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NEW JERSEY SCHOOL LAW DECISIONS

Indexed

January 1, 1984 to December 31, 1984

Vol. 1

New Jersey State Department of Education
225 West State Street
Trenton, New Jersey 08625

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Commissioner of Education

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	PAGE
Accetta, Michael, et al. v. Board of Education of the City of Hoboken, Hudson County	518
Alaskan Insulation, Inc. v. Board of Education of the Town of Hackettstown, Warren County	575
Allenhurst, Monmouth County, Board of Education of the Borough of; Diane Garfole and Carmen Garfole	1135
Amato, Matthew F., Jr. v. Board of Education of the Hudson County Area Vocational and Technical Schools, Hudson County	1721
Anderson, Joseph, Superintendent, Borough of Ridgefield, Bergen County; Edward Bogosian et al. v.	136
Bailey, Marilyn A., and Louise Orlando; Board of Education of the Borough of Fair Lawn, Bergen County v.	1156
Black Horse Pike Regional School District, Camden County, Board of Education of the v. Janice Mooney	810
Boehm, Lori v. Board of Education of the Township of Pennsauken, Camden County	1113
Bogosian, Edward, et al. v. Joseph Anderson, Superintendent, Borough of Ridgefield, Bergen County	136
Bongart, Robert G. v. Board of Education of the Borough of Stone Harbor, Cape May County	1320
Boonton, Morris County, Board of Education of the Township of; James Bree v.	1378
Bosner, Stanley v. Board of Education of the Township of Old Bridge, Middlesex County	769
Bound Brook, Somerset County; In the Matter of the Tenure Hearing of Edith Trautwein, School District of the Borough of	35
Bree, James v. Board of Education of the Township of Boonton, Morris County	1378
Brendel, William R. v. Board of Education of the Borough of Northvale, Bergen County	57
Bridgeton, Cumberland County; In the Matter of the Tenure Hearing of Billy McMahan, School District of the City of	208
Brody, David, School District of the Borough of Elmwood Park, Bergen County; In the Matter of the Tenure Hearing of	1216

You are viewing an archived copy from the New Jersey State Library.

PAGE

Brown, Edgar, and Oliver Brown v. Board of Education of the City of Newark, Essex County 671

Buena Regional School District, Atlantic County, Board of Education of the; John Polaha v. 1832

Burlington County Vocational-Technical School, Burlington County, Board of Education of the; Yvonne Meli v. 906

Burnside, Mr. & Mrs. Willie, Jr., on their own and on behalf of their minor son, R.B. et al. v. NJSIAA et al. 1677

C.B., an infant by her mother and natural guardian, S.B. v. Board of Education of the City of Trenton, Mercer County..... 624

C.D., a minor child, by her parents, M.D. and S.D. et al. v. Board of Education of the Lenape Regional High School District, Burlington County 1473

Camden, Camden County, Board of Education of the City of; Flora Turner v. 823

Camden County Vocational-Technical School District, Camden County; In the Matter of the Tenure Hearing of Cornelius Taylor 1390

Carlson, Bruce E. v. Board of Education of the Township of Woodbridge, Middlesex County 1282

Castaldo, Anthony, School District of the Union County Regional High School No. 1, Union County; In the Matter of the Tenure Hearing of 685

Cherry Hill Supportive Staff Association et al. v. Board of Education of the Township of Cherry Hill, Camden County..... 1437

Clayton, Gloucester County, Board of Education of the Borough of; Mary C. Schoeler v. 792

Cliffside Park, Bergen County, Board of Education of the Borough of v. Vincent T. McKenna..... 1702

Cordasco, Angela v. Board of Education of the City of East Orange, Essex County..... 1191

Corrado, Andrew T. v. Board of Education of the Borough of Newfield, Gloucester County..... 933

D.D. by E.D., his parent and guardian ad litem v. Board of Education of the Lenape Regional High School District, Burlington County..... 1562

Deptford, Board of Education of the Township of v. Olympic Conference and NJSIAA 191

DiNardo, Margaret B. v. Board of Education of Jersey City, Hudson County..... 116

You are viewing an archived copy from the New Jersey State Library.

PAGE

Doyle, Robert E., School District of the Township of Pemberton, Burlington County; In the Matter of the Tenure Hearing of..... 350

Earl, David, School District of the City of Trenton, Mercer County; In the Matter of the Tenure Hearing of..... 298

East Brunswick, Middlesex County, Board of Education of the Township of; Donald Speer v. 1100

East Orange, Essex County, Board of Education of the City of; Angela Cordasco v. 1191

Edgewater, Bergen County, Board of Education of the Borough of; Dale Myhren v. 241

Edison, Middlesex County, Board of Education of the Township of; Edison Township Education Association v. 1073

Edison Township Board of Education, Middlesex County; In the Matter of the Seniority Rights of Certain Teaching Staff Members Employed by the Old Bridge Township Board of Education and the..... 1414

Edison Township Education Association v. Board of Education of the Township of Edison, Middlesex County..... 1073

Elizabeth, Union County; In the Matter of the Tenure Hearing of Anthony Pasquale, School District of the City of..... 1

Elmwood Park, Bergen County; In the Matter of the Tenure Hearing of David Brody, School District of the Borough of..... 1216

Emerson, Bergen County, Board of Education of the Borough of; Carol Gundlah v. 1202

Essex County Educational Services Commission v. Board of Trustees, Teachers' Pension and Annuity Fund; NJEA v. 420

Essex County Educational Services Commission v. Board of Trustees, Teachers' Pension and Annuity Fund; NJEA et al. v. 392

Fair Lawn, Bergen County, Board of Education of the Borough of v. Marilyn A. Bailey and Louise Orlando 1156

Fair Lawn, Bergen County, Board of Education of the Borough of; Stanley F. Solomons v. 384

Figurelli, Jennifer C. v. Board of Education of the City of Jersey City, Hudson County..... 1297

Flood, Phillip v. Board of Education of Jersey City, Hudson County.. 74

Fodor, Zolton J., School District of the Township of Green Brook, Somerset County; In the Matter of the Tenure Hearing of 269

You are viewing an archived copy from the New Jersey State Library.

PAGE

Furst, Michael v. Board of Education of the Township of Rockaway, Morris County..... 881

G.L.D. and H.W.D., on behalf of F.D. v. Board of Education of the Manalapan-Englishtown Regional School District, Monmouth County..... 633

Gallagher, Bruce v. Board of Education of the Town of Nutley et al., Essex County..... 229

Garfole, Diane, and Carmen Garfole v. Board of Education of the Borough of Allenhurst, Monmouth County..... 1135

Gibson, Daniel v. Board of Education of the City of Newark, Essex County..... 444

Glen Rock, Bergen County, Board of Education of the Borough of; Jeanette Johnson v. 894

Goebel, Gussie v. Board of Education of the Borough of Maywood, Bergen County..... 1638

Greater Egg Harbor Regional High School District, Atlantic County, Board of Education of the; Marilyn Sussman v. 1664

Greenberg, William A. v. Board of Education of the Borough of Highland Park, Middlesex County 1885

Green Brook, Somerset County; In the Matter of the Annual School Election Held in the Township of..... 1358

Green Brook, Somerset County; In the Matter of the Tenure Hearing of Zolton J. Fodor, School District of the Township of..... 269

Gundlah, Carol v. Board of Education of the Borough of Emerson, Bergen County..... 1202

Hackettstown, Warren County, Board of Education of the Town of; Alaskan Insulation, Inc. v. 575

Haddon Heights, Camden County, Board of Education of the Borough of; Carolyn Mahan v. 642

Hamilton Township Supplemental Teachers' Association et al. v. Hamilton Board of Education, Mercer County 843

Hawthorne, Bruce and Carol, and Richard and Beverly Congdon; Board of Education of the West Morris Regional High School District, Morris County v. 777

Hazlet et al., Monmouth County, Board of Education of the Township of; E.P. Reid, Inc. v. 602

Highland Park, Middlesex County, Board of Education of the Borough of; William A. Greenberg v. 1885

You are viewing an archived copy from the New Jersey State Library.

PAGE

Hoboken, Hudson County, Board of Education of the City of; Michael Accetta et al. v. 518

Hudson County Area Vocational and Technical Schools, Hudson County, Board of Education of the; Matthew F. Amato, Jr. v. 1721

Hudson County Area Vocational-Technical School District, Hudson County, Board of Education of the; Frank Roberts et al. v. 999

Ivan, Lawrence, and Thomas Murray v. Board of Education of the Princeton Regional School District et al., Mercer County 1656

J.C. v. Board of Education of the City of Long Branch, Monmouth County..... 1091

J.S. as guardian of K.S. v. Board of Education of the Town of Phillipsburg, Warren County..... 1248

Jersey City, Hudson County, Board of Education of the City of; Margaret B. DiNardo v. 116

Jersey City, Hudson County, Board of Education of the City of; Jennifer C. Figurelli v. 1297

Jersey City, Hudson County, Board of Education of the City of; Phillip Flood v. 74

Jersey City, Hudson County, Board of Education of the City of; Dorothy McGreevy v. 1546

Jersey City, Hudson County, Board of Education of the City of; James V. Wallace v. 1149

Johnson, Jeanette v. Board of Education of the Borough of Glen Rock, Bergen County 894

Keansburg, Monmouth County, Board of Education of the Borough of; William B. King v. 922

King, William B. v. Board of Education of the Borough of Keansburg, Monmouth County..... 922

Kinney, Mary L. v. Board of Education of the Township of Sparta, Sussex County..... 157

Lakewood, Ocean County; In the Matter of the Annual School Election Held in the Township of..... 1498

Lauffer, Arthur J. v. Board of Education of the Borough of Leonia, Bergen County..... 1290

Lenape Regional High School District, Burlington County, Board of Education of the; C.D. a minor child, by her parents, M.D. and S.D. et al. v. 1473

You are viewing an archived copy from the New Jersey State Library.

PAGE

Lenape Regional High School District, Burlington County, Board of Education of the; D.D. by E.D., his parent and guardian ad litem v. 1562

Leonia, Bergen County, Board of Education of the Borough of; Arthur J. Lauffer v. 1290

Leyton, Marco v. NJSIAA and Carteret Board of Education, Middlesex County 485

Liskovec, Larry F., School District of the Township of Woodbridge, Middlesex County; In the Matter of the Tenure Hearing of 1600

Little Ferry, Bergen County, Board of Education of the Borough of; Jerilynn Tirico v. 86

Long Branch, Monmouth County, Board of Education of the City of; J.C. v. 1091

Mahan, Carolyn v. Board of Education of the Borough of Haddon Heights, Camden County..... 642

Manalapan-Englishtown Regional School District, Monmouth County, Board of Education of the; G.L.D. and H.W.D., on behalf of F.D. v. 633

Manalapan-Englishtown Regional, Monmouth County; In the Matter of the Tenure Hearing of Joseph Murphy, School District of..... 174

Marlboro, Monmouth County, Board of Education of the Township of; Edward C. Weigand v. 534

Masone, Steve v. Board of Education of the Borough of Rutherford, Bergen County..... 1167

Maywood, Bergen County, Board of Education of the Borough of; Gussie Goebel v. 1638

McGreevy, Dorothy v. Board of Education of the City of Jersey City, Hudson County 1546

McKenna, Vincent T.; Board of Education of the Borough of Cliffside Park, Bergen County v. 1702

Mercer County Area Vocational-Technical Schools, Mercer County, Board of Education of the; John H. Rivers v. 102

McMahan, Billy, School District of the County of Bridgeton, Cumberland County; In the Matter of the Tenure Hearing of 208

Meli, Yvonne v. Board of Education of the Burlington County Vocational-Technical School, Burlington County..... 906

Meyer, Judith Elsie v. Board of Education of the Township of Wayne, Passaic County..... 1849

You are viewing an archived copy from the New Jersey State Library.

PAGE

Michaels, Nathan James, School District of the City of Newark, Essex County; In the Matter of the Tenure Hearing of 143

Middletown, Monmouth County, Board of Education of the Township of; Melinda Shafran v. 969

Miles, Janet D. v. Board of Education of the Borough of Watchung, Somerset County..... 1058

Millburn School for the Hearing Handicapped a/k/a New Jersey Regional Day School at Millburn and Division of Field Services of the Department of Education; Larry Forestal, Principal, Parthenia Smith, Director; Annette O'Toole v. 311

Monro, Robert v. Board of Education of the Ramapo Indian Hills Regional High School District, Bergen County..... 1337

Montville Township Education Association and Montville Township Educational Secretaries Association v. Board of Education of the Township of Montville, Morris County..... 550

Mooney, Janice; Board of Education of the Black Horse Pike Regional School District, Camden County..... 810

Morris School District, Morris County, Board of Education of the; Parents for Student Safety, Inc. v. 1454

Murphy, Joseph, School District of Manalapan-Englishtown Regional, Monmouth County; In the Matter of the Tenure Hearing of 174

Myhren, Dale v. Board of Education of the Borough of Edgewater, Bergen County..... 241

Nafash, Patricia, School District of the Borough of Ridgefield, Bergen County; In the Matter of the Tenure Hearing of..... 333

Newark, Essex County, Board of Education of the City of v. Edgar Brown et al..... 671

Newark, Essex County, Board of Education of the City of; Daniel Gibson v. 444

Newark, Essex County, Board of Education of the City of; Newark Teachers Union, Local 481, AFT/AFL-CIO and Edna Smith v. 1045

Newark, Essex County, Board of Education of the City of; Leonor Outor v. 1510

Newark, Essex County, Board of Education of the City of; Joseph Volpe v. 1520

Newark, Essex County; In the Matter of the Tenure Hearing of Nathan James Michaels, School District of the City of 143

Newark, Essex County; In the Matter of the Tenure Hearing of Stanley Slovney, School District of the City of..... 1764

You are viewing an archived copy from the New Jersey State Library.

PAGE

Newark et al., Essex County, Board of Education of the City of; Dr. Columbus Salley v. 1714

Newark Teachers Union, Local 481, AFT/AFL-CIO, and Edna Smith v. Board of Education of the City of Newark, Essex County..... 1045

Newfield, Gloucester County, Board of Education of the Borough of; Andrew T. Corrado v. 933

NJEA v. Essex County Educational Services Commission v. Board of Trustees, Teachers' Pension and Annuity Fund..... 420

NJEA and Educational Services Teachers Association v. Essex County Educational Services Commission v. Board of Trustees, Teachers' Pension and Annuity Fund..... 392

NJSIAA and Carteret Board of Education, Middlesex County; Marco Leyton v. 485

NJSIAA et al.; Mr. & Mrs. Willie Burnside, Jr., on their own and on behalf of their minor son, R.B. et al. v. 1677

Newton, Sussex County, Board of Education of the Town of; Patricia Peck v. 506

Northvale, Bergen County, Board of Education of the Borough of; William R. Brendel v. 57

Nutley et al., Essex County, Board of Education of the Town of; Bruce Gallagher v. 229

Old Bridge, Middlesex County, Board of Education of the Township of; Stanley Bosner v. 769

Old Bridge Township Board of Education and Edison Township Board of Education, Middlesex County; In the Matter of the Seniority Rights of Certain Teaching Staff Members Employed by the 1414

Olympic Conference and NJSIAA; Board of Education of the Township of Deptford v. 191

Orange, Essex County, Board of Education of the City of; James Sherman v. 1257

O'Toole, Annette v. Larry Forestal, Principal, Parthenia Smith, Director, Millburn School for the Hearing Handicapped a/k/a New Jersey Regional Day School at Millburn and Division of Field Services of the Department of Education..... 311

Outor, Leonor v. Board of Education of the City of Newark, Essex County..... 1510

Parents for Student Safety, Inc. v. Board of Education of the Morris School District, Morris County..... 1454

You are viewing an archived copy from the New Jersey State Library.

	PAGE
Parsippany-Troy Hills, Morris County, Board of Education of; Thomas J. Santarsiero et al. v.	854
Pasquale, Anthony, School District of the City of Elizabeth, Union County; In the Matter of the Tenure Hearing of	1
Peck, Patricia v. Board of Education of the Town of Newton, Sussex County	506
Pemberton, Burlington County; In the Matter of the Tenure Hearing of Robert E. Doyle, School District of the Township of	350
Pennsauken, Camden County, Board of Education of the Township of; Lori Boehm v.	1113
Phillipsburg, Warren County, Board of Education of the Town of; J.S. as guardian of K.S. v.	1248
Plainfield Education Association, on behalf of Lizzie Butler et al. v. Board of Education of the City of Plainfield, Union County	1578
Polaha, John v. Board of Education of the Buena Regional School District, Atlantic County	1832
Pollack, Elliot v. Board of Education of the Village of Ridgefield Park, Bergen County	1027
Princeton Regional School District et al., Mercer County, Board of Education of the; Lawrence Ivan and Thomas Murray v.	1656
Punko, Michael A. v. Board of Education of the City of Rahway, Union County	1871
Quinton, Salem County, Board of Education of the Township of; Helen C. Upperman v.	562
Rahway, Union County, Board of Education of the City of; Michael A. Punko v.	1871
Ramapo Indian Hills Regional High School District, Bergen County, Board of Education of the; Robert Monro v.	1337
Reid, E.P., Inc. v. Board of Education of the Township of Hazlet et al., Monmouth County	602
Ridgefield, Bergen County; In the Matter of the Tenure Hearing of Patricia Nafash, School District of the Borough of	333
Ridgefield Park, Bergen County, Board of Education of the Village of; Elliot Pollack v.	1027
Rivers, John H. v. Board of Education of the Mercer County Area Vocational-Technical Schools, Mercer County	102
Roberts, Frank, et al. v. Board of Education of the Hudson County Area Vocational-Technical School District, Hudson County	999

You are viewing an archived copy from the New Jersey State Library.

PAGE

Rockaway, Morris County, Board of Education of the Township of; Michael Furst v. 881

Romanoli, Peter J. v. Board of Education of the Township of Willingboro, Burlington County..... 1738

Rumson-Fair Haven Education Association et al. v. Board of Education of the Rumson-Fair Haven Regional H.S. District, Monmouth County..... 166

Rutherford, Bergen County, Board of Education of the Borough of; Steve Masone v. 1167

Salley, Dr. Columbus v. Board of Education of the City of Newark et al., Essex County 1714

Santarsiero, Thomas J., et al. v. Board of Education of Parsippany-Troy Hills, Morris County..... 854

Schmidt, Robert v. Board of Education of the Township of Weehawken, Hudson County..... 593

Schmidt, Robert v. Board of Education of the Township of Weehawken, Hudson County..... 600

Schoeler, Mary C. v. Board of Education of the Borough of Clayton, Gloucester County..... 792

Shafran, Melinda v. Board of Education of the Township of Middletown, Monmouth County 969

Sherman, James v. Board of Education of the City of Orange, Essex County..... 1257

Shrewsbury, Monmouth County, Board of Education of the Borough of; Mary R. Walton v. 1425

Slovney, Stanley, School District of the City of Newark, Essex County; In the Matter of the Tenure Hearing of..... 1764

Solomons, Stanley F. v. Board of Education of the Borough of Fair Lawn, Bergen County..... 384

South River Education Association et al. v. Board of Education of the Borough of South River, Middlesex County..... 1531

Sparta, Sussex County, Board of Education of the Township of; Mary L. Kinney v. 157

Speer, Donald v. Board of Education of the Township of East Brunswick, Middlesex County 1100

Stockton, Charles v. Board of Education of the City of Trenton, Mercer County..... 1802

You are viewing an archived copy from the New Jersey State Library.

PAGE

Stone Harbor, Cape May County, Board of Education of the Borough of; Robert G. Bongart, Superintendent of Schools, Cape May County v. 1320

Sussman, Marilyn v. Board of Education of the Greater Egg Harbor Regional High School District, Atlantic County 1664

Taylor, Cornelius, School District of Camden County Vocational-Technical, Camden County; In the Matter of the Tenure Hearing of..... 1390

Teachers' Pension and Annuity Fund, Board of Trustees; NJEA v. Essex County Educational Services Commission v. 420

Teachers' Pension and Annuity Fund, Board of Trustees; NJEA and Educational Services Teachers Association v. Essex County Educational Services Commission v. 392

Tirico, Jerilynn v. Board of Education of the Borough of Little Ferry, Bergen County..... 86

Trautwein, Edith, School District of the Borough of Bound Brook, Somerset County; In the Matter of the Tenure Hearing of 35

Trenton, Mercer County, Board of Education of the City of; C.B., an infant by her mother and natural guardian, S.B. v. 624

Trenton, Mercer County, Board of Education of the City of; Charles Stockton v. 1802

Trenton, Mercer County; In the Matter of the Tenure Hearing of David Earl, School District of the City of..... 298

Turner, Flora v. Board of Education of the City of Camden, Camden County 823

Union County Regional High School No. 1, Union County; In the Matter of the Tenure Hearing of Anthony Castaldo, School District of the 685

Upper Freehold Regional, Monmouth County, Board of Education of, Board of Education of the Township of Millstone, Monmouth County and Board of Education of the Township of Plumsted, Ocean County; Board of Education of the Township of Washington, Mercer County v. 1814

Upperman, Helen C. v. Board of Education of the Township of Quinton, Salem County..... 562

Volpe, Joseph v. Board of Education of the City of Newark, Essex County 1520

Wallace, James V. v. Board of Education of the City of Jersey City, Hudson County 1149

You are viewing an archived copy from the New Jersey State Library.

PAGE

Walton, Mary R. v. Board of Education of the Borough of Shrewsbury, Monmouth County 1425

Washington, Mercer County, Board of Education of the Township of v. Board of Education of Upper Freehold Regional, Board of Education of the Township of Millstone, Monmouth County and Board of Education of the Township of Plumsted, Ocean County 1814

Watchung, Somerset County, Board of Education of the Borough of; Janet D. Miles v. 1058

Wayne, Passaic County, Board of Education of the Township of; Judith Elsie Meyer v. 1849

Weehawken, Hudson County, Board of Education of the Township of; Robert Schmidt v. 593

Weehawken, Hudson County, Board of Education of the Township of; Robert Schmidt v. 600

Weigand, Edward C. v. Board of Education of the Township of Marlboro, Monmouth County 534

West Morris Regional High School District, Morris County, Board of Education of the v. Bruce and Carol Hawthorne et al. 777

Willingboro, Burlington County, Board of Education of the Township of; Peter J. Romanoli v. 1738

Woodbridge, Middlesex County, Board of Education of the Township of; Bruce E. Carlson v. 1282

Woodbridge, Middlesex County; In the Matter of the Tenure Hearing of Larry F. Liskovec, School District of the Township of..... 1600

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DECISIONS RENDERED BY THE STATE BOARD OF EDUCATION
SUPERIOR COURT AND SUPREME COURT
1984

	PAGE
Accetta, Michael, et al. v. Board of Education of the City of Hoboken, Hudson County (State Board)	533
Alaskan Insulation, Inc. v. Board of Education of the Town of Hackettstown, Warren County (State Board)	592
Brody, David, School District of the Borough of Elmwood Park, Bergen County; In the Matter of the Tenure Hearing of (State Board)	1247
Burnside, Mr. and Mrs. Willie, on behalf of their minor son, R.B., et al. v. NJSIAA (Superior Court)	1695
Capalbo, Samuel C., School District of the Borough of Keansburg, Monmouth County; In the Matter of the Tenure Hearing of (State Board)	1909
Castaldo, Anthony, School District of the Union County Regional High School No. 1, Union County; In the Matter of the Tenure Hearing of (State Board)	768
Cedarville Teachers Association v. Board of Education of the Township of Lawrence, Cumberland County (Superior Court)	1910
Cicconetti, Victor R. v. Board of Education of the City of Long Branch, Monmouth County (Superior Court)	1912
Cinnaminson Teachers' Association et al. v. Board of Education of the Township of Cinnaminson, Burlington County (State Board)	1915
Cinnaminson Teachers' Association et al. v. Board of Education of the Township of Cinnaminson, Burlington County (Superior Court).	1916
Cohen, Michael J. v. Board of Education of the Township of East Brunswick, Middlesex County (Superior Court)	1918
Colavita, Michael S. v. Board of Education of the Township of Hillsborough, Somerset County (State Board)	1920
Colella, Wilma v. Board of Education of Elmwood Park, Bergen County (Superior Court)	1921
Cordasco, Angela v. Board of Education of the City of East Orange, Essex County (State Board)	1201
Deetz, Barry F., School District of the Village of Ridgewood, Bergen County; In the Matter of the Tenure Hearing of (State Board)	1923

You are viewing an archived copy from the New Jersey State Library.

PAGE

DiNardo, Margaret B. v. Board of Education of Jersey City, Hudson County (State Board)..... 135

Doyle, Robert E., School District of the Township of Pemberton, Burlington County; In the Matter of the Tenure Hearing of (State Board)..... 383

Earl, David, School District of the City of Trenton, Mercer County; In the Matter of the Tenure Hearing of (State Board)..... 310

Edison Township Education Association v. Board of Education of the Township of Edison, Middlesex County (State Board)..... 1085

Edison Township Education Association et al. v. Board of Education of the Township of Edison, Middlesex County (State Board)..... 1930

Fair Lawn, Bergen County, Board of Education of the Borough of Education of the Borough of; Marilyn A. Bailey and Louise Orlando (State Board)..... 1165

Figurelli, Jennifer C. v. Board of Education of the City of Jersey City, Hudson County (State Board)..... 1319

Fischbach, Peter v. Board of Education of the Township of North Bergen, Hudson County (State Board)..... 1931

Flanagan, James J. v. Board of Education of the City of Camden, Camden County (State Board)..... 1932

Fodor, Zolton J., School District of the Township of Green Brook, Somerset County; In the Matter of the Tenure Hearing of (State Board)..... 297

Furst, Michael v. Board of Education of the Township of Rockaway, Morris County (State Board)..... 892

Gibson, Daniel v. Board of Education of the City of Newark, Essex County (State Board)..... 483

Improta, Ferdinand A. v. Board of Education of the Township of Weehawken, Hudson County (Superior Court)..... 1937

Irvington Education Association and Jeanne Donadio v. Board of Education of the Town of Irvington, Essex County (Superior Court)..... 1939

Ivan, Lawrence, and Thomas Murray v. Board of Education of the Princeton Regional School District et al., Mercer County (Superior Court)..... 1945

Johnson, Jerry M. v. Board of Education of the Township of Piscataway, Middlesex County (State Board)..... 1949

You are viewing an archived copy from the New Jersey State Library.

PAGE

Kendall, Lovell v. Board of Education of the City of Camden, Camden County (Superior Court)..... 1950

Kulik, Ronald S. v. Board of Education of the Town of Montclair, Essex County (State Board)..... 1953

Lennon, Gertrude (Trudy), School District of the Borough of Spotswood, Middlesex County (State Board)..... 1954

Lingelbach, Karen v. Board of Education of the Borough of Hopatcong, Sussex County (State Board)..... 1955

Lukas, Barbara, et al. v. State of New Jersey, Department of Human Services et al. (Superior Court)..... 1960

Martin, Donald, School District of the City of Asbury Park, Monmouth County; In the Matter of the Tenure Hearing of: Donald Martin v. Board of Education of the City of Asbury Park, Monmouth County (State Board)..... 1962

Matawan Regional Teachers Association et al. v. Board of Education of the Matawan-Aberdeen Regional School District, Monmouth County (State Board)..... 1963

McClelland, George, School District of the Township of Washington, Mercer County; In the Matter of the Tenure Hearing of (Superior Court)..... 1964

McMahan, Billy, School District of the City of Bridgeton, Cumberland County; In the Matter of the Tenure Hearing of (State Board).... 228

Meli, Yvonne v. Board of Education of the Burlington County Vocational-Technical School, Burlington County (State Board)..... 921

Miles, Janet D. v. Board of Education of the Borough of Watchung, Somerset County (State Board)..... 1072

Mirabello, Glory v. Board of Education of the Township of Rochelle Park, Bergen County (State Board)..... 1967

Miscia, Kenneth v. Board of Education of the Township of East Hanover, Morris County (State Board)..... 1971

Mishkin, Lois v. Board of Education of the Borough of Mountainside, Union County (Superior Court)..... 1975

Montville Township Education Association and Montville Township Educational Secretaries Association v. Board of Education of the Township of Montville, Morris County (State Board)..... 559

You are viewing an archived copy from the New Jersey State Library.

PAGE

Myhren, Dale v. Board of Education of the Borough of Edgewater, Bergen County (State Board)..... 268

Newark, Essex County, Board of Education of the City of v. Edgar Brown and Oliver Brown (State Board)..... 684

Newark, Essex County, Board of Education of the City of v. Ruth Levitt and Esther E. Sasloe (Superior Court)..... 1977

New Milford Education Association et al. v. Board of Education of the Borough of New Milford, Bergen County (Superior Court)..... 1984

Nogaki, Douglas, School District of the Borough of New Milford, Bergen County; In the Matter of the Tenure Hearing of (State Board).... 1986

Nolan, Joan R., School District of the Borough of Merchantville, Camden County; In the Matter of the Tenure Hearing of (Superior Court)..... 1991

North Plainfield Education Association et al. v. Board of Education of the Borough of North Plainfield, Somerset County (Supreme Court)..... 1997

O'Hara, Mary Alice, School District of the Camden County Vocational-Technical School, Camden County; In the Matter of the Tenure Hearing of (State Board)..... 2002

O'Toole, Annette v. Larry Forestal et al. (State Board)..... 332

Pasquale, Anthony, School District of the City of Elizabeth, Union County; In the Matter of the Tenure Hearing of (State Board).... 34

Pellechio, Carmine, School District of the Township of North Bergen, Hudson County; In the Matter of the Tenure Hearing of (Superior Court)..... 2003

Roberts, Frank, et al. v. Board of Education of the Hudson County Area Vocational-Technical School District, Hudson County (State Board)..... 1026

Rooney, Etta, et al. v. Board of Education of the Borough of Upper Saddle River, Bergen County (Superior Court)..... 2004

Rowley, Donald, School District of Manalapan-Englishtown Regional, Monmouth County; In the Matter of the Tenure Hearing of (State Board)..... 2006

Rudolph-Nachtman, Evelyn, and Robert Herbert v. Board of Education of Middletown, Monmouth County (State Board)..... 2009

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PAGE

Santarsiero, Thomas J., et al. v. Board of Education of Parsippany-Troy Hills, Morris County (State Board)..... 880

Scarpignato, Anthony J., School District of the Borough of Edgewater, Bergen County; In the Matter of the Tenure Hearing of (Superior Court)..... 2013

Schmidt, Edward, and Robert Laib v. Board of Education of the Borough of New Providence, Union County (Superior Court)..... 2015

Schmidt, Robert v. Board of Education of the Township of Weehawken, Hudson County (Superior Court)..... 2018

Schmidt, Robert v. Board of Education of the Township of Weehawken, Hudson County (Superior Court on Remand)..... 597

Shelko, Lois v. Board of Education of the Mercer County Special Services School District, Mercer County (Supreme Court)..... 2023

Still, Walter Jr. v. Board of Education of the Township of Cherry Hill, Camden County (Superior Court)..... 2035

Tanelli, Orazio, School District of the Town of Montclair, Essex County; In the Matter of the Tenure Hearing of (Superior Court). 2038

Tenney, Alan S., School District of the Borough of Palisades Park, Bergen County; In the Matter of the Tenure Hearing of (State Board)..... 2042

Tiefenbacher, Thomas, School District of the City of East Orange, Essex County; In the Matter of the Tenure Hearing of (State Board)..... 2043

Verost, William T., School District of the Village of Ridgewood, Bergen County; In the Matter of the Tenure Hearing of (Superior Court)..... 2047

Weigand, Edward C. v. Board of Education of the Township of Marlboro, Monmouth County (State Board)..... 549

Zorfass, Sheri v. Board of Education of the Township of Cherry Hill, Camden County (State Board)..... 2048

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INITIAL DECISION
OAL DKT. NO. EDU 6879-83
(OAL DKT NO. EDU 8438-81 ON REMAND)
AGENCY DKT. NO. 439-11/81A

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,
Petitioners,

v.

ANTHONY PASQUALE,
Respondent.

APPEARANCES:

Raymond D. O'Brien, Esq., for petitioner
(O'Brien, Liotta & Mandel, attorneys)

Sanford R. Oxfeld, Esq., for respondent
(Rothbard, Harris & Oxfeld, attorneys)

Record Closed: Octobert 14, 1983 **Decided: November 22, 1983**

BEFORE **JAMES A. OSPENSON,** ALJ:

On November 2, 1981, the Board of Education of the City of Elizabeth, Union County, certified to the Commissioner of the Department of Education tenure charges of unbecoming conduct against Anthony Pasquale, pursuant to N.J.S.A. 18A:6-10 et seq. in that at, on or about September 1981 and subsequent or previous thereto, respondent sexually assaulted young male students at Winfield Scott School no. 2. Respondent was suspended without pay. The incidents alleged were several in number during the period 1980-81.

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Following respondent's answer in general denial with affirmative defenses, the Commissioner of the Department of Education transmitted the matter to the Office of Administrative Law on December 1, 1981 for hearing and determination as a contested case in accordance with N.J.S.A. 52:14F-1 et seq. After hearing, an Initial Decision was rendered by the administrative law judge on May 24, 1983. In a Decision dated July 8, 1983, the Commissioner remanded the matter to the Office of Administrative Law on September 6, 1983 for more detailed findings of fact together with conclusions based upon each of the alleged incidents of unbecoming conduct. Jurisdiction was retained by the Commissioner.

This present matter under OAL DKT. no. EDU 6879-83, therefore, is on remand by the Commissioner of Education of OAL DKT. no. EDU 8438-81 for the purpose expressed. No further hearings were conducted; no further evidence was adduced.

EVIDENCE AT HEARING

Shirley Hicks, testifying for the Board, said she was employed as a classroom aide in Winfield Scott School no. 2 beginning April 1976 and was so employed during the 1980-81 school year. In the year 1979-80, she was classroom aide in respondent's class. Her duties in respondent's class were to assist him and to help the children. Beginning in September 1980, she said, respondent had seven pupils. A typical day would entail her helping children read or play puzzles. Each pupil, she said, had his own individual desk, separated from the others by a cubicle box or partition. She described the classroom, room no. 19, as a basement with full windows looking out the front side of the building on a corner of Madison Avenue. At front of the room, on the Madison Avenue side, there was a cubicle for each child. The door was opposite the windows. Respondent's desk was at the left as one entered the room. There was a long table in front of respondent's desk and another near the door. A color TV set was to the right as one entered the room, positioned on a tall stand. During lunch hour, when respondent had a

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half hour, she would customarily stay with the children basically to baby-sit them. The children were multiply handicapped, which to her meant learning disabilities. Some were emotional, she said, some were disruptive and could not learn quickly.

On one occasion in the morning during the fall 1980, when her back was turned, she said she looked back and saw one child, a twin, aged five years, sitting on respondent's lap. She saw respondent's face was red. His hands were down into the child's pants. He got up and Hicks noticed he had an erection. She said she knew something was wrong. She had seen respondent's hand, from his knuckles up, inside the child's pants. She said she was embarrassed and upset. She saw respondent push the child away and get up. The child had been sitting on respondent's lap, facing away from him. She could not say whether respondent's hands were moving or not. (The above refers to incident no. 1).

On another occasion later in the fall 1980, Hicks testified, just after lunch she saw a pupil, B.T., in his cubicle, which was last on the left at the corner of the building. Hicks described the cubicle like a box or partition with a desk for each child. The partition was about five feet high. Hicks, five feet seven and one quarter inches tall, said she could see over it. When pupils sit in their cubicles, they face Madison Avenue, with their backs to the classroom. On that occasion, said Hicks, she saw respondent in the cubicle with B.T. Hicks said she walked back and forth giving help to other children. After 10 or 15 minutes, she said, respondent got up from his chair in B.T.'s cubicle and had an obvious erection. B.T. then came out from the cubicle, Hicks said, and she noticed his zipper was open. Hicks had seen B.T. sitting on respondent's lap; and respondent was whispering to the child.

Later, Hicks asked B.T. in the boys' room if respondent had touched him. B.T. replied "no." When asked why his pants were unzipped, according to Hicks, B.T. said first he did not know then added, he could not say because respondent would get mad. (Incident no. 2).

After the twin incident (incident no. 1), Hicks said, she left the room and told Principal Hawkins after Mrs. Akins had suggest she do so.

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Hicks said she never saw respondent teaching by drawing numbers or letters on the children's bodies, or touching them, or undressing them. She said she saw respondent with erections some four to five times that year. Each time, she said, he had a boy on his lap.

When asked why she left respondent's class, Hicks testified she simply didn't like what was going on in the class. She felt she could not do anything about what was going on. She asked Dr. Mattingly, director of special education, to be moved. She said she did not want to stay in the same classroom with respondent, with whom she said she did not get along. They disagreed about how to discipline the children, and Hicks felt she was disparaged by respondent in front of the children, conduct she said she resented. She repeated, however, she did not like the fact she saw respondent with erections four or more times that year.

On cross-examination, Hicks said she observed respondent would on occasion play with the children, tickle them and put them on his lap. She conceded she had first asked for a change in assignment before she first saw respondent acting improperly. She said never saw respondent teaching the children to dress or undress during the time she was there. She repeated she saw respondent's hands inside the twins' pants (incident no. 1), that is, his fingers down to the knuckles inside the pants. She repeated she spoke of the B.T. incident to the principal, after she took B.T. to the bathroom, and suggested the principal view matters for himself. She presumed the principal did so. She said she never told or confronted respondent with her concerns because she was too embarrassed to do so. She told Mrs. Akins because Akins was, like herself, a woman. She told Principal Hawkins because he was principal.

On redirect examination, Hicks said there was a second incident regarding B.T. that occurred later in the fall 1980 (incident no. 3). She saw B.T. standing at respondent's desk, where he remained for about five minutes. She was at a long table nearby. Respondent, she said, had an erection, although she did not observe respondent's hands in the child's pants.

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Enrique Mojica, called by the Board, testified he was employed by the Board for the past six years. For two years he was custodian at Lafayette Middle School. After he got his black seal license as engineer of boilers, he was assigned to School no. 23 for two years. For the past two years he was assigned at Winfield Scott School no. 2, where he arrived about September 1980. There he was head custodian, there being two other custodians, and he presently, since 1981, has been assigned to the high school. His duties as head custodian at school no. 2 in 1980-81, he said, were to oversee the heating plant, to cut grass, to clean rooms and to supervise the other two custodians. He would usually arrive each day for work at 7:00 a.m. and leave at 4:00 p.m. He said he is familiar with classroom no. 19 where respondent was assigned because he cleaned it. The room is approximately 21 feet by 16 feet. His duties included bringing morning milk for the nine or ten children assigned to respondent's classroom. At the same time, he said, he would check all bottom levels of the school for unauthorized persons. He knew both Mrs. Taylor and Mrs. Hicks as aides in September 1980, when respondent first came to the school. He said he helped respondent set up classroom no. 19 but, he said, respondent put up the cubicles by himself. He knew some of respondent's pupils by name and knew the twins but could not tell them apart.

Mojica testified he saw respondent do something was with A, one of the twins. Mojica entered the classroom to see respondent seated at his desk. A, a tall child about 10 years old, was standing right next to him, crying. He was facing respondent. Mojica thought A acted as if he didn't want anything do with respondent. From a distance of about 16 feet, Mojica said, he saw respondent rub "right down in A's penis area" several times, outside the pants. Mrs. Taylor was present. The lighting was okay, according to Mojica. He did not do anything about what he saw, said Mojica, giving respondent the benefit of his doubts. (By stipulation incident no. 6 occurred in the spring of 1981).

On another occasion in the spring 1981, Mojica while sweeping the hallway was called by Mrs. Taylor to come watch what was happening in the classroom. In Mojica's mind, she looked shocked. From the door of classroom no. 19, Mojica said, he saw respondent with one of the twins sitting in his lap. Respondent was rubbing the child's

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penis area, outside the pants. Mojica said he was shocked. Mrs. Taylor was with him then. Respondent was seated next to the TV, which was on. Other children were in the room. Mojica watched this action for several minutes. He noticed the twin had an erection. He too was shocked, he said. He said Mrs. Taylor saw the occurrence.

Mojica said he did not try to stop respondent, although he said he thought he should have done so. He went back to work but the incident kept bothering him. He was afraid no one would believe the word of a janitor about the conduct of a teacher. After discussing the matter with his wife, who, he said, told him to do what was right, he went two days later to Principal Hawkins and told him about the incident. Mojica said he felt like grabbing respondent and beating him up because he, Mojica, had children of his own. He was shocked. Because he knew respondent's wife, he said, when he saw her sometime later in front of the building he told her what he had seen. He said she did not appear shocked (incident no. 7).

On cross-examination, Mojica repeated the incident involving the twin occurred in the front of the TV while other children were in a semicircle on the floor around it. Luz Munoz, the aide at the time, was not there; at least, Mojica said, he did not see her. The twin was seated on respondent's lap with one of the child's leg on each side of respondent's legs. Respondent was rubbing the child's penis outside his pants. The twin was lying back on respondent's chest watching TV. Mojica said he watched for 3, 4 or perhaps 5 minutes. The time was just after 2:00 p.m. Mojica said he spoke to the principal about the incident two days later. He realized, he said, he was jeopardizing respondent's job by reporting the incident to the principal. He repeated he spoke to respondent's wife about the incident a month or so later. He repeated Mrs. Taylor seemed to have gone out of her way to get him to come observe respondent's action. When he did so, Mrs. Taylor was behind him, he said. He was shocked and said he could not believe what he had seen.

Shown his statement to police, Mojica said he did not mention the incident involving A (incident no. 6) because the police did not ask him. He reported in that police statement only the incident involving the twin (incident no. 7).

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On redirect examination, Mojica repeated respondent's wife did not seem shocked when he told her what he had seen. He was confronted with his police statement (R-9) in which his words were "she seemed upset and felt bad." Mojica said again he thought for two days about his job, respondent's job and the pupils. He wondered whether anyone would believe him. He reported what he had seen to the principal because he thought it his sworn duty. He said he would not want his own child in respondent's class. Mojica was confronted with his deposition testimony that included his statement that it was a frequent event for respondent to have children on his lap. Mojica said he saw respondent do that frequently and affectionately touch the children. The incidents with A and the twin, however, he said, were not "affection."

Gwendolyn Taylor, called by the Board, testified she is married with seven children and was employed by the Elizabeth Board since September 1980 at Winfield Scott School no. 2 as a teacher's aide. Her salary was minimum wage; her hours were 8:00 a.m. to 3:00 p.m. Beginning in September 1980 she was assigned to assist in kindergarten class located on the ground floor or basement. She worked in that assignment from September 1980 to January 1981. Next to the kindergarten class was the art room; next to it was classroom no. 19, respondent's class. In January 1981, she said, she transferred to respondent's class. Most of her own children, she said, were at school no. 2; her five year old son was in another teacher's kindergarten class; another son, who is handicapped, also attended the school. None of her children were in respondent's class. She assisted in respondent's class in June 1981. In the second or third week of September 1981 she again came to respondent's class, where she stayed until the second or third week of October 1981. Generally, she said, she liked respondent and his teaching. She had no disagreements with him. She said she saw respondent personally teaching the children their letters and numbers. He would have them at his desk. She said he was very affectionate with them and she observed him on occasion tickling, hugging and whispering to them. She saw him tickle their chests and stomachs; she could not say whether he was drawing letters or numbers.

In the period from January 1981 to June 1981, she said, she never saw respondent

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teaching the children to dress or undress except she did observe his teaching them to button shirts or tie and untie shoes. But during the period September 1981 to October 1981, she said she saw respondent help dress and undress the boys down to their underwear in their cubicles. Respondent, she said, had a desk behind a partition. She too, she said, helped dress or undress children but not down to their underwear, rather only taking their shirts off.

On one occasion (incident no. 10), on a morning in September 1981, Taylor said she saw respondent playing with a little boy's penis. Respondent was teaching the boy, H, to undress. The incident occurred by the window next to his desk in a cubicle near the TV set, which was on. Taylor said respondent could tell her footsteps so she took her shoes off and went to the other side. She saw respondent playing with H's penis but, she said, she did not actual see the penis, rather only respondent's hands inside H's white undershorts. The child had an undershirt on. Taylor observed this for a few seconds from a distance of about 15 to 20 feet away. Respondent was facing to her right; H was facing respondent. She did not know which hand respondent used but said she saw it inside the child's underwear "up to respondent's wrist." Though there was a desk between her and them, she said her vision was not obstructed. She could hear no conversation. After respondent dressed H, they came out of the cubicle. Taylor said she took her shoes off because she wanted to observe what respondent was doing, that is, to see if he was doing "what he was doing last year." When respondent exited the cubicle, she said, she noticed nothing else unusual about him.

After that incident, at a time still in September 1981, she testified, when the children were being taught to dress and undress themselves, she saw respondent in a cubicle with either child H or O. Respondent took the two boys to the library and, Taylor said, when he returned he was "swollen", that is, his penis was swollen - he had an erection (incident no. 11).

Taylor said she reported the first incident (incident no. 10) to Principal Hawkins but did not report the other incident (incident no. 11).

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Taylor described classroom no. 19 as having eight cubicles along the Madison Avenue wall. There was a door on the inside wall. There was a TV set. Inside the room to the left was a large seven by two foot cabinet. Next was a counter one foot high, then a sink, a refrigerator and some shelves. In front of the sink was respondent's desk and a cube, or cubicle. Along the East Jersey Street wall, she said, were mailboxes or shelves under windows covered with waxed paper. There were low, long tables for the children near the TV set and two tables in the middle of the room, one of which was near respondent's desk. There was a jungle gym. Taylor would usually work at the table near respondent's desk.

Taylor recalled an incident (incident no. 4) in February 1981, early in the morning, with S, who was a pupil between January and June of 1981. S entered the classroom. Respondent was there but Luz Munoz, an aide, was not present at the time. Taylor left the room, she said, but came back to observe S and respondent talking. She said she saw respondent's hand on S's penis on the outside of the boy's pants. Respondent was seated at his desk; S was standing between respondent's legs. She made the observation from about six feet away. She could see all of them except their feet because, she said, that desk and tables were between them and her. She could see the front of S. Respondent had his hands on the front of S's pants at the zipper in his penis area. She observed them, she said, for about half a minute. Taylor said she spoke up: "Mr. Pasquale;" whereupon, she said, respondent dropped his hands and replied: "Yes, Mrs. Taylor?"

Taylor said she then went upstairs and told Principal Hawkins but, she said, she did not know what he did about the matter.

Another incident (incident no. 7) occurred on an afternoon in June 1981 with two of the children, the twins. Taylor said respondent asked her to take down some bulletins outside the classroom. Respondent and children in the class were seated in a semicircle before the TV set. On her return she said she saw respondent seated

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with the two boys, one at his leg and one sitting on his lap. Respondent, she said, had his hand inside one of the boy's zippers. At the time she was in the hallway looking through the window of the door, which though closed she could see through. She was about 10 feet away. Specifically, she said, respondent's fingers were inside the zipper; she could see his hand but did not recall which hand. Taylor said motioned to the janitor, Mojica, who was nearby, saying "Sh-h-h-h-h-h-h." He came over to the doorway and he looked inside. Taylor said she shied away and would not look anymore. Taylor said she said nothing, nor did Mojica say anything. He looked, she said, for about three minutes at what was going on. She thought Mojica opened the door to say something to respondent and they may have had a conversation. Later in the day, she said, she told Mojica to report it.

Taylor testified to another incident (incident no. 5) involving a pupil, J, at some time in spring 1981. Taylor was giving J a lesson near respondent's desk. Another pupil, A was with respondent in respondent's cubicle. Respondent, she said, was giving "affection." At this, Taylor said, J got mad and said "I know what he's [respondent] doing. He's playing pussy." Taylor said she replied, "Don't say that." Taylor said A told her, "No one will believe me." She asked A later what he meant. Taylor herself did not know what A meant. She said she could not at the time of the incident see into the cubicle, nor, indeed, see anything of respondent except the top of his head. She could see A, who was about four feet tall, standing but could only see his head. Respondent and A were facing each other or, at least, she said, respondent was trying to get A to face him.

Another incident that occurred near the end of school in the 1980-81 year (incident no.8), according to Taylor, occurred when respondent told her he had taken J home with him. Respondent said he had written a note to J's mother. J told respondent, in Taylor's presence that his mother would not let him come to respondent's home.

On cross examination concerning incident no. 11, when respondent took two boys to the library, Taylor said she noticed no touching but did notice respondent had an erection. Transcript, June 2, 1982, 91-24 to 92-21.

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Taylor said she helped the children dress and undress, both boys and girls. Respondent did not help any of the girls, only the boys. Taylor said he did not attempt to hide the fact of his helping children dress and undress. The procedures were done openly and not in a secretive manner. She said she believed respondent thought this was something he should teach multiply handicapped students.

Confronted with her deposition testimony about incident no. 10, Taylor acknowledged she had not mentioned taking off her shoes to observe respondent. She just forgot that circumstance at deposition; but, she insisted, she did take off her shoes. She denied that anyone had prepped her to change her testimony at hearing. Again, in her deposition testimony she said she saw respondent's hands outside of the child's pants but, she said, she actually saw respondent's hands inside the boy's pants.

Concerning the incident with pupil S (incident no. 4), Taylor said she saw respondent's hands at S's penis area. His hands were not moving or rubbing. She saw the act for about half a second. She said she went to Principal Hawkins immediately and later to Mrs. Hicks. She did not approach respondent to ask why he did what she saw.

Concerning incident no. 7 involving the twins, Taylor was confronted with her deposition testimony, which was to the affect then she saw both boys on respondent's lap. She said that was not accurate. One boy only was on his lap, the other was next to him. She said she saw respondent's hand inside the boy's zipper, which was opened.

The deposition testimony of Dina Miller was admitted into evidence by consent of the parties. She testified she was employed by the Elizabeth Board for the past three years as a speech therapist. She said on Monday, September 28, 1981 she was in the library annex during the afternoon session with one of respondent's students, whom she was testing. Respondent entered the library, she said, holding two pupils, each by the hand. Respondent went to a side room where the bilingual teacher usually was. She was not there at the time, however, Miller said. Respondent walked in the room and said "Sh-h-h-h, Sh-h-h-h." Miller wondered why he took the boys into the room. He was there

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about 2 or 3 minutes. She could not see what was going on in the room. Respondent then closed the door. Miller thought that strange. When Miller took the child she was testing back to his class, she told Mrs. Taylor, respondent's aide, that respondent was in a room in the downstairs library. Taylor seemed shocked, Miller said. Miller then went to Principal Hawkins' office, because she felt there was no reason for respondent to be in the room with two children. Miller said she had heard from other members of the faculty respondent had allegedly touched students in their private parts. She thought that might have been going on and that was why she reported to the principal. She admitted, however, she never saw respondent touch a student in any way she thought untoward. She never saw him have an erection while in proximity to a pupil. She neither saw what occurred in the room that day nor did she ever learn since what happened there. [Incident no. 11].

The deposition of Mary Hill was admitted into evidence by consent. Hill, a Title I teacher, was employed by the Board for ten years. The day before school closed in June 1981, she said, she was proctoring the class of a kindergarten teacher who was absent for the day. When she got to the class, a kindergarten class, respondent was already there. When she received a phone call from the office to go upstairs she told an aide, Mrs. Taylor, she could not stay in room alone, even though respondent, a certified teacher, was present. She said respondent asked her if she did not trust him. Her reply was she didn't think about it. When she returned, she saw Mrs. Taylor sitting at the teacher's desk in the kindergarten. She sat down beside her. She saw respondent about seven feet away, sitting on a kindergarten chair with the twins, one on each knee, and "they were masturbating furiously, both of them. It was like a fantasy. . ." She said they were sliding back and forth on respondent's legs. They were not touching their own penises, nor was respondent touching them. [Incident no. 9].

Hill was sure respondent had not heard her enter the room and did not know she was there. She felt what she saw was a terrible thing. She was stunned. She did not know if respondent had an erection or whether the pupils did. She knew they were masturbating. She turned to Mrs. Taylor and asked "What should I do?" She said Taylor replied that she had reported an incident the day before (incident no. 7). When respondent heard her voice, he stood up and the children fell off his lap.

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Michelle Pasquale, respondent's wife, testified she was presently working as a substitute teacher at Summit Child Care Center. Before that she was a fifth grade teacher employed by the Elizabeth Board for one year in the 1980-81 school year. Her position was terminated in a reduction in force. She holds instructional certificates in nursery, elementary, and teacher of the handicapped fields.

Mrs. Pasquale testified she was acquainted with Enrique Mojica, head custodian in school no. 2. He once told her, she said, he would like to go out with her if she wasn't married. During 1980-81, her year of employment, she said he never approached her concerning respondent's behavior. On September 1 or 2 in the 1981-82 school year, however, she said, Mojica approached her at school no. 2 in respondent's new classroom. She recalled in the conversation she told him she was pregnant and he seemed pleased. Mojica said he had something to tell her and would tell her on Friday. He said he didn't want to hurt her. Mrs. Pasquale said she was curious. Later that day, becoming more curious, she asked Mojica what he wanted to tell her. Mojica said he saw respondent doing something to boys last year. He motioned in a brushing stroke across his pants over the zipper and fly. He said he thought he saw respondent brushing the boys like that but didn't say respondent touched them. Mrs. Pasquale asked if Mojica was sure and he replied he was. Mrs. Pasquale asked what she should say to respondent and Mojica suggested she talk to him. Mojica said he had talked about the matter to Principal Hawkins in June but did not know what had been done about it. Mojica said he loved them both and would like to go with her if she were not married. Mrs. Pasquale was very surprised at Mojica's statement. She did not think he would have had the nerve to say what he said. She denied she ever told Mojica, as he had testified, that this was not the first time such incidents had happened.

Mrs. Pasquale knew J, one of respondent's students who once on respondent's invitation had stayed at their home in the spring of the year with permission of J's mother. There were family activities at their home, she said; J seemed happy, but he became sick and had to be taken home. There was nothing irregular concerning respondent's relationship with J, she said.

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After testifying generally concerning his background, respondent said his vision is such that he could see the children in his class most of the time. He used his ears and hands, particularly, in his teaching method. He could hear what pupils were doing in their cubicles. Across the room, he would know by the sound of a desk moving what child moved it. Generally, he said, he was able to know without seeing because of his ability to hear more acutely. The children in his class were multiply handicapped, that is, with two or more impairments. His pupils were classified officially and assigned to him for the entire day but could leave for social phasing like art or gym without other children. Some children stayed in his classroom for more than one year, though this was not considered staying back. In his transfer from school no. 20 to school no. 2, for 1980-81, he said, he took some pupils with him. He needed a teacher's aide in his class, he said, because the class limit was eight. He requested one to help him in their reading. Luz Munoz was a bilingual aide who helped work with Spanish students. She was with him for 1980-81.

Concerning the twins, respondent said they first came in November 1980 when they were not then classified. He first saw them crying in the principal's office. He spoke to their kindergarten teacher and asked if he could help. He was just getting the bilingual aide and suggested to Principal Hawkins his offer, which was approved. See R-19. Respondent felt he made considerable headway with the twins. They stopped crying and learned colors, shapes and began talking in fluent English. His technique in stopping their crying was to use affection, self-assurance and self-affirmation. He taught them to relax because they seemed scared stiff of school. The twins seemed to him to have a visual memory disability. Accordingly, he used his "tactile method" on the children by writing with his fingers on their stomachs. He tried writing on their shirts but they did not appear to feel it. He tried on their skin, which they enjoyed. He denied he ever touched their private parts. The bilingual aide, Munoz, said respondent, never spoke to him or commented that he was touching his pupils' private parts. To encourage the twins, he said, he would hug them. He would whisper to them, he said, so as not to disturb others in class. He was never given any negative comment in evaluations about his hugging technique. Exhibits R-20, 21, 22 and 23 were observations and performance reports in 1980 and 1981 that demonstrated absence of criticism in that respect.

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Concerning taking pupils home, respondent said he had taken several children home with permission of their parents. Pupil J stayed with him once after his marriage to Mrs. Pasquale. His mother consented. Since that one time, respondent said, J's mother had not consented again, that is, she never returned to respondent signed permission slips. J, he said, frequently pestered him to be invited to his home.

Respondent said he first met Mrs. Hicks in September 1980. He had not known her at school no. 3 or school no. 20 before then. He walked into class one day and found her there as his teacher's aide. She seemed resentful, he said, in having to leave Mrs. Akins, the teacher she formerly worked with. Her attitude portrayed her resentment: she was sharp, cold and uncooperative to him, recalled respondent. He denied ever criticizing her in front of the class except when he had to stop her doing something bad. She came from a trainable retarded child class of age about 10. Respondent's children, he said, were multiply handicapped and different teaching methods therefore had to be used. She appeared adverse to the children, respondent said, the reason being, he felt, that he had a method and environment or structure established in such a way any change would break down the structure and the children would take advantage of the breakdown.

Respondent said Hicks testified she saw the twins on his lap in the afternoon. Respondent said that was not possible because the twins came in the morning. (Being of Puerto Rican extraction, the bilingual aide Munoz worked with them.) Respondent said Hicks saw his hand in their pants. He said probably he was tucking in their shirts because he tried to keep them neat. He did not recall experiencing an erection. He said he did not intentionally put his hand on their penises.

Concerning Hicks' testimony about incident no. 2 late in November or early December 1980, respondent recalled the incident because B.T. was learning three numbers 9-6-11. B.T. was, in respondent's opinion, extremely distractable. In recalling the incident, respondent did not recall if B.T.'s zipper was open and did not recall if had an erection.

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Concerning incident no. 3, also involving B.T., in which Hicks testified respondent's hand was inside the child's zipper, respondent did not recall that incident.

Concerning Enrique Mojica, he first met him before school started in 1980. Throughout the year, respondent said, Mojica would give him a broom or a shovel and ask for help in sweeping out the room. He would collect garbage. Mojica told respondent his problems about his wife and girl friend. Respondent said he tried to make Mojica feel good because he liked to be macho. Mojica appeared jealous of respondent for his talent in carpentry, since respondent could do carpentry work as well as Mojica.

Respondent described A as child who would cry constantly and who needed a lot of affection. Educably retarded, he started in the class when bilingual aide Munoz started. In the spring about May 1981 (incident no. 6), respondent said, he was teaching the children to make picture frames and was trying to get the kids cleaned up. A was upset. Respondent was trying to brush sawdust off A and to comfort him at the same time. In brushing the front of A's pants, respondent said, Mojica saw him in the process of so doing. The touching was innocent, and respondent denied touching A's penis or putting his hand into his pants. He gave the front of A's pants a dozen or two rubs, he said.

Respondent said he recalled the incident of the twins watching TV (incident no. 7). One twin, D, was on his lap, wearing white shorts and a green or blue short sleeve shirt. The children were in a C-shaped circle about the TV set. The other twin, O, said respondent, was not in the room at the time at all. He was in kindergarten. Respondent said he could tell the twins apart. D was the more sensitive and needed more affection or physical affirmation. Respondent said he recollected the incident very well and could even recall the color of the clothes D wore. Respondent said it would have been difficult for Mojica to see, as he claimed, respondent rubbing the twin because the kids were big not small, he said. The letter "M" in a circle on a diagram (R-24, 25) indicated where Mojica was standing. The door to the classroom was opened. Mrs. Taylor was at position "BB." Neither Mojica nor Taylor said anything to respondent that day, he said. He and the

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children were watching the Electric Company on TV. Respondent said it was possible he had his hand on the twins' lap. He denied intentionally putting his hand in the child's pants. The child wore pants with an elastic waist but without any zipper. Respondent denied he put his hand in the top of the pants or that he had touched the penis of either twin at any time in 1980-81.

Respondent said he may have turned lights out in the classroom at nap time but denied ever having turned off the lights for any illicit purpose. After the TV show, respondent said, Mrs. Taylor came into the classroom but made no comment. Mojica came in later to get the garbage after the kids went home. In February, respondent said, Mrs. Taylor asked if he would work with her son, K. J, her other son, would come in to see him sometimes with a note. K was classified; J was not.

Concerning Taylor's testimony about H undressing (incident no. 10), respondent said the teaching of dressing and undressing was instituted when he began teaching. The idea came from his Kean College class and was to promote learning self-help skills. The articles removed in undressing were shirt, top shirt, shoes and pants but not T-shirt or underpants. Respondent said the administration knew of his practice because it was set down in his plan book. There was no attempt by him to hide the practice because he had a chart of skills being taught that included dressing and undressing. He said he taught H to dress and undress since it was on H's individual education plan, put there by the child study team. He denied pulling H's underpants or putting his hand inside them but, he said, sometimes his hand would inadvertently go into the underpants in the attempt at showing H what to do. H never complained, respondent said.[1] Concerning Taylor's testimony about S (incident no. 4), respondent said S was Mrs. Kerr's pupil, who left the class when bilingual aide Munoz left the class. Both were there but S never was there alone, without the aide. To Mrs. Taylor's testimony respondent's hand was on the outside of S's pants by his penis, respondent said it was possible his hand could have been there. S was an unkempt child usually in shambles. Respondent said he could have been putting S together and could have put his hand in the front of his pants to check his zipper.

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1 Transcript, June 8, 1982, pps. 119-6 to 119-8 and 126-16 to 126-21; and see footnote 2, infra.

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Concerning incident no. 11 and Mrs. Taylor's testimony respondent was observed having an erection while going to the library with two boys, respondent said he remembered that day. He had lost a table and was looking for it. A black boy, whose name respondent did not know, needed help in his dressing and he asked Mrs. Taylor to help him snap up his shirt. Respondent said he couldn't remember having an erection. In walking through the library, respondent went with two boys to the ESL room, where he found the tables. The door was closed. Respondent denied anything improper and denied touching the boys except to hold their hands.

Concerning incident no. 5 and Mrs. Taylor's testimony about a child's statement to her that respondent was in A's cubicle "playing pussy," respondent said he remembered the incident having occurred in late May or early June 1981. Respondent said he was trying to get A to do his work and trying to settle him down. Another child, J, was reading with Mrs. Taylor. It was J who made the remark about "playing pussy with A." Respondent said he told J to do his work. Respondent said J often used the word "pussy" and knew what it meant. Respondent said he was merely trying to hold A's arms at the waist but denied touching A's penis.

Called by respondent, Luz Munoz, age 25 years, testified she is married with no children and has been resident in this country since 1974, when she emigrated from Puerto Rico. She said she was presently employed elsewhere and not by the Elizabeth Board. From November 1980 to April 1981, she said, she was employed by the Board as a bilingual teacher aide assigned to Winfield Scott School no. 2. During that time, she was assigned to respondent's class in the morning five days a week. In the afternoons, she was assigned to classes of other teachers. Shown R-3, a photograph of the twins, she said she knew them; they came to respondent's class after she did. At first, she said, the twins did not speak at all, cried frequently, were very quiet and sad. Respondent handled the twins by being affectionate but strict with them. He tried to instill confidence in them. They began to respond and improve, she said, and they began to learn their numbers and to talk more often. She said respondent showed them affection by going to them individually and hugging and holding them.

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Concerning charges against respondent, she said, when she heard of them she was shocked and surprised. She never thought the charges could be true. She admired respondent because he was strict but fair. She knew Mrs. Hicks and Mrs. Taylor, teacher aides like herself. She never saw respondent insult or yell at them in front of students. Though others said respondent had erections after hugging the twins or other students on his lap, Munoz said, she never saw that. She never saw respondent wear tight jeans, rather only a suit. She never saw respondent with B, a pupil, with an open zipper nor, indeed, did she either see that with any other boy. She said she never saw respondent's hand on the penis of any child. She saw respondent hugging children but she never saw respondent hugging B.

She identified Exhibits R-4 and R-5 as depicting herself teaching the twins their numbers. She said respondent would write numbers on the bare skin of the belly of the twins in order to teach them numbers. Their shirts were pulled up. She did not know if respondent did that with other pupils. She never saw respondent put his hand inside a shirt. Though he taught pupils to dress and undress, she said, he also taught them tohang up their coats and to zipper their coats.

Munoz said she knew Mojica, who frequently talked to her but who, she said, would talk to most everyone. He would talk about his wife, with whom he said he did not get along well.

On cross examination, Munoz said she is not certified as a teacher but speaks both English and Spanish. She said she saw respondent hug children and talk to them but that was all. She never saw them on respondent's lap. She never saw respondent in cubicles with the children. She said respondent was a very concerned teacher whom she admired more than others. She said she never saw respondent in his cubicle, which was next to his desk, with a student. She said respondent was like a father to all children, especially the twins who had no father. The change in the twins' attitude was noticeable by March or February 1981; they were different children by then.

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Recalled on direct examination on the fourth hearing day, respondent testified (concerning incident no. 8), J wanted to come to respondent's home because he knew he was being promoted to an older class and respondent wouldn't see him anymore. Respondent tried to talk J out of it because he knew J's mother would not approve. He wrote a permission slip home to his mother anyway, but J brought it back saying his mother had refused permission. Respondent said J.'s mother never gave him a reason for refusal after the first occasion when J visited his home and became sick. Respondent said he never touched J improperly in any way.

Concerning incident no. 9 which occurred on June 19, 1981, a Friday, last day of school, respondent said he was looking for a ride at end of the half day school schedule. He heard Mrs. Hill was in the kindergarten, Mrs. Hill being a certified compensatory education teacher. Respondent, who was looking for Mrs. Olsen, was told by Mrs. Hill that Mrs. Olsen was absent. Respondent said he stayed and played with the twins, who were disruptive and he succeeded in settling them down. The time was just after 10:30 A.M. Respondent suggested to Mrs. Hill he would stay while she answered the phone from the office. Mrs. Taylor, an aide, was there. He continued to play with the children there. There were several, girls and boys. They did horsey rides while respondent was seated on a children's chair. When Mrs. Hill returned, the children got off his lap. Respondent left to find a ride and so he said goodbye to the children. He gave them a hug. Concerning Mrs. Hill's statement the children were holding on to legs, rubbing back and forth and "masturbating," respondent said that was not so. The children just stopped playing. He never dropped them.

Respondent said he did not know whether the children were masturbating. He said he did not think they were masturbating. He denied touching them in the area of their penises. He said Mrs. Taylor made no comment to him nor did she say anything at all to him. Respondent said what she testified to was a "non-incident." He said he probably had played with the twin like that before.

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Generally, he said, he had never touched the children in the penis area for sexual purposes. He said he may have touched those areas but did not do so intentionally. He denied ever so touching B.T., as charged in incidents nos. 2 and 3. He said it was possible he could have touched B.T. on the zipper to check to see if it were open.

Concerning incident 4, respondent said he never touched S to achieve sexual arousal. He may have touched him, he said, to make sure his zipper was zipped. Concerning incidents nos. 5, 6 and 8, respondent denied he ever touched J or A in the penis area to get sexual gratification. He said he possibly may have touched A to check his zipper, but he never touched J.

Concerning incidents nos. 10 and 11, respondent denied touching H or O for sexual gratification. He said he could have touched their genital areas, however, to check their clothing after they went to the bathroom after they dressed and undressed, or after they had put on their shirts.

Respondent recalled an occasion when he spoke with Dr. Jane Mattingly concerning placement of the twins in his class. Dr. Mattingly, he said, was coordinator of special services. She came to his room and told him other special education teachers had complained he was working with nonclassified children like D and O. Respondent said other teachers could not do anything with the twins. Respondent was doing so to help and his help was okayed by the principal. He said Dr. Mattingly said she was responsible for the boys' safety. She asked respondent to stop but respondent replied he would have to think about it and get back to her. Afterwards, he said, he went to Principal Hawkins and asked if Dr. Mattingly was responsible for the children in his class. According to respondent, Hawkins replied no. Respondent asked Hawkins if he should continue his efforts and was told that if progress was being made, then to continue.

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Respondent said he is a strongly religious person. Concerning the charges in general, he said he would never do such things. Such things were morally wrong. Respondent said he is a moral person.

Beginning cross examination, on the fifth day of hearing, respondent said he first began working with handicapped children, those visually handicapped, the deaf, the retarded, and those said to be autistic, when he was a student at the then Newark State Teachers' College. His college majors were in the areas of teacher of general elementary and teacher of the handicapped. He felt he had to prove himself, to himself.

Concerning classroom no. 19 at Winfield Scott School no. 2, respondent said he made bookcases with sliding doors, cubicles, mailboxes, games, educational materials and restored a jungle gym. The new cubicles, he said, were about three feet by four feet, in which there was room for a desk, a chair and a box.

He said it was very possible he had put a child on his lap while in a cubicle but, he said, he didn't remember ever doing it. In his deposition, he conceded, he had testified a child would sit on top of him.

Concerning teaching methods, respondent said he had used the tactile or touch method, the kinesthetic method of touch and motion, and the auditory as well as the visual methods. With one autistic child, for example, respondent said he used the tactile method and found it best. His most prevalent method was use of "love," or a combination of all his skills. He felt he was adept in teaching skills. In the case of J, whose classification was neurologically impaired and emotionally disturbed, respondent said he tried to input to J to control himself from emotional outbursts by using love, care and affection, and by working at one task at a time and so to build from there. For J, respondent said, he followed the individual educational plan prepared by the child study

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team, the teacher and the parent. The plan left respondent certain lattitude from which he developed a more detailed plan. His teaching tools were, for example, the reward system and a multi-sensory system using affection and love. For B, respondent said, he used the same multi-sensory system with rewards and love. He was working on his numbers. J showed progress, respondent said, by learning to work for hours, to read at a second grade level, and to sit, work and be responsible.

Asked about incident no. 2 involving B, when Mrs. Hicks testified she observed respondent with an erection, respondent said "I don't remember having an erection." Concerning incident no. 1, respondent said he did not recall it at all: "Thus I don't remember the incident happening."

Asked about a conversation with Principal Hawkins on June 19, 1981, respondent said Hawkins entered the classroom and spoke to him. Hawkins said some people had said respondent was finagling with children. Respondent said Hawkins said to stop doing it but not to worry if he had not done such things. Hawkins stayed about five minutes and left. Respondent did not recall what he had replied to Hawkins. In September 1981, respondent said, Hawkins told him a teacher had seen respondent with two boys coming out of the boys' room. Respondent said Hawkins said for his own protection not to dress or undress the boys. Respondent did not recall what he replied to Hawkins, except that respondent's impression was Hawkins wanted to stay out of the situation.

Asked about incident no. 11, respondent said he did not recall having had an erection that day: that is, he said, "It wasn't something I took notice of."

Concerning incident no. 10, respondent said he did not touch H's penis intentionally. As a matter of fact, he said, he did not touch it at all, even unintentionally. He said he would take H's hand and perhaps his shirt and with his other hand would show him how to tuck his shirt into his pants. He did that often until H learned how to do it, he said.

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Asked whether there had been complaints lodged against him for touching children, respondent said there was an investigation of an incident in 1973, as a result of which he was asked to stay home with pay. Nothing official was ever done, however, he said.

Respondent said "behavior modification" is a teaching method he employs to stop bad behavior and start good behavior. He uses rewards like poker chips, which could be cashed in to buy prizes. He learned the method from his practice teaching.

Concerning his attributes as a teacher, respondent said he could tell the feelings of a child by touching. God gave him a gift to tell by touching if a child was happy or not. God gave him a gift to see by touch. By touching he can tell a child's emotion. He made judgments by touch.

Recalled by the Board, Enrique Mojica denied he had ever said he wanted to go out with Mrs. Pasquale. He said he had chatted with her on occasion concerning his troubles with his wife. They sometimes discussed their respective marital situations.

Mojica said the door to classroom no. 19 could be locked from the inside. All doors though constructed to be locked only from the outside could sometimes be locked from the inside by half-shooting the bolt by key from the outside. Mojica said respondent showed him that method, which he did not know until then.

Albert Hawkins, Jr., principal of Winfield Scott School no. 2, who was then completing his sixth year in the post, testified respondent's class in classroom 19 was for multiply handicapped children. He was aware respondent had some in his class not so classified. He knew of the twins, who were delivered to respondent's class on a regular basis. Spanish speaking, they were upset and would cry frequently. Respondent would

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come to his office, see the twins crying and would talk to them. Respondent asked Hawkins if the twins could stay with him in his class. Hawkins said he agreed initially because respondent appeared to calm the twins. Hawkins said he saw respondent hugging the twins in his office. He never saw them sitting on respondent's lap, nor, he said, did he ever observe that with other children. One reason he gave permission, Hawkins said, was that respondent had a bilingual aide in the class. In any event, he said, he was initially satisfied with the way respondent handled the twins. Later, he said, he found out the twins were in respondent's class when he did not know about it. Hawkins said he told their teacher to keep them in class. They seemed to be making adjustment. The twins' teacher told Hawkins respondent would come to classroom no. 20 to get the twins, however. As to that practice, Hawkins said he told the teacher not to let respondent do that.

Respondent was first assigned to classroom no. 2 on the first or main floor. His classroom assignment was changed to classroom no. 19 when respondent said he did not want to be in the basement near the art class, activities of which appeared to disturb respondent.

Hawkins said classrooms 19 and 2 could in reality be locked and unlocked from the inside. The intent at the school was to have the doors lockable by key from the outside and unlockable from the inside. During the school year 1980-81, Hawkins said, he observed respondent in classroom no. 19 with the door locked on more than one occasion. On one of those occasions, he said, a pupil was in the classroom with respondent. Hawkins said he did not think anything of it at the time.

Concerning incident no. 2, Hawkins said he first received a report of the incident from Mrs. Hicks, who said she saw respondent in a cubicle with a child sitting on his lap when respondent stood up, Mrs. Hicks reported to Hawkins, she observed respondent had an erection. She told him she saw respondent in the cubicle with the child, whose zipper was opened. She said she saw respondent touching the boy in the penis area. Hawkins went down to the classroom to see respondent but saw nothing untoward. Mrs. Hicks, Hawkins said, wanted to transfer away from respondent's class.

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Mrs. Taylor next came to Hawkins to complain about the same kind of behavior by respondent. She told him respondent once had the twins on his knees while they were rotating their bodies on or against his knees. Hawkins said he never saw respondent do anything improper. He had observed respondent on occasion when respondent would often not know Hawkins was there.

Mr. Mojica complained to Hawkins about respondent's conduct. Hawkins said Mojica said he saw respondent doing the same things as others had described. Mojica at least twice complained to Hawkins about the conduct. The first occasion was in the latter part of the school year, when Mojica told Hawkins it made him sick to his stomach and "turned him off."

Mrs. Miller, the speech teacher, told Hawkins respondent once went to the library with two boys and closed the door. Respondent told the boys "Sh-h-h-h, be quiet." Miller told him she was not surprised at this because at the time they were a lot of rumors about respondent and she had heard aides discussing them.

After Mojica's report, Hawkins said, he had a conference with respondent about it. Mojica's report was the final straw, according to Hawkins, so he asked respondent to see him in his office, where they talked. The time was an afternoon in the latter part of the school year. Hawkins said he confronted respondent with the reports and asked whether it was true he had been fooling with the boys. Respondent said no but, in Hawkins' view, respondent did not appear to get excited about the assertions. Hawkins told respondent if the rumors were not true, don't worry; if the rumors were true, stop the conduct. Respondent told Hawkins that he had been accused once before but gave no further details. Hawkins told respondent to be careful. There had been, he said, clear and vivid descriptions of respondent's conduct by others to him.

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Concerning the cubicles in respondent's classroom, Hawkins said respondent told him they were used to separate active students from the others. Hawkins said he never told respondent to use them, but in September 1981 he decided to let respondent use them in classroom no. 2 because by then, the cubicles were being built by respondent.

Respondent said he once had a discussion with the father of B.T., who demanded B.T. be removed from respondent's class because, as was said, the parent felt respondent was not teaching B.T. anything. There was complaint about the cubicles in the classroom, the parent expressing the opinion he did not like his child being separated from the rest of the class. He also felt the behavior modification theory of rewards was "meaningless."

Hawkins said after his conference in June 1981 with respondent, following reports to him by Mrs. Hicks, Mrs. Taylor and finally Mojica, he reported the matter to Rocco Colelli, superintendent of schools. The superintendent advised him to have a conference with respondent. At that time nothing was put in writing. In September 1981 Mrs. Miller and Mrs. Taylor approached Hawkins concerning their observations of respondent (incident no. 10). Hawkins said he spoke at length to respondent a second time concerning incident no. 11. The incident involved respondent's taking two boys to the library. Hawkins said he was not completely satisfied with respondent's explanation of the incident at the time. Respondent's reasons for taking the boys to the library, said Hawkins, were not kosher.

Concerning another incident regarding an open zipper on a boy's pants, respondent told Hawkins the IEP specified the child should be taught to dress and undress. Hawkins told respondent not to do that kind of activity and not to demonstrate taking pants on and off. Hawkins said respondent told him he was upset about their conference the previous June. Hawkins said he replied that respondent should not let rumors take on substance by putting oneself in positions that could be misconstrued. Hawkins said he did not believe respondent's explanations but had no proofs otherwise. It was at this time respondent told Hawkins he had been accused once before in school no. 5 over similar matters.

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Called by the Board, Dr. Jane Mattingly testified she was coordinator of special education in the district since 1979. In November 1980, she said, Principal Hawkins spoke to her concerning reports to him by Mrs. Hicks to the effect that respondent had erections in class involving B.T. Dr. Mattingly did not do anything at that time herself and was concerned that Mrs. Hicks could have misinterpreted the situation because there had been friction between her and respondent over her classroom role and over adminstration of medicine to one of the pupils. Later, she said, she recommended Mrs. Hicks be transferred away from respondent's classroom.

She said she had not assigned the twins, who were unclassified, to respondent's class. After learning they were in respondent's classroom in early 1981, she spoke to respondent about it. As a result of conference, she said she gave her assent to their remaining in the class temporarily. Dr. Mattingly said she observed respondent officially as a teacher in January 1981. Exhibit R-22. She identified her performance report on respondent's work in Exhibit R-23, dated May 27, 1981.

Dr. Mattingly said she never saw children on respondent's lap and never saw him hugging or tickling the children or writing on their bellies or bare skin. In any event, such in her view was not an accepted pedagogical teaching method. And certainly, she said, it was not an appropriate part of what is known as the tactile method.

SUPPLEMENTARY FINDINGS OF FACT

Based on the foregoing, having heard testimony of the witnesses and having reviewed the exhibits in evidence, I make the following supplementary findings of fact:

1. On an occasion in fall 1980 with a child seated on his lap, respondent touched the child with his hands inside the child's clothing and became visibly sexually aroused (erection).

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2. On another occasion in fall 1980, with a child seated on his lap in a cubicle, respondent experienced obvious sexual arousal (erection) and the child was observed leaving respondent's lap with his zipper open.

3. On another occasion in fall 1980, after working closely with a child at respondent's desk, respondent was observed in a state of sexual arousal (erection).

4. On an occasion in February 1981 when teacher aides were not in the classroom, respondent, with a child standing between his legs, touched the child's penis area, outside his clothing, for about half a minute, dropping his hands when addressed by a returning aide. The aide reported the incident to the principal.

