, based on his performance in the year in question, to withhold Petitioner-Appellant's increment is supported further by the transcripts. The transcripts show that at the Board meeting, the Superintendent presented to the Board description of the documentation relating to the six reasons upon which the Board acted to withhold the incre- ment, all of which involved conduct and performance in the year in question. Tr.6/10/85, at 120. That documentation was available at the meeting and was reviewed around the table. Id. at 120-21. The Superintendent testified that most Board members were familiar with Appellant's pattern over a period of a few years, Tr.6/10/85, at 122, and that, as a result, the Board asked for additional information. Id. However, he further testified that the information it sought concerned whether there was a continuing pattern or whether there was improvement or regression. Id. Such inquiry was appropriate, Borrelli v. Board of Education of the Borough of Rutherford, decided by the State Board, July 3, 1985, and we find no indication in the record that the Board's decision was based on Appellant's performance in remote school years or was the result of habit. Id. Rather, we conclude that the record supports the conclusion of the Commissioner that the Board's decision was reasonably based on the record before it. Colavita v. Board of Education of the Hillsborough Township School District, Docket #A-4342-83T6 (App. Div. March 28, 1985); Kopera v. West Orange Bd. of Ed., 60 N.J. 288 (App. Div. 1960).

May 7, 1986

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