5. On an occasion in spring 1981, respondent, with a child in respondent's cubicle, was giving "affection," characterized by another pupil as "playing pussy."

6. On an occasion in spring 1981, respondent touched and rubbed a child, who was crying, in the child's genital area, outside his clothing.

7. On an occasion in spring 1981, respondent, with a child on his lap, repeatedly rubbed the child's genital area, outside his clothing, the child becoming sexually aroused (erection). The incident was reported to the principal.

8. There is no probative significance in evidence relating to incident no. 8.

9. There is no probative significance in evidence relating to incident no. 9.

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10. On an occasion in fall 1981 in a cubicle, respondent touched a child's genital area inside his clothing and played with the child's penis, while ostensibly teaching the child to dress and undress.

11. On an occasion in Fall 1981, respondent was observed in an obvious state of tumescence upon returning from the library where he had been alone in a side room with two boys. An aide reported the incident to the principal.

12. The several children involved in incidents hereinabove not being of legal age, no inference is drawn herein from evidence they were silent about respondent's touching them as found nor from absence of Board evidence of express non-consent to such contact.[2]

CONCLUSION

Except as modified or supplemented herein, I hereby **RE-AFFIRM** conclusions stated in the Initial Decision of May 24, 1983 under OAL DKT. No. EDU 8438-81, for reasons expressed therein including, specifically, that finding respondent guilty of unbecoming teacher conduct and that ordering respondent removed from his tenured employment position as a member of the teaching staff of the school district of the City of Elizabeth, Union County, as of date of certification of tenure charges on November 2, 1981.

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2 Children of the age of those involved herein, that is, are in my view incompetent to consent to unlawful or improper touching of their persons and by their silence cannot, therefore, be considered to have given tacit consent thereto. The standard parallels N.J.S.A. 2C:2-10. But see I/M/O Ziobro, 1983 S.L.D. — (September 28, 1983), in which an administrative law judge's findings of unbecoming teacher conduct based on pupil testimony were reversed by the Commissioner principally because on review of the record he found their failure promptly to report offensive teacher conduct rendered their testimony "unreliable" (slip opinion at 29-31).

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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 22, 1983
DATE

James A. Ospenson
JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

11/23/83
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

Nov. 28, 1983
DATE

Ronald J. Rubin
FOR OFFICE OF ADMINISTRATIVE LAW

js

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IN THE MATTER OF THE TENURE :
HEARING OF ANTHONY PASQUALE, :
SCHOOL DISTRICT OF THE CITY OF :
ELIZABETH, UNION COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

The Commissioner has reviewed the record in the instant matter as well as the initial decision rendered by the administrative law judge. The Commissioner notes that respondent has filed exceptions to the initial decision in a timely manner pursuant to the provisions of N.J.A.C. 1:1-16.4a, b, and c. The Board urges the Commissioner to accept the findings and recommendations of the judge. Reply exceptions entered by the Board were untimely.

Before considering the exceptions filed herein and rendering his determination, the Commissioner notes that this matter is before him pursuant to a remand dated July 8, 1983 which held as follows:

> "In the Commissioner's judgment, the incidents enumerated herein in which respondent has been charged with unbecoming conduct have not been fully developed by the judge to the extent that they formulate the basis for those conclusions and recommendations contained in the initial decision.
>
> "It is apparent that an extensive record has been developed in the instant matter. However, before the Commissioner renders a final determination regarding the sufficiency of the Board's charges and further determines what penalty, if any, should be imposed upon respondent, it is clear that both the testimony and the documentation with respect to the separate incidents in support of such charges must be included in a more detailed finding of fact by the judge together with his conclusions based upon each of the alleged incidents of unbecoming conduct.
>
> "The Commissioner further finds that the ALJ fails to provide a sufficient factual basis to explain why he reached the conclusion rendered herein in the face of what was obviously conflicting testimony as indicated by the record. Notwithstanding the ALJ's dismissal of the relevancy of certain conflicting testimony, the Commissioner reserves the right to be apprised of and review said testimony on his own.

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"Accordingly, this matter is hereby remanded to the Office of Administrative Law for the reasons set forth above. The Commissioner retains jurisdiction in the instant matter."

In reviewing the instant decision, the Commissioner notes that the ALJ has set forth in detail his findings of fact which led him to the conclusions as rendered in the initial decision of May 24, 1983. The Commissioner further notes that respondent's exceptions allege that the judge completely failed to point out that the Commissioner would not accept his original conclusions.

Respondent further contends that the judge by virtue of the five-months' lapse between remand and decision on remand demonstrated he had lost familiarity with the factual content of the case in question. Respondent thereupon proceeds to chronicle what are in his view a series of misstatements of facts and conclusions unsupported by facts. Said contentions are hereby incorporated into the record by reference.

Ultimately, it is contended by respondent that the judge failed to demonstrate or set forth what conduct constituted conduct unbecoming a teacher. It is respondent's contention that whatever admission made by him relative to what the judge considered sexually motivated touching were, in fact, merely the necessary ministrations of a totally blind teacher's attempt to "*** see to it that his children had their shirts tucked in their pants or their zippers zipped ***." (Respondent's Exceptions, at p. 13) Further, respondent alleges that the judge's decision is barren of reference to his almost total blindness.

Upon review of said exceptions, the Commissioner finds them to be totally lacking in credibility. While admitting to the touching incidents as set forth in the record, respondent's rationalization that they were the result of his desire to assure that his pupils were not in a state of dishabille would strain the credibility of the most gullible and accepting persons. The Commissioner cannot classify himself as such. Even were one to accept arguendo the validity of respondent's allegations as to misstatements of fact as alleged in the exceptions, there is a sufficiency of credible evidence on the record by respondent's own admission to justify the findings and conclusions that his actions constituted unbecoming conduct sufficient to direct his dismissal from the Elizabeth Public Schools.

Consequently, and in light of the findings above, the Commissioner affirms the findings and conclusions of the judge and adopts them as his own. Respondent, having been found guilty of conduct unbecoming a teacher, is hereby removed from his tenured employment as a teaching staff member of the school district of the City of Elizabeth as of the date of the certification of charges on November 2, 1981.

JANUARY 9, 1984 COMMISSIONER OF EDUCATION

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IN THE MATTER OF THE TENURE	:	
HEARING OF ANTHONY PASQUALE,	:	STATE BOARD OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF ELIZABETH, UNION COUNTY,	:	
	:	

Decided by the Commissioner of Education, January 9, 1984

For the Respondent-Appellant, Oxfeld, Cohen and Blunda
(Sanford R. Oxfeld, Esq., of Counsel)

For the Petitioner-Respondent, O'Brien, Liotta and Mandel
(Raymond D. O'Brien, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein, with the modification that Respondent-Appellant is dismissed from his position as of January 9, 1984, the date of the Commissioner's decision in this matter.

This modification is mandated by N.J.S.A. 18A:6-14, which provides that if determination of charges is not made by the Commissioner within 120 calendar days after certification of charges, such person shall be paid beginning on the 121st day until such determination is made. See Pietrunti v. Bd. of Ed. of Brick Twp., 128 N.J. Super. 149 (App. Div.), cert. denied 419 U.S. 1057 (1974).

While the State Board recognizes its statutory responsibility to modify the Commissioner's decision in this case, it is extremely frustrated that it is required to do so where charges of sexual assaults on young students have been sustained. The State Board emphasizes its belief that, although the most stringent penalty permissible under the statute is being imposed, such penalty is not adequate in light of the offenses in this case.

September 5, 1984

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 9692-82

AGENCY DKT. NO. 384-9/82A

BOUND BROOK BOARD OF EDUCATION,

Petitioner

v

EDITH TRAUTWEIN,

Respondent.

APPEARANCES:

William P. Westling, Esq., for petitioner (Westling, Lime & Welchman, attorneys)

Stephen E. Klausner, Esq., for the respondent (Klausner & Hunter, attorneys)

Record Closed: September 30, 1983 Decided: November 15, 1983

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

The Bound Brook Board of Education (Board) certified five charges under the Tenure Hearing Law, N.J.S.A. 18A:6-10 et seq. as filed with it by the superintendent of schools and the Board president, to the Commissioner of Education for determination against Edith Trautwein (respondent), a teacher with a tenure status in its employ. After the Commissioner transferred the matter to the Office of Administrative Law as a contested case under N.J.S.A. 52:14F-1 et seq., a prehearing conference, discovery, and a written denial of respondent's motion to dismiss the charges as a matter of law followed. The matter then proceeded to plenary hearing the week commencing March 21, 1983, at the Edison Township Municipal Building. At the conclusion of the Board's case on March 23, 1983, respondent moved to dismiss the charges for the asserted failure of the

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Board to carry its initial burden of proof. An initial decision, attached hereto and incorporated herein as if set forth in full, was issued which recommended to the Commissioner that four of the five charges against respondent be dismissed. (see Bound Brook Board of Education v. Edith Trautwein, OAL DKT. NO. EDU 9692-82 (April 4, 1983).) The Commissioner affirmed dismissal of three of the four charges, but remanded for respondent to enter a defense to two charges. (see In the Matter of the Tenure Hearing of Edith Trautwein, School District of the Borough of Bound Brook, Somerset County, OAL DKT. EDU 9692-82, affirmed in part, reversed in part, Comm. of Ed. (May 19, 1983).)

Accordingly, respondent was required to defend against the following two charges of the original five certified against her.

Charge One

1. On or about February 1976, the Board adopted Absence Review Procedure, reproduced Exhibit "A" in the accompanying Statement of Evidence, and made a part hereof.

2. Edith Trautwein has been employed by the District since 1964. As of April 19 and July 26, 1976, when the Board voted to withhold her salary increment for the 1976-77 school year because of excessive absenteeism, Edith Trautwein had been absent a total of 238 1/2 days. See "Absences By Edith Trautwein 1964-82," reproduced as Exhibit "B" in the accompanying Statement of Evidence, and made a part hereof. See, also, p. 3 of Exhibit "C," infra. The decision by the Board to withhold Edith Trautwein's 1976-77 increment was sustained on April 8, 1980, by the Appellate Division of the Superior Court. See opinion reproduced as Exhibit "C" in the accompanying Statement of Evidence, and made a part of hereof.

3. Notwithstanding that Edith Trautwein thus knew or had reason to know the consequences of excessive absenteeism, she has, nonetheless, been absent for 71 days from her classroom since September 1, 1976; 37 times (exclusive of five consecutive days for illness) since September 1, 1979, when she reached the top step of the District Salary Guide.

4. Edith Trautwein has been absent an average of 17.2 days per year over the past 18 years. Her rate of absenteeism is about the three times the average rate for District teachers.

   Edith Trautwein's continuous, excessive absenteeism constitutes conduct unbecoming a teacher or is other good

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cause to terminate the employment of Edith Trautwein or to reduce her salary.

Charge Two

1. On or about February 4, 1981, the Board voted to reinstate a pupil to class, effective February 5, 1981, following an administrative suspension, and pending a hearing before the Board scheduled for February 11, 1981. The Board took this action pursuant to its exclusive responsibility and obligation to impose suspension and reinstatement of the students according to law. See N.J.S.A. 18A:37-1 et seq.

2. Edith Trautwein, in her capacity as President of the Bound Brook Education Association (B.B.E.A.) and as a tenure teacher employed in the District thereupon counseled, led, aided, abetted and participated in a one-day walkout or strike by the teacher-employees of the District on Friday, February 6, 1981.

3. On the morning of February 6, 1981, the Board delivered two letters to Edith Trautwein. The first letter, Exhibit "B," is from the Superintendent and Board President and responded to the B.B.E.A.'s decision to call the one-day strike or walkout, and stated the Board's position on the matter. The second letter, Exhibit "D-1" referred to the pertinent provisions of the collective bargaining agreement between the B.B.E.A. and the Board, and directed Edith Trautwein "to disavow the strike of February 6, 1981 in writing and notify the strikers to return to work. Such disavowal is expected immediately." Edith Trautwein did not disavow the strike and did not notify the strikers to return to work.

4. The one-day strike received extensive local publicity as is evidenced by Exhibit "E" in the accompanying Statement of Evidence, and made a part hereof.

   Edith Trautwein's conduct in counseling, leading, aiding, abetting and participating in the one-day strike or walkout, and in failing to disavow the strike or to use her position as President of the B.B.E.A. to prevent or terminate such strike before the end of the school day on February 6, 1981 constitutes conduct unbecoming a teacher or other good cause to terminate the employment of Edith Trautwein, or to reduce her salary because such conduct:

   (a) Was insubordinate;

   (b) Was contrary to law;

   (c) Was designed to coerce and pressure the Board in a disciplinary proceeding contrary to the due process rights of the Board and the student involved;

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(d) Was intended to impair public confidence in the administration, management and conduct of school affairs in the District;

(e) Fomented controversy, conflict in dissention;

(f) Interfered with the lawful duties of the Board and the administration;

(g) Was subversive of the discipline and morale of the school system;

(h) Disrupted school services and education to the students in the District.

At the initial hearing in the matter, the Board established that it adopted an Absence Review Procedure which provides that:

> Any employee (10 to 12 month contract) who has an average absenteeism record in excess of one day per month for illness and temporary and personal leave absences (excluding approved professional improvement or visitation days) for three or more years, without evidence of a lengthy illness of five or more days duration which accounts for the absences, shall be required to present a physician's certificate for each subsequent absence.*** Tenure employees whose excessive absenteeism continues unabated will be referred to the superintendent who may arrange a hearing before the Board of Education to determine whether the excessive absenteeim and other deficiencies warrant withholidng of an increment, the certification of charges to the Commissioner of Education for dismissal under the tenure statutes, or other appropriate actions (P-2).

Under the terms of this policy, a 10-month employee who is absent for more than 30 days over a 3-year period, when none of the absences are five or more consecutive days, comes under scrutiny by the Board.

Respondent's absences since her employment by the Board in 1964 is as follows:

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School Year	No. of Days Absent
1964-65	7
1965-66	14
1966-67	7 1/2
1967-68	7
1968-69	7
1969-70	16
1970-71	13
1971-72	88
1972-73	23
1973-74	20
1974-75	23
1975-76	13
1976-77	9
1977-78	11
1978-79	9
1979-80	15
1980-81	16
1981-82	11
Total	309 1/2

Respondent's average absence per year between 1964-65 through 1981-82 is 17.2 days per year. Respondent is in violation of the Board's policy in respect of absences by her absence for more than 30 days within the past three years.

The Board's absence policy is its expression of concern over short-term absences of its teachers, as opposed to long-term absences due to illness or other similar kinds of emergencies. The Board views short-term absences, particularly those which are sporadic and on short notice, to be more disruptive of the educational program since little opportunity exists to secure carefully selected substitute teachers. In 1976, the Board withheld respondent's salary increment as the result of her asserted excessive absenteeism. Though respondent challenged that action in 1976, the Board's determination to withhold her increment was affirmed by the New Jersey Superior Court, Appellate

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Division (See Edith E. Trautwein v. Board of Education of the Borough of Bound Brook, A-2773-78, decided April 8, 1980) (P-5). The salary increment withheld from petitioner for 1976-77 was not restored to her until 1979-80 when she reached the maximum step of the Board's salary guide. Respondent's record of absences shows that in 1978-79, when her salary was one step less than the maximum, she was absent nine days. In the subsequent years, when respondent's salary was at maximum, her absences increased to 15, 16 and 11 days respectively.

During 1981-82, the superintendent registered concern with respondent in respect of her continued absenteeism. On March 8, 1982, the Board, at an executive session, determined that it would require respondent to appear before it on April 12, 1982 to explain her absences between April 1, 1979 through March 31, 1982. During that period, respondent was absent 43 days from her duties, five of which were consecutive days for personal illness. The later five days were not seen by the Board to be part of a violation of its absentee policy. However, the remaining 38 days of absences, taken for personal illness, family illness, and personal business were seen by the Board to be in violation of its absentee policy.

Respondent appeared on April 12, 1982 and explained to the Board her absences in question. Respondent explained that for each day absent due to personal illness, she was indeed ill. In respect of personal business absences, respondent explained that she was under subpoena to testify at Public Employee Relations Commission hearings. In respect of family illnesses, respondent explained her daughter suffered a sciatic nerve injury and was bedridden at home between April 1976 through January 1977. During that same period of time, respeondent explained her daughter was hospitalized on four different occasions. Respondent explained her daugther was treated with steriods which, in turn, required emergency surgery in the fall of 1976. Respondent explained to the Board that during the period of time in respect of her daughter's illness, her husband, mother-in-law, and her own sister assisted in taking care of her daughter. Respondent explained that when her mother-in-law retired and moved to Florida, coupled with her sister taking a new job, and her husband's employment duties being changed, she could no longer look to those persons for assistance and that as a result she, respondent, had to remain at home to care for her ill daughter.

The Board president, Dr. Joseph Vischetti, who testified before me, explained that he was not satisfied with respondent's explanations for her absences at that meeting.

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He determined that because of his perception respondent's absences were excessive, in light of the legitimacy and purpose of the Board policy in respect of attendance, that the Board, then and there, should certify charged against respondent to the Commissioner for determination and seek her removal from her employment with it. The nine member Board, however, informally determined by a vote of five to four, not to certify charges against respondent on April 12, 1982. Rather, the Board determined to cause its superintendent to issue respondent a severe letter of reprimand. The superintendent, by letter dated April 20, 1982, advised respondent as follows:

> As you know, teacher classroom attendance is one of the Board's primary concerns. You expressed to the Board how difficult it was for you to appear before the Board to explain why your absences are more than that of other teachers. You should know that it was just as difficult for the Board to retrace these matter with you, and it did so only because of the urgency of the issue.
>
> Some perspective is needed. You will agree, we are sure, that teacher absence from the classroom works in detriment to the education of our students and the student is equally deprived whether the absence is excused or not excused. From this viewpoint, it will be seen that while the Board is most sympathetic to the problems of a teacher who "must" be absent, it has an overriding duty to ensure attendance to the maximum degree possible. This was why our Absence Review Procedure was adopted and it is why the Board met with you on Monday, April 12th.
>
> In light of that meeting and the discussion which followed your presentation, the Board thinks these points should be fully understood. Of course, all absences — medical, family, personal -- should be fully documented.
>
> A. Personal illness
>
> 1. Where it appears you have a medical problem which persists, you should advise the Board of this fact in such steps as may be available to you to minimize its impact.
>
> 2. Document absences with a description of the illness on the signed sheet from the physican's office visit or other treatment center.
>
> B. Family illness
>
> 1. You should explore alternative measures to provide care at home and advise the Board of these efforts.

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2. Specific medical documentation should be provided for any future family illness requiring your absence.

Your absences during the past three years have been excessive under the Board's absence review procedure. However, in view of your appearance before the Board with assurances that your attendance should improve in the near future, the Board will reserve judgment on the matter at this time. Since your attendance record will remain under continuing Board review, it is imperative that you exert every means to obtain a much improved attendance record (P-9).

Between April 12, 1982, the date respondent explained her absences to the Board and the date a majority of the Board refused to certify tenure charges against her contrary to the recommendation of its president, respondent had no further absences through June 30, 1982, the close of the school year.

During May 1982 the issue of a community feedback form emerged in the Bound Brook schools. The superintendent and the Board were in favor of the form, while respondent took an opposite position. The superintendent chastised respondent for remarks attributable to her in a local newspaper under issue dated May 20, 1982. Respondent then expressed her views in a letter to the editor eventually published by the Newark Star Ledger. The publication of that letter and its contents formed the basis for one of the original charges. That charge was earlier dismissed on the grounds that the content of the published letter were within respondent's permissible area of speech under the First Amendment to the United States Constitution and under Article I, Paragraph 6, of the New Jersey Constitution. It was subsequent to the publication of respondent's letter to the editor in the Newark Star Ledger that the Board determined on September 20, 1983 to certify charges against her to the Commissioner including the charge of excessive absenteeism.

DISCUSSION AND FINDINGS ON CHARGE ONE

Respondent's average absences over the years of her employment is in excess of sick leave allowed persons holding employment in all local public school districts, N.J.S.A. 18A:30-2. But, the fact is that on April 12, 1982, respondent explained her more recent absences to the Board. Notwithstanding that respondent's absences exceeded the statutory number of sick days allowable, and the number of absences by respondent exceeded the Board's own policy, the Board on April 12, 1982, was content to cause its

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superintendent of schools to issue a letter of reprimand to respondent and to encourage her to improve her attendance.

It is clear that the superintendent issued the Board-directed letter of reprimand to respondent following the April 12, meeting and it is also clear that between April 12 through June 30, 1982, respondent's attendance must be seen to have improved for she missed no additional days. In fact, there is no evidence that even during the first month of September 1982, the beginning month of the next school year, respondent was absent on any occasion.

It must be recalled that the Board, contrary to the Board president's recommendation to it on April 12, 1982, determined that respondent's attendance record, presumably in light of her explanation to it, did not justify the certification of a charge in respect of excessive absenteeism against her. The Board president is clear and unequivocal in his testimony that he rejected respondent's explanation and he wanted to certify a tenure charge in respect of absenteeism against respondent on April 12, 1982. However, a majority of the Board disagreed with that position.

The only intervening event between April 12, 1982, when the Board majority determined not to accept the Board president's recommendation to certify tenure charges on absenteeism against respondent to September 20, 1982 when the Board majority determined to certify tenure charges in respect of attendance against respondent, was the publication of respondent's letter to the editor in the Newark Star Ledger on June 20, 1982. Had the letter to the editor not been published by the Newark Star Ledger, it is clear that the Board would not have certified the tenure charge in respect of attendance against respondent to the Commissioner.

CHARGE 2

By order of the Commissioner, respondent was required to defend against the allegations contained within Charge 2 as set forth above. It is recalled that the Board established at the initial hearing these facts. On or about Friday, January 23, 1981 a 16-year-old female pupil was suspended for five school days as the result of an incident which occurred between that pupil and her teacher. The basis for the suspension was that the school principal found the pupil to be in open defiance and disobedience of the teacher's authority, in respect of the pupil's physical confrontation with the teacher. The teacher,

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on January 30, 1981, submitted a written statement charging the particular pupil with assault under the provisions of N.J.S.A. 18A:37-2.1. The pupil was notified on or about January 30, 1981 that her suspension from regular school attendancewas to continue pending a Board hearing. The Board scheduled a hearing for the evening of February 4, 1981. The Board could not conduct a hearing that evening because of the unavailability of the teacher who alleged the assault to be present. Consequently, the Board, upon advice of counsel, determined that the pupil's suspension should not be continued in the absence of a hearing for that pupil. Accordingly, the Board determined on February 4, 1981 to terminate the pupil's suspension and readmit her to regular school attendance pending a hearing to be scheduled in the future.

The following day, February 5, 1981, the superintendent advised the entire staff of the action the Board had taken the previous evening in respect to the reinstatement of the supended pupil (P-12). The superintendent intended to squelch rumors he knew were circulating among staff members in respect of the discipline imposed upon the pupil and injuries inflicted upon the teacher. During the evening of February 5, 1981, there was a labor negotiating meeting between the Board's committee and the Association's committee in the Board's office building. The superintendent's office and the Board's office are housed in the same building which is located immediately across the street from the high school building. The superintendent is a member of the Board's negotiating committee. Respondent, as president of the Bound Brook Education Association, is a member of the Association's negotiating committee. As the superintendent was preparing for the scheduled negotiating session on the evening of February 5, 1981, respondent and a representative of the New Jersey Education Association (NJEA), the state-wide teachers association of which the Bound Brook Education Association is a part, approached him. Respondent handed the superintendent a document which advised him that the executive committee of the Association was to recommend the following morning at 7:15 a.m., February 6, 1981, that the membership fail to report to work "***as a show of protest against the Board in administration's inaction***" in respect of the pupil discipline (P-13). The NJEA representative advised the superintendent that if the pupil were reinstated to school, the teachers would "hit the bricks," or otherwise engage in a work stoppage, a collective withholding of services, or to put it plainly, go on strike. On the morning of February 6, 1981 as the teachers were meeting in a local cafe, the superintendent advised respondent, in writing, that as president of the Association, she was reminded that the proposed refusal to report to classes by the teachers would constitute a breach of the then existing Agreement between the Board and the

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Association and that he, the superintendent, considered such a breach to be distructive and wholly unacceptable. The superintendent also advised respondent that the Board had attempted to provide a hearing for the pupil on February 4 but because of the failure of the teacher to appear at the hearing, it had to be adjourned and was rescheduled for February 13, 1981.

When the teachers set up picket lines in front of the Board's office and in front of the high school, the superintendent instructed respondent, in writing, "***to disavow the strike *** and notify the strikers to return to work***" (P-15).

Because of the strike by teachers on February 6, the superintendent was obliged to send pupils home for the day at 8:40 a.m.; athletic events scheduled for the day had to be cancelled; physical damage was done to the building by way of broken windows and doors; and, at the elementary school level parents of pupils had to be contacted to retrieve their youngsters. The teachers ceased all picketing by 10:00 a.m.

Respondent, in her defense to the charge, explained that during the fall of 1979 school authorities instituted forms for teachers to report student assaults. Though teachers submitted such reports, no teacher was ever called to testify at any Board hearing in respect of student assaults. Some communication thereafter ensued between the Association and the Board, but in respondent's view, nothing was accomplished in respect of asserted student assaults. Respondent contends that by September 1981 discipline in the high school deteriorated and though teachers reported incidents to school authorities, nothing happened.

On January 23, 1981, respondent was requested by the school nurse to visit with the teacher allegedly assaulted by the pupil in an effort to calm the teacher down. The teacher, respondent claims, stated that the student kicked her in the chest and called her obscene names.

That evening, respondent visited the teacher at home and learned that the teacher had been to the doctor and that she was in pain and unable to talk. The following day, respondent, having heard that the pupil who was to have committed the assault was to return to school on January 30, visited the superintendent in the company of the NJEA representative. Though respondent said little at that meeting, the NJEA representative and the superintendent had a confrontation. The NJEA representative was demanding of

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the superintendent why the pupil was to be reinstated to school, while the superintendent was attempting to explain the affected teacher had not yet filed a charge against the student. It was at this meeting that the NJEA representative informed the superintendent that the teachers would "hit the bricks." This meeting was conducted under the belief that the student was to be reinstated to school on January 30, 1981. However, as the result of that meeting the student's suspension was continued until the Board afforded the pupil a hearing which was scheduled for February 4, 1981.

Respondent claims she, along with counsel, intended to attend the hearing of February 4 to explain to the Board why the affected teacher could not attend. Respondent did not attend that scheduled hearing, however, because, as she explains, the student's attorney advised that if she, respondent, appeared at the hearing in the absence of the teacher, he would claim that respondent was exerting undue influence upon the Board. The following day, February 5, 1981, the superintendent advised the staff the reasons why the scheduled pupil hearing was adjourned. Two teachers explained they were incensed that the pupil was to be reinstated without the Board first hearing evidence from the teacher against the pupil. These two teachers claimed they were so incensed over the reinstatement of the pupil that they voiced their displeasure to anyone who would listen. The displeasure soon spread throughout the corridors and classrooms of the high school where the incident occurred, and the displeasure subsequently reached the elementary school level.

A meeting of the Association executive committee was held the afternoon of February 5, 1981. Respondent says she did not call that meeting; the NJEA representative claims he did upon her request to him of what should be done. Thirteen executive committee members who attended agree that while respondent chaired the meeting and explained, from her point of view, what had occurred between the pupil and the teacher, she did not participate in a discussion nor did she advocate any course of action. If the teachers who testified before me in respect of respondent's conduct at the executive committee meetings and at the general membership meeting conducted the morning of February 6 are to be believed, respondent did nothing more than to call the meeting to order, explain what had occurred, and sat back and said nothing for the rest of the meeting. The question of the strike was not advocated by anyone in particular, according to the teachers, but was raised by many people. The executive meeting of the afternoon of February 5, according to respondent, was called as the result of an aroused membership

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which arousal was caused by her expressions of the asserted facts of the incident and as the NJEA representative understood what respondent told him.

On the morning of February 6, as the teachers met in a local cafe, respondent opened the meeting by explaining to the general membership the facts as she perceived them. Respondent contends that she thereafter did not participate in the substantive portion of the meeting. It was the membership, according to respondent, who demanded that services be withheld that day because of their sense of frustration. A vote was taken and the membership determined to strike.

There is no doubt that the Board had knowledge of respondent's conduct and participation in the February 6, 1981 incident since that date and there is no doubt it was also in possession of all evidence produced here in support of the charge. The superintendent, in explanation of the lapse of 18 months between February 6, 1981 through the actual filing date of the charges against respondent, explained that two events motivated him and the Board to resurrect the strike incident to be used as a charge against respondent. The superintendent explained that when respondent's letter to the editor appeared in the Newark Star Ledger on June 20 and the Board subsequently determined to use the content of that letter as a charge of unbecoming conduct against respondent, as well as the absentee charge, it also determined to bring a charge of unbecoming conduct against respondent for the events of February 6, 1981.

DISCUSSION AND FINDINGS ON CHARGE 2

I have had the opportunity to observe respondent as she testified and during the entire period of hearing. I am impressed with respondent's dynamic personality, and what I perceive to be a demonstrable capacity for persuading persons to her point of view. In fact, respondent was elected to the position of Association president by her colleagues presumably on the strength of her ability to mobilize many persons towards a common goal. It is doubtful that professional teachers would elect someone to such a prestigious position as President of their association who, in their minds, could not organize and lead effectively.

I am persuaded that respondent was instrumental in molding the form of the teachers' reaction in January-February 1981 to the asserted pupil assault upon the teacher. At the executive committee meeting on February 4, 1981 it was respondent who,

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by her own admission, explained the "facts" as she perceived them to the executive committee. Respondent's perception of the "facts" as she saw them is that a student assaulted a teacher. Those articulated "facts" more likely than not were that the student, regardless of the conduct of the affected teacher, was at fault and a convincing discipline was necessary to be imposed upon her by the Board.

Respondent, as president of the Association, in concert with the NJEA representative, dessiminated her perception of the asserted facts of the incident between the pupil and the teacher in a manner calculated to bring about a certain, undefined result which would demonstrate to the Board the present need to consider the Association more seriously in respect of pupil discipline. I do not find that respondent set out in a calculating fashion to encourage the membership to go on strike. However, the executive committee was called into session as the result of respondent's request for guidance from the NJEA representative. From that point forward, the evidence suggests that respondent, through her utterances in respect of the "facts," did not hinder the inexorable movement of the group towards drastic action. Of course, the concerted effort of the membership to withhold services was the result and that result, a strike by public employees, is unlawful.

Nonetheless, if the Board perceived respondent's conduct in respect of the February 6th strike to be so unlawful, so unbecoming, and so humiliating to the district that she alone must be held personally accountable, the obvious question is why the Board waited for 18 months before it elected to certify a charge against her in respect of that incident. The question has already been answered by the superintendent, reported earlier, that when the Board determined to certify a charge in respect of respondent's absences after it determined to certify a charge against respondent in respect of the content of her published letter to the editor, the Board then decided to include this charge against respondent.

DISCUSSION OF LAW

This case has finally become clear that notwithstanding respondent's participation in the teachers strike of February 6, 1981 and her absentee record during her employment with the Board, the Board itself did not consider respondent's conduct in either instance to be sufficiently egregious to file tenure charges against her until the Newark Star Ledger published her letter to the editor on June 20, 1982. In Mt. Healthy

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City Bd. of Ed. v. Doyle, 429 U.S. 274, 50 L. Ed. 2d 471 (1977), First Amendment limitations were recognized to be imposed upon the discretion of a local school board to refuse to rehire a non-tenured teacher. There, the school board had declined to renew Doyle's employment contract, in part because he had exercised his First Amendment rights. The Court, recognizing Doyle did not have tenure and could have been discharged for no reason whatever, held that Doyle could "***nonetheless establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedoms." 429 U.S., at 283-284, 50 L. Ed. 2d 471. The Court further held that once Doyle had shown "that his conduct was constitutionally protected, and that this conduct was a 'substantial factor'*** in the Board's decision not to rehire him***" the school board was obliged to show "by a preponderence of the evidence that it would have reached the same decision as to respondent's re-employment even in the absence of the protected conduct." Id. at 287, 50 L. Ed. 2d 471. See also Board of Education, Island Trees Union Free School District No. 26 v. Steven A. Pico, ___ U.S. ___, 73 L.Ed. 2d. 435, 449 (1982).

Here, this Board was in possession of all relevant evidence in respect of respondent's conduct concerning the events surrounding the February 6, 1981 incident since that date. Since April 12, 1982, when it required respondent to explain her absences, it was in possession of all relevant evidence in respect of her attendance record on that date. Yet, in neither case did the Board deem respondent's conduct of February 6 or her attendance record, individually or collectively, sufficiently serious to warrant the certification of charges against her. Clearly, the only event which followed April 12, 1982 which can be seen to be the motiviating factor surrounding the Board's determination to certify each of the charges against respondent is the publication of her letter to the editor in the Newark Star Ledger on July 20, 1982. Had that letter not been published, it is clear that respondent, absent some other breach of expected conduct, would not have been the subject of tenure charges brought primarily by the superintendent and the Board president.

Accordingly, the conclusion I must reach, under the evidence of record, is that the Board is attempting to discipline respondent, by way of the extreme sanction of termination of her tenured employment, because of her exercise of constitutionally protected speech through the publication of her letter to the editor in the Star Ledger. This being so, regardless of the merits of respondent's conduct leading to the stike on February 6, 1981 and regardless of her attendance record, the charges must be dismissed

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because the sole reason the Board brought the charges is not because of their substance, but because of respondent's published letter.

Having decided that Charges One and Two have been brought against respondent by the Board in retaliation for the exercise of her free speech, there is no need to address respondent's remaining arguments for dismissal in respect of N.J.S.A. 18A:6-13, staleness, and the single controversy doctrine. Accordingly, the remaining Charges One and Two certified against respondent by the Board of Education of the Borough of Bound Brook are hereby **DISMISSED.**

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

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

Hackensack NJ 11/14/83
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

11/15/83
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

Nov. 18, 1983
DATE

Ronald L. Parker
OFFICE OF ADMINISTRATIVE LAW

ml

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LIST OF EVIDENCE

P-1	Resume
P-2	Absence review procedure
P-3	Respondent's absences
P-4	Appellate Division opinion
P-5	Letter, November 13, 1981 to respondent from superintendent
P-7	Executive Board meeting minutes
P-8	Letter, April 2, 1982 to respondent from superintendent
P-9	Letter, April 20, 1982 to respondent from superintendent
P-10	Agreement, 1978-81
P-11	Minutes, February 4, 1981
P-12	Memorandum, February 4, 1981
P-13	Minutes, Executive meeting, Association
P-14	Letter, February 6, 1981 to respondent from superintendent
P-15	Letter, February 6, 1981 to respondent from superintendent
P-17	Letter to the editor
P-18	Newspaper report (copy)
P-19	Letter, May 28, 1982 to respondent from superintendent
P-23	Minutes, Special meeting of the Board, April 9, 1976
P-24A	Statement, January 23, 1981
P-24B	Statement, January 23, 1981
P-24C	Statement, January 23, 1981
P-24D	Statement, January 23, 1981
P-24E	Statement, January 23, 1981
P-24F	Statement, January 23, 1981
P-24G	Statement, January 26, 1981
P-24H	Statement, January 26, 1981
P-24I	Statement, January 26, 1981
R-2	Minutes, Board meting, April 12, 1982
R-3	Memorandum, to Board from superintendent, March 31, 1980
R-4	Student notice of suspension, January 30, 1981
R-5	Respondent's graph in re absences
R-5A	Absences - respondent
J-1	Agreement, 1981-83

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OAL DKT. NO. EDU 9692-82

IN THE MATTER OF THE TENURE	:	
HEARING OF EDITH TRAUTWEIN,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH	:	DECISION ON REMAND
OF BOUND BROOK, SOMERSET COUNTY.	:	
	:	

The Commissioner has reviewed the record in the instant matter including the initial decision on remand rendered by the Office of Administrative Law, Daniel B. McKeown, ALJ.

It is observed that the Board's exceptions to the initial decision as well as respondent's reply exceptions were filed pursuant to N.J.A.C. 1:1-16.4a, b and c.

The Board in its exceptions takes the view that the judge erred in his decision on remand with respect to his determination of the remaining tenure charges (1 and 2) in which a hearing on the merits of said charges was required by the Commissioner before a final determination could be rendered.

In this regard the Board maintains in part that:

> "***As a factual matter, the ALJ [on April 4, 1983] found the Board was, in fact, 'punishing' respondent for her strike activity; but was not, in fact, 'punishing' her for her absenteeism. Upon your review of that decision, you affirmed the ALJ's conclusion that respondent's absenteeism required her defense on the merits; and you reversed the ALJ on the strike activity issue, saying that Trautwein's unique status as a

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> labor association president justified the Board in viewing her conduct as different than the (sic) conduct of other teachers.
>
> "It is equally clear that when you made your May 19, 1983 decision you necessarily decided all the outstanding legal issues involved in these matters as well. For, if the Board's action constituted an impermissible 'punishment' you would not have reversed the ALJ on the strike charge, and you would not have upheld him on the charge of absenteeism. Therefore, when this case came before ALJ McKeown on remand from your office the sole issues on that remand was (sic) Trautwein's leadership role (and not whether she was being punished), and whether the proven absences under the circumstances they were claimed constituted conduct unbecoming, etc. (and not whether she was being punished).***"
>
> (Board's Exceptions, at pp. 3-4)

Respondent in her exceptions essentially concurs with the findings and conclusions of the judge's decision on remand and urges its affirmance by the Commissioner.

The Commissioner, upon review of the exceptions filed by the parties, cannot agree with the position taken by the Board in its exceptions to the initial decision. In the first instance it is clear from the record developed in this matter upon remand that the evidence with regard to the charge of excessive absenteeism (charge 1) against respondent establishes that such absences, although excessive, were not without just cause. Moreover, the Board, on April 12, 1982 acted within its discretionary authority to issue a letter of reprimand to respondent rather than taking other alternatives which were open to it at that time.

Similarly, the Commissioner finds and determines that respondent's defenses, with regard to her activities in her capacity as president of the BBEA as it related to the teachers' strike

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action taken on February 6, 1981, do not reveal that she used her position to either encourage the resultant action, nor may her behavior with regard to this incident be construed as a personal manifestation of animus toward the Board.

The Commissioner cannot ignore the fact that the fully developed record of this matter indicates that the Board took no action in regard to respondent's alleged conduct of February 6, 1981 until some eighteen months later, which was triggered by her letter to the editor published in the Star Ledger on June 20, 1982.

In the Commissioner's judgment, he cannot escape the conclusion that the principal motivating factor giving rise to the Board's tenure charges against respondent was the publication of her letter which, though highly critical of the Board and its administration, was nevertheless an exercise of her constitutionally protected speech.

The Board's apparent reliance upon the incident of June 20, 1982 as the vehicle by which it then moved forward to certify tenure charges against respondent is defective and fatal to the instant proceedings. The Commissioner so holds.

Accordingly, in view of the above, the Commissioner incorporates those findings and determinations made in his decision of May 19, 1983 herein and further adopts as his own those findings and conclusions of the ALJ issued in the initial decision on remand of April 4, 1983. The remaining two tenure charges against respondent can be and are hereby dismissed.

January 13, 1984

ACTING COMMISSIONER OF EDUCATION

DATE OF MAILING - JANUARY 13, 1984

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IN THE MATTER OF THE TENURE :
HEARING OF EDITH TRAUTWEIN, : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH : DECISION ON REMAND
OF BOUND BROOK, SOMERSET COUNTY. :
:

The Commissioner has reviewed the record in the instant matter including the initial decision on remand rendered by the Office of Administrative Law, Daniel B. McKeown, ALJ.

It is observed that the Board's exceptions to the initial decision as well as respondent's reply exceptions were filed pursuant to N.J.A.C. 1:1-16.4a, b and c.

The Board in its exceptions takes the view that the judge erred in his decision on remand with respect to his determination of the remaining tenure charges (1 and 2) in which a hearing on the merits of said charges was required by the Commissioner before a final determination could be rendered.

In this regard the Board maintains in part that:

> "***As a factual matter, the ALJ [on April 4, 1983] found the Board was, in fact, 'punishing' respondent for her strike activity; but was not, in fact, 'punishing' her for her absenteeism. Upon your review of that decision, you affirmed the ALJ's conclusion that respondent's absenteeism required her defense on the merits; and you reversed the ALJ on the strike activity issue, saying that Trautwein's unique status as a labor association president justified the Board in viewing her conduct as different than the (sic) conduct of other teachers.
>
> "It is equally clear that when you made your May 19, 1983 decision you necessarily decided all the outstanding legal issues involved in these matters as well. For, if the Board's action constituted an impermissible 'punishment' you would not have reversed the ALJ on the strike charge, and you would not have upheld him on the charge of absenteeism. Therefore, when this case came before ALJ McKeown on remand from your office the sole issues on that remand was (sic) Trautwein's leadership role (and not whether she was being punished), and whether the proven absences under the circumstances they were claimed constituted conduct unbecoming, etc. (and not whether she was being punished).***"
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Similarly, the Commissioner finds and determines that respondent's defenses, with regard to her activities in her capacity as president of the BBEA as it related to the teachers' strike action taken on February 6, 1981, do not reveal that she used her position to either encourage the resultant action, nor may her behavior with regard to this incident be construed as a personal manifestation of animus toward the Board.

The Commissioner cannot ignore the fact that the fully developed record of this matter indicates that the Board took no action in regard to respondent's alleged conduct of February 6, 1981 until some eighteen months later, which was triggered by her letter to the editor published in the Star Ledger on June 20, 1982.

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The Board's apparent reliance upon the incident of June 20, 1982 as the vehicle by which it then moved forward to certify tenure charges against respondent is defective and fatal to the instant proceedings. The Commissioner so holds.

Accordingly, in view of the above, the Commissioner incorporates those findings and determinations made in his decision of May 19, 1983 herein and further adopts as his own those findings and conclusions of the ALJ issued in the initial decision on remand of April 4, 1983. The remaining two tenure charges against respondent can be and are hereby dismissed.

COMMISSIONER OF EDUCATION

JANUARY 13, 1984

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INITIAL DECISION
OAL DKT. NO. EDU 0438-83
AGENCY DKT. NO. 499-12/82A

WILLIAM R. BRENDEL,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF NORTHVALE, BERGEN COUNTY,
Respondent.

APPEARANCES:

Anthony N. Gallina, Esq., for petitioner
(Aronsohn & Springstead, attorneys)

Irving C. Evers, Esq., for respondent
(Parisi, Evers & Greenfield, P.A., attorneys)

Record Closed: November 2, 1983 Decided: November 29, 1983

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

Petitioner, William R. Brendel, is a tenured teacher of physical education employed by the respondent, the Board of Education of the Borough of Northvale, a K-8 school district. In October 1982, Brendel had been involuntarily assigned to coach girls'

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basketball, thereby necessitating his attendance at practices and games during non-school hours. He alleged that this assignment had imposed a great hardship on his family and himself. He further claimed that the procedure followed regarding his assignment was in violation of both Board policy and of a posting requirement set forth in the collective negotiations agreement. Brendell sought an order requiring the Board to distribute extracurricular duties among all staff members on a more equitable basis and to compensate him for certain monetary losses that he suffered as a result of his particular assignment.* The Board denied the allegations and took the position that its assignment of Brendel to coach girls' basketball in 1982-83 was, under all the circumstances, perfectly appropriate and well within the scope of its inherent managerial prerogatives.

TESTIMONY

Brendel holds a master's degree and is certified to teach both physical education and English (grades 7 through 12). About five years ago he and his family (wife and three children) moved from Oradell, New Jersey to Highland Mills, New York, which is located approximately 35 miles from his job in Northvale.

In June 1982, a notice to faculty had been posted setting forth that for the 1982-83 school year various extracurricular positions were available including, inter alia, girls' basketball coach, which carried a stipend of $485 (Exhibit P-2). Brendel did not apply for the job nor, as it turned out, did anyone else.

On October 1, 1982, Brendel was informed by the superintendent, Dr. Robert McGuire, that he would have to coach girls' basketball for the 1982-83 school year. The "season" for that activity ran from November 3 through March 3. On the following day, October 2, 1982, Brendel received written confirmation from McGuire of the assignment (Exhibit P-1).

* Brendel had moved unsuccessfully for interim relief. Since the 1982-83 school year has now ended, that portion of the Verified Petition which sought relief from the particular coaching assignment has become moot.

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When first approached by Dr. McGuire on October 1, Brendel protested his involuntary assignment. Nevertheless, he did begin in November 1982 to perform the assignment, although still seeking relief. Indeed, in October he had dispatched a letter to a board-staff liaison committee in which he explained that because of certain familial responsibilities, which he detailed in the letter, it would be an extreme hardship upon his wife and him to require that he perform this extracurricular assignment. Brendel explained that beyond the immediate problem of having to find a new babysitter was the additional hardship which would be imposed in the nature of the cost of using two cars so that both he and his wife could travel daily to and from their work. He also pointed out that simply because he was a physical education teacher did not mean that he was the only person who would be able to coach girls' basketball. He noted, too, that a teacher's own subjective feeling with respect to an assignment was important and that given his past contributions to the school system some other person should be assigned in order to distribute the burden more equitably (Exhibit P-4). Brendel later personally pursued his appeal to the Board at one of its public meetings where he read a letter which he had prepared concerning his position (Exhibit P-5).

The particular nature of the hardships claimed by Brendel were detailed by him as follows: his wife teaches in Bergenfield and he had expected that they would be able to travel to and from work in the same car during 1982-83. Brendel and his wife are also the parents of three preschool children and arrangments had been made during the summer of 1982 to find a babysitter who would be available until 4:15 p.m. Without an extracurricular assignment, he normally would have been able to return home with his wife by that time. Since, as the result of the assignment, there would be days when he would have to stay late in order to carry out his coaching duties it became necessary to find another babysitter, at an increased cost of $50 per week. Moreover, he calculated that he and his wife ended up travelling to and from work in separate cars on 22 occasions, which necessitated extra expenses for gasoline and maintenance. Brendel stressed that there are a number of other teachers in the school district who could have been assigned to the coaching position (Exhibit P-7), including two female physical education teachers, a Mrs. McRae and a Mrs. Ahrens.

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Upon being appointed, Brendel attempted on his own to alleviate his scheduling problem by conducting practice sessions in the morning before school started. He said he first polled the students involved and all were in favor. In addition, he also checked to see if there were any conflicts with other teachers having activities at the same time (Exhibit P-10). However, Brendel shortly received a memorandum from his principal advising him not to conduct morning practice (Exhibit P-11). In that memorandum, the principal, Mr. Mendillo, advised Brendel that holding such practice conflicted with concert band rehearsals, as well as with an ensemble activity. Mendillo pointed out that he had taken similar action some years earlier because of that very same type of conflicts. Thus, Brendel was directed to schedule practice sessions only after school (Exhibt P-11).

In order to demonstrate further the alleged unfairness of his assignment, Brendel pointed to the fact that he had been responsible for developing a number of interscholastic and intramural sports programs in Northvale. He also had coached a variety of sports including basketball, wrestling, softball and flag football. In fact, during his 19 years in the school system he had coached for 15 of those years. In summary, Brendel felt that he was being imposed upon unfairly by the Board simply because he was a physical education teacher, and that given his particular familial circumstances in 1982-83 and his readiness to serve in the past, his involuntary assignment to coach girls' basketball in the face of a large pool of other potential coaches was an act of discrimination which violated that section of Board policy which states that where no qualified applicant applies for such an assignment the Board may assign a qualified teacher, "... on a non-discriminatory basis, one which takes into account teachers' present commitments and past assignments" (Exhibit P-3).

With respect to the Board's anticipated claim of his special credentials to be assigned to coach, Brendel explained that in his professional opinion any certified teacher could coach an activity such as girls' basketball at that grade level without having a specific, detailed knowledge of the sport. While he agreed it might be "preferable" to appoint someone who has those credentials, it certainly is not mandatory. Thus, he again

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stressed that the repeated assignment to one person, given the large pool of potential appointees, was inequitable.

Testimony on Brendel's behalf was also offered by another teacher in the school system, Andrew Nemets, the president of the Northvale Education Association. He said that in September 1982 the superintendent, Dr. McGuire, had asked him if he would be willing to coach girls' basketball. After giving the subject some thought he turned the request down. According to Nemets, McGuire told him that he would have to assign Brendel the job if he could not obtain a volunteer.

The petitioner then called the superintendent as his own witness. Dr. McGuire said that all cocurricular or extracurricular assignments are made initially by him, subject to Board approval. With respect to the particular assignment of Brendel to coach girls basketball for 1982-83, Dr. McGuire explained that he did so for several reasons: (a) although the position was posted, no applications were received; (b) he had asked two other staff members to take the job, Mr. Nemets and Mrs. McRae, but both had declined. Mrs. McRae, who is a physical education teacher, had already volunteered to handle two other sports, fall cross-country and spring track; (c) he attempted to reach out for volunteers in other school districts through an organization made up of local superintendents but received no affirmative response; (d) Brendel was most highly qualified; and (e) Brendel had coached the sport the previous school year.

Dr. McGuire also explained that the delay to October occurred because he had first conferred with Mendillo in order to attempt to find some other person. With respect to his decision not to direct Nemets to take the position, McGuire said that Nemets had been assigned once before and, moreover, was not a physical education teacher. With regard to Mrs. Ahrens, who was a physical education teacher, she was only employed part-time, coming to Northvale just once or twice per week. McGuire did not feel that assigning her would be at all appropriate under such circumstances.

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Another witness called by petitioner was the principal, Mr. Mendillo. He said that he recommended that Brendel be appointed girls' basketball coach only after other attempts to find someone else had failed. Neither posting the position nor "spreading the word" through a principal's group to which he belongs had produced a candidate for the job. Mendillo had also been told by someone from Old Tappan that a former teacher who worked in Northvale might be interested. However, when Mendillo spoke to that individual he found that this was not the case. Mendillo did ask Mrs. Ahrens if she wanted the job and received a negative response from her, since she only worked part-time and also had certain babysitting problems. Thus, Mendillo and McGuire reached a mutual decision that, given all of the circumstances, Brendel was the logical person for the job.

With regard to his decision to eliminate certain morning activities, including intramurals and sports practices, Mendillo said he stopped them because they conflicted with music and chorus and he did not want to have a child in a position to chose between those activities and a sport. As McGuire, Mendillo basically felt that Brendel should be appointed since he was eminently qualified and the two other physical education teachers, Mrs. McRae and Mrs. Ahrens, were either otherwise occupied or not appropriate for the job.

DISCUSSION

Both sides agree that the question of the assignment of teachers to extra or co-curricular activities has been held to be a matter which lies within the managerial discretion of a board of education. See, e.g., Mainland Regional Teachers Association v. Bd. of Ed. of Mainland Regional School District, 176 N.J. Super. 476 (App. Div. 1980), certif. den. 87 N.J. 312 (1981); Teaneck Bd. of Ed. v. Teaneck Teachers Ass'n., 185 N.J. Super. 269, 277 (App. Div. 1982). As the appellate division observed in the Mainland Regional case, supra "the number of such extra classroom activities, 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

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management prerogatives." Mainland Regional Teachers Association, supra, at 482.

Nevertheless, the fact that an assignment is a matter of managerial prerogative essentially means that it is not an appropriate subject for collective negotiations. This is not the beginning and end of the inquiry in a case like the one sub judice. Rather, even given the exercise of managerial discretion, the court must continue to explore whether or not in so acting the Board has trammelled upon some other protected right. Put another way, has the particular assignment been shown to have been arbitrary, capricious or unreasonable. Boards of education, of course, have been admonished not to act in such an unlawful manner. See, Boult v. Bd. of Ed. of Passaic, 135 N.J.L. 329 (Sup. Ct. 1947), aff'd. 135 N.J.L. 421 (E. & A. 1948). Thus, in various decisions, the Commissioner has seen fit to explore the question of whether a board's action was appropriate under the school laws. In the leading case of Smith v. Bd. of Ed. of the Borough of Paramus, 1968 S.L.D. 62, a charge was made that the Board's actions in assigning teachers to extracurricular duties was discriminatory. Although he rejected the claim and upheld the broad authority of boards to direct the assignment of their staff people, the Commissioner noted it was incumbent upon the board to act fairly and impartially in such matters.

In the decision in Bd. of Ed. of Asbury Park v. Asbury Park Education Association, 145 N.J. Super. 495 (Chan. Div. 1976), the court listed the following factors to be considered in determining whether extracurricular assignments were reasonable: (1) the assignment must not require excessive hours beyond the normal teaching period; (2) the assignment must be related to the teacher's interest, abilities and certifications; (3) the assignment must be made with a purpose beneficial to pupils; (4) the assignment must not be discriminatory; and (5) the assignment must be professional in nature. See, Bd. of Ed. of Asbury Park, supra, at 500.

Bearing in mind these sound principles, a review and consideration of the evidence in this case inexorably leads me to the conclusion that the assignment of petitioner to coach girls' basketball for the 1982-83 school year was reasonable and proper.

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Clearly, the Board and its responsible agents made efforts to seek out some alternative person other than petitioner to handle the assignment. Dr. McGuire and Mr. Mendillo articulated these several efforts. The particular assignment involved coaching a sport—a perfectly logical activity for a physical education teacher. Moreover, petitioner had coached the same sport in the previous year and thus brought continuity to the assignment. While there were other employees who taught physical education, for one reason or another, they were not as suitable for that particular assignment at that particular time. A subjective disagreement with the considerations that the Board brought to bear is not tantamount to a finding of unreasonableness or of invidious discrimination. Also, as Mr. Nemetz observed, he was told by Dr. McGuire that the involuntary designation of Brendel was an act which was taken almost reluctantly since no other suitable candidate emerged from the search process. Given the case law in this area, it would be totally inappropriate for me to substitute my judgment for that of the Board in connection with the particular appointment of Brendel under all of the facts in this case. While I might sympathize with the inconveniences that it might have caused him in his personal life, they were certainly not of a particularly serious nature and were accommodated by him in due course. Having chosen to teach in Northvale while living at some distance away in New York State, Brendel surely understood that sacrifices might be required by virtue of that geographic distance. Neither the Northvale Board nor any other board has to be a guarantor of convenience insofar as extracurricular or cocurricular assignments are concerned. While the Board certainly had the discretion to designate someone else, it is obvious to me that its decision not to do so in this case was neither arbitrary, capricious nor unreasonable.

Insofar as the allegation of violation of Board policy is concerned, the literal language of that policy vests ultimate discretion in the Board in any case. Under all of the circumstances, I do not find that the assignment of Brendel was discriminatory.

With respect to the alleged violation of a contractual posting requirement, the evidence fails to demonstrate the same. Moreover, there may even be a question as to whether this is an appropriate subject for consideration in the instant forum. Be that as it

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may, the fact that Brendel was not advised until October 1 of his assignment was explained by both Dr. McGuire and Mr. Mendillo in perfectly adequate fashion.

I, therefore, make the following Findings of Fact consistent with the foregoing discussion:

1. Petitioner, William R. Brendel, is a tenured teacher of physical education employed by the Board of Education of Northvale;

2. Brendel voluntarily was assigned to coach girls' basketball for the 1981-82 school year;

3. Given his certification and experience as a physical education teacher, the assignment of Brendel to perform such coaching duties is a perfectly logical and appropriate one;

4. In June 1982, the Board posted a notice of vacancies with respect to various coaching positions, including that of girls' basketball for the 1982-83 school year;

5. No one voluntarily applied for the aforesaid position;

6. Thereafter, the Board, through its superintendent and principal, made efforts to attempt to interest teachers other than Brendel in the assignment—to no avail;

7. In addition, efforts were made to notify administrators in surrounding school districts of the vacancy—no one applied from these districts;

8. Although other physical education teachers are employed by the Northvale Board of Education, no one was suitable for the girls' basketball assignment for the 1982-83 school year;

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9. The appointment of petitioner, upon the recommendation of the principal and superintendent, to coach girls' basketball for 1982-83 was neither arbitrary, capricious, unreasonable nor was it discriminatory or otherwise in violation of law, Board policy or any provision of the collective negotiations agreement.

Therefore, in view of the above Findings of Fact and my consideration of the applicable statutory and case law, I **CONCLUDE** that the petition should be **DISMISSED.**

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF EDUCATION, SAUL COOPERMAN,** who is empowered by law 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 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 29, 1983
DATE

Stephen G. Weiss
STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

December 1, 1983
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

Dec 5, 1983
DATE

Ronald J. Baker/ahc
FOR OFFICE OF ADMINISTRATIVE LAW

ms/e

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APPENDIX

List of Witnesses

William R. Brendel
Andrew Nemetz
Robert M. McGuire
Ernest Mendillo, Jr.

List of Exhibits

Exhibit No.	Description
P-1	Letter, dated October 1, 1982, from Dr. McGuire to Mr. Brendel
P-2	Memorandum, dated June 1, 1982, to all faculty from Mr. Mendillo
P-3	Board policy on extracurricular activities
P-4	Letter, dated October 5, 1982, to Liaison Committee from Mr. Brendel
P-5	Letter, dated November 9, 1982, to members of the Board of Education from Mr. Brendel
P-6	Letter, dated December 6, 1982, from Mr. Hope to Mr. Brendel
P-7	Northvale School District Faculty and Staff List, 1982-83
P-8(Id.)	Memorandum, State Dept. of Education, September 1, 1978
P-9(Id.)	Physical Education Curriculum Guide
P-10	Letter, dated December 3, 1982, signed by Mr. Thatcher

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P-11	Memorandum, dated December 7, 1982, to Mr. Brendel from Mr. Mendillo
P-12(Id.)	Memorandum, State Dept. of Education
P-13	Letter, dated June 20, 1983, from Dr. McGuire to Mr. Brendel
P-14	Letter, dated October 24, 1978, from Mr. Cornell to Mr. Brendel
P-15	Letter, dated October 30, 1978, from Mr. Brendel to Northvale Board of Education
P-16	Memorandum, dated November 8, 1979, to Mr. Brendel from Mr. Mendillo

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WILLIAM R. BRENDEL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NORTHVALE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

Petitioner in primary exceptions objects to the findings of fact by Judge Weiss set down in points 3, 8 and 9. Petitioner objects to the judge's determination that his coaching assignment was logical and appropriate, that no one else was suitable for the assignment and that the action of the Board was not arbitrary, capricious, unreasonable, discriminatory or in violation of its own policy or the terms of the negotiated agreement. Petitioner relies on his brief previously submitted.

The Board in reply exceptions refutes the arguments advanced by petitioner in his exceptions. The Board states that the findings of fact are correct and should not be set aside. The Board points to the fact that it did consider other faculty members in consideration of their training and capabilities. The Board denies being in violation of its own policy and argues that the hardship claimed by petitioner was self-created by his own decision to move some 35 miles from his teaching position. The Commissioner finds merit in the Board's arguments.

The Commissioner notes that both parties rely on briefs previously submitted. An examination of the arguments advanced therein reveals to the Commissioner that in main such issues have been considered by the judge in reaching his decision and need not be now reconsidered.

The Commissioner can understand the personal problems expressed by petitioner in P-5 but is constrained to note that portions of the rationale expressed therein could be offered by petitioner as reason to preclude his assignment to any extracurricular assignment. The Commissioner is fully aware of N.J.S.A. 18A:26-1.1 herewith set down in full:

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> "No board of education of any school district shall require any teaching staff member to reside within the school district within which he is employed."

The right of a teacher to a residence located in a geographical area pleasing to him/her is guaranteed by this law. However, the distance or inconvenience of travel that can possibly be generated may at no time be used by the teacher as a reason to avoid the discharge of professional responsibilities. The Commissioner so holds.

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

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

JANUARY 17, 1984

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4453-83
AGENCY DKT. NO. 147-5/83A

PHILIP FLOOD,
Petitioner,
v.
JERSEY CITY
BOARD OF EDUCATION,
Respondent.

APPEARANCES:

Francis E. Schiller, Esq., for petitioner
(Schiller, Vyzas, McGill & Squeo, attorneys)

William A. Massa, Esq., for respondent

Record Closed: October 18, 1983 Decided: December 1, 1983

BEFORE **KEN R. SPRINGER**, ALJ:

Procedural History

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

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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. For the reasons which follow, Flood must be reinstated to the position of Assistant Director of Basic Skills/Title I and compensated for any loss of salary.

Findings of Fact

All of the material facts are undisputed. From the joint stipulation of the parties, joint exhibits, and the uncontradicted testimony at the hearing, I **FIND:**

Philip Flood began working for the Jersey City Board of Education in September 1966. He held an appropriate certificate as a teacher and was assigned to regular classroom teaching duties. As of September 1969, Flood achieved tenure as a teacher in the district. Between September 1974 and December 7, 1980, Flood occupied a position known as "teacher assigned to the office of the principal."* Meanwhile, in June 1978 Flood obtained an administrative certificate endorsed as a principal/supervisor. Such certificate authorized Flood to perform various managerial functions, including supervision of instructional personnel.

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*The nature and duties of this assignment have no bearing on the outcome of this particular case.

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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 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:

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Academic Year	Position	Dates	Days Worked
1980-81	Acting Ass't Director	12/08/80 to 06/30/81	121
1981-82	Acting Ass't Director	09/08/81 to 06/30/82	180
1982-83	Acting Director	08/01/82 to 11/22/82	60
		Total	361

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that Flood acquired tenure in the position of Assistant Director of Title I/Basic Skills.

Tenure is a statutory right which inures to all teaching staff members who meet the conditions of the statute. Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63, 77 (1982); Zimmerman v. Newark Bd. of Ed., 38 N.J. 65, 72 (1962), cert. den. 371 U.S. 956 (1963). Generally, tenure is available to teaching staff members who work in positions for which a certificate is required, who hold valid certificates, and who have worked the requisite number of years. N.J.S.A. 18A:28-5. Spiewak, 90 N.J. at 81. N.J.S.A. 18A:28-6(c), the statute on which Flood relies in support of his tenure claim, provides that:

> 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 ... shall not obtain tenure in his new position until after... employment in the new position within a period of three consecutive academic years, for the equivalent of more than two academic years.

As defined by N.J.S.A. 18A:1-1, the term "academic year" means "the period between the time school opens ... after the general summer vacation until the next succeeding summer vacation." The parties have stipulated that an academic year in this district was comprised of 180 days. Hence it would seem that Flood qualified for tenure in the supervisory position by working for 361 days (the equivalent of more than two academic years) during the academic years 1980-81, 1981-82 and 1982-83. There are three possible reasons why the tenure rights conferred by N.J.S.A. 18A:28-6(c) might not be applicable in Flood's particular case. None of these reasons, however, is sufficient to remove Flood from the protection of the tenure statute.

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First, the Board urges that Flood should not be able to count his summer employment in August 1982 toward the acquisition of tenure. The statute itself draws no express distinction between summer employment and employment during the course of the regular school year. But the Commissioner of Education has declined to recognize voluntary summer employment in determining eligibility for tenure. In support of its argument, the Board cites Braverman v. Franklin Twp. Bd. of Ed., 1971 S.L.D. 460, for the proposition that summer employment must not be included in the probationary period for obtaining tenure. That case arose in the context of another provision of the tenure law, N.J.S.A. 18A:28-5(c), which provides for the accrual of tenure after employment for "the equivalent of more than three academic years within a period of any four academic years." Denial of tenure rested on the Commissioner's holding that it would not be "logically possible" for anyone employed on an academic-year basis to serve more than three academic years in a period of time shorter than three calendar years. 1971 S.L.D. at 462. Braverman does not reach a situation like the present one, where Flood worked an 11-month year and his summer service was part of the responsibilities of his regular employment. Later decisions of the Commissioner clarify that tenure credit will not be given for participation in "short summer seminars and workshops" or performance of "voluntary summer work." Mihatov v. Woodcliff Lake Bd. of Ed., 1977 S.L.D. 1, 9. On the other hand, when summer service is required by the board of education as a condition of regular employment and when the employee does not receive any additional compensation beyond his annual salary on the negotiated guide, such time is countable toward tenure. Cf. Jannarone v. Asbury Park Bd. of Ed., 1976 S.L.D. 526 (summer employment considered in determining eligibility for tenure as superintendent of schools).

Second, a question is raised whether Flood's service in an "acting" capacity can be counted toward tenure in a permanent position. One of the statutory exceptions to the acquisition of tenure is set forth in N.J.S.A. 18A:16-1.1:

> In each district the board of education may designate some person to act in the place of any officer or employee during the absence, disability or disqualification of any such officer or employee..

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> ... but no person so acting shall acquire tenure in the office or employment in which he acts pursuant to this section when so acting.

Even the Board acknowledges that the designation "acting" cannot defeat petitioner's tenure claim when a true vacancy exists in the position. Put succinctly by the Commissioner of Education,

> ...[P]erformance of the duties of an office either as a so-called "substitute" or in an acting capacity begins to accrue or accrues [tenure rights] if the position of employment is otherwise vacant. The title affixed to a position may not in such circumstances abort a tenured entitlement. Rossi v. Newark Bd. of Ed., 1977 S.L.D. 734, 739.

Proofs at the hearing conclusively established that the positions involved were vacant at the time when Flood was assigned to fill them. No evidence was offered by the Board to contradict Flood's assertion that he was not just temporarily replacing someone else. Flood cannot be said to have acted "in the place of any officer or employee during [such person's] absence" within the meaning of N.J.S.A. 18A:16-1.1. Consequently, his time spent in such activity should be counted toward tenure acquisition.

Third, Flood must be able to tack on his time spent as director to his time spent as assistant director in order to qualify for tenure in the latter position. Pursuant to N.J.S.A. 18A:28-6(c), as we have already seen, a teaching staff member "promoted with his consent to another position" acquires tenure "in the new position" after passage of the prescribed period of time. Here Flood did not serve the required period of more than two academic years "in the new position" of assistant director. Instead, before expiration of the two academic years, Flood received a second promotion to the still higher position of director.

N.J.S.A. 18A:28-6(c) goes on to provide 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." Read literally, this language suggests that once Flood had been promoted from assistant director to director, his service in the newer position of director should be counted in calculating Flood's eligibility for tenure in his

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prior position as assistant director. Such conclusion is further buttressed by the undisputed fact that Flood's duties as director were substantially similar to the duties he performed as assistant director. The major difference between jobs appears to be that his promotion to director gave him more rather than less responsibility over the same programs. In the Statement attached to Assembly Bill 343 (1962) which eventually became N.J.S.A. 18A:28-6, the sponsors of the legislation expressed the view that its enactment would encourage the promotion of candidates from within the district, while at the same time giving the board of education ample opportunity to observe a local employee in the new position before granting tenure. If the Board were dissatisfied with Flood's performance as assistant director, it could have returned him to teaching duties at any time within the two-year probationary period. It chose not to do so. To the contrary, the Board voted to give Flood even greater supervisory authority in the area to which it had previously assigned him. Under these circumstances, the logic of the tenure statute dictates that Flood be allowed to add the time served as director in determining his eligibility for tenure in the position of assistant director.

Order

It is **ORDERED** that the Jersey City Board of Education forthwith reinstate petitioner to the position of Assistant Director of Title I/Basic Skills.

And it is further **ORDERED** that the Board promptly pay to petitioner the amount of any loss in salary from November 22, 1982 to the date of his reinstatement.

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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.

Dec. 1, 1983
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

Dec. 1, 1983
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

Dec. 6, 1983
DATE

Ronald L. Parker
FOR OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

List of Witnesses

1. Phillip T. Flood

List of Exhibits

No.	Description
J-1	Copy of order entered in Flood v. Jersey City Bd. of Ed., Superior Court, Ch. Div., Docket No. C-1545-82
J-2	Copy of employment record of Phillip Flood
J-3	Copy of job description for Director of Title I/Basic Skills
J-4	Copy of job description for Assistant Director of Title I/Basic Skills
J-5	Copy of letter to Francis E. Schiller, Esq. from James J. Jencarelli, dated January 13, 1983
J-6	Copy of letter to Francis Schiller, Esq. from James J. Jencarelli, dated February 1, 1983
J-7	Copy of resolution of Jersey City Board of Education, adopted December 17, 1980
J-8	Copy of resolution of Jersey City Board of Education, adopted July 22, 1982

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J-9	Copy of resolution of Jersey City Board of Education
J-10	Copy of resolution of Jersey City Board of Education
J-11	Copy of resolution of Jersey City Board of Education, adopted July 14, 1982
J-12	Copy of diploma from Jersey City State College, dated June 1, 1977
J-13	Copy of administrative certificate endorsed as principal/supervisor, issued June 1978
J-14	Copy of administrative certificate endorsed as school administrator, issued February 1982
J-15	Copy of letter to Louis Acocella from James J. Jencarelli, dated June 18, 1981
J-16	Copy of letter to Francis E. Schiller, Esq. from James J. Jencarelli, dated August 24, 1983
J-17	Joint Stipulation of Facts

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OAL DKT. NO. EDU 4453-83

PHILLIP FLOOD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

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

Accordingly, the Board shall reinstate petitioner to the position of Assistant Director of Title I/Basic Skills with appropriate remuneration. IT IS SO DETERMINED.

COMMISSIONER OF EDUCATION

January 17, 1984
Date of Mailing January 19, 1984

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PHILLIP FLOOD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

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

Accordingly, the Board shall reinstate petitioner to the position of Assistant Director of Title I/Basic Skills with appropriate remuneration. IT IS SO DETERMINED.

COMMISSIONER OF EDUCATION

JANUARY 17, 1984

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INITIAL DECISION
OAL DKT. NO. EDU 213-83
AGENCY DKT. NO. 487-12/82A

JERILYN TIRICO,
Petitioner,
v.
LITTLE FERRY BOARD OF EDUCATION,
Respondent.

APPEARANCES:

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

William DeLorenzo, Jr., Esq., for respondent
(DeLorenzo & DeLorenzo, attorneys)

Record Closed: October 21, 1983 Decided: December 5, 1983

BEFORE **SYBIL R. MOSES,** ALJ:

This is a controversy concerning the questions of whether petitioner, Jerilyn Tirico, was entitled to be placed in the science position for elementary grade pupils for 1982-83 or, in the alternative, whether she was entitled to proper salary guide placement while she served as a Basic Skills teacher in 1982-83. The petition was filed on December 8, 1982, pursuant to N.J.S.A. 18:6-9, which vests the Commissioner of Education with jurisdiction to hear and determine all controversies and disputes arising under the school laws. The

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OALD DKT. NO. EDU 213-83

Board of Education of Little Ferry (Board) filed an answer on December 28, 1982, asserting that the Board has, over a long period of time, established additional qualifications as criteria for appointment to the position of teacher of science, which qualifications are in addition to the minimum requirements established by the New Jersey State Board of Education. The matter was forwarded to the Office of Administrative Law for determination as a contested case on January 13, 1983, pursuant to N.J.S.A. 52:14F-1 et seq. and N.J.S.A. 52:14B-1 et seq.

A prehearing conference was held on April 7, 1983. At that time it was determined that the following legal issues had to be resolved:

A. Whether petitioner's seniority rights were violated when the Board did not hire her as a full-time teacher of science at the start of the 1982-83 school year?

B. Whether the Board can establish higher and/or additional qualifications for a teaching position, beyond certification, when that position is part of a compartmentalized school program?

C. If the answer to (B) is yes, did this Board establish said higher and/or additional qualifications? Is there a special or required method for setting such requirements which the Board must follow?

D. Were petitioner's tenure rights violated by her present assignment to a position which has salary and benefits which are less than those she received in 1981-82 and are less than other full-time classroom teachers with similar experience and academic credentials?

E. If petitioner prevails on any of the above issues, to what relief is she entitled?

F. Should any remedy or relief given to petitioner include salary guide credit for employment during the 1976-77 school year in this district as a supplemental teacher?

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Settlement conferences were held between the parties, but after negotiations, it was determined that settlement was not viable. The hearing scheduled for July 19, 1983, had to be adjourned because the Superintendent of Schools, the Board's chief witness, was out of the State for the summer months. The hearing in this matter took place on September 14, 1983, at the Office of Administative Law in Newark, New Jersey. Briefs were timely filed, and the record closed on October 21, 1983.

Counsel entered into a Stipulation of Facts in regard to petitioner's employment history and certain other matters which are not in controversy. (See, C-1 in evidence.) I adopt the stipulation of facts as part of this decision, as if it were set forth at length herein.

The following other items were moved into evidence during the course of the hearing.

R-5	The minutes of the Little Ferry Board of Education, June 29, 1983
R-6—A through K	Photos of the science lab taken by Ms. Vivian Velez, teacher
R-1 through R-4	Marked for identification but never moved into evidence

Petitioner relied on the Stipulation of Facts and testified as to her present position on the salary guide as follows:

In 1976-77 she was not placed on the salary guide and received an hourly wage.
1977-78 B.A.
1978-79 B.A.
1979-80 B.A.
1980-81 B.A.
1981-82 B.A. + 15 credits

The Board relied on the testimony of Irwin Weisman, Superintendent of Schools, Charles G. Fitzpatrick, Principal of the Memorial School, and Vivian Velez, science teacher in Little Ferry. The thrust of the testimony of all three witnesses was to show that the science program in the Little Ferry school system was of a unique and special character as there was a great difference between the normal teaching of science in the

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classroom and the way science is taught in the special science lab designed in the late 1960s and built in the Memorial School in Little Ferry.

Superintendent Weisman testified that the laboratory and demonstration experiences are crucial to the children, and that the one-on-one atmosphere of interaction with the teacher is vital in order to provide adequate preparation for Little Ferry students going to Ridgefield Park High School. In his opinion, since the late 1960's, the Little Ferry science program required a teacher with a secondary science background or teaching and/or work experience on that level in order to provide the students with maximum exposure to the subject. Normal teaching of science in the classroom is different. It relies heavily on textbooks, and before the science lab was built, teaching of science in Little Ferry utilized textbooks and a four foot rolling demonstration cart with simple equipment and a water hookup.

Three teachers have been hired to teach the special science program in Little Ferry since its inception. They included Mr. Frank Feudi, who was a high school science teacher who was replaced by Mr. Strickland, who had a secondary teaching and industrial science background. Strickland taught from 1978 to 1981 and Feudi from 1969 to 1978. In 1981, the Board hired Vivian Velez, who also had a secondary science background, having taught science to junior and senior high school pupils in New York City.

Mr. Weisman stated that it was well known among the Board's employees that the Board was always looking for someone to teach in the science program who had special skills, even though no formal requirements had ever been established for the position of science teacher. In June 1983, the Board formally adopted a revised policy manual in regard to the science program, which set up science teacher qualifications as part of that program, (See R-5 in evidence), and codified what had been the hiring standards since 1969. Superintendent Weisman stated that the classroom teachers in the Memorial School do not teach science, as all science is taught via the special program. He conceded that there is a certain discretion in applying the requirements recently adopted by the Board.

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Mr. Fitzpatrick corroborated the testimony of Mr. Weisman. He said that the standards established by the June 1983 policy were merely a ratification of the standards used to hire teachers prior to June 1983. They just had never been adopted formally before that time.

Mr. Fitzpatrick reiterated that from 1969 to the present day all teachers hired to teach science met the special qualifications. When Mr. Feudi left the employ of the Board in 1978, Ms. Tirico, then teaching, was never considered as his replacement. When Mr. Strickland left, no staff member, including Tirico, "fit the bill." Ms. Tirico never submitted documentation showing expertise to teach in the special science program, other than the fact that she holds an elementary certificate. Fitzpatrick said that a teacher who is certified to teach science in a classroom setting is not the type of person to teach in the Memorial School science program. In his opinion, Ms. Velez is superior because of her knowledge of the subject, her independent lab experience, her experience in working with students and her high recommendations. If Little Ferry is required to take a teacher from its present ranks, the best it would have in science would be a textbook program taught by someone with a lack of expertise and experience in teaching such a special science program.

Ms. Velez has been teaching grades five, six, seven and eight, as well as two special science classes, for the last three years. She works in a specially designed room which contains desks, with demonstration lab counter in front and eight fully equipped lab counters in the back. A science prep room is attached, which contains the chemicals, animals for disection, etc. During the course of the year, the children dissect a sheep's heart to learn the circulatory system, a frog to learn the digestive system, the brain of a sheep, a fetal pig to learn the skeletal system and an earth worm. This could not be done in a classroom setting, because there is not enough space, because equipment is lacking and because there is not enough time.

Prior to teaching in Little Ferry, Ms. Velez taught high school science for two years in New York City, utilizing a lab similar to the one in Memorial School. She has a B.S. in Biology and is presently enrolled in a M.S. program for a degree in Environmental Science.

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She is certified in Biological Science and has pending an application to receive a K through 12 comprehensive science certificate from the State of New Jersey. In Ms. Velez's opinion, classroom teachers do not have the same experience and cannot provide the same continuity and efficiency of operation that a special science program and teacher can. The program has a theme; to learn and appreciate science and to relate it to the children's daily lives and to the world around them. Ms. Velez detailed the programs provided to the 5th, 6th, 7th and 8th grades. She said that the students reacted to the special program in a positive and eager manner, and with enthusiasm and interest. Ms. Velez said that the teacher who has a regular certificate could teach the program only if he or she had the knowledge, experience and background to work in the special science room.

There are two issues in controversy here. The first is whether Ms. Tirico, who is a tenured teacher within the Little Ferry system, was entitled to be placed in the position of teacher of science in 1982 for the 1982-83 school year, and if she was entitled to same, what relief should she receive for not being put in that positon for that year. (She is not asking to be placed in the position for the 1983-84 school year.) The second issue is if she was not entitled to be the teacher of science in Little Ferry, was she entitled to proper salary guide placement while she served as a Basic Skills teacher in 1982-83.

Counsel for petitioner argues that the Board is violating the State regulations on certification requirements, tenure and seniority since it never took any action pursuant to resolution or written policy which required special qualifications for a teacher in this special science program. He points out that 1982-83 school year preceded the amended State seniority regulations. Petitioner has taught pursuant to an elementary certification, which includes grades seven and eight, with or without departmental instruction, and in junior high schools, and therefore has a seniority claim to any positions within the grades K through 8, at least for the 1982-83 school year, including the science position held by Velez for 1982-83, since Velez's students were all in grades five through eight. Counsel argues that retaining Velez over petitioner was a violation of her right to be free from dismissal or reduction in compensation, absent the preferral of charges or a reduction in force based on seniority, since there has been no valid imposition of additional

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qualifications. Therefore Tirico's tenure and seniority as an elementary teacher mandate that she be appointed to fill the departmentalized science position held by Ms. Velez, who is without tenure or seniority. See, Paul Fitzpatrick, et al. v. Board of Ed. Weehawken, 1980 S.L.D. 595, aff'd St. Bd. of Ed. 1981 S.L.D. __ (March 4, 1981) aff'd in part, reversed in part, (N.J. App. Div., June 16, 1982, Dkt. No. A-3278-8OT 3) (unreported).

Counsel for Ms. Tirico does not challenge the fact that a Board can formally adopt educationally justified additional requirements for the science position, but argues that it must be done by resolution, and not delegated to the Superintendent of Schools or other hiring officials. He relies on Teaneck Education Association, et al. v. Board of Ed. Teaneck, 1983 S.L.D. ____, (September 30, 1983), where the Commissioner held that in order to impose requirements beyond those required by law, the Board itself must take appropriate action. Since Ms. Tirico suffered as a result of the Board's "illegal conduct," she is entitled to all salary lost, reduced by the amount she earned as a Basic Skills teacher. Counsel says it is irrelevant to claim that Velez is more qualified because the mandates of the tenure law negate an attempt to compare a tenured teacher with the appropriate certification, when there is no Board resolution to add additional requirements, with a nontenured teacher who has no seniority.

Counsel argues that Ms. Tirico is entitled to be placed on the salary guide at the B.A. + 15 salary level for the 1982-83 school year. If her 1976-77 experience as a supplemental teacher is counted for salary guide purposes, she is entitled to placement at Step 6, B.A. + 15, which is $19,860, less mitigation. If that is not counted, she is entitled to Step 5 in the B.A. + 15 category ($18,970 less mitigation). Counsel cites Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982) in support of his argument that petitioner is entitled to be placed on the appropriate step on the salary guide no matter what she is teaching, as long as she is in a tenure-eligible position. He points out that the Supreme Court determined that remedial teachers are teaching staff members within the meaning of N.J.S.A. 18A:1-1 and are entitled to attain tenure, pursuant to N.J.S.A. 18A:28-5, since they must have certificates to have the jobs in the first place.

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Counsel for the Board argues that the Little Ferry specialized science program cannot be conducted in a classroom by a classroom teacher. He argues that petitioner has no special background in any field of science and no capability to do what the present or past science teachers have done. Petitioner is not entitled to be placed in the position of science teacher as it would be contrary to the interest of the educational program and the antithesis of the purpose of certification. Counsel argues that since petitioner is not qualified to teach in the specialized science program, her tenure rights and/or seniority rights have not been violated by the appointment of someone who is not tenured to teach in that program. Counsel argues that Ms. Tirico has never taught science as part of her classroom instruction and therefore has not gained any seniority in the teaching of science. Counsel argues that while the criteria for the specialized science position were recently memorialized in 1983, they are the same criteria used since 1969, well known to all.

The Board argues that even if petitioner was entitled to have been appointed to the position of science teacher for 1982-83 school year, it had no obligation to place her in that position until she made a request and until the 60 days notice required by contract was given. Therefore, it is not responsible for full-time pay until November 9, 1982. Furthermore her prior experience in 1976-77 as a supplemental teacher should not be counted because she had lesser duties, obligations and responsibilities. She does not have the teaching experience to place her on the salary guide at the higher level requested.

A review of the testimony in evidence and a consideration of the arguments of counsel and the applicable law leads me to make the following Findings of Fact, which are in addition to the stipulated facts:

1. The Little Ferry Board of Education established a specialized science program in 1969. Said program teaches various aspects of biology, chemistry, physics and natural sciences to 5th through 8th grade students.

2. That program must be conducted by a teacher who has expertise and knowledge in the subject and the teaching of science. That program is

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conducted in a special room which has laboratory facilities and safety features.

3. The three teachers who have taught the specialized program, Mr. Feudi, Mr. Strickland and Ms. Velez, all have experience and training in the teaching of science at the secondary level and all have certification in a field of science.

4. The criteria established for teachers to teach the specialized science program have been in effect since 1969. In 1983, the Board adopted a formal resolution memorializing the criteria in effect since 1969.

5. Petitioner, Jerilyn Tirico, has an elementary certificate. She has no special experience or background in any field of science. She has never taught science to 5th through 8th graders since she began teaching in the Little Ferry school system, since that subject has always been taught in the specialized program. She has no seniority in the teaching of science.

6. When Mr. Feudi left in 1978 and when Mr. Strickland left in 1981, Ms. Tirico never made application for the position of specialized science teacher.

7. The classroom teacher in the Memorial School in Little Ferry is not even present during the 50-minute period of specialized science instruction which the students attend under the direction of a specialized science teacher.

8. The special science program in the Memorial School in Little Ferry benefits the students of the school district and prepares them in a special way for attendance at Ridgefield Park High School.

9. Jerilyn Tirico became eligible for placement at the B.A. + 15 salary guide level at the beginning of the 1981-82 school year.

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10. During the 1982-83 school year, petitioner began work on November 8, 1982 as a Basic Skills teacher at a per diem salary of $44 a day. Said position was a full-time position.

11. Petitioner suffered a reduction in compensation from 1981-82 to 1982-83, although she was employed full time in a tenure-eligible teaching position in the Little Ferry school system. Petitioner was a teaching staff member at all times.

12. Petitioner's employment as a full-time supplemental teacher in 1976-77 was in a tenure-eligible position.

The first issue to be determined is whether petitioner's seniority rights were violated when she was not hired as the full-time special science program teacher at the beginning of the 1982-83 school year. A review of the facts found in this case indicates that the Board had well established criteria and standards for the hiring of teachers in its specialized science program. It further establishes that the Board's criteria and standards were well known to the teaching population, and it further establishes that all the teachers hired to teach in that special program had the specialized science background and expertise necessary to conduct a meaningful learning experience in science for the students in the Little Ferry school system. The formal adoption of the standards in 1983 by the Board of Education was merely a ratification of what had been in existence prior to that year, and since 1969.

I have reviewed of the cases cited by counsel for petitioner, including Fitzpatrick, et al. v. Board of Ed. of Weehawken, (N.J. App. Div., June 16, 1982 A-3278-80T3. It states that teachers with less seniority in a particular compartmentalized, deptmentalized program (in that instance, social studies) cannot be hired over teachers with more total seniority in that social studies field. The Appellate Division held, and this judge concurs, that "[w]e are of the view that the obligation to protect seniority rights goes no further than that recognized in Downs and Seidel and that any requirement of working out the possible permutations in assignments, which might, for example, result in reassignment of

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a highly skilled and successful teacher in one academic field to another academic field, would infringe unduly on respondent, board of education's, predominant responsibility to maintain a thorough and efficient system of education, N.J.S.A. 18A:7A-1 et seq." Unreported slip opinion, at 4. While the facts in Fitzpatrick are not on all fours with the facts in the case at bar, the comment about maintaining the Board's right and responsibility to provide a thorough and efficient system of education for the students in its system is well-taken. If a teacher's seniority rights cannot force the Board to move highly skilled and successful teachers from one academic field to another, then, by analogy, the Board in Little Ferry cannot be forced to abrogate its responsibility to provide a thorough and efficient system of education in the field of science by creating, staffing and funding a specialized science program. To rule that in order to protect petitioner's seniority rights, a clearly well-qualified and highly specialized teacher of science must be laid off, so that a teacher who has no experience whatsoever and who merely holds a general elementary certificate must be hired, is to put the cart before the horse. It would defeat the purpose of the thorough and efficient clause and abridge the rights and responsibilities of boards of education.

Accordingly, I conclude that while it would have been the better practice for the Board of Education to formalize the standards and criteria it wished to apply to teachers hired for the specialized science program early on, the Board nevertheless has been consistent since 1969 in making known the type of person it was seeking to hire for that program. The Board was entitled to set up specific qualifications for the position of teacher in the special science program. These qualifications were memorialized in June 1983, but were in effect since 1969. Ms. Tirico, the holder of a general elementary certificate, should not be permitted to prevent the retention of a highly skilled, academically able and specialized person to teach in what is clearly a specialized program in Little Ferry, one of which the Board of Education can be proud. The Board has not set higher qualifications than those required for the certification of an elementary teacher. It has created a specialized science program that requires someone other than a certified elementary teacher because of the level of educational background, expertise and knowledge necessary to teach this program. Therefore, I conclude that petitioner was not entitled to be appointed to the position of special science teacher for the 1982-83 school year. That portion of the complaint must be dismissed.

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The remaining issues in controversy deal with the additional salary and benefits, if any, to which Ms. Tirico is entitled for teaching Basic Skills full time on a per diem basis, during the 1982-83 school year. It is stipulated that Ms. Tirico is a tenured teacher in the Little Ferry system. The oft-cited case, Spiewak v. Bd. of Ed. of Rutherford, 90 N.J. 63 (1982) clearly stands for the proposition that remedial teachers are teaching staff members within the meaning of N.J.S.A. 18A:1-1 and are in tenure-eligible positions, pursuant to N.J.S.A. 18A:28-5. This means that they are to be treated no differently than any other teachers in the school district and that as a matter of law, there is no rationale for giving remedial teachers lower salary and benefits than regular classroom teachers. A review of the facts and law surrounding this issue, the question of the appropriate placement on the salary guide for Ms. Tirico, who was tenured and who was teaching in a tenure eligible position, leads me to conclude that she should be granted placement on the regular salary guide as of September 1982, prorated from November 9, 1982, at B.A. + 15 and it further leads me to conclude that the time spent as a remedial teacher in 1976-77 is to be included in the calculations for salary guide placement. See, Board of Education of Hoboken v. Temple, 1982 S.L.D. ___ (December 2, 1982) where the Commissioner held that credit for service in a remedial capacity was to be given a teacher who had spent one year as a remedial teacher followed by several years as a classroom teacher. The facts in Hoboken v. Temple are clearly in accord with the facts in this matter. See also, Bennett, et al. v. Kearny Board of Education, 1983 S.L.D. ___ (January 21, 1983) aff'd State Board of Education 1983 S.L.D. _____ (June 1, 1983) where remedial teachers who had been placed at step one of the salary guide were granted full benefits, including salary guide credit, for all their remedial or other employment as teaching staff members.

Accordingly, based on the foregoing analysis, I have determined that Jerilyn Tirico is entitled to be paid the difference between the salary she earned in the 1982-83 school year, commencing November 9, 1982 and the money she would have earned had she been on the appropriate step on the salary guide, pro-rated from that date. The amount earned, $44 per day, is to be considered in mitigation of her total salary. The specific amount due Ms. Tirico for 1982-83 is $19,860 (Step 6, B.A. + 15), less mitigation. She is placed on that step because her year of service in 1976-77, in a position where she was a teaching staff member in a position which was tenure-eligible and where she had to be treated equally, must be taken into consideration.

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Therefore, it is hereby **ORDERED** that the petition of Jerilyn Tirico asking that she be declared to have been entitled to be appointed the teacher in the special science program in the Memorial School in the Little Ferry school system in 1982-83 be, and is, hereby **DENIED**; and

It is further **ORDERED** that petitioner, Jerilyn Tirico, having attained tenure in the Little Ferry school system, pursuant to N.J.S.A. 18A:28-5, and having taught in 1976-77 in a full-time tenure-eligible, remedial position and having taught in 1982-83 in a full-time tenure-eligible remedial positon, be placed on the appropriate step on the salary guide, as of September 1982, consonant with her years of teaching experience, degree earned and post-graduate credits earned; and

It is further **ORDERED** that the appropriate step on the salary guide as of September 1982 is Step 6, B.A. + 15, at a salary of $19,860; and

It is further **ORDERED** that petitioner, Jerilyn Tirico, receive all other benefits in accordance with her position on the salary guide; and

It is further **ORDERED** that petitioner Jerilyn Tirico be awarded the sum of $19,860 minus the amount she actually earned during the 1982-83 school year.

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OALD DKT. NO. EDU 213-83

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.

December 5, 1983
DATE

SYBIL R. MOSES, ALJ
Receipt Acknowledged:

December 5, 1983
DATE

DEPARTMENT OF EDUCATION
Mailed To Parties:

Dec 7, 1983
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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JERILYNN TIRICO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF LITTLE FERRY, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

Petitioner's primary exceptions to the initial decision herein by Judge Moses affirms that decision in part while taking exception to the portion of the decision which denies petitioner's claim to the position of teacher of science on the elementary level. Petitioner upholds the affirmative aspect of the decision determining her entitlement to a full salary for her period of employment from November 9, 1982 until June 30, 1983. Petitioner claims entitlement to full salary reimbursement for the entire school year of 1982-83, less mitigation. The Commissioner finds merit in petitioner's arguments.

The Commissioner notes with approval respondent's creation of a unique and special science program requiring a teacher with greater than ordinary certification and experience. The Commissioner also notes that the standards thereto were not formally adopted by the Board until June 1983. Teaneck Education Association, supra. Uncontested testimony in the present matter shows that the requirements for this unique program were administratively imposed prior to 1983. The Commissioner notes that these events occurred under the old seniority rules wherein the word elementary shall include kindergarten, grades 1-6 and grades 7-8 with or without departmental instruction, including grades 7-8 in junior high schools. Subsequent to September 1, 1983 the elementary category has been redefined to limit it to kindergarten, grades 1-6 and grades 7-8 without departmental instruction. In such circumstances the Commissioner finds and determines that petitioner held eligibility to the afore-noted eighth grade program pursuant to her certification, tenure and seniority rights, Edison Township Education Association et al. v. Board of Education of the Township of

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Edison, decided December 29, 1983. Accordingly, the determination by Judge Moses is set aside. Petitioner Tirico shall be accorded full compensation for the 1982-83 school year less mitigation. The Commissioner so holds.

The Commissioner reverses in part the findings and determination in the initial decision in this matter. However, petitioner shall be accorded proper remuneration less mitigation as determined herein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JANUARY 19, 1984

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INITIAL DECISION
OAL DKT. NO. EDU 1368-83
AGENCY DKT. NO. 5-1/83A

JOHN H. RIVERS,
Petitioner
v.
BOARD OF EDUCATION OF THE MERCER COUNTY AREA VOCATIONAL-TECHNICAL SCHOOLS, MERCER COUNTY,
Respondent.

APPEARANCES:

Richard A. Friedman, Esq., and Barbara G. Rapkin, Esq., for petitioner (Ruhlman, Butrym & Friedman, attorneys)

David W. Carroll, Esq., for respondent (Baggitt, Mancino & Carroll, attorneys)

Record Closed: October 27, 1983 Decided: November 30, 1983

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

Petitioner, a tenured teacher, contends that his employer, the Board of Education of the Mercer County Area Vocational-Technical Schools (Board), Mercer County, illegally reduced his salary during November 1982. The Board, while admitting that it began to pay petitioner in 1982-83 at the annual rate of $24,760, took no official action to fix petitioner's salary for 1982-83 and contends that its action reducing petitioner's salary from $24,760 to $24,050 during November 1982 was a legal action taken to correct an error.

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When the pleadings were filed before the Commissioner, he transferred the matter on March 1, 1983, as a contested case to the Office of Administrative Law for processing, pursuant to the provisions of N.J.S.A. 52:14F-1 et seq. At a prehearing conference conducted at the Office of Administrative Law, Trenton, New Jersey, on June 23, 1983, it was agreed that the viable issues are as follows:

A. Was petitioner entitled to be placed at $24,760, step six, on the 1982-83 salary guide?

B. Did the school district's action setting his salary at $24,760 entitle petitioner to payment of that amount for the 1982-83 school year?

C. Was the Board obligated to restore the 1981-82 increment or to consider restoration of the increment for the 1982-83 school year or for succeeding school years?

It was further agreed that all facts would be stipulated and that the matter would proceed on cross motions for summary decision. After the facts were stipulated and later modified in part by a supplemental submission of stipulation in respect to stipulation 8(e), briefs were filed completing the record on October 27, 1983.

THE FACTS:

I **FIND** the following to be relevant facts as stipulated by the parties:

1. Since November 17, 1975, Petitioner has been employed as a Student Personnel Coordinator, a twelve month position in the Mercer County Vocational-Technical School District.

2. Petitioner's salary history from 1978-79 through 1981-82, as adjusted, is set forth below. The correctness of these salary determinations is stipulated.

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Year	Salary Rate	Basis for determining salary
1978-79	$ 16,825	As per negotiated agreement
1979-80	18,005	7% increase over 78-79 salary, as per negotiated agreement
1980-81	20,395	(a)7.5% increase over 79-80 salary, as per negotiated agreement; plus (b) $1040 adjustment for military service credit, as per August 4, 1982 memorandum (attached)
1981-82	21,510	(a) 8% increase over 80-81 salary (adjusted for military service credit) as per August 4, 1982 memorandum and as per negotiated agreement; (b) The figure shown is after reduction of $520 increment withheld for cause. If increment had not been withheld, salary would have been $22,020.

3. The April 21, 1981 resolution setting petitioner's 1981-82 salary read as follows:

The following staff to be reemployed at the contracted salary less the normal educational increment of $520.

Rivers, John	$ 20,905	
	- 520	Super (S.N.) Student Personnel
	$ 20,385	Coordinator

This salary was later adjusted to $21,510 on the basis of the August 4, 1982 military service credit agreement.

4. Petitioner was notified by letter of April 29, 1981 of the increment withholding and the reasons therefor, and had also

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received prior notice of the administration's recommendation (copies attached).

5. The record is silent as to whether the Board specifically discussed restoring petitioner's increment in any future year; but is clear that the Board acted to set his salary in future years without such restoration.

6. The August 4, 1982 agreement regarding credit for military service reflected a settlement of prior litigation between the parties; which settlement was approved by the Commissioner of Education in a decision dated January 17, 1983. (attached)

7. Prior to 1982-83, no salary guide existed for coordinators. The negotiated agreement established a minimum and a maximum, and the amount of increments (set at $520), but actual salaries were based upon the percentage negotiated each year times the employee's prior year's salary (less the amount of any increment withheld).

8a. As of July 1, 1982, the beginning of the 1982-83 school year, no successor agreement had as yet been negotiated to the collective bargaining contract which expired June 30, 1982, and petitioner, as well as all other Coordinators, received a $520 increment, pending settlement of negotiations.

b. On or about July 31, 1982, petitioner received an additional adjustment pursuant to the military credit settlement, and his 1982-83 salary became $22,030.

c. On or about August 5, 1982, the Board of Education approved a three year agreement with the Coordinators Association, covering the period July 1, 1982 to June 30, 1985. Such agreement established a salary schedule for each of the years 1982-83, 1983-84 and 1984-85, which schedule is attached hereto.

d. In accordance with the understanding reached in negotiations, the initial placement of all unit members on the new salary guide for 1982-83 was based on their 1981-82 salary times 11% (the negotiated increase) and then to the next highest step on the 1982-83 guide.

e. The procedure described in subparagraph (d) was implemented by the Board's payroll department with respect to all coordinators except petitioner. If this had been done with respect to petitioner's salary, his 1982-83 salary would have become $24,050 (Step 5 on the new guide). Because of what the Board contends was an administrative or clerical error in implementing the above procedure (the 11% was incorrectly applied to his interim 1982-83 salary, rather than to his 1981-82 salary), petitioner was placed at $24,760 (Step 6 on the

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new guide) by Board resolution (see attached letter dated August 18, 1982). Petitioner stipulates that this occurred, but denies petitioner's salary was incorrectly set.

[as amended in modification of stipulation, August 31, 1983]

f. Petitioner was paid at the rate of $24,760 through November 15, 1982. (Enclosure)

g. On November 9, 1982, the superintendent wrote to petitioner stating that his 1982-83 salary placement was incorrect, and that he should have been placed on Step 5 instead of Step 6.

h. The Board on November 16, 1982 took action to place petitioner on Step 5 with an annual salary of $24,050.

i. Petitioner's salary was reduced accordingly, and he was paid at the annual rate of $24,050 for 1982-83.

DISCUSSION AND CONCLUSIONS:

It is stipulated that if the Board or its agents had computed petitioner's 1982-83 salary in accordance with the terms of the negotiated agreement, it would have been completed as follows:

1981-82 salary	$ 21,510
Plus 11% of 1981-82 salary	2,366
	$ 23,876

Since the next higher step above $23,876 on the negotiated salary scale was step five, $24,050, it was this figure which was provided for by the terms of the negotiated agreement to be Rivers' 1982-83 salary. These provisions of the negotiated agreement were precisely applied in fixing the salaries of all coordinators except Rivers. By what was presumably inadvertent error, the computation of Rivers' salary entitlement was set by applying the 11% to Rivers' 1982-83 salary rather than to his 1981-82 salary. This computation placed him on step six, $24,760, the next higher step on the guide. Thus, he was placed at what is listed as step six on the coordinator's guide at $24,760, rather than at step five at $24,050. Absent a showing that the Board itself fixed Rivers' salary at $24,760, it appears that it was established as the result of clerical or administrative error rather than formal action of the Board. It is also clear, however that Rivers was paid at the annual rate of $24,760 for four months from July through October before

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either the Board or its agents sought to take corrective action.

There is within the record no evidence that the Board set his salary at step five, $24,050, or any other figure. Rivers, however, had reason to rely on the Superintendent's letter, dated August 18, 1982, which notified him as follows:

> 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.

The legal payment of teaching staff members requires the signatures on the payroll of both the Board Secretary and the Board President (N.J.S.A. 18A-19.9). Even though no formal action may have been taken by the Board to fix petitioner's annual salary at $24,760, retroactive to July 1, 1983, it is fact that he was paid at that rate from July 1982 through October 1982, before he was advised again by the Superintendent on November 9, 1982, as follows:

> Please be advised that your salary for the 1982-83 school year was inappropriately placed on step 6 of the 1982-83 Coordinators Guide. The computation shows that you should be placed on step 5 of the guide with an annual salary of $24,050. This adjustment will take place following the Board meeting on November 16, 1982.

By the time this letter reached petitioner, however, he had been paid for a four-month period at the annual rate of $24,760. I **CONCLUDE** that under contract law, even in the absence of action by the Board fixing his salary at $24,760, his salary as a tenured teacher had been established at that rate. When he was paid for four months at the rate of $24,760, he was, in fact, in a contractual relationship whereby the Board's offer of employment and his agreement to provide his services were sealed by consideration in the amount of $24,760. As a tenured employee he had every reason to believe that he would continue to be paid at that rate throughout the 1982-83 school year.

The Board contends that it has the legal right to take corrective action by reducing Rivers' 1982-83 salary from $24,760 to $24,050, and that Rivers is not entitled to benefit from a windfall resulting from error. Petitioner argues, conversely, that once the Board paid his salary as a tenured teacher, it had no authority to reduce that salary in or after November 1982 absent the certification of tenure charges against him.

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Having considered and balanced all of the arguments of the litigants, I **CONCLUDE** that the weight of statutory law and case precedent supports petitioner's contention. N.J.S.A. 18A:28-5 provides that tenured teaching staff members:

> shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed. . . .

The facts of this case are directly on point with those in Agnes Galop v. Hanover Tp. Bd. of Ed., 1975 S.L.D. 358, aff'd, State Board 1975 S.L.D. 366. Therein, as here, a tenured teaching staff member's salary was fixed and paid for a period of time at a higher level on the salary guide than that to which she was entitled. Therein, as here, the error was not attributable to the teaching staff member's actions. When the Hanover Board sought to recoup overpayments and reduce Galop's salary to a figure consistent with the academic credits she had acquired, the Commissioner held as follows:

> Petitioner was in no way responsible for this unfortunate error and, having received notice thereof and payment for a period of several months, had reason to rely upon the Board's official act establishing her salary at that level for the period of one school year. N.J.S.A. 18A:6-10; DeRenzo, supra; Docherty, supra; Harris, supra; Kawaida Towers, supra. Therefore, the Board is not entitled to recover any portion of the salary paid to petitioner during the months of July 1973 through February 1974. Nor was it legally entitled to reduce her monthly rate of payment thereafter through June 1974. The Commissioner so holds and directs the Board of Education of the Township of Hanover to compensate petitioner the appropriate sum of moneys in accordance with this determination.
>
> Petitioner has no residual entitlement to such a favored position beyond the end of her 1973-74 contract and is to be paid for the 1974-75 school year, and thereafter, as provided by her proper step and level on the Board's negotiated salary guide and authorized by the Board's official action.
>
> The Commissioner is constrained to caution all local boards of education and their administrative officers to examine in minute detail those documents which are submitted for official resolution authorizing contractual salaries of the numerous employees of school districts. In every instance such matters should be thoroughly scrutinized prior to official action. By so doing, boards will avoid the payment of unnecessary sums, as herein, and avoid the disharmony and unnecessary litigation occasioned by careless and inadvertent error.

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> The Commissioner is further constrained to state that, while relatively small sums, as herein, 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. Board of Education of Passaic et al., supra; United States v. Hart, supra.
>
> [at 364-365]

Similarly, in another case of administrative error which resulted in fixing three teachers' salaries at higher levels than provided for by the salary guide, the Commissioner in Anson et al v. Bridgeton Bd. of Ed., 1972 S.L.D. 638 stated at pp. 640-641:

> Petitioners acquired vested rights to the salaries 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.
>
> Therefore, since petitioners' salaries were improperly reduced, the Board of Education of the City of Bridgeton is accordingly directed to pay to petitioners the amounts of the differences in earnings to which they are entitled in accordance with the determination of the Commissioner herein.

These decisions of the Commissioner and the State Board's affirmance in Galop, stand as controlling precedents in case law and must be applied to the facts of the instant matter which are substantially the same. I **CONCLUDE,** therefore, that once the Board, through the signatures of its President and the Board Secretary on the payrolls for July through October, had fixed and paid Rivers' salary for those months at the rate of $24,760, it had no authority to reduce it. The argument of the Board that the benefit to Rivers was of windfall proportions must fall in the face of the holding in Galop, wherein the Commissioner iterated that he would not sustain a mistake of windfall proportions.

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Galop's salary was fixed solely by error of the Board and its agents at a figure $550 higher than that to which she was entitled by reason of her graduate academic credits. In the instant case, the error was one of $710, a slightly higher figure. I **CONCLUDE** that this figure is not of windfall proportions, and does not threaten a viable education program in the district, pursuant to the Commissioner's cautionary words in Galop.

Petitioner Rivers contends that the Board must continue to fix his salary applying subsequent annual increments for satisfactory service to the figure of $24,760. In support of this argument, petitioner contends that the Board was obligated to restore his 1981-82 increment in a later year. While the Board has the legal authority to restore that $520 increment, I **CONCLUDE** that it is not legally obligated to do so. This conclusion is grounded on the clear words of N.J.S.A. 18A:29-14 which states that:

> Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a majority vote of all the members of the board of education. . . . It shall not be mandatory upon the board of education to pay any such denied increment in any future year as an adjustment increment.
>
> [emphasis added]

Petitioner, in this action, does not seek to challenge the merits of the withholding of his 1981-82 increment. Were he to do so in his petition filed during January 1983, he would be grossly out of time. The clear words of the statute cannot be superseded by decisions in the litigated cases cited by petitioner. It is clearly within the discretion of the Board when, if ever, it shall restore the withheld increment to petitioner. See in this regard Louis A. Garibaldi, Jr. v. Toms River Regional School District, 1977 S.L.D. 192.

I further **CONCLUDE** that the Board is correct wherein it contends that it may legally hold Rivers at the salary at the step of the salary guide (Step 6) on which he was paid during the 1982-83 school year until he is entitled to a higher step on the salary guide by reason of approved service. This conclusion is grounded on the holdings of the Commissioner in Mary Honaker v. Hillsdale Bd. of Ed., 1980 S.L.D. 898 at p. 906; Galop, supra; and Kiefer Shriner v. Boonton Bd. of Ed., 1975 S.L.D. 939. Apropos is that which was stated by the hearing examiner in Shriner at p. 941:

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In another matter, Elizabeth Stiles et al v. Board of Education of the Borough of Ringwood, Passaic County, 1974 S.L.D. 1170, the Commissioner stated that salaries once established, albeit in error, by a board of education may not later be reduced by rescinding action of the board. However, the Commissioner went on to state therein, that:

> ". . .This determination, however, does not require the Board to continue to compensate petitioners according to the provisions of its bachelor's degree scale. . . . Petitioners do not possess baccalaureate degrees. . . . Accordingly, the Board may hold petitioners at their present respective salaries until their years of experience entitle each of them, respectively, to receive the next increment on the non-degree salary scale. . . ." (Emphasis supplied.) (at p. 1175)

The hearing examiner takes cognizance of the fact that petitioner has not performed the work of an athletic director since July 1, 1973, and recommends that the Commissioner determine that, while petitioner may not be reduced in salary, he has no continuing entitlement to a salary $1,000 greater than that called for in the negotiated agreement for one of his years of experience and training and assigned duties.

In his concurrence at p. 942, the Commissioner stated:

> In the instant matter, petitioner's total contract salary for 1972-73 was established at $16,500. The Board could, with propriety, have established a stipend, exclusive of petitioner's teaching salary, and not made such stipend an integral part of petitioner's regular salary. The facts disclose that no distinction had been made between his compensation as athletic director and that as a teaching staff member.
>
> Petitioner has no continuing entitlement beyond 1972-73 to a salary $1,000 greater than that called for in the negotiated salary policy for a teaching staff member of his years of experience, training, and assigned duties. The Commissioner so holds. Consequently, the Board may establish petitioner's salary at $16,500 subsequent to school year 1972-73 until his years of experience entitle him to receive the next increment on his assigned salary scale. Stiles et al. v. Ringwood, supra
>
> The Commissioner holds the Board improperly established petitioner's 1973-74 salary at $15,980 which was a reduction of $520. It is well established that a board of education may not reduce the salary of a tenured employee without the certification

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of tenure charges to the Commissioner who alone has the power to determine whether or not a salary reduction may be invoked as a penalty. N.J.S.A. 18A:6-10; In re Fulcomer, 93 N.J. Super. 404 (App. Div. 1967)

DETERMINATION:

In consideration of the facts and conclusions set forth above and in the light of the cited decisions which stand as case precedents, it is **DETERMINED** and **ORDERED** that the Board will compensate petitioner Rivers additionally for the 1982-83 school year the difference between what he was paid and the amount of $24,760, to which he was legally entitled. To this extent, the petitioner's prayer for relief is **GRANTED.**

It is further **ORDERED** that the Board is entitled to pay petitioner at the rate for step six of the 1983-84 scale on the coordinators guide for the ensuing 1983-84 school year, if he has been adjudged by the Board to be entitled, by reason of satisfactory service, to an adjustment increment for step 6 on the salary guide. (See 1983-84 Salary Guide attached to the Stipulation of Facts.) In any event it may not reduce his salary in 1983-84 to a figure below $24,760. Insofar as petitioner lays claim to placement on step seven of the coordinators salary guide for the 1983-84 school year, that portion of petitioner's prayer for relief is **DENIED** (Shriner, supra; Galop, supra; Stiles, supra; Anson, supra).

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OAL DKT. NO. EDU 1368-83

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.

December 30, 1983
DATE

ERIC G. ERRICKSON, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

Dec. 6, 1983
DATE

OFFICE OF ADMINISTRATIVE LAW

bm/ee

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JOHN H. RIVERS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MERCER COUNTY AREA VOCATIONAL-TECHNICAL SCHOOLS, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

The Board in primary exceptions contends that Galop, supra, was incorrectly decided and that "this Commissioner" should re-evaluate the validity of the holdings therein and any others so predicated. The Board in support of its argument for refutation cites Jane M. Williams v. Deptford Board of Education, Docket No. A-5796-81-T1, New Jersey Superior Court, Appellate Division, decided November 16, 1983, while noting that this decision is not directly on point.

Petitioner in primary exceptions concurs with the initial decision by the Honorable Eric G. Errickson, ALJ noting that petitioner's salary was set at $24,760 by formal Board resolution. Petitioner's reply exceptions state that Galop was affirmed by the State Board of Education and may not be set aside by the Commissioner as "bad law" as suggested by the Board. Petitioner points to the lack of action by the Legislature to amend the tenure statute and denies the applicability of Williams, supra, to the present matter. Petitioner pleads for the affirmation of the initial decision. The Commissioner finds merit in petitioner's arguments.

The Commissioner, like the parties, is bound by the authority vested in the State Board speaking in Galop. Until such authority is overruled by a change in the law therein set down, Galop is controlling.

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

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Petitioner shall receive remuneration for 1982-83 and 1983-84 school years as set down herein by Judge Errickson with the noted restriction that petitioner's salary may not be reduced to a figure less than $24,760. Petitioner's claim to salary placement on step seven of the coordinator's salary guide for the 1983-84 school year is denied.

IT IS SO DETERMINED.

COMMISSIONER OF EDUCATION

JANUARY 17, 1984

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3883-83
AGENCY REF. NO. 373-9/81A

MARGARET B. DI NARDO,
Petitioner
v.
JERSEY CITY BOARD OF EDUCATION,
Respondent

APPEARANCES:

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

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

Record Closed: October 28, 1983 Decided: November 30, 1983

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

Margaret B. DiNardo, a tenured Assistant Superintendent, alleged her tenure and seniority rights were violated when the Board abolished the position of Assistant Superintendent for Elementary Education held by her; the Board's action was arbitrary, capricious and politically motivated; and that her reassignment and salary reduction was illegal.

The Board denied the allegations and asserts it acted within its lawful authority at all times relevant.

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The matter was initially transmitted to the Office of Administrative Law as a contested case on October 19, 1981 pursuant to N.J.S.A. 52:14F-1 et seq. and docketed as EDU 7196-81. An Initial Decision was rendered on July 23, 1982, which granted Summary Decision to petitioner DiNardo, and ordered her reinstatement. The Commissioner of Education affirmed on September 9, 1982. The State Board of Education reversed and remanded "for a hearing and a more complete development of the record" on May 4, 1983.

The matter was retransmitted to the Office of Administrative Law on May 23, 1983 and redocketed as EDU 3883-83. A Prehearing Conference was held on June 13, 1983, and a plenary hearing held on September 12 and 13, 1983. Simultaneous briefs were filed and the record closed upon receipt of same on October 28, 1983. Responses were waived.

The Initial Decision in EDU 7196-81 rendered on July 22, 1982, the Commissioner's affirmation of September 9, 1982, and State Board of Education's remand of same on May 4, 1983 are incorporated herein by reference.

RELEVANT TESTIMONIAL EVIDENCE

The petitioner's secretary testified that in July 1981, Councilman Fricchione and City Council aide O'Day visited the office of the petitioner, and upon learning it was petitioner's office O'Day responded with the "cut" sign by drawing the thumb of his right hand across his neck. (TI-4).

O'Day affirmed the secretary's testimony and testified he made a similar gesture in other offices. In response to a query concerning the rationale for said gesture, he testified that "politics is a strange thing" and that "one of the issues in the election was that there was a lot of waste at the Board of Education." (TI-10, 11). He also testified that he was not privy to any discussions by the City Council relative to the abolishment of positions in the school system, and did not recall any meetings or discussions concerning the petitioner. (TI-11).

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Councilman Fricchione was subpoened to testify by petitioner's counsel and exercised his Fifth Amendment right not to testify "because I have an indictment pending." (TI-14).

Petitioner DiNardo testified that after the abolishment of the position of Assistant Superintendent for Elementary Education, she was reassigned as a reading specialist; her employment was reduced from 12 to 10 months; and she was placed on the teacher's salary guide. (TI-42). It was stipulated that she is tenured in all positions held since her initial employment in respondent's school district in September 1963, and further that only Assistant Superintendent Charles Williams has greater seniority than she. (TI-48).

DiNardo also stated that she was present at the July 21, 1981 meeting when the Board approved the abolishment resolutions because all Assistant Superintendents were required to be present at Board meetings, but that she had not been noticed of the resolutions, nor had there been any discussions with or awareness by her that said resolutions were to be presented for adoption. (TI-49,50).

DiNardo testified extensively as to her duties as Assistant Superintendent for Elementary Education (TI-51-55), and stated that many of those duties have been performed by staff members Charles Silver, Charles Smith, James Connelly, Joan Murphy, Earleen Robinson, Maryann Hammer, and Joseph Rakowski since her transfer. (TI-56,57).

In response to queries as to her knowledge that the above-named staff members were performing her former duties as Assistant Superintendent, DiNardo referred to transfer resolutions approved by the Board. (TI-57,58) (See also P-7, P-8, P-9, P-10, P-11 and P-15).

DiNardo further testified that Silver was assigned to elementary school operations; Smith told her of his curriculum and purchase order responsibilities; Connelly was assigned district line responsibilities relative to elementary reorganization; Murphy

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was responsible for library media centers, and she became aware of this by observation and memos in her reading specialist role at School 39; Robinson was assigned to coordinate parent involvement program, which she became aware of as her school representative in the program; and, Hammer was assigned the Ginn reading materials responsibility. (TI-57-70). All such responsibilities had been previously assigned to her.

Joseph C. Marsella was initially employed by the respondent Board in 1971 as a teacher; and was appointed as Coordinator of Community Education in September 1977; and was reassigned as a classroom teacher in 1981. He is also a part-owner of a restaurant. (TII-8,9).

Marsella testified that Board President John Sheeran and Mayoral aide Edward Deak alleged that he took boxes of Board records from his school office to his restaurant. Sheeran demanded the return of same. Marsella testified the boxes contained his personal belongings and made arrangements to provide them for examination. Sheeran, Deak and a representative of the Division of Alcoholic Beverage Control (ABC) confiscated the boxes and took them to the ABC office. He followed them to the ABC office to get a receipt for his boxes, and while waiting for same a discussion with Sheeran was held concerning personnel changes in the school system. Marsella testified that Sheeran advised him that Smith and Clausell probably would come back but definitely not Mrs. DiNardo. (TII-12, 13) [The boxes were returned to Marsella, and ABC took no action.]

Marsella also testified that he and the petitioner are first cousins; they both were active in a previous mayoral election and received promotional appointments following the successful election of their candidate. (TII-14-16).

First Asistant Superintendent James Jencarelli, in charge of personnel, testified that he is responsible for the preparation of all resolutions relating to personnel. (TII-23). He also stated that the assignment of teaching staff members, such as principals and assistant principals, to the central office for the performance of specific tasks has been a general practice in respondent's school district (TII-23). He also stated that only two

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categorical positions remaining in the central office as assistant superintendents were his position and the deputy assistant superintendent, a position held by Franklin Williams. (Tr.II-23) (See also N.J.A.C. 6:3-1.10(k)(4).

Jencarelli stated that he was assigned as assistant superintendent in charge of personnel in September 1973, and functioned in that position until December 1977 when he was reassigned as assistant superintendent of elementary schools. He held that position until July 1979, when he was again reassigned in charge of personnel. The personnel position was held by DiNardo from December 1977 to July 1979. (TII-20).

Jencarelli further testified as to the reassignment of responsibilities in the reorganization process following the Board's abolition of the seven assistant superintendent's positions, as well as the aforementioned practice of assigning teaching staff members to the central office before and after the Board's July 21, 1981 abolishment resolution.

A Mr. Birkner was a principal assigned to Superintendent's office in 1976 or 1977. He retired in 1978 and was replaced by James Walling, an assistant principal, who assisted DiNardo in the personnel office. Walling continued in that position after Jencarelli was reassigned in charge of personnel until the summer of 1981, at which time Jencarelli could no longer rely on Walling because Board president Sheeran and attorney Vaughan advised him that Walling would be reassigned to directly assist the Superintendent. (TII-26).

Jencarelli further testified that James Connolly is an assistant principal who was assigned to the central office to assist the deputy assistant superintendent in reestablishing district lines (Tr. II-27); Joseph Rakowski is a coordinator of guidance counselors who was assigned to the central office "to assist in the establishment of an annex and to work on the enrollment of pupils in the Hudson City school section where No. 28 was scheduled to close and as of yet has not" (TII-27, 28); and Maryann Hammer, a former reading specialist and coordinator had been assigned to the central office (Tr. II-28) [no testimony as to her duties but R-5 lists her as "Act. Coord. Comp. Ed."]

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Jencarelli testified that as of September 1, 1983 Connolly, Rakowski and Hammer were again reassigned as assistant principal, elementary guidance, and reading specialist, respectively. See R-5. He also stated that Dorothy McGreevy, a reading specialist, had been assigned to the central office as an acting supervisor of curriculum and again reassigned as a reading specialist as of September 1, 1983. (Tr. II-29 and R-5).

Relative to the redistribution of the administrative responsibilities, Jencarelli testified that "I have enough to do in personnel . . . so I picked nothing up" (TII-33); that "Williams and Ross picked up the responsibilities plus the principals at each of the schools" (TII-33); and when asked if principals or assistant principals assigned to the central office were given responsibilities formerly assigned to assistant superintendents, he replied "Yes, there were some of those." (TII-34).

He further stated that principal Charles Silver and assistant principal Bertha Robinson were still assigned to the central office but didn't know what responsibilities had been assigned to them. (TII-35).

Jencarelli also testified that he determined monetary savings of about $175,000 as the result of the July 21 abolishment of positions on request of the Board president and attorney subsequent to the Board's action (TII-39)1, and on cross-examination stated the request was made in August 1981. (TII-57).

He further testified on cross-examination that one Joan Murphy, a supervisor of elementary grades was assigned the supervision of library media associates which had formerly been the responsibility of DiNardo. (TII-58).

In response to further examination relative to his testimony that he was responsible for all personnel matters and resolutions, he testified that he was only in charge of selected personnel areas which others do not wish to deal with which are delegated to him. He has no role in the transfer of principals and assistant principals to the central office other than a ministerial one (TII-60).

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Jencarelli also testified that he concurred with the testimony of DiNardo relative to her responsibilities as assistant superintendent, a position formerly held by him, and also stated on assumption that the Superintendent "weeded out some of those responsibilities to" . . . the staff members assigned to the central office (Tr., II-68, 69).

On redirect examination relative to the process of personnel reassignments, Jencarelli testified that "the Board president has asserted or usurped his duties as a board member. We have had other Board members besides the Board president who have submitted resolutions as they relate to personnel . . . without prior consultation with [himself or the Superintendent or Deputy Assistant Superintendent]," and that the Board acted on them. (TII-77).

Relative to quantitative staffing of the schools, in light of decreased enrollment, Jencarelli stated that in the last five years there has been an increase in teaching staff members. (TII-84).

Portions of depositions of Superintendent Ross, Jencarelli, and Board secretary Silvestri were selected by both parties and admitted into evidence and marked as P-2. The relevant testimony of those staff members now follows.

Ross testified that there were job descriptions for the titles of positions held by coordinators, supervisors, principals and assistant principals, but there were no job descriptions for their reassignments in the central office while maintaining the titles of positions previously held. He also stated that Charles Silver, a principal reassigned to the central office was assigned responsibilities previously those of DiNardo (assistant superintendent for elementary schools) and others. He also stated that Charles Smith, an assistant superintendent whose position was abolished by the July 21 resolution, was reassigned to the central office as an elementary principal with tasks similar to those he had as assistant superintendent but without the overall control of the curriculum department.

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Board secretary Silvestri testified as to his role relative to the July 21 resolutions, since they stated they were submitted and approved by him, and said: "Mr. Sheeran [Board president] came to my office. He asked for resolutions dealing with the dismissal of people. I had never done anything like that . . . Mr. Sheeran came in with these resolutions terminating people. I told him at that time that he was in the wrong place. He maintained that he was directing me to put my name on this. I said to him he could not put my name on this because it really had nothing to do with me, also as being directed to do so, he put my name. However, . . . prior to that, he did not have my name on the resolution, he had the name of Mr. Jencarelli, and then for some reason, when I got to the Board, I was apprised that my name appeared on the resolution and they had whited out Mr. Jencarelli's name . . . my name was put on the document against my wishes . . . No, it was not my submissions."

RELEVANT DOCUMENTARY EVIDENCE

A telegram was sent to DiNardo from President Sheeran on July 22, 1981 "to advise you to report to Doctor Michael Ross immediatley to complete a status review of your duties." P-6.

A resolution was adopted by the Board on August 19, 1981 which reassigned six of the assistant superintendents, including DiNardo, resulting from the July 21 abolishment resolution of July 21. It is noted that the salaries of three were increased and those of the remaining three were decreased. DiNardo's salary was decreased by $7,577. P-12.

The Superintendent recommended the reestablishment of certain positions of assistant superintendent and the reassignments of five staff members, including DiNardo, to those positions on February 23, 1983. The rationale for one position as a committment to the concepts of affirmative action etc., and for others because "it has now been determined that neither economy nor efficiency have been realized." The resolutions were not approved. P-16, P-17, P-18.

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FINDINGS OF FACT

A review of the entire record of testimonial and documentary evidence in this matter results in the following FINDINGS OF FACT:

1) Margaret B. DiNardo is a tenured Assistant Superintendent of Schools.

2) DiNardo's salary was reduced by the abolishment of her position and subsequent reassignment as a reading specialist by $7,577.

3) The July 21, 1981 resolution abolishing the positions of Assistant Superintendents was ministerially prepared and submitted to the Board by the Board secretary, but constructively prepared and submitted by the Board President without the consultation of the Superintendent of Schools.

4) The responsibilities formerly assigned to DiNardo as Assistant Superintendent of Elementary Schools were reassigned to the Superintendent, Deputy Assistant Superintendent, building principals, as well as to other staff members assigned to the central office who were non-tenured and therefore without seniority as Assistant Superintendents.

5) There are job descriptions for the titles held by staff members assigned to the central office.

6) There are no job descriptions for the positions held by staff members assigned to the central office.

7) The reassignment of supervisors, coordinators, assistant principals and principals to the central office, while retaining the titles of positions previously held, is a general practice of the Jersey City Board of Education without the authorization of policy adoption or approval of the County Superintendent of Schools.

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8) Prior to the Board meeting of July 21, 1981 at which the Board acted to abolish the petitioner's position disputed herein, as well as others, there was no Board discussion of the economy or efficiency such action might result therefrom.

9) Prior to the Board meeting of July 21, 1981, there was no Board discussion relative to the abolishment of petitioner's position, or others.

10) The action of the Board in abolishing the position of Assistant Superintendent of Elementary Schools on July 21, 1981 was arbitrary and capricious.

11) The subsequent reassignment of DiNardo as reading specialist at a reduced salary was arbitrary, capricious and in bad faith.

12) In the absence of good faith, the assignment of some of DiNardo's duties as Assistant Superintendent to staff members subsequently transferred to the central office was ultra vires.

13) The Board violated N.J.A.C. 6:8-4.7 due to its failure to consult the Superintendent of Schools before it acted.

14) The Board violated N.J.A.C. 6:11-3.6 by its use of recognized titles in unrecognized positions.

DISCUSSION AND CONCLUSIONS OF LAW

There is no compelling need to address the need of consultation with the Superintendent relative to important professional personnel matters, as the Commissioner addressed same in his decision of September 9, 1982 in this matter when it was docketed as EDU 7196-81.

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The impact of municipal elections in Jersey City on the public school system is worthy of note.

Historians view the statement that those who live by the sword must die by the sword as axiomatic. However, since an axiom is a statement accepted as true without proof or argument, it's truth must be argued here in light of the circumstances and applicable law.

The testimony of O'Day and Marsella, the school visit of O'Day and Councilman Fricchione following election, the considerable dialogue found in the transcript of the Board's July 21 meeting, and the confrontation of Sheeran and Deak with Marsella would seem to indicate a politicized nexus between City Council and Board of Education operations.

It can be reasonably concluded, on the basis of Marsella's testimony, that his own promotion in the school system as well as the elevation of DiNardo to an assistant superintendency resulted from the election to office of the mayoral candidate they actively supported. One could argue that DiNardo should not complain of a demotion when a candidate of her choice does not succeed. Nevertheless, her service as assistant superintendent has resulted in her acquisition of tenure and seniority rights which provide protection as a matter of law.

There is no suggestion here of a substitution of the judgment of a local Board in exercising its discretionary authority in operating and staffing its schools. There is, however, a strong suggestion that our public schools were created for the education of children; that a school district's chief educator and administrator be consulted on policy matters that affect the education of children; and that our children not become the pawns of local politicians.

The discretionary authority vested in local Board of Education by the Legislature is unquestionable, but it must be exercised within the limitations imposed by law and not abused.

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N.J.A.C. 6:8-4.7 states:

(a) Each district board of education, after consultation with the chief school administrator and teaching staff members, shall adopt efficient administrative procedures which shall include but not be limited to:

1. Sound district and school fiscal operations; and

2. Effective management procedures, pursuant to law and regulations. [emphasis added]

N.J.A.C. 6:11-3.6 states:

(a) School districts shall assign position titles to teaching staff members which are recognized in these regulations.

(b) If a local board of education determines that the use of an unrecognized position title is desirable, or if a previously-established unrecognized title exists, such board shall submit a written request for permission to use the proposed title to the county superintendent of schools, prior to making such appointment. Such request shall include a detailed job description. The county superintendent shall exercise his/her discretion regarding approval of such request, and make a determination of the appropriate certification and title for the position. The county superintendent of schools shall review annually all previously approved unrecognized position titles, and determine whether such titles shall be continued for the next school year.

In this matter, it is clear that the Board took action in the absence of procedures, without consultation with the Superintendent, and no exploration or discussion of the impact of its action on economy or efficiency. Economic exploration was not instigated until one month after the Board's action.

It appears to be apparent that past Board practice without policy served as the sole reliance for the transfer of staff members in title to the central office to hold positions without job descriptions or approval of the county superintendent.

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The Commissioner of Education has held that the element of good faith to be essential in matters such as position abolishment and reorganization. See Lauten v. Board of Education of Jersey City, 1963 S.L.D. 119; Page v. Board of Education of the City of Trenton and Maffei, 1973 S.L.D. 704, aff'd St. Bd. 1974 S.L.D. 1416.

The Commissioner also addressed the matter of service of staff members in new positions, as here in the central office while retaining former titles, in an analogous context when he said he "cannot condone this designation of a bona fide administrative position by an unappropriate title, which would result in relegating petitioner's service to an amorphous limbo." Boeshore v. North Bergen, 1974 S.L.D. 805 (at 817).

Based on the aforementioned FINDINGS that the Board abused its discretionary authority due to its arbitrary and capricious action in abolishing the position of Assistant Superintendent of Elementary Schools, and that subsequent reassignments were ultra vires and/or in violation of State Board regulations, I **CONCLUDE** that petitioner is to be reinstated to the position she held prior to the Board's action with remuneration commensurate with the position as though having served in such without interruption. **IT IS SO ORDERED.**

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

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OAL DKT. NO. EDU 3883-83

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

30 November 1983
DATE

WARD R. YOUNG, ALJ

December 5, 1983
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

Dec 7, 1983
DATE

Mailed To Parties:
FOR OFFICE OF ADMINISTRATIVE LAW

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OAL DKT. NO. EDU 3883-83

ADDENDUM

WITNESSES

For Petitioner:

Joyce Pietruszewski, administrative secretary
Willliam O'Day, councilman's aide
Thomas H. Fricchione, councilman
Margaret B. DiNardo, petitioner
Joseph C. Marsella, teaching staff member

For Respondent:

James J. Jencarelli, first assistant superintendent

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EVIDENTIARY DOCUMENTS

P-1: Transcript of July 21, 1981 Board Meeting

P-2: Transcript of August 22, 1983 depositions of Ross, Jencarelli and Sylvestri

P-3: July 21, 1981 Resolution abolishing Asst' Supt. positions

P-4: July 24, 1981 Ross to DiNardo memo

P-5: July 24, 1981 Jencarelli to DiNardo memo

P-6: July 22, 1981 Board President to DiNardo telegram

P-7: July 22, 1982 Board resolution re Silver and Smith

P-8: September 16, 1981 Board resolution re Connelly transfer

P-9: August 25, 1982 Board resolution re Robinson transfer

P-10: August 25, 1982 Board resolution re Hammer transfer

P-11: August 25, 1982 Board resolution re Rakowski transfer

P-12: August 19, 1981 Board resolution re assignment and salary changes of DiNardo and other Asst. Superintendents

P-13: Assistant Superintendent for Elementary Education job description adopted December 17, 1979; amended October 15, 1980.

P-14: June 14, 1978 Board resolution re Walling transfer

P-15: January 20, 1982 Board resolution re Walling transfer

P-16: February 23, 1983 recommendation of Superintendent to reestablish Assistant Superintendent positions

P-17: February 23, 1983 Superintendent recommendation re reinstatement of DiNardo and Williams

P-18: February 23, 1983 Superintendent recommendation re reestablishment of three assistant superintendent positions and reinstatement of Jones, Matthews and Smith

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P-19: November 13, 1981 propounded interrogatories by petitioner, answered on January 4, 1982 with reference to #12, 13, 14, 15, 20, and 21 with attached exhibits

P-20: February 2, 1982 propounded supplementary interrogatories, answerd on March 5, 1982 with reference to #1 and 9, with attachments and exhibits

R-1: Elementary Principal job description adopted December 19, 1979

R-4: First Assistant Superintendent job description adopted December 19, 1979; amended October 15, 1980

R-5: August 24, 1983 Board resolution re personnel reassignments

R-6: Table of Pupil Enrollments, 1972-1982

(R-2 and R-3 not submitted in evidence)

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

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

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

The Commissioner notes that primary and reply exceptions were filed by the Board and petitioner respectively. Changes and corrections to the primary exceptions were filed by the Board in an untimely fashion and accordingly were not considered.

The Board contends that petitioner's former duties as one of seven assistant superintendents whose positions were abolished were properly reassigned to other administrators. The Board states that these former duties were reassigned in an upward direction to Superintendent Ross and Deputy Superintendent Williams and in a downward direction variously to principals, coordinators and supervisors assigned to the superintendent's office. The Board contends that it acted in good faith pursuant to N.J.S.A. 18A:28-9 by effecting economies in the administrative structure because of a reduction in pupils and argues that its action in this matter should be upheld.

Petitioner in reply exceptions refutes the Board's argument that the reduction in pupils was the explanation for her removal by the Board. Petitioner argues that such reason was never given as the basis for removing her and was belatedly advanced in August 1981, more than one month after the Board acted. Petitioner contends that the Board violated N.J.A.C. 6:11-3.6 and urges affirmation of the determination by the judge. The Commissioner finds merit in petitioner's arguments.

The Commissioner views with approval the words of Judge Young, ante, where he said:

> "There is no suggestion here of a substitution of the judgment of a local Board in exercising its discretionary authority in operating and staffing

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> its schools. There is, however, a strong suggestion that our public schools were created for the education of children; that a school district's chief educator and administrator be consulted on policy matters that affect the education of children; and that our children not become the pawns of local politicians.
>
> "The discretionary authority vested in local Board of Education by the Legislature is unquestionable, but it must be exercised within the limitations imposed by law and not abused."

The Commissioner finds it evident that the Board's action herein was made absent consultation with its own Chief School Administrator, N.J.A.C. 6:8-4.7 and without approval of the County Superintendent, N.J.A.C. 6:11-3.6. Such abuse of discretionary power of a board of education has previously been addressed in Page, supra, and Boeshore, supra.

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

Accordingly, petitioner shall be reinstated to her prior position with appropriate mitigated remuneration as though fully employed therein.

IT IS SO DETERMINED.

COMMISSIONER OF EDUCATION

JANUARY 19, 1984

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MARGARET B. DINARDO,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, January 19, 1984

For the Petitioner-Appellant, Rothbard, Harris and Oxfeld
(Barry A. Aisenstock, Esq., of Counsel)

For the Respondent-Respondent, Connell, Foley & Geiser
(Thomas S. Cosma, Esq., of Counsel)

The State Board of Education denies the Petitioner's Motion to dismiss the appeal and affirms the decision of the Commissioner for the reasons expressed.

August 8, 1984

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INITIAL DECISION
OAL DKT. NO. EDU 6202-83
AGENCY DKT. NO. 128-5/83A

EDWARD BOGOSIAN, RICHARD SHULTIS and THOMAS FENELLE,

Petitioners

v.

JOSEPH ANDERSON,

Respondent

APPEARANCES:

Stephen F. Pellino, Esq., for petitioners
(Birchwale & Pellino, attorneys)

Stanley Turitz, Esq., for respondent
(Ga[illegible] & Geffner, attorneys)

Record Closed: November 14, 1983 Decided: December 2, 1983

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

Petitioners, members of the Ridgefield Board of Education, filed a Petition of Appeal with the Commissioner of Education on May 6 1983 wherein the conduct of the Superintendent of Schools, respondent herein, was criticized with a prayer that the Commissioner dismiss the respondent, or in the alternative order a salary reduction. Petitioners subsequently filed an amendment to the Petition, wherein the extent of relief sought is limited to a determination of the impropriety of respondent's conduct.

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The respondent denies the allegations of impropriety and avers his conduct at all times has been within his lawful authority in the reasonable exercise of his duties.

The matter was transmitted to the Office of Administrative Law on August 9, 1983 as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on August 29, 1983 and an Order entered on that date which incorporated the framed issues as follows:

1. Shall the Petition of Appeal be dismissed due to petitioner's violation of N.J.S.A. 6:24-1.2?

2. Shall the Petition of Appeal be dismissed due to the failure of petitioners to state a cause of action cognizable under N.J.S.A. 18A:6-9?

3. Shall the Petition of Appeal be dismissed due to the failure of petitioners to comply with N.J.S.A. 18A:6-11?

4. In the event petitioners prevail on the aforementioned issues, does the Superintendent's conduct warrant disciplinary action by the Commissioner of Education.

On October 28, 1983, respondent filed a Notice of Motion to Dismiss with an accompanying letter brief and Certification of the Board secretary. Petitioners filed a letter brief in response and requested reconsideration of their motion to amend their complaint. The record in this matter closed on November 14, the date established for the filing of an optional reply by the movant, which was not filed.

Relative to petitioners' Motion to Amend, the undersigned wrote to the parties under date of October 17, 1983 and said:

> I see no compelling need to amend the Petition as impropriety is inherently incorporated in Issue #4. In the event of an affirmative determination of that issue, the Commissioner has

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> the authority to determine whether disciplinary action is warranted. Mr. Pellino's letter would certainly be reviewed by the Commissioner as it is incorporated in the case file, and the intent of petitioners will certainly be clear to him.

The respondent argues, in support of his Motion, that statutory procedural requirement demands that the charges be dismissed; that N.J.S.A. 18A:6-11 clearly spells out the requirement concerning charges to be brought against a tenured employee; the Board secretary certified that no charges have been filed with him pursuant to N.J.S.A. 18A:6-11; and finally cites in support of his position In the Matter of Tenure Hearing of Marilyn Feitel, 1977 S.L.D. 451, aff'd 458; In re Edwards, 1982 S.L.D. ____ (decided March 9, 1982).

Petitioners state in their response that "it is represented that the petition in this matter basically alleges that the respondent, Joseph Anderson, Superintendent of the Ridgefield Public Schools, has acted wrongfully and improperly in failing to transmit to the Board of Education on a timely basis an appraisal report which contains significant and pertinent information relevant to major policy decisions that the Board was considering at the time." Petitioners apparently seek a reconsideration of the determination of the undersigned not to Amend to remove the prayer for dismissal or a reduction in salary from under the umbrella of N.J.S.A. 18A:6-11.

Petitioners request for reconsideration of their Motion to Amend is **DENIED.** If it were to be granted, said Motion does not negate a principle issue framed in the Prehearing Order concerning the Commissioner's role upon receipt of a complaint of alleged unbecoming conduct of a tenured teaching staff member in the absence of certified tenure charges.

This matter is a companion to a Petition filed by Bogosian alone against the Board of Education concerning resolutions adopted by the Board which petitioner perceived were designed to stifle him and other Board members. That matter was docketed as EDU 4547-83 (Agency reference 129-5/83A) and was **DISMISSED** in an Initial Decision rendered by the undersigned on November 10, 1983. Reference is made solely for the awareness of the Commisisoner.

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The crux of this matter is whether petitioners have stated a cause of action cognizable under N.J.S.A 18A:6-9, assuming, arguendo, that the Superintendent did in fact submit the appraisal report in an untimely fashion.

It is not disputed that respondent is tenured and therefore the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10, et seq. is applicable when a dismissal or reduction in the compensation of a tenured teaching staff member is sought. The process is clearly established, and petitioners in this matter do not dispute that no charges were filed with the Board secretary, and therefore not discussed or certified by the Board.

Petitioners fail to cite any other statute, regulation, or decisional law upon which they could rely in order to secure the intervention of the Commissioner of Education in a purely local matter concerning the internal relations between a Superintendent and the Board. If the Commissioner were to intervene, absent a criminal or otherwise unlawful offense, the failure of any Board to act to the satisfaction of a constitutent or Board member relative to complaints registered against a teaching staff member would create chaos in an otherwise orderly statutory and regulatory scheme designed for the operation of New Jersey school districts.

In the event a Board fails to certify written charges filed with the ecretary, the Commissioner would indeed consider an Order to Certify upon a determination of merit following a hearing. However, in this matter, no charges were filed and no determination was considered or made by the Board.

I **FIND** that petitioners did not comply with N.J.S.A. 18A:6-11. **I FURTHER FIND** that petitioners have failed to state a cause of action cognizable under N.J.S.A. 18A:6-9, or any other statute, regulation, or decisional law.

I **CONCLUDE**, therefore, that respondents Motion is **GRANTED**, and this matter shall be and is hereby **DISMISSED. IT IS SO ORDERED.**

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OAL DKT. NO. EDU 6202-83

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.

2 December 1983
DATE

WARD R. YOUNG, ALJ

Receipt Acknowledged:

12/7/83
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

Dec 9, 1983
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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EDWARD BOGOSIAN, RICHARD SHULTIS AND THOMAS FENELLE,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
JOSEPH ANDERSON, SUPERINTENDENT, BOROUGH OF RIDGEFIELD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

Petitioners in primary exceptions contend that the judge erred by denying their Motion to Amend. Petitioners argue that they no longer seek dismissal of respondent or a reduction of his salary but rather only seek a determination by the Commissioner as to the propriety of respondent's actions. The Commissioner finds no merit in such argument.

Assuming, arguendo, that the Commissioner did find that the Superintendent was untimely in his submission of a report to the Board, the Commissioner fails to determine what action petitioners expect him to take. Petitioners themselves state they do not seek a reduction in salary or the removal of the Superintendent. No tenure charges have been filed pursuant to the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq. The Commissioner will not engage in a witch hunt nor be persuaded to tilt at windmills. The matter is a local one resting between the Board and its Chief School Administrator. As was said in Schinck v. Westwood, 60 N.J. Super. 448:

> "***We are mindful of the general principle that on appellate review we should not substitute our judgment for the specialized and expert judgment of the Commissioner and the Board, and also of the local school board, all of whom have been entrusted with the fulfillment of the legislative policy. To do so would constitute a judicial exercise of the administrative function. Cf. Grundlehner v. Dangler, 29 N.J. 256, 266 (1959); In re Plainfield-Union Water Co., 14 N.J. 296, 307-8 (1954).***" (at 476)

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

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

JANUARY 23, 1984

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INITIAL DECISION
OAL DKT. NO. EDU 5736-83
AGENCY DKT. NO. 188-6/83A

BOARD OF EDUCATION OF THE CITY OF NEWARK,
Petitioner,
v.
NATHAN JAMES MICHAELS,
Respondent.

APPEARANCES:

Dwayne Vaughn, Esq., for petitioner
(Louis Rosen, Esq., General Counsel)

C. Robert Sarcone, Esq., for respondent

Record Closed: December 7, 1983 Decided: December 12, 1983

BEFORE **NAOMI DOWER-LaBASTILLE**, ALJ:

The Board of Education of the City of Newark (Board) certified tenure charges against Nathan James Michaels (respondent) pursuant to N.J.S.A. 18A:6-10 et seq. alleging two kinds of conduct unbecoming a teaching staff member. 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.

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Hearings were held on October 14, 26, 27 and November 17, 1983. A list of exhibits introduced at the hearings is attached to this decision. As reflected in the prehearing order, the Board charged respondent with the following conduct which it deemed to be unprofessional conduct or conduct unbecoming a teaching staff member:

1. A. Telling teachers and students that another teacher committed certain sexual acts with students on school property.

   B. Spreading rumors that certain administrators were having "affairs" with teachers.

   C. Spreading rumors that certain teachers were having extra-marital affairs.

2. Insubordination in allowing improper use of the high school intercom on two occasions in February 1983, which had a disruptive effect on the school.

Respondent moved to dismiss all charges at the end of the Board's case. At that stage of the proofs, the Board had not offered one item of admissible evidence sufficient to find that respondent had done any of the acts with which he was charged, with the exception of the act charged in 1A., for which there was one admissible statement with an ambiguous meaning which was attributed to respondent. I granted the motion to dismiss all counts but 1A., but suggested to respondent that in order to place a complete record before the commissioner and avoid the possibility of a remand, he could present such testimony as he wished on all charges. Respondent opted to do this with respect to the charge involving improper use of the intercom. Given the state of the factual proofs, the only discussion of law required is that relating to the admissibility of certain evidence, particularly on the intercom incident. There were no admissible proofs offered to support charges 1B and C, which were also dismissed. Several teachers testified two students had told them in 1982 that respondent was heard to say certain teachers were having "affairs." The students were not produced to testify.

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Discussion of Fact

Respondent and Eva M. Ogens are both tenured science teachers who were assigned to Weequahic High School in 1982-83. Weequahic is a large, center city high school with a somewhat volatile atmosphere due to overcrowding and the problems attendant upon any center city student body. The staff is integrated: the principal, Dr. Wright, is black as were some of the teacher witnesses; respondent and Mrs. Ogens are white. None of the student witnesses was white. Mrs. Ogens is young and quite attractive. Respondent, who is 52 years old, was senior-class advisor and was apparently very well liked by the students. The reason Mrs. Ogens assumes prominence in this discussion is because she is analogous to a complaining witness. It was she who presented to the school authorities charges that respondent had told students that she had engaged in sexual acts with a certain student, and it was she who threatened to bring suit against the Board if it took no action to fire respondent. She brought the matter to a head immediately after the intercom incident thus involving that issue in the charges here, although a vice principal who discussed the intercom incident with respondent was of the belief that their discussion concluded further action on that issue.

The Intercom Issue

The seniors at Weequahic raised money for their activities through dues payments and profits from sale of items at the student store that was located in the school. Respondent was their class advisor and supervised the store. In fact, he picked up bakery items, such as bean pies, for sale there. Since supervision of the senior activities was an extra-curricular assignment for respondent, who had his regular science teaching duties to perform, and had a lunch period, he was not always available to supervise the activities. The store was only open during the lunch periods (H5 and 6). In the spring of 1983, the school administration became dissatisfied with the problems arising out of the student store; congregation of students at the store, hall discipline and "junk food" were mentioned as a focus of their concern and the principal ordered the store closed.

The seniors regularly read bulletins on the intercom located at the main office

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during a short homeroom period (second period). On a Friday after the store-closing order and, again, on the Monday following, a senior-class officer read an announcement blaming certain complaining teachers and a security guard for the closing of their store, causing turmoil among the students, harassment of the named teachers and raising administrative ire. Each of these senior-class officers was separately questioned by the principal and vice principal, who had run in to cut off the intercom when he heard the content of the bulletin. When called on the carpet, the senior-class officers allegedly claimed respondent had written both statements for them to read over the intercom. Board representatives attempted to find the two seniors who allegedly made such statements concerning respondent but were unsuccessful. Both students, Keith Davis and Craig Samuels, graduated in 1983 and the Board was unable to find them for the purpose of serving subpoenae in October 1983.

Having been unable to obtain testimony from the two class officers at the hearing, the Board attempted to enter into evidence the 1983 reports of the administrators who spoke to them. The Board argued that, pursuant to N.J.S.A. 52:14B-10(a), all relevant evidence is admissible unless ruled unduly prejudicial. I sustained the objection of respondent. It is true that reliable hearsay is admissible. I can conceive no more inherently unreliable statements than those extracted by the principal and vice-principal from two high school students several months before they expected to graduate, when these students had a strong motive to exonerate themselves from serious disciplinary charges. Such statements should only be accepted under oath at a hearing with opportunity for cross examination. Such hearsay would also be inherently prejudicial, since it would constitute the only evidence against respondent on the intercom charges. Refusing to admit these statements via the reports of administrators resulted in the grant of a motion to dismiss the intercom charges, there being no other evidence whatsoever tying respondent to the disruptive intercom announcements.

Respondent opted to offer testimony on the issue so that the record would be complete if the commissioner did not accept a recommendation to dismiss the charges. In his testimony, respondent flatly denied either writing, dictating, reading or approving the offending announcements. He also testified that Vice Principal Meadows did not talk to him about the problem until after the second incident. I have no reason to disbelieve

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him, since all of his testimony was quite credible. Thus, the intercom charges would be dismissed under any view of the admissibility of the hearsay evidence. Such evidence would have no weight as against credible testimony of respondent.

The Remaining Charge Concerning Mrs. Ogens

At the end of the Board's case, the only evidence to support the charge that respondent told teachers and students that another teacher (Mrs. Ogens) committed certain sexual acts with students on school property was contained in the testimony of Illya Barrino, who was 15 years old in the spring of 1983 and who claimed that respondent walked into a second-period class at the change of classes and said within the hearing of students, "Did you hear about Mrs. Ogens? I hear she was suckin' face." Barrino then testified that he "took" respondent "to mean" that Ogens performed fellatio on a student. In fact, respondent never said, "I heard she was suckin' face." He testified that in his 52 years he had never heard this terminology until the student's testimony, and I believe him. Barrino told another student, O'Donnell Williams, who eventually told Mrs. Ogens, that he heard she performed fellatio. He added that he heard she was having sex with another teacher. Williams testified that there were different rumors going around and "people were adding to it."

Much of the rest of the testimony on this charge concerned rampant rumors among students and teachers in the school and the effect of this story upon Mrs. Ogens, who was importuned and harassed during her teaching duties as a result of the rumor. The Board also placed emphasis on a meeting between administration and respondent which was convened to probe the allegations that respondent had spread the rumor. Respondent chose not to discuss the matter before the group, but rather, asked to speak to the principal privately. The Board implied that respondent must have been guilty of the charge because he did not then and there vociferously deny all involvement.

The origin of the rumor emerged from the aggregate testimony of the student witnesses. The context must be considered: a center city school overcrowded (2,106 students in a school built for 1,400) with adolescents in grades 9 to 12 which one science

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teacher witness described as a "hot bed of yak, yak, yak." (Board witness Mrs. Nolley). What happened was this. On a day in the spring of 1983, respondent began teaching his eighth-period science class of ninth graders in Room 407 (For diagram see P-5) when Mrs. Ogens, an attractive young woman, and a student, Robert Roberson, entered from the science office to the rear of his teaching station. Mrs. Ogens expressed surprise that the class was in use. She picked up the science room keys from respondent and led the student to the back of the class, unlocked the bookroom door in the rear, entered with the student and closed the door.

The classroom is constructed as a lecture room, with stepped tiers for seating, so that Mrs. Ogens and the young man had to climb toward the back in full sight of the class to enter the bookroom, an enlarged kind of closet, which had no other entrance. About 15 minutes later, Mrs. Ogens and Robinson emerged from the bookroom. At the time, the room was quiet; the students were engaged in some learning task, so that they were distracted by the sound from the back of the classroom and many looked back. As Mrs. Ogens came out, she patted down her hair and clothing quickly, as some women habitually do to assure a neat appearance.

As Mrs. Ogens was turned toward the door, locking it, Roberson took advantage of being the class center of attention and made an obscene gesture with his finger indicating he had just obtained some sexual favor from the teacher. Many in the class reacted with "ooh, aah" sounds and laughter and respondent had to admonish them to calm down and get to work. Some students said, "they must have been doing something because they was in a long time." (Vanessa Evans' testimony). Mrs. Ogens and Roberson departed as they had come, down the stepped tiers, and out the office door in the front. One student told another of Roberson's sexual braggadocio, the story grew and changed, and students told teachers. Illya Barrino and another male student, emboldened by a desire for approval or a sense of importance or the titillation of repeating an obscene hand gesture to Mrs. Ogens, advised her of what was being said about her and assured her that they knew she wouldn't do that kind of thing. Mrs. Ogens said the boys told her at the time that they heard this from other students. Mrs. Ogens took no action at the time, regarding student hearsay as unreliable.

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Within the next two weeks, Mrs. Ogens was the recipient of a salacious note in her mailbox on March 1, 1983 and another teacher, Mrs. Milberg, told Ogens she "felt sorry" for her because of the rumors. Mrs. Ogens then talked to other teachers and asked them to come with her to complain to the principal, Dr. Wright. They did so on March 2, 1983. Thus, Dr. Wright was presented with two incidents involving respondent almost simultaneously, since the intercom incident had occurred within the past few days.

On March 2, the principal called in six students and questioned them about the extant rumor. After these meetings, Mrs. Ogens was subjected to sexual solicitations by male students ("My place or yours?") suggestive comments (There goes that lady"), and disruptive knocks on her classroom door. Prior to the meeting, according to the science chairman's testimony (Bruce Bennett), he had heard nothing about respondent's alleged slander of Mrs. Ogens. The inference is plain that the ugly conduct targeting Mrs. Ogens arose as a result of the questioning of students about such a sensational subject, an action which indicated that the adults in authority were taking the students' gossip seriously; the questioning of students and accusatory meeting with respondent also apparently stirred up the student body, because many liked respondent, their science teacher and senior class advisor. Student unrest stemming from the intercom incident a few days earlier boiled up after the investigation of sensational gossip.

A number of students in respondent's eighth- period class, having heard that their teacher was in trouble, determined to support him against Mrs. Ogens. Of their own volition, they wrote notes to the school authorities which described what they saw in their class about a week earlier, tending to show the rumor about Mrs. Ogens was true. Two ninth-grade girls asked respondent for a pass to go to the office, which he gave them. They collected the notes at the end of the eighth-period class and presented them to the principal, Dr. Wright. When Vanessa Evans testified about this incident, it was clear that she was telling the truth. She had an excellent memory. She stated that as they left Dr. Wright's office, they glanced back and, although they could not see his desk because of the layout of the room, they saw his hand reach out over the scrap paper basket and throw the notes away. Vanessa said to the other girl, "Did you see what he did?" The other girl replied, "Yes, I did." Dr. Wright testified that he had no recollection of the notes although he remembers two girls coming to see him.

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Robert Roberson was subpoenaed by respondent. His testimony generally confirmed that of other students in respondent's eighth-period class, although he named the seventh period as the class in which the events occurred. He did go with Mrs. Ogens at the end of the seventh period just before the bell. He also confirmed the reason for his private conference with Mrs. Ogens. Her apartment had recently been burglarized and she was upset about it. Roberson sought her out, told her he knew who did it, and agreed to meet with her in private to divulge the information. She asked him to get her keys back from the thieves. Roberson also testified that the sensational rumor was true. I don't believe him. The reason for this element of Roberson's testimony is not difficult to discern. When respondent was preparing to defend the tenure charges, he questioned Roberson and persuaded the young man to sign a statement under oath.

As the above incidents show, Roberson was eager for approval and attention and he had already bragged to his classmates of a sexual relationship with the attractive young teacher. Perhaps he believed his own fantasies. He made a sensational statement under oath and by the time he testified, he knew that a recantation could result in a charge of perjury. He had to stick to his story. A minor portion of his testimony, which he volunteered, is indicative of Roberson's character. He was cross examined concerning his excessive absences from school with the purposes of raising inferences that he sought a passing grade in return for his assistance and didn't get it from Mrs. Ogens. During that colloquy, Roberson volunteered that he had reasons for some of his absences, such as "when my son was born." Roberson is sixteen years old. It can be seen that Roberson tends to bolster his self image with a reputation for sexual prowess, not an unusual adolescent characteristic, but a pernicious one in these circumstances.

At the administrative meeting held to investigate respondent's alleged conduct, respondent determined not to talk with a group present. Mrs. Ogens had a little pad with her on which she had written down what her attorney had told her, according to the shop steward who was present (Mrs. Samuels). Before respondent was called in, Mrs. Ogens told the principal that the Board had to do something about respondent, or she would sue them. In this situation, respondent asked to speak to Dr. Wright alone, because he had seen the incident which sparked the rumors, did not believe they were without foundation,

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and felt the principal should know this. Respondent also heard of, or knew of, an earlier incident or incidents of conduct on the part of Mrs. Ogens which had the appearance of impropriety. Respondent felt that Mrs. Ogens should be the subject of investigation, not himself. Respondent did not take the opportunity to spread the sensational story to all those present at the meeting, conduct consistent with his denial of the charges. Respondent did deny that he made the statements about Mrs. Ogens to both his shop steward and department chairman. He also told Mrs. Ogens, "I never said that," when she accused him.

Dr. Frey, an assistant executive superintendent, determined that respondent should be transferred immediately out of Weequahic High and advised him that if he accepted a transfer, no charges would be brought. Respondent was incensed at what he considered the injustice of such a transfer, however. He wanted a hearing and contacted a councilman and others, presumably to convince the Board not to vote a transfer for him. These charges ensued, since at the meeting on March 21, 1982 Dr. Frey told respondent that if he did anything else the administration would bring charges. Dr. Wright conceded in his testimony that respondent's relations with students were very positive as to what he did with and for them and that respondent had no real negative evaluations in his teaching career.

Respondent was transferred to another school involuntarily. Warren Troublefield, another science teacher at the school, testified that on two subsequent occasions Mrs. Ogens initiated with him a conversation about respondent. "How is your friend doing? Is he still working?" she asked. "He's lucky to have a job. Before I'm finished with him I'll have his job if its the last thing I do." In early June 1983 Mrs. Ogens initiated another conversation and said, "I'm definitely going to have his job. What do you expect me to do? Put yourself in my husband's position." Troublefield related that he never heard respondent make any derogatory statements about other teachers or other people, even though they sometimes talked together as colleagues in the science department.

Findings of Fact

Based on the entire record, I **FIND:**

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1. Respondent teacher did not write, draft, approve in advance or know about the content of the intercom announcements read by two Weequahic senior officers on Friday, February 25 and Monday, February 28, 1983.

2. It was not until after the second announcement was read on Monday that Vice Principal Meadows admonished respondent that as senior-class advisor he should keep closer control on the seniors' intercom activities. In any event, respondent was busy with his classroom activities during the end of the second period and was not present in the office area at the intercom access when the disturbing announcements were made.

3. There was no evidence that respondent was spreading rumors that administrators or teachers were having affairs, extramarital or otherwise.

4. Respondent did not tell teachers and students that Mrs. Ogens, a fellow science teacher, had committed sexual acts with a student on school property.

5. The origin of the rumor concerning Mrs. Ogens was an event witnessed by a number of students at or about the same time as the intercom incidents which caused the students to infer that a sexual incident had occurred, that inference having been aided and abetted by the sexual braggadocio of the young male student and the adolescent gossip that ensued.

6. The harassment experienced by Mrs. Ogens was a direct result of the subsequent "investigations" by her and the school administration during which they questioned a number of students about this sensational subject, thus giving credence to the student gossip and spreading the rumor throughout the school.

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7. Respondent had not previously had any negative evaluations and his work as senior advisor was favorably recognized by the high school administration and by the students who judge him to be a good and well-liked teacher.

Conclusions of Law

Based on the findings above, no facts support any of the Board's charges of conduct unbecoming a teaching staff member under the Tenure Act, N.J.S.A. 78A:6-10 et seq. I **CONCLUDE** that the Board has proved none of the charges. It is unfortunate for all concerned that these charges were brought. It might be efficacious for the Board and administration to analyze all the circumstances leading to certification. It is difficult to understand why school administrators would credit such sensational hearsay transmitted via students in the face of absolute denials by the teaching staff member in question and his revelation of factual circumstances which, when viewed in the light of adolescent psychology and the school milieu, tended to explain the hearsay and rumors. After the charges were certified, timely investigation must have showed that there was virtually no admissible evidence to support the allegations. It would not have been too late to withdraw them under such circumstances, thus saving both parties considerable expense, as well as protecting the student witnesses from an unpleasant experience and the work of the school from unnecessary disruption.

Based on the findings and conclusion above, it is therefore **ORDERED** that the charges be dismissed and respondent be paid any salary which he would have received during the first 120 days he was suspended.

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 5736-83

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

December 12, 1983
DATE

Naomi Dower LaBastille
NAOMI DOWER-LaBASTILLE, ALJ

Receipt Acknowledged:

12/15/83
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

Dec. 19, 1983
DATE

Ronald L. Lasken/jrp
FOR OFFICE OF ADMINISTRATIVE LAW

jrp

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IN THE MATTER OF THE TENURE	:	
HEARING OF NATHAN JAMES	:	COMMISSIONER OF EDUCATION
MICHAELS, SCHOOL DISTRICT OF	:	DECISION
THE CITY OF NEWARK, ESSEX COUNTY.	:	
	:	

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

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

The Board in primary exceptions contends that Judge Dower-LaBastille improperly excluded any testimony which was adverse to respondent. The Board argues that the judge failed to follow applicable rules and that such action was plainly in error and pleads that the Commissioner so determine. The Board continues by claiming that the judge improperly determined that all the Board's witnesses, for one reason or another, are unreliable while all of respondent's witnesses are inherently reliable. The Board requests reversal of the judge in this matter. The Commissioner cannot agree with the pleading herein of the Board.

The Commissioner notes that primary exceptions by respondent were not filed in a timely fashion.

The Commissioner observes the sweeping condemnation by the Board of the judge in this matter. However, the Commissioner is constrained to comment that there is nothing in the record to show any move for recusal on the part of the Board.

A close reading of this matter leads the Commissioner to declare that the judge properly considered the proofs necessary to determine that the Board did not prove any of the charges of conduct unbecoming a teaching staff member. The Commissioner so holds.

Further, the Commissioner affirms the finding by the judge herein concerning the credibility of witnesses from "***the 'proofs as a whole' with due regard to the opportunity of the one who heard the witnesses to judge their credibility***." Mayflower Securities v. Bureau of Securities, 64 N.J. 85, 92-93 (1973); Close v. Kordulak Bros., 44 N.J. 589, 599 (1965).

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

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Accordingly, the charges against respondent shall be dismissed with payment to him of any and all salary and emoluments that may have been withheld during litigation.

IT IS SO DETERMINED.

COMMISSIONER OF EDUCATION

JANUARY 30, 1984

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6667-83
AGENCY DKT. NO. 222-7/83A

MARY L. KINNEY,

Petitioner

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF SPARTA.
Sussex County

Respondent

APPEARANCES:

Andrew F. Zazzali, Jr., Esq., for petitioner
(Zazzali, Zazzali & Kroll, attorneys)

David J. Weaver, Esq., for respondent
(Trapasso, Dolan & Hollander, attorneys)

Record Closed: December 9, 1983 **Decided: December 19, 1983**

BEFORE WARD R. YOUNG, ALJ:

Petitioner alleged the Board violated her seniority rights due to its failure to assign her to teach Latin courses during the 1983-84 school year and seeks an Order to require said assignments. The Board denied any impropriety, and avers that petitioner has failed to state a claim upon which relief may be granted, inter alia, and seeks a Summary Judgment of Dismissal with prejudice.

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The matter was transmitted to the Office of Administrative Law on August 29, 1983 as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on October 26, 1983 at which the parties agreed there would be no need for plenary hearing in the absence of disputed material facts. The respondent filed a Motion to Dismiss and the matter was briefed pursuant to N.J.A.C. 1:1-9.2. The record closed on December 9, 1983, the due date of respondent's optional reply.

Petitioner was certified to teach Latin as of June 1, 1966. She was also certified to teach English. She was employed in respondent's school district as of September 1, 1966 as a teacher of Latin and English, and was assigned to teach both subjects until April 30, 1974, when she was only assigned to teach English. Latin had been dropped from the curriculum after the 1973-74 school year until it was reinstated as of the 1983-84 school year.

Latin is currently being taught by a teacher other than petitioner. Said teacher was issued his certificate as a teacher of Latin in June 1983. Petitioner is assigned to teach English during the current year.

Petitioner argues for the application of N.J.A.C. 6:3-1.10(k)(27) and the amended N.J.A.C. 6:3-1.10(e)(15) in support of her claim to the assignment as teacher of Latin.

N.J.A.C. 6:3-1.10 incorporates standards for determining seniority. It is undisputed that petitioner has the greatest seniority as a teacher of Latin, as the current Latin teacher is non-tenured and has none. The regulation was promulgated under the authority of N.J.S.A. 18A:28-10 which states:

> 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.

Chapter 28 of Title 18A of the New Jersey Statutes Annotated codifies and incorporates the legislative intent relative to tenured teaching staff members. Article 3

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is devoted to the Effect of Reduction of Force Upon Person Under Tenure. See N.J.S.A. 18A:28-9 through N.J.S.A. 18A:28-14.

In the instant matter, there was no reduction of force or dismissal of petitioner. The true issue here is the authority of the Board to assign its teaching staff members under the certifications held by them.

The only case cited by petitioner in support of her claim is Howley and Brookholdt v. Ewing Township Bd. of Ed., 1982 S.L.D. _____ (decided December 20, 1982). In that matter Howley's position was abolished and the issue focused on his reversion to the position of vice-principal. There is no abolishment of petitioner's position in the instant matter. The Howley decision clearly states that "Seniority is a concept which only applies to certain rights of tenured personnel and only has meaning when a reduction in the employment force is necessary" (at 13). It also clearly establishes that tenure attaches to a position while the only thing which can accrue in a category is seniority.

The transfer and/or assignments of teaching staff members as a legal exercise of its managerial prerogative consistent with statutory and decisional law is also well established. See N.J.S.A. 18A:11-1; N.J.S.A. 18A:27-4 and N.J.S.A. 18A:7A-1 et seq. See also Williams v. Plainfield Bd. of Ed., 176 N.J. Super. 154 (App. Div. 1980), cert. den. 87 N.J. 300 (1981), and DeSimone v. Bd. of Ed. of the Borough of Fairview, 1966 S.L.D. 43, wherein the Commissioner said:

> The protection afforded petitioner by the tenure laws is in her position as teacher. As a teacher she has no claim to a particular class or grade or school but may be assigned by her employer to teach within the scope of her certificate. Greenway v. Camden Board of Education, 1939-49 S.L.D. 151, affirmed State Board of Education 155, affirmed New Jersey Supreme Court 129 N.J.L. 46 (1942). As a teacher under tenure she could not be dismissed or suffer a reduction in salary without cause, but she could be transferred to other teaching positions for which she was qualified. A transfer is not a demotion or a dismissal. Cheeseman v. Gloucester City Board of Education, 1 N.J. Misc. 318 (Sup. Ct. 1923); Downs v. Hoboken Board of Education, 12 N.J. Misc. 345 (Sup. Ct. 1934), affirmed 113 N.J.L. 401 (E. & A.) 1934). (at 47)

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I **FIND** for the aforementioned reasons that petitioner has not filed a claim for which relief may be granted. I **CONCLUDE**, therefore, that Summary Decision is **GRANTED** to respondent, and **FURTHER CONCLUDE** that this Petition of Appeal shall be and is hereby **DISMISSED.**

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

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

19 December 1983
DATE

Ward R. Young
WARD R. YOUNG, ALJ

Receipt Acknowledged:

12/31/83
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

Dec. 23, 1983
DATE

Ronald L. Tabakin
FOR OFFICE OF ADMINISTRATIVE LAW

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MARY L. KINNEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SPARTA, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The Commissioner has reviewed the record in the instant matter including the initial decision rendered by the Office of Administrative Law, Ward R. Young, ALJ.

It is observed that petitioner's exceptions to the initial decision and the Board's reply exceptions have been filed in accordance with the provisions of N.J.A.C. 1:1-16.4a, b and c.

In the Commissioner's judgment it is clear, upon review of petitioner's exceptions to the initial decision which are noted and incorporated by reference herein, that her seniority rights and tenure status are not at issue, by virtue of the action taken by the Board to reassign her within the scope of her teaching certificate. In this regard, the Commissioner finds and determines that her exceptions to the initial decision are without merit. The Commissioner so holds.

In arriving at the above finding and determination the Commissioner relies upon those conclusions and recommendations reached by the judge in his initial decision as well as those specific arguments advanced by the Board in its reply exceptions which read in pertinent part as follows:

> "***Petitioner claims a violation of her seniority rights pursuant to the Administrative Code and N.J.S.A. 18A:28-12. Pertinent portions of that statute are as follows:
>
> > 'If any teaching staff member shall be dismissed as a result of such reduction, such person shall be and remain upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified and he shall be reemployed by the body causing dismissal,'...
> > N.J.S.A. 18A:28-12.

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"Thus, seniority rights under this statute are only relevant when such teaching staff member is dismissed. It is undisputed that the Board of Education has the power pursuant to N.J.S.A. 18A:25-1 to transfer teaching staff members. This proposition was recently upheld in the case of Williams v. Plainfield Bd. of Ed., 176 N.J. Super. 154 (App. Div. 1980) certif. den. 87 N.J. 300 (1981).

"In the case at bar, Petitioner, Mary L. Kinney, was not dismissed from her employment with the Sparta Board of Education. She was merely transferred from one teaching assignment to another within her certification and which she was qualified to teach under her subject matter endorsements. Thus, the entire issue of violation of seniority rights is moot and irrelevant because the condition precedent to that consideration, a dismissal of the individual in question, did not occur. In addition, the seniority rights section that Petitioner claims is a basis for relief, is N.J.A.C. 6:3-1.10 et seq. That section specifically points out that seniority as discussed in the Administrative Code sections is dependent upon a dismissal as contemplated by N.J.S.A. 18A:28-9 et seq. It is submitted that this statute is emminently (sic) clear on this point and since Petitioner has never been dismissed, and has been gainfully employed continuously by the Sparta Board of Education, she has no standing to raise any seniority claims.***"
(Board's Exceptions, at pp. 2-3)

In light of the foregoing, the Commissioner finds and determines that the instant Petition of Appeal can be and is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBRUARY 1, 1984

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6198-83
AGENCY DKT. NO. 215-6/83A

RUMSON-FAIR HAVEN EDUCATION ASSOCIATION, on behalf of ALEX KOHARSKI, ROBERT MOIR, ROBERT BARRY, DON BEIDLER, THEODORE BROWN, ROBERT CULP, JOSEPH DIGNAN, VINCENT ESPOSITO, VIVIAN JOHNSON-FITCH, WILLIAM FRAZEE, SUSAN GRAZIANO, GEORGE GROSSMAN, JOSEPH LANZA, HAL LORME, THOMAS McBRIDE, ELENA PATTERSON, RICHARD RICHTER, ROBERT STOUT,
Petitioners

v.

RUMSON-FAIR HAVEN BOARD OF EDUCATION,
Respondent

APPEARANCES:

Arnold M. Mellk, Esq., for petitioners (Katzenbach, Gildea & Rudner, attorneys)

Martin M. Barger, Esq., for respondent (Reussille, Mausner, Carotenuto, Bruno & Barger, attorneys)

Record Closed: November 2, 1983 **Decided:** December 20, 1983

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OAL DKT. NO. EDU 6198-83

BEFORE DANIEL B. MCKEOWN, ALJ:

The Rumson-Fair Haven Education Association (Association) on behalf of the individually named petitioners, each of whom is employed as a teaching staff member by the Rumson-Fair Haven Board of Education (Board), seeks an order declaring that the Board unlawfully withheld one day's pay because of their absence from school in observance of Martin Luther King's day. 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. 52:14F-1 et seq. At a prehearing conference conducted September 14, 1983 the parties agreed that the matter be decided on cross motions for summary decision. The record closed November 2, 1983.

BACKGROUND FACTS

The undisputed facts of the matter, as determined by the pleadings, are as follows.

N.J.S.A. 36:1-1 declares, as a public holiday, "January 15, known as Martin Luther King's Birthday." January 15, 1983 was a Saturday. On the preceeding Friday, January 14, 1983, each individually named petitioner was absent from his/her school duties. On or about June 23, 1983 the Board deducted one day's pay from the pay checks of each of the individually named petitioners because of their absence from school on January 14, 1983. It is this day's pay petitioners seek to have returned to them, with interest. The issue is, as stated in the Prehearing Order:

> Whether, when a day declared to be a public holiday falls on a Saturday, N.J.S.A. 18A:25-3 shall be read to provide its benefits to "teaching staff members" for the preceeding Friday.

Three statutes must be addressed to resolve this issue. First, N.J.S.A. 18A:25-3 provides in full as follows:

> No teaching staff member shall be required to perform his duties on any day declared by law to be a public holiday and no deduction shall be made from such member's salary by reason of the fact that such a public holiday happens to be a school day and any term of any contract made with any such member which is in violation of this section shall be void.

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> The following days in each year shall, for all purposes whatsoever as regards the presenting for payment or acceptance, and of the protesting and giving notice of dishonor, of bills of exchange, bank checks and promissory notes be treated and considered as the first day of the week, commonly called Sunday, and as public holidays: * * * January 15, known as Martin Luther King's birthday * * * and any day heretofore or hereafter appointed, ordered or recommended by the Governor of this State, or the President of the United States as a day of fasting and prayer, or other religious observance, or as a bank holiday or holidays. All such bills, checks and notes, otherwise presentable for acceptance or payment on any of the days herein enumerated, shall be deemed to be payable and presentable for acceptance or payment on the secular or business day next succeeding any such holiday.
>
> Whenever any of the days herein enumerated can and shall fall on a Sunday, the Monday next following shall, for any of the purposes herein enumerated be deemed a public holiday; and bills of exchange, checks and promisory notes which otherwise would be presentable for acceptance or payment on such Monday, shall be deemed to be presentable for acceptance or payment on the secular or business day next succeeding such holiday.
>
> In construing this section, every Saturday shall, until 12 o'clock noon, be deemed a secular or business day, except as hereinbefore provided in regard to bills of exchange, bank checks and promissory notes, and the days herein enumerated except bank holidays and Saturdays shall be considered as the first day the week, commonly called Sunday, and public holidays, for all purposes whatsoever as regards the transaction of business in the public offices of this State, or counties of this State; but on all other days or half days, except Sunday or as otherwise provided by law, such offices shall be kept open for the transaction of business.

The third statute implicated is N.J.S.A. 36:1-1.2 which provides in full as follows:

> Whenever any legal holiday enumerated in R.S. 36:1-1 other than Saturday can and shall fall on a Saturday, the preceeding Friday shall be deemed to be said holiday for State employees, and the public offices of the State government shall be closed for the transaction of business.

Petitioners, relying upon the Commissioner's prior application of N.J.S.A. 18A:25-3 in Carl Moldovan et al. v. Bd. of Ed. of Hamilton Tp., 1971 S.L.D. 246, contend that the Board may make no deductions from their salary because of their absence from school on public holidays.

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Petitioners argue that the three statutes, read in pari materia, mandate the conclusions that teachers may not be required to perform their duties on the Friday before a Saturday on which a public holiday falls, and that no deduction may be made from their salaries as a consequence of their failure to work. The Board contends, to the contrary, that though January 15 is declared a public holiday, N.J.S.A. 36:1-1 merely provides that when public holidays fall on a Sunday, the Monday next following shall be deemed the public holiday. The Board reasons that if the legislature intended to provide for the celebration the previous Friday of a holiday falling on a Saturday, in a similar fashion to the celebration the following Monday of a holiday falling on a Sunday, it would have so stated in this authorizing statute. Because the legislature did not so provide, the Board concludes it did not so intend. Furthermore, the Board points to N.J.S.A. 36:1-1.2 which does address the celebration of holidays falling on Saturday the previous Friday but only in respect of certain employees. The Board contends that that statute, by its very words, limits the celebration on the preceeding Friday of holidays falling on Saturday to state employees. Finally, the Board contends that because N.J.S.A. 36:1-1 differs from N.J.S.A. 36:1-1.2, the legislature intended to distinguish between Saturdays and Sundays for purposes of the celebration of public holidays falling on either day.

Petitioners position admits of a distinction between Saturdays and Sundays in that Sunday has the status of a full public holiday because, by statute, neither banks nor public offices may be opened for the transaction of business. Accordingly, in order to allow for a full and separate observance of a public holiday falling on a Sunday, the legislature specified that "the Monday next following" shall be deemed the public holiday for all purposes. Saturday, to the contrary, does not have the status of a full public holiday in that the statute, N.J.S.A. 36:1-1, provides that "* * *every Saturday shall, until 12 o'clock noon, be deemed a secular or business day* * *." Notwithstanding that all public offices must be closed on Saturdays, banks are authorized to transact business throughout the day. Petitioners contend that N.J.S.A. 36:1-1.2 was intended by the legislature to provide a separate observance of a public holiday falling on a Saturday when governmental offices are not open. Thus, petitioners reason that unless N.J.S.A. 18A:25-3 is read to provide authorization through N.J.S.A. 36:1-1.2 for teachers to observe a separate public holiday on the Friday preceeding a Saturday on which a holiday falls, the primary object of the statutory scheme at N.J.S.A. 36:1-1, et seq., for the commemoration of public holidays will be defeated. Petitioners conclude that the legislature, through its enactment of both N.J.S.A. 36:1-1 and 36:1-1.2, intended holidays

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to be celebrated on separate days when such holidays fall on Saturday and Sunday. Finally, petitioners contend that unless N.J.S.A. 18A:25-3 is construed to authorize separate observances for teachers of public holidays on the Friday preceeding the Saturday on which the holiday falls, teachers will have been unfairly and irrationally singled out and prohibited from celebrating public holidays.

DISCUSSION

N.J.S.A. 18A:25-3 makes no explicit reference to any other statute regarding the definition of a public holiday. However, the Commissioner, in Moldovan v. Hamilton Tp. Bd. of Ed., 1971 S.L.D. 246, 248, ruled that N.J.S.A. 36:1-1 is the controlling statutory authority in respect of public holidays. The issue presented here appears to be one of first impression in New Jersey for there is no case law directly on point.

First, it must be noted that Chapter 135, Laws of 1978, codified at N.J.S.A. 36:1-1.2, provides "An Act concerning public holidays for State employees and regulating the transaction of business in the public offices of the State government* * *." In determing legislative intent, one must look to the plain language of the statute without arbitrarily expanding its scope beyond the plainly expressed legislative intent. Pacific Discount Co. v. Powell, 70 N.J. Super. 156 (App. Div. 1961). The plain language of the statute provides that public holidays falling on Saturdays shall be deemed to occur the preceeding Friday "* * * for State employees* * *." This is not a case, as in Moldovan, supra, by which a public holiday falls on a weekday, or under N.J.S.A. 36:1-1 on Sunday, and the Board required its teachers to be in attendance. Rather, in this case the public holiday, Dr. Martin Luther King's birthday, fell on a Saturday and petitioners considered the preceeding Friday as the public holiday. Petitioners are not State employees. Petitioners are employees of a local board of education. Consequently, petitioners are not of the class of employees which the legislature addressed at N.J.S.A. 36:1-1.2.

N.J.S.A. 36:1-1 et seq. addresses Legal Holidays. As noted earlier, N.J.S.A. 36:1-1 specifies those days known as legal holidays. But within the same chapter, N.J.S.A. 36:1-7 acknowledges Grandparents' Day, N.J.S.A. 36:1-8 acknowledges Volunteer Fireman's Day, and N.J.S.A. 36:1-9 acknowledges Volunteer first aid and rescue squad day. These latter days, because they are not enumerated in N.J.S.A. 36:1-1, are celebrated only on Sundays. Accordingly, one must look to the provisions of N.J.S.A. 36:1-1 to determine whether N.J.S.A. 18A:25-3 authorizes teachers to celebrate on the preceeding Friday those days enumerated which happen to fall on a Saturday. Though the whole of

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N.J.S.A. 36:1-1 et seq., is the legislative expression of public holidays and days of general observance as distinguished from public holidays, N.J.S.A. 36:1-1.2 was enacted for a specific group of persons and that legislative expression does not justify applying the "in pari materia" rule. The statute is not ambiguous and its intent can be determined by the words used. N.J.S.A. 36:1-1 provides only that enumerated public holidays which fall on a Sunday are to be celebrated the following Monday.

I **CONCLUDE** that N.J.S.A. 18A:25-3, to the extent that the Commissioner on a prior occasion ruled that N.J.S.A. 36:1-1 is controlling statutory authority in respect of public holidays, does not authorize teachers to absent themselves from their duties on the Friday preceeding a Saturday upon which a public holiday falls. In respect of petitioners argument that they have been unfairly and irrationally singled out and prohibited from celebrating public holidays, I find no merit in that argument. No prohibition attaches to petitioners from celebrating, or from having celebrated, Dr. Martin Luther King's birthday on Saturday, January 15, 1983. I know of no obligation by which employees of local boards of education must be granted the same benefits employees of the State receive.

The petition of appeal is **DISMISSED.**

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

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

December 20, 1983
DATE

Daniel B. McKeown
DANIEL B. MCKEOWN, ALJ

Receipt Acknowledged:

Dec. 20, 1983
DATE

Seymour Ellis
DEPARTMENT OF EDUCATION

Mailed To Parties:

Dec. 22, 1983
DATE

Ronald L. Lankenau
OFFICE OF ADMINISTRATIVE LAW

ks

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RUMSON-FAIR HAVEN EDUCATION ASSOCIATION ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RUMSON-FAIR HAVEN REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

Petitioners except to the initial decision by Judge Daniel B. McKeown, contending that the judge should have construed N.J.S.A. 18A:25-3 in pari materia with N.J.S.A. 36:1-1 and N.J.S.A. 36:1-1.2, thus all applicable to public school teachers. The Commissioner simply cannot agree.

The Commissioner notes that the arguments advanced in petitioners' exceptions were presented to the judge who duly considered them in detail and set them aside; so too must the Commissioner. The Commissioner observes that the language of N.J.S.A. 36:1-1.2 is clear and explicit by reference to "***said holiday for State employees***." Petitioners cannot claim to be State employees and invoke the protection of N.J.S.A. 36:1-1.2 and still remain members of the Rumson-Fair Haven Education Association which is a local teachers bargaining agent. By virtue of such fact, it is clear that petitioners are not state employees but employees of a local board of education. The Commissioner so holds.

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

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

FEBRUARY 3, 1984

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INITIAL DECISION
OAL DKT. NO. EDU 0335-83
AGENCY DKT. NO. 500-12/82A

IN THE MATTER OF THE TENURE HEARING OF JOSEPH MURPHY, SCHOOL DISTRICT OF THE MANALAPAN-ENGLISHTOWN REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY

APPEARANCES:

Sanford D. Brown, Esq., for the Complainant Board (Dawes & Brown, attorneys)

Arnold M. Mellk, Esq., for the respondent (Katzenbach Gildea & Rudner, attorneys)

Record Closed: November 7, 1983 Decided:

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

The Board of Education of the Manalapan-Englishtown Regional School District (Board) certified the charge of conduct unbecoming a teaching staff member against respondent, a tenured teacher in its employ, pursuant to N.J.S.A. 18A:6-10 et seq. The Board found probable cause to credit the evidence and support the charge, and that such charge is sufficient to warrant an official letter of reprimand with two days' suspension and salary reduction, pursuant to N.J.S.A. 18A:6-11 et seq. Respondent denies the charge and sets forth nine affirmative defenses with a demand that the charge be dismissed.

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The matter was transmitted from the Commissioner of Education, on January 20, 1983, to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on February 25, 1983, where it was agreed, among other things, that the hearing would be held on April 21 and 22, 1983. That hearing was held with a continuance on September 19, 1983. The parties submitted post-hearing memoranda and the record closed on November 7, 1983.

THE CHARGE

By way of resolution, dated December 16, 1982, the Board charged that respondent was "guilty of failing and neglecting to attend a scheduled activity, to wit, 'Back To School Night' which conduct is unbecoming a teacher in violation of N.J.S.A. 18A:6-10 et seq., which absence was without permission of his immediate supervisors;. . . ."

SUMMARY OF THE TESTIMONAL AND DOCUMENTARY EVIDENCE

The exhibits are numerous with one exhibit alone containing 102 documents consisting of teaching staff members' requests for emergency personal leave (R-22); (see, Inventory of Documents in Evidence attached hereto).

Testifying on behalf of the Board, the principal of the Pine Brook School, to which respondent was assigned, asserted that all teaching staff members were advised on September 7, 1982, of the Back-to-School Night (BTSN) to be held on the date of September 30, 1982 (P-1). By virtue of respondent's assignment as a homeroom teacher and the principal's understanding of the collective negotiations contract between the Board and the Education Association (Association), respondent was required to attend BTSN on September 30, 1982. The pertinent contract language to which the principal referred is found in the Agreement between Manalapan-Englishtown Regional Board of Education and Manalapan-Englishtown Education Association, June 1, 1981 to June 30, 1983, at Article VII, subsection 7.13, which reads as follows:

> Teachers may be required to attend no more than five (5) evening assignments or meeting each school year. [P-4]

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It was the principal's understanding that respondent was required to be present at BTSN in addition to four after-school parent conferences as found at Article VII, subsections 7.14 et seq.

The principal attended BTSN on September 30, 1982, and prior to the arrival of the parents he was advised by the school's assistant principal that respondent was not in attendance. Thereupon, the principal telephoned respondent's home and was advised by an unnamed relative of respondent that respondent was working in another school district. Although no teacher attendance list was kept for BTSN, the principal testified that all teachers, except respondent, were in attendance. The Social Studies supervisor was available to meet with respondent's homeroom parents and distributed respondent's teaching material to those in attendance.

On the subsequent day, October 1, 1982, respondent, who also represents the New Jersey Education Association with teacher negotiations and contract dispute resolutions in other school districts, advised the principal that he was involved in a matter concerning Freehold Borough Board of Education and the New Jersey Public Employees Relation Commission (PERC) on September 30, 1982. The principal testified that respondent represented to him that the PERC matter had been scheduled for September 30, 1982, requiring respondent's presence. Respondent made a request on October 1, 1982, for personal emergency leave for his absence at BTSN on September 30,1982. (P-5).

The principal asserted that respondent made his request pursuant to Article XXII of the negotiated agreement entitled Temporary Leaves of Absence and under subsection 22.1, which provides that:

> Teachers shall be entitled to two (2) days leave of absence for personal, legal, business, household or family matters which require absence during school hours. Application to the teacher's principal or other immediate superior for personal leave shall be made in writing at least one week before taking such leave (except in case of emergencies; whereby, application with reasons shall be made as soon as possible after return to duty), and the applicant, for such leave, shall not be required to state the reason for taking such leave other than that he is taking it under this Section. The days shall not be consecutive and shall not be taken at the beginning or end of a vacation period. Granting of the days of leave shall be in accordance with the operational needs of the school as defined by the Superintendent. [P-4; emphasis added]

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The principal neither signed nor approved respondent's application for emergency leave of absence but, rather, forwarded the application to the Superintendent, noting that the principal had never previously approved this type of request (P-5).

On cross-examination, the principal testified, among other things, that he had known respondent for approximately ten years and knew him before respondent's assignment to the Pine Brook school three years prior to the herein incident. The principal asserted that he was aware of respondent's involvement in incidents and controversies in the school district,[1] and that respondent was the subject of discussion by every school administrator in the school district.

With regard to BTSN, respondent prepared and provided a videotape which was shown and reviewed by the parents of pupils in respondent's classroom. The videotape made reference to the curriculum and subject matter taught by respondent as well as class projects to be covered during the academic year. No parents talked to or registered any complaint to the principal with regard to respondent's absence at BTSN.

The principal admitted that pursuant to the contractual agreement (P-4), it was his duty to approve respondent's request for personal emergency leave. He further admitted that he had never, in ten years, disapproved an after-the-fact emergency leave request. However, in this instance, he sought the advice of the Superintendent of Schools. On October 1, 1982, the principal discussed the incident of respondent's absence from BTSN together with respondent's stated reasons for his absence with the Superintendent (P-5). Several days subsequent to this discussion, the Superintendent advised the principal that tenure charges would be brought against respondent.

The Superintendent testified that he first became aware of respondent's request for an emergency leave of absence subsequent to September 30, 1982. He asserted that he investigated the incident by telephoning the Superintendent of Schools of the Borough of Freehold. The Freehold Superintendent advised that he had knowledge on September 15, 1982, of the PERC session to be held on September 30, 1982. Thereafter, the Superintendent reviewed the terms of conditions of the agreement between the Board and the Association (P-4) and determined that respondent's request should be denied. He determined that respondent had prior knowledge of the PERC session on September 30,

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[1] See: Manalapan-Englishtown Ed. Ass'n v. Bd. of Ed., etc. 187 N.J. Super. 426 (App. Div. 1981).

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1982, and that approval of respondent's request for an emergency leave of absence, after the fact, was inappropriate. The Superintendent conceded that there were no administrative guidelines upon which a denial of a requested personal emergency leave of absence was based.

The Superintendent admitted that he was aware of the fact that the Board had previously certified tenure charges against respondent and that those charges were dismissed by the Commission of Education.[2] He further admitted that he was aware of respondent's involvement in litigation against a principal in the Board's employ, wherein several teaching staff members, including respondent, challenged the Board for its failure to certify tenure charges against the principal subsequent to the Board's receipt of the Association's complaint.[3] He asserted that he did not, at any time, speak to respondent subsequent to October 1, 1982, concerning respondent's request for personal emergency leave for September 30, 1982.

At or about this juncture, respondent advanced an oral motion to dismiss the herein matter, grounding his motion upon the following assertions: There was no residuum of competent evidence to support the charge; the Superintendent swore to hearsay to which he had no direct knowledge; and the certificate of charges was incomplete. The Board objected to respondent's oral motion, contending, among other things, that the Board found probable cause to credit the charge based upon the evidence before it by way of the Superintendent's written statement of evidence and respondent's written statement of position and written statement of evidence, pursuant to N.J.S.A. 18A:6-11. Oral argument having been heard, the court denied respondent's motion to dismiss and required the Board to move forward with its proofs.

The Freehold Borough Superintendent of Schools testified on behalf of the Board, asserting, among other things, that he was in receipt of a telephone call from the Manalapan-Englishtown Superintendent sometime after September 30, 1982, with regard to respondent's attendance at a negotiating session at Freehold on September 30, 1982. The Freehold Superintendent asserted that the negotiations between Freehold teachers

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[2] In the Matter of the Tenure Hearing of Joseph Murphy, School District of the Manalapan-Englishtown Regional School District, Monmouth County, OAL DKT. EDU 878-80 (Commissioner's Decision, October 24, 1980).

[3] 187 N.J. Super. 426 (App. Div. 1981)

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and Board of Education was at a critical stage and that both parties had applied to PERC for the fact-finding. A university professor had been assigned by PERC as the factfinder with September 30, 1982, as the most convenient date to hold the session. On or about September 23, 1982, the Freehold Superintendent met with the Freehold Board attorney who agreed that September 30, 1982, was the most convenient date for himself and the Board. Thereafter, at a date not specified on the record, the Freehold Superintendent contacted the Freehold Board members concerning the fact-finding session to be held on contact September 30, 1982. The Freehold Superintendent had no contact with respondent with regard to setting the date for the fact-finding session, contending that it was the Freehold Board attorney who made the decision and set the date. He further testified that respondent, among others, attended the September 30, 1982 fact-finding session.

The assistant principal of the Pine Brook Elementary School testified that on or about September 21, 1982, he had a conversation with respondent at which respondent suggested that he had a problem with his attendance at BTSN on September 30, 1982. The assistant principal asserted that respondent stated that as an N.J.E.A. representative, to attend a meeting with the Freehold Borough teachers on the evening of September 30, 1982, and to avoid attending BTSN, respondent intended to use one of hs sick leave days of absence. The assistant principal asserted that he advised respondent not to use a sick day because the Board had revised its sick leave policy and that respondent might get into trouble with the Board if it learned he had taken a sick leave day when in fact he was not ill and was attending a negotiation session in another school district.

Subsequent to the Board's having placed its case in chief on the record, respondent renewed his motion to dismiss ab initio. Subsequent to hearing oral argument, the court denied respondent's motion and required him to move forward with his defenses to the charge.

Two teachers testified on respondent's behalf, attesting to respondent's good reputation in the school and community. A third teacher, who was active in the local Association affairs, testified that prior to the 1981-83 agreement in effect, teachers who took temporary leaves of absence were not required to complete a form or to give reasons for the temporary absence. The teacher asserted that he had been absent from one BTSN and was not required to provide a reason for his absence.

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Respondent, testifying on his own behalf, offered 24 teacher requests for personal emergency leave for the 1981-82, 1982-83 school years, 23 of which were approved without the reasons given on the form for such emergency personal leave (R-1 through R-23). One such request (R-23) was for a teacher's emergency leave on October 5, 1981, the date of the 1981-82 school year BTSN, which was approved without a reason for the absence having been stated on the form. Nor were any of the 23 requests forwarded to the Superintendent for his review, consideration or approval. Respondent contends that the absence as shown on P-23 was the same type of activity respondent is alleged to have violated; however, no action was taken against the other teacher.

Respondent testified that on September 21, 1982, he discussed the possibility of the Freehold Borough PERC session following on the evening of either September 29, or 30, 1982. At that time, respondent asserted, he was not certain on which of the two dates the PERC session would be held. Respondent contends that the assistant principal advised respondent that respondent would take a sick day and not report to work. Respondent informed the assistant principal that on September 30, 1982, he was taking his pupils on a class trip to the Monmouth County Courthouse during the regular school hours and that after school, he was coaching the girls' soccer team. Respondent asserted that he did not learn that the PERC session was to be held on September 30, 1982, until September 30, 1982. Subsequent to his return to school from the class trip, respondent attempted to contact the assistant principal and the principal to advise them of his conflict for that evening; however, neither of the two administrators was available. He prepared the materials and videotape and made arrangements for a supervisor to cover his classroom for the parents for the BTSN and attended the PERC session at Freehold Borough on September 30, 1982.

FINDINGS OF FACT

Having carefully reviewed and considered the testimony and other evidence offered in this matter, and having given fair weight thereto, and having observed the demeanor of the witnesses and assessed their credibility, I **FIND** the following to be fact:

1. On September 7, 1982, at or about the opening of school for the 1982-83 academic year, the Pine Brook principal announced, among other things, that the school's Back-to-School Night would be held on September 30, 1982 (P-1).

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2. Subsequently, sometime in September 1982, the precise date undetermined, the principal advised the pupils' parents or guardians that Back-to-School Night would be held on September 30, 1982, commencing at 7:45 p.m. (P-2). This was followed by a memorandum dated September 28, 1982, from the principal to all staff members of the Pine Brook School (P-3).

3. On or about September 21, 1982, respondent, who acts as a representative for N.J.E.A., advised the Pine Brook assistant principal of the possibility of a PERC fact-finding meeting on either September 29 or September 30, 1982, between the Freehold Borough Teachers Association and the Freehold Borough Board of Education which required respondent's attendance.

4. The PERC fact-finding session was scheduled for September 30, 1982, on or about September 23, 1983 by the attorney for the Freehold Borough Board of Education at the convenience of the fact-finder, the Freehold Borough Board and the attorney.

5. Respondent was not advised by the Freehold Borough Board of the date of September 30, 1982, as to the scheduled PERC fact-finding meeting.

6. On September 30, 1982, respondent was conducting a class field trip to the Monmouth County Courthouse, Freehold Borough, New Jersey. It was sometime during his class field trip that respondent learned of the PERC meeting scheduled for the evening of September 30, 1982.

7. Upon respondent's return from the class field trip to the Pine Brook School, respondent attempted to locate the principal and/or the assistant principal to advise them of the conflicting meetings; however, he was unsuccessful because of the fact that neither administrator was available.

8. Respondent proceeded to coach the girls' soccer team after school hours on September 30, 1982.

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9. On the afternoon of September 30, 1982, respondent prepared a videotape tape and other materials to be presented to the parents at the Back-to-School Night setting forth respondent's goals and objectives for the pupils for the remainder of the school year. Respondent made arrangements for a member of the school district's supervisory staff to present the materials to the parents attending Back-to-School Night.

10. Respondent absented himself from Back-to-School Night and attended the PERC fact-finding session at the Freehold Borough Board of Education on September 30, 1982.

11. No complaints or objections were raised by or registered to the school authorities by the parents attending respondent's prepared Back-to-School Night Program.

12. On the subsequent day, October 1, 1982, respondent requested an emergency personal leave day for his absence at the Back-to-School Night, pursuant to Article XXII, § 22.1, of the agreement between the Board and the Association (P-4).

13. The Pine Brook principal neither approved nor denied respondent's request for an emergency personal leave day but, rather, telephoned the Superintendent of Schools and upon the Superintendent's instructions, forwarded respondent's request to the Superintendent.

14. The Superintendent denied respondent's request for emergency personal leave and subsequently informed the Pine Brook principal that tenure charges would be filed against respondent for his failure to attend the Back-to-School Night.

15. Notwithstanding the language of Article XXII § 22.1, which states in pertinent part that: ("emergencies. . . application with reasons shall be made as soon as possible after return to duty)" (P-4), the record demonstrates that during the 1981-82 and 1982-83 school year, 23 emergency personal leaves were granted to teaching staff members without reasons set forth on the application forms (R-1 through R-23).

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16. The record demonstrates that a teaching staff member was granted an emergency personal leave day without a reason set forth on the application form for an absence to Back-to-School Night on or about October 5, 1981 (R-23).

17. Article XXII, § 22.1, provides no criteria or authority as to what comprises an authorized (or unauthorized) emergency personal leave (P-4).

18. Respondent has been the subject of tenure charges filed and certified against him by the Board in the past which were found to be without merit and dismissed by the Commissioner of Education, In re Joseph Murphy, supra.

19. Respondent has been involved in litigation against the Board and its agents before the Superior Court, Appellate Division. In re Manalapan-Englishtown Ed. Ass'n, supra.

DISCUSSION

The charge certified by the Board against respondent is "unbecoming conduct," one of several charges available to the Board to impose sanctions or disciplinary action against a tenured staff member in its employ, pursuant to N.J.S.A. 18A:6-10. Such charges, if found to be true by a preponderance of the reliable and credible evidence, may lead to a reduction in the charged tenured employee's compensation or, alternatively, the employee's dismissal. Tenure charges are serious for, once certified, it may create a dysfunction in the school system with respect to the credibility of the parties to the controversy; i.e., the Board and administrator as the charging party, and the charged tenure employee. In some instances, the certifying of tenure charges against an employee has had the effect of polarizing a school community; pitting the employees against the head of education and its administrators and causing discord among parents and pupils to choose sides in the dispute. There is no showing of such a result in the herein matter. The point to be made, however, is that such action is not to be entered into lightly but, rather, with due caution and circumspection.

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The basis of the Board's charge is that respondent is alleged to be guilty of "failing and neglecting to attend a scheduled activity, to wit, 'Back-to-School Night.' " (See: Resolution of the Manalapan-Englishtown Regional Board of Education, dated December 16, 1982, attached hereto). Except for alleged guilt, this basis for the charge has never been denied by respondent. To the contrary, respondent forthrightly admitted to the Board, as well as to this tribunal, that he did, in fact, absent himself without prior approval or authorization from his assigned duty to the Pine Brook School's Back-to-School Night on September 30, 1982. The question to be determined by this court is whether, under the totality of the circumstances, the basis of the charge rises to the offense of "unbecoming conduct."

The facts in this matter clearly demonstrate that the Board has adopted a policy (Article XXII) which provides for emergency personal leaves of absence for "personal, legal, business, household or family matters" (P-4). The only requirements expressed in the policy provide that the applicant state the reasons for the emergency personal leave as soon as possible after return to duty. Respondent complied with both of these policy conditions; however, his request was denied. The only condition expressed in the emergency personal leave policy is: "Granting of the days of leave shall be in accordance with the operational needs of the school as defined by the Superintendent" (P-4 at p. 21). This condition, in the judgment of this court, is overly broad and lacks precision in operational definition. In addition, the record demonstrates that emergency personal leaves of absence have been granted without compliance to the "giving of reasons" requirement (R-1 through R-23).

It is clear that a stated policy of a board of education must be reasonable. It follows that the interpretation and implementation of that policy must also be reasonable. Guidelines for interpretation of a policy were set out in Harry A. Romeo, Jr. v. Bd. of Ed. of the Twp. of Madison, Middlesex Co., 1973 S.L.D. 102 as follows:

> In ascertaining the meaning of a policy, just as of a statute, the intention is to be found within the four corners of the document itself. The language employed by the adoption should be given its ordinary and common significance. Lane v. Holderman, 23 N.J. 304 (1957). Where the wording is clear and explicit on its face, the policy must speak for itself and be construed according to its own terms. Duke Power Company, Inc. v. Edward J. Patten, Secretary of State et al., 20 N.J. 42, 49 (1955); Zietko v. New Jersey Manufacturers Casualty Ins. Co., 132 N.J.L. 206, 211 (E. & A. 19744); Bass v. Allen Home Development Co., 8 N.J. 219, 226

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> (1951); Sperry and Hutchinson Company v. Margetts, 15 N.J. 203, 209 (1954); 2 Sutherland, Statutes Statutory Construction (3rd ed. 1943), section 4502" [at 106]

The facts demonstrate that respondent followed the Board's policy as prescribed by Article XXII § 22.1 (P-4). Additionally, there is no competent, credible evidence that as the result of respondent's absence from the Back-to-School Night the Board's educational program was disrupted in any manner. To the contrary, the facts clearly demonstrate that respondent prepared a program for the parents which was presented in respondent's absence by a supervisory staff member in the Board's employ. In addition, the school administrators could not point to any comments or criticisms by parents with regard to respondent's absence.

This is not to minimize the import of Back-to-School Night activities, for they play a significant role in informing parents of the school's goals and objectives. Back-to-School Night provides parents and teachers alike the opportunity to get acquainted to discuss the individual child's program and progress, albeit, abbreviated in the time allowed. It also provides, among other things, a generally positive public relations mechanism for the schools.

The Commissioner has stated his position with respect to the protection of tenure as articulated In the Matter of the Tenure Hearing of Joseph A. Maratea, Township of Riverside, Burlington Co., 1966 S.L.D. 77 aff'd State Bd. of Ed. 106, aff'd New Jersey Superior Court, App. Div. (1967 S.L.D. 351), wherein it was said:

> The Commissioner is assiduous to protect school personnel in their employment when they are subjected to unfair or improper attacks or when they are unable to perform effectively because of conditions not of their own making or beyond their control. [1966 S.L.D. at 106]

Given all the circumstances in this matter, this court fails to see that respondent's action can give rise to a tenure charge of "unbecoming conduct." At most, respondent made a mistake in judgment which, considering all the evidence before me, would not constitute conduct unbecoming a teaching staff member. See: In the Matter of the Tenure Hearing of Catherine Reilly, School District of the City of Jersey City, Hudson Co., 1977 S.L.D. 403. This matter is, in fact, de minimis non curat lex.

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Accordingly, it is noted that the Commissioner has, in certain instances, set aside the actions of boards of education wherein it was determined that they abused their discretionary powers. The criteria for such a determination is found in George A. Ruch v. Bd. of Ed. of the Greater Egg Harbor Regional School District, Atlantic Co., 1968 S.L.D. 7, dismissed State Bd. of Ed. 11, aff'd New Jersey Superior Court, App. Div. (1969 S.L.D. 202) where the Commissioner said:

> The Commissioner agrees that boards of education may not act in an unlawful, unreasonable, frivolous, or arbitrary manner in the exercise of their powers with respect to the employment of personnel. Thus a board of education may not resort to statutorily proscribed discriminatory practices, i.e., race, religion, color, etc., in hiring or dismissing staff. Nor may its employment practices be based on frivolous, capricious, or arbitrary considerations which have no relationship to the purpose to be served. Such a modus operandi is clearly unacceptable and when it exists it should be brought to light and subjected to scrutiny. [1968 S.L.D. at 10]

Accordingly, I **CONCLUDE** that the Board's action to certify tenure charges against respondent was based upon frivolous, capricious and arbitrary considerations without a rational relationship to the purpose to be served.

It is **ORDERED,** therefore, that the tenure charge against respondent Joseph Murphy be and are hereby **DISMISSED.**

The petitioner Board now seeks to recover the cost of discovery imposed upon it by this court on behalf of respondent. Petitioner Board relies upon N.J.A.C. 1:1-11.4(a) and affidavit submitted by the Superintendent. It is noted herein that under normal circumstances, petitioner's motion would be granted to require respondent to reimburse the Board for the reasonable expenses and costs caused by respondent's discovery request. However, where a party incurs expenses as a result of an action instituted in bad faith, there is precedent for making the party with unclean hands bear the burden of the costs.

> Normally, when a plaintiff files suit and unjustifiably charges a defendant with illegal activity only for the purpose to harass or embarrass defendant, a situation arises which would warrant the trial court's granting costs to defendant in order to indemnify him against the expense of vindicating the right invaded by plaintiff. [Kotlikoff v. Tp. of Pennsauken, 131 N.J. Super. 590, 598 (Law Div. 1974)]

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Accordingly, pursuant to the above dictum and within the discretion of this court, I **CONCLUDE** that the Board's motion is without merit and is hereby **DENIED** and **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.

21 December 1983
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

Dec. 29, 1983
DATE

Ronald L. Parker/pb
OFFICE OF ADMINISTRATIVE LAW

bm

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PETITIONER'S EXHIBITS

P-1 Pine Brook School, Opening School Agenda, September 7, 1982

P-2 September 1982 - Dear Parent or Guardian

P-3 Memorandum dated September 28, 1982, All Staff, Back-to-School Night

P-4 Agreement Between Manalapan-Englishtown Regional Board of Education and Manalapan-Englishtown Education Association, June 1, 1981 to June 30, 1983

P-5 Request for Personal Leave, dated October 1, 1982

P-6 Marla Krasinsky Request for Emergency Personal Leave, dated December 11, 1981 for December 10, 1981 - Reason: Furnace Delivery

P-7 Virginia McEwan Request for Emergency Personal Leave, dated February 1, 1982 for January 29, 1982

P-8 Loretta Dabbs Request for 1/2 Emergency Personal Leave, dated December 21, 1981 for December 18, 1981

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RESPONDENT'S EXHIBITS

R-1 Maxine Bussell-Request for Personal Day-Emergency
R-2 Elaine Worman Dios-Request for Personal Emergency Leave
R-3 E. Puchalek-Request for Personal Emergency Leave
R-4 Maxine Bussell-Request for Personal Day-Emergency
R-5 Diane Piorkowski-Request for Personal Day-Emergency
R-6 Diane Piorkowski-Request for Personal Day-Emergency
R-7 Elaine Worman Dios-Request for Personal Day-Emergency
R-8 Sue Tennenbaum-Request for Personal Day-Emergency
R-9 Susan McNeill-Request for Personal Day-Emergency
R-10 Roseann Madden-Request for Personal Day-Emergency
R-11 Roseann Madden-Request for Personal Day-Emergency
R-12 Carol Walker-Request for Personal Day-Emergency
R-13 Maxine Saum-Request for Personal Day-Emergency
R-14 Barbara Beagle-Request for Personal Day-Emergency
R-15 Helen Certa-Request for Personal Day-Emergency
R-16 Jacqueline Martin-Request for Personal Day-Emergency
R-17 Ruth Gaswirth-Request for Personal Day-Emergency
R-18 Patricia Montagna-Request for Personal Day Emergency
R-19 Margorie Ganz - Request for Personal Day-Emergency
R-20 Helene Caesar-Request for Personal Day-Emergency
R-21 Donna Rosenberg-Request for Personal Day-Emergency
R-22 102 Requests for Personal Leave-Emergency which met the following criteria:

1. Requests were made during the operation of the Agreement between the Board and the Association, dated June 1, 1981 to June 30, 1983
2. Requested leave was for emergency purposes
3. The requested leave was approved
4. No reason for the requested emergency leave was recorded

R-23 Don Sweeten-Request for Emergency Leave, dated October 5, 1981: Night of Pinebrook Back-toSchool Night

R-24 Vic Guino-Request for Personal Leave-Emergency, dated November 8, 1982, for November 5, 1982, reasons stated

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IN THE MATTER OF THE TENURE :
HEARING OF JOSEPH MURPHY, SCHOOL :
DISTRICT OF MANALAPAN-ENGLISHTOWN : COMMISSIONER OF EDUCATION
REGIONAL, MONMOUTH COUNTY. : DECISION
:

The Commissioner has reviewed the record of the instant matter including the initial decision rendered by the Office of Administrative Law, Lillard E. Law, ALJ.

It is observed that no timely exceptions to the initial decision were filed by the parties with the Commissioner pursuant to N.J.A.C. 1:1-16.4a, b and c.

The Commissioner upon review of those findings and conclusions issued by the judge in the initial decision observes that the judge has recommended that the tenure charge against respondent be dismissed. The Commissioner concurs with the judge's recommendations herein, specifically for those reasons set down in the initial decision and which in part are grounded upon those prior decisions of the Commissioner in Maratea Tenure, Ruch and Romeo, supra. The Commissioner so holds.

Accordingly, the Commissioner finds and determines that the Board's tenure charge against respondent herein can be and is hereby dismissed. IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBRUARY 6, 1984

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6869-83
AGENCY DKT. NO. 189-6/83A

DEPTFORD TOWNSHIP
BOARD OF EDUCATION,
Petitioner
v.
OLYMPIC CONFERENCE
AND NEW JERSEY STATE
INTERSCHOLASTIC ATHLETIC
ASSOCIATION,
Respondents.

APPEARANCES:

Alan R. Schmoll, Esq., representing petitioner, Board of Education of Deptford Township (Capehart & Scatchard, attorneys)

John D. Wade, Esq., for the respondent, Olympic Conference, (Wade & Friedman, attorneys)

Michael J. Herbert, Esq., for the respondent, NJSIAA, (Sterns, Herbert & Weinroth, attorneys)

Record Closed: November 14, 1983 Decided: December 29, 1983

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

Petitioner appeals from a determination by the Olympic Conference and the New Jersey State Interscholastic Athletic Association (NJSIAA) penalizing its school

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district, asserting that the Deptford Township Board of Education (Board) was denied due process of law prior to the assessment of penalties by the conference and the NJSIAA. Petitioner prays that the penalties assessed by the Olympic Conference and the NJSIAA be declared without force and effect, and that the Commissioner of Education determine that the Board was denied due process of law.

After filing with the Commissioner, 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.

At prehearing conference on September 30, 1983, the issues were established and it was determined that no factual dispute exists between the parties; therefore, the litigants agreed to file letter briefs and have the matter determined by Summary Decision. At that same prehearing conference, the respondent NJSIAA attorney submitted a complete document (J-1) which sets forth the entire history of this matter in sequence and readily understandable form. This document has facilitated the review of this case for the parties and the administrative law judge.

The relevant facts are not in dispute and will be restated here essentially as set forth in the NJSIAA and Olympic Conference brief.

STATEMENT OF THE CASE

The Deptford Township Board of Education operates a local public school known as the Deptford Township High School.

The Olympic Conference is comprised of a group of secondary schools voluntarily organized to participate in interscholastic athletics and to encourage certain athletic goals. Among the objectives of the Olympic Conference, as outlined in its Constitution and By-Laws, is to provide educational experiences for boys and girls that will benefit them throughout their lives; to help youth learn and value good sportsmanship and fair play as sound principles of life; to provide opportunities for schools to work closely together in expanding activities for youth; and to encourage wholesome relationships among participants, spectators, schools and communities (Joint Exhibit, No. 20).

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The NJSIAA is joined in this action pursuant to Article III Section 8 of Olympic's Constitution which requires "all member schools of [the Olympic Conference to be a] member of the N.J.S.I.A.A." Article VII designates the NJSIAA as the forum for appeals from determinations of the Olympic Conference respecting protests, controversies and disputes.

On October 4, 1982, Deptford High School (Deptford) and Cherry Hill High School West (Cherry Hill) played a junior varsity football game at the Cherry Hill facility. At the conclusion of the contest, several fights broke out between various players from both teams. The altercations were of such a magnitude that the principal of Cherry Hill, Joan Katz, wrote, on October 5, 1982 to David DeGroodt, who then served as Commissioner of the Olympic Conference (Joint Exhibit, No 9). As Ms. Katz stated in her letter, she was writing to Mr. DeGroodt in order to "make him aware of a serious incident that occurred following the Deptford/Cherry High School West Junior Varsity football game which took place at High School West on Monday, October 4, 1982." (Id.)

Thereafter, in response to Ms. Katz' letter, Mr. DeGroodt appointed a three-person committee to investigate the matter and to deliver the results of their findings to the full Olympic Conference. Accordingly, the Investigating Committee, which consisted of the Commissioner, Assistant Commissioner, and President of the Athletic Directors' Association of the Olympic Conference, conducted a thorough investigation of the incident. The actions taken by that Committee included receiving telephone information from school officials; receiving telephone information from the three game officials; viewing video tapes of the last minutes of the game and the beginning of the fight at Cherry Hill; viewing written statements from players of both teams; taking statements from all coaches, athletic directors, and school principals involved; holding interviews with involved students at Deptford High School; holding interviews with students at Cherry Hill West High School; and interviewing officials in person at Collingswood High School (Joint Exhibit, No. 10).

Thereafter, the Committee fully explicated its findings in the matter and concluded that Deptford's coaching staff "was responsible for creating a belligerent climate that fostered the situation which occurred on the field after the game." (Id.) The Committee further found that the objectionable actions of Deptford's coaching staff included the use of profanity on the field during the game; inappropriate comments to officials in front of student athletes and inappropriate comments to student athletes in front of officials; and inappropriate response when a Deptford player was ejected from the game. (Id.)

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The Committee also set forth its finding that the Cherry Hill West Coaching Staff did not contribute to the problem; that the game was officiated in an appropriate manner by the three officials and did not occur as a result of their negligence; and that the initial fight broke out as a result of verbal threats which took place between two players during the game. (Id.)

Accordingly, the Committee recommended that the two student athletes involved should be disciplined; that, in order to impress upon both teams the seriousness of the incident, both teams should be prohibited from participating in their next regularly scheduled Junior Varsity contest with the result that they forfeit the contest to the scheduled teams; that the involved coaches be disciplined and that their past record be taken into consideration in determining the appropriate disciplinary action; and that the administration of the coaching staffs of both schools conduct an in-depth investigation on their own so that appropriate discipline might be administered to all involved student athletes. (Id.)

In responding to the recommendations of the Committee, Deptford's Principal, Richard A. Gondolf, thanked the members of the Committee in a letter dated October 19, 1982 and stated as follows:

> My thanks to you and the members of the Olympic Conference Investigating Committee for all the time and effort you spent reviewing the unfortunate incident that occurred on October 4, 1982, at the Cherry Hill West/Deptford J. V. football game. It is always beneficial to have an impartial committee make an investigation so the biases of the parties being investigated are minimized.
>
> The recommendations made by your Committee are also valuable in that they serve as a guide for possible action to prevent occurrences such as this from happening again (Joint Exhibit, No. 11).

Principal Gondolf then went on to outline the various disciplinary actions the Deptford School District had taken in response to the Committee's recommendations as follows:

> 1. This is perhaps the most important - Deptford coaches involved in the October 4 contest at Cherry Hill West, namely; coaches R. Semple, F. Swartz and D. Vignola, are

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receiving severe reprimands from the Superintendent of Schools, Dr. D. Moyer. The Past performance of each coach is being considered in the severity of the reprimands.

The letters of reprimand are now being reviewed by the Deptford Township Board of Education attorney, Alan Schmoll.

2. All players determined to be directly involved in the fight are being placed on probation for the remainder of the school year.

3. Four players were suspended from participating in either the Edgewood varsity or J.V. game and practice for one week beginning on October 9.

4. To indicate the seriousness of this situation and to make an impression upon all of the team members, Deptford is forfeiting the Highland J.V. football game scheduled to be played on Monday, October 25. Highland was chosen because it is the first conference J.V. game after the altercation and will have greater impact upon the players than a non-conference game.

5. The head coach, Mr. J. Corbi, is now attending all J.V. games - home or away - to supervise his coaching assistants.

6. I met with the entire team to discuss the fact that they were wrong for being involved in a fight, regardless of who they thought instigated it, and that any further misbehavior of this nature would result in their being suspended from all athletic and co-curricular programs for the school year.

7. An in-depth investigation is continuing to ensure that all student athletes involved are appropriately disciplined.

I am confident that the measures taken will have the impact desired and will prevent future inappropriate and unsportsmanlike conduct on our part.

At this time it should be noted that in conducting our investigation, the Deptford bus drivers have testified that after the fighting stopped and our players boarded the buses, the Cherry Hill West team members gathered around the buses, threw objects through the open windows and shouted profanities at our players.

I bring this up, not to shift the blame on anyone, but rather to indicate a lack of control on the part of the Cherry Hill West coaches who should possibly be disciplined also.

Thank you again for your services, and please convey my regrets to anyone concerned for all the inconveniences and problems that resulted from this matter. (J-1, 11).

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At a regularly scheduled Olympic Conference meeting, held on October 21, 1982, and subsequent to a discussion wherein the entire Conference membership (including representatives from the Deptford Board) were made aware of the scope of the investigation and the findings of the three-person committee, it was determined that the disciplinary action as set forth by the Board was insufficient and that further disciplinary action was necessary. Thereafter, a motion was passed requiring Deptford to "forfeit all games for the duration of the season if Coach Vignola was involved" (Joint Exhibit, No. 12). The Olympic Conference's action was prompted by the fact that Coach Vignola had been the object of a previous investigation by Olympic involving an "incident of some significance" and had, at that time, been subject to disciplinary measures. The NJSIAA asserts that the motion was made pursuant to the procedures outlined in the Constitution of the Olympic Conference as set forth in Article VII, Section 1 and Article XII (Joint Exhibit, No. 20).

By letter dated October 28, 1983, the Board, through its attorney, objected to the action taken by the Olympic Conference and requested that a hearing be conducted (Joint Exhibit, No. 13). By letter dated December 9, 1983, Commissioner David DeGroodt responded to the request contained in the Board's October 28, 1983 letter, which had, among other things, requested police video tapes of the near riot at the football game. (Id.) Mr. DeGroodt, on behalf of the Olympic Conference, stated, in part, as follows:

> You are aware of the investigation, the follow-up procedures, and the responsibilities of the Conference pursuant to our constitution (see attached). The Committee report was reviewed and discussed with the entire membership of the Conference on October 21, 1982. The results of our exhaustive three-day investigation, interviews and hearing were discussed.
>
> As noted in the Committee report, we again informed you of the League's willingness to make available to your office the information available to the Committee. The video tape is part of the Cherry Hill Police Department's Record; Therefore your request for this must be made through them. You were advised of this at the Hearing on October 6, 1982 (Joint Exhibit, No. 14).

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Thereafter, the Board requested that the Executive Committee of the NJSIAA hear an appeal of the matter. By letter dated February 3, 1983, the NJSIAA advised the attorney for the Board that the requested hearing would be held on March 9, 1983. In that same letter, counsel for the NJSIAA advised the Board of the procedures which would be utilized at that hearing:

> We would ask that you forward to Robert Kanaby, the Executive Director of the NJSIAA, a copy of any and all documents which you wish to present to the Executive Committee, together with any briefs or memoranda, no later than March 1, 1983. By this letter we are advising David DeGroodt, the Commissioner of the Olympic Conference of the same requirement. We will then forward all the materials from Deptford and the Olympic Conference to the members of the Executive Committee prior to the hearing for their study. While hearings by the Executive Committee are not conducted in a "trial type" manner, we will allow you to present oral testimony under oath by any witnesses that you deem appropriate, keeping in mind that such testimony should not be duplicative or cumulative. As counsel for the NJSIAA, I will serve as Hearing Officer and will direct any questions to witnesses that the Executive Committee believes appropriate. You will be allowed to cross-examine the witnesses for the Olympic Conference by first addressing such questions through the Hearing Officer.
>
> I trust you all understand that we will attempt to provide both parties with maximum amount of due process while keeping in mind the fact that the Executive Committee functions as an appellate body and has a composition of 41 members, thereby preventing a truly adversarial proceeding (Joint Exhibit, No. 21).

On March 9, 1983, the Executive Committee of the NJSIAA, sitting as an appellate body, conducted a hearing adhering to the procedure outlined above. That hearing was transcribed by a court reporter and included presentations by Deptford's attorney and principal (Joint Exhibit, No. 22). The Executive Committee found that the penalty assessed against the Board did not violate the Constitution of the Olympic Conference nor was there a violation of the Board's due process rights. The decision of the NJSIAA Executive Committee was expressed in a March 21, 1983, letter from its counsel to the Board and the Olympic Conference (Joint Exhibit, No. 3).

It is from this appellate decision of the NJSIAA Executive Committee that the Board has filed the within the appeal to the Commissioner of Education, pursuant to N.J.S.A. 18A:11-3.

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The Board contends that its approach to resolve the situation did not satisfy the Conference and at its fall meeting the Conference members passed a motion, over to protest of the Board, which required it to "forfeit all games for the duration of the season if Coach Vignola was involved." (J-1, 12).

Board counsel corresponded with Mr. DeGroodt by letter dated October 28, 1982, requesting access to the evidence considered by the Conference Committee and requesting a hearing in order to insure that due process was afforded (J-1, 13).

The Board contends that there was no response from the Conference to this request, even though Dr. Moyer left messages for Mr. DeGroodt to call. At a Conference meeting on December 9, 1982, Mr. DeGroodt offered to meet with Dr. Moyer and handed him a letter dated the same day relating to the case (J-1, 14). However, the Board felt that the offer had come too late because the appeal to the NJSIAA had already been filed, and it still had not received the requested evidence. Additionally, the Board states that the minutes of the October 21, 1982 meeting were not delivered to it until the December 9th meeting.

Mr. DeGroodt, thereafter, on December 10, 1982, sent copies of statements which had been taken from various persons by the Conference Committee. (J-1, 15-19).

JURISDICTION

N.J.S.A. 18A:11-3 grants to the Commissioner jurisdiction to hear appeals arising from disputes between athletic conferences and conference members.

Unless there are exceptional circumstances making the exhaustion of remedies doctrine inapplicable, school-law disputes are not cognizable judicial business of trial courts (Theodore v. Dover Bd. of Ed., 183 N.J. Super. 407, 1982). The Commissioner has jurisdiction over controversies and disputes arising under the school laws (N.J.S.A. 18A:6-9). Further, N.J.S.A. 18A:11-3 provides that the rules and regulations of an athletic conference shall be "enforced first by the internal procedures of the association." The statute also provides that where public schools are concerned "appeals shall be to the Commissioner of Education and thereafter the Superior Court." Id. Thus, on its face, the statute confers jurisdiction upon the Commissioner of Education to hear appeals arising from disputes between athletic conferences and conference members.

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See, Hinfey v. Matawan Regional Bd. of Ed., 77 N.J. 514 (1978); Ferraron v. Bd. of Ed. of Scotch Plains, 1977 S.L.D. 998; Maltese v. NJSIAA, decided by the Commissioner, March 27, 1981; Smith v. NJSIAA, decided by the Commissioner, August 13, 1981.

Is the Board Entitled to a de novo hearing?

While a de novo hearing may not be demanded as a matter of right, the Commissioner may order a de novo hearing by an administrative law judge to make independent findings of fact. Although the Commissioner has authority to order a de novo hearing, he may also rely on the record developed. In this case, a de novo hearing, by the Commissioner could have the effect of exonerating the affected coach, or, showing mitigating circumstances. A de novo hearing could also result in setting aside the penalty imposed by the Conference and the NJSIAA; however, I am convinced from my review that a decision may be reached on this record (J-1) because there is no substantive factual dispute between the parties. Consequently, this matter will be decided on the record submitted as J-1.

The Board's contention is correct in that it was denied due process by the Conference. When the Conference determined that the penalty assessed by the Board against its coaches was insufficient, the Conference had no authority to increase that penalty without first (a) affording due process to the Board and its coaches in the form of a hearing; and (b) following its own Constitution in the imposition of additional penalties.

Respondent cites Houman v. Mayor & Council Bor. Pompton Lakes, 155 N.J. Super. 129 (Law Div. 1977); Bernstein v. Bd. of Trustees of the Teachers' Pension & Annuity Fund, 152 N.J. Super. 71 (App. Div. 1977) to support its determination that the petitioner has had a hearing which meets the intent expressed in the Olympic Conference Constitution. Houman concerned an action brought by taxpayers to have the Borough's tax appeals to the State set aside and Bernstein was a former teacher who appealed from a decision of the Board of Trustees of the Teachers' Pension & Annuity Fund which held her ineligible to file for ordinary diability retirement. Both these cases discuss the principle of substantial compliance with a statute and not compliance with any hearing where an adjudication must be rendered based on the facts gleaned at the hearing. Consequently, these cases fail to provide support for respondent's contention that the Olympic Conference complied with the procedure set forth in its Constitution.

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In NJSIAA v. Iron Hills Athletic Conference, (Docket No. C-3912-81E) the Court is quoted by respondent as determining that the Athletic Conference was not entitled to an adversarial type hearing. Judge Reginald Stanton, J.S.C., quoted at some length, stated that the Iron Hills matter did not involve an adversary-type trial, and he went on to say that many other groups and persons were given ample opportunity to present facts and arguments before Judge Errickson (ALJ). However, the Iron Hills matter had to do with the realignment of an athletic conference, and the views of all of those interested persons were made known during that hearing. But Iron Hills was not a contested case as defined in N.J.A.C. 1:1-1.4. Therefore, the Iron Hills matter is distinguishable from the matter considered here because of the disciplinary measures taken against coach Vignola before he had an opportunity to be heard.

Other cases cited by respondent are not on point since in the matter here considered there has been a disciplinary action imposed on a coach, interferring with the contractual relationship between that Board and its coach, and that disciplinary action was taken without affording the affected coach a hearing.

The transcript, appended to and made part of J-1, shows that the Conference's Investigating Committee completed its investigation and made several recommendations to the Board regarding the corrective action which it deemed appropriate. (See: NJSIAA Brief at p. 4) What its Brief failed to state, however, is that the action taken by the Board's agents included every recommendation of the Investigating Committee, and more. In addition to the Committee's recommendations, the Board's agents also (1) suspended the participating players from practice for one week, (2) directed the head coach to supervise his assistants at all remaining J.V. games - home or away, and (3) counseled the entire team on appropriate team behavior (J-1, 11).

The transcript shows that the Deptford Superintendent and the High School Principal were notified by letter from the Olympic Conference Commissioner dated October 11, 1982 concerning the Investigating Committee's report, its findings and recommendations. That letter suggested that any responses to the Committee's findings should be received by the Olympic Conference Commissioner no later than October 19, 1982. The Deptford High School Principal responded on October 19, 1982, and his letter read at the Olympic Conference meeting held on October 21, 1982; however,

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this letter, which met and exceeded all of the recommendations made by the Investigating Committee, including continuing the investigation, was considered by the Conference as insufficient in its penalty for coach Vignola.

Based on the Investigating Committee's recommendation that appropriate action be taken by Deptford against its coaches and players, and not considering Principal Gondolf's letter as responsive to the recommended discipline already taken by the Deptford Administrative staff, the Conference voted affirmatively to impose its own penalty on the Deptford coaches, its players and teams.

It is apparent from a review of the record that the fight following the football game occurred on October 4, 1982, the Investigating Committee's report was filed on October 11, 1982 and the action was taken shortly thereafter by the Deptford Administrators as reported in Principal Gondolf's letter dated October 19, 1982. Notwithstanding, this sequence of events, and aware of the reprimand for the Deptford coaches at its October 21 meeting; the Conference determined that there was insufficient disciplinary action against the Deptford coach, and voted affirmatively that Deptford must forfeit all games for the duration of the season if coach Vignola was involved.

The Conference members attending the October 21, 1982 meeting did not know any of the factual circumstances concerning coach Vignola's other alleged infractions which occurred in the year prior to the October 4, 1982 football incident. However, the Conference considered those earlier incidents when it imposed its penalty. In essence, the Conference was penalizing the coach because he was involved in prior on-field incidents without knowing the nature of the those incidents, or whether or not coach Vignola's actions were justified in those earlier incidents.

It is quite clear that due process has been denied the Deptford Board in that no notice was given to the Deptford coaches about any action which might affect them; the Board was not given an opportunity to continue its in depth investigation as was set forth in Principal Gondolf's letter (J-1, 11); and the coaches were not permitted to testify in their own behalf or present any witnesses on their behalf prior to the Conference's action demanding that the Board forfeit its remaining J.V. football games if its J.V. coaches were involved. See: Nicoletta v. No. Jersey Water Supply Commission, 77 N.J. 145 (1978).

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For these reasons, I **CONCLUDE** that the Deptford Board and its affected coaches were denied due process by the Conference members when the Conference determined that Deptford must forfeit its remaining games if the coaches were involved.

It is obvious that this matter cannot be declared moot, irrespective of the fact that the 1982 football season has ended, because of the distinct possibility of a recurrence of this type discipline, or corrective action by the Conference and the NJSIAA. This is not to say that the Conference and the NJSIAA may not impose any discipline on a Conference member school or its staff; however, no corrective action can or should be taken prior to affording the affected persons or teams or member schools due process and a fair hearing.

Such a process may seem unwieldy and too time consuming to have any effect on a sports season then in progress. However, if the incident is sufficiently severe, as it certainly was in this case, it appears that personal contact between the Conference Committee and the offending school could take place in an expedited manner to prohibit the offending individuals from further participation during the sports season, with official action to be taken at a later date. Such a procedure would have the effect of protecting the rights of those persons not involved in the offensive conduct, and properly investigating, hearing, and disciplining those persons who were responsible for the incident.

The Investigating Committee's work, although very thorough, does not constitute a hearing in terms of any due process requirement. The Olympic Conference Constitution, Revised Edition, February 19, 1979 (J-1, 20), provides for expulsion of players; forfeit of games; and disciplinary actions for players and coaches (Article 12). Nevertheless, Article VIII of the Conference Constitution provides for the resolution of protests, controversies and disputes involving member schools. Section I deals with protests, and although not applicable to the kind of situation presented here, recognizes that hearings are a necessary part of dispute resolution procedures. The record shows that there never has been a hearing prior to the action requiring Deptford to forfeit the remainder of its games. The record shows further, that there was a motion adopted at the October 21, 1982 meeting, requiring Deptford to forfeit the remainder of its games if one of the offending coaches attended. However, Section 3 of Article XII of the Conference Constitution provides that such action should be taken by resolution of the Executive Committee. The Executive Committee did not adopt any such resolution.

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For these reasons, I **CONCLUDE** that the Executive Committee did not abide by its own rules embodied in its Constitution when it acted to discipline the Deptford team and its coaches.

Having reached this determination and these conclusions, I **FIND** it unnecessary to go further into any interference which may have occurred between the contractual relationship between coach Vignola and the Deptford Board of Education. Suffice it to say that the Conference and the NJSIAA had the necessary authority to investigate and take punitive action in this matter; however, any punitive action taken should have followed a hearing. If hearings had been conducted, it is not mere speculation that the Board may have agreed with the action taken by the Conference and the NJSIAA, making any further action in this matter unnecessary.

For all of the above reasons, the request by the Board for a de novo hearing is **DENIED.** However, the action taken by the Conference and the NJSIAA as it affected coach Vignola shall be set aside and expunged from his record.

In all other respects, the Petition of Appeal 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** my Initial Decision with **SAUL COOPERMAN** for consideration.

29 December 83
DATE

August E. Thomas
AUGUST E. THOMAS, ALJ

Receipt Acknowledged:

December 30, 1983
DATE

Seymour Cohen
DEPARTMENT OF EDUCATION

Mailed To Parties:

Jan. 4, 1984
DATE

Ronald L. Lardieri/pkw
OFFICE OF ADMINISTRATIVE LAW

ks

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OAL DKT. NO. EDU 6869-83

DOCUMENT IN EVIDENCE

J-1 Record and Transcript on Appeal

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BOARD OF EDUCATION OF THE TOWNSHIP OF DEPTFORD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
OLYMPIC CONFERENCE AND NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION
RESPONDENTS.	:	

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

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

Respondents in primary exceptions to the initial decision by Judge Thomas argue that he erred in not deciding that a hearing as provided by the Constitution of the Olympic Conference or the NJSIAA had been afforded petitioner. Respondents contend that an opportunity was provided for Coach Vignola to appear before the NJSIAA to offer testimony (which he did not take) and plead that the judge's decision be set aside.

The Board in reply exceptions argues otherwise, stating that no evidence exists in the record that Coach Vignola was afforded the opportunity to appear before the NJSIAA or any other body specifically for the purpose of defending himself against a charge of improper conduct. The Board states that the February 3, 1983 letter from the NJSIAA was directed to the Board's attorney and no allegations have been made that the coach either received such a letter or was informed of his opportunity to offer any testimony. The Board pleads for the affirmation of the judge's decision herein. The Commissioner finds merit in the Board's arguments noting that a reply to the reply exceptions dated February 3, 1984 was not considered, there being no provision in law for such submission.

A thorough examination of the record of this controverted matter and a close reading of the initial decision convinces the Commissioner that the judge's determination herein is a proper one.

The Commissioner finds the circumstances herein to be unfortunate, but notes with approval the investigatory action described in the Statement of the Case, ante in the initial decision, the accuracy of which is not contested by either party. The

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Commissioner notes that on October 4, 1982 an altercation arose at a Junior Varsity football game at Cherry Hill between Deptford High School and Cherry Hill High School West. The incident was of sufficient magnitude to warrant investigation by the high school administrations and the Investigation Committee of the Olympic Conference with subsequent recommendation of disciplinary action.

The Commissioner deplores the details of the incident requiring such procedure but further notes with approval the involvement of the parties herein to take action both to investigate the disturbance and to prevent the repetition of any such incident in the future. The Commissioner finds and determines that the Conference and the NJSIAA have ample authority to determine the facts of this matter and take appropriate disciplinary action. However, the Commissioner, while viewing with approval the positive approach of the parties herein, holds that any further punitive action which the conference believed should have been instituted should only have been undertaken after having afforded the accused party an opportunity to defend himself against a specific charge of improper conduct. The Commissioner so holds.

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

For all the foregoing reasons the conclusions reached by the judge are adopted as the Commissioner's own. The action taken by the Olympic Conference affecting Coach Vignola is to be set aside and expunged from his record; the disciplinary action taken by the Deptford Board of Education, however, remains unaffected by the decision herein. The Petition of Appeal is dismissed with prejudice.

COMMISSIONER OF EDUCATION

FEBRUARY 14, 1984

PENDING N.J. SUPERIOR COURT

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3131-83
AGENCY DKT. NO. 67-3/83A

SCHOOL DISTRICT OF
THE CITY OF BRIDGETON,
Petitioner
v.
BILLY MC MAHAN,
Respondent.

APPEARANCES:

A. Paul Kienzle, Jr., Esq., for the petitioner (Casarow, Casarow & Kienzle, attorneys)

John E. Collins, Esq., for the respondent (Selikoff & Cohen, attorneys)

Record Closed: November 23, 1983 **Decided:** January 9, 1984

BEFORE AUGUST E. THOMAS, ALJ:

The Board of Education of the City of Bridgeton (Board) filed tenure charges of incapacity, unbecoming conduct, misbehavior, neglect, and other just cause against Billy K. McMahan, a tenured custodial employee. Respondent was suspended without pay. (N.J.S.A. 18A:6-14).

The charges were joined (N.J.S.A. 18A:6-11) and transferred by the Commissioner of Education to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. A hearing was conducted on three days, October 17, 18 and 19, 1983, in Bridgeton City Hall, Bridgeton. Fifteen witnesses testified and eighteen documents were accepted as evidence. Letter briefs were filed after the hearing.

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Charge No. One

Mr. Billy K. McMahan, upon being hired, concealed his criminal record and misrepresented the existence of said criminal record.

Harry W. Baitinger, testified that he is the Business Manager for the Board but has been on medical leave of absence since July 1, 1983. Baitinger was in charge of custodial services as well as buildings and maintenance. As a part of his duties, he supervised the Building and Grounds Supervisor. Baitinger testified that he recommended that respondent be employed by the Board on December 4, 1979 and that respondent was hired on December 11, 1979. McMahan's application was first reviewed by Harry Snihur, Supervisor of Buildings and Grounds, who recommended McMahan for an interview. Baitinger and Snihur together interviewed McMahan.

Baitinger testified that during the interview he asked McMahan about his background and whether or not he had a police record. McMahan stated that he had "a couple of charges" against him for "fighting" when he was young. Baitinger stated that this interview occurred in November 1979 and that McMahan did not reveal any felony charges. Although Baitinger later testified that he did not remember asking specifically about respondent's criminal record, the record will show through respondent's own testimony that this question was asked. Snihur testified similarly (See: P-11).

Baitinger testified that he subsequently learned of respondent's criminal record after the Bridgeton Police Department investigated a typewriter damage incident at Bridgeton High School (Charge No. Seven). The Board submitted evidence of respondent's criminal record through respondent's guilty pleas to the following charges:

1. Carrying a concealed weapon.
2. Aiding and abetting.
3. Atrocious assault and battery.
4. Unlawful use of a dangerous weapon.
5. Conspiracy.

(P-3, P-4). Baitinger testified that he was not aware of these convictions and suspended sentences at the time of respondent's employment. He testified further that he would not have recommended respondent for employment if he had known of these criminal charges and convictions.

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Baitinger testified also that respondent was not recommended for employment after his first application; however, because he persisted in seeking a job with the Board, Baitinger asked a Board member, Jack Ward, who is a Bridgeton City policeman, to investigate McMahan's background. Subsequently, McMahan was recommended after Baitinger's contact with Jack Ward.

Michael Snihur, who is employed by the Board as the Supervisor of Buildings and Grounds, testified that as a part of his job he interviews custodians for employment and that he interviewed respondent. Snihur testified that when asked about his record, McMahan told him that McMahan had a couple of fights in school but that he was "clean". In support of his testimony, the Board submitted in evidence the handwritten notes of McMahan's interview by Baitinger and Snihur dated November 13, 1979. Those notes show that McMahan admitted to fighting charges in 1972 and 1976, and stated to Snihur and Baitinger that he had no other charges or problems with the police (P-11).

The Board president testified that she was not aware in December 1979 when respondent was hired that he had a criminal record. She testified further that she would not have voted to employ him if she had been aware of that record.

Jack Ward, the Board member, police officer, testified that he had been employed by the Bridgeton Police Department for 22 years and that he has been a Board member for several years since 1973. He testified that McMahan visited him to seek employment as a custodian for the Board. Ward testified that he agreed to assist McMahan and that he told him to fill out an application. He testified further that McMahan might have told him that he had a police record but that he couldn't remember it. He testified that he didn't recall any problem in McMahan's getting employment with the Board. He had known McMahan for years by being around the city as a police officer.

Under cross-examination, Jack Ward testified that McMahan did not mention any weapons charge and, consequently, he could not have mentioned that to Baitinger.

Ward was called as a rebuttal witness by the Board and he testified that he first learned at this hearing, that McMahan had shot another man and that he would not have recommended him for employment if he had known that at the time.

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Respondent testified that after his initial application for employment he went to see Baitinger in 1978 regarding a job with the Board. He testified that Baitinger had a newspaper clipping attached to his application (R-2).[1] Respondent testified that he knew at that point that Baitinger would not hire him, so he went to see Jack Ward to "get the record straight" that he had a criminal record and that he was not involved in drugs. Respondent testified that he told Ward that he was aware of an opening in the senior high school and that Baitinger would not hire him because of the newspaper clipping. Respondent testified further that Ward told him to go fill out a new application and that he would be called in for a job interview. Respondent testified that at his interview with Snihur and Baitinger he told them that he had a criminal record, and that they were "lying when they said I didn't tell them" about the criminal record.

Based on my review of the testimony and the documents in evidence presented in support of this charge, I **FIND** as fact that respondent did not report to his interviewers the fact that he had been convicted on any criminal charges. Except for his denial of the charge and his testimony that he did in fact tell of the criminal charges against him, all of the other witnesses testified that at no time were they aware of his convictions. Further, the two Board members, including his own witness, testified that they would not have employed him had they known of that criminal record.

For these reasons I find Charge No. One to be true in fact.

Charges Nos. Two, Three & Four

Charge No. Two

Mr. McMahan has demonstrated the inability to cooperate with, and get along with employees regarding work assignments.

Charge No. Three

Antagonistic demeanor directed to supervisor.

---

[1] The Bridgeton Evening News published an article concerning a Sea Brook man who was stopped in connection with a missing persons report and who was subsequently arrested on drug charges by the Bridgeton Police. The article refers to a Timmie Keith McMahan, who is respondent's brother according to the testimony at the hearing. Respondent believes that Baitinger blocked his employment thinking that he was the person reported in the newspaper article.

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Charge No. Four

> Mr. McMahan tape recorded a meeting involving myself (Baitinger), Mr. Michael Snihur and Mr. Pete Tisa on January 25, 1983. The tape recording at that meeting was done secretly by Mr. McMahan and was totally unauthorized. Later that day, while Mr. McMahan was at work, he again tape recorded his conversation with his supervisor, Mr. Tisa, secretly and without any authorization. When Mr. Tisa took Mr. McMahan to his work area, Mr. McMahan was insubordinate to Mr. Tisa by refusing to receive instructions given by Mr. Tisa concerning the method of working in A Hall at the Senior High School.

Charges Two, Three and Four are combined because they are overlapping and similar in their proofs.

Baitinger testified concerning an incident between respondent and Michael Narlesky, another custodian employed by the Board. The dispute between Narlesky and McMahan involved their job assignments at the high school, and McMahan asked to have his own assignment changed. Later, Narlesky and his wife complained of being harrassed; sugar was poured in his gas tank; his tires were slashed; and his wife had received threatening phone calls.

Respondent denied any knowledge of these incidents and both men were given a letter of warning according to Baitinger's testimony (See: P-5, 6 and R-4). Baitinger testified further that he could blame neither Narlesky nor McMahan for the lack of cooperation between them and he conceded that Mrs. Narlesky had called and stated that the phone threat was the voice of Pete Tisa.

At the hearing evidence was presented regarding alleged conflicts between respondent and the high school day shift custodians and other custodians concerning respondent's summer assignments. That testimony and evidence will not be considered in these charges because the record does not disclose any evidence that respondent was charged with any conflicts with any of these persons. Consequently, he has not been put on notice of these charges and has not had an opportunity to defend against them; therefore, the evidence regarding Charge No. Two is limited to respondent's relationships with Michael Narlesky and Pete Tisa. (N.J.S.A. 18A:6-11).

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Evidence was presented that whatever friction existed between respondent and Narlesky and between respondent and his supervisor, Tisa, was the result of the beer-drinking and personal auto repairs which Tisa admittedly permitted in the high school. The record shows that Tisa had confrontations with both men concerning their job assignments. Tisa testified that he made custodial assignments in the high school during the night shift and that McMahan felt overloaded with two bathrooms, so he called "Bank Street" (the Board office) because he (respondent) didn't like the assignment. Tisa testified further that Narlesky was angry because he didn't want the bathrooms.

Testimony was elicited which detailed beer-drinking episodes at the high school while respondent was repairing cars. Tisa explained one beer-drinking and car repair episode stating that respondent worked on everybody's cars, "mine, my son's, his, his girlfriend's, and friend's cars, Kelly's." Tisa admitted that he knew what was going on concerning fixing the cars and he "let it go to keep everybody happy." When Baitinger learned of this, he warned respondent and Tisa about their activities and Baitinger believed that the incident had been resolved.

Tisa testified that McMahan was not antagonistic toward him. However, he testified further that when McMahan returned to his high school assignment he "gave me a lot of crap" because of his assignment to A Hall. Tisa testified that McMahan refused to accept his direction, but that he later settled down and that he was able to give him his assignment. One result of this incident was that McMahan told Tisa he had their (Tisa and Baitinger) conversation on tape stating "I've got you guys on tape and I'm going to take this to the Board."

Tisa testified further that McMahan also resented the change in the lunch hour from one hour to one-half hour. He testified that the hour lunch was wrong but that it had been a continuing practice until he changed it correctly to the one-half hour to which they were entitled. Concerning a gymnasium incident, Tisa testified that McMahan did not like the assignment however "I told him to get back to his territory and to go to work."

Tisa testified that during this confrontation with McMahan he saw a small item like a pocket radio or a tape recorder, and that during their conversation about McMahan's assignment in A Hall "he was on fire." Tisa testified that respondent did not

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refuse to go to A Hall, but "would not let me tell him what to do in A Hall." Tisa testified finally that he had a chat with respondent later that night and that he was performing his duties in A Hall, and that "there was no problem at all." He concluded stating "for the most part I got along with McMahan; we had our spats but this is normal."

Based on the foregoing testimony and evidence regarding Charges Two, Three and Four, I **CONCLUDE** that the Board has not supported these charges by a preponderance of the credible evidence that McMahan refused to cooperate with other employees, exhibited an antagonistic demeanor to his supervisor; or that the alleged tape recording was unauthorized and illegal. The evidence shows that there was no tape recording. McMahan admittedly told Tisa and Baitinger that he had tape recorded their conversations; however, he had only a small radio and his utterances were idle threats probably stated to defend his position which he believed was threatened.

Although the Board has not proved these charges by a preponderance of the credible evidence, the record clearly shows that respondent contributed to a negative work environment. It was obviously difficult for the supervisor and the business manager to direct the orderly and regular maintenance of the schools, which performance must be expected from janitorial staffs.

It is recommended that these charges be considered in the whole of this decision because they have a bearing on the behavior of the litigants regarding Charge No. Seven.

Charge No. Five

Mr. McMahan has a poor attendance record.

Baitinger testified that he filed this tenure charge because respondent was absent so often that it affected his employment. He testified that respondent used all of his sick leave and took additional sick days for which his pay was docked. He testified also that respondent had used all of his vacation days and that he was paid for all workers' compensation days when he was absent. Baitinger testified that respondent was employed in December 1979 and between that employment date and June 30, 1980 he was absent six and one-half days for illness. During the 1980-81 school year, respondent exhausted 12 sick days and was docked for two and one-half days absence for illness. Between

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September 22, 1981 and January 10, 1982, respondent was absent 79 days because of a workers' compensation award. He was absent an additional 18 days following January 10, 1982, and his pay was docked for six of these 18 days. Respondent was placed on a leave of absence between March 1, 1982 through June 30, 1982, a period of 88 days. Beginning July 1, 1982 through February 1, 1983, respondent was absent on four sick days and had his pay docked for one of these days. Beginning on September 22, 1982 through January 24, 1983, respondent was absent 81 days on a second workers' compensation award.

Baitinger concluded, and so recommended to the Board in certifying this charge, that respondent had been employed 37 and one-half months; and during that time he was sick or had his pay docked on 44 days; had absences for workers' compensation awards for 160 days; and had a leave of absence for 88 days. The record shows that out of 37 and one-half months employment in total, respondent has been absent for approximately 14.6 months of that time (P-1, P-2).

Respondent argues that his absences have been unfairly characterized by the Board, but he admits that he had three long-term absences during his tenure as a school custodian; however, he asserts that these absences were beyond his control. Two were workers' compensation claim absences. In support of his argument, respondent cites N.J.S.A. 34:15-39.1 which provides in part as follows:

> It shall be unlawful for any employee or his duly authorized agent to discharge or in any other manner discriminate against an employee as to his employment because such employee has claimed or attempted to claim workman's compensation benefits from such employee.

Respondent testified further that his third long-term absence was caused by an automobile accident for which he received an approved leave of absence from March 1, 1982 through May 31, 1982, which was later extended through June 30, 1982. Respondent concluded by stating that his legitimate absences during a three-year period show that he was absent only 34 days for an average of less than 12 sick days each year.

Although the record discloses a very poor attendance pattern by respondent, his long-term absences must be considered legitimate. Additionally, the absences for which he was docked in pay following his automobile accident and until the Board

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approved his leave of absence on March 1, 1982, were absences he could not control. Except for the other sick days taken by respondent for which his pay was docked, I **FIND** that respondent's absences were excessive but not to the extent which would warrant his dismissal. Consequently, I recommend that Charge No. Five be **DISMISSED.**

Charge No. Six

> Mr. McMahan has demonstrated the inability and the unwillingness to accept work assignments.

The record shows that there were several requests by respondent for transfer from the high school, and that respondent's reason for these requests was to remove himself from Tisa. Respondent believed that he had been receiving hostile treatment by Tisa after he reported to Baitinger Tisa's involvement in the beer-drinking, car repair episodes.

Respondent's attitude concerning lavatory assignments and his confrontations with Tisa have been discussed in Charges Two, Three and Four. While the record shows that there were incidents between respondent and Tisa and respondent and Narlesky, the record does not disclose that respondent refused to perform any of his work assignments. The strongest evidence was elicited through the testimony of Tisa, who testified about respondent's reluctance to perform certain assignments. Nevertheless, Tisa testified that after a period of time, respondent would calm down and carry out his assignments.

As a result of the foregoing testimony, I recommend that Charge No. Six be **DISMISSED.**

Charge No. Seven

> On January 27, 1983, deliberate damage was caused to thirty-two (32) classroom typewriters in Room B-7, Mr. McMahan's work assignment area.

McMahan testified that Baitinger told him that he could return to his H Hall assignment at the high school after his temporary assignment as a custodian at the Indian Avenue school. Respondent felt that it was necessary for him to return to H Hall because he was the reserve boiler man, with a license, and he testified that he resisted any assignment elsewhere. Respondent testified that Baitinger later told him he was going to

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A Hall and that H Hall was to be assigned to Tisa's son's father-in-law. At this juncture, respondent testified that he told Baitinger that he would go to A Hall but that he was going to file a grievance. He testified that Baitinger became angry and told him he was faking his injuries at which time respondent testified he became "mad" and told Baitinger that he had taped their conversation.

Nevertheless, respondent testified that he went to the high school as directed and met Tisa who accused him of being a trouble maker and allegedly said "I guess you taped this too." Submitted in support of this testimony is (R-7), petitioner's grievance dated January 27, 1983 in which he demands that he be reinstated in the H Hall assignment.

The Board asserts that the foregoing actions clearly show that McMahan had the motive to damage the school typewriters and that he had the opportunity and the very real inclination to do so and that his motive is obvious by reason of his anger at his placement in the high school.

The record shows that McMahan reported to work at 4:00 p.m. on January 27, 1983, and that he left his assignment as scheduled at 12:30 a.m.

The high school principal, Robert Sharp, testified that on the morning of January 28, 1983, Miss Magolda, the Department Chairman for the business education program, reported to him that 32 electric typewriters (IBM Selectric) in Room B-7 had been vandalized. Sharp went to room B-7 to examine the damage and reported it to Baitinger's office.

William Cassidy, the Distributive Education Coordinator testified that he is assigned to Room B-2. He testified that he believed that a substitute teacher was assigned to Room B-7 on January 27, the day the typewriters were damaged. Cassidy testified that he checked all of the doors in B Hall after school, and that all of the doors were locked, or, he made sure they were locked. He testified that he held a meeting after school because his department head was absent and that he was the last person in B Hall. He testified that he checked all of the doors between 3:15 and 3:30 p.m. He emphasized on direct and cross-examination that all of the doors were locked.

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Tisa testified that he checked all doors every day without fail to see that they were locked because that is his job. He described his job as securing the building and making sure that it is locked. He testified further that after McMahan reported to A Hall after 4:00 p.m., he started his daily routine of checking all of the doors.

Tisa testified that he learned first about the typewriters the next day when he encountered a school teacher at a supermarket. He testified further that two keys are needed to get into the typing room and that the second key is necessary to lock the door from the outside. Tisa testified that about 6:00 p.m., McMahan advised him that he saw someone coming out of Room B-10, which is three doors down the hall from B-7. Tisa testified that McMahan advised him that he saw a young black male run out of B-10 and that the door was open; however, no typewriters are in room B-10. He testified further that McMahan has never mentioned damaged typewriters to him "on the 27th, 28th or at any time." Tisa denied that he had damaged the typewriters.

Evidence was elicited that the only keys providing access to room B-7 would be found in the school vault, with the assigned janitor, the room teacher, and Tisa and that it was necessary to use a master key and a special key to gain access to the typing room. Additional testimony was elicited to show that certain important keys are locked in a "cage." The cage was described as an area enclosed in heavy wire which contained a board on which the special keys were placed and that one would have to unlock the cage to gain access to the board to get the special key to unlock the typing room.

Dorothy Simons is the typing teacher who was assigned to room B-7 and B-9, and she testified that she was absent on January 27, 1983 when the typewriters were damaged. She testified that she arrived at school on January 28, 1983 at about 8:15 a.m. Simons testified that she went straight to the blackboard to write an assignment for her pupils and didn't notice anything amiss initially. However, shortly thereafter a student complained to her that the element was broken on her typewriter. Simons called her department head and they checked all of the machines and found that they were all broken. She testified that the trash cans in the room were empty, and in response to counsel's question stated "if the lights were on and she was cleaning the room, she would have been able to see the debris on the floor - you couln't have missed debris on the floor."

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Respondent's testimony relative to this charge is that he arrived at his job assignment at 4:00 p.m. and went directly to the cafeteria to clean. That assignment lasted approximately one to one and one-quarter hours. Respondent testified that he then went to A Hall and B Hall at which time he saw a young black male coming out of room B-7. He testified that he asked the boy what he was doing in the room and how he got into the room, and that the boy showed him typing papers and said he had forgotten them. Respondent testified that the lights were out however it was still light outside and "I remember looking across the room, I could see the typwriters." He testified that everything looked o.k. and that he told the boy that he was not to go into the room without a custodian. The boy left the school and McMahan testified that he locked the door, "both locks."

At this point, attention must be drawn to the discrepancy between the testimony of the Board witnesses and respondent. Tisa testified that McMahan approached him about 6:00 p.m. which is nearly an hour after McMahan testified that he saw a boy exiting room B-7. Tisa testified that McMahan told him he saw someone coming out of B-10 which is three doors away from room B-7, and that he saw a young black male run out of B-10. Tisa testified further that he locked the doors in B Hall at 4:00 p.m.

Cassidy testified that following his after school meeting, he checked to make certain that all doors were locked; consequently, we have testimony from two Board witnesses who were absolutely certain that the door to Room B-7 was double locked no later than 4:00 p.m. on the afternoon of January 27, 1983.

Respondent's testimony is inconsistent with that offered by Board witnesses on at least three grounds. First: Tisa testified that respondent approached him on the evening of the 27th and told him he saw someone run out of Room B-10. Tisa testified that he and respondent went to Room B-10, found the door open, but nothing amiss, and that no typewriters are in Room B-10. They locked the door and left. Even if respondent were correct in his testimony that he was referring to B-7 and not B-10, he made no mention to Tisa about speaking to the boy and advising him not to enter any room without a custodian. Secondly: Respondent's testimony is diametrically opposed to that of Cassidy who also testified that every room in B Hall was locked before he left about 3:30 in the afternoon on January 27th. Finally: The evidence shows that the elements on each

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of the 32 typewriters were damaged with a blunt instrument (a hammer was suggested). No instrument causing the damage has ever been located. Respondent, who testified that he talked to the boy and was advised that he went to the typing room to retrieve papers he had forgotten, did not notice the boy having a blunt instrument which he could have used to cause damage. In fact, there was no inference made by respondent that the boy did any damage to the typewriters. All that is suggested through his testimony is that the door to B-7 was unlocked.

I had the opportunity to observe the witnesses as they testified. There is no question but that Cassidy and Tisa were very firm in their resolve that the rooms in B Hall were locked no later than 4:00 p.m. on January 27, 1983. If these statements had come from one witness there could be speculation for a margin of error. However, two Board employees who testified that room B-7 was locked no later than 4:00 p.m. on January 27, 1983 practically eliminates any probability that the room was not locked. Their testimony was straight forward and credible.

On the other hand, respondent's testimony does not ring true when the incident is examined in its entirety. Tisa's testimony cannot be discounted. Not only was he told that B-10 was entered, he and respondent went to Room B-10 after it was reported open. Further, respondent allegedly told Tisa that he saw a young black male run out of the building. Respondent testified at hearing that he encountered the boy in the hall and spoke to him and that he left the building, at which time he locked B-7. My observations of respondent concerning this charge revealed that respondent was uneasy and that he reddened considerably during the questioning. While these observations may not be significant by themselves, when viewed with the charges and the cumulating evidence against respondent pertaining to those charges together with the discrepancies in the testimony, I could not believe respondent's version of what actually happened.

Respondent testified that he filed his grievance on January 27, 1983 because he "felt treated very unfairly." This action preceeded his 4:00 p.m. to 12:00 midnight workshift, and this action followed the meeting two days earlier when he told Baitinger that he was on tape after being denied the assignment he requested. Respondent testified "I was angry."

The record shows that the loss to the typewriters was in the amount of $4,786.12 (P-8, P-9).

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Based on the testimony and evidence regarding Charge No. Seven, I **FIND** as fact that respondent deliberately damaged the typewriters in Room B-7 on January 27, 1983. The evidence shows that he had the motive to damage the typewriters and that he was the only custodian in the area at the time; he had access to the room; and the totality of the circumstances lead to respondent as the person who damaged the typewriters.

Based on the foregoing testimony and evidence, I **FIND** as fact that the Board has sustained its burden of proof regarding Charge No. Seven.

In the Matter of the Tenure Hearing of Edward R. Chrzan School District of the Borough of Sayreville, Middlesex County, 1974 S.L.D. 867, 889, the Commissioner commented as follows:

> The janitor in a public school plays an important role in the educational program in addition to maintaining the schoolhouse in a safe, clean, and efficient manner. He must come into regular contact with members of the school staff, and he is expected to comport himself in a manner which will reflect dependability and inspire confidence. The use of rough language and acting in a manner as exhibited herein with respect to teachers are grave offenses, which fall far short of conduct for a janitor in a public school.

In this decision the Commissioner was concerned about "rough language" and disrepectful actions towards teachers.

The Commissioner concluded that the conduct of Chrzan, in a series of instances, had been so gross as to warrant the forfeiture of his tenure status and his employment with the Board.

In the Matter of the Tenure Hearing of Russell A. Fairfax, School District of the Village of Ridgewood, Bergen County, 1974 S.L.D. 1126, 1131 the Commissioner commented as follows:

> In previous instances, the Commissioner has imposed the penalty of dismissal on a janitor found guilty of being intoxicated and using rough language. McDougall, supra; In the Matter of the Tenure Hearing of Joseph McDonald, 1963 S.L.D. 213. The Commissioner has also dismissed janitorial employees for insubordination, disregarding orders, and failure to comply with instructions and perform assigned duties. In the Matter of the Tenure Hearing of

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Adam Rogalinski, 1967 S.L.D. 110; In the Matter of the Tenure Hearing of Joseph Fortuna, 1967 S.L.D. 150; In the Matter of the Tenure Hearing of Theresa Cobb, 1966 S.L.D. 197; In the Matter of the Tenure Hearing of Joseph McDougall, supra.

The Commissioner ordered that Fairfax forfeit his tenure and he was dismissed as a Board employee.

The determination of fitness to teach was set forth clearly by the New Jersey Supreme Court in 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), where the Court determined that unfitness to hold a post might be shown by one incident, if sufficiently flagrant. Although that decision concerned a teaching staff member (principal) that rationale may be applied to any employee in the public schools.

Respondent has demonstrated his unfitness as a custodian in several ways; however, either the single incident of concealing his background; or, the single incident of damaging 32 typewriters, demonstrates sufficient just cause to warrant his dismissal. The record also shows a series of incidents, not too significant by themselves, but cumulatively demonstrating respondent's unfitness for his position.

For these reasons, I **CONCLUDE** that the Board has shown sufficient just cause for respondent's termination. Therefore, it is **ORDERED** that Billy Keith McMahan is **DISMISSED** from his tenured position as a custodian with the Bridgeton City Board of Education as of the date of his suspension.

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 3131-83

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

January 9, 1984
DATE

August E. Thomas
AUGUST E. THOMAS, ALJ

Receipt Acknowledged:

1/9/84
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

Jan. 11, 1984
DATE

Ronald L. Lankenau
OFFICE OF ADMINISTRATIVE LAW

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DOCUMENTS IN EVIDENCE

P-1 Attendance Records
P-2 Attendance Summary
P-3 Court Record of Conviction - 3/14/77
P-4 Court Record of Conviction - 1/27/77
P-5 Letter to McMahan, dated September 22, 1981
P-6 Baitinger notes - 8 & 9/1981
P-7 Sharp report to Baitinger - 2/15/83
P-8 Repair estimate for typewriters - 1/81/83
P-9 Insurance Carrier report - 5/20/83
P-10 Magolda Report - 1/28/83
P-11 Snihur interview form - 11/13/79

R-1 McMahan job application, dated 10/11/78
R-2 Newspaper article
R-3 McMahan job application, dated 10/22/79
R-4 Narlesky letter, dated September 21, 1981
R-5 McMahan letter to Baitinger, dated September 23, 1981
R-6 Dagostino letter to Mastoraki, dated September 27, 1982
R-7 McMahan grievance - 1/27/83

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IN THE MATTER OF THE TENURE :
HEARING OF BILLY MC MAHAN, : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF : DECISION
BRIDGETON, CUMBERLAND COUNTY. :

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law, August E. Thomas, ALJ.

It is observed that respondent's exceptions to the initial decision, as well as the Board's reply exceptions, were filed pursuant to N.J.A.C. 1:1-16.4a, b, and c.

In his exceptions to the initial decision respondent takes issue with the findings and determination of the judge which find him guilty of Charge No. One, ante. Respondent maintains that the evidence contained in the record of this matter, including the testimony of Snihur, Baitinger and Ward, support his contentions that each of them was informed by him at the time of his initial employment that he had a criminal record and that he was on probation. In this regard respondent argues that the judge, in rendering his findings and determination with respect to Charge No. One completely mischaracterized Mr. Ward's testimony regarding his knowledge of the prior weapons charge at the time respondent was employed. (Respondent's Exceptions, at pp. 1-5)

Additionally, respondent maintains that the judge's findings and determination of his guilt with regard to Charge No. Seven, ante, are in error and cannot be supported in fact. Respondent argues in his exceptions as follows:

> "***The record shows that the Board did not prove the truth of Charge Seven by a preponderance of the evidence. There were no eyewitnesses to the damage caused to the typewriter elements. Furthermore, the Board did not even prove that the damage was done while Respondent was on duty between 4:00 P.M. and 12:30 A.M. on January 27 and 28, 1983. In fact, the evidence points to the contrary. As argued above, it is probable that the damage was committed after Respondent's shift, quite possibly between 7:30 and 8:15 A.M. on January 28, 1983. The only piece of circumstantial evidence connecting Respondent with the damage was his alleged motivation based on his

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> re-assignment. However, even this piece of evidence carries no weight, since the Board's own witness, Mr. Tisa, stated that Respondent's anger had subsided by 10:00 P.M. on January 25, 1983, two days prior to the damage done to the typewriters.***" (Emphasis in text.)
>
> (Respondent's Exceptions, at pp. 11-12)

Finally, respondent argues that the judge, in dismissing Charges Nos. Two, Three and Four, ante, erred when he recommended that such charges be considered in the whole of this decision because they have a bearing on the behavior of the litigants regarding Charge No. Seven, ante. Respondent maintains that the record of this matter does not establish a cause and effect relationship with respect to his behavior two days earlier as being attributable to the determination of his being found guilty of Charge No. Seven.

The Board in its reply exceptions maintains that the record of this matter clearly reveals respondent's lack of credibility in presenting testimony on his own behalf in defense of tenure charges against him as has been established in the record of this matter and reported in detail in the initial decision through those observations of the judge at the time of the tenure hearings.

The Board argues that respondent's exceptions to the initial decision are self-serving and without merit.

The Board also maintains that the specific testimony of its witnesses contained in the transcript of these proceedings clearly supports those findings and determination rendered by the judge, holding that there was a preponderance of credible testimony and evidence presented in this matter to establish respondent's guilt relating to Charges Nos. One and Seven. The Board urges the Commissioner to affirm the findings and determination rendered in the initial decision recommending respondent's dismissal as a tenured custodian in the Board's employ.

The Commissioner has reviewed the exceptions of the parties setting forth their respective arguments. The Commissioner, upon carefully weighing those arguments advanced by respondent in his exceptions to the initial decision, is not persuaded that they warrant a reversal of the judge's findings and conclusions pertaining to respondent's guilt as it relates to tenure Charges Nos. One and Seven herein. The Commissioner so holds.

Accordingly, the Commissioner affirms the judge's findings and determination in the initial decision and hereby adopts them as his own.

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In light of the above, the Commissioner directs that respondent be dismissed from his tenured custodial position in the Board's employ as of the date of his suspension without pay.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBRUARY 23, 1984

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IN THE MATTER OF THE TENURE :
HEARING OF BILLY MC MAHAN, : STATE BOARD OF EDUCATION
SCHOOL DISTRICT OF THE CITY : DECISION
OF BRIDGETON, CUMBERLAND COUNTY, :
:

Decided by the Commissioner of Education, February 23, 1984

For the Petitioner-Respondent, Casarow and Kienzle
(A. Paul Kienzle, Esq., of Counsel)

For the Respondent-Appellant, Selikoff & Cohen
(John E. Collins, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein, with the modification that Respondent is dismissed from his position as of February 23, 1984, the date of the Commissioner's decision in this matter.

August 8, 1984

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INITIAL DECISION
OAL DKT. NO. EDU 6192-83
AGENCY DKT. NO. 180-6/83A

BRUCE GALLAGHER,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWN OF NUTLEY,
FRANK VOTTO and JAMES FADULE,
Respondents.

APPEARANCES:

Petitioner: **Robert A. Fagella**, Esq.,
(Zazzali, Zazzali and Kroll, attorneys)

Respondent: **Rodney T. Hara**, Esq.
(Aron and Salsberg, attorneys)

Record Closed: January 13, 1984 Decided: January 19, 1984

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OAL DKT. NO. EDU 6192-83

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

Gallagher, a tenured teaching staff member, alleged the actions of the Board to be arbitrary, capricious, unreasonable, and an abuse of its discretionary authority when it withheld his salary increments for the 1983-84 school year, and chose not to reappoint him as assistant baseball and varsity basketball coach.

The Board denies the allegations and avers its withholding action was for good cause, and petitioner's non-reappointment as coach was within its managerial prerogative and justifiable.

The matter was transmitted to the Office of Administrative Law as a contested case on August 9, 1983 pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on October 24, 1983, and the matter was heard at the Office of Administrative Law in Newark on January 12 nd 13, 1984. The parties waived posthearing briefs and the record closed at the conclusion of hearing on January 13, 1984.

RELEVANT TESTIMONIAL EVIDENCE

Gallagher testified at considerable length and revealed his version of the scenario that triggered the actions in dispute. On Janaury 21, 1983, a customary interview by a local sportswriter occurred at the conclusion of his seventh period class and resulted in their presence in or about the cafeteria. They were joined by another teaching staff member, a Mr. Osborne, who showed them a dollar bill which had on it a picture of L.D., a female senior student, in place of that of George Washington. Although it is unclear as to who instigated the idea, it was decided that they would have fun with it, and they proceeded to L.D.'s eighth period science class.

According to Gallagher, Osborne knocked on the classroom door and backed away. Gallagher beckoned L.D. by motion through the door window pane. Gallagher held out the dollar and said: "A souvenir dollar for souvenir shorts." L.D. took the dollar and returned to her seat. This incident occurred at the classroom doorway. Osborne and the

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sportswriter were positioned some distance from the doorway. Gallagher testified the incident occured a minute or two prior to the end of the period. The group laughed and left.

Sportswriter Blank corroborated Gallagher's testimony of the incident with the exception of who knocked on the classroom door and what was actually said, as he was some 25 or 30 feet from the doorway. He corroborated the date of the incident in recalling it followed the day of the Clifton game, and he and Gallagher left the building to go to a Newark basketball game on the day in question. He also testified that Gallagher is intense and volatile at courtside during a ball game.

Patricia W. Stave, a non-tenured teacher of L.D.'s eighth period Science class, also testified. The classroom door was open into the corridor some 160 degrees. She was distracted by a noise at the doorway, and recognized Gallagher as the basekteball coach who was standing in the doorway. She also saw Osborne leaning against the opposite corridor wall but did not see the sportswriter. She stated the incident occurred during the first half of the period on January 28, but did not hear the short conversation between Gallagher and L.D. She did not object to L.D. leaving her seat to respond to Gallagher's beckoning if L.D. wanted to confer. According to Stave, L.D. let out a little shriek and hurried back to her seat after the Gallagher/L.D. conference, and that L.D. was visibly upset and uncharacteristically unsettled. Later in the period L.D. voluntarily came to Stave and stated she didn't know what a pervert like him wanted with her. Stave reported the incident to principal Votto the week following as the incident occurred at the end of the day on a Friday.

The court examined Stave with the aid of a chalkboard to ascertain her testimony concerning the relative locations of the doorway, L.D.'s seat, and the teacher's seat, as well as the position of the door itself.

Principal Votto testified that he investigated the matter after learning of it from Stave and interviewed Gallagher, Osborne, and L.D. He further stated that he concluded the Gallagher statement to L.D. incorporated a sexual connotation; that Gallagher was

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not reappointed as assistant baseball coach because of a concern of a shadow cast on Gallagher's behavior and character; and that Gallagher's non-reappointment as basketball coach resulted from the athletic director's recommendation based on Gallagher's demeanor as a basketball coach, which Votto endorsed and stated was unrelated to the L.D. incident. He reported the L.D. incident to the Superintendent's office.

Superintendent Fadule testified that he conducted an independent investigation of the L.D. incident, which he perceived to be a most serious breach of conduct by a teaching staff member. He conducted numerous conferences which included Osborne, Blank, Gallagher, Stave, Votto, L.D. and an NJEA representative at various times. He concluded that it was not Osborne's idea to "have fun" even though only Osborne knew where L.D. was scheduled during the eighth period. He further concluded that the incident occurred on January 28th as Stave recognized Gallagher as the basketball coach because she went to the Montclair game on January 25, and also because Votto was unavailable because of a program following the 28th. He believed L.D. who allegedly told Fadule that the statement made by Gallagher was: "if I give you this dollar will you take your pants off?"

Fadule testified also that he made the determination not to reappoint Gallagher as assistant baseball coach as he questioned the latter's judgment and felt too uncomfortable with Gallagher in that role because of the L.D. incident. He also stated that Gallagher's non-reappointment as basketball coach resulted from the athletic director's evaluation of Gallagher and his subsequent recommendation, which was processed through the Board's athletic committee, and was unrelated to the L.D. incident. His final testimony was that he recommended the withholding of Gallagher's 1983-84 salary increments because of Gallagher's conduct in the L.D. matter and conclusion that Gallagher interrupted a Science class without authority or reasonable cause, temporarily removed L.D. from her class and made the utterance, regardless of whether the Gallagher or L.D. version of that utterance is believed.

Athletic Director Gallucci also testified as to his recommendation that Gallagher not be reappointed as basketball coach, and said that his evaluation of Gallagher's

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deportment in that position and his general attitude was negative. He also stated he had discussed these problems with Gallagher on several occasions, which resulted in some but insufficient improvement, and further stated that his recommendation was completely unrelated to the L.D. incident.

Gallagher conceded that Gallucci had discussed his concern for Gallagher's courtside conduct on previous occasions.

RELEVANT DOCUMENTARY EVIDENCE

P-3 is the summary evaluation of Gallagher as a basketball coach by the athletic director for the 1982-83 school year. It is commendable in a number of respects, but very negative concerning Gallagher's lack of cooperation and unprofessional courtside conduct. Memoranda supportive of Gallucci's concerns were admitted and marked as R-1 and R-2.

DISCUSSIONS and FINDINGS OF FACT

Several questions were put to the court by petitioner's counsel concerning hearsay evidence. The crediblity of witnesses also is at issue because of conflicting testimony.

The court is fully aware of the residuum rule which requires a preponderance of credible evidence to support findings and conclusions of law, although hearsay evidence may be employed to corroborate competent proof or competent proof may be supported or given added probative force by hearsay testimony. N.J.A.C. 1:1-15.8 states:

> (a) Subject to the judge's discretion to exclude evidence under N.J.A.C. 1:1-15.2(a) or a valid claim of privilege, hearsay evidence shall be admissible in the trial of contested cases. Hearsay evidence which is admitted shall be accorded whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability.
>
> (b) Notwithstanding the admissibility of hearsay evidence, some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness.

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See also Weston v. State, 60 N.J. 36. In the instant matter there is disputed testimony concerning the day the L.D. incident occurred, whose idea triggered the trek to L.D.'s classroom, the actual words spoken by Gallagher to L.D., whether the incident occurred during the first half of period eight or just prior to the end of the period, who actually interrupted the eighth period Science class, whether the door of Stave's classsroom was open as she testified or whether Gallagher beckoned L.D. through the window pane in the door (which could not occur if the door was open 160 degrees), or whether L.D. was visibly upset by the incident. The relevance and importance of conflicting testimony must be viewed perspectively with the rationale of the Superintendent's withholding recommendation and non-reappointment of Gallagher as assistant baseball coach, which resulted from his direct confrontation with all principals involved with the incident.

Gallagher testified that he took the dollar bill in hand from Osborne, went to L.D.'s classroom with Osborne and Blank, beckoned L.D. to come to the doorway and said "A souvenir dollar for souvenir shorts." He also testified that no offensieve undertone was intended by his comment to L.D., which was voluntary on his part, and that his conduct was inapporpirate and immature.

Fadule testified that his recommendation to withhold Gallagher's salary increments was based on his conclusions that Gallagher was principally responsible for the interruption of the eighth period Science class, the temporary removal of L.D. from that class, and Gallagher's utterance to L.D., even if Gallagher's version of said utterance is ascertained to be factual.

Relating Gallagher's testimony to the Superintendent's rationale for his recommendations, I **FIND** the aforementioned conflicting testimony to be irrelevant. It matters not whether the incident occurred on January 21 or 28. It did happen and Gallgher's own testimony supports the following relevant **FINDINGS OF FACT:**

1. Gallagher was principally responsible for the interruption of L.D.'s eighth period Science class.

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2. Gallagher had neither authority or good cause to interrupt L.D.'s class.

3. Gallagher's interruption of L.D.'s class resulted in her temporary removal from that class.

4. Gallagher's comment to L.D. concerning the souvenir dollar and either her shorts or her pants, regardless of his intention, was immature, inappropriate, and behaviorally unprofessional.

Relative to the athletic director Gallucci's recommendation not to reappoint Gallagher as varsity basketball coach, Gallagher did not dispute the incidents related by Gallucci which concerned him, but rationalized his behavior in his response to Gallucci's evaluation. See the attachment to P-3. I believe Gallucci's testimony that his recommendation not to reappoint Gallagher as basketball coach was related to his assessment of Gallagher's demeanor in that responsible role, and was unrelated to the L.D. incident. **I FIND**, therefore, the existence of a rational basis in fact to be supportive of Gallucci's recommendation, and a proper exercise of his discretionary authority and responsibility as athletic director.

I ALSO FIND that petitioner has not met his burden of proof that the recommendations of Gallucci, Votto, and Fadule nor the action of the Board in withholding Gallagher's salary increments or his non-reappointment as assistant baseball and varsity basketball coach were arbitrary, capricious, unreasonable or abuses of discretionary authority.

THE LAW

Th applicable statute, N.J.S.A. 18A:29-14, which authorizes a Board to withhold salary increments is undisputed.

The Commissioner stated in Myers v. Board of Education of the Borough of

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Glassboro, 1966 S.L.D. 66: "the quantum of proof required to sustain a decision to withhold a salary increment is less than that required to establish cause for dismissal of a teacher under tenure." (at 68).

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

> We are here concerned with a determination made by an administrative agency duly created and empowered by legislative fiat. When such a body acts within its authority, its decision is entitled to a presumption of correctness and will not be upset unless there is any affirmative showing that such decision was arbitrary, capricious or unreasonable. (89 N.J. Super. at 332).

The court in Kopera v. Board of Education of the Town of West Orange, 60 N.J. Super. 288 (App. Div. 1960) said:

> We hold that it is lawful and reasonable for West Orange to require favorable reports by superintendents and those charged with supervisory responsiblity and approval by the Board of Education [as] a prerequisite to the granting of all increases in salary! (at 294).

The question of the assignment of teachers to extra or co-curricular activities has been held to be a matter which lies within the managerial discretion of a board of education. See, e.g., Mainland Regional Teachers Association v. Bd. of Ed. of Mainland Regional School District, 176 N.J. Super. 476 (App. Div. 1980), cert. den. 87 N.J. 312 (1981); Teaneck Bd. of Ed. v. Teaneck Teachers Ass'n, 185 N.J. Super. 267, 277 (App. Div. 1982). The Mainland court said at 482: "the number of such extra classroom activities, 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." Nevertheless, even given the exercise of managerial discretion, it remains for the court to determine whether that exercise has been abused, or whether a protected right has been violated.

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It cannot be disputed that the Legislature provides a statutory property right to teaching staff members through the enactment of tenure laws. Tenure, however, does not attach to coaching assignments, nor is a property right vested in salary expectations.

In the instant matter, I have found that the Board did not abuse its discretionary authority in withholding Gallagher's salary increments and acting not to reappoint him as a coach. It is also undisputed that the Board is responsible to its constituency for the wisdom of their actions, but is responsible to the Commissioner for the legality of same.

CONCLUSIONS OF LAW

I CONCLUDE, therefore, after review of the relevant **FINDINGS OF FACT** and consideration of applicable statutory and case law, the instant Petition of Appeal shall be and is hereby **DISMISSED.**

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

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

19 January 1984
DATE

Ward R. Young
WARD R. YOUNG, ALJ

January 23, 1984
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Jan. 25, 1984
DATE

Mailed To Parties:

Ronald L. Parkes/jko
FOR OFFICE OF ADMINISTRATIVE LAW

jtp

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Witnesses

For the Petitioner:

Bruce L. Gallagher, petitioner
Stephen J. Blank, sportswriter

For the Respondent:

Patricia W. Stave, Science teacher
Frank T. Votto, high school principal
James J. Fadule, Jr., Superintendent of Schools
Thomas Gallucci, Athletic Director

Evidentiary Documents

P-1 Copy of souvenir dollar
P-2 82-83 Basketball Schedule
P-3 Evalution document as basketball coach by Gallucci and petitioner's response

R-1 January 3, 1983 letter - Gallucci to Gallagher
R-2 February 22, 1982 letter - Gallucci to Gallagher
R-3 Nutley coaching handbook
R-4 June 30, 1982 Votto evalution of Gallucci
R-5 March 18, 1983 report - Superintendent to Board
R-6 Increment withholding letter - Superintendent to Gallagher
R-7 April 6, 1983 reprimand letter - Fadule to Osborne
R-8 March 4, 1983 psoting of assistant baseball vacancy
R-9 June 1981 evaluation of Gallucci by Zwirek

Note: R-10 was not admitted into evidence due to its irrelevancy as determined by the court.

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BRUCE GALLAGHER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF NUTLEY ET AL., ESSEX COUNTY,	:	DECISION
RESPONDENTS.	:	

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

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

Petitioner in primary exceptions argues that the initial decision by Judge Young supporting the action of the Board herein be set aside and that the Commissioner order as a substitute punishment the issuance of a letter of reprimand to petitioner. It is argued that the incredibly disproportionate penalties Petitioner Gallagher received in relation to the lack of punishment meted out to fellow teacher Osborne (a written reprimand) warrants a reversal by the Commissioner.

In reply exceptions the Board contends otherwise, stating that the evidence advanced herein supports the conclusion that petitioner's increment was properly withheld. Further, the Board states that it acted within its discretionary authority in not reappointing petitioner to previously held coaching positions as validated by the evaluations of the athletic director. The Board cites Hazlet Teachers Association and Joseph Oxley v. Board of Education of the Township of Hazlet, 1975 S.L.D. 374, in support of its contention. The Commissioner finds merit in the arguments advanced by the Board.

A close reading of the initial decision, including the analysis of the testimony of witnesses plus consideration of the evidentiary documents, convinces the Commissioner that Judge Young's determinations herein were properly buttressed by the record and law applicable thereto.

The Commissioner cannot agree with petitioner's pleadings that the punishment ascribed to him was inappropriate when compared with that of fellow teacher Osborne. There is no merit in such argument. Osborne's actions in the incident herein were considered by the ALJ and the disparity of the punishment received by these two

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teachers was found to be both consistent with their respective actions and within the discretionary authority of the Board. The Commissioner so holds.

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

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

FEBRUARY 28, 1984

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 10342-82
AGENCY DKT. NO. 417-10/82A

DALE MYHREN,
Petitioner,

v.

BOARD OF EDUCATION OF THE
BOROUGH OF EDGEWATER, BERGEN COUNTY,
Respondent.

APPEARANCES:

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

Steven J. Zaben, Esq., for respondent

Record Closed: November 28, 1983 Decided: January 13, 1984

BEFORE **JAMES A. OSPENSON,** ALJ:

Dale Myhren, certified in January 1975, as elementary teacher (K-8 and nursery school) and in October 1975, as teacher of the handicapped, alleged employment by the Board of Education of the Borough of Edgewater, Bergen County, as a special education teacher from April 1975 to June 30, 1977, and as elementary teacher from 1977 to September 30, 1980. From October 1, 1980 to June 20, 1981, she was on maternity leave. She alleged the special education position was abolished in September 1977 and her

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elementary teaching position in August 1981, giving rise to preferred eligibility rights under N.J.S.A. 18A:28-12 in both teaching categories, rights which flowed from her having acquired tenure as a teaching staff member generally in April 1978 under N.J.S.A. 18A:28-5. When the Board rejected petitioner's application and employed for 1982-83 another person, who was without tenure, for the position of teacher of the perceptually impaired (a position requiring certification as teacher of the handicapped), petitioner filed her petition of appeal against the Board in the Department of Education claiming abridgment of those rights and seeking installment in the challenged position with back pay and emoluments. The Board denied petitioner's claims, contending generally that her employment over the years was solely as elementary teacher in grades 1 and 2 and that whatever petitioner's preferred eligibility or seniority rights were she had none with respect to appointment to the questioned special education position now held by another. Subsequently petitioner moved to amend the original petition of appeal to allege the Board's refusal to appoint her to the special education position for 1983-84 was a retaliation for her attempt to seek redress of matters alleged in the original petition. The Board denied the allegation.

The original petition of appeal was filed in the Bureau of Controversies and Disputes of the Department of Education on October 25, 1982. The Board's answer was filed there on November 15, 1982. Accordingly, the Commissioner of the Department of Education transmitted the matter to the Office of Administrative Law on November 19, 1982 for hearing and determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

On notice to the parties, a prehearing conference was conducted in the Office of Administrative Law on February 23, 1983 and an order entered establishing, inter alia, hearing dates beginning June 6, 1983. The parties were directed to confer for completion of discovery and in order to fashion such written stipulations of facts as should fairly shorten proofs at hearing. They were directed to file for record all relevant documentation such as Board minutes of employment and termination, employment contracts, correspondence and all applications for State aid for special education classes and statements of amounts provided under N.J.S.A. 18A:58-6 to the district in the years

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1974-75, 1975-76, and 1976-77. At issue in the matter, it was established, were the following:

A) Whether petitioner's employment from April 1975 to June 30, 1977 was in the category of special education (teacher of the handicapped N.J.A.C. 6:11-6.3(c)1 iii; 6:11-8.4(c)4);

B) If so, whether the Board violated petitioner's preferred eligibility and/or tenure and seniority rights by not employing her as teacher of the perceptually impaired and by employing another less senior or untenured for 1982-83 and 1983-84 instead; and

C) If so, what is her remedy.

Hearing scheduled in the Office of Administrative Law beginning June 6, 1983, was adjourned at request and/or with consent of the parties. Hearing was conducted and concluded in the Office of Administrative Law on September 19 and 20, 1983. Following completion of post-hearing submissions, the record closed November 28, 1983.

After prehearing conference and before hearing, petitioner moved for an order permitting her and counsel to inspect and copy child study team reports for some 44 named first grade students in classes she taught from 1974-77, contending she was hired by the Board as special education teacher and assigned to an unlabeled special education first grade class. She said she learned her students had been "screened" by the child study team and "found to be lacking in many developmental areas." She was, she said, to use her special education certificate and background, special education material and individual programs "to keep the children from falling too far behind and possibly being classified in the future." The Board having denied petitioner's position was as special education teacher, she argued she must inspect and copy child study team records for the 44 students to corroborate her tenure and seniority claims by demonstrating procedures of N.J.A.C. 6:28-1.1 et seq., were followed. She did not assert any of the 44 pupils were in fact classified during her teaching service.

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The administrative law judge reviewed petitioner's motion and certification and the Board's certification in opposition. On balance, it was ruled, the administrative law judge was more than satisfied any order permitting such inspection and disclosure of mandated or permitted pupil records would be an unwarranted, unnecessary and unreasonable incursion into the personal privacy rights of the 44 affected pupils and parents even under protective court order, as such rights are recognized under N.J.S.A. 18A:36-19 and N.J.A.C. 6:3-2.1 et seq., generally, and N.J.A.C. 6:3-2.5(a), specifically.

Conversely, in his view, petitioner had not made sufficient showing (1) that the requested inspection and disclosure would not be unduly burdensome on the Board's obligations under statute and N.J.A.C. 6:3-2.2(b) and N.J.A.C. 6:3-2.6(a)4; (2) that alternative less intrusive discovery methods had been exhausted (N.J.A.C. 1:1-11.1); or (3) that but for the relief requested her rights at hearing were in risk of irretrievable prejudice.[1]

STIPULATIONS AND PRELIMINARY FINDINGS OF FACT

The parties having so stipulated, I make the following preliminary Findings of Fact:

1. Petitioner was employed by the Board during the following periods of time:

   (a) April, 1975 - June, 1975
   (b) September, 1975 - June, 1976
   (c) September, 1976 - June, 1977
   (d) September, 1977 - June, 1978
   (e) September, 1978 - June, 1979
   (f) September, 1979 - June, 1980
   (g) September 1, 1980 - September 30, 1980

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1 Petitioner's counsel certified (page 4, paragraph 10) ". . . the information sought will go far towards assisting the trier of fact to pierce the label the Board has attached to these groups; and further to determine factually whether petitioner was employed under her teacher of the handicapped certificate during relevant periods in issue."

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2. During the respective periods of time set forth in stipulation No. 1, petitioner was employed in the following capacities:

   (a) Elementary teacher - Grade 1
   (b) Elementary teacher - Grade 1
   (c) Elementary teacher - Grade 1
   (d) Elementary teacher - Grade 2
   (e) Elementary teacher - Grade 4
   (f) Elementary teacher - Grade 4
   (g) Elementary teacher

3. From October 1, 1980 to June 30, 1981, petitioner was on a Board approved maternity leave of absence.

4. The Board is the designated authority charged with responsibility of operating the public school(s) of Edgewater.

5. Petitioner holds valid, permanent, teaching certificates as a teacher of the handicapped and as elementary school teacher (N-8). The instructional certificates were issued by the New Jersey State Board of Examiners in October 1975 and January 1975, respectively.

6. Petitioner obtained tenure as a teaching staff member in or about April 1978, pursuant to N.J.S.A. 18A:28-5.

7. Petitioner's elementary teaching position was abolished in August 1977, and petitioner was employed as teacher in another elementary teaching position for 1977-78.

8. Petitioner's elementary teaching position was abolished in or about April 1981, effective September 1, 1981.

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9. The Board, during that time period, maintained a perceptually impaired class; however, the age groups for that class were ages 7-11 and 8-12.

10. Pursuant to N.J.S.A. 18A:28-12, petitioner possesses preferred eligibility rights in the elementary teaching category.

11. On June 25, 1982, respondent posted a job notice for the position of teacher of the perceptually impaired.

12. On or about June 30, 1982, petitioner notified the Board that she was available for the position and that her seniority and preferred eligibility rights required she be assigned to the position.

13. On or about July 31, 1982, the Board notified petitioner she was not appointed to the position of teacher of the perceptually impaired.

14. The Board determined to appoint an individual with 10 years experience but no prior teaching experience in the district to the position of teacher of the perceptually impaired.

15. That individual, Betty Moscone, is not tenured and, therefore, possesses no seniority rights in the district.

16. An additional special education position became available in respondent's district for the 1983-84 school year.

17. Petitioner applied and was interviewed for the position by the district's chief school administrator, Dr. Ted Blumstein.

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18. By letter dated June 22, 1983, petitioner was notified she would not be appointed to the special education position available for the school year 1983-84.

EVIDENCE AT HEARING

Petitioner, Dale Myhren, testified she holds the B.A. degree in education from William Paterson College, from which she was graduated in January 1975. Her college majors were early childhood education and special education. In January 1975 she received her standard instructional certificate in elementary education (N.J.A.C. 6:3-1.10(k)(28)) with a subject field endoresment in nursery school (N.J.A.C. 6:11-8.4(b)(13); 6:11-6.3(e)). She applied through the office of the county superintendent for a subject field endorsement as teacher of the handicapped, which was issued in October 1975, after she had begun her employment in the Edgewater School district. She was required to take no additional courses for that endorsement, she said.

During her last year at college, she said, she substituted at Edgewater and was told there might soon be a vacancy by Elinor Regan, the school principal. The vacancy would be left by Nancy Kleiner, a first grade teacher who was soon to go on maternity leave. Petitioner said the principal told her the position would run from April 1975 until June 1975. Petitioner was told she would need her elementary certification and her teacher of the handicapped certification for teaching Mrs. Kleiner's class. She went on to teach the class in 1975-76 and 1976-77, when the position was abolished in a reduction in force.

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Petitioner said her students were what was called "high risk" students, many of whom were perceptually impaired. Petitioner said she was told her pupils had been tested while in kindergarten and that many were lacking in developmental areas. As a result, she said, those high risk students were put in her first grade class. To petitioner, the term "high risk" students meant those with audio and/or visual discrimination problems, or those perceptually impaired. For her curriculum in the class, petitioner used special learning materials like DLM learning materials, Frostig lessons and special workbooks on phonics.

While students her pupils in her first-grade class were not officially classified, she said, some went on during the next year to be so classified, while some went on to regular classes without difficulty.

Petitioner's first-grade class was one of two first grade classes. The other was taught by Paula Amore, whose students, petitioner said, had no learning deficiencies. Petitioner had no function in assignment of children from kindergarten either to her class or to Mrs. Amore's class.

In September 1975, petitioner said, a fifth grade teacher, Virginia Torre, applied for the first grade position assigned to petitioner.

Petitioner said she was reassigned to a different teaching position in 1977-78, a time when enrollment had dropped. Her first-grade class was abolished and she was assigned to a regular second grade class.

In April 1978, petitioner said she was told by Edward McGill, administrative principal, she had acquired tenure.

From April 1975 through June 1977, petitioner said, there two special education classes taught by two teachers whose certifications were of the perceptually impaired. One class was of primary age and one class was of intermediate age.

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Stanley Galorenzo, one of the teachers, left the district in June 1982 for another job. The other teacher, Margaret Latowsky, retired in June 1983. Her position was posted and petitioner applied for it. In an interview in May 1983, with Dr. Ted Blumstein, chief administrative officer for the district since the previous February, petitioner said Dr. Blumstein told her he wanted her for the position and felt she could do the job. But, he said to petitioner, members of the Board of Education did not want petitioner. Petitioner said he told her if he could tell the Board she would drop her pending suit against the Board, she would have the job. Petitioner said she replied she would discuss the matter with her attorney. Blumstein said her seniority would be as if she were coming in as non-tenured special education teacher.

Petitioner on cross-examination said she was aware of a July 1975 job posting for the position she obtained for the following September. (R-1). The job was for "a temporary vacancy in Grade 1 at the George Washington School." The certification requirement was "full elementary certification and additional experience in the special education field, especially in the area of perceptual impairment." The job description was to "assume full responsibility as classroom teacher of Grade 1." Petitioner acknowledged she knew when she began she was not teaching a classified group. She felt all her first grade students had problems but realized not all were perceptually impaired. They were not, she knew, legally classified. Some of her students advanced to the second grade without classification; others went on to be classified and were put in primary/intermediate legally designated special education classes. Petitioner received no special education teaching stipend for her work in the first grade classes from 1975 to 1977. She regarded her teaching position as in a "special first grade class." But, she conceded, the phrase was not used officially in curriculum or policy, rather only in conversation informally in the school. She understood, she said, classified and unclassified students were not mixed in the same classroom.

About June 25, 1982, petitioner said, she saw a job notice for teacher of the perceptually impaired. She applied but was not interviewed. She received a letter informing her she was one of 62 applicants for the special education position for 1982-83 and that another was chosen. J-(w). That other person was Betty Masconi.

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Virginia Torre, called by petitioner, testified she was presently employed by the Board as a third grade teacher. Her first employment was in 1968. She holds elementary certification K-8. For 1975-76, she said, she learned Mary Kleiner was on maternity leave and spoke to Mr. McGill asking to be transferred to Kleiner's class. She was told by McGill, she said, a teacher of that class would have to have some special education background or credits in special education, which Torre did not have. McGill's letter to her to that effect was P-1.

Called by petitioner, George Frank testified he was employed by the Board from the late 1960's to early 1970's as a consultant school psychologist. He is a certified school psychologist in New Jersey. He was not employed by the Board when petitioner was employed. Concerning a program for kindergarten students who seemed developmentally slow, during the late 1960's, Frank described the nature of their difficulties as problems of slow learning in language, slow development of motor skills and in readiness to undertake regular academic work. To him, he said, "high risk" meant those who would not succeed as might be expected of other average students, and those who needed extra remedial help in order to succeed. Not all first graders, of course, he said, were "high risks." Directed by Mr. McGill in the late 1960's to develop a screening plan or program, he said he worked with the LTD-C and other teachers in such a screening process. The group would look at kindergarten children and those who were screened as "high risks" were given further tests. Perceptual impairment, he said, is a vague term not easily susceptible of definition. Implied is a continuing developmental problem. He preferred use of the term "high risks" and to let actual classification as perceptually impaired await further testing. For kindergarten students at "high risk," he said, the attempt was made to provide them with individual programs in order to delay academic demands of the first grade for the time being. The intent, however, was not to classify such students early in first grade. The effort was to help the first grade teacher attempt to decide whether students should go on to second grade or stay in smaller classes. It was his hope, he said, in speaking to Mr. McGill, to have the Edgewater district find a teacher for the program, one with experience in special education. He did not understand it to have been the design of the

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district to have that teacher in a first grade class necesarily so qualified. For the children in the smaller first grade class, the attempt was made generally to tailor each student's program individually. He dealt principally during his tenure with Mrs. Kleiner, petitioner's predecessor. In the late 1960's and early 1970's, he said, Kleiner's particular class was referred to as "the small first grade" or "the pre-first grade class." Such terms were used descriptively but not officially. He understood Mrs. Kleiner's class in the early 1970's was not a regular classified special education class. There was no specific intent to classify the students. Workbooks and other curriculum measures utilized in the class, he said, could be used for all students, not alone for only special education students. It was his understanding the provision for the first grade class taught first by Kleiner then by petitioner was deliberate on the part of the Board. Any official change to making a regular special education class would have entailed testing, evaluation by the child study team and specific employment of a special education teacher, all of which would have been necessary for State aid reimbursement. In his view, all of such provisions would have entailed expense for the district and was not undertaken.

Called by petitioner, Richard Joseph Dexheimer, testified he was employed by the Board from 1967 through July 1982 as teacher and building principal. He was principal since 1975. He was petitioner's supervisor in April 1975 and building principal in 1975-76. He referred to petitioner's class as a special education class because petitioner was a certified special education teacher conducting such activities in a special education class. Petitioner, he said, had half as many students as in the regular first grade class. Planning was done on an individual basis for individual students.

On cross-examination, Dexheimer said his position was ended on a reduction in force because of a closed school. He filed suit against the Board in 1980. When his principalship was ended, he was returned to classroom teaching duties and his salary was reduced. He conceded he knew there were no classified special education students in petitioner's first grade class, but he still thought of the class as a special education class. He was aware, he said, there were other actual special education classes.

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Called by petitioner, Elaine Solomon testified she has been employed by the Board since 1965 as LTD-C, for which she is certificated. She said she worked with petitioner from April 1975 through June 1977. She worked with students coming to the first grade from kindergarten as LTD-C. While in kindergarten, she said, she screened the students to determine which would likely need extra remedial help. In a kindergarten remedial program, she would meet with parents, teacher and children. At end of the kindergarten year she would measure students' progress with the kindergarten teacher on the Metropolitan Achievement Test. Results went to the building principal who would have final say as to which class the graduating kindergarten students would enter, petitioner's or Mrs. Amore's class. Solomon said her input was to help identify the potential achievement of students. Some children's birthdates were late, she said, and their maturation was not ripe. These were "high risk" students in terms of potential academic success. Attempt was made not to label students, she said, by placement in petitioner's class.

Solomon said she worked closely with petitioner, making suggestions for curriculum materials and conducting conferences. Typical materials used were kindergarten or first grade perceptual tools, booklets, Parquetry Language Master, and Peabody Language Development kits. These were also available, she said, to Mrs. Amore's class. Solomon said individualized programs were not developed by her team for petitioner's class. In the time in question, from 1975 to 1977, she said, there was another officially designated class for the perceptually impaired, that is, Mrs. Latowsky's class. Her students were older: from 8 years to 11 years. Children younger than that were not classified. She would meet with petitioner in conference as the need arose, on a weekly or sometime on a daily basis. She had similar responsibilities with Mrs. Amore's class, she said, but she saw petitioner more frequently because she seemed to have more children with difficulty. Petitioner's class was referred as a "transitional first grade class" and not as a "special education class." That was, Solomon understood, in accordance with Board policy. The determining point for evaluations was at the end of the first grade experience. Petitioner's class, she said, was a modified first grade program; the term "high risk" was, according to Solomon, "education jargonese." She understood petitioner's class was not an official special education class. Curriculum books used were the same for petitioner and for Mrs. Amore, she said, although each used the books differently.

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Called by the Board, Elinor Regan testified she retired from employment by the Board in June 1975. She has some 34 years experience, 19 years as a teacher and 14 years as a principal. She was principal when petitioner was first employed in 1975. For Mrs. Kleiner's position, she said, it was felt there was needed someone with background in special areas to help youngsters who were in need of specialized training so they might avoid academic problems later on. Certification for the job was elementary certification plus a background or experience in special training or education. Regan said the first grade class petitioner took over from Mrs. Kleiner was never alluded to as a special education class because students were never classified. The workbooks and balance beams were teaching aids that could be used in other classes not just in special education classes. In George Washington School where she was principal, she said, the official special education class was taught by Mrs. Latowsky. In another school, the Elinor Van Gelder School, another class was taught by Mr. Galorenzo. She recalled petitioner's students were of various types, some bright and some perceptually impaired. Petitioner's students were not necessarily classifiable because they were in her class. Developmentally slow children, she said, are not necessarily perceptually impaired. They would get help in petitioner's class by special training or attention.

Called by the Board, Raymond Colantoni, testified he has been employed by the Board since 1957 as Board secretary. His duties generally include the business end of the district, keeping records and minutes of the Board, preparing state and county reports. He attends Board meetings and negotiations of employment contracts.

Colantoni identified R-2 as an excerpt from Mrs. Kleiner's personnel folder showing her employment in 1973-74 and 1974-75 as grade teacher. R-3 is a similar excerpt from petitioner's personnel folder showing her assignment as grade 1 teacher in 1975 and 1975-77 without reference to any alleged "special education" assignment. Two official perceptually impaired, special education classes were taught by Mrs. Latowsky and Mr. Galorenzo.

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R-4, a Report of Certificated and Non-Certificated Staff, dated September 30, 1976, showed petitioner listed under the job code assignment 1001 meaning first grade teacher, full time. Mrs. Amore was listed the same. Margaret Latowsky was shown under job code 2472, which signified teacher of perceptually impaired. R-5 in evidence was the position and assignment code explanation for job code 1001. R-6 in evidence was the position and assignment code explanation for job code 2472, Mrs. Latowsky's designation, which signified teacher of neurologically or perceptually impaired.

R-7 in evidence was form SA-1, Application for State Financial Aid, for 1974-75, which indicated 19 pupils in special education classes in the district. R-8 was a monthly pupil enrollment for September 1974, showing 19 special education students in classes taught by Galorenzo, Latowsky and Howard.

Exhibits R-9, R-10, R-11 and R-12 were State Aid Applications, forms SA-1, for 1975-76, 1976-77, and monthly pupil enrollments for those respective years in September. All reflected listing of special education students taught in classes by Galorenzo, Latowsky and another special education teacher. None showed petitioner's designation as anything but first grade teacher.

Exhibit R-13 was identified as form A 4-2, Annual Special Education Financial Statistical Report to the County Superintendent for the school year ending June 30, 1975, which was prepared by Colantoni. It indicated three special education classes listed by line item classification, J-213. Petitioner's salary position was not listed under that line item account as teacher of a special education class. Her first grade class was not one of the three special education classes included in the classification. In the report were special education costs for 1974-75 which, by direction, included only those costs approvable by the Bureau of Special Education Division of Curriculum and Instruction. Exhibits R-14, R-15 and R-16 were similar reports for the years 1974, 1975 and 1976. As before, petitioner's first grade class was not included as a special education class for State aid reimbursement purposes.

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Recalled on direct examination by the Board, Dr. Ted Blumstein was asked concerning the interview with petitioner in May 1983 when the Board sought a replacement for Mrs. Latowsky's position. In a general conversation after the interview was over, Blumstein said, petitioner appeared nervous and said she was anxious to have the position. She told him if she did get the position she would drop her pending suit against the Board. The conversation was cordial, according to Blumstein. He told her at the time 32 other applicants had applied and that he would refer her words to the Board. The ultimate applicant chosen, he said, was Vera Roth, a teacher with six years experience, three of which were in a classroom similar to Latowsky's. Blumstein specifically denied petitioner's allegation that he told her the Board would hire her if she dropped her suit. Blumstein said that was not correct because he was without power to hire or fire and could only make recommendations to the Board.

The deposition testimony of Edward McGill disclosed McGill was employed by the Board from 1956 through 1982. From 1975 to 1982 he was administrative principal. He testified he interviewed petitioner in April 1975. He said she was hired to take the place of Mrs. Kleiner who left on maternity leave. At time of interview, he said, although Kleiner's class was not considered a special education class, he would have preferred to have a teacher with background of special education because the class had children with learning problems. He said Ms. Regan concurred in that thought. To a question as to what was his understanding insofar as which certification the individual hired to fill the position had to be possessed of, McGill said it was not a question of "had to be possessed." He said if a particular individual were available with special education background, that was the person "we" wanted, if the party were available. The feeling was, he said, an administrative understanding between him and Miss Regan rather then an official decision by the Board. Petitioner's class was not classified, he said, as a special education class. Special education teachers received an extra stipend of $200 over basic salary. To his recollection, petitioner never received any such additional stipend. Petitioner's class was a regular first grade class and was so listed on the district's monthly report of enrollment and also on yearly reports sent to the State Department of Education.

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DISCUSSION

Petitioner's preferred eligibility rights of reemployment under N.J.S.A. 18A:28-12 in the position of teacher of the perceptually impaired for 1982-83 and again, for 1983-84, depend fundamentally and necessarily on whether she acquired seniority in such a categorized position by her employment in the district from April 1975 to June 30, 1977, years during which she accrued such tenure in the district as the Board here admitted she acquired. Seniority, pursuant to N.J.S.A. 18A:28-9 (as provided in N.J.A.C. 6:3-1.10 et seq.), shall be determined according to the number of academic or calendar years of employment in the district in specific categories. N.J.A.C. 6:3-1.10(h) provides that whenever any person's particular employment shall be abolished in a category, he/she shall be given that employment in the same category to which he/she is entitled by seniority. Petitioner's elementary instructional certification is such a category under N.J.A.C. 6:3-1.10(k)28; her certification as teacher of the handicapped is another subject field category under N.J.A.C. 6:11-8.4(c)4.

Thrust of petitioner's argument is that her employment from April 1975 to June 30, 1977, was employment the title of which was not properly descriptive of the duties she performed and that, as a consequence, she has a right to be placed in a properly descriptive category commensurate with duties actually performed and not, as insisted by the Board, in one known by the mere title of elementary teacher. Her claim to employment categorization in those years is that she was a de facto special education teacher in one of the district's two first grades at George Washington School. Her argument is advanced on the authority of Boeshore v. Bd. of Ed., Township of North Bergen, 1974 S.L.D. 805. In that case the Commissioner held the Board improperly transferred petitioner involuntarily from a tenured position as assistant superintendent to a position of acting principal, a transfer the Commissioner said was ultra vires its powers. Petitioner had performed duties of assistant superintendent of schools while appropriately certificated therefor and was aggrieved by Board action changing designation of the position from assistant superintendent to assistant to the superintendent. As in Boeshore, petitioner here argued, the misdesignation was mere deception. She argued the class she taught was a "high risk" class of developmentally slow students and was one to which she was hired solely by reason of her special education certification.

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The Board argued petitioner's class, however, was never more than a first grade elementary class and that petitioner was never hired under her special education certification to teach it. The Board argued it was admitted none of petitioner's students was classified under State Board regulations in N.J.A.C. 6:28-1.1 et seq. and that none was subject to official individualized education programming as defined in N.J.A.C. 6:28-1.8, 2.1. Petitioner's original employment, said the Board, given her dual certifications as elementary teacher and teacher of the handicapped, was serendipitous. The latter certification, said the Board, was not a necessary or legally sufficient precondition of original employment. Though it may have prompted petitioner's selection as one experienced in special education, the circumstance could not in law change the nature of petitioner's employment as first grade elementary teacher. School administrative and financial records clearly revealed the district had not viewed or reported petitioner's first grade class as an official special education class nor had State aid for the class and its instructional personnel ever been sought, during the years from 1974 through 1977, under N.J.S.A. 18A:58-6:

> b. Each local school district. . . shall be reimbursed by State aid for (1) the cost of operating an educational program for handicapped children including costs of identification, examination, supervision and other special education services approved by the commissioner, to the extent of one-half of such costs. . .

Petitioner's own personnel records, moreover, argued the Board, showed she was consistently throughout her service during the years in question considered only as first grade elementary teacher, with salary beginning on the first level of the teachers' salary guide, and was never paid any extra stipend for service as special education teacher.

Petitioner did not challenge those assertions.

It may be observed initially that seniority credit, even presumptively, is dependent upon certification held at time of initial employment. Here, petitioner was certified as elementary teacher in January 1975 but was not certified as teacher of the

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handicapped until October 1975, nearly six months after her initial employment in April 1975. In Morer v. Bd. of Ed., Township of Teaneck, 1976 S.L.D. 963, it appeared that petitioner at time of initial employment by the Teaneck Board held certification only in general business education and subsequently acquired tenure in that field. Her position was abolished by the Board and she was dismissed as a result of a reduction in force at end of the 1974-75 school year. By virtue of eligibility for temporary certification as English teacher at time of termination, she claimed entitlement to a position in the English Department. Her claim was not allowed. Similarly, in Frietag v. Bd. of Ed., Borough of Glen Rock, 1978 S.L.D. 792, petitioner, a tenured teacher of Spanish, taught journalism for the Board during the school year 1975-76. Her position was abolished. Alleging eligibility for a certificate to teach English, she claimed seniority as a secondary school English teacher. Following Morer, the Commissioner said, her claim to seniority protection must be determined in accordance with the subject field endorsed on her certificate at time of her initial employment with the Board. Petitioner could only claim a tenure status and seniority protection within scope of the subject field endorsed on her teaching certificate at that time. Id. at 793.

The question results, nevertheless, whether for service in a first grade elementary teaching position entailing instruction of "high risk" pupils, which was not a special education class, whose students were not classified, and for which the district neither sought nor received State aid reimbursement from 1974-77, petitioner, though certificated in elementary education and as a teacher of the handicapped during that service, is entitled to seniority credit under N.J.A.C. 6:3-1.10(b).

It seems well established that one must actually have served in a category for which seniority is claimed; mere certification is not sufficient. In Friedman v. Bd. of Ed., Town of Westfield, 1981 S.L.D. — (Comm'r Dec. July 9, 1981), petitioner, a former tenured distributive education teacher, alleged the Board had improperly denied him position as teacher of cooperative industrial education. The Commissioner affirmed findings and determination of an administrative law judge who concluded petitioner had not served in the category for which he claimed seniority. Id. at 8-9. In Compton v. Bd. of Ed., Township of Hanover, 1972 S.L.D. 274, it appeared petitioner had tenurable employment

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service of three years as guidance counselor and two years as coordinator of special services, during which time she possessed elementary teacher certification and elementary school principal certification in addition to counselor certification. The Commissioner held she had no additional seniority, merely by virtue of certificate status, to perform duties as a teacher or as a principal, in future, that she had not performed in the past. Id. at 277.

In Dullea v. Bd. of Ed., Borough of Northvale, 1978 S.L.D. 638, petitioner was employed continuously by the Board from September 1965 through June 1975 as a special education class teacher. At no time was she assigned by the Board to teach a regular elementary school class but at all times while employed by the Board held an elementary school certificate. When the Board abolished her employment at the end of the 1974-75 academic year, she alleged violation of her tenure and seniority rights and sought reinstatement to an elementary teaching position. The Board admitted petitioner was tenured but denied she had seniority rights in any other position than that of special education teacher, which was abolished for reasons of economy under N.J.S.A. 18A:28-9. The Commissioner concluded, on the evidence, petitioner's employment was in the category of teacher of the handicapped and not that of elementary teacher. The Commissioner said:

> Petitioner's assertion of entitlement to displace a regular elementary classroom teacher with fewer years of service in the Board's employ is without sound legal basis. Her sole claim to reemployment arises from N.J.S.A. 18A:28-13 and N.J.A.C. 6:3-1.10 which require that the Board first place her on its preferred eligibility list for the category of teacher of the handicapped and thereafter notify her of any vacancy which may occur in that category. Petitioner has failed to show that, aside from her seniority entitlement as teacher of the handicapped, she has earned seniority entitlement in any other category of employment to which she may revert. Accordingly, her prayers for relief may not be granted. Dullea at 642.

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From all of the above, I **CONCLUDE** that petitioner here, when first employed by the Board in April 1975 and later in September 1975 was employed as an elementary first grade teacher by the Board exclusively under her elementary teacher's certification and assigned afterwards consistently therewith; that the employment position to which she was initially assigned was not a special education class de facto or de jure under N.J.A.C. 6:28-1; that students in petitioner's elementary first grade class for the years of her service from April 1975 until June 1977 were not special education students so classified under N.J.A.C. 6:28-1 et seq.; that the Board's provision of such a class as taught by petitioner was not one for which State aid reimbursement was sought over the years in question under provisions of N.J.S.A. 18A:58-6; that the Board's employment of petitioner was in no way a sham or pretense; and that, finally, as a result, petitioner during her years of elementary teaching service accrued neither tenure nor any concomitant rights of seniority in any other position by that service.

Petitioner's final claim, arising out of Count III of her amended petition of appeal, was that she was improperly denied the position of teacher of the handicapped for 1983-84 by the Board's chief school administrator, who, it was alleged, told her she would not be appointed to the position unless she agreed to dismissal of her then pending action before the Commissioner. Petitioner's rejection after application (J-(x)) recited other well qualified candidates had applied but the Board selected another it felt was better suited to district needs. Testimony at hearing on the issue was elicited from petitioner and the chief school administrator. The latter testified it was petitioner herself who broached the subject of the pending litigation and that it was she who in effect offered to drop the suit in exchange for acceptance in the position. I have considered both testimony of the witnesses and the documentary record. In my view, and I so **FIND**, petitioner has failed to sustain her burden of proof that Board rejection of her application was a deliberate and arbitrary act of retaliation against her for initiation of the present litigation.

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CONCLUSION

Based on the foregoing, having heard witnesses in testimony and having reviewed the documentary evidence, having considered arguments of law raised, I hereby **CONCLUDE** petitioner's assertion of entitlement to displace another person untenured and/or less senior presently employed by the Board as teacher of the handicapped is without basis in fact or law, her rights of tenure and seniority remaining those of a regularly employed elementary teacher for the years of her employment from April 1975 until September 30, 1980. Any rights of reemployment arise in her favor under N.J.S.A. 18A:28-12, 13 and N.J.A.C. 6:3-1.10, which require the Board retain her on its preferred eligibility list for the category of her elementary certification to await notification of future vacancy. Petitioner has failed to show that, aside from her seniority entitlement as elementary teacher, she earned seniority in any other category of employment. The petition of appeal, therefore, is hereby **DISMISSED** as to all counts.

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 10342-82

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

January 13, 1984
DATE

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

1/18/84
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

Jan. 20, 1984
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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LISTS OF EXHIBITS

P-1 Letter of Edward McGill, administrative principal, to Virginia Torre, dated June 9, 1975.

P-2 Deposition transcript of Edward McGill, dated June 16, 1983.

R-1 Job posting for classroom teacher of grade 1, dated July 21, 1975, requiring full elementary certification and additional experience in the special education field, especially in the area of perceptual impairment.

R-2 Excerpt from personnel folder of Nancy Kleiner showing employment as grade 1 teacher for 1973-74 and 1974-75.

R-3 Personnel folder excerpt of petitioner, showing employment as grade 1 teacher from April 1975 to June 1975 and from 1975-76 to 1976-77.

R-4 September 30, 1976, report of certificated staff showing assignment of petitioner under job code 1001 (first grade teacher).

R-5 Explanation of position and assignment codes showing code 1001 to be elementary grade 1.

R-6 Explanation of position and assignment codes showing code 2472 as neurologically or perceptually impaired teacher.

R-7 Form SA-1 application for State aid for 1974.

R-8 Pupil enrollment for September 1974 showing Kleiner as grade 1 teacher and Latowsky as special education teacher (PI).

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R-9 Form SA-1, application for State aid for 1975.

R-10 Form SA-1, application for State aid for 1976.

R-11 Pupil enrollment as of September 15, 1976, showing petitioner as teacher of grade 1 and Latowsky as special education teacher (PI).

R-12 Pupil enrollment as of September 12, 1975, showing petitioner as teacher of grade 1 and Latowsky as special education teacher (PI).

R-13 1974-75 Report of the Board to the county superintendent for the S/Y ending June 30, 1975.

R-14 1974 Certified Special Education Personnel Form, showing Latowsky as teacher (P.I.).

R-15 1975 Certified Special Education Personnel Form, showing Latowsky as teacher (P.I.).

R-16 1976 Certified Special Education Personnel Form, showing Latowsky as teacher (P.I.).

J-(a) Excerpt from Board minutes of regular meeting held on April 16, 1975 (A-1).

J-(b) Excerpt from Board minutes of regular meeting held on August 20, 1975 (A-2).

J-(c) Excerpt from Board minutes of regular meeting held on October 20, 1976 (A-3).

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J-(d) Excerpt from Board minutes of regular meeting held on August 23, 1977 (A-4).

J-(e) Excerpt from Board minutes of regular meeting held on April 18, 1979 (A-5).

J-(f) Excerpt from Board minutes of regular meeting held on August 23, 1979 (A-6).

J-(g) Resolution of the Board dated August 23, 1977 (K-1).

J-(h) Resolution of the Board dated June 30, 1980 (K-2).

J-(i) Resolution of the Board dated April 27, 1981 (K-3).

J-(j) Resolution of the Board dated April 27, 1981 (K-4).

J-(k) Excerpt from Board minutes of regular meeting held on August 23, 1977 (K-5).

J-(l) Excerpt from Board minutes of regular meeting held on July 1, 1980 (K-6).

J-(m) Excerpt from Board minutes of regular meeting held on April 27, 1981 (K-7).

J-(n) Petitioner's employment contract for the period September 1, 1975 - June 30. 1976.

J-(o) Letter dated April 14, 1980 from Thomas J. Breen to petitioner.

J-(p) Letter dated June 2, 1980 from petitioner to Edward McGill.

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J-(q) Letter dated June 6, 1980 from Thomas J. Breen to petitioner.

J-(r) Letter dated April 29, 1981 from Edward McGill to petitioner.

J-(s) Letter dated August 28, 1981 from petitioner to Charles Murphy.

J-(t) Letter dated August 31, 1981 from Charles Murphy to petitioner.

J-(u) Letter dated November 2, 1981 from Raymond J. Colantoni to Division of Unemployment Insurance.

J-(v) Letter dated June 30, 1982 from petitioner to Mildred Merlo.

J-(w) Letter dated July 31, 1982 from Mildred Merlo to petitioner.

J-(x) Letter dated June 22, 1983 from Dr. T. Blumstein to petitioner.

J-(y) Letter dated May 12, 1983 from Celeste R. Rorro to Sheldon H. Pincus, Esq.

J-(z) Evaluation form for Education of the Handicapped - Bergen County Superintendent of Schools, dated October 22, 1975.

J-(aa) Certificate as teacher of handicapped, issued October 1975.

J-(bb) Certificate as nursery-elementary school teacher, issued January 1975.

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DALE MYHREN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF EDGEWATER, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

Petitioner excepts to the entire initial decision by Judge Ospenson contending that her employment was always on the elementary level in special education. Petitioner relies on Boeshore, supra, and prays for reversal of the judge's decision herein dismissing her Petition. The Board in reply exceptions argues otherwise, stating that petitioner never served in the capacity of a special education teacher and has earned no benefits in that category. The Board states that no pupil in her class was classified pursuant to N.J.A.C. 6:28-1.6 nor was the class in which petitioner served reported to the county or state level as a special education class. The Commissioner finds merit in the stance of the Board.

A close examination of the record reveals to the Commissioner no evidence that the Board or its agents ever considered petitioner's class to be one established for classified pupils (N.J.A.C. 6:28-1.7) or as eligible for state funds (N.J.A.C. 6:28-3.1(d)1). Petitioner gained tenure and seniority rights as an elementary teacher pursuant to the statutory mandate N.J.S.A. 18A:28-5 and has no claim otherwise. The Commissioner so holds.

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

Accordingly, the Petition of Appeal is hereby dismissed.

FEBRUARY 29, 1984 COMMISSIONER OF EDUCATION

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DALE MYHREN,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF EDGEWATER, BERGEN COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, February 29, 1984

For the Petitioner-Appellant, Bucceri and Pincus
(Susan A. Weinberg, Esq., of Counsel)

For the Respondent-Respondent, Steven J. Zaben, Esq.

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

August 8, 1984

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

GREEN BROOK SCHOOL DISTRICT,	OAL DKT. NO. EDU 8407-83
Petitioner	OAL DKT. NO. EDU 7187-83
v.	(Consolidated)
ZOLTON J. FODOR,	AGENCY DKT. NO. 367-10/83A
Respondent.	

APPEARANCES:

Kenneth S. Meyers, Esq. (Nichols, Thomson, Peek and Meyers, attorneys) for petitioner Green Brook School District.

Ezra D. Rosenberg, Esq. (Katzenbach, Gildea & Rudner, attorneys) for respondent Zolton J. Fodor.

Record Closed: December 20, 1983 Decided: January 13, 1984

BEFORE STEVEN L. LEFELT, ALJ:

The Green Brook School District under N.J.S.A. 18A:6-10 seeks to dismiss Zolton J. Fodor as a tenured elementary school teacher for inefficiency as a result of his inability to control his classes. Mr. Fodor contends that the District failed to prove inefficiency meriting dismissal and that the District improperly implemented the 90 days permitted by N.J.S.A.18A:6-11 for the teacher to correct the charged inefficiency.

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Procedural History

On April 11, 1983, under N.J.S.A. 18A:6-11, the District charged Zolton J. Fodor with inefficiency. The 90 day period began on April 12, 1983, and ended temporarily on June 30, 1983 (the end of the 1982-83 Green Brook school year). It began again on September 1, 1983, and concluded on September 11, 1983 (the 11th day of the 1983-84 school year).

On June 14, 1983, as the 1982-83 school year was ending, the District based on the April 11, 1983 tenure charges and under the authority of N.J.S.A. 18A:29-14, withheld Mr. Fodor's salary adjustment and increment for the 1983-84 school year. On July 29, 1983, Mr. Fodor petitioned the Department of Education for reversal of the District's decision to withhold his increment.

On September 26, 1983, after the 90 day period had concluded, the District found probable cause to credit the inefficiency charges and suspended Mr. Fodor immediately without pay pursuant to N.J.S.A. 18A:6-14. The District certified the tenure charges to the Department of Education on September 27, 1983.

In EDU 8407-83, the tenure charge, was transmitted by the Department of Education to the Office of Administrative Law (OAL) on October 21, 1983, and EDU 7187-83, the increment matter, was transmitted by the Department of Education to the OAL on September 15, 1983. On November 18, 1983, the increment withholding case and the tenure charges were preheard and consolidated. Both matters were heard on December 19 and 20, 1983, pursuant to N.J.S.A. 52:14F-1 et seq. and N.J.S.A.52:14B-1 et seq.

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Findings of Fact

Zolton J. Fodor has been teaching since 1963. He is recognized by his colleagues at the Irene E. Feldkirchner School as a kind, committed and intelligent person. He has taught 6th grade for 13 years and 5th grade for the last 7 years until his suspension. Beginning in 1975, however, Mr. Fodor's annual evaluations began to note his classroom control problems. For the last six or seven years, Green Brook parents have been calling board of education members and administrators yearly in an effort to either keep their children out of or have their children removed from Mr. Fodor's classes. The general tenor of the parental complaints, as expressed by one Board member, was that the children in Mr. Fodor's classes were permitted to "run wild." Mr. Fodor was never informed of the complaining parents' names but I, nevertheless, conclude from the testimony and documentary evidence that parents have been in fact complaining about Mr. Fodor for the past six or seven years.

In order to prove Mr. Fodor's inefficiency based upon a lack of control, the District presented a number of witnesses including a board of education member, the superintendent of schools, numerous teachers and Mr. Fodor's principal. From this testimony and the documentary evidence I am able to make the following findings concerning occurrences before and during Mr. Fodor's last full school year (1982-83) and during the 90 day period (April 12, 1983 - September 11, 1983).

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Before and During 1982-83

1. On April 1, 1980, six students teased another student in Mr. Fodor's class. The student being teased had poked the others while going to the pencil sharpener.

2. On June 4, 1980, nine children disrupted Mr. Fodor's class by announcing, "I hate . . . ." (followed by a boy's name).

3. On May 15, 1981, a student, a Jehovah's witness, would not salute the flag and Mr. Fodor's students verbally attacked this student using language with racial, religious overtones. Mr. Fodor refused to permit the student who was being attacked to go to the principal. The principal by memo indicated a concern with Mr. Fodor's possible "cover-up" and with the children's acceptance of "the fact that you are not listened to and therefore they can do pretty much what they please in your room."

4. On June 9, 1981, a student claimed that Mr. Fodor had physically pushed her out of the classroom.

5. On June 9, 1981, when the principal entered Mr. Fodor's class he observed children out of their seats for no apparent reason. He also saw Mr. Fodor picking up paper and crayon bits around the room without maintaining eye contact on the students.

6. On February 25, 1982, while Mr. Fodor's principal was observing his teaching a student threw scrap paper at a basket. The paper was thrown in an ark in front of Mr. Fodor who ignored the incident.

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7. On February 23, 1983, a new student to Mr. Fodor's class was verbally harassed by other students. A paper airplane was thrown and Mr. Fodor did nothing.

8. On February 24, 1983, an argument which started elsewhere between two students was continued in Mr. Fodor's room. The students antagonized each other with abusive comments from opposite ends of the room. One student got up, walked over to the other student and punched him in the mouth causing a bloody lip and a possible chipped tooth. Mr. Fodor did not stop the verbal argument, did not admonish the student to stay in his seat, but tried to stop the fight by attempting to place himself between the students.

9. After the fight, Mr. Fodor applied tissue to the injured boy's mouth to stop the bleeding. After it appeared to have stopped, Mr. Fodor sent the boy to the nurse. He did not accompany the boy. Another teacher found the injured boy bleeding and crying at a hall water fountain. She took the boy to the nurse. While the principal claimed that Mr. Fodor discouraged the boy from going to the nurse this belief was based upon a statement allegedly made by another teacher who did not confirm the statement on the witness stand. Consequently, **I CONCLUDE** that Mr. Fodor did not discourage the boy from going to the nurse.

10. By written memo on March 1, 1983, Mr. Fodor was charged with using abusive or inappropriate language in the classroom. Mr. Fodor denied this and other charges of abusive and inappropriate language. There is no evidence of abusive language except in memos containing unnamed hearsay charges. Students did not testify and all teachers denied hearing any abusive or inappropriate language from Mr. Fodor. Consequently, **I CONCLUDE** on the basis of the proof that abusive or inappropriate language was not used.

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11. On March 17, 1983, Mr. Fodor proceeded to lead his class to a water fountain in the hall. Five students had been left behind in the locked empty classroom. The students believed it was funny to have hidden themselves in the classroom. Mr. Fodor had locked the door to the classroom and had been unaware of the students presence in the room.

12. Numerous witnesses testified concerning Mr. Fodor's methods of leading his 5th graders to the lavatory, music, gym and lunch. The walk to the cafeteria from Mr. Fodor's room required the students to leave one building and go into another building. The normal process required the teacher to remain at the middle or end of the line and to instruct the lead students to walk to a certain point allowing the others to catch up before proceeding. In order not to disturb other classes the line was to proceed quietly and orderly. Mr. Fodor's classes, however, were permitted to move without restriction noisely through the halls. They simply proceeded in any order and speed. Only one teacher testified to having seen Mr. Fodor during the 90 day period leading a group of students much more forcefully, with straighter lines and with the children quieter than ever before. The overwhelming weight of the testimony, however, leads me to conclude that this observation was not indicative of any actual permanent improvement. Mr. Fodor himself admitted to not following the normal procedures every time. I CONCLUDE that frequently Mr. Fodor led his students from one place to another permitting excessive noise and disorder before and during the 1982-83 school year.

13. Mr. Fodor's colleagues who had classrooms on either side of his testified to hearing screaming, screeching and the moving of furniture in Mr. Fodor's room. One of his neighbors testified to hearing disruptions including banging on the walls almost daily after mid- year. With great embarrassment, these teachers would on eight or nine occassions during the 1982-83 school year enter Mr. Fodor's room to restore order. Usually their action was precipitated by noise that was so loud that they feared for the students safety. When these

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teachers entered the room they observed children out of their seats running around and throwing things. Mr. Fodor was sometimes seated at his desk and other times trying to stop the disorder. Once the students saw the other teacher enter the room, they immediately became quiet. There was some testimony that the noises from Mr. Fodor's room were not unusually loud and Mr. Fodor claimed that the noise was caused by his students performing science experiments. However, the testimony also included the head of maintenance who explained that at the end of the 1982-83 school year, Mr. Fodor's room had graffiti on one of the walls visible from about 10 feet. This was claimed unusual for 5th graders. In addition, a student was once seen by another teacher while Mr. Fodor's class was in session dancing on top of the radiator. One teacher testified that when her students heard noises from Mr. Fodor's room, they would giggle and look at each other. Consequently, **I CONCLUDE** again on the basis of the overwhelming weight of the testimony and after giving considerable weight to the testimony of Mr. Fodor's classroom neighbors and others who had regular contact with Mr. Fodor that in fact the noise level was quite unusual, could not possibly have been caused exclusively by science experiments and was indicative of an apparent excessive freedom of action permitted in Mr. Fodor's classes.

In connection with this finding it is important to note that while a few of Mr. Fodor's 1982-83 students may have been "difficult," they were by the weight of the testimony not impossible or uncontrollable. In fact the testimony indicates that the atmosphere generated by Mr. Fodor encouraged even well disciplined, academically motivated students to act unruly or unrestrained in ways that were surprising to the other teachers who knew these students. On one occasion for example, one of these students was observed hanging on Mr. Fodor in a "buddy buddy fashion." On another, a student was heard calling Mr. Fodor by his first name "Zolton." Another teacher observed students throughout the year talking back to Mr. Fodor and being otherwise disrespectful. This teacher was concerned and upset that children would treat an adult, let alone a teacher, in this way.

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14. Students were often permitted to leave Mr. Fodor's classes without hall passes. The greatest number of students roaming the halls with and without passes were from Mr. Fodor's classes. It was observed that students from Mr. Fodor's classes would spend about 15 minutes in the afternoons at the lavatory.

During the 90 day period

1. After receiving the written charges of inefficiency, essentially recounting some of the above occurrences, Mr. Fodor received no formal classroom observations, no seminars or workshops on discipline and no guidance from other teachers. Mr. Fodor did receive from his principal one written annual evaluation and five memos detailing specific incidents which had occurred in Mr. Fodor's classroom. The May 31, 1983 memo detailed incidents which occurred on May 23, 25 and 26 and contained this statement: "once again I will be glad to help in this matter as I have before, but the primary responsibility is yours." The various memos written to Mr. Fodor by the principal and the testimony indicated that the principal had given Mr. Fodor assistance in the past including some specific directions. As early as May and June 1977, in memos to Mr. Fodor, the principal stressed the importance of setting a tone in the beginning of the year. Each class he indicated must be considered important, a standard of behavior must be set and children must be held to it. The principal advised Mr. Fodor that each student should be seated unless there was an educational reason for movement and that students should not be permitted to leave the room without permission. He suggested a logbook be maintained for students to sign-out and in after permission to leave was given so Mr. Fodor could keep better control over students leaving his classes. Infractions of the rules, the principal further suggested, must be dealt with immediately. The goal was consistent, fair handed firmness with the youngsters. Finally the principal stressed that extreme informality and extreme formality are both detrimental to instruction. None of the students should be treated as Mr. Fodor's friends or foes.

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At other times, the principal instructed Mr. Fodor to keep his chairs properly aligned and to dismiss students only in small groups. In addition, the principal instructed Mr. Fodor 10-20 times on the proper procedures to move the students in lines. Two workshops on assertive discipline had been offered to Mr. Fodor and he attended at least one of these sessions in the 1980-81 school year.

During the 90 day period, a number of short informal conversations were had between Mr. Fodor and the principal concerning Mr. Fodor's problems. The principal never checked on whether Mr. Fodor was following any of the specific suggestions previously made such as the logbook, seating charts, etc. When asked why the principal was not more specific in control guidance during the 90 day period he testified that the defects displayed by Mr. Fodor were those of a first year teacher or an occasional substitute and not those of a 20 year teaching veteran. He asked "how many times do you have to repeat such basic information?"

2. On April 27, 1983, the principal spent 20 minutes in the room next to Mr. Fodor's. During this time, he heard loud noises and finally entered the classroom to quiet Mr. Fodor's students. Mr. Fodor had been showing a film and some trouble had occurred with the projector. Nevertheless, I **CONCLUDE** that the noise, necessitating the principal's entrance, was excessive.

3. On May 17, 1983, Mr. Fodor's students had apparently agreed to screech in unison at a particular time. Another teacher had to enter Mr. Fodor's room to regain control and to quiet the class.

4. On May 23, 1983, a teacher had to enter Mr. Fodor's class because of the noise. She observed Mr. Fodor's eight math students running around.

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5. When Mr. Fodor was absent a substitute teacher had no problem with Mr. Fodor's classes. The lessons were conducted and the children were orderly. Some of the teachers noted that when Mr. Fodor had a substitute the entire building was quieter.

6. On May 25, 1983, the principal at about 2:50 p.m. entered Mr. Fodor's room because of excessive noise. He observed the students running around in the back of the room and screeching. Mr. Fodor had bus duty which would have required him to leave his classroom a few minutes before 3 p.m. The students therefore, should not have been uncontrolled at 2:50 p.m.

7. On May 26, 1983, the principal found two of Mr. Fodor's students outside the building without passes and without any excuse for being there. Several days before Mr. Fodor had received a notice advising all teachers to enforce the pass system. Besides these two students, the principal had observed Mr. Fodor's students roaming the halls. While most had passes he believed that there continued to be too many of Mr. Fodor's students in the halls. In June 1983, at least six of Mr. Fodor's students were found outside the building by themselves. They indicated that Mr. Fodor had told them that they could stay out by themselves if they were good.

8. On May 26, 1983, a teacher had to enter Mr. Fodor's room to stop the noise.

9. On May 26, 1983, one of the two students who had been discovered outside the building without a pass lied to the principal by claiming that Mr. Fodor had bent his finger back. While this assertion by the student proved unfounded, a number of other physical abuse incidents were charged. On one instance before

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1982-83 Mr. Fodor was observed struggling to keep his classroom door closed from the inside while a student who had been placed in the hall for disciplinary reasons struggled to get in. Some board members had heard that Mr. Fodor made pupils sit down by physical force and Mr. Fodor himself testified that while he would not push a student into his or her seat, he would "lead" the student by an arm. On the basis of the testimony I **CONCLUDE** that Mr. Fodor has used physical restraint in his classes on a number of occasions before and during 1982-83.

10. On June 7, 1983, a pupil claimed that Mr. Fodor had hit or kicked him. The boy's mother complained to the principal. Mr. Fodor was instructed to stay away and that the principal would defuse the incident and deal with it. The principal investigated the situation and determined that the class had been in general disorder and paper was being thrown around. A pupil left his seat without permission and picked up some paper. Mr. Fodor took him and/or led him physically to a seat and a scab on the boy's elbow came loose. Mr. Fodor had not kicked the boy. Mr. Fodor being upset about the pending tenure charges went to the student's home against the wishes of the parent and began speaking with the pupil. The parent who did not want Mr. Fodor speaking with her son, eventually called the police.

11. The principal continued to observe Mr. Fodor leading his students in a noncohesive group and on June 9, 1983, the principal observed several of Mr. Fodor's students out of their seats and noisy. He settled them down. He returned 10 minutes later and several students were again out of their seats.

12. Also on June 9, 1983, a student in Mr. Fodor's class threw a pair of scissors over his shoulder to the rear of the room and broke a window. The student was extremely upset by his own actions. When the principal observed the room he noticed wadded up paper and bits of crayons lying around the room.

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13. On the last day of the 1982-83 school year some of Mr. Fodor's students were permitted against the administrations instructions to attend the "moving up" ceremony and partake in the refreshments for the "graduates" and their families even though they had no cause to attend the festivities. Mr. Fodor claimed that only two of his students who had siblings "graduating" were permitted to attend. However, a teacher complained to Mr. Fodor that he had disobeyed the instructions and made it difficult for her to keep her class away from the ceremony. Some of Mr. Fodor's students had talked through open windows to her students. When Mr. Fodor was confronted with this complaint he did not deny it. **I CONCLUDE** that more than two of Mr. Fodor's students in fact attended this ceremony, against the principal's instruction.

14. In June 1983, teachers observed students climbing in and out of Mr. Fodor's first floor windows. On one occasion a block of wood was observed coming through Mr. Fodor's windows. Mr. Fodor denied seeing or permitting students to climb in and out of his windows and claimed this was impossible since he kept his bottom windows closed and only the top opened. Nevertheless, **I CONCLUDE** that the teachers who observed this activity were believable. Mr. Fodor must have been oblivious to the students' activities.

15. In September of 1983, during the last days of the 90 day period, no incidents were reported and no observations or counselling occurred. On the basis of his performance during the 90 day period Mr. Fodor was informed on September 13, 1983, that the principal was recommending his termination.

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Legal Issues

The teacher has made essentially two legal arguments.

First, Mr. Fodor contends that the 90 day improvement period required by N.J.S.A. 18A:6-11 as implemented by the school District did not provide a real opportunity for him to correct his control defects.

Second, Mr. Fodor contends that whatever inefficiency or control problems were proven do not require dismissal of a 20 year teacher who is an effective teacher.

Legal Analysis

The 90 day period

Mr. Fodor essentially argues that the Green Brook Board made a predetermined decision to remove him before the 90- day period. This intention was implemented by the principal's failure to engage in a constructive dialogue with Mr. Fodor during the 90 days. Furthermore, the splitting of the 90 days between two school years (1982-83 and the first approximately 10 days of 1983-84) is argued supportive of the Boards predetermined decision to remove Mr. Fodor. The teacher argues finally that in-class observations and ongoing assistance during the improvement period are required. If a Board chooses to file inefficiency charges "the administration bears the heavy responsibility to render positive assistance to the teacher in an effort to overcome his inefficiencies." In the Matter of the Tenure Hearing of Donald Rowley, 1983 S.L.D. ___ (May 23, 1983).

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This is not a situation where a teacher suddenly and unexplainably "goes bad" and is charged with vague assertions of inefficiency. The charges against Mr. Fodor gave specific examples of incidents that could not be permitted. For example charge one claimed inefficiency and improper control over students. An example was provided where on March 17, 1983, "he attempted to lead his class to the water fountain in the hall while remaining oblivious to the fact that five students had remained behind in the classroom unsupervised." The administration's concern over Mr. Fodor's lack of control can be traced to 1975 when his evaluation stated "his tolerance is sometimes taken advantage of. Slight tightening in this regard might be beneficial." In virtually every evaluation from that date on, the specific problem of classroom control was raised. For example, on May 28, 1980, Mr. Fodor's evaluation recognized "a good deal of improvement on discipline and instruction last year. This year, however, has been a dissappointment." The evaluation suggested that there is too much student movement, informal attendance should be taken at the beginning of each period, desks should be lined up in rows and students permanently assigned. As further examples, on March 10, 1981, the evaluation recommended that Mr. Fodor begin his class more assertively and not to allow interruptions and calling out. On November 17, 1981, his evaluation criticized his method of leading the students through the halls with excessive noise and disruption.

Furthermore, there can be no question that Mr. Fodor understood what was required of him. In 1979, his job description as received by him required a "classroom environment that is conducive to learning, . . . reasonable rules of classroom behavior and procedures and that he maintain "order in the classroom in a fair and just manner." Mr. Fodor himself just prior to the 90 day period was required to prepare and he did prepare "Objectives to Improve Classroom Decorun and Discipline." These objectives dealt with all of Mr. Fodor's apparent problems including getting the children to enter the class quietly, go to their assigned seats and get ready for lessons. The objectives expected the children to follow the teacher's directions promptly and to behave properly and not to disrupt the class, etc.

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Numerous constructive contacts through the years beginning in 1975 were had between Mr. Fodor and his principal. The actions of the principal as confirmed by the written documents demonstrated a willingness to help, a fairness and actual help provided Mr. Fodor throughout his tenure. For example, on June 20, 1980, the principal again advised Mr. Fodor of control problems and community pressures. He stated that if Mr. Fodor did not improve, "I will pursue appropriate disciplinary action which may go all the way to dismissal. I will be glad to help you in any way I can to improve the situation, but I will not do your job for you." The record rings with repeated efforts to help Mr. Fodor with very basic control guidance. I can only **CONCLUDE** from this record that Mr. Fodor chose for some reason not to tighten up his classroom. Perhaps one of his colleagues was correct when she testified that he seemed to need the students' friendship. For whatever reason, Mr. Fodor chose not to control the students and in his own testimony indicated that his concern with control was sporadic at best. He asserted no particular pedagogic theory to justify his lack of control. He simply did not try consistently to control his classes. The principal and the Green Brook District generally appear to be not excessively concerned with discipline. Rather, the degree of the absence of control manifested by Mr. Fodor seems unusually startling.

It would have been preferred to observe Mr. Fodor's classes during the 90 day period. I disagree with the Board's contention that observations for control defects would be pointless since the mere presence of the observer forces better student behavior. The record reflects repeated incidents of poor student behavior and lack of control incidents noted during formal observations. Thus, formal observations should usually be conducted during the 90 day period. Nevertheless, I do not believe that this failure should be determinative. Even if Mr. Fodor tried to "tighten up," as he claimed during the 90 day period, the continuing incidents occurring in Mr. Fodor's classes lead inexorably to the conclusion that Mr. Fodor's control techniques were either ineffective or occasionally nonexistent during the 90 day period. I believe that observations would have confirmed this conclusion.

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Most significantly in determining the fairness of the 90 day period, the Board had twice previously (in 1978-79 and 1981-82) withheld Mr. Fodor's increments for inadequately controlling his classes. Each year after 1975, Mr. Fodor's improper control techniques caused the students to become more and more uncontrollable as the year progressed. The spring was always worse than the fall. Nevertheless, I do not believe that the Board selected the timing of the 90-day period in order to make it more difficult or impossible for Mr. Fodor to improve. Mr. Fodor's own actions forced the Board to move rapidly as the incidents occurring in the spring of 1982-83 appeared to jeopardize the health and safety of his students.

N.J.S.A. 18A:6-11 requires 90 days in which the teacher can " correct and overcome the inefficiency." No particular pattern or scheme of assistance or approach by a school board is required during the 90 day period. Each case must, therefore, be judged on its own merits. A determination must be made concerning whether the 90 day period was reasonably implemented so that the teacher had a fair opportunity to improve. Here, the charges were specific. A long history of corrective action preceded the 90 day period. Specific suggstions to overcome Mr. Fodor's inefficiencies had been repeatedly suggested to him. Mr. Fodor admitted that he was told during the 90 day period to have his students seated, to dismiss them row-by-row, how to lead his classes to the lavatory, and, about timing punishment immediately after the event. A helpful and fair attitude was manifested by the administration prior to and during the 90 day period. The splitting of the 90 day period between two school years is not deficient. It is well settled that where the school year ends before the expiration of the 90 day period the balance of the period is to be carried over to the beginning of the next school year. In the Matter of the Tenure Hearing of Lillian H. Levine, 1977 S.L.D. 1129; In the Matter of the Tenure Hearing of Robert M. Wagner, 1972 S.L.D. 650. During the 90 day period, the teacher's defects were pointed out and occasional offers to

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help were made by the principal. The teacher failed either to improve or to seek the offered assistance. I, therefore, do not believe that under these circumstances the alleged procedural failings during the 90 day period should abort the charges.

The teacher's own objectives for improving classroom control, which were developed in response to the principal's request in 1983 were directed at stemming the very instances which occurred during the 90 day period. The only conclusion possible is that Mr. Fodor is incapable of implementing these objectives. A new 90 day period, in my opinion, would be futile. I believe that Mr. Fodor was provided with a fair opportunity to improve during the 90 day period. The Board did not intentionally or unintentionally inhibit the possibility of improvement. The Board should not be penalized because the teacher's own actions and severe control deficiencies may have in fact made improvement highly unlikely.

Does this inefficiency merit dismissal?

Here, the teacher argues that instruction did not suffer because of the lack of control and that the record supports a conclusion that, periods of generally acceptable control were marred by lapses, followed by sustained improvement. This, Mr. Fodor argues, should result at best in another loss of increment, not dismissal.

All of Mr. Fodor's evaluations from 1975 on reflect problems with control varying in severity. Only 1978-79, the year of the first increment withholding can be clearly characterized as a year of acceptable improvement. In fact, at the end of that year the principal made a recommendation to the Board that Mr. Fodor have returned some of his withheld increment. Mr. Fodor's own testimony highlighted 1978-79 as the year he worked on his control problems. Weekly letters to parents from that school year were submitted into evidence and demonstrated a "tightening up."

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After Mr. Fodor lost his increment for 1981-82 he testified that he "went back to" his control plan previously implemented. This testimony supports the administration's observation that often there would be some slight improvement for a month or two or less and then regression. Mr. Fodor's control and discipline efforts during the 1979-80 school year were characterized in Mr Fodor's evalualtion on May 28, 1980 as a "disappointment." The 1980-81 school year continued with problems. The December 1980 evaluation noted that some "good friends chatted a bit too much. Mr. Fodor dealt with some of this but more was needed. Things are noticeably better but further improvement is still possible." Mr. Fodor's March 10, 1981, evaluation indicated that "control left a good deal to be desired and must be improved." The 1981-82 school year was characterized as "just acceptable." The principal wanted it "better next year" and the level was not one "we are really happy with at this time."

What I CONCLUDE from the documents and the testimony is a District and particularly a principal working with a teacher for a number of years in an effort to improve observable defects. The District used compulsion (the increment withholdings) and praise coupled with guidance whenever appropriate. Mr. Fodor's good attendance for example was frequently commended. I cannot conclude that another increment withholding will have any greater impact than the two previous.

Some of the testimony went toward establishing that the students' education did not suffer from Mr. Fodor's admitted control defects. The California Achievement Tests were offered to demonstrate "appropriate growth" of Mr. Fodor's students. No specific charge by the Board has been made concerning Mr. Fodor's teaching abilities. However, I must acknowledge that the record contains evidence which raises questions about his teaching. For example, it was demonstrated that Mr. Fodor's teaching ability can not be determined from the California Achievement Test results. His math students received supplemental

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help. His English students were supported by a strong reading teacher and science, the only subject in which he alone taught all 5th graders is not tested on the California Achievement Tests. Furthermore, Mr. Fodor's evaluations reflect some instructional difficulties. On May 28, 1980 it was stated that "discipline and instruction not up to par." The evaluation suggested that Mr. Fodor's instruction should be "more purposeful with greater demands made on youngsters." In December 1980, the principal informed Mr. Fodor that the lesson he observed "could have been improved with a bit more instructional . . . structure." In 1981-82 the principal informed Mr. Fodor that control and purposefulness of instruction "this year is better but still in significant need of improvement" . . . "greater effort" needed. On April 27, 1983, the principal wrote Mr. Fodor "I have given you instructions and support for the past six or seven years, to no avail. You have used up all the chances. There has to be real control and real instruction. Nothing short of that is acceptable." (emphasis added) In short, I find it difficult to believe that the depth and pervasiveness of Mr. Fodor's lack of control did not have an adverse impact on his student's educational growth.

Nevertheless, Mr. Fodor still argues that dismissal is inappropriate. Different conduct has been used to support a charge of inefficiency. Teachers have been charged with inefficiency where their irregular attendance precluded an efficient teaching program. In the Matter of the Tenure Hearing of Catherine Reilly, 1977 S.L.D. 403. A charge of inefficiency was brought where a teacher allegedly failed to prepare and submit written instructional plans, failed to provide meaningful learning experiences, failed to provide structure for classes and was generally uncooperative. In the Matter of the Tenure Hearing of Marilyn Feitel, 1977 S.L.D. 451. Similarly, a teacher was charged with inefficiency where he did not demonstrate a sound understanding of the subject matter, did not instruct his classes with accurate and factual data, did not exercise efficient and orderly classroom and management procedures, etc. In the Matter of the Tenure Hearing of Michael E. Secula, 1977 S.L.D. 967.

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In a case with facts similar to the instant one, a teacher was charged with inefficiency for failing to maintain order and a proper teaching decorum. In the Matter of the Tenure Hearing for Juanita Zielenski, 1977 S.L.D. 786. Specifically, the respondent's classes were noisy and frequently out of control. Students were permitted to run around the room and to throw spitballs, paper clips and paper airplanes. The charge of inefficiency was sustained without any showing of a detrimental impact on the students' education. See also, Bd. of Ed. Lawrence Tp. v. Lester Helmus, 2 N.J.A.R. 334 (1980).

On the basis of this record I must **CONCLUDE** that Mr. Fodor's inefficiency has been conclusively established and that his problems were not occasional lapses but rather constant. His reputation in the District coupled with his actions over the last six or seven years in my opinion, renders his inefficiencies permanent in Green Brook. His lack of respect, lack of authority and inability to control the classroom has made him unfit to discharge the duties and functions of an elementary teacher. Cf. In re Tenure Hearing of Grossman, 27 N.J. Super. 13 (App. Div. 1974) certif. den. 65 N.J. 292 (1974). His lack of control and authority has been detrimental to his students and should not be allowed to continue. Bd. of Ed. Lawrence Twp. v. Lester Helmus, 2 N.J.A.R. 334 (1980). The tenure of office law should not protect the inefficient. The welfare of the pupils should be the first consideration.

Conclusion and Order

For the reasons explained above, I **CONCLUDE** and **ORDER** that Zolton J. Fodor's tenure position as a teaching staff member in the employ of the Green Brook Board of Education be forfeited as of the date of his suspension.

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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.

DATE

STEVEN L. LEFELT, ALJ

1/18/84
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Jan. 20, 1984
DATE

Mailed To Parties:

Ronald L. Parker/sdb
FOR OFFICE OF ADMINISTRATIVE LAW

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WITNESSES

For Petitioner:

Laurie Fitchett
John Kolchin
Rubin Feldstein
Mindy Brainum
Kathryn L. Moore
Maurene Fulop
Joan Richardson
Claire Carlson
Laura MacGregor
Gary W. Taylor
Saxon Cwalinski
Christine Doane
Gregory Strodel
Doris M. James

For Respondent:

Zolton J. Fodor

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EXHIBITS

P-1	Ev.	April 7, 1978 Fodor acknowledgement of 1978-79 increment withholding
P-2	Ev.	April 28, 1981 letter to Fodor from Kolchin re withholding increment
P-3	Ev.	May 14, 1981 letter to Fodor from Kolchin re denial of increment
P-4(a-j)	Ev.	Minutes Board of Education Meetings 1979-83 when action taken against Fodor or dismissed (reserved on 4(g))
P-5	Ev.	Fodor's attendance card 1980-81
P-6	Ev.	April 11, 1983 letter of charges against Fodor to Kolchin from Feldstein
P-7	Ev.	April 12, 1983 letter to Fodor from Kolchin re charges
P-8	Ev.	June 3, 1983 letter to Fodor from Kolchin re withholding increment
P-9	Ev.	June 14, 1983 letter to Fodor from Kolchin re withholding increment
P-10	Ev.	September 13, 1983 three page affidavit by Feldstein of alleged charges against Fodor.
P-11	Ev.	September 13, 1983 letter to Fodor from Kolchin re 15 days notice
P-12	Ev.	September 27, 1983 letter to Com. Cooperman from Kolchin re suspension of Fodor
P-1	Ev.	Job Description - Teacher, signed by Fodor August 13 , 1979
P-14	Ev.	Annual Performance Report 1981-82
P-15	Ev.	Annual Performance Report 1982-83
P-16	Ev.	May 20, 1977 letter to Fodor from Feldstein re improvement
P-17	Ev.	September 6, 1977 memo to Fodor from Feldstein re standards and objectives
P-18	Ev.	April 17, 1978 memo to Fodor from Feldstein re sub-standard performance

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P-19	Ev.	March 8, 1978 memo to Fodor from Feldstein re withholding salary increment
P-20	Ev.	June 27, 1978 memo to Fodor from Feldstein re instruction and discipline
P-21	Ev.	April 1, 1980 memo to Fodor from Feldstein re structure and decorum
P-22	Ev.	May 28, 1980 memo to Fodor from Feldstein re standards
P-23	Ev.	June 4, 1980 memo to Fodor from Feldstein re discipline and decorum
P-24	Ev.	June 20, 1980 memo to Fodor from Feldstein re standards
P-25	Ev.	May 15, 1981 memo to Fodor from Feldstein re classroom decorum
P-26	Ev.	June 9, 1981 memo to Fodor from Feldstein re class control
P-27	Ev.	February 7, 1978 Evaluation of Fodor
P-28	Ev.	February 22, 1983 memo to Fodor from Feldstein re decorum and discipline
P-29	Ev.	2 page undated "Objectives to Improve Classroom Decorum and Discipline"
P-30	Ev.	February 25, 1983 memo to Fodor from Feldstein re decorum and discipline
P-31	Ev.	March 1, 1983 memo to Fodor from Feldstein re conference
P-32	Ev.	April 27, 1983 memo to Fodor from Felstein re classroom control
P-33	Ev.	March 18, 1983 memo to Fodor from Feldstein re discipline and control
P-34	Ev.	May 16, 1983 memo to Fodor from Feldstein re May 13, 1983 conference
P-35	Ev.	May 18, 1983 memo to Fodor from Feldstein re summary of conference
P-36	Ev.	May 31, 1983 memo to Fodor from Feldstein re events of the week of May 23, 1983

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P-37	Ev.	June 10, 1983 memo to Fodor from Feldstein re discipline and control
P-38	Ev.	June 10, 1983 Faculty Bulletin No. 28
R-8	Ev.	November 8, 1972 Principal's Report on Teacher Progress
R-9	Ev.	February 15, 1973 Principal's Report on Teacher Progress
R-10	Ev.	January 14, 1974 Principal's Report on Teacher Progress
R-11	Ev.	March 20, 1974 Principal's Report on Teacher Progress
R-12	Ev.	November 27, 1974 Principal's Report on Teacher Progress
R-13	Ev.	March 6, 1975 Principal's Report on Teacher Progress
R-14	Ev.	November 24, 1975 Principal's Report on Teacher Progress
R-15	Ev.	March 4, 1976 Principal's Report on Teacher Progress
R-16	Ev.	November 8, 1976 Evaluation of Fodor
R-17	Ev.	February 10, 1977 Evaluation of Fodor
R-18	Ev.	November 17, 1978 Evaluation of Fodor
R-19	Ev.	March 2, 1979 Evaluation of Fodor
R-20	Ev.	December 8, 1980 Observation Form
R-21	Ev.	March 10, 1981 Observation Form
R-22	Ev.	March 31, 1981 Observation Form
R-23	Ev.	November 19, 1981 Observation Form
R-24	Ev.	February 25, 1982 Observation Form
R-25	Ev.	November 2, 1982 Observation Form
R-26	Ev.	March 25, 1983 Observation Form
R-32	Ev.	February 23, 1981 letter to Fodor from Kolchin re attendance
R-33	Ev.	February 26, 1982 letter to Fodor from Kolchin re attendance
R-34	Ev.	September 1982 memo to all staff members
R-35	Ev.	February 3, 1983 letter to Fodor from Kolchin re attendance
R-36	Ev.	June 15, 1979 memo to Kolchin from Feldstein re Fodor

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R-39	Ev.	April 1981 California Achievement Test Grade 3
R-40	Ev.	April 1982 California Achievement Test Grade 4
R-41	Ev.	April 1983 California Achievement Test Grade 5
R-43 to		
R-50	Ev.	Letters to parents from Fodor, 1978-79
R-51	Ev.	Discipline Forms on Students
R-52 to		
R-66	Ev.	Disciplinary Forms
R-67	Ev.	Progress Report on pupil
(a & b)	Ev.	Progress Report on pupil
R-68	Ev.	Classroom Behavior Rules
68(a)	Ev.	I Expect My Students Will Behave
68(b)	Ev.	Discipline Plan

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IN THE MATTER OF THE TENURE	:	
HEARING OF ZOLTON J. FODOR,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF GREEN BROOK, SOMERSET COUNTY.	:	
	:	

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

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

Respondent in primary exceptions to the initial decision by Judge Lefelt contends that the Board has failed to present evidence that his alleged inefficiency had a detrimental effect on his pupils' learning. Further, respondent contends that the judge failed to properly delineate the findings of fact that could be considered favorable to him. Finally, respondent argues that the Board failed in its obligation under N.J.S.A. 18A:6-11 to assist him in his efforts to improve his alleged inefficiencies during the 90-day period allocated for that purpose. Respondent complains that neither parents nor pupils were called to testify concerning the charges by the Board. In re Zielenski, supra; Helmus, supra. Respondent argues that there is no evidence that his alleged lack of control in any way diminished the learning by his pupils, stating that the California Achievement Test scores offered into evidence indicate to the contrary. Respondent pleads for rejection by the Commissioner of the initial decision and reinstatement to his tenured position together with back pay and all emoluments and benefits thereto.

The Board in reply exceptions argues otherwise, stating that the testimony at the hearing gives overwhelming credence to the conclusion that lack of control existed in the classroom and that inefficiency on the part of respondent was of a permanent nature. The Board stated that respondent's reliance on test scores is misplaced inasmuch as strong teachers were chosen to serve with him as fellow teachers in the departmentalized fifth grade and remedial instruction to his pupils was also offered. The Board notes that its withholding of an increment on two separate occasions surely should have warned him of its concern. The Board notes that the testimony and exhibits in this matter demonstrate a teacher incapable of permanent rehabilitation. The Board avers that the overwhelming amount of testimony from administration and fellow teachers was competent, admissible, credible, uncontradicted and substantiated the showing of respondent's inability to maintain con-

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sistent control of his pupils. The Board sustains the judge's finding that a helpful and fair attitude towards respondent was found to exist. Finally, the Board argues that compulsion with praise and appropriate guidance have been proffered to respondent, none of which resulted in sustained improvement. The Commissioner finds merit in the arguments of the Board.

A close reading of this detailed decision convinces the Commissioner that the judge properly and carefully weighed and analyzed the facts of the instant case. Nor does the Commissioner find any indication of harshness or discrimination shown towards this teacher. The Commissioner cannot agree with respondent's contention that the California Achievement Test scores be used as a measure of his teaching effectiveness. As reflected in the findings of the ALJ, there appears to be no hard evidence that respondent's efforts as a science teacher specifically reflected itself in the claimed generally satisfactory performance of his pupils on a test of basic skills.

The Commissioner cannot agree with the argument advanced by respondent that his problems with lack of control in any way diminished learning by his pupils. In the opinion of the Commissioner an orderly learning environment is prerequisite to effective teaching and learning. The teacher that cannot win and hold the attention and respect of his pupils cannot expect to motivate them to place a value on learning nor to acquire proper study and work habits. The Commissioner so holds.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own. Respondent shall be released from his tenured position as a teaching staff member in the employ of the Green Brook Board of Education as of the date of his suspension.

COMMISSIONER OF EDUCATION

MARCH 2, 1984

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IN THE MATTER OF THE TENURE :
HEARING OF ZOLTON J. FODOR, : STATE BOARD OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP : DECISION
OF GREEN BROOK, SOMERSET COUNTY. :
:

Decided by the Commissioner of Education, March 2, 1984

For the Petitioner-Respondent, Nichols, Thomson, Peek, Meyers (Kenneth S. Meyers, Esq., of Counsel)

For the Respondent-Appellant, Katzenbach , Gildea & Rudner (Ezra D. Rosenberg, Esq., of Counsel)

The State Board of Education affirms the decision of the Commissioner and orders the release of Respondent from his tenured teaching position with the modification that the date of his dismissal be corrected to read March 2, 1984. The State Board hereby grants Respondent's motion to supplement the record with affidavit of counsel concerning the record before the Commissioner.

July 11, 1984

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8059-83
AGENCY DTK. NO. 353-9/83A

TRENTON BOARD OF EDUCATION,
Petitioner
v.
David Earl,
Respondent.

APPEARANCES:

Robert B. Rottkamp, Jr., Esq., for the petitioner (Merlino, Rottkamp & Flacks, attorneys)

Jeffrey M. Hall, Esq., for the respondent (Katzenbach, Gildea & Rudner, attorneys)

Record Closed: December 29, 1983 Decided: January 13, 1984

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

Petitioner, a tenured teacher employed by the Board of Education of the City of Trenton (Board), was suspended without pay by the Board following its determination to certify tenure charges of conduct unbecoming a teacher to the Commissioner of Education (N.J.S.A. 18A:6-11.).

After respondent's answer was filed, the Commissioner transferred this matter to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was conducted in the Office of Administrative Law on November 2, 1983, at which time the nature of the proceeding and issue was framed as follows:

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Are Respondent's pleas and sentences sufficient reasons for his dismissal or reduction in salary?

Board counsel advised the administrative law judge that he would submit a Motion for Summary Decision in this matter. Thereafter, the Board submitted its letter brief with attached exhibits in support of its Motion to Dismiss David Earl, pursuant to N.J.S.A. 18A:6-10 et seq., and respondent filed a letter brief in opposition to the Board's Motion for Summary Decision. The Board on January 6, 1984, filed a letter reply brief.

The facts of the matter are not in dispute and are set forth below as follows. Respondent was indicted on January 17, 1983 in Bucks County, Pennsylvania, for possession of one pound of methamphetamine (speed), possession with intent to deliver (sell) the same, and lysergic acid diethylamide (L.S.D.) and delivery (sale) of controlled substances. Respondent entered a guilty plea to all of the above charges on September 20, 1983 at which time he was sentenced by Judge Garb to the Bucks County Prison for not less than six (6) months nor more than twenty-three (23) months (Exhibit A, B & C). Work release for respondent was later approved by the Court (Exhibit B & C).

Also on January 17, 1983, Hunterdon County, New Jersey authorities searched respondent's home and seized drugs and drug paraphenalia, including methaqualone and methamphetamines (Exhibits G & H). Respondent was indicted for possession of methamphetamine and methaqualone and possession with intent to distribute same. On July 28, 1983, respondent entered guilty pleas to Judge D'Annunzio and is awaiting sentencing on the above charges (Exhibits D through I).

The Board asserts that the criminal offenses to which respondent has already pled guilty are sufficient to warrant his dismissal, pursuant to N.J.S.A. 18A:6-10 et seq, and/or establish just cause for forfeiture of his public employment pursuant N.J.S.A. 2C:51-2.

The Board asserts that respondent was convicted of peddling L.S.D., methamphetamine (speed) and methaqualone, which are the most dangerous classification of toxic drugs within Schedule I, as codified in N.J.S.A. 24:21-5. The Board asserts further that the crimes committed by respondent in New Jersey and those for which he has already been sentenced in Pennsylvania are high misdemeanors punishable, on each count, by imprisonment for up to five years plus a $15,000 fine. (N.J.S.A. 24:21-19(b)(3).

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Respondent asserts that unhappy personal circumstances led to his involvement with drugs; however, he kept his life-style to himself and his friends, and involved no one else in drug activity. Respondent stated that since his arrest, he has put his life in order and has rehabilitated himself. He works in the asbestos removal industry as a consultant (Exhibits C & F). Respondent asserts further that he has been completely contrite as shown by his apology to the Board and others made in open Court on two occasions. Respondent emphasizes that his drug involvement was confined to personal and social use at his rural Hunterdon County home, far removed from Trenton High School, and that there is no evidence that his personal life and use of drugs was known by, or affected, any of his pupils (Exhibits C & F).

From my review of the relevant decisions cited by counsel in their briefs, I discern that over the years the Commissioner has established standards of conduct which he believes must be expected from public school teachers. One decision describing the Commissioner's expectations is In the Matter of the Tenure Hearing of Ernest Tordo, School District of the Twp. of Jackson, Ocean County, 1974 S.L.D. 97 where the Commissioner discussed Tordo's acceptance of a bribe and stated as follows:

> Teachers are public employees who hold positions demanding public trust, and in such positions they teach, inform and mold habits and attitudes, and influence the opinions of their pupils. Pupils learn, therefore, not only what they are taught by their teacher, but what they see, hear, experience, and learn about the teacher. When a teacher deliberately and willfully violates the law, as in this matter, and consequently violates the public trust placed in him, he must expect dismissal . . .
>
> In making a determination . . . the Commissioner must consider not only the effect of his decision on the respondent, but on the pupils, their parents, other teaching staff members, and the community at large . . .
>
> Respondent's crime and its resultant notoriety certainly touched on his position as a public school teacher, and the Commissioner holds that he must forfeit his right to tenure in his position. (at 98-99)

In furtherance of his expectations concerning a standard of conduct for public school teachers, the Commissioner has rendered a series of decisions involving the use and abuse of drugs by teachers. In the Tenure Hearing of Westley L. Myers, 1976 S.L.D. 1028, the Commissioner mandated the forfeiture of Myers' position where the teacher was convicted of distributing marijuana. In the Matter of the Tenure Hearing of James T. Fridy, School District of the City of Long Branch, Monmouth County, 1980 S.L.D. _____,

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decided by the Commissioner on December 22, 1980, the Commissioner held that Fridy's conduct as a sex offender and his conviction of impairing the morals of a minor and contributing to the delinquincy of a minor, was a crime involving moral turpitude. The Commissioner concluded that such a conclusion obviates the need for the filing of tenure charges or a tenure hearing. Accordingly, the Commissioner ordered that Fridy forfeit his tenure.

The cases cited by respondent are not precisely on point except for In the Matter of David Earl Humphreys School District of the Twp. of Pennsville, Salem County, 1979 S.L.D. 839, 841 (State Board of Education) where the State Board held that the teacher's tenure hearing law required that due process permit nothing less than a hearing for a teacher who has been convicted of a criminal offense. Although the decision in Humphreys states that a tenure hearing is required under the circumstances where criminal charges have been upheld, later decisions have provided that no hearing is required when a teacher is convicted of a criminal offense. See: In the Matter of the Tenure Hearing of Novis W. Saunders, School District of the City of Elizabeth, docket no. EDU 1232-80, decided by the Commissioner, April 21, 1981, where the Commissioner considered the Humphreys decision and dismissed Saunders without benefit of a tenure hearing.

Further, in Lovell Kendall v. Camden City Board of Education, Camden County, docket no. EDU 1293-81, decided by the Commissioner March 16, 1983, the Commissioner concluded that petitioner's plea of guilty to charges of fraud was evidence that she had committed a crime of moral turpitude and/or a crime of the third degree under N.J.S.A. 2C:51-2. As a result, the Commissioner concluded that petitioner had forfeited her position immediately upon her conviction, and that there was no entitlement to a tenure hearing.

N.J.S.A. 2C:51-2a(1) states in pertinent part that -

> a. A person holding any public office, position, or employment, elective or appointive, under the government of this State or any agency or political subdivision thereof, who is convicted of an offense shall forfeit such office or position if:
>
> (1) He is convicted under the laws of this State of an offense involving dishonesty or of a crime of the third degree or above or under the laws of another state or of

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> the United States of an offense or a crime which, if committed in this State, would be such an offense or crime . . .

Thus, the statute mandates that a guilty person "shall forfeit" such office or position when the crime involves moral turpitude or dishonesty or a crime of the third degree (Emphasis added) (N.J.S.A. 2C:51-2).

Black's Law Dictionary (rev. 4th ed. 1970) defines moral turpitude as follows:

> An act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man. [Cites omitted.]
>
> Conduct contrary to justice, honesty, modesty, or good morals. [Cites omitted.]

The Commissioner has previously examined the statutory requirement set forth in N.J.S.A. 18A:6-10 et seq. which requires that a tenure hearing must be provided prior to the discipline or dismissal of any tenured teaching staff member. However, the Commissioner has had to weigh this statutory requirement with the statutory mandate set forth by N.J.S.A. 2C:51-2 et seq. which demands the immediate forfeiture of public employment after conviction of an offense involving dishonesty (moral turpitude), a crime of the third degree or above, whether committed in another state or New Jersey, or an offense involving or touching such position or employment. In Kendall, the Commissioner applied N.J.S.A. 2C:51-2 and stated that it applied to all persons "holding any public office, position or employment, elective or appointive, under the government of this State or any agency or political subdivision thereof . . ."

The record and the law in the instant matter amply support the Board's contention that respondent has been convicted of crimes involving moral turpitude. Consequently, I **CONCLUDE** that respondent must forfeit his position immediately pursuant to N.J.S.A. 2C:51-2.

Based on the above, it is **ORDERED** that respondents be **DISMISSED** from his teaching position as of the date of his suspension by the Board.

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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.

13 January 84
DATE

August E. Thomas
AUGUST E. THOMAS, ALJ

Receipt Acknowledged:

1/17/84
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

Jan. 19, 1984
DATE

Ronald L. Parker/skb
OFFICE OF ADMINISTRATIVE LAW

ij

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DOCUMENTS IN EVIDENCE

Exhibits A - I Attached to petitioner's letter brief

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IN THE MATTER OF THE TENURE	:	
HEARING OF DAVID EARL, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF TRENTON,	:	DECISION
MERCER COUNTY.	:	
	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law, August E. Thomas, ALJ.

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

In his exceptions respondent argues that the judge, in granting the Board's Motion for Summary Judgment in its favor, erroneously concluded that N.J.S.A. 2C:51-2 requires the forfeiture of his tenured teaching position in the Board's employ. In this regard respondent relies upon the arguments advanced in his brief filed with the judge in opposition to the Board's Motion for Summary Judgment.

In pertinent part respondent makes the following statements of fact with respect to the charges made against him to which he pleaded guilty and was sentenced in the State of Pennsylvania:

> "***On January 17, 1983, Earl made a delivery of one pound of metamphetamine (sic) to an undercover agent which had been arranged by a 'cooperating individual.' He was immediately arrested and 100 doses of lysergic acid dyethalemine (sic) (hereafter 'LSD') was (sic) found in his possession. Mr. Earl had been holding the LSD for about a year. It too had been brought to the meeting at the cooperating witness' request. (Exhibit C).
>
> ***
>
> "In Pennsylvania, Earl was charged with possession, possession with intent to deliver, and delivery of methamphetamine, and with possession and possession with intent to deliver LSD. (Exhibit A). On September 20, Earl entered a plea of guilty to the charges and was sentenced

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to concurrent terms of 6 to 23 months. Work release for Earl was later approved by the Court. (Exhibits B and C).

***

"A. Statutory Forfeiture Is Inapplicable as Earl's Convictions Are Not Crimes Enumerated by N.J.S.A. 2C:51-2.

In pertinent part, the forfeiture statute provides:

> 'A person holding any public office, position, or employment, elective or appointive, under the government of this State or any agency or political subdivision thereof, who is convicted of an offense shall forfeit such office or position if:
>
> (1) He is convicted under the laws of this State of an offense involving dishonesty or of a crime of the third degree or above or under the laws of another state or of the United States of an offense or a crime which, if committed in this State, would be such an offense or crime;
>
> (2) He is convicted of an offense involving or touching such office, position or employment;'

N.J.S.A. 2C:51-2a. Thus, public employment is subject to termination if the employee is convicted of (1) an offense involving dishonesty; (2) a first, second, or third degree crime or conviction of an equivalent crime imposed by other states or the federal government; or (3) an offense involving or touching such public employment. The Board argues Earl's convictions implicate all three elements of the statute. It is clear, though, that Earl pleaded guilty to crimes which cannot be classified as criminal violations covered by N.J.S.A. 2C:51-2.

"Earl was indicted for and found guilty of N.J.S.A. 24:21-19a(1) which provides:

> 'Except as authorized by this act, it shall be unlawful for any person knowingly or intentionally: (1) to * *

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> * distribute * * * or to possess or have under his control with intent to * * * distribute * * * a controlled dangerous substance * * *.'

"N.J.S.A. 24:21-19a(1). This crime is classified by Title 24 as a high misdemeanor punishable upon conviction to a term of imprisonment of not more than five years and a fine of up to $15,000 or both. N.J.S.A. 24:21-19b(3). Earl's Pennsylvania guilty pleas constitute admissions to crimes which, if committed in New Jersey, would result in charges under the same statute. (Emphasis supplied.)

***

"Lastly, the Board argues that Earl was convicted of third degree crimes. In support of its argument, the Board observes that Earl's violations are denominated by the Controlled Substances Act as high misdemeanors. N.J.S.A. 24:21-19b(3). The Board then argues Title 24 high misdemeanors should be 'analogized' to third degree crimes under the Penal Code, citing N.J.S.A. 2C:43-1(6). Thus, under this analogy, Earl's crimes are proscribed by N.J.S.A. 2C:51-2 and his office is forfeit. Pb 2, 4.

"Statutory construction and case law require a different result. In this context, N.J.S.A. 2C:51-2a directs forfeiture if the public employee was:

> 'convicted * * * of a crime of the third degree or above or under the laws of another state or of the United States of an offense or a crime which, if committed in this State, would be such an offense or crime * * *.'

The sentencing provision states of the Penal Code that '* * * a crime defined * * * as a high misdemeanor shall constitute for the purpose of sentence a crime of the third degree.' (emphasis supplied). N.J.S.A. 2C:43-16.

"Significantly, the latter restricts the effect of classification of high misdemeanors under the Penal Code to sentencing, while the former expressly limits forfeiture to crimes of the

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> third degree or their functional equivalents in other jurisdictions. The forfeiture statute does not include crimes denominated by the New Jersey law as 'high misdemeanors' as covered crimes. Since it is a penal statute which must be strictly construed, N.J.S.A. 2C:51-2 cannot be interpreted to include a Title 24 violation as a covered crime. State v. Fair Lawn Service Center, 20 N.J. 468, 472 (1956). Accordingly, construction of this statute requires that forfeiture not be applied in these circumstances.***"
> (Respondent's Exceptions)

The Commissioner has reviewed respondent's exceptions to the initial decision as well as the Board's reply to those exceptions incorporated by reference herein. It is clear that respondent rejects the judge's conclusional findings and determination invoking the forfeiture provision of N.J.S.A. 2C:51-2.

Instead, respondent asserts that he is entitled to a hearing on the Board's charge of unbecoming conduct pursuant to the controlling provisions of the Tenure Employees Hearing Law (N.J.S.A. 18A:6-10 et seq.). The Commissioner cannot agree.

In the Commissioner's judgment, respondent's Pennsylvania conviction renders him subject to forfeiture of his tenured position pursuant to N.J.S.A. 2C:51-2 which compels forfeiture from public position for, inter alia, conviction of:

> "***a crime of the third degree or above under the laws of another state or of the United States of an offense or a crime which, if committed in this State, would be such an offense or crime.***"
> [N.J.S.A. 2C:51-2(a)(1)]

Although conviction under N.J.S.A. 24:21-19a(1) is described under Title 24 as a high misdemeanor, Title 2C indicates that such conviction is subject to the forfeiture provision.

N.J.S.A. 2C:1-4(d) provides:

> "Subject to the provisions of section 2C:43-1, reference in any statute, rule, or regulation outside the code to the term 'high misdemeanor' shall mean crimes of the first, second, or third degree and reference to the term 'misdemeanor' shall mean all crimes."

This general definition of "high misdemeanor" equating the term of crimes of the first, second or third degree is applicable to the instant question of whether respondent is subject to the forfeiture statute. N.J.S.A. 2C:1-5(b) which provides:

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> "b. The provisions of subtitle 1 of the code are applicable to offenses defined by other statutes. The provisions of subtitle 3 are applicable to offenses defined by other statutes but the maximum penalties applicable to such offenses, if specifically provided in the statute defining such offenses, shall be as provided therein, rather than as provided in this code, except that if the non-code offense is a misdemeanor with a maximum penalty of more than 18 months imprisonment, the provisions of section 2C:43-1b shall apply."

The reference to N.J.S.A. 2C:43-1 is noteworthy in that it equates conviction of a high misdemeanor only to conviction of a crime of the third degree for purposes of sentencing, subject to certain caveats on sentencing for violations of the "New Jersey Controlled Dangerous Substances Act" (N.J.S.A. 24:21-1 et seq.), which are not pertinent to these proceedings. Respondent's argument that a high misdemeanor is the equivalent of a crime of the third degree only for purposes of sentencing is erroneous. This ignores the general provision of N.J.S.A. 2C:1-4(d) made applicable to offenses under other statutes by N.J.S.A. 2C:1-5(b). The forfeiture statute was correctly applied by the ALJ. Respondent forfeited his tenured position as of the date of sentencing in Pennsylvania, September 20, 1983. (See N.J.S.A. 2C:51-2(b)(2).)

Accordingly, for the reasons set forth above, supplementing those findings and conclusions set forth in the initial decision which are affirmed by the Commissioner herein, it is found and determined that respondent has forfeited his tenured teaching position in the Board's employ pursuant to the provisions of N.J.S.A. 2C:51-2 as of September 20, 1983.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 2, 1984

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IN THE MATTER OF THE TENURE	:	
HEARING OF DAVID EARL, SCHOOL	:	STATE BOARD OF EDUCATION
DISTRICT OF THE CITY OF TRENTON,	:	DECISION
MERCER COUNTY.	:	
	:	

Decided by the Commissioner of Education, March 2, 1983

For the Petitioner-Respondent, Merlino, Rottkamp and Flacks
(Robert B. Rottkamp, Jr., , 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.

June 6, 1984

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 0127-83
AGENCY DKT. NO. 419-10/82A

ANNETTE O'TOOLE,
Petitioner
v.
LARRY FORESTAL, PRINCIPAL,
PARTHENIA SMITH, DIRECTOR,
MILLBURN SCHOOL FOR THE HEARING
HANDICAPPED a/k/a NEW JERSEY
REGIONAL DAY SCHOOL AT MILLBURN
AND DIVISION OF FIELD SERVICES OF
THE DEPARTMENT OF EDUCATION OF NEW JERSEY,
Respondents

APPEARANCES:

Eugene T. O'Toole, Esq. for petitioner

Jaynee LaVecchia, Deputy Attorney General, for respondents
(Irwin I. Kimmelman, Attorney General of New Jersey, attorney)

Record Closed: December 7, 1983 Decided: January 17, 1984

BEFORE **ROBERT T. PICKETT**, ALJ:

PROCEDURAL HISTORY

The petitioner, Annette O'Toole, filed an appeal with the Commissioner of Education alleging, inter alia, that the respondents terminated her employment as a part-

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time physical education teacher contrary to N.J.S.A. Title 18A. The matter was properly joined before the Commissioner of Education and was subsequently transmitted to the Office of Administrative Law pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held in this matter on March 18, 1983. The hearing in this matter was held on May 20 and May 24, 1983, and the record initially closed on August 28, 1983. The record was subsequently reopened as a result of an inquiry by the court. On or about December 7, 1983, the respondents' filed a motion to dismiss the petitioner's claim to reinstatement in her position based on her failure to accept a physical education position offered to her at Regional Day School at Millburn (RDSM). The record closed on December 7, 1983.

UNDISPUTED FACTS

After a long and careful review of the factual record in this proceeding, and thorough review of the legal issues as well, this court is of the opinion that the critical facts in question are not in dispute. Therefore, there is no need, and no value, in reciting in detail the testimony offered in this proceeding. The petitioner has, of course, certain legal claims regarding her layoff and/or termination which are subject to appropriate legal interpretation. The petitioner called Larry Forestal, the Principal at RDSM, and Parthenia Smith, the Director of Regional Day Schools for the Department of Education, to testify on her behalf. The petitioner testified also. The respondents called Steven Pagano and Parthenia Smith to testify on their behalf. The following facts are hereby adopted as undisputed facts.

Petitioner was appointed as a part-time physical education teacher on or February 1, 1970, with the Millburn School for the Hearing Handicapped (MSHH) as it was then known. MSHH was affiliated with the Millburn Board of Education. Petitioner taught physical education three days a week. Shortly thereafter, in 1971, the Department of Education (DOE) took over the operation of the MSHH. The petitioner remained in the employ of the MSHH after the DOE assumed control of the facility and eventually acquired tenure in accordance with N.J.S.A. 18A:60-1 et seq. In January 1981, the petitioner's work schedule was decreased from three days per week to two days per week.

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The petitioner taught two days per week for the remaining portion of the 1980-81 school year and for the 1981-82 school year. During the 1981-82 school year, the MSHH facility was purchased by the State with proceeds from the State Facilities for the Handicapped Bond Issue, as authorized by L. 1973, c. 149, and L. 1979, c. 276. Thereafter, commencing with the 1982-83 school year, the MSHH became a regional day school for the severely handicapped and its name changed to the Regional Day School at Millburn (RDSM). The bond issue required, inter alia, the DOE to establish and operate regional day schools for severely handicapped students. In 1979, the New Jersey Legislature enacted L. 1979, c. 276 which more specifically directed the disbursement of the proceeds of the bond issue to be used for the establishment of the ten (10) regional day schools, each serving distinct regions of the State and the handicapped student population.

The RDSM, prior to the commencement of the academic year 1982-83, projected a maximum pupil population of approximately 52 pupils with an anticipated school budget of $591,913 based upon salaries of teaching staff members, materials and other support services. Tuition was determined to be approximately $11,500 per pupil for the 1982-83 school year, a rate designed to be competitive with other public and private educational facilities for handicapped pupils. Both the budget and tuition rate were established by the DOE. RDSM was required to operate the facility on the proposed operational budget as established by the DOE. RDSM does not receive separate state appropriation. The proposed budget of $591,913 and tuition rate of $11,500 were substantially different from the proposed budget and tuition rate established in July 1982 by the principal of the then MSHH. The principal, Larry Forestal, had established a budget based on a tuition rate of $12,500. As a result of the budget and tuition rate established by the DOE, the RSDM was forced to consider certain economies in order retain an optimal educational program within the projected budget and tuition rate established by DOE. The Principal, Larry Forestal, made certain decisions, in consultation with the DOE, regarding certain staff and program needs at RDSM. As a result of discussions with the DOE, the principal determined four teaching staff positions would have to be eliminated in order to meet the projected budget and tuition rate established by the DOE. The four positions eliminated included two classroom teaching

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positions, one full-time learning disability technical consultant and the physical education position held by petitioner. The RDSM, through the principal, determined, with respect to physical education, that since the classes were self-contained, physical education could be taught by the classroom teachers. Petitioner was notified, by telephone, on or about July 30, 1982 by the principal that her position would be eliminated effective September 1, 1982. The petitioner subsequently received written notice advising her of her termination on or about August 2, 1982, from the principal, Larry Forestal. Since petitioner held only a teaching certificate in Health and Physical Education, she could not hold any other position at the RSDM. Petitioner's employment ceased at RSDM effective September 1, 1982.

ANALYSIS

Essentially, the petitioner contests the actions of the respondents in (1) reducing her part-time position in January 1981, (2) eliminating physical education instruction (by a certified physical education teacher) to the students at RDSM as contrary to the State Constitution and Title 18A, (3) terminating her from her position at RDSM and (4) failing to transfer her to other regional day schools as her tenured status required.

REDUCTION IN PARTTIME STATUS

The petitioner readily concedes that the action of the respondents, more specifically the Principal Larry Forestal, in reducing her part-time position from three days per week to two days per week occurred in January 1981. It is likewise undisputed that the petitioner filed the petition in this matter on or about November 5, 1982--some 22 months after the alleged reduction in her part-time status. As a teaching staff member at RDSM, petitioner is entitled to address grievances to the Commissioner of Education. N.J.A.C. 6:24-1.2 requires that a petition directed to the Commissioner of Education must be filed within 90 days after receipt of the notice by the petitioner of the order, ruling or other action concerning which the hearing is requested. The Supreme Court of New Jersey has given an interpretation of this filing rule, by way of footnote,

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where it determined that a petitioner who elected to pursue arbitration had to comply with the 90-day filing requirement in order to raise a matter before the Commissioner. Board of Education Bernards Tp. v. Bernards Tp. Education Assn., 79 N.J. 311, 326-27 n.4 (1979).

In Riely v. Hunterdon Central High Board of Education, 173 N.J. Super. 109 (App. Div. 1980), a case involving the nonrenewal of an untenured teacher's contract, the Appellate Division remanded the matter to the State Board of Education with instructions to dismiss the teacher's petition as being filed out of time. The court noted that a petitioner could not proceed initially to binding arbitration and then following the termination of arbitration, file a petition with the Commissioner after the 90-day time limit had expired. Riely at 113-14.

Various school law decisions are in pari materia with the above holdings. In Smith and the New Brunswick Ed. Ass'n. v. New Brunswick Bd. of Ed., 1978 S.L.D. 214, the Commissioner held that the 90-day period of limitations applied to a petition filed only 14 days after codification of N.J.A.C. 6:24-1.2, as the rule became effective when filed with the Division of Administrative Procedures. See also, Hall v. Englewood Bd. of Ed., 1980 S.L.D. _____ (Dec. 11, 1981), aff'd by Comm. of Ed. (Jan. 26, 1982); De Risi v. Teaneck Bd. of Ed., 1981 S.L.D. _____ (Sept. 26, 1981) aff'd by Comm. of Ed. (Nov. 12, 1981); Contardo and Fitzgerald v. Trenton Bd. of Ed., 1980 S.L.D. _____ (May 12, 1981) aff'd by Comm. of Ed. (June 26, 1981).

In the instant case, the action that petitioner is contesting occurred in January 1981, yet the petition was not filed until November 1982 or 22 months later. Absent the application of N.J.A.C. 6:24-1.19 the petition on this issue must be dismissed as untimely.

Pursuant to N.J.A.C. 6:24-1.19, the Commissioner may, in his discretion, relax or dispense with the 90-day rule by finding that a strict adherence thereto may be deemed inappropriate, or unnecessary, or may result in injustice. Since the Riely decision, however, the Commissioner and the courts now read N.J.A.C. 6:24-1.2 very

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strictly and apply it almost without exception. See, Baley v. Mansfield Tp. Bd. of Ed., 1980 S.L.D. _____ (June 19, 1980). In Baley the Commissioner of Education did not relax the filing rule in spite of the fact that petitioner's counsel failed to file a petition challenging the local board's denial of a salary increment, in a timely fashion because he had become ill with mononucleosis; Accord, Jamesburg Ed. Assn. v. Jamesburg Bd. of Ed., 1980 S.L.D. _____ (Sept. 12, 1980); DeRisi, supra; and Hall, supra; but see, Shokey v. Tp. of Cinnaminson Bd. of Ed., 1978 S.L.D. 919 wherein the Commissioner relaxed the 90-day rule, finding that to do otherwise would result in injustice. It is pointed out, however, that Shokey was decided prior to the Appellate Division decision in Riely where that court reminded the Commissioner of his own strict interpretation of N.J.A.C. 6:24-1.2 in Wagner v. Bridgewater-Raritan Reg'l. School Dist. Bd. of Ed., 1978 S.L.D. 827. See also, Perrotti v. Newark Bd. of Ed., 1980 S.L.D. _____ (March 25, 1981) rev'd Comm'n of Ed. The administrative law judge's finding that 90-day rule barred petitioner's claim was reversed because the delay in filing was "attributable solely to the Board." Id. at 7.

In the instant controversy there is no allegation that petitioner was prevented by the respondents from filing a timely petition on the issue nor is there even a suggestion that the circumstances warrant a relaxation of the 90-day rule. The court, therefore, **CONCLUDES** the relaxation provision of N.J.A.C. 6:24-1.19 cannot, therefore, be invoked in this matter and hereby orders the petition on this issue **DISMISSED WITH PREJUDICE.**

ELIMINATION OF PHYSICAL EDUCATION FROM RDSM CURRICULUM AND TERMINATION OF PETITIONER'S EMPLOYMENT

The petitioner, through her attorney, contends that physical education training is "an essential part of a constitutionally—mandated education program . . ." by reason of N.J.S.A. 18A:35-5 et seq., N.J.S.A. 18A:7A-1 et seq., N.J.S.A. 18A: 46-1 et seq., and that the program, as such, may not be terminated under any circumstances. The petitioner cites numerous state statutes that she suggests supports her position. However, a thorough review of the statutes governing physical education in the school districts of New Jersey, and its relevant regulations, does not support petitioner's position. For example, N.J.S.A. 18A:37-6 states that the instruction in physical education shall be

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subject to the general supervision and direction of the Commissioner of Education. N.J.A.C. 6:29-6.1, sets forth the individuals who may be regarded as qualified to instruct and/or teach in physical education. Likewise, this court has reviewed the New Jersey Constitution and could not find any specific reference to the teaching of physical education in the schools of the State of New Jersey nor an implied reference to physical education instruction in the concept of "thorough and efficient" education as required by the Constitution. Certainly, our laws, and the Commissioner of Education, view the instruction in physical education as an important component of a child's education and have devised certain rules for instruction in the event that certified physical education instructors are not available at a particular school for whatever reason. N.J.A.C. 6:29-6.1(a). In the context of RDSM, N.J.A.C. 6:28-2.3(b) provides that the primary instructional responsibility for classified handicapped pupils in special classes shall be that of the classroom teacher. Therefore, based on the regulations and governing statutes, this court **FINDS** and **CONCLUDES** that the respondents are not violating applicable statutes and regulations with respect to the requirement that physical education be provided to pupils, special or otherwise.

It is well established that the positions of tenured staff may be eliminated for economy reasons. In re Maywood Board of Education, 168 N.J. Super. 45 (App. Div. 1979). It is well within the authority and discretion of the employer to dismiss tenured staff when, for economic reasons, positions must be eliminated. In such situations, it is not for the dismissed employee nor for the Commissioner of Education to substitute their judgment for the judgment of the employer. Rather managerial prerogative controls in the absence of a showing of bad faith. The structuring of programs and the deployment of personnel to provide necessary programs within the strictures of fiscal restraint is one of the fundamental prerogatives of a public employer. This right cannot even be the subject of negotiation or arbitration. Englewood Bd. of Ed. v. Englewood Teachers' Assn., 150 N.J. Super. 265 (App. Div. 1977); Union City Bd. of Ed. v. Union City Teachers' Assn., 145 N.J. Super. 435 (App. Div. 1976). Cf. Bernards Tp. Bd. of Ed. v. Bernards Tp. Ed. Assn., 79 N.J. 311 (1979); Ridgefield Park Ed. Assn. v. Ridgefield Park Bd. of Ed., 78 N.J. 144

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(1978); State v. State Supervisory Employees Assn., 78 N.J. 54, 90 (1978); Bd. of Ed., Tp. N. Bergen v. N. Bergen Fed. Teachers, 141 N.J. Super. 97 (App. Div. 1976). See also, in re Byram Tp. Bd. of Ed., 152 N.J. Super. 12 (App. Div. 1977).

In the instant matter, petitioner has not satisfied her burden of showing that respondents' decision to eliminate the physical education instructor position was infected with bad faith. At the hearing, respondents presented credible evidence in support of their decision. The decision to terminate petitioner reflect a reasoned approach to the economic realities faced by the RDSM in August 1982. Petitioner may not agree with the decision. Nonetheless, it is for the public employer to make those decisions and its judgment is not to be substituted by one of its employees nor even by the Commissioner of Education unless shown to be made not on any reasoned basis but purely out of bad faith toward the individual affected. Petitioner has not met this standard.

Therefore, this court **FINDS** and **CONCLUDES** that the petitioner has not satisfied her burden of showing that the decision to lay her off and/or terminate her from her position as a part-time physical education instruction was infected with bad faith, arbitrary and capricious.

PLACEMENT AT OTHER REGIONAL DAY SCHOOLS

Having found that petitioner's layoff and/or termination from position was done in good faith, this court must now examine whether the petitioner was entitled to employment preference at any of the other regional day schools based on her tenured status. It is the petitioner's position that if her position was eliminated for reasons of economy, then she should have been given preference to any similar position with the other regional day schools. She indicated and has so testified that she was not given that opportunity and that other individuals were hired or continued with less tenure in the employ of what she contends is a regional day school system.

Within the regional day schools, as in other educational units, teachers can acquire tenure. Tenure is granted through State statutes which were designed "to aid in the establishment of a competent and efficient school system (by providing teaching staff

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members) with a measure of security in the ranks they hold after years of service," Viemeister v. Prospect Park Bd. of Ed., 5 N.J. Super. 215, 218 (App. Div. 1949), and to protect the positions of those teachers who already have demonstrated their abilities during the statutorily prescribed testing period. Schulz v. State Board of Education, 132 N.J.L. 345, 348 (E.&A. 1945). N.J.S.A. 18A:60-1 provides the only basis upon which a teaching staff member in a state operated education institutional may acquire tenure. The tenure laws represent important expressions of legislative policy which should be given liberal support, consistent, however, with legitimate demands for governmental economy. Viemeister at 218. Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63, 74 (1982).

Whether certain teachers are entitled to tenure never depends upon the contractual agreement between teachers and the board of education. Tenure is granted by statute. It may not be waived or forfeited. Once a teacher acquires tenure status, he or she cannot be dismissed except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause. Zimmerman v. Newark Bd. of Ed., 38 N.J. 65 (1962), cert. denied, 371 U.S. 956 (1963).

As stated in Boeshore v. North Bergen Bd. of Ed., 1974 S.L.D. 805,:

> The Commissioner must be vigilant to protect those who are entitled to tenure from the erosion of their tenure rights by subterfuge and evasion. He must be equally vigilant against the employment of devices to confer tenure upon those who are not entitled to its protection. Id. at 814.

Accordingly, petitioner is entitled to have every effort made to protect her tenure rights.

Whether or not the petitioner is entitled to tenure at another regional day school, however, will depend upon the status of regional day schools, i.e., whether they are separate and autonomous entities or operate as one regional day school district. If the regional day schools operate as one district, then through the application of the tenure provision N.J.S.A. 18A:28-5, petitioner would have tenure status within the district.

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Keane v. Flemington-Raritan Regional School District, 1970 S.L.D. 162, 164. Accordingly, petitioner would be entitled to placement, over nontenured teachers and tenured teachers with less seniority, at another regional day school. If, on the other hand, it is found that the schools are separate and autonomous entities, then petitioner's tenure is limited to the RDSM. The legislative history is silent on this point and in the circumstances it is clear that no controlling inference as to intent may be drawn from that silence.

The testimony of respondents' witnesses indicated that each regional day school established by the DOE is a distinct entity due to on the nature and substance of the programs offered by it and the handicapped student population served by it as well. The testimony was credible. Indeed, the respondents, through their attorney, conceded that the only instance where a system-wide faculty rights and privileges were created by Legislature was the former Garden State School District. See N.J.S.A. 30:4AA-1 et seq. (repealed); N.J.S.A. 18A:7B-1 et seq., N.J.S.A. 18A:7B-10 and N.J.S.A. 18A:7B-11. There is no such indication, however, of any legislative intent to make regional day schools a system of state run institutions having a common faculty. The authorizing legislation seems to imply that the regional day schools are to be autonomous entities serving the needs of the handicapped student population in different regions of the state. The autonomous nature of the regional day schools is clearly illustrated in the various contracts between the DOE and the schools in which it is indicated that the employees of the school(s) are to be the employees of that entity and shall be subject to all rights and benefits from that local entity (See Exhibit R-1, paragraph 13). This contract language then would seem quite consistent with the long-established practice of DOE and the respondents of maintaining separate faculties for educational institutions with different missions within the DOE. See also, Att'y. Gen. Form. Op. 1975, No. 18.

Based on the evidence presented and the testimony of various witnesses, this court **FINDS** and **CONCLUDES** that the various regional day schools created as a result of L. 1973 c. 149 and supplemented by L. 1979, c. 276 are autonomous entities designed to serve the very specific needs of handicapped student community in different regions of the state and, therefore, petitioner's claim to tenure is limited to available positions in her certified area to RDSM and not the other regional day schools.

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REINSTATEMENT CONSIDERATIONS

The DOE received additional federal funds to fund its handicapped education programs in regional day schools programs as authorized by L. 1979, c. 149 and L. 1979, c. 276 sometime after the start of the 1983-84 academic year. The DOE determined that some of the additional funds would be used, in part, to fund one-half physical education instruction position at RDSM and the Regional Day School at Morris. By letter dated November 9, 1983, the attorney for the respondents notified petitioner and her attorney that the position was being offered to her. The respondents requested that the petitioner advised them on or before November 29, 1983, whether she would accept the position.

The petitioner, through her attorney, requested that the respondents provide her with more information regarding the position. The attorney for the respondents subsequently provided the requested details of the position to petitioner. On or about December 1, 1983, the attorney for the petitioner informed the court and the attorney for the respondents that the petitioner had relocated to Vermont and was unable to accept the job offer. No subsequent confirmation of the petitioner's attorney's statement on her behalf was filed with the court or with the respondents' attorney. On or about December 7, 1983, the respondents filed a motion with the court seeking dismissal of that portion of petitioner's claim which seeks reinstatement to a teaching position in any regional day school in New Jersey and a determination that the petitioner has abandoned her tenured rights at RDSM. The petitioner filed no papers in opposition to the respondents' motion. Nonetheless, this court is reluctant to find that the petitioner, in the absence of any confirmation directly from her, now wishes to abandon her tenure rights at RDSM. Her statement of rejection of the position offered by the respondents, through her attorney, would appear to be grounded in the unfortunate antagonisms resulting from this litigation and not on any rational basis. The petitioner was employed at RDSM for a period of approximately 12 years and her failure to respond to the offer of reemployment during the course of this litigation cannot and must not be held against her. The petitioner must be free to make a rational decision about whether she wishes to return to the employ of RDSM after all issues in this proceeding have been resolved. This court would recommend to the Commissioner of Education that he give her that opportunity and avoid the harsh

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result the respondents wish to impose on her for her failure to accept their November 9, 1983 offer. As a result of petitioner's failure to respond in a timely fashion to respondents offer, the respondents have no doubt filled the position as of December 5, 1983. Nonetheless, the filling of the position does not prevent the respondents from making petitioner another firm and specific offer of reemployment for the same position within a time frame to be established by this court for the academic year 1984-85. Therefore, this court **FINDS** and **CONCLUDES** that the petitioner has not abandoned her tenure rights and reemployment rights to her former position at RDSM and must be given an opportunity to accept or reject any offer by the respondents for reemployment within 60 days from the date of final decision by the Commissioner of Education. If after the 60 days the petitioner fails or refuses to advise the respondents of her acceptance or rejection of their offer, then the petitioner will be deemed to have abandoned her rights and privileges to reemployment at RDSM.

CONCLUSION

Having reviewed the evidence and the testimony in this matter carefully, this court **CONCLUDES** that the petitioner has failed to prove by preponderance of the credible evidence that the respondents terminated her from her position as a part-time physical education teacher contrary to provisions of N.J.S.A. 18A and in bad faith and that petitioner's other claims are without merit and, therefore, her petition in its entirety must be **DISMISSED WITH PREJUDICE.**

It is hereby **ORDERED** that the respondents provide the petitioner with a written offer of reemployment, assuming funds are still available, in accordance with its prior letter, dated November 9, 1983, to commence beginning the academic year 1984-1985, and the petitioner shall have 60 days from the date of the final decision by the Commissioner of Education to accept or reject said offer. In the event, funds are not available for the academic year 1984-85 to reemploy petitioner, it is hereby **ORDERED** that petitioner shall retain her right to reemployment in her former position at RDSM in accordance with the applicable statues and regulations.

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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.

January 17, 1984
DATE

ROBERT T. PICKETT, ALJ

Receipt Acknowledged:

Jan. 18, 1984
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

Jan. 23, 1984
DATE

Ronald L. Lakewood
FOR OFFICE OF ADMINISTRATIVE LAW

par /e

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APPENDIX

LIST OF WITNESSES

For Petitioner:

Parthenia Smith
Larry Forestal
Annette O'Toole

For Respondent:

Parthenia Smith
Steven Steven Pagano

EXHIBITS MARKED IN EVIDENCE

P-1 Letter from Larry Forestal to petitioner, dated January 20, 1981.

P-2 Budget plan of RDSM for fiscal year of 1983.

P-3 Answers to interrogatories by the respondents.

P-4 Letter to parents and/or guardians of students at RDSM, dated September 17, 1982.

P-5 Letter from Larry Forestal to petitioner, dated August 2, 1982.

P-6 A listing of staff at RDSM.

R-1 Sample contract with regional day school

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OAL DKT. NO. EDU 0127-83

C-1 Copy of Legislation authorizing regional day schools and issuance of bonds for facilities for the education of severely handicapped children/L. 1973, c.148 and 149

C-2 Master Plan to Implement Chapter 149, Laws of 1973, for Regional Day Schools for the Severely Handicapped (original and amended).

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ANNETTE O'TOOLE,	:	
PETITIONER,	:	
V.	:	
LARRY FORESTAL, PRINCIPAL, PARTHENIA SMITH, DIRECTOR, MILLBURN SCHOOL FOR THE HEARING HANDICAPPED a/k/a NEW JERSEY REGIONAL DAY SCHOOL AT MILLBURN AND DIVISION OF FIELD SERVICES OF THE DEPARTMENT OF EDUCATION,	:	COMMISSIONER OF EDUCATION
	:	DECISION
RESPONDENTS.	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law, Robert T. Pickett, ALJ.

It is observed that timely exceptions to the initial decision have been filed by counsel for respondents.

Respondents' exceptions to the initial decision are hereinafter set forth in toto:

> "Respondents commend the Initial Decision to you for your acceptance with one proposed modification. Respondents believe that the Initial Decision correctly determined that the reduction in force at the Millburn Regional Day School which affected petitioner's position was not infected with bad faith nor was it arbitrary or capricious (Initial Decision at 8). The Initial Decision also correctly concludes that it was not otherwise illegal for the Regional Day School to assign responsibility for physical education instruction to the classroom teachers assigned to the special education pupils at the Regional Day School (I.D. at 7). See Respondents' Post-Hearing Brief, Point Three.* Finally, respondents also concur with the Initial Decision's conclusion that petitioner's tenure and seniority rights pursuant to N.J.S.A. 18A:60-1, -2 and -3 attach only to the education institution in which she actually worked, namely the Millburn Regional Day School (I.D. at 10). Thus, petitioner is not entitled to claim bumping rights to a physical education instructor's posi-

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tion in any of the other regional day schools -- most of which have already been contracted out by the State Department of Education to local operators (Respondents' Post-Hearing Brief, Points One and Two).

"In all of the recommended findings and conclusion[s] of the Initial Decision set out above, respondents heartily concur. Respondents urge the Commissioner to accept these recommended findings and conclusions.

"Respondents do not endorse, however, one conclusion recommended in the Initial Decision. It pertains to petitioner's right to remain on a preferred eligibility list for reemployment at the Millburn Regional Day School. It is respondents' position that petitioner abandoned any right to reemploy when she refused to accept an offer of reemployment at the Millburn Regional Day School for a physical education instructor's position which became available during the first semester of the 1983-84 school year.

"Respondents provided petitioner with all of the information requested about the position and advised petitioner that she had to accept the position on or before November 29, 1983 (I.D. at 11). Petitioner did not respond. Only through a conference call arranged by the administrative law judge on December 1, 1983 did respondents learn that petitioner has relocated to Vermont and would not accept the position. Ibid. Thereafter, respondents moved to dismiss that portion of petitioner's claim which seeks reinstatement to a teaching position in any regional day school and sought a declaration that petitioner abandoned her tenure and seniority rights. The Initial Decision recommends the following ruling on respondents' motion:

> 'The petitioner filed no papers in opposition to the respondents' motion. Nonetheless, this court is reluctant to

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*A copy of Respondents' Post-Hearing Brief is attached hereto for the Commissioner's convenience.

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find that the petitioner, in the absence of any confirmation directly from her, now wishes to abandon her tenure rights at RDSM. Her statement of rejection of the position offered by the respondents, through her attorney, would apear to be grounded in the unfortunate antagonisms resulting from this litigation and not on any rational basis. The petitioner was employed at RDSM for a period of approximately 12 years and her failure to respond to the offer of reemployment during the course of this litigation cannot and must not be held against her. The petitioner must be free to make a rational decision about whether she wishes to return to the employ of RDSM after all issues in this proceeding have been resolved. This court would recommend to the Commissioner of Education that he give her that opportunity and avoid the harsh result the respondents wish to impose on her for her failure to accept their November 9, 1983 offer. As a result of petitioner's failure to respond in a timely fashion to respondents' offer, the respondents have no doubt filled the position as of December 5, 1983. Nonetheless, the filling of the position does not prevent the respondents from making petitioner another firm and specific offer of reemployment for the same position within a time frame to be established by this court for the academic year 1984-85. Therefore, this court FINDS and CONCLUDES that the petitioner has not abandoned her tenure rights and reemployment rights to her former position at RDSM and must be given an opportunity to accept or reject any offer by the respondents for reemployment within 60 days from the date of final decison by the Commissioner of Education. If after the 60 days the petitioner fails or refuses to advise the respondents of her acceptance or rejection of their offer, then the petitioner will be deemed to have abandoned her rights and privileges to reemployment at RDSM [I.D. at 11-12].'

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"Respondents respectfully urge the Commissioner to reject the above recommendation. N.J.S.A. 18A:60-3 governs an individual's reemployment rights in the event of a reduction in force in a state operated educational institution. It provides in pertinent part:

> 'Should any such professor, associate professor, assistant professor, instructor, supervisor, registrar, teacher, or other person employed in a teaching capacity under tenure be dismissed as a result of such reduction such person shall be and remain upon a preferred eligible list in the order of years of service for reemployment, whenever vacancies occur, and shall be reemployed by the Commissioner in such order, when, and if a vacancy in a position for which such professor, associate professor, assistant professor, instructor, supervisor, registrar, teacher, or other person employed in a teaching capacity shall be qualified. Such reemployment shall give full recognition to previous years of service.'

Pursuant to N.J.S.A. 18A:60-3, respondents offered petitioner reemployment in the position in which she had served. Petitioner refused the position. This refusal must be regarded as abandonment of her position and also therefore an abandonment of her tenure and seniority rights.

"It is well established that a position may be relinquished and tenure abandoned. See Lange v. Audubon Bd. of Ed., 26 N.J. Super. 83 (App. Div. 1953) and cases cited therein. Abandonment may occur when a teaching staff member refused an offer of reemployment following a reduction in force. Cf. Vexler v. Red Bank Bd. of Ed., 1 N.J.A.R. 196 (1982). See also DeSimone v. Fairview Bd. of Ed., 1966 S.L.D. 43. (A part-time teacher can be required to accept a full-time position). In the instant matter, the State's responsibility to petitioner ended once she was offered and had rejected the State's offer of a physical education instructor position at Millburn RDS. The fact that the newly opened position was to be full-time, half at Millburn

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RDS and half at Morris RDS, is irrelevant to the legal question of whether the State had satisfied its obligation under N.J.S.A. 18A:60-3. It is the respondents' position that nothing further was required pursuant to N.J.S.A. 18A:60-3 and that upon petitioner's refusal of the position on December 1, 1983 her tenure and seniority rights at the Millburn RDS expired. Any claim, therefore, for reinstatement is without merit. Indeed, in light of petitioner's relocation to Vermont and her admission that it is now impossible for her to accept a position at the Millburn RDS, any claim for reinstatement is moot.

"Furthermore, the Initial Decision's recommendation that a physical education position for the 1984-85 school year be offered to petitioner within 60 days of issuance of the Commissioner's decision is not practical. Respondents may not know the 1984-85 budget for the Millburn Regional Day School until late Spring or Summer of 1984. Even then respondents may not know if a physical education instructor's position will be funded. In 1983-84, respondents were not able to fund such a position after the school year commenced and some additional federal funds became available. Thus, if the Commissioner were to determine that petitioner's tenure and seniority rights remain intact, respondents urge that no timelines be set for the offering of a physical education position at Millburn Regional Day School. An offer would then be made as is normally done, when the position became available. However, respondents strongly urge the Commissioner to declare that petitioner abandoned her tenure and seniority claims and has no right to reinstatement.

"With the above suggested modification, respondents urge the Commissioner to accept the findings and conclusions recommended in the Initial Decision."

(Respondents' Exceptions, at pp. 1-5)

The Commissioner has reviewed respondents' exceptions in support of their contention that petitioner abandoned any right to reemployment at the Millburn Regional Day School by virtue of her refusal to accept a position as a physical education teacher there during the fall semester of the 1983-84 school year.

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In the Commissioner's judgment respondents' arguments in support of their exceptions have sufficient merit to warrant modification of the judge's conclusion to the effect that petitioner is entitled to be reemployed by the Millburn Regional Day School.

The Commissioner in arriving at the above finding and determination is constrained to observe that petitioner did not avail herself of her legal right to oppose respondents' Motion to Dismiss before the judge or, in the alternative, to file reply exceptions to the initial decision before the Commissioner pursuant to N.J.A.C. 1:1-16.4a, b and c.

Accordingly, the Commissioner hereby affirms the recommended findings and conclusions set forth in the initial decision as modified above.

It is hereby ordered that the instant Petition of Appeal can be and is hereby dismissed.

MARCH 5, 1984 COMMISSIONER OF EDUCATION

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ANNETTE O'TOOLE,	:	
PETITIONER-RESPONDENT,	:	
V.	:	
LARRY FORESTAL, PRINCIPAL, PARTHENIA SMITH, DIRECTOR, MILLBURN SCHOOL FOR THE HEARING HANDICAPPED a/k/a NEW JERSEY REGIONAL DAY SCHOOL AT MILLBURN AND DIVISION OF FIELD SERVICES OF THE DEPARTMENT OF EDUCATION,	:	STATE BOARD OF EDUCATION
	:	DECISION
RESPONDENTS-APPELLANTS.	:	

Decided by the Commissioner of Education, March 5, 1984

For the Petitioner-Respondent, Eugene T. O'Toole, Esq.

For the Respondents-Appellants Irwin I. Kimmelman, Attorney General of New Jersey (Jaynee LaVecchia, Deputy Attorney General, of Counsel)

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

September 5, 1984

PENDING N.J. SUPERIOR COURT

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INITIAL DECISION
OAL DKT. NO. EDU 9459-82
AGENCY DKT. NO. 367-9/82A

RIDGEFIELD BOARD OF EDUCATION,
Petitioner
v.
PATRICIA NAFASH,
Respondent.

APPEARANCES:

Stanley Turitz, Esq., for petitioner

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

Record Closed: December 12, 1983 Decided: January 25, 1984

BEFORE BRUCE R. CAMPBELL, ALJ:

The Ridgefield Board of Education (Board) brought five charges under the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq., against Patricia Nafash (respondent), a teaching staff member in its employ.

The charges were served in accordance with the provisions of N.J.S.A. 18A:6-11. After respondent exercised her opportunity to submit a written statement of position and a written statement of evidence in respect to the charges, the Board determined there was probable cause and that the charges, if credited, were sufficient to warrant dismissal or reduction in salary. The charges were forwarded to the Commissioner of Education. The charges were answered in a timely fashion and the matter was transferred

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to the Office of Administrative Law as a contested case. N.J.S.A. 52:14B-1 et seq.; N.J.S.A. 52:14F-1 et seq. The record shows no procedural defects of service of charges and the parties agree there were none.

The Board charges incompetency in the performance of the respondent's duties as a teacher in the Ridgefield public schools during the years 1979-80, 1980-81 and 1981-82. The Board alleges the respondent's incompetency consists of her failure to implement major areas of elementary and/or secondary classroom teacher's duties as required in her job description. More specifically, the Board alleges the respondent has been incompetent in the performance of the following areas of her responsibility:

I. Failure to implement by instruction and action the district's, school's and department's philosophy of education and instructional goals and objectives in accordance with the requirements of the Public School Education Act of 1975 as amended;

II. Failure to translate lesson plans into different skill levels and different styles to maximize the ability of success for the student and provide the best utilization of available time for instruction;

III. Failure to establish and maintain standards of student behavior needed to achieve a functional learning atmosphere in the classroom;

IV. Failure to evaluate students' academic and social growth, keep appropriate records based on cognitive and observable behavioral data, "related to cognitive and affective district building goals," prepare progress reports and modify instruction based uppon such data and reports;

V. Failure to maintain professional competence and continued improvement through in-service education activities provided by the district, annual performance evaluation, and selected professional growth activities described in the individual professional improvement plan.

A prehearing motion to dismiss the charges was denied. The respondent argued that the charges allege inefficiency, not incompetence, and that there was a

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failure to comply with N.J.S.A. 18A:6-11, particularly as it relates to notice of charges of inefficiency and a 90-day period in which to correct and overcome the inefficiency. The ruling was that the charges were fairly characterized as charges of incompetence. The Board was required to shoulder its burden of going forward and its burden of persuasion. The ruling concluded by stating, "The Board's proofs, of course, must demonstrate incompetence. And, of course, the respondent may make other motions at appropriate times." The ruling was not appealled.

At the close of the Board's case in chief, the respondent again moved for dismissal. The court denied the motion, stating enough had been presented that, if not mitigated, rebutted or discredited, it could sustain some action. The petitioner was required to defend. The ruling was not appealled.

Ten days of hearing were held at the Office of Administrative Law, Newark, concluding on September 15, 1983. For good cause shown, the time for submission of briefs was enlarged. The record closed on December 12, 1983.

I

In its opening statement, the Board succinctly outlined this case. The issue is simply whether the respondent demonstrated the skill and the capacity to be an effective teacher in the classroom. The only person who observed the respondent and who had the responsibility for judging her performance was the director of music. Although other evidence was introduced which will be addressed below, the case rests primarily on the testimony of the director of music.

The respondent asserted, as she did in her answer, that the charges merely allege inefficiency, not incompetence. However, the Board has failed to provide 90 days' written notice, prior to certification of charges, as required by N.J.S.A. 18A:6-11.

II

The charge of incompetence, as distinguished from the charge of inefficiency, presumes that the proofs in support of the charge will demonstrate that respondent is so

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lacking in competency to perform the responsibilities of classroom teacher that the requirements of the 90-day improvement period, required for a charge of inefficiency, N.J.S.A. 18A:6-11, would be a useless exercise. (See, Tenure Hearing of Inez McRoe, 1977 S.L.D. 572, 584.) Incompetence requires proof that the affected person, regardless of the assistance offered by certified supervisors, does not have the ability or capacity to be an effective teacher. School Dist. of Tp. of East Brunswick, Middlesex Cty. v. Renee Sokolow, OAL DKT. EDU 6440-81 (Nov. 5, 1982), adopted, Comm'r of Ed. (Dec. 20, 1982).

It is conceded that the respondent had a history of good evaluations prior to the employment of the current director of music. A long period of good observations does not guarantee continued good performance. Some evidence exists tending to show that the respondent was below average in some areas of teaching performance. By definition, however, half of all teachers are below average. Being below average in one or more aspects does not automatically require a conclusion that the teacher needs to be removed.

Voluminous testimony was adduced. While it appears that the respondent may have had some problems maintaining discipline in her classes, it is also clear that there was a lack of support from her immediate supervisor in this respect. In fact, on one occasion, he exacerbated rather than ameliorated a discipline problem.

The director of music testified as to a long series of events each of which is, to a greater or lesser extent, memorialized in observation forms, evaluation forms or memoranda (P-3 to P-29, P-31 to P-33, P-35).

CHARGE I

The director testified that the school district has a philosophy of education for music education. He stated that this philosophy remained the same throughout his tenure as director of music. The record shows, however, that this philosophy never was adopted as a policy of the Board. It appeared in written form as a two-page part of the annual report of the entire school district. The annual report contains a history of the educational events in the school system for a given year. (T VIII, 149; T X, 87). The philosophy set forth in these annual reports did not specify goals or objectives for the department. It listed discrete activities (P-42).

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The director testified on cross-examination that the departmental philosophy to which he referred was his personal opinion regarding how he wanted to run the department. (T III, 21, 2-6). It has not been established that the director conveyed these goals and objectives to the respondent. They were, except for P-42, not in writing and changed from year to year.

The allegations underlying this charge are found primarily in a series of classroom observations. In an evaluation dated October 30, 1979 (P-3), the director alleged that the respondent departed from the philosophy of the district in that the instruction was verbal in nature and lacked discipline. However, the bill of particulars prepared by him (R-95) sets forth only the verbal nature of the class as an allegation in support of the charge.

The respondent testified that she was able to determine whether pupils had mastered the subject matter by questioning during the following weeks. The class was able to delve farther into the nature and sounds of instruments and the degree of knowledge gained by pupils was determined by tests and her direct observation of class participation. (T VIII, 158).

In an evaluation dated November 20, 1979 (P-4), the director contends that this charge is supported by his claims that the class was verbal and that there was no mastery of sound. (T I, 31-32). However, on cross-examination he stated that paragraph four of the observation dealing with the "verbal" claim did not substantiate the charge of a violation of philosophy. (T III, 53-57).

The respondent maintains that she examined the individual work of pupils to determine if they were able to identify pieces of music and vocal parts in music. Mastery was, in part, determined by a quiz given at the end of the unit. (T VIII, 158-59).

Although the respondent commented in writing on the statements made by the director in the observation, the director admitted that he never read the comments and made no real effort to do so. (T III, 58-59). The director could not recall the post-observation conference with the respondent. (T III, 59-63).

In a memorandum dated January 3, 1980 (P-5), the director stated that the respondent used the same teaching methodology over a period of some three years. He alluded to discipline in his discussion of observations with the respondent. (T I, 37).

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The respondent's gauge of the mastery of subject matter of this lesson by her pupils is the same as that previously set forth (P-4). However, the memorandum underlying the director's allegations arose from an informal conversation he had with the respondent. The respondent was unaware that the matters discussed would be passed on to other administrators. Rather, she was given the impression that the conversation was an attempt to settle any differences of opinion between the director and herself. (T VIII, 160-61). On this basis, she prepared a response to the director's comments (P-6). (T VIII, 161-62).

A memorandum dated January 21, 1980 (P-7), prepared at the director's request by the deceased principal is alleged to show lack of subject mastery because of pupil pitch problems. (T I, 43). However, the director discredited any determinations made by non-musicians. On this basis, the director concluded that the principal was unqualified to observe and evaluate music teachers. (T III, 76).

A classroom observation of February 15, 1980 (P-8) contains an estimate that 60 percent of the class was singing off key. The director saw this as a lack of subject matter mastery. (T I, 45). He admitted that he did not attempt to count the pupils in question, being satisfied with merely picking this number. (T III, 96). Again, the director had no recollection of any observation conference occurring after this observation. (T III, 101-02).

The respondent contends she was able to determine subject mastery by these pupils by observing their singing. The lesson was designed to teach interval singing and two-part singing. The estimate given by the director as to off key singers was, in her view, incorrect. (T VIII, 162-63).

In the 1979-80 annual performance report (P-9), the director criticized the abilities of the respondent as a singer and pianist. He held the respondent to a level of ability not set forth in any job description or other statement of qualifications for the position. Specifically, he determined that the respondent should be able to play the piano at the first year conservatory level. (T III, 102-04, 105-06). His comment is contrary to a statement previously made by him during a deposition. During deposition, he stated that the respondent should have the ability of a first year college level. (T III, 108-09). He attempted to justify this discrepancy by stating that the terms "college" and "conservatory" are identical, after having first explained at length the difference between the terms. (T III, 103, 109).

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A letter from the respondent to the director, dated August 28, 1980 (P-12) and the reply from the director to the respondent, dated September 22, 1980 (P-13) along with testimony adduced, indicate that after an increment withholding, the respondent made a request of the director for specific suggestions on how to improve as a teacher in his opinion. The director responded by stating that it was her responsibility to teach while he would observe and criticize her teaching. The director made no attempt to discuss any specific instructions for improvement with the respondent. (T III, 112, 164).

Evaluations conducted on November 18, 1980 (P-16, P-17), were similar in nature to the preceding. However, the respondent testified that she was able to determine the subject mastery of her pupils by the quality of their singing. The first class was a chorus class. Pupil progress in such classes is determined by assessing the quality of pupil singing and the amount of material covered in class.

The director had no recollection of the number of pupils who were allegedly singing improperly. Nor did he meet with the respondent to discuss her comments regarding his evaluation. He testified that it was his "observation and she was entitled to her opinion." (T I, 63). The second observation was of a general music class. Mastery of subject matter was determined by the assignments given to the pupils. Pupils participated in music criticism and were directed to write a criticism of an assigned selection. (T IX, 3). The director stated the respondent spent too much time in verbal instruction in this class. However, he acknowledged that even when working with his own band students, circumstances would arise that would require spending more time on a lesson than planned. (T III, 131-33). Again, the director had no recollection of the post-observation conference with the respondent.

Exhibit P-18 concerns an observation that did not occur in a class but at a try-out to determine if the chorus was prepared for a performance. The pupils were singing in tune. The songs chosen required the ability to sing in two-part and three-part harmony. (T IX, 3-4). The director included this document as part of his support and testimony on this charge. He was, however, unable to recall his own testimony and the document itself is not included as a part of the bill of particulars for this charge. (T I, 70; T III, 138) (R-95). An observation form dated March 13, 1981, concerns a class involving rhythm and singing. The respondent determined subject mastery by the performance of the pupils. (T IX 5). The director admitted that part of the rationale he gave relative to this charge was not set forth in the bill of particulars he prepared. (T III, 142-43).

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Exhibit P-20, also dated March 13, 1981, covers a class dealing with syncopation. Pupils were graded on their ability to keep the rhythmic pattern and to apply the idea of syncopation to a song. (T IX, 5).

The director had no recollection of a post-observation conference. (T III, 151). Nor did he read the comments made by the respondent relative to his observation report. (T III, 152).

Exhibits P-22 and P-23 deal with a lesson on conducting and the responsibilities of a conductor. Mastery was determined in a subsequent class when the respondent had pupils conduct the class in a singing exercise. (T IX, 6).

Once again the director had no recollection of the post-observation conference. He also stated that his criticisms relative to her lesson plans were based on the fact that he was not physically presented with the plans upon entering the room. There is no claim that the respondent lacked such plans. (T III, 184, 187-88).

On January 5, 1982, the director prepared a classroom observation form (P-26) and a music evaluation form (P-27). The class observed was a chorus class. Responding to statements in these observations, the respondent credibly testified that pupil mastery of subject matter in this chorus class was determined by observing the participation, behavior and attention of her pupils. They mastered the subject matter because they were capable of performing the material. (T IX, 6-7).

Again the director had no recollection of the post-observation conference. (T III, 210-11). More importantly, he admitted that the respondent had received the music for this class only earlier on the day of his observation and that, contrary to his earlier testimony, the respondent did not have two planning periods prior to class in which she could prepare. (T III, 211-12).

III

A summary of testimony pertinent to charges II, III, IV and V would be similar to that concerning charge I, but would add little to consideration of the case. What emerges from the whole record and what is typified by the foregoing recital of testimony

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is the lack of credibility of the music director. And since he was the maker of the observations and evaluations presented in major support of the charges he drew, the truthfulness of these is cast in doubt also.

Beyond the inconsistency of his testimony is the manner in which he testified. I was soon convinced that he came with a prepared text. The record shows several admonitions for going beyond the scope of a question and others for unresponsiveness. Testimonial candor was conspicuously absent. Against this, I found the respondent's testimony to be clear, forthright and credible.

It is possible that a teacher suddenly may lose the ability to perform effectively. It also is possible that a conflict of personalities suddenly may produce a spate of negative evaluations. I am convinced that the latter is the case here.

Considering testimonial demeanor in general and contradictions, admissions and examples of selective recall in particular, I cannot credit the music director's testimony. Mayflower Securities v. Bureau of Securities, 64 N.J. 85, 92-3 (1973) citing Close v. Kordulak Bros., 44 N.J. 589, 599 (1965).

The documentary evidence before me is not persuasive after hearing the testimony of the music director. The proofs might at best show inefficiency in the areas identified in the broad language of the charges. But, as pointed out above, these are charges not of efficiency but of incompetence.

Tape recordings (R-54a through g) introduced by the respondent are inconclusive. The same is true of the testimony of a former principal, August Vogel, who testified that his knowledge of the respondent's performance since the appointment of the music director came mainly through the music director. His own evaluations of the respondent done before appointment of the music director generally were favorable. His opinion that the respondent does not have the skills to carry out the philosophical goals of the district was based, in great measure, on the reports and evaluations of the music director. He identified two pupils, referred to in certain of the music director's criticisms of the respondent's class control, as having had chronic behavior problems extending well beyond their music classes.

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The superintendent of schools testified that he based his decision to file charges against the respondent on evaluations, observations and reports of his administrative and supervisory staff. He did not conduct an observation of the respondent.

There was also testimony tending to show that the onset of negative evaluations of the respondent coincided with the successful prosecution of a grievance against the director of music. Of itself, this fact would not loom large. In the context of this case, however, it reinforces the court's conclusion as to the credibility of the music director.

I have also considered the testimony of two teachers and a former member of the board of education offered by the respondent and do not find it sufficiently material to weigh with the other evidence in the case.

IV

In consideration of the foregoing, I **FIND** that the proofs in this case do not establish by a preponderance of the credible evidence that the respondent is incompetent. The tenure charges certified by the Ridgefield Board of Education against Patricia Nafash are **DISMISSED**. It is so **ORDERED**.

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

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OAL DKT. NO. EDU 9459-82

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

25 JANUARY 1984
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

1-26-84
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

January 30, 1984
DATE

Ronald L. Rubin
OFFICE OF ADMINISTRATIVE LAW

sc/ee

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EXHIBIT LIST

P-1	Job description - Secondary classroom teacher
P-2	Job description - Elementary classroom teacher
P-3	Music evaluation form 10/30/79
P-4	Music evaluation form 11/20/79
P-4A	Music evaluation form 1/2/80
P-5	Memo: Schlee to Anderson 1/3/80
P-6	Memo: Nafash to Anderson 1/15/80
P-7	Memo: Woodcock to Schlee 1/21/80
P-8	Classroom observation form 2/15/80
P-9	1979/80 Annual Performance Report
P-10	Recommendation to withhold increment
P-11	Notice to Nafash 4/11/80 withhold increment
P-12	Letter: Nafash to Schlee 8/28/80
P-13	Letter: Schlee to Nafash 9/22/80
P-14	Eighth grade lesson plans
P-15	Seventh grade lesson plans
P-16	Music evaluation form 11/18/80
P-17	Music evaluation form 11/18/80
P-18	Classroom observation 12/3/80
P-18A	Memo: Schlee to Vogel and Nafash 12/24/81
P-19	Music evaluation form 3/13/81
P-20	Music evaluation form 3/13/81
P-21	Memo: Vogel to Nafash 11/4/81
P-22	Classroom observation form 11/30/81
P-23	Music evaluation form 11/30/81
P-24	Memo: Schlee to Vogel and Nafash 11/4/81
P-25	Memo: Schlee to Vogel and Nafash 12/21/81
P-25A	Vogel to Schlee
P-26	Classroom observation form 1/5/82
P-27	Music evaluation form 1/5/82
P-27A	Vogel/Nafash 4/19/82
P-28	1981/1982 Annual Performance Report
P-29	Withholding increment 1982/1983

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P-31 Eighth grade lesson plans - Mrs. Nafash
P-32 Seventh grade lesson plans - Mrs. Nafash
P-33 Classroom observation 11/16/81
P-35 Vogel note 12/18/81
P-41 Schlee resume
P-42 "Music Thrives" booklet

R-1 12/7/79 Rebuttal to Observation of 10/30/79 - 6th grade 1:42-2:22
R-2 Memo: Woodcock to Schlee re: Nafash 1/21/80
R-3 Grievance re: Typing Duties 10/9/80
R-4 Memo: Nafash to Schlee re: 8th grade musical 10/14/80
R-5 Memo: RTA to Anderson re: Typing Grievance 10/15/80
R-6 Memo: Schlee to Nafash re: 8th grade musical 11/3/80
R-7 Memo: Nafash to Anderson re: 8th grade musical 11/10/80
R-8 Memo: Anderson to Brockel re: Typing Grievance 11/18/80
R-9 Memo: Schlee to Anderson re: 8th grade musical 11/20/80
R-10 Memo: Schlee to Nafash re: March Middle School musical - stolen equipment 11/20/80
R-11 Memo: "To Be Included in Mrs. Nafash file." 12/12/80
R-12 Memo: Faculty Committee to Schlee 12/12/80
R-13 Memo: Nafash to Woodcock re: Rehearsal time for holiday concert 12/22/80
R-14 Memo: Schlee to Music Faculty 2/13/81
R-15 Memo: Anderson to Board re: Nafash health situation 3/24/81
R-16 Anderson Notes 3/19/81
R-17 Letter: Anderson to Nafash re: Medical exam 3/27/81
R-18 Memo: Anderson to Nafash re: Hearing exam 4/15/81
R-19 Memo: Nafash to Woodcock re: use of room 102 5/27/81
R-20 Memo: Woodcock to Dahl et al. re: supervision of Room 102 5/28/81
R-21 Letter: Dr. Tobias to Dr. Rosen 4/28/81
R-22 Letter: Anderson to Nafash re: withholding of increments
R-23 Memo: Nafash to Vogel re: reply to memo dated 11/4/81. 11/14/81
R-24 Memo: Schlee to Vogel and Nafash re: conference 11/4/81
R-25 Memo: Vogel to Schlee re: music concerns 11/5/81
R-26 Observation, grade 7, period 6, by Vogel 11/16/81
R-27 Music Evaluation 9:12 a.m. with 12/4/81 rebuttal without addendum 11/30/81

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R-28	Memo: Schlee to Staff Subject: first day of school 9/11/81
R-29	Memo: Nafash to Schlee and Vogel re: sixth grade lesson plans 1/4/82
R-30	Rebuttal to Evaluation 9:12 a.m. dated 1/15/82 1/5/82
R-31	Memo: RTA to Schlee re: planbooks 2/9/82
R-32	Rebuttal to Teachers Annual Performance Report 4/19/82
R-33	PIPS for 81-82
R-34	Memo: Nafash to Schlee re: Piano in multipurpose room 4/22/82
R-35	Memo: Nafash to Vogel re: his 4/19/82 memo 4/26/82
R-36	Observation 5/7/82
R-37	Rebuttal 6/24/82
R-38	Letter: Sciglitano to Nafash and Offerjost 5/27/82
R-39	Memo: Nafash to Anderson re: stereo speakers 6/1/82
R-40	Memo: Anderson to Nafash 6/2/82
R-41	Memo: re: Vandelism 6/2/82
R-42	RTA to Schlee re: procedural violation of 5/7/82 grievance 6/23/82
R-43	Memo: Schlee to Staff re: end of school meeting 6/28/82
R-44(a)	Staff Schedules and Class Head 81-82
R-44(b)	Staff Schedules and Class Head 80-81
R-44(c)	Staff Schedules and Class Head 82-83
R-45(a)	School Calendars 79-80
R-45(b)	School Calendars 80-81
R-45(c)	School Calendars 81-82
R-46	Exhibit 5 - Record Album - Spring High School Concert
R-47	Policy of Plan Books
R-48(a)	Doctor's Reports - Dr. Lacher
R-48(b)	Doctor's Reports - Dr. Tobias
R-49(a)	Dates of Staff Observations 79-80
R-49(b)	Dates of Staff Observations 80-81
R-49(c)	Dates of Staff Observations 81-82
R-51	P. 23 Id Steckline to Feldman re: Liaison Meeting
R-52	P. 24 - Notebook
R-53(a)-2	Letters Woodcock to Parents re: Hayer Discipline
R-54	Cassette Tapes
R-54(a)	Nov. 18, 1980 - 8th grade chorus 8:30 a.m.
R-54(b)	Nov. 18, 1980 - 8th grade general music 9:12 a.m.
R-54(c)	March 13, 1982 - 6th grade general music 1:45 p.m.

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R-54(d)	March 13, 1981 - 5th grade general music 2:30 p.m.
R-54(e)	7th grade Christmas concert - 1979
	7th grade Spring concert 1980
R-54(f)	Rehearsal Tape - Piano - Christmas 1980
R-54(g)	Piano Rehearsal Tape - Spring 1981
R-55	Observation - McHale of Krause (Nafash)
R-56	Memo: McHale to Krause 11/25/68
R-57	Observation by McHale 1/14/69
R-58	Evaluation 2/29/69
R-59	Letter: Skewes to Krause 6/26/69
R-60	Memo: Skewes to McHale 2/3/70
R-61	Memo: McHale to Krause 9/30/70
R-62	McHale to Skewes 2/16/71
R-63	McHale to Skewes 3/2/71
R-64	Evaluation by McHale 2/25/71
R-65	Observation - Woodcock 1/24/72
R-66	Evaluation - Woodcock 3/10/72
R-67	Observation - Woodcock 11/14/72
R-68	Observation - Woodcock 1/5/73
R-69	Evaluation - Woodcock 1/23/73
R-70	Observation - Woodcock 10/23/73
R-71	Observation - Woodcock 12/3/73
R-72	Evaluation - Woodcock 1/18/74
R-73	Memo: Woodcock to Nafash re: Professional conduct 5/17/74
R-74	Memo Monday 5/20/74
R-75	Note: Ledden to Nafash 4/16/74
R-76	Note: Ledden to Nafash 5/21/74
R-77	Memo: Nafash to Woodcock 5/20/74
R-78	Observation - Woodcock 10/23/74
R-79	Observation - Woodcock 12/13/74
R-80	Evaluation - Woodcock 1/6/75
R-81	Observation - Woodcock 10/22/75
R-82	Observation - Woodcock 2/1/76
R-83	Evaluation - Woodcock 3/4/76
R-84	Observation - Woodcock 5/10/76
R-85	Observation - 6th grade - Schlee 11/30/76

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R-86	Staff evaluation - Schlee 6/23/77
R-87	Memo: Woodcock re: 78-79 salary increments
R-88	Memo: Schlee re: 78-79 salary increments
R-89	Memo: Woodcock to Schlee re: H.S. chorus 12/20/78
R-90	Observation - Schlee 1/25/79
R-91	Schlee 79-80 salary increments
R-92	Memo: re: Curriculum 4/3/79
R-93	Letter: lockett to Nafash 4/27/79
R-97	1978-81 Agreement, Art. 15
R-98A	PIPs for 79-80 - Personal
R-98B	PIPs for 79-80 - Community
R-98C	PIPs for 79-80 - Classroom

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IN THE MATTER OF THE TENURE	:	
HEARING OF PATRICIA NAFASH,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH	:	DECISION
OF RIDGEFIELD, BERGEN COUNTY.	:	
	:	

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

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

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own. The Commissioner is constrained to comment favorably upon the excellence of the judge's analysis of the testimony and evidence as presented herein. The Commissioner is further constrained to observe that said analysis can serve to provide local boards of education and their agents with guidance in carrying out their responsibilities for evaluation and supervision of tenured staff.

Accordingly, the tenure charges certified by the Board are hereby dismissed.

COMMISSIONER OF EDUCATION

MARCH 12, 1984

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INITIAL DECISION
OAL DKT. NO. EDU 4171-83
AGENCY DKT. NO. 119-4/83A

BOARD OF EDUCATION OF THE TOWNSHIP OF PEMBERTON, BURLINGTON COUNTY,
Petitioner
v.
ROBERT E. DOYLE,
Respondent.

APPEARANCES:

Ernest N. Sever, Esq., for the petitioner (Sever & Hart, attorneys)

Joel S. Selikoff, Esq., for the respondent (Selikoff & Cohen, attorneys)

Record Closed: December 14, 1983 Decided: January 26, 1983

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

This matter concerns the seven charges brought against Robert E. Doyle, a teacher with tenure status, which were certified to the Commissioner of Education by resolution of the Board of Education of the Township of Pemberton, Burlington County (hereinafter referred to as "Board"). The respondent requested a hearing and the matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq.

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At the prehearing conference on June 21, 1983, it was agreed to by the parties that the issues in this matter are:

(A) Whether the tenure charges, if true, constitute good cause for removing the respondent from his position, pursuant to the provisions of N.J.S.A. 18A:6-10.

(B) Whether the petitioner complied with the statute as to the statement of evidence, N.J.S.A. 18A:6-11.

Prior to the hearing in the matter, Mr. Selikoff indicated by letter dated July 1, 1983, that the respondent would not pursue Issue B and, therefore, that issue is no longer a contested matter. Also, I issued an order, dated August 1, 1983, permitting Mr. Selikoff to take the depositions of certain administrators and students.

The certified tenure charges filed against Dr. Doyle relate to seven alleged incidents, each involving Dr. Doyle and one or two students, and the charges are being brought pursuant to N.J.S.A. 18A:6-10 et seq. and N.J.S.A. 18A:6-1. During the hearing and in the briefs submitted by the parties, the specific basis for the tenure charges brought against Dr. Doyle was discussed, and I **CONCLUDE** that the Board charged Dr. Doyle with conduct unbecoming a teacher based on the alleged use of force in the disciplining of students in violation of N.J.S.A. 18A:6-1.

The pertinent statute in this matter is N.J.S.A. 18A:6-1 which, in part, provides:

> No person employed or engaged in a school or educational institution, whether public or private, shall inflict or cause to be inflicted corporal punishment upon a pupil attending such school or institution; but any such person may, within the scope of his employment, use and apply such amounts of force as is reasonable and necessary:
>
> (1) to quell a disturbance, threatening physical injury to others;
>
> (2) to obtain possession of weapons or other dangerous objects upon the person or within the control of a pupil;
>
> (3) for the purpose of self-defense; and
>
> (4) for the protection of persons or property;

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> and such acts, or any of them, shall not be construed to constitute corporal punishment within the meaning and intention of this section. . . .

The underlying philosophy of this statute has been described by the Commissioner of Education (hereinafter referred to as "Commissioner") as the right of the student to freedom from offensive bodily touching even though there is not physical harm, In the Matter of the Tenure Hearing of Fredrick L. Ostergren, 1966 S.L.D. 185, 186.

It has been well recognized in this State that N.J.S.A. 18A:6-1 prohibits the touching of students for disciplinary purposes even if the teacher acts without violence and there is no physical harm to the student. The law places a heavy responsibility on teachers to act with self-restraint, and the Commissioner has frequently recognized that a competent teacher does not have to resort to physical force to maintain discipline. See, In the Matter of the Tenure Hearing of Thomas Appleby, 1969 S.L.D. 159, aff'd, State Board of Education, 1970 S.L.D. 449, aff'd, N.J. Sup. Ct., Dkt. No. A-539-70 (App. Div. March 14, 1972); In the matter of the Tenure Hearing of Jacque I. Sammons, 1972 S.L.D. 302; In the Matter of the Tenure Hearing of Ernest Tordo 1974 S.L.D. 97; In the Matter of the Tenure Hearing of William Kittell, 1972 S.L.D. 535; In the Matter of the Tenure Hearing of Walter Kizer, 1973 S.L.D. 505.

The hearing in this matter took place on September 19, 20, 22 and 23, 1983, and the petitioner presented the testimony of 19 witnesses, consisting of 3 teachers, 6 students (the students' ages varied from 13 to 16 years old), 7 administrators, 2 school nurses and the president of the Board. The petitioner did not present the testimony of J.R.,* one of the two students mentioned in Count 4, or of J.M., the student mentioned in Count 7 of the tenure charges filed against Dr. Doyle.

At the conclusion of the petitioner's case, Mr. Selikoff moved to dismiss the charges and argued that the Board had not presented a prima facie case of a violation of N.J.S.A. 18A:6-1 as to any of the seven counts filed against the respondent. Mr. Sever argued that the Board had presented a prima facie case and stated that J.R. and J.M. did

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* Initials will be used instead of the names of the students since they are minors.

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not testify because both of these students had moved out of the school district. After reviewing the arguments of the parties, I concluded that the petitioner had presented a prima facie case as to Counts 1, 2, 3 and 6, that Count 7 should be dismissed since neither J.M. nor an eyewitness testified, that the portion of Count 4 relating to J.R. should be dismissed since neither J.R. nor an eyewitness testified, and that Count 5 should be amended to delete the allegation that Dr. Doyle had pushed D.H. into his seat because there was insufficient proof presented as to that allegation.

After the hearing, but prior to the closure to the record in the matter, Mr. Sever moved for the issuance of an order requiring Dr. Doyle to return to work as a guidance counselor in the adult evening education program. After reviewing the legal memoranda from the parties, I issued an order on November 28, 1983, requiring Dr. Doyle to return to work on December 5, 1983. The matter of Dr. Doyle's returning to work in a different position was also discussed during the hearing but was not pursued by the Board at that time.

After a period of time for the receipt of briefs, the record in this matter closed on December 14, 1983.

At the time of the hearing, Dr. Doyle was 60 years old, a single parent and had been employed by the Board for 13 years. Dr. Doyle has a Ph.D. in Student Personnel and is certified as a counselor and as a coordinator of school personnel services (R-2). No prior disciplinary action had ever been taken against Dr. Doyle by the Board.

The incidents which gave rise to the tenure charges filed against Dr. Doyle took place over a four-year period and occurred after Dr. Doyle was transferred from the high school. Dr. Doyle was transferred twice during that period of time.

All of the remaining charges involve factual issues as to whether or not the circumstances warranted the intervention by Dr. Doyle and whether his actions were within one of the exceptions set forth in N.J.S.A. 18A:6-1. As to Counts 1 and 4, there is also a factual dispute as to whether Dr. Doyle used excessive force when he touched the involved students.

Except for Count 1, the factual issues will have to be determined primarily on the credibility of Dr. Doyle and the student involved in the incident.

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There are numerous school law decisions in which the Commissioner has recognized the need to examine the testimony of children with great caution. See, In the Matter of the Tenure Hearing of William Simpson, 1978 S.L.D. 368, 374, aff'd, State Board of Education, 1978 S.L.D. 377; In the Matter of the Tenure Hearing of John Birch, 1978 S.L.D. 63, 79; In the Matter of the Tenure Hearing of Edward J. Quinn, 1975 S.L.D. 397, 410-11; In the Matter of the Tenure Hearing of Fredrick J. Nittel, 1974 S.L.D. 1269, aff'd, State Board of Education, 1975 S.L.D. 1111.

Since the decision in Palmer v. Bd. of Ed. of Audubon, 1939-40 S.L.D. 183, 188 the Commissioner has frequently stated:

> . . . testimony of children, especially of those ten years of age, against a teacher, whose duty is to discipline them, must be examined with extreme care. It is dangerous to use such testimony against a teacher; it is likewise dangerous not to use it. The necessities of the situation sometimes makes it necessary to use the testimony of school children. If such testimony were not admissible, the children would be at a teacher's mercy because there is no way to prove certain charges except by the testimony of children.

In this matter, all the charges, except Count 1, are based on incidents which occurred when only Dr. Doyle and students were present and, therefore, the Board had to call the students as witnesses to substantiate its charges. In his brief, Mr. Selikoff sought to challenge the testimony of the students because the Board had elected not to present the testimony of other students for corroboration. I do not accept his argument that the testimony of more than one student is needed in order to establish a fact. Nor will I accept Mr. Selikoff's argument that a student's testimony should be disregarded because he or she had a poor recollection of the specific circumstances surrounding the incident. In general, I found that the students' recollections were comparable to those of the adult witnesses who testified in this matter.

As to the remaining tenure charges, each will be discussed separately with the pertinent findings of fact and conclusions of law.

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COUNT 1

This charge alleges that on February 15, 1983, in the school auditorium of the Aletta M. Crichton School, Dr. Doyle grabbed a student, E.F., by his arm and shook him in a rough and violent manner, necessitating the attention of the school nurse. The incident occurred after a school program as students were leaving the auditorium through a double door, while others were waiting to leave. Ruth A. Brower told one of her students, E.F., to go into the hall and retrieve a chair left there by another student. While E.F. was returning with the chair, he was stopped by Dr. Doyle.

E.F. testified that he was carrying the chair by his side when Dr. Doyle grabbed him by his right arm, spun him around, shook him and screamed that he might hurt someone. E.F. was scared and upset, and he started to cry but held back the tears.

E.F. stated that when he was reentering the auditorium, he did not use the same door which was being used by the exiting students. He denied that he bumped into another student, denied that he stumbled and denied that his teacher had to pull him away from Dr. Doyle.

E.F. stated that he had bruises in the shape of fingers on his arm and that Ms. Brower sent him to the school nurse, who put an ice pack on his arm. According to E.F., he was afraid to go to school the next day and was removed from Dr. Doyle's career class because he was afraid that Dr. Doyle might still be angry with him.

Ms. Brower stated that she watched E.F. return to the auditorium and that E.F. was carrying the chair in front of him. Ms. Brower saw E.F. trip over a student and say something; however, she did not think that E.F.'s movements were endangering either himself or any other student. According to Ms. Brower, Dr. Doyle came storming into the room, grabbed E.F., turned him around and asked E.F. what he was doing and shouted that he was endangering other students. Ms. Brower stated that she had to pull E.F. away from Dr. Doyle. E.F. told Ms. Brower that his arm hurt, and she took him back to her classroom and called the principal.

While she was waiting for the principal, Ms. Brower stated that Dr. Doyle came up to her in a rage and she refused to speak to him.

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Both the principal, Gerald DeClementi, and the vice principal, Irving Bolden, Jr., arrived at Ms. Brower's classroom. The principal took E.F. to see the school nurse and Ms. Brower spoke to Mr Bolden about the incident. The next day, Ms. Brower saw bruises, like finger marks, on E.F.'s arm.

According to Ms. Brower, E.F. was in Dr. Doyle's career awareness class which was held twice a month. Prior to the incident, Dr. Doyle complained to her that E.F. was not taking notes in his class and she instructed her students to pay attention to Dr. Doyle and to take notes. After the incident, E.F. told Ms. Brower that he was afraid to be in Dr. Doyle's class and he was excused.

In her written report about the incident (P-3), Ms. Brower did not mention that she had to pull E.F. away from Dr. Doyle, nor did she indicate that Dr. Doyle came to her classroom in a rage. In her report, Ms. Brower stated that the respondent tried to apologize and when she refused to speak to him, he yelled "we'll see about that" (P-3).

Barbara Sauer, a teacher who was in the auditorium, saw E.F., who was carrying a chair in front of him, enter the auditorium and she thought E.F.'s movements were unsafe because he was walking against the student traffic. Ms. Sauer started to go toward E.F. so that she could tell E.F. to be careful when she saw that Dr. Doyle was about to approach E.F. Ms. Sauer did not see what occurred thereafter.

The school nurse, Willette Jones, testified that E.F. was brought to her office by the principal on February 15, 1983, and that he had mild contusions—bruises in the shape of fingerprints—on his right arm (P-1, P-6). E.F. was upset and he told Ms. Jones that Dr. Doyle grabbed and shook him. E.F. appeared to be uncomfortable with the attention he was receiving. Ms. Jones placed an ice pack on the contusions. Ms. Jones saw E.F. on the next day, not because of his injury but because she anticipated that the principal would want a full report.

Sometime later on the day of the incident, Dr. Doyle met with Mr. Bolden and Mr. DeClementi. During the meeting, Mr. Bolden heard the respondent say that he tried to prevent a student from falling down and deny that he touched E.F. even after he was confronted with the statements of Ms. Brower and the school nurse. Mr. Bolden described Dr. Doyle as being upset by the accusation.

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Mr. DeClementi stated that Ms. Brower accused Dr. Doyle of "abusing" E.F. by grabbing and shaking E.F. in a violent manner. Mr. DeClementi spoke to E.F. on February 15, 1983, and E.F. told him that he had tripped over another student, that Dr. Doyle had hurt him by grabbing and shaking him, and that Ms. Brower had to pull him away from Dr. Doyle. At the time Mr. DeClementi spoke to him, E.F. was very upset.

When Mr. DeClementi met with Dr. Doyle on February 15, 1983, Dr. Doyle denied touching E.F. and the respondent refused to prepare a statement regarding the incident.

Mr. DeClementi called E.F.'s mother on February 15, 1983, to tell her about the incident and to assure her that he would investigate the matter. Later, in his presence, Dr. Doyle also called E.F.'s mother and assured her that he had not hurt E.F.

On the next day, Dr. Doyle gave Mr. DeClementi a written statement (R-3) in which he admitted that he had touched E.F. On that day, Mr. DeClementi met with the parents of E.F. and at Mr. DeClementi's request, Dr. Doyle attended part of the meeting. Dr. Doyle read his statement but E.F.'s father was angry and was not satisfied with Dr. Doyle's explanation. E.F.'s father then spoke to Robert J. Moore, Assistant Superintendent of Schools, about the incident.

Mr. DeClementi testified that prior to the E.F. incident, Dr. Doyle became angry about a letter criticizing his performance and acted in an unprofessional manner. Dr. Doyle "snapped" at Mr. DeClementi, put the letter up to his face and screamed at him. According to Mr. DeClementi, this occurred in either September or October 1982.

Robert J. Moore testified that he met with Dr. Doyle regarding the E.F. incident after he spoke with Mr. DeClementi and E.F.'s parents. Mr. Moore heard Dr. Doyle's account of what happened and told him again not to touch students (P-4). Mr. Moore had also met with Dr. Doyle after the D.H. incident (Count 5).

Mr. Moore admitted that Dr. Doyle was entitled to have a union representative present at the meeting but that Dr. Doyle was not given the opportunity to arrange for a union representative. The respondent did not file a grievance about the matter.

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On his own behalf, Dr. Doyle stated that after the school program on February 15, 1983, he was in the hallway when he saw a tall boy, carrying a chair in front of him, enter the auditorium while small girls were leaving the room. He saw this student trip over a girl and almost fall and then proceed to run in an erratic manner. Dr. Doyle yelled at the boy to stop running a couple of times but the student did not stop. Since he was concerned about the safety of the boy as well as the other students, the respondent followed the boy and put his hand on the student's left shoulder and turned him around. Dr. Doyle stated that he used only the amount of force necessary to stop and turn the boy around and denied that he shook the student. Dr. Doyle stated that he then released E.F. and he denied that Ms. Brower pulled E.F. away from him. When he saw Ms. Brower, he became aware that E.F. was in one of his career awareness classes. E.F. did not say he was hurt, and E.F. and Ms. Brower left.

A few minutes later, Dr. Doyle went to see Ms. Brower in her classroom to explain what had occurred. According to Dr. Doyle, Ms. Brower was angry, told him to go away, said that she didn't want to speak to him and closed the door of her classroom. Dr. Doyle admitted he became angry when she did this.

Sometime after the incident, Dr. Doyle received a call that Mr. DeClementi wanted to see him. Without giving him any advance notice or advising him that he could bring a union representative, Mr. DeClementi asked Dr. Doyle what had occurred. Mr. DeClementi claimed that Dr. Doyle had abused a student and the respondent denied it. Dr. Doyle stated that he did not deny touching E.F. Mr. DeClementi asked Dr. Doyle to submit a report and Dr. Doyle said that he felt there was no reason for a report. Later, Dr. Doyle returned to the principal's office and asked to speak to E.F. Mr. DeClementi placed the call to E.F.'s residence, and Dr. Doyle spoke briefly to E.F.'s mother and then he spoke to E.F., who accused him of grabbing his arm and hurting him. Dr. Doyle denied that he spoke to E.F.'s mother regarding the incident or that E.F. was taken out of his class.

As to the testimony of Mr. DeClementi about his reaction to a letter, Mr. Doyle said that he was mad because he did not think the criticism set forth in the letter (R-7) was appropriate, because the principal wrote the letter without first talking to him and because the principal had sent copies of the letter to various administrators.

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According to Dr. Doyle, the principal had the reputation of being a hard person to work for and he felt that Mr. DeClementi had an animosity to him.

Sometime after the incident, Dr. Doyle was called, without any advance notice or opportunity to bring a union representative to a meeting with Mr. Moore. According to Dr. Doyle, Mr. Moore stated that they were meeting about another incident and he ignored Dr. Doyle's attempt to explain what had occurred.

Dr. Doyle said that he did not understand what was prohibited by the corporal punishment statute, N.J.S.A. 18A:6-1, until after the tenure charges were filed and he discussed the matter with his attorney. Dr. Doyle stated that he now understands that touching is prohibited except when it is necessary to protect yourself or others. Dr. Doyle felt his action in the E.F. incident was justified and consistent with law.

Based on the testimony, I **FIND** that the facts pertinent to this charge are:

(1) E.F. was entering the auditorium, walking against the student traffic. He was carrying a chair in front of him and he tripped over one student prior to being stopped by Dr. Doyle.

(2) Dr. Doyle shouted to E.F. to stop but either E.F. did not hear him or was unaware that he was being addressed.

(3) When E.F. did not stop, Dr. Doyle placed his hand on E.F.'s right forearm to stop and turn him around. Dr. Doyle continued to hold E.F.'s arm while he shouted that E.F. was endangering himself and other students by walking rapidly through students who were going in the opposite direction.

(4) When E.F.'s teacher, Ms. Brower, objected to Dr. Doyle's actions, Dr. Doyle released E.F.

(5) E.F. was frightened and there were bruises on his arm in the shape of Dr. Doyle's fingers.

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(6 Dr. Doyle initially denied touching E.F. and later said that he touched E.F. but denied that he had used enough force to hurt him.

(7) Because of the incident, E.F. requested to be and was taken out of Dr. Doyle's class.

Based on the testimony, I **CONCLUDE** that the situation warranted the intervention of Dr. Doyle but that there was no imminent peril and therefore no need to physically stop E.F. After E.F. failed to respond to the oral command, Dr. Doyle should have tried to get in front of E.F. to stop him or if he could not, he should have asked another teacher to assist him. I **FIND** that by physically stopping and turning him, Dr. Doyle exposed E.F. to injury. E.F. could have lost his balance and injured himself either by falling or by poking himself with the chair he was carrying. Therefore, I **CONCLUDE** that Dr. Doyle used excessive force and that his action was in violation of N.J.S.A. 18A:6-1.

COUNT 2

This charge alleges that on May 28, 1982, Dr. Doyle grabbed B.G. by the arm, pulled him from his place in line and took him to the rear of said line. This incident occurred in the hallway of the Newcomb Middle School, near Dr. Doyle's office. At the time, Katherine Rudroff's class, including B.G., was in the hallway going to the lavatories.

B.G. testified that he was in line and that he and some other students were clowning around. Dr. Doyle grabbed B.G. by the shoulders and pulled him to the end of the line. When B.G. complained about Dr. Doyle's action and said that other boys were also fooling around in the line, Dr. Doyle told B.G. to behave or he would send him to the principal's office. B.G. said that he was not hurt but that he was angry and embarrassed. There were no marks on B.G.'s shoulder and he did not ask to see the nurse. When he went home, B.G. told his parents what had occurred. B.G. was not afraid of Dr. Doyle and he did not have Dr. Doyle as his guidance counselor.

On cross-examination, B.G. was unable to name the other students that were in line near him.

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Ms. Rudruff stated that she was in the hallway but was around the corner when the incident occurred between Dr. Doyle and B.G. When she came back, she saw that Dr. Doyle had his hand on B.G.'s shoulder and B.G. looked as if he had been disciplined. Ms. Rudruff asked Dr. Doyle what happened and he told her that B.G. had kicked his door; later Dr. Doyle told her that B.G. had kicked other students.

Ms. Rudruff stated that she sometimes sat in when Dr. Doyle was teaching her class and that she had never had a concern regarding the physical safety of her students while Dr. Doyle was there. However, she stated that Dr. Doyle had a problem maintaining discipline when he taught her class and she thought Dr. Doyle had an uneven temperment.

Peter T. Brescia, the principal of Newcomb Middle School, stated that on May 29, 1982, B.G.'s father, a member of the Board, came to see him regarding the incident. At the principal's request, Dr. Doyle joined the meeting and B.G.'s father told Dr. Doyle that he did not want him to touch his son. Mr. Brescia later had a meeting with Dr. Doyle and the respondent's union representative about the B.G. incident. During this meeting, Dr. Brescia told Dr. Doyle that he did not want him to touch a student unless it was absolutely necessary, and the union representative stated that Dr. Doyle should not touch a student even if there was a fight. Mr. Brescia sent Dr. Doyle a memorandum confirming what was said at the meeting (P-9).

Mr. Brescia stated that the school policy was that teachers should not touch students even in a polite manner. If a student was unruly, the teachers were instructed to send the student to the principal's office or call for help. The only time a teacher was justified in touching a student was if there was an emergency and either the teacher or student was in danger of injury.

The B.G. incident was the third such incident involving Dr. Doyle in the two school years that Dr. Doyle was at the Newcomb Middle School. Mr. Brescia concluded that Dr. Doyle had no reason to touch B.G. and he felt that a pattern of touching was developing and he questioned Dr. Doyle's judgment in deciding when he was allowed to touch a student.

Vincent Fynan, assistant principal at the Newcomb Middle School, stated that Dr. Brescia asked him to sit in at both meetings with Dr. Doyle as a witness since there had been prior incidents. Mr. Fynan recalled that Mr. Brescia told Dr. Doyle not to touch students.

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Dr. Doyle testified that when he came out of his office he saw that B.G. was trying to get into a line of boys and he saw B.G. kick other boys in the line. The respondent told B.G. to stop it or cool it and when B.G. continued, he placed his hands on B.G.'s shoulder and gently moved B.G. to the end of the line. B.G. started to argue with him about going back to his place in line and Dr. Doyle told him to behave or he would be sent to the principal's office. According to Dr. Doyle, he took this action because he was afraid that one of the boys might be injured or that a fight might develop.

About three days later, Dr. Doyle was asked to attend a meeting with a board member about a problem. B.G.'s father was there and he controlled the meeting. B.G.'s father told Dr. Doyle not to touch his son and accused him of manhandling students. At the time of the meeting, Dr. Doyle could not recall B.G. and asked to see him. When B.G. came into the office, Dr. Doyle recognized the boy. Sometime before the end of the meeting, Dr. Doyle left because he got mad about how the meeting was being handled. After the meeting, Dr. Doyle prepared a report about what occurred between him and B.G. (R-4).

Thereafter, Dr. Doyle asked for a meeting with the principal and his union representative. During this meeting, the principal told him not to touch students but did not tell him what was wrong about how he handled the B.G. incident. Dr. Doyle recalled that the union representative told him not to touch the students even if a fight occurred. Dr. Doyle considered that this statement was made as a joke; however, the principal got upset by the remark. Dr. Doyle denied that he got a copy of Mr. Brescia's letter regarding the B.G. incident (P-9).

Based on the testimony, I **FIND** that the facts pertinent to this charge are:

(1) On May 28, 1982, B.G. and several other students were fooling around, pushing and shoving each other in a line outside of Dr. Doyle's office.

(2) Dr. Doyle told B.G. to quiet down and when B.G. did not obey, Dr. Doyle placed his hands on B.G.'s shoulders, pulled him out of the line and took him to the end of the line.

(3) B.G. was not physically hurt but he was both angry and embarrassed by Dr. Doyle's action.

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(4) No other teacher was present in that portion of the hallway at the time.

(5) B.G.'s father was a member of the Board at the time of the incident.

(6) Dr. Doyle had been warned previously not to touch students by Mr. Brescia.

Based on the testimony, I **CONCLUDE** that Dr. Doyle was not justified in physically moving B.G. to the end of the line. Although Dr. Doyle saw a disturbance, there was no imminent peril and Dr. Doyle should have continued his effort to quell the disturbance by oral directions or by calling for assistance. Therefore, I **CONCLUDE** that Dr. Doyle's action was in violation of N.J.S.A. 18A:6-1.

COUNT 3

This charge alleges that on March 25, 1982, the respondent grabbed A.F. and held her against the doors as other students were exiting the school. This incident occurred at the end of the school day in the Newcomb Middle School, while Dr. Doyle was on hall duty.

A.F. admitted that she had cut into another line of students and that Dr. Doyle called her out of the line and told her to stop cutting in. A.F. said "okay" and went back into line. Dr. Doyle then pulled her out of the line by taking hold of her left arm. He pushed her against the wall and held both of her arms while he stood in front of her. A.F. did not recall what Dr. Doyle had said to her but after all the students had left, Dr. Doyle permitted her to go.

A.F. stated that she was not hurt and that she was not afraid of Dr. Doyle. A.F. denied that she was running or bumping into other students or Dr. Doyle, and denied that Dr. Doyle had any reason to pull her out of the line. That evening, A.F. told her mother about the incident and the next day the principal asked to see her about the matter. A.F. did not have Dr. Doyle as a guidance counselor or teacher.

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The principal, Mr. Brescia, testified that at the end of the school day on March 25, 1982, he saw Dr. Doyle and a student standing side by side along the wall of the entrance to the school. The student, A.F., looked upset, as if she had been crying, and Dr. Doyle did not let the student leave until all of the other students had left the building. That afternoon Mr. Brescia received a call from A.F.'s mother complaining that her daughter had been restrained by Dr. Doyle and that he had held A.F. against a wall.

On March 26, 1982, Mr. Brescia spoke to A.F. and she admitted that she had cut into a line of students and said that Dr. Doyle pulled her out of the line and held her against a wall by holding both of her arms. Dr. Doyle told A.F. that she was causing a hazardous situation.

According to Mr. Brescia, he spoke to Dr. Doyle and sent him a letter stating that the respondent should not touch students (P-10). Mr. Brescia did not take Dr. Doyle off the hall duty assignment after the A.F. incident.

Dr. Doyle stated that he saw A.F. walking fast, bumping into students and cutting into lines, and that he yelled out for her to stop cutting into lines. A.F. did not obey and Dr. Doyle put himself in front of the doors so that he could speak to her since he was concerned that someone could be knocked down. A.F. bumped into him and Dr. Doyle held her for a minute so that she would not fall. Dr. Doyle did not talk to A.F. and she immediately passed him and went out of the school. Dr. Doyle denied that he pulled A.F. out of the line, denied that he held her and denied that he did not permit her to leave until all the students had left the building.

According to Dr. Doyle, he spoke to the principal the next day and was told that Mr. Brescia had received a telephone call from A.F.'s mother. Mr. Brescia did not listen to the respondent's version of what had occurred, nor did he ask Dr. Doyle to submit a written statement. Dr. Doyle stated that he did not see a copy of the letter addressed to him from Mr. Brescia regarding the incident (P-10) until after charges had been brought against him.

At the hearing, Dr. Doyle said that he would now act differently if confronted with the same situation. He would not have gotten in front of A.F. but would have just tried to get her name so that he could report the matter.

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Based on the testimony, I **FIND** that the facts pertinent to this charge are:

(1) Dr. Doyle physically took A.F. out of the line of students leaving the school after she did not obey his order not to cut into other lines.

(2) Dr. Doyle did not let A.F. leave until the other students had left the building, and A.F. was upset but not hurt by Dr. Doyle's action.

As to this incident, the testimony of Dr. Doyle is in direct conflict with that of A.F. The only other person who saw part of the incident was Mr. Brescia and his testimony is more consistent with that of A.F. Prior to the incident, A.F. did not have Dr. Doyle as a teacher or counselor and there was no reason presented as to why she would lie about what occurred; therefore, even though I observed a certain amount of hostility during her testimony, I accept A.F.'s version of what occurred.

I **CONCLUDE** that the circumstances did not warrant the action taken by Dr. Doyle, that there was no imminent peril to any student and that Dr. Doyle's action was in violation of N.J.S.A. 18A:6-1.

COUNT 4

This charge now reads that on March 19, 1981, Dr. Doyle struck a student, V.R., with his foot, during a guidance class at the Newcomb Middle School.

V.R. testified that on March 19, 1981, she was sitting in the front row and that Dr. Doyle was walking back and forth in front of the class. V.R. had her legs stretched out in front of her and Dr. Doyle tripped over her legs, almost lost his balance, but he did not fall. Dr. Doyle then kicked her legs and shouted at her to keep her legs in. V.R. testified that she was not hurt and that Dr. Doyle sent her out of the room. In the past, Dr. Doyle had disciplined her and this was not the first time he had sent her out of the class to stand in the hallway.

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While she was in the corridor, V.R. testified that she saw Dr. Doyle push another student, J.R., into his seat and that she saw Dr. Doyle raise his hand as if he were going to hit J.R. V.R. could not see whether or not Dr. Doyle struck J.R. since her vision was blocked. After J.R. was sent out of the room, V.R. and J.R. went to the principal's office to sit.

On cross-examination, V.R. stated that she thought Dr. Doyle should not have disciplined her on March 19, 1981, and that she did not like the respondent. She admitted that her legs were an obstruction and that Dr. Doyle could have hurt himself by falling over her legs. V.R. also admitted that in her deposition she stated that she saw Dr. Doyle hit J.R.

Mr. Fynan stated that he saw V.R. sitting in the principal's office on March 19, 1981, and asked why she was there. V.R. told him that Dr. Doyle had kicked her legs. Mr. Fynan also spoke to J.R. and asked both students to write down what had happened. Mr. Fynan gave these statements to Mr. Brescia and stated that later these statements could not be found and he assumes that they were thrown away.

Mr. Brescia testified that Dr. Doyle told him that V.R. had her legs out in the aisle and that he asked V.R. to pull her legs in and when she did not respond, Dr. Doyle moved V.R.'s legs out of the way with the instep of his foot. V.R. told Mr. Brescia that Dr. Doyle kicked her legs but that he did not use much force and she was not hurt. Mr. Brescia advised Dr. Doyle orally and in writing (P-12) that if his class was disruptive he should report the incident to the teacher or to one of the administrators and that Dr. Doyle should not touch a student.

Dr. Doyle testified that V.R. was talking in his class and he told her to sit in the front row. Dr. Doyle stated that he was writing on the blackboard and walking back and forth in front of the class and that he tripped on V.R.'s legs. As he checked his fall, Dr. Doyle moved V.R.'s legs out of the way with the instep of his foot. Dr. Doyle then told her to leave the room. Mr. Brescia discussed the matter with him and read to Dr. Doyle the letter he had prepared regarding the incident (P-12). Dr. Doyle submitted a response (R-5) and received nothing back from the principal.

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Dr. Doyle stated that if V.R. were his student today, he would have contacted her parents about her attitude in class rather than trying to cope with her himself.

As to this incident, I do not find that Dr. Doyle's testimony is credible. I do not believe that after he tripped over V.R.'s legs and was in the process of regaining his balance, he was able to gently and intentionally move V.R.'s legs out of the way.

Based on the testimony, I **FIND** that the facts pertinent to this charge are:

(1) V.R. had her legs stretched out in front of her and Dr. Doyle tripped over her legs and almost fell down.

(2) Dr. Doyle, without thinking, kicked her legs out of the way.

(3) V.R. was not hurt by Dr. Doyle's action.

Having considered the facts, I **CONCLUDE** that Dr. Doyle's action shows a lack of restraint which is not excusable in light of the prior warnings he had received from Ms. Lucas and Mr. Moore (see, Counts 5 and 6) regarding the touching of students. Therefore, I **CONCLUDE** that Dr. Doyle's action was in violation of N.J.S.A. 18A:6-1.

Count 5

This charge now alleges that on June 3, 1980, the respondent slapped the hand of D.H., a student in his career class at the Isaiah Haines School.

D.H. testified that at the start of the class on June 3, 1980, the students were unruly and that Dr. Doyle was trying to settle down the class and that he tried to help Dr. Doyle by yelling either "quiet down" or "yo" and by whistling. According to D.H., he was standing a couple of feet away from Dr. Doyle when he placed his fingers in his mouth and whistled. He admitted that it was a loud and shrill whistle and that Dr. Doyle was surprised. Dr. Doyle turned around, took a couple of steps and slapped D.H.'s hands and face. D.H. said he had red welts on his hands and face and that sometime later he was

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sent to see the nurse who put an ice pack on his face and hands. That evening D.H. told his mother about the incident. Several days later, Dr. Doyle questioned him as to what he told his mother and Dr. Doyle said it was his fault. D.H. was surprised by Dr. Doyle's action but he was not afraid and remained in Dr. Doyle's class.

Rosemary Danbury, a nurse employed at the Isaiah Haines School, stated that she saw D.H. after the incident, and that his left hand was slightly red (P-14). D.H. told her that Dr. Doyle hit him on the hand. Because D.H. asked her for treatment, Ms. Danbury placed an ice pack on the hand but indicated that she felt no treatment or follow-up was necessary. At the request of his mother, Ms. Danbury saw D.H. on June 5, 1980, and assured his mother that D.H. was all right. According to Ms. Danbury, D.H. liked to visit the nurse's office and she felt that he wanted to get out of his classes.

Patricia Lucas, the principal of the Isaiah Haines School, testified that Dr. Doyle reported the incident involving D.H. and that D.H. told her that Dr. Doyle slapped him on his hands in order to stop him from whistling. In her letter, she stated that Dr. Doyle admitted to her that he slapped D.H. on the hand and that she concluded he used undue force (P-17).

Ms. Lucas stated that Mr. Doyle was assigned to the Isaiah Haines School for two school years and during that period there were three incidents involving Dr. Doyle and students and that these were the only cases of alleged corporal punishment during that period. After each incident, Ms. Lucas met with Dr. Doyle and confirmed in writing that he should not touch a student for disciplinary purposes and that the only time a teacher should touch a student was when his or another person's life was endangered (P-17, P-18, P-20).

Ms. Lucas denied that there was any personal animosity between her and Dr. Doyle but admitted that they had professional differences. Ms. Lucas did not recall why Dr. Doyle was transferred from her school but thought that the change was a good idea.

Frank Vanella, Director of Elementary Education, stated that he was present at a meeting regarding the D.H. incident at the request of Mr. Moore, and that both Dr. Doyle and his union representative were there. During the meeting, Dr. Doyle stated

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that he felt that he had acted correctly in the D.H. incident and that he did not feel his action constituted corporal punishment. Mr. Moore stated that the D.H. incident was not the first occurrence and he admonished Dr. Doyle and told the respondent that he should not touch students.

Mr. Moore testified that he met with Dr. Doyle after the D.H. incident and Dr. Doyle explained what occurred and denied that he used excessive force. Mr. Moore stated that Dr. Doyle was not receptive to his suggestions on how the matter should have been handled. According to Mr. Moore, prior to this meeting, he had had several informal talks with Dr. Doyle about not touching students.

After meeting with Dr. Doyle, Mr. Moore concluded that Dr. Doyle's action was not justified and was in violation of the corporal punishment statute. In his report to the Superintendent of Schools, Mr. Moore recommended that disciplinary action be taken against Dr. Doyle (P-13). No disciplinary action was taken.

On his own behalf, Dr. Doyle stated that while he was trying to bring the class to order, D.H. got up and whistled in a shrill manner a few inches from his face. Dr. Doyle stated that he was shocked, frightened and surprised and automatically used his hand to push D.H.'s hands away from his face. He stated that he did not consider this to be a slap and that he used a nominal amount of force.

Having heard the testimony of Dr. Doyle and D.H., I question the credibility of each. I do not believe Dr. Doyle's testimony that D.H. stood within a few inches of his face when he whistled, nor do I believe D.H.'s testimony that he was trying to help Dr. Doyle bring the class to order by yelling and whistling.

Based on the testimony, I **FIND** that the pertinent facts are:

(1) Dr. Doyle's career class was in chaos and Dr. Doyle was trying to bring the class to order when D.H. stood up and yelled and whistled, thereby adding to the disruption.

(2) D.H. was standing behind and a couple of feet away from Dr. Doyle, and his action both startled and surprised Dr. Doyle.

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(3) Dr. Doyle turned around and slapped D.H.'s hands in order to push them away from his face. The respondent's action probably also bruised D.H.'s face because D.H.'s hands were by his mouth. Dr. Doyle did not intend to injure or punish D.H. but was responding to the noise which was being made by D.H.

(4) Both Ms. Lucas and Mr. Moore had previously discussed with Dr. Doyle the use of force in disciplining students.

Having considered the facts, I **CONCLUDE** that Dr. Doyle's action shows a lack of restraint and a use of excess force which is not excusable in light of the warnings he had previously received from the principal and Mr. Moore regarding the touching of students. Therefore, I **CONCLUDE** that Dr. Doyle's action was in violation of N.J.S.A. 18A:6-1.

COUNT 6

This charge alleges that on January 10, 1980, the respondent grabbed a student, H.B., by the neck and pushed him in his seat during a guidance class in the Isaiah Haines School.

H.B. testified that Dr. Doyle refused to give him permission to sharpen his pencil during class and told him to remain seated. When H.B. got up to sharpen his pencil, Dr. Doyle grabbed him, squeezed his neck, and pushed back into his chair.

H.B. thought that Dr. Doyle was wrong and he told the principal, Ms. Lucas, what Dr. Doyle had done. H.B. was not hurt, did not go to see the nurse, was not afraid of the respondent and remained in Dr. Doyle's class.

On cross-examination, H.B. admitted that he prepared a note regarding the incident in which he stated that Dr. Doyle threw him into his chair and admitted that it was an exaggeration and was written when he was angry. Additionally, during his deposition, H.B. stated that he was not pushed but was put into his chair.

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Patricia Lucas testified that the H.B. incident was the second incident involving Dr. Doyle. The first incident involved J.M. (Count 7), and it was Ms. Lucas' conclusion that Dr. Doyle used undue force to get J.M. out of the classroom. Ms. Lucas reprimanded the respondent for his action, as well as for leaving his class alone while he brought J.M. to her office (P-20). As to the incident involving H.B., it was Ms. Lucas' recollection that H.B. reported the matter to her and after talking to both Dr. Doyle and H.B., it was her opinion that Dr. Doyle used unnecessary force.

Dr. Doyle stated that after he had told H.B. to stay in his seat, he saw that H.B. was getting up and he put his hand on H.B.'s shoulder. He stated that without using much force, he kept H.B. seated. He denied that he grabbed or pushed H.B. Dr. Doyle said that his action was not premeditated, that he was not trying to punish or hurt H.B. and that H.B. was not hurt. The respondent's motivation was to get H.B. to obey his directive. Dr. Doyle admitted that in retrospect, he should not have touched H.B. and stated that he did so because he did not have a full understanding of the prohibitions contained in N.J.S.A. 18A:6-1.

Based on the testimony, I **FIND** that the pertinent facts are:

(1) Dr. Doyle used his hand to prevent H.B. from getting up after he had given H.B. an order to remain in his seat.

(2) H.B. decided that he had to sharpen his pencil and defied Dr. Doyle's order to remain seated.

(3) H.B. was angered but not physically hurt by Dr. Doyle's action. Dr. Doyle did not intend to either punish or hurt H.B.

Having considered the facts, I **CONCLUDE** that Dr. Doyle's action was in violation of N.J.S.A. 18A:6-1.

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CHARACTER WITNESSES

Ina Matthews stated that she was employed by the Board as a teacher from 1960 to 1982 and that it was her experience that guidance counselors had a problem controlling a class since they were not the class's regular teacher.

Ms. Matthews worked with Dr. Doyle at the high school and at the Newcomb Middle School and found him to be able, patient and considerate when dealing with students. Dr. Doyle told her about the incidents with E.F. and B.G.

While she was employed by the Board, Ms. Matthews was accused on two occasions of improperly touching a student. Ms. Matthews stated that it is usually not necessary for a teacher to touch a student.

Dr. Dominick D'Nunzio testified that Dr. Doyle was hired by the Board to handle a new program at the high school. While Dr. Doyle was there, he had an even temperament and had good rapport with the administration and students.

Beatrice Lesniak, a third grade teacher employed by the Board, stated that Dr. Doyle would come into her class three times a week to work with students having problems and that Dr. Doyle worked well with her students. Ms. Lesniak stated that there was no incident of improper touching of students while Dr. Doyle was in her class.

CONCLUSION

In closing, Mr. Selikoff argued that the charges should be dismissed since the Board had not shown that Dr. Doyle's use of force was premeditated and intended to inflict pain or punishment and the facts show only a number of isolated instances involving a minimal amount of force.

As to all the incidents except for the matter involving H.B., Mr. Selikoff argued that the respondent acted in situations where a dangerous situation existed and he felt that action was necessary in order to protect students and himself from harm and, therefore, his actions are protected by the exceptions set forth in N.J.S.A. 18A:6-1. As to

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the H.B. incident, Dr. Doyle admitted that he had not handled the matter properly but that this one incident was not flagrant and showed simply a lack of poor judgment on the part of Dr. Doyle and, as such, the incident did not warrant dismissal or the imposition of any disciplinary sanctions on Dr. Doyle.

Mr. Selikoff argued that in determining whether or not to impose any penalty on Dr. Doyle, the matter should be considered pursuant to the standards set forth in In re Fulcomer, 93 N.J. Super. 404 (App. Div. 1967) rather than the standard used in Redcay v. State Board of Education, 130 N.J.L. 369 (Sup. Ct. 1943), aff'd, 131 N.J.L. 326 (E.&A. 1944).

In remanding the matter regarding Mr. Fulcomer to the Commissioner, the Appellate Division stated that the penalty to be imposed on the teacher "should be based upon the Commissioner's findings as to the nature and gravity of the offenses under all circumstances involved, any evidence as to provocation, extenuation or aggravation, and should take into consideration any harm or injurious effect which the teacher's conduct may have had on the maintenance of discipline and proper administration of the school system," Fulcomer at 422, and also advised the Commissioner to take into consideration "the impact of the penalty on appellant's teaching career, including the difficulty which would confront him, as a teacher dismissed for unbecoming conduct, in obtaining a teaching position in this State", Id. at 421.

Upon reconsideration, the Commissioner evaluated the two incidents that occurred on one day and determined not to remove Mr. Fulcomer. The Commissioner noted that although other incidents had been mentioned there was inconclusive and insufficient proof as to those matters, 1967 S.L.D. 215, aff'd by the App. Div., 1967 S.L.D. 220.

Although I agree with Mr. Selikoff's argument that the standards used in the Fulcomer case should be considered in this matter, I also **CONCLUDE** that the standard set forth in Redcay is also applicable. Although Mr. Selikoff correctly points out that there is a factual difference between Redcay and this matter, the "numerous incidents" standard set forth in the case is equally applicable in matters where only one type of misconduct is alleged.

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In closing, Mr. Severs stated that although the Board recognized that Mr. Doyle may have a problem getting a new job, the Board's primary duty is to protect students. In this matter, Dr. Doyle persisted in touching students over an extended period of time even though he was repeatedly warned by a number of administrators not to engage in such conduct. Mr. Sever argued that the Board had proved the charges of corporal punishment and conduct unbecoming a teaching staff member and that Dr. Doyle should be discharged.

After reviewing all the facts in this matter, I **CONCLUDE** that the charges, Counts 1 through 6, viewed individually would not warrant any disciplinary action being taken against Dr. Doyle; however, the charges show a pattern of the use of force for disciplinary purposes by Dr. Doyle and a persistence by Dr. Doyle of using force even though he was advised on numerous occasions by principals or other administrators that his conduct was not proper and was in violation of N.J.S.A. 18A:6-1.

Dr. Doyle's testimony that he did not fully understand the prohibitions contained in N.J.S.A. 18A:6-1 until after the charges were filed is not credible. The statute is quite clear and the facts show that Dr. Doyle was counseled about the matter on numerous occasions. The principals and administrators who testified are the same persons who talked to Dr. Doyle over the years, and from their testimony it appears they had a clear understanding of the statute and that they gave Dr. Doyle repeated warnings regarding his use of force for disciplinary purposes.

Although the respondent has shown that Dr. Doyle's dismissal will probably have an adverse impact on his future career and that the respondent's action had very little effect on the general maintenance of discipline and proper administration of the school system, I must **CONCLUDE** that the interest of the students is paramount and the pattern of unacceptable conduct warrants the removal of Dr. Doyle from his position.

At the hearing, and in his brief, Mr. Selikoff mentioned that the Board could not have considered the charges to be sufficient to warrant removal since the Board wanted Dr. Doyle to return to work. Mr. Sever made it clear that the Board's action was prompted by its concern about the fact that Dr. Doyle was receiving his salary without providing any services and that the Board acted when it found a position for Dr. Doyle

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which would not expose him to young students. Even if I were to conclude that the Board did not consider the charges sufficient to warrant removal, the statute and school law decisions have clearly established that the Commissioner and not the Board should determine the appropriate penalty to be imposed after tenure charges are filed, Fulcomer supra.

Therefore, I **ORDER** that Dr. Doyle be removed from his tenured position as guidance counselor.

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.

January 26, 1984
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

January 30, 1984
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

February 1, 1984
DATE

Ronald L. Parker /xs.
OFFICE OF ADMINISTRATIVE LAW

ij/ee

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APPENDIX

EXHIBITS ADMITTED INTO EVIDENCE

For the petitioner:

P-1 Accident Report regarding E.F.

P-2 Marked for identification only

P-3 Memorandum from Ruth Ann Brower to Mr. DeClementi, regarding the incident involving E.F.

P-4 Memorandum to the File prepared by Robert Moore, dated February 16, 1983

P-5 Report prepared by Mr. DeClementi regarding the E.F. incident, dated February 17, 1983

P-6 Report of Willette Jones, R.N., regarding the E.F. incident, dated February 15, 1983

P-7 Statement of Irving Bolden regarding the E.F. incident, dated February 15, 1983

P-8 Marked for identification only

P-9 Letter from Peter T. Brescia to Dr. Robert Doyle, dated June 2, 1982

P-10 Memorandum from Peter T. Brescia to Dr. Robert Doyle, dated March 25, 1982

P-11 Marked for identification only

P-12 Letter from Peter T. Brescia to Dr. Robert Doyle, dated March 24, 1981

P-13 Memorandum from Robert J. Moore to Rudolph B. Borkowski, dated June 6, 1980

P-14 Notes of Rosemary Danbury, dated June 3, 1980, June 5, 1980 and June 5, 1980

P-15 Marked for identification only

P-16 Marked for identification only

P-17 Letter from Patricia Lucas to Dr. Robert Doyle, dated June 5, 1980

P-18 Letter from Patricia Lucas to Dr. Robert Doyle, dated January 16, 1980

P-19 Memorandum from Patricia Lucas to Robert Moore, dated March 24, 1980

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P-20 Letter from Patricia Lucas to Dr. Robert Doyle, dated June 18, 1979

P-21 Daily Health Room Record for the Pemberton Township School, dated June 3, 1980

For the respondent:

R-1 Marked For identification only

R-2 The resume of Robert E. Doyle

R-3 Memorandum from Dr. Robert Doyle to Mr. DeClementi, dated February 15, 1983

R-4 Memorandum from Dr. Robert Doyle to Peter T. Brescia, dated May 28, 1982

R-5 Letter from Robert E. Doyle to Peter T. Brescia, dated March 27, 1981

R-6 Marked For identification only

R-7 Letter from Gerald DeClementi to Dr. Robert Doyle, dated September 29, 1982

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WITNESSES

For the petitioner:

Ruth A. Brower
E.F.
Barbara Sauer
Willette Jones
Irving Bolden, Jr.
Gerald L. DeClementi
B.G.
Peter T. Brescia
V.R.
D.H.
Vincent Fynan
Catherine Rudruff
Patricia Lucas
Rosemary Danbury
Frank Vanella
H.B.
Robert J. Moore
A.F.
Juanita Roland

For the respondent:

Dr. Robert E. Doyle
Ina Matthews
Dr. Dominick D'Nunzio
Beatrice Lesniak

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IN THE MATTER OF THE TENURE HEARING OF ROBERT E. DOYLE, SCHOOL DISTRICT OF THE TOWNSHIP OF PEMBERTON, BURLINGTON COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

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

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

The Board filed primary exceptions to the initial decision by the judge requesting a modification to said decision which would provide that respondent be removed from his tenured position as guidance counselor as of the date of his suspension by the Board.

Respondent, in reply to the Board's exceptions, argues that the Board's request be rejected on the grounds that N.J.S.A. 18A:6-14 provides full salary be paid in tenure matters beginning on the 121st day following certification of charges until the determination of the charges is made by the Commissioner. The Board was notified on February 16, 1984 that it was prohibited from discontinuing respondent's salary inasmuch as the initial decision by the judge does not constitute the final determination by the Commissioner. Therefore, the Board was directed to refrain from any action regarding the denial of respondent's salary pending said final determination.

Respondent, in an extensive filing of primary exceptions, urges the Commissioner to reject the judge's findings and conclusions, that he dismiss the charges and that he reinstate respondent on the following grounds:

1. Respondent is not guilty of corporal punishment in that the judge failed to distinguish between corporal punishment as prohibited by N.J.S.A. 18A:6-1 and other types of excessive or unnecessary force which have never been held to be corporal punishment. Exceptions center around the contention that an action must be more than ill-advised and offensive but punitive in nature to be considered corporal punishment as supported by Craze v. Board of Education of Allendale, 1938 S.L.D. 585, rev'd State Board 588; Tenure Hearing of Fred J. Gaus, III, 1979 S.L.D. 248, rev'd 1980 S.L.D. 1490; Tenure Hearing of Pauline Nickerson, 1965 S.L.D. 130; Tenure Hearing of Samuel Ivens, 1977 S.L.D. 960 and In re Fulcomer, supra. Further, respondent contends that the judge's understanding

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of the "underlying philosophy" of corporal punishment is erroneous for a variety of reasons cited, one of which being that In re Kittell, supra, and In re Ostergren, supra, are distinguished from the instant matter in terms of severity of physical contact, intention of physical harm and penalty (neither teacher being dismissed) and another being that Kizer and Appleby involved more than allegations of corporal punishment.

2. The evidence shows that in none of the instances did the respondent use physical contact to punish or harm students. Any contact made was minimal and intended to protect persons, prevent injury, promote order, or was unintentional. Each of the six charges is categorically rejected by respondent primarily on this issue as well as the credibility of student witnesses.

In addition, respondent maintains that his due process rights were abridged in Count 6 wherein he was found innocent of the charge as stated but was determined guilty of a charge never stated, that is, using his hand to prevent the student from leaving his seat.

3. The judge applied the wrong legal standard to the analysis of penalty, going beyond the six charges and erroneously applying the "series of incidents" standard. Respondent pleads that this application of the Redcay standard should be rejected in that no charges were certified as to a violation of prior warnings or to any other deficiency in performance. In addition, the penalty analysis used should be rejected because the Fulcomer standard of review was not given appropriate weight by the judge. Respondent contends that the judge's findings in fact do meet the Fulcomer standards in terms of nature and gravity of the offenses; evidence of provocation/aggravation; any harm or injurious effect on maintenance of discipline and proper administration of school system; and individual/personal considerations, i.e. age, nearness to retirement, impact of penalty on teaching career, pension and the like.

In reviewing the entire record the Commissioner has carefully weighed the legal arguments advanced by respondent in his primary exceptions as well as the findings and conclusions of the judge. The Commissioner agrees with her conclusion that the charges, when viewed individually, would not warrant any disciplinary action. None of the charges indicate that respondent intended to cause bodily pain or suffering and there is sufficient evidence to support that his actions in four counts, 1, 2, 3, and 5 were in response to disruptive or potentially hazardous situations. The judge is correct in her conclusion that the use of force was improper.

The Commissioner finds that in Count 4, respondent's reaction to tripping and almost falling over V.R.'s outstretched legs was instinctive. While it is true that the charges as stated

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in Count 6 were not substantiated, the record supports that respondent did use his hand to restrain H.B. in his seat and that he admitted he should not have done so. The Commissioner rejects the assertion that respondent's due process rights were abridged because the action determined improper was not specifically stated in the charge. However, the Commissioner does not support the finding that respondent's action was indicative of corporal punishment. In Craze, supra, the Commissioner states:

> "***It is conceivable that a teacher might lay hands upon a pupil in order to restrain his progress or correct or straighten his position without being considered to have inflicted or to have intended to inflict corporal punishment upon him.***" (1938 S.L.D. at 586).

H.B. had defied a directive by respondent to remain seated. It is clear that H.B. was not physically hurt and that respondent did not intend to either punish or inflict pain.

The Commissioner finds that respondent's argument that the judge erroneously applied the Redcay standard of series of incidents to be without merit. While differences do exist in the instant matter regarding severity of physical contact, intent to harm and the charges are restricted to corporal punishment, the judge is correct in considering the totality of the incidents. Similarly, the Commissioner finds respondent's contention that prior warnings should not be considered by the judge, in that a specific charge of such had not been made by the Board, is without merit. The record clearly indicates that respondent had ample prior warning regarding his touching of students and it is appropriate that this fact be given weight by the judge.

While there is considerable merit to support the assertion that, when viewed in toto the level of physical contact does not meet the standard of intent to inflict harm or punishment, one incident did result in a pupil seeking the attention of the nurse for bruises and contusions. This count is mitigated, in part, by the fact that the particular situation did warrant immediate teacher intervention. Nonetheless, when viewing respondent's actions in totality, with the exception of Count 6, the record does substantiate conduct unbecoming a teacher. The judge is correct in her finding that the law places a heavy responsibility on teachers to act with self-restraint and that the Commissioner holds that a competent teacher does not need to resort to physical intervention to maintain discipline.

In considering the penalty for respondent's conduct, the Commissioner concurs with the judge's conclusion that the Fulcomer standards should be applied in this case as well as the Redcay standards. In the Commissioner's judgment the interest and well-being of students is paramount. The pattern of unacceptable conduct

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demonstrated by respondent cannot be tolerated. However, forfeiture of seniority rights and dismissal in this instant matter are deemed unduly harsh when applying the Fulcomer standards.

Accordingly, the Commissioner finds and determines that the appropriate penalty to be imposed upon respondent for unbecoming conduct is the loss of salary for the 120 days of suspension plus an additional 30 days' salary as well as the withholding of any salary increment for the 1983-84 school year. This determination is predicated upon such factors as respondent's prior employment record, length of service, age, the nature and gravity of the offenses under all circumstances, and any injurious effect on the maintenance of discipline or proper administration of the district. The Commissioner does not in any manner condone the lack of self-restraint or the resort to physical contact by a teacher in the disciplining of students and seeks to impress on respondent and others that such unbecoming conduct on the part of a teacher will not be tolerated. The Commissioner supports the underlying legal philosophy of disciplinary measures stated in Nickerson, supra, which avows that an individual not only has a right to freedom from bodily harm or infliction of pain by another but also a right to freedom from offensive bodily touching even if no actual physical harm results.

Accordingly, the Commissioner orders that respondent be deprived of salary for the 120-day suspension period plus an additional 30 days' salary and that any salary increment for 1983-84 be withheld. In all other respects the Board is directed to reinstate respondent in a position as guidance counselor similar to that which he formerly occupied in the Pemberton Township School District.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 15, 1984

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IN THE MATTER OF THE TENURE :

HEARING OF ROBERT E. DOYLE, : STATE BOARD OF EDUCATION

SCHOOL DISTRICT OF THE TOWNSHIP : DECISION

OF PEMBERTON, BURLINGTON COUNTY. :

_____:

Decided by the Commissioner of Education, March 15, 1984

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)

The decision of the Commissioner of Education is reversed. The initial decision of the Administrative Law Judge is reinstated and adopted by the State Board of Education for the reasons expressed therein.

S. David Brandt, John T. Klagholz,
Nancy Schaenen and Robert Marik opposed.
November 7, 1984

PENDING N.J. SUPERIOR COURT

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 0155-82
AGENCY DKT. NO. 466-12/81A

STANLEY F. SOLOMONS,
Petitioner,
v.
FAIR LAWN BOARD OF EDUCATION,
Respondent.

APPEARANCES:

Stanley F. Solomons, petitioner, Pro Se

Reginald F. Hopkinson, Esq., for respondent
(Jeffer, Hopkinson & Vogel, attorneys)

Record Closed: January 27, 1984 Decided: January 30, 1984

BEFORE **KEN R. SPRINGER**, ALJ:

Procedural History

This matter comes before the Office of Administrative Law on respondent's motion to dismiss the petition for lack of jurisdiction or, alternatively, for failure to comply with the 90-day limitation set forth in N.J.A.C. 6:24-1.2. On December 4, 1981, petitioner Stanley F. Solomons filed a verified petition with the Commissioner of

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Education asserting jurisdiction over the subject matter by virtue of N.J.S.A. 18A:6-9. The collective negotiating unit representing teachers in the district and the Fair Lawn Board of Education had entered into a contractual agreement covering both the 1980-81 and 1981-82 school years. Basically, petitioner seeks to enforce certain provisions of this agreement dealing with hours of employment and number of classes during the 1980-81 and 1981-82 school years. In his petition, the petitioner asks for money damages and compensatory time under the provisions of the agreement.

Subsequently, the Commissioner of Education transferred the matter to the Office of Administrative Law for handling as a contested case. Respondent has brought this motion to dismiss the case on the ground, among others, that the dispute involves the terms and conditions of petitioner's employment and that petitioner's remedy for an alleged contractual breach must be obtained exclusively through the grievance procedures established by the agreement. Oral argument on respondent's motion was heard by telephone conference call on January 27, 1984.

Findings of Fact

None of the facts necessary for the disposition of this motion are in dispute. From the pleadings and the motion papers submitted by the parties, I FIND:

During the 1980-81 school year, the normal working hours for teachers in the district were from 8:15 a.m. to 2:51 a.m. Some teachers, notably physical education and driver education instructors at the high school, were allowed to begin teaching at 7:30 a.m. and to leave the building at 2:30 p.m. In 1980-81, as in prior years, petitioner commenced teaching at 7:30 a.m. Unlike the other teachers who started at 7:30 a.m., however, petitioner was not permitted to leave the building until 3:00 p.m. Thus, petitioner was required to stay one-half hour longer than other teachers who began their morning duties at the same time he did. Furthermore, in 1980-81 petitioner taught six classes per day, compared to other teachers who taught only five classes per day. Under Article VIII, paragraph C of the applicable collective agreement,

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> In the secondary schools no teacher shall be required to teach more than 5 periods per day without additional compensation. If a teacher is assigned an additional period in a given day, that teacher shall be compensated at a rate of $9.00 per period in 1980-81...

While several teachers in the district received the benefit of this provision, petitioner was not given any additional compensation for teaching an extra class.

Similarly, in 1981-82, petitioner began work at 7:30 a.m. and was required to remain on the school premises until 3:00 p.m. However, his teaching load was reduced from six to five classes per day. Hence, petitioner's claim for 1981-82 is limited to compensatory time and does not include any money for teaching a sixth class.

Before filing his petition with the Commissioner of Education, petitioner attempted to pursue the five-step grievance process set forth in the collective agreement. His grievance consisted of the same complaint which forms the basis of his present action before the Commissioner of Education. After denials of his grievance at Levels I and II, on January 6, 1981 petitioner made a Level III appeal to the superintendent of schools. On July 16, 1981, the superintendent of schools issued a written decision denying the grievance. Then petitioner proceeded to a Level IV appeal to the Board of Education. By letter dated August 3, 1981, the Board also denied the grievance.

Pursuant to the collective agreement, petitioner's next avenue for appeal was to request in writing that the Fair Lawn Education Association submit his grievance to binding arbitration. Within five days after the Board's adverse action, petitioner sought to institute a Level V appeal by sending a letter requesting that the Association submit the dispute on his behalf to binding arbitration. On October 12, 1981, the Association responded to petitioner that its field representative would "meet and talk with dues paying members only." Since petitioner had not joined the Association, he was not allowed to consult with its field representative. The Association never took any action to submit petitioner's grievance to binding arbitration.

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At about this time, petitioner filed his petition with the Commissioner of Education. Subsequent to the commencement of this proceeding, on April 14, 1982 petitioner filed a separate unfair practice charge against the Board with the Public Employment Relations Commission ("PERC") seeking what amounts to identical relief as that which is sought here. He is represented by legal counsel in the PERC proceeding. Hearings before PERC were held on March 7, 1983, November 16, 1983 and January 18, 1984. PERC has not yet issued its decision.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the Commissioner of Education lacks jurisdiction over the subject matter of this case.

N.J.S.A. 18A:6-9 provides that:

> The Commissioner shall have jurisdiction to hear and determine...all controversies and disputes arising under the school laws, excepting those governing higher education, or under the rules of the state board or of the commissioner.

Such broad grant of jurisdiction, however, must be read in harmony with N.J.S.A. 34:13A-5.3 which authorizes public employees to negotiate grievance procedures and which, as then written,[1] provided

> Notwithstanding any procedures for the resolution of disputes, controversies or grievances established by any other statute, grievance procedures established by agreement between the public employer and the representative organization shall be utilized for any dispute covered by the terms of such agreement.

---

[1]Effective July 30, 1982, the statute was amended to read: "The procedures agreed to by the parties may not replace or be inconsistent with any alternate statutory appeal procedure nor may they provide for binding arbitration of disputes involving the discipline of employees with statutory protection under tenure or civil service laws. Grievance and disciplinary review procedures established by agreement between the public employer and the representative organization shall be utilized for any dispute covered by the terms of such agreement." L. 1982, c. 103, § 1.

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Whether a particular item may properly be the subject of public employment negotiations depends upon whether it should be considered a negotiable "term and condition of employment" or a nonnegotiable "managerial prerogative." If the item is a term and condition of employment, the parties are free to agree on any dispute-resolution mechanism to resolve disagreements, including binding arbitration. If, on the other hand, the item is a managerial prerogative, then the parties cannot encroach upon the area of governmental policy by contracting for binding arbitration. Bernards Twp. Bd. of Ed. v. Bernards Twp. Ed. Ass'n, 79 N.J. 311, 325 (1979); Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 160-162 (1978). Terms and conditions of employment are "those matters which itimately and directly affect the work and welfare of public employees" as distinguished from "matters pertaining to the determination of governmental policy." State v. State Supervisory Employees Ass'n, 78 N.J. 54, 68 (1978). Often the line between the negotiable and the nonnegotiable will be shadowy. Dunellen Bd. of Ed. v. Dunellen Ed. Ass'n, 64 N.J. 17, 25 (1973).

It is well-settled, however, that the particular items involved in this case, namely hours of employment and compensation for teaching an extra class, are terms and conditions of employment. Englewood Bd. of Ed v. Englewood Teachers Ass'n, 64 N.J. 1, 6 (1973). Indeed, the New Jersey Supreme Court has stated that rates of pay and working hours "appear to be items most clearly falling within that category." Woodstown-Pilesgrove Reg. Sch. Dist. Bd. of Ed. v. Woodstown-Pilesgrove Reg. Ed. Ass'n, 81 N.J. 582, 589 (1980). Put another way, these subjects present "no issues of any substance under the school laws" and "the expertise of the Commissioner of Education would not significantly further the interpretative process as to the intended meaning of the parties' agreement." Englewood, 64 N.J. at 8. Consequently, the disagreement between the parties over the application of the contractual language regarding working hours and compensation does not constitute a controversy "arising under the school laws" as that term is used by N.J.S.A. 18A:6-9. Jurisdiction to hear and decide such disputes rests exclusively with the decision-making apparatus contemplated by the collective agreement rather than with the Commissioner of Education. Grievance procedures established by agreement of the parties or their representatives "shall be utilized for any dispute covered by the terms of such agreement." N.J.S.A. 34:13A-5.3.

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Even assuming that the Commissioner of Education has concurrent jurisdiction to decide such items as working hours and compensation, the circumstances of this case are appropriate for the Commissioner of Education to abstain from exercising his jurisdiction so that the matter can be heard fairly and fully in a single proceeding without risk of inconsistent outcomes. City of Hackensack v. Winner, 82 N.J. 1 (1980). Here the parties have already litigated virtually the same issues before PERC, an administrative agency with presumed expertise in the field of labor relations. Absent any showing of an overriding question of educational policy, the Commissioner should stay his hand and adopt whatever determination is reached as a result of the PERC proceeding.

In light of the ruling on the jurisdictional issue, it is unnecessary to consider respondent's further argument that the petition must be dismissed as untimely under N.J.A.C. 6:24-1.2. On this point, however, see Riely v. Hunterdon Central High Bd. of Ed., 173 N.J. Super. 109 (App. Div. 1980), in which it was held that a litigant may not withhold initiation of an appeal to the Commissioner of Education during the pendency of arbitration proceedings.

Order

It is **ORDERED** that respondent's motion to dismiss the petition for lack of jurisdiction is hereby **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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OAL DKT. NO. EDU 0155-82

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

January 30, 1984
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

February 1, 1984
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

February 2, 1984
DATE

Ronald L. Parker/K.J
FOR OFFICE OF ADMINISTRATIVE LAW

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STANLEY F. SOLOMONS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FAIR LAWN, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

It is observed that no exceptions to the initial decision were filed by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Commissioner, upon review of the recommended findings and conclusions of law rendered herein by the judge with respect to the question of the Commissioner's jurisdiction in the instant matter, concurs with these findings and hereby adopts them as his own.

Accordingly, the Commissioner finds and determines that the Board's Motion to Dismiss the instant Petition of Appeal can be and is hereby granted.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 19, 1984

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

ORDER

PARTIAL SUMMARY DECISION

OAL DKT. NO. EDU 1666-82
AGENCY DKT. NO. 48-2/82

NEW JERSEY EDUCATIONAL ASSOCIATION and EDUCATIONAL SERVICES TEACHERS ASSOCIATION,

Petitioners,

-vs-

ESSEX COUNTY EDUCATIONAL SERVICE COMMISSION,

Respondent,

-vs-

BOARD OF TRUSTEES, TEACHERS' PENSION AND ANNUITY FUND,

Third Party Respondent.

ON PETITIONER'S MOTION FOR PARTIAL SUMMARY DECISION

The procedural background and facts essential to an understanding of these proceedings to this point are set out in my disposition of Respondent's earlier motion for summary decision, a copy of which is attached as an appendix. That motion was denied because I determined that genuine issues of material fact existed in respect of the validity of Respondent's actions first, in the Spring of 1980, in purporting to terminate the employment of 61 non-tenured teachers and then, on July 1, 1980, in purporting to effect a reduction in force as to the remaining 42 teachers in its employ.

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I determined at the time, however, that a possible independent basis existed for recognizing the job-connected interests of the discharged teachers. If, on fuller analysis, it could be determined that the teachers possessed re-employment or other job-connected rights which could be recognized and effected notwithstanding the technical validity of Respondent's actions when undertaken, a protracted trial on the validity question could be avoided, leaving for resolution only the questions of the extent of the teachers' re-employment, tenure accumulation and pension membership rights, and the feasibility of effecting them. Accordingly, I instructed the Petitioners to renew their motion for summary decision which had previously been withdrawn. The Petitioners so moved and the parties have presented their arguments in writing. The questions to be resolved on this motion were set out on pp. 9-11 of my order:

> Although I am obliged to deny Respondent's motion for summary decision on the issues embodied in subparagraph 1(i) of the prehearing order, the issues embodied in subparagraph 1(ii) of the prehearing order present an alternative and independent basis for deciding the threshold question in this case. In the light of events transpiring since the non-reemployment notices were sent and the attempted reduction in force was undertaken, particularly the Appellate Division's ultra vires determination and the record established in last summer's litigation before me and the Commissioner of Education, the legal sufficiency and good faith of the Respondent's acts, however well established they might come to be, may be illusory issues.
>
> The Commissioner of Education's plenary, remedial and policy-making authority in the field of education (see, e.g. Jenkins, et al v. Tp. of Morris School Dist. and Bd. of Ed., 58 N.J. 483 (1971)) furnishes a potentially ample basis for determining that, even if the non-reemployment and reduction in force actions were valid when undertaken, subsequent events and the requirements of fairness as dictated by considerations of sound educational policy require a different and carefully structured result than that contended for by the Respondent. This may be especially so in a case concerning the actions of a statutory entity such as the ECESC, apparently subject to the direct supervision and full administrative oversight of the

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> Commissioner and the State Board of Education, as distinguished from a local school board in the light of our home rule traditions. Questions of technical sufficiency and good faith may well be superseded by a full and insightful consideration of the undisputed facts in this matter to date in the light of the general legislative scheme for the fielding of educational programs, the legal rights of teachers and other employees, and the broad remedial powers of the Commissioner, as well as his responsibility to assure that both the spirit and the letter of the school laws pervade all educational administration in this State. That the case, as thusly framed, may be one of first impression should not preclude the possibility of determining the legal rights of the parties on a motion for summary decision.

The instant issue bears upon legal questions of statutory authority and relationship, and also upon the discretionary authority of the Commissioner of Education as a policy making officer. The eligibility of these questions for resolution on a motion for partial summary decision is clear. They present no genuine issues of material fact, but only questions of law and policy. In no way do I address the procedural correctness, the good faith, or the legal sufficiency of Respondent's termination actions, all factual determinations in respect of which a trial would be necessary. For the purpose of resolving the issue presently before me, and for that purpose alone, it will be assumed that the discharges were correctly and validly effected and that Respondent's actions were taken in good faith. The questions before me, distilled to their essence are: (1) whether the Commissioner's supervisory responsibility over public and publicly funded elementary and secondary education in the State includes the authority to overturn actions of educational services commissions undertaken in compliance with legal standards or requirements, particularly when those actions are discretionary exercises; and, if so, (2) whether the Commissioner should exercise his authority in this case. Further, if the Commissioner determines to exercise that authority, (3) what relief should be afforded.

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THE COMMISSIONER'S AUTHORITY

A determination of the extent of the Commissioner's authority to control the actions of educational services commissions requires an understanding of the place such entities occupy in our system of elementary and secondary education. Educational services commissions are entirely creatures of administrative action. They are bodies corporate, N.J.S.A. 18A:6-61, discretionarily created by the State Board of Education pursuant to legislative authorization. N.J.S.A. 18A:6-52. Under the enabling legislation, they have limited functions which may be further circumscribed and particularized by the State Board of Education. They are created "for the purpose of carrying on programs of educational research and development and providing to public school districts such educational and administrative services as may be authorized pursuant to rules of the State Board of Education." N.J.S.A. 18A:6-51(a).

Some of the powers of educational services commissions necessarily mimic those of local boards of education because all are bodies corporate functioning in the same subject matter field. Yet, a comparison of N.J.S.A. 18A:6-51, et seq., the enabling statute for educational services commissions, with N.J.S.A. 18A:10-1 et seq., N.J.S.A. 18A:11-1 et seq. and N.J.S.A. 18A:12-1 et seq., the statutes outlining the powers of local school boards, demonstrates clearly that local school boards are designed to be independent bodies politic as well as corporate, having inherent powers of school district governance, which status is clearly established, not only by statute, but also by the Constitution, Art. IV, Sect. 7, Para. 9(7). Thus, the authority of local school boards may validly be circumscribed only by (a) general legislation; (b) the exercise of the general rulemaking powers of the State Board of Education, N.J.S.A. 18A:4-15, or (c) review under the established quasi-judicial authority of the Commissioner of Education, N.J.S.A. 18A:6-9, on a case by case basis. Local

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school boards may not, in ordinary circumstances, be governed by the Commissioner of Education or the State Board of Education through direct oversight.

The statutory scheme pertaining to educational services commissions is very different. Organized on a regional basis to serve special needs of school boards in one or more counties, they administer programs generally established by legislation. It cannot be that they were designed to be bodies politic with independent governmental or quasi-governmental existence and authority; for when the Legislature seeks to so characterize an entity in the field of education, it does so clearly and precisely. See, e.g., N.J.S.A. 18A:6-45.

The decisions to create an educational services commission and to determine the limitations on its scope of operations are entirely within the discretion of the State Board of Education. N.J.S.A. 18A:6-52. The statute in no way mandates the creation of such entities, but instead leaves it to the State Board to determine whether and how its own policy objectives will be furthered by their creation. As has already been observed, for organizational convenience and purposes of succession, educational services commissions are bodies corporate, N.J.S.A. 18A:6-61, but they have no independent governmental or quasi-governmental existence as bodies politic.

Thus viewed, educational services commissions are schematically more similar to any division or bureau in the Department of Education or to a county Superintendent of Schools than they are to local school boards. The fact that educational services commissions are envisioned to be organized on a county or regional basis renders them no less an integral part of the mechanism by which the Department of Education discharges its statutory and constitutional responsibilities than are the county superintendents of schools whose appointment, by contrast, is required by statute. See N.J.S.A. 18A:7-1.

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Thus, in summary, from the organic statute which establishes the concept of educational services commissions, N.J.S.A. 18A:6-51 et seq., and comparing that enactment to others comprising the statutory motif for the education system, it is clear that educational services commissions are as much a part of the body of the State Department of Education as any division or bureau of the Department physically located with the Commissioner.

It follows then that educational services commissions are subject to the direct oversight of the Commissioner of Education; and their discretionary acts are subject to the supervisory jurisdiction of the Commissioner as "(a) the chief executive and administrative officer of the department having general charge and supervision of the work of the department; and (b) the official agent of the state board for all purposes...." N.J.S.A. 18A:4-22. The Commissioner, in turn, is free within the ambit of the rules of the State Board to determine from time to time how his oversight responsibilities may best be discharged; whether on a day by day basis or by affording some autonomy to the educational services commissions and choosing to review their actions, as here thus far, in the more formal context of a petition or complaint.

There are only two sources of lawful front-line authority in the field of elementary and secondary education in this State pursuant to our Constitution and laws: the local school boards acting locally by virtue of their home rule powers, and the Commissioner of Education acting more generally pursuant to law and the regulations of the State Board of Education. There simply are no other authorities and every person or educational entity functioning in the field on a day-to-day basis must be subject to the administrative oversight or one or the other. In the case of educational services commissions, the only logical choice, as between these two, must be the Commissioner of Education.

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THE EXERCISE OF AUTHORITY

Viewed in their best light, the actions of the Respondent, which gave rise to this proceeding and earlier ones, were presumably undertaken for reasons then perceived by the Respondent to be amply warranted. As established by the foregoing discussion, it is within the authority of the Commissioner of Education to review and to modify or annul any action undertaken by an educational services commission whenever, in his judgment, the occasion requires. That the Commissioner might exercise this authority only rarely and in a sparing way does not negate his clear power to do so whenever, in his discretion, he chooses.

Also underlying the actions of the Respondent was that body's views of its administrative needs and its legal authority, positions later rejected by both the Commissioner of Education and the Courts. To the extent the law has been declared, it is the Commissioner's responsibility to enforce it with respect to those activities under his aegis.

Furthermore, even in the absence of a legal requirement, and barring a legal prohibition, it is well within the plenary powers reposed in the Commissioner's office for him to decide to apply his perceptions of fairness in order to handle any matter in the most equitable manner, so that those who have been adversely affected by the acts of others under the Commissioner's sway may be dealt with rightly. In a matter such as that presented by the instant case, if the Commissioner determines it to be administratively feasible, he may restore those affected, to the greatest extent possible, to the positions they would have had if the law had been correctly interpreted and applied in the first instance.

Applying considerations of equity and fairness, it is evident in the light of events since 1980, and I so recommend, that every effort should be made to restore both the non-tenured and tenured

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teachers, to the greatest extent permitted by law and insofar as is economically and administratively feasible, to the employment, tenure accumulation and pension rights which they lost by virtue of the Respondent's actions. The teachers were in no way at fault; and the Respondent's actions, which may or may not have been taken in good faith, were based upon premises thereafter evaluated as improper and upon a presumed legal authority thereafter determined to have been ultra vires.

Many questions remain to be determined, but they are largely administrative in nature. They include: (1) Do any positions presently exist which the affected teachers may occupy?(2) What are the considerations which ought to apply in determining whether and how the teachers affected in 1980 should be permitted to displace any persons presently holding the same or comparable positions? (3) In this regard, can or should any distinctions be made between the tenured and non-tenured persons affected by the 1980 actions? (4) How many of the individuals affected by the 1980 actions are available for re-employment by the Respondent? (5) Can the members of the 1980 groups be effectively granted tenure accumulation rights? (6) Should seniority and experience accumulation factors apply to the affected teachers and to what extent? (7) What special considerations exist in respect of the teachers' pension membership rights?

The foregoing questions and others are impacted by legal considerations, but they are mainly factual in character, calling by their nature for administrative resolution. It would be well if the Commissioner of Education in an exercise of his plenary authority could find ways of dealing with these problems with the cooperation of the parties, on a level of administrative resolution. Similarly, the Board of Trustees of the Teachers' Pension and Annuity Fund, should deal administratively with the pension rights questions which are outside the Commissioner's jurisdiction. To the extent this cannot be successfully accomplished, the instant contested case remains an open docket

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for the resolution of questions of fact or law which need to be litigated.

THE RELIEF TO BE AFFORDED

In the light of the foregoing, I CONCLUDE that whether or not the non-tenure dismissals and the reduction in force undertaken by the Respondent in 1980 were legally and formally sufficient when attempted, the teachers so affected cannot be deemed, in the light of subsequent developments, to have lost their employment or re-employment interests, their tenure accumulation interests or their pension membership interests. While it may be that substantial impediments exist in law, or in respect of economic pressures, or because of administrative feasibility which would prevent a full effectuation of these interests, every effort should be undertaken to make the teachers whole to the greatest extent possible.

Accordingly, it is ORDERED that Petitioner's motion for partial summary judgment is granted to the extent that, notwithstanding the Respondent's attempted dismissal and reduction in force undertaken in 1980, the teachers affected are recognized as having, in principle, rights of employment, re-employment, tenure accumulation, and pension membership; and

it is further ORDERED, that appropriate administrative efforts to determine the precise nature and extent of the claims of the teachers be undertaken in the Department of Education and by the Board of Trustees of the Teachers Pension and Annuity Fund, after the effective date of this order. These efforts should include, but not be limited to (1) a determination whether any legal impediments exist to effect the interests of the teachers; (2) the economic and administrative feasibility of effecting such interests; (3) a further narrowing of the issues between the parties on questions relating to the employment, re-employment, tenure accumulation and pension entitlements of the teachers; and

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it is further ORDERED, that to the extent the foregoing administrative efforts are not undertaken or are undertaken without successfully resolving all matters at issue after a full opportunity to do so, such questions shall be resolved within the context of this contested case on the motion of any party; and

it is further ORDERED that this order granting partial summary decision shall not be effective until a final agency decision has been rendered on this issue either upon interlocutory review pursuant to 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, and

it is further ORDERED, pursuant to N.J.A.C. 1:1-13.3(b) that this order and decision, along with the record in this case to date, shall be submitted to the Commissioner of Education for immediate review as an initial decision.

January 26, 1984

HOWARD H. KESTIN, CALJ

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO. EDU 1666-82
AGENCY DKT. NO. 48-2/82

NEW JERSEY EDUCATION ASSOCIATION and EDUCATIONAL SERVICES TEACHERS ASSOCIATION,

Petitioners,

-vs-

ESSEX COUNTY EDUCATIONAL SERVICE COMMISSION,

Respondent,

-vs-

BOARD OF TRUSTEES, TEACHERS' PENSION AND ANNUITY FUND,

Third Party Respondent.

PROCEDURAL ORDER

ON MOTION FOR SUMMARY DECISION

This matter arises on the respondent's motion for summary decision pursuant to N.J.A.C. 1:1-13 et seq. by Edward F. Petit-Clair, Esq. (Petit-Clair and Graves, attorneys for respondent); in the presence of William S. Greenberg, Esq. (Greenberg, Kelley and Prior, attorneys for petitioners) and William P. Malloy, Deputy Attorney General (Hon. Irwin I. Kimmelman, Attorney General of New Jersey, attorney for third party respondent). The oral and written arguments of the movant and the other parties have been heard and fully considered.

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This contested case is part of a litigation complex which has had a long and convoluted procedural history beginning in the Fall of 1980. The case in its present posture arises from a January 18, 1982 order entered by Hon. Nicholas Scalera of the Superior Court, Chancery Division, transferring to the Commissioner of Education, pursuant to N.J.S.A. 18A:6-9, certain issues constituting a controversy and dispute arising under the school laws. On February 25, 1982, the matter, having been determined to be a contested case under N.J.S.A. 52:14B-1 et seq., was transmitted to the Office of Administrative Law pursuant to N.J.S.A. 52:14B-10 and N.J.S.A. 52:14F-1 et seq. The case was preheard (see order of April 10, 1982) and scheduled for trial beginning on May 11, 1982. On the day of trial, both parties moved for summary decision, but the petitioners, shortly after so moving, withdrew their motion. The respondent's motion pends and is the subject of this order. In addition to oral argument on May 11, the parties have filed trial memoranda and letter statements. The Attorney General, whose motion for intervention on behalf of the Teachers' Pension and Annuity Fund, pursuant to N.J.A.C. 1:1-12.1 et seq., was granted on the record, has filed a letter in which he takes no position on the motion for summary decision.

The litigation between the parties began on September 18, 1980 with the filing of an unfair labor practice charge by the Educational Services Teachers Association (ESTA) against the respondent, Essex County Educational Services Commission (ECESC), in the Public Employment Relations Commission (PERC). This was

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followed on December 5, 1980 by the commencement of suit in the Superior Court, Chancery Division (Essex County), in which ESTA and the New Jersey Educational Association (NJEA), both being the petitioners here, sought wide ranging relief against the ECESC and others. The procedural background to August 10, 1981 was recounted in detail at pages 1 to 3 of my Initial Decision of that date (EDU 4302-81; Agency Dkt. No. 265-7/81A), and will not be set forth again. Much has occurred procedurally since that time, however.

In an order issued on May 12, 1981, Hon. Arthur C. Dwyer of the Superior Court, Chancery Division, had effectively divided the litigation between the parties into four parts:

(1) The unfair labor practice issues embodied in the complaint were severed and transferred to PERC to be consolidated with the then pending unfair labor practice charge. That Commission through its Director of Unfair Practices has recently declined to issue a complaint on these charges. See Order of June 3, 1982 (PERC Docket No. CO-81-69). A complaint has issued, however, on another, recently filed (February 1, 1982), unfair labor practice charge. See Order of June 7, 1982 (PERC Docket No. CO-82-190-137). The respondent's motion to consolidate either or both of these PERC proceedings with the instant matter was denied by me in an order dated April 30, 1982. Consequently, these issues are not presently before me.

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(2) Issues arising under the school laws, referred to the Commissioner of Education and transmitted to the Office of Administrative Law, were decided in EDU 4302-81, subsequently accepted by the Commissioner of Education.

(3) Judge Dwyer's partial summary judgment that the respondent possessed the legal authority to subcontract with a private vendor for the rendition of educational services established by L. 1977, c. 192 and c. 193 (N.J.S.A. 18A:46A-1 et seq., and N.J.S.A. 18A:46-19.1 et seq.) was reversed by the Appellate Division on October 15, 1981.

(4) Claims for declaratory, equitable and legal relief were retained by Judge Dwyer for possible further proceedings in the Chancery Division.

The Appellate Division's reversal of the partial summary judgment broadened the scope of the claims still before the Chancery Division, leading to Judge Scalera's order of January 18, 1982, and thus creating a fifth segment of this litigation. By the terms of Judge Scalera's order, remaining claims arising under the school laws as a result of the Appellate Division's reversal were transferred to the Commissioner of Education; and subsequently transmitted to the Office of Administrative Law.

Claims for declaratory, legal and equitable relief continue to pend in the Chancery Division, presumably awaiting the outcome of the instant proceeding.

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As framed in Paragraph 1(b) of my Prehearing Order of April 10, the issues presently before me are:

(1) What, if any, are the employment or reemployment rights under Title 18A of the New Jersey Revised Statutes and rules and regulations adopted pursuant thereto, of the teachers who were employed by the respondent in 1979-80, in the light of events during that year and subsequently?

(i) Were the teachers properly discharged and, if not, what is their present employment status and what are their rights thereunder?

(ii) Do the teachers have rights of reemployment and, if so, what are the nature and extent of any such rights?

(2) Depending on the resolution of the foregoing issues, what are the tenure accumulation rights of the teachers, if any?

(3) Depending upon the resolution of the foregoing issues, what are the pension membership rights of the teachers, if any?

Considering the last of these issues and as provided in paragraph 15 of the prehearing order, the Board of Trustees of the Teachers' Pension and Annuity Fund (TPAF) and the Attorney General were invited to move to intervene in this matter, so that all issues arising between the parties might be disposed of in a single proceeding. The Attorney General did so move on behalf of the TPAF

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Board and, with the consent of the parties, intervention was ordered on the record.

I have determined, upon careful scrutiny of respondents' trial memorandum, that its arguments in support of its motion for summary decision only address the issues embodied in subparagraph 1(i) of the pretrial order and deal not at all with the issues contained in subparagraph 1(ii). Indeed, this is as it should be, since it has been respondent's position from the outset that the questions of proper termination and discharge, if answered in the affirmative, are dispositive of the remaining issues in the case. Thus, respondent's motion is properly limited in scope.

The respondent asserts, as a basis for its motion for summary decision in respect of the basic issue that, in the Spring of 1980 it acted properly as a technical matter, as required by law, and in good faith, first to terminate 61 non-tenured teachers by notifying them before April 30 that they would not be reemployed for the coming school year and then, on July 1, to effect a reduction in force as to the remaining 42 teachers in its employ. The respondent argues that all 103 teachers were properly discharged, that they have no employment rights, and that, therefore, as a matter of law, the respondent is entitled to prevail in this matter.

The petitioners, on the other hand, while not disputing the facts of the issuance of the non-reemployment letters and the attempted reduction in force, argue that the respondent's actions in both respects were permeated with bad faith and so intertwined with the subsequently declared ultra vires act of contracting with a private vendor as to be null and void from their inception.

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The respondent rejoins with a recitation of the events occurring in the Spring of 1980 in order to establish that:

(1) the initial non-reappointment letters issued because of a potential cut-back in program;

(2) irrespective of the size of its program and in the light of its cash flow problems (fully described in my Initial Decision in EDU 4302-81 at pp. 9 and 16), it could not field a program at all unless it could borrow money to finance it from the outset;

(3) the respondent and a potential lender were advised by the Attorney General's office in late May and following that the respondent lacked the legal authority to borrow money;

(4) because of this advice, the respondent determined to discontinue its direct rendition of the educational services and simultaneously began seriously to consider the possibility of subcontracting the services, a matter that had been discussed as a possible alternative since late February, 1980.

These events and positions, the respondent contends, establish the absence of a sufficiently direct relationship between the decision to subcontract and the discharge of 103 teachers as to negate any suggestion of bad faith even though the act of subcontracting was subsequently delcared to be ultra vires. The respondent further argues, therefore, that the non-reemployment letters and the reduction in force were valid and effective, the actions being based essentially on the determination to discontinue

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the direct rendition of services and only incidentally, if at all, on the determination to subcontract. The petitioners dispute both the happening of the events and the validity of the positions.

The respondent's motion must be denied. The petitioners in resisting the motion, have adequately isolated a number of factual issues which must be addressed before the respondent can prevail. Among these are the effect of the undisputed facts: (1) that subcontracting had been a topic of discussion since February, 1980; (2) that the respondent was, at all times in 1979-80, seeking to expand its program for the following year; and (3) that the 1980-81 educational program turned out to be larger than the program the year before. These and other aspects of the case raise serious questions of fact concerning the good faith attending the non-reemployment notices and reduction in force, and, therefore, the legal sufficiency of these actions. See, e.g., Deborah Shaner v. Bd. of Ed. Gloucester City, 1938 S.L.D. 542, affirmed St. Bd. 1938 S.L.D. 545; Viemeister v. Bd. of Education of Prospect Park, 5 N.J. Super 215 (App. Div. 1949); Victor Catano v. Board of Education of the Township of Woodbridge, Middlesex County, 1971 S.L.D. 448.

It is well established in respect of motions for summary judgment in the trial courts, upon which our summary decision procedure is based, that such motions should not ordinarily be granted where state of mind, such as intentor motive is in issue. Exxon Corp. v Wagner, 154 N.J. Super 538 (App. Div. 1977). See also Allen v. Planning Bd. Tp. of Eversham, 137 N.J. Super 359

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(App. Div. 1975). Good faith or the absence of it is manifestly within this ambit, particularly where the effects of patterns of action are in issue. Additionally, it is clear that any doubts on the question of the existence of genuine issues of fact should be most strictly resolved against the movant, especially where the critical facts are particularly within the moving party's knowledge. See Bilotti v. Accurate Forming Corp., 39 N.J. 184, 206 (1963) and Martin v. Educational Testing Service, Inc., 179 N.J. Super 317 (Ch. Div. 1981).

Respondent validly asserts the presumption of correctness which attends reductions in force and similar actions by employing authorities. Unquestionably, the burden of proving bad faith is a difficult one to sustain, but this cannot be a basis for depriving the petitioners of the opportunity to so prove or to satisfy the court of technical insufficiencies in the acts undertaken. The factual arguments raised by the petitoners do not appear to be spurious. As the matter is presently before me, therefore, I am persuaded that genuine issues of fact do exist, which are material to the issues embodied in subparagraph 1(i) of the prehearing order. The petitioners are entitled to a trial on these facts. To allow the respondent to prevail at this juncture would be to elevate form over substance, a result which should always be avoided in the application of important educational policies. Viemeister v. Bd. of Education of Prospect Park, 5 N.J. Super 215 (App. Div. 1949).

Although I am obliged to deny respondent's motion for summary decision on the issues embodied in subparagraph 1(i) of the prehearing order, the issues embodied in subparagraph 1(ii) of the

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prehearing order present an alternative and independent basis for deciding the threshold question in this case. In the light of events transpiring since the non-reemployment notices were sent and the attempted reduction in force was undertaken, particularly the Appellate Division's ultra vires determination and the record established in last summer's litigation before me and the Commissioner of Education, the legal sufficiency and good faith of the respondent's acts, however well established they might come to be, may be illusory issues.

The Commissioner of Education's plenary, remedial and policy-making authority in the field of education (see, e.g., Jenkins, et al v. Tp. of Morris School Dist. and Bd. of Ed., 58 N.J. 483 (1971)) furnishes a potentially ample basis for determining that, even if the non-reemployment and reduction in force actions were valid when undertaken, subsequent events and the requirements of fairness as dictated by considerations of sound educational policy require a different and carefully structured result than that contented for by the respondent. This may be especially so in a case concerning the actions of a statutory entity such as the ECESC, apparently subject to the direct supervision and full administrative oversight of the Commissioner and the State Board of Education, as distinguished from a local school board in the light of our home rule traditions. Questions of technical sufficiency and good faith may well be superceded by a full and insightful consideration of the undisputed facts in this matter to date in the light of the general legislative scheme for the fielding of educational programs, the legal rights of teachers and other employees, and the broad remedial powers of the Commissioner,

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as well as his responsibility to assure that both the spirit and the letter of the school laws pervade all educational administration in this State. That the case, as thusly framed, may be one of first impression should not preclude the possibility of determining the legal rights of the parties on a motion for summary decision.

These questions have not been placed before me in respondent's motion nor in petitioners' response, however, and I cannot, therefore, fairly decide them at this time. Nevertheless, sound considerations of judicial administration require that a potentially protracted trial of complex and subjective factual issues (such as those embodied in subparagraph 1(i) of the prehearing order), be avoided if a fair and correct result may be reached as a matter of law. These principles are embodied in N.J.A.C. 1:1-13.1 et seq., particularly 1:1-13.3(a). See also, R. 4:46-3.

Accordingly, the petitioners are directed to renew their motion for partial summary decision and both principal parties are directed to brief and argue the issues embodied in subparagraph 1(ii) of the prehearing order as well as the appropriateness of those issues for summary decision. The likelihood is, if that motion is denied after a full consideration and in the light of the disposition of the instant motion, that the case will be set down for trial on all the issues established in the prehearing order. If the motion is granted, trial will likely be necessary at least on the pension, tenure and other individualized employment issues established in the whole of paragraph 1(b) of the prehearing order.

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It is, therefore, on this 23rd day of June, 1982

ORDERED that

Respondent's motion for summary decision is denied; and it is

FURTHER ORDERED that

(1) Petitioners shall move for partial summary judgment on the issues embodied in subparagraph 1(ii) of paragraph 1(b) of the prehearing order as elucidated above, and shall serve and file appropriate moving papers no later than July 2, 1982; and

(2) Petitioners and Respondent shall simultaneously prepare briefs on the legal issues, to be served and filed no later than July 20, 1982; and

(3) By July 7, 1982, Third Party Respondent shall advise the court and the other parties whether it intends to take a position on the petitioners' motion for partial summary judgment; and, if it elects to take a position, shall serve and file its brief no later than July 20, 1982; and

(4) Any party may serve and file responses to the aforementioned briefs no later than July 27, 1982.

This Order being procedural under N.J.A.C. 1:1-9.7(e) is not subject to agency head review.

HOWARD H. KESTIN
CHIEF ADMINISTRATIVE LAW JUDGE

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NEW JERSEY EDUCATION ASSOCIATION AND EDUCATIONAL SERVICES TEACHERS ASSOCIATION,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
ESSEX COUNTY EDUCATIONAL SERVICES COMMISSION,	:	DECISION
RESPONDENT,	:	
V.	:	
BOARD OF TRUSTEES, TEACHERS' PENSION AND ANNUITY FUND,	:	
THIRD PARTY RESPONDENT.	:	

The Commissioner has reviewed the Partial Summary Decision of January 26, 1984, as well as the Procedural Order on Motion for Summary Decision issued by Judge Kestin on June 23, 1982 which sets forth the long and tangled procedural history of the matter herein considered. The Commissioner has also reviewed the papers submitted by the respective parties in the instant matter. The Commissioner notes that exceptions to Judge Kestin's Partial Summary Decision were submitted by respondent in a timely fashion as were petitioners' reply exceptions pursuant to N.J.A.C. 1:1-16.4a, b and c.

Respondent takes exception to Judge Kestin's finding that educational services commissions are "discretionarily created by the State Board of Education pursuant to legislative authorization" (ante at p. 4) and as such are subject to the direct oversight of the Commissioner pursuant to regulations established by the State Board just like a bureau or division of the State Department of Education itself. Respondent argues that educational services commissions, rather than being "creatures" of the State Board, are in reality entities created through the initiatives of local boards of education acting in consort in order to provide services that they themselves have determined to be necessary. The role of the State Board, according to respondent, is to approve the nature of and the need for the services requested. N.J.S.A. 18A:6-51 et seq.

Respondent further argues that the judge misconstrued the action of the Essex County Educational Services Commission when it terminated sixty-one nontenured teachers in the spring of 1980 and the balance of its teaching force, the remaining forty-two teachers, on July 1, 1980. Respondent urges the Commissioner to recognize that its actions to terminate its teaching force were taken in good faith and cites the fact that neither the Commissioner nor any court of the State of New Jersey ever ruled on the propriety of the above-

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cited terminations. Respondent further cites as support for such position that the State Board by resolution adopted February 4, 1981 specifically authorized educational services commissions to subcontract the provision of services, notwithstanding the fact that such subcontracting was eventually determined to be outside the authority of educational services commissions by the Appellate Division of the Superior Court in N.J.E.A. et al. and James R. Zazzali, Attorney General of New Jersey v. Essex County Educational Services Commission et al., A-3086-80-T2, decided October 15, 1981. Consequently, respondent disputes the existence of what may be termed residual "considerations of equity and fairness" which would provide justification for the Commissioner

> "***to restore both the non-tenured and tenured teachers, to the greatest extent permitted by law and insofar as is economically and administratively feasible, to the employment, tenure accumulation and pension rights which they lost by virtue of the Respondent's actions.***"
>
> (ante at pp. 7-8)

Respondent's exceptions further contend that the ECESC discharged whatever responsibilities to petitioner of an equitable nature existed when it provided within its contract with Education and Training Consultants, Inc. (ETC) that all teachers employed by respondent be offered employment by ETC and such employment was subsequently offered by ETC. Since 83 of the 103 individuals accepted such employment, respondent argues that it exceeded any legal requirements and the teachers by accepting such employment in effect waived any future claims against the Association. To accord the teachers herein any further rights, argues respondent, would be in violation of the New Jersey Constitution which precludes against governmental bodies making gifts of public money insofar as the petitioners herein have rendered no services to respondent. Article VIII, Sec. III, paras. 2 and 3 of the New Jersey Constitution.

Finally, respondent urges rejection of any rights of equity created by the judge's Partial Summary Decision and Order in that such rights are barred by virtue of petitioners' having "slept on their rights" by not pursuing them before the Commissioner. Although the termination of teachers controverted herein took place no later than July 1, 1980, petitioners filed an unfair labor practices charge with PERC on September 18, 1980 and a complaint before the Superior Court, Chancery Division, on December 5, 1980. At no time, until the matter was transferred by order of Judge Scalera on January 18, 1982 to the Commissioner for failure to exhaust administrative remedies, did petitioners seek relief before the Commissioner. Further, respondent contends that petitioners, after having filed a motion for Partial Summary Judgment at the direction of the judge on July 2, 1982 with briefs having been submitted by both parties, permitted the entire matter to remain in limbo for one and one-half years without further seeking to pursue their claims.

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Respondent, therefore, urges the Commissioner to reject those claims for failure to have pursued them.

Petitioners' reply exceptions generally reject respondent's exceptions and urge adoption of the judge's findings relative to the Commissioner's wide authority to apply considerations of equity and fairness to grant a remedy to petitioners herein to the greatest extent possible by law and within the constraint of economic and administrative feasibility. Petitioners urge such adoption based upon the judge's findings that the teachers employed by respondent were the innocent victims of that body's ultra vires determination to subcontract services to nonpublic school pupils. Petitioners' reply exceptions, while conceding the technical correctness of respondent's assertion that educational services commissions are created by local boards of education, urge adoption of the judge's finding that the ultimate authority for the establishment of educational services commissions rests with the State Board.

Petitioners further argue that, notwithstanding objections by respondent, two Appellate Division decisions and an Attorney General's Opinion (Formal Opinion No. 1-1981) both distinguished the authority of an educational services commission from that of a local board of education which is expressly authorized to subcontract out for Chapter 192-193 services to nonpublic school handicapped pupils, while educational services commissions are not. Based upon such finding, petitioners further urge acceptance of the judge's conclusions that educational service commissions may not be equated with local boards of education and are under the direct authority and supervision of the Commissioner. Petitioners cite, as further indication of lack of direct authority on the part of educational services commissions, the required presence of county superintendents on the board of directors of such commissions. While conceding that local boards' actions may be overturned by the Commissioner on a case-by-case basis under the authority vested in him by N.J.S.A. 18A:6-9, petitioners argue that such authority is different from having one of the Commissioner's representatives sit as a voting member on the board of directors.

Even leaving aside the judge's rationale of the Commissioner's authority to grant relief herein, petitioners recite in detail the broad authority of the Commissioner to take action necessary to pursue and preserve public policy. (See Jenkins v. Township of Morris School District, 58 N.J. 483 (1971); Booker v. Plainfield, 45 N.J. 161 (1965); Board of Education of the Township of East Brunswick v. Township Council of the Township of East Brunswick, 48 N.J. 94 (1966).)

Petitioners further cite the responsibility of the Commissioner to assure the provision of a thorough and efficient education as prescribed by N.J.S.A. 18A:7A-1 et seq. as well as requirements of State Board special education regulations, N.J.A.C. 6:28-1.1 et seq., as further evidence of the broad statutory and regulatory authority of the Commissioner to reach a determination herein as recommended by the judge.

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In support of the judge's conclusion that the Commissioner should exercise this broad authority cited above, petitioners argue that none of those terminated in 1980 were terminated for cause. They were, therefore, adversely affected by the ultra vires determination respondent to subcontract the services to be rendered to nonpublic school pupils.

Petitioners likewise reject respondent's equity argument claiming that the offer of reemployment to teachers terminated in the spring of 1980 went no farther than an agreement to grant an interview and to consider them for reemployment. Petitioners further reject the constitutional argument raised by respondent in its exceptions, contending that the judge's Order was limited in nature and does not necessarily specifically direct the payment of monies but merely asks the Commissioner to consider whether the teachers terminated in 1980 should be totally deprived of rights of reemployment, tenure accumulation and pension benefits. Even if funds were to be expended as a result of a Commissioner's determination, such payments would not be considered a gift since it has been held that the recovery of full salary by an employee wrongfully discharged is not in violation of the Constitution.

Petitioners' final reply takes exception to respondent's contention that they sat on their rights before the Commissioner by having first filed in the Chancery Division contending that such action, when transferred from a court to an administrative agency, may not be held to the detriment of the filing party. Petitioners further argue that the failure of the judge to decide its motion for summary decision made in July 1982 until January 1984 may not be regarded as a failure to pursue their cause with vigor. Petitioners contend that they have pursued this case with vigor throughout the long period of litigation and have never conceded or acquiesced in the right of respondent to hire individuals other than those whom it terminated in 1980.

The Commissioner has thoroughly analyzed the arguments set forth in the exceptions and reply exceptions submitted by the parties as well as the conclusions reached by the judge. Upon such review, the Commissioner finds merit in respondent's contention that the judge improperly concluded that educational services commissions are creations of the State Board of Education pursuant to legislative authorization. As accurately pointed out by respondent herein, N.J.S.A. 18A:6-52 specifically defines the initiative for seeking creation of an educational services commission as being within the province of local boards of education. Such boards of education pursuant to the above-cited statute further define what services they need and wish to be able to provide. The sole function of the State Board in the creation process is to "***determine whether there is a need for such a commission and whether its operation is feasible." The Commissioner, likewise, finds the judge's conclusion that an educational services commission is "***more similar to any division or bureau in the Department of Education or to a county Superintendent of Schools than [it is] to local school

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boards" (ante, at p. 5) to be totally unsupported by any statutory reference, nor can the Commissioner find support for such conclusion based upon his own reading of the applicable statutes. N.J.S.A. 18A:6-51 et seq. The Commissioner notes that the Attorney General's Formal Opinion No. 1-1981, which categorically rejects the right of an educational services commission to subcontract for the performance of educational services to local districts, recognizes such commissions as being something other than a subdivision of the Department of Education when it states:

> "***[I]t is clear that the Legislature, which has already created local districts to discharge its responsibility under the Education Clause, has further authorized the creation of regional public agencies to assist districts in the performance of their educational functions.***" (Emphasis supplied.) (at p. 8)

Pursuant to the above-cited language, an educational services commission cannot be considered to be the same as a division or bureau of the State Department of Education. Thus, the Commissioner finds that an educational services commission is not a local educational agency; it does have a statutorily-defined status quite apart from the State Department of Education whose agency head, the State Board of Education, has the authority to approve both the need for its existence and the scope of its operations.

In addressing petitioners' reply exceptions, the Commissioner is constrained to observe that, while he finds merit in the argument that educational services commissions do not have the authority to subcontract for the provision of educational services, he cannot conclude, as do petitioners, that the required presence of the county superintendent on the board of directors of the educational services commission reflects a statutory intent to restrict such a body's autonomy or thus makes it subject to the direct day-to-day supervision of the Commissioner. To accept such logic would, in effect, impose the same denial of autonomy on county vocational schools that likewise by statute require membership on their boards of education by the county superintendent of schools. N.J.S.A. 18A:54-16

While the Commissioner need not quarrel with petitioners' reply exceptions which delineate in detail the wide-ranging authority enjoyed by his office, the existence of such authority does not bear with it the right to act in a manner which is not firmly guarded in law or regulation or to impose his will by fiat. In each instance in which the Commissioner's authority has been recognized in the court decisions so painstakingly delineated by petitioners in their reply exceptions that authority may not be imposed purely by fiat and is always subject to due process review. (See In re Upper Freehold Regional School District, 86 N.J. 265 (1981) and In re Trenton Board of Education, 86 N.J. 327 (1981).)

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In that regard, the Commissioner cannot accept either the judge's or petitioners' contention that his supervisory responsibilities over the public schools of this state authorize him to overturn actions of an educational services commission without a legal finding as to the appropriateness of those actions and as to the rights of petitioners in this matter. Nor can the Commissioner accept the conclusion that the method of obtaining the necessary factual basis for rendering a determination in this matter can best be and most appropriately be obtained through administrative means, particularly in the absence of agreement between the parties as to either the appropriateness or the legal sufficiency of such a process.

Consequently, and for the reasons herein delineated, the Commissioner reverses the finding of Judge Kestin and remands this matter to the Office of Administrative Law for a full and immediate hearing on the merits on those issues delineated in the Prehearing Order of April 10, 1982.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 22, 1984

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INITIAL DECISION

OAL DKT. NO. EDU 1666-82 (ON REMAND)

AGENCY DKT. NO. 48-2/82A

NEW JERSEY EDUCATION ASSOCIATION,

Petitioner,

v.

ESSEX COUNTY EDUCATIONAL SERVICES COMMISSION,

Respondent,

v.

BOARD OF TRUSTEES, TEACHERS' PENSION AND ANNUITY FUND,

Third-Party Respondent.

APPEARANCES:

William S. Greenberg, Esq. for petitioner (Greenberg, Kelley & Prior, attorneys)

Edward F. Petit-Clair, Esq. for respondent (Petit-Clair & Graves, attorneys)

Charlotte A. Kitler, Deputy Attorney General, for third party respondent (Irwin I. Kimmelman, Attorney General of New Jersey, attorney)

Record Closed: July 17, 1984 Decided: August 15, 1984

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

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This case has a lengthy prior history which need not be repeated here. Suffice it to say that shortly following the Commissioner's Decision of March 22, 1984, in which he reviewed the January 26, 1984 Partial Summary Decision and Procedural Order issued by Chief Judge Kestin and remanded the matter to the Office of Administrative Law for an expeditious hearing on the merits, a conference was conducted with counsel. It was there agreed that the threshhold issue to be addressed and decided was whether the action taken by the respondent's Board of Directors in 1980, discharging all of its teachers, was the product of good faith. In the event that issue was determined in the negative, the question of those teachers' remedies would then be addressed.[1] A plenary hearing was conducted before me on June 18, 1984, at which time the testimony of Warren W. Buehler, Executive Director of the New Jersey Educational Services Commission (hereafter "Commission") was offered. Although Buehler was called as a witness by the petitioner, and cross-examined by the respondent, this was done pursuant to an informal agreement between counsel that his testimony would be offered jointly in lieu of calling all of the individual Commission members. No other oral testimony was offered.

TESTIMONY

Buehler became Executive Director of the Commission in August 1979 and is in charge of administering and supervising the activities and programs of the agency. In September 1979, the Commission employed 25 full-time teachers. That number rapidly increased during the next few months and by April 1980, the Commission employed 103 full-time teachers. Funding for the Commission was provided by an assessment on a per pupil basis to the participating local public school districts. Buehler soon discovered that a serious financial problem existed. Indeed, there was a real threat of a lack of funds to pay staff during September 1979 prior to the receipt of any revenues from the individual school districts themselves. Thus, Buehler arranged a meeting with Mr. Vincent Calabrese, an Assistant Commissioner in the Department of Education, to discuss the

[1] A Deputy Attorney General appeared at the conference on behalf of The Board of Trustees, Teachers Pension and Annuity Fund. However, it was agreed that this third-party respondent would not participate unless and until the remedies issue was reached.

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problem. With the assistance of Calabrese, a $50,000 loan to the Commission was arranged from the Pilgrim State Bank at a favorable rate of interest. The loan, which provided enough funds so that the Commission could pay its staff and cover other expenses during the first part of the 1979-80 school year, then was repaid over the course of that school year from fees paid to the Commission from the local districts to whom the Commission's services were provided. The districts took the position that that could not begin to make those payments until October 1979, since no payments would be made before the services actually were delivered. So too, there was a built-in lag time between submission of the Commission's bill and its review, approval and payment by a local district. In sum, said Buehler, the Commission faced a particularly serious cash flow problem at the beginning of the 1979-80 school year and the Pilgrim State Bank loan "rescued" it.

During the second half of the 1979-80 school year the Commission naturally addressed itself to how it would be able to fund its 1980-81 operations, in view of the cash flow problem previously noted. Ultimately, said Buehler, it was decided to discharge all of the teaching staff members and to subcontract out the services they provided to a private vendor. According to Buehler, this option was believed by the Commission to be its only viable alternative to going out of business altogether, a result which obviously would be to the detriment of the local school boards and to the children served by the Commission. The Commission also declined to attempt to rescind contracts with districts as a cost saving measure since that alternative, too, would have put those districts in a very difficult position. During the Spring of 1980 efforts were made by Buehler to negotiate a loan similar to that received from Pilgrim State Bank in 1979. Pilgrim, it seems, had declined to renew the Commission's line of credit. Another financial institution, First National State Bank, advised Buehler that its attorneys apparently had questioned the legality of a loan to an entity such as the Commission and a written opinion of the Attorney General had been sought. Buehler also contacted the Department of Education and was orally informed by an Assistant to the Commissioner, Arthur Winkler, Esq., that he believed such a loan would be illegal. In late June 1980 Buehler had a telephone conversation with the Deputy Attorney General then assigned to

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the Department of Education, who orally confirmed Winkler's opinion.[2] Prior to this time, and in light of the serious fiscal uncertainties facing the Commission, letters had been sent to the teaching staff members advising them that they would not be rehired (Exhibits J-1 and J-2).

Buehler insisted that he made determined efforts to improve the cash flow problem by calling a number of the districts to explain the situation to them and asking them to expedite payment. However, the school business people with whom he spoke pointed out that their boards were acting as quickly as they could and it was not feasible to call special meetings just to pay bills from the Commission.

Accordingly, in July 1980, the Commission entered into a contract with an entity known as Education and Training Consultants Inc., (herafter "ETC"), a private vendor, for the provision of auxilliary and remedial services to local school districts on the Commission's behalf. The president of that corporation, Mr. Vincent Lasporgada, had been introduced to Buehler in February 1980 by the then Essex County Superintendent of Schools, Howard White, who was also a member of the Commission. White told Buehler that Lasporgada had a proposal that ought to be considered and a meeting was held in White's office, at which time Lasporgada explained that ETC could provide the Commission with instructional services on a subcontracted basis and thereby resolve the cash flow problem. At that time the Commission already had a relationship with ETC in the form of lease-purchase agreements regarding mobile classrooms. Lasporgada stressed to White and Buehler that ETC had successfully performed similar contracted services arrangements for Camden and Jersey City, as well as for school districts in Pennsylvania. In late April 1980, Lasporgada met with Buehler, White and other members of the Commission. Lasporgada gave a more specific presentation and advised those present

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[2] Written confirmation of the Deputy's oral opinion did not follow until February 1981. See Opinion Letter from Deputy Attorney General Duncan to Deputy Assistant Commissioner Ruh, February 2, 1981 (Exhibit R-6). According to that opinion the Commission had no statutory authority to borrow privately to fund its operating expenses and that such costs were to be met through periodic payments from participating school districts.

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that he had the people, the resources and the financial wherewithal to provide the services needed. Buehler recalled that Lasporgada also said that he would offer jobs to all of the teachers employed by the Commission during 1979-80. Thereafter, on June 3, 1980, Lasporgada made a formal presentation to the full Board of Directors where he again explained his program and services. Specifications thereafter were prepared and bid proposals publicly solicited. (Exhibit J-3, par.1, pp.1-2) On July 1, 1980, the Commissioner formally awarded a contract to ETC, having also received a bid from another vendor, Remedial Education and Diagnostic Services, Inc. (hereafter READS) (Exhibit J-3, par.25).

ETC performed in accordance with its contract during 1980-81. However, in August 1981, it was determined in a decision by Chief Judge Kestin that the Commission could not enter into a contract with ETC any further, since it did not appear to have sufficient capital to guarantee that the services could continue to be provided in an effective manner. See NJEA, et al. v. NJESC, et als., OAL DKT. EDU 4302-81, (August 10, 1981). Accordingly, for the 1981-82 school year, the Commission determined to engage the services of READS. However, in November 1981, the Chancery Division, held that the Commission had no lawful authority to subcontract and the agreement with READS promptly was terminated. That decision later was affirmed on appeal. See 191 N.J. Super. 524 (App.Div. 1983). Thus, as of November 1981, the Commission hired its own teachers, but this time on an hourly basis. From that point until now, the Commission has continued to provide auxiliary and remedial services to local districts through teachers employed by it, but paid at an hourly rate. No other fringe benefits are enjoyed by those persons, except that beginning in the 1984-85 school year it has been agreed that some hospitalization benefits will be offered. The hourly rate was originally about $9.75 in 1981, but has risen to about $11.80 at this time. According to Buehler, the total amount of money to be spent during the 1983-84 school year for instructional staff is still less than that which would have been spent had the full-time contracted teachers employed in 1979-80 been retained and salary increases given to them at a rate comparable to that given to the hourly people-about 8% per year.

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On cross-examination, which was conducted by counsel for the Commission, Buehler filled in several gaps left open during his direct. He noted that in April 1980 it was estimated that the payroll requirements for the beginning of the 1980-81 school year would be about $175,000 and he had to explore ways in which to meet that burden. At no time before April 1980 did he or any Commission member, as far as Buehler knew, seriously consider hiring ETC or any other outside vendor. Certainly, no Board member had expressed any such interest to him. However, during late April and into May 1980 Buehler learned that access to a bank loan or loans was going to be a remote likelihood since Pilgrim State Bank had turned him down (Exhibit R-1), and a vice-president of First National State Bank had orally informed him of a potential legal problem and then followed it up with a confirming letter (Exhibit R-2). At or about the same time Winkler told also Buehler about the legal impediment. Although a short term $200,000 loan committment actually was made to the Commission by Midlantic Bank at the end of May 1980, (Exhibit R-5) counsel advised that it would not be legal to enter in any such arrangement. Subsequently, Buehler spoke with the Deputy Attorney General who gave him the same advice (Exhibit R-3).

In late May 1980, the Commission met to discuss the serious fiscal problems that it faced. At that time the prospect of subcontracting was discussed and ETC was prominently mentioned. A continuation of the meeting was conducted in early June 1980, at which time Lasporgada attended and made his presentation to the Board. At the same meeting Buehler gave the Board some projections for the 1980-81 school year, noting that in the area of direct services to nonpublic schools there would be an immediate need for about $196,000 for teachers' salaries and that the Commission clearly would not have that sort of money in time (Exhibit R-4). In short, the Commission faced a dire economic crisis - it apparently could not timely fund its anticipated services, nor did it have the legal authority to borrow money to cover any deficit. Thus, according to Buehler, the Commission came to the unhappy conclusion that it would either subcontract or go out of business.

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Buehler insisted that the major concern of the members of the Commission was to continue to provide the necessary services to nonpublic school pupils, and any option which meant going out of business simply had to be avoided. Since a bank loan did not appear to be a feasible alternative, the emphasis then turned to subcontracting. Buehler conceded that had Midlantic's $200,000 offer been legally capable of acceptance, that loan would have given the Commission enough of a "breather" to handle the beginning of the 1980-81 school year and subcontracting to ETC would not have taken place. However, given the legal situation, the Commission did move to subcontract. In addition, because of its cash flow problems, the Commission had solicited bids for the sale of its mobile classrooms and accepted ETC's offer of $300,000 for them (Exhibit J-3, par.24, p.5). Buehler explained that mobile classrooms were useless to the Commission if it did not have teachers, and since the teachers now were going to be provided by ETC in 1980-81, it made sense for ETC to buy the mobile classrooms. Thus, with the $300,000 payment for the classrooms, and the fact that ETC took over the teaching services function, the Commission continued to exist in 1980-81. The following year, after ETC was disqualified, the Board engaged READS, but the court decision ruling any subcontracting to be illegal required a termination of the READS relationship, too. However, the Commission never had to pay READS and in effect, it received free services from that entity during September and October 1981. Indeed, by the end of the 1981-82 school year, the Commission actually had a surplus.

Buehler reiterated that the first time subcontracting seriously was considered was after he spoke with Winkler in May 1980. Neither Buehler nor the Commission favored subcontracting, but without it neither he nor the Commission could see how teachers could be paid in September 1980. Thus, the Commission's meetings of late May and June 1980 addressed themselves to the subcontracting topic and a decision was made to move forward in that direction. The action taken on July 1, 1980 was the logical culmination of that process.

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DISCUSSION

In its post-hearing brief the petitioner argues that the teachers employed by the Commission were never legally terminated in their employment and are entitled to be returned to the status quo as of the time of their discharge, to the greatest extent possible. The Commission, in its post-hearing brief, argues that the NJEA is collaterally estopped in this case from relitigating issues which previously were determined by Chief Judge Kestin in his Initial Decision in OAL DKT. NO. EDU 4302-81. Beyond that, the respondent argues that the discharge of its teachers in 1980 was a proper reduction in force which clearly was required by the financial and legal exigencies which confronted the Commission at that time. The respondent also points out that the burden of proof rests upon the petitioner to demonstrate that the acts of the Commission were arbitrary, capricious, unreasonable or otherwise made in bad faith and that it has failed to carry that burden.

I believe it appropriate first briefly to address the point made by respondent regarding the impact on the instant case of Chief Judge Kestin's Initial Decision in August 1981. In that case he concluded that, absent proof to the contrary, the Commission validly discharged its legal obligations when it contracted with ETC for the 1980-81 school year and that at the time of the execution of that contract the Commission possessed the legal capacity to enter into it. Chief Judge Kestin further found that beginning in 1979-80 difficulties began to be experienced by the Commission with respect to its administration of the program of services offered to local school districts because of a cash flow problem. He specifically observed, "Because the payments from State revenues for these mandated services are made to the school districts involved, and because the funds may not be paid to the entity providing the services until the services are rendered, there was an unavoidable time lag until the Commission could receive reimbursement from the districts for its startup costs. Advice received by the Commission from the Attorney General's office that it could not lawfully borrow money, was a factor in the decision to contract with a private vendor for the provision of the services." See, EDU 4302-81, (August 10, 1981), p.9.

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In my view none of the findings and/or conclusions and/or observations made by Chief Judge Kestin in his August 1981 decision are of such a nature as to preclude my consideration of the evidence offered before me in the instant matter. The issue before Chief Judge Kestin was not the same issue which this case involves. If it were, then there would have been no need for the Prehearing Order of April 10, 1982 even to address it. In short, I am not bound by the doctrine of collateral estoppel, or by any other doctrine, from dealing with the threshhold issue articulated in that prehearing order and which the Commissioner of Education has determined should be heard on an expedited basis.

The basic position taken by the petitioner is that a close examination of the circumstances which existed during the 1979-80 school year reveals that the action of the Commission in discharging its teachers and hiring ETC was not done in good faith. Rather, according to the petitioner, the Commission was engaged in a charade designed to evade its legal obligations to its teachers so that money could be saved by contracting out services to a favored private vendor. Thus, petitioner's point to the fact that activities were underway as early as February 1980 with respect to a potential subcontracting of those services, even though the first hint of any legal impediment to borrowing money to fund those services did not arise until May of that year. Beyond that, petitioner argues that the "bogus" actions of the Commission are reflected in its total failure to consider, no less pursue, readily available alternatives to raising money, short of subcontracting. In addition, petitioners scoff at the notion that the Commission's only alternative to subcontracting was to cease providing any services at all, suggesting that the Commissioner of Education's broad authority to insure the delivery of a thorough and efficient education certainly could have provided a foundation for appropriate action. Petitioners observe, by way of example, that the Commissioner could have seen to it through his own authority, or that of the State Board, to expedite State aid payments to local school districts in advance of September.

My own indpendent consideration of the testimony offered by Buehler leads inexorably to the conclusion that while other potential options conceivably could have been explored by the Commission, with or without the help of Department of Education

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officials, the fact that this was not done is not fatal. Second guessing the Commission's judgment to subcontract to ETC, and deciding through hindsight that other alternatives might have been pursued, does not demonstrate illegality of the choice made. Whether or not the Commission's action in April - July 1980, discharging its teachers and hiring ETC, was the product of good faith has to be gauged by the facts that the Commission had before it at that time. To that end there is no dispute that the Commission sincerely believed that it was faced with a severe budget crunch in September 1980. Indeed, it had borrowed $50,000 from a bank the year before, and when it discovered that this potential source of funds had disappeared it was forced to scramble about for options. The fact that Lasporgada was introduced to Buehler by White as early as February 1980 does not establish bad faith. Clearly, despite this introduction, and despite the obvious solicitation of business being made by ETC, the Commission sincerely was reaching out for financial help in order to continue to retain its own staff members. It certainly wanted to pursue the bank loan route and acted well within the bounds of reasonable discretion by holding back when the legal problem concerning its very authority to do so was raised. Again, the viewpoint of the Commission at that time is the critical focus, not what the Commission, petitioners or anyone else might have done given the benefit of hindsight some years later. To put it in another way, the Commission was entitled to exercise bad judgment, or even to fail fully to consider other options that might have been available to it. That is not bad faith. Given Buehler's unrebutted testimony I fail to perceive any sound basis to conclude, as petitioner's urge, that the Commission's action was the product of any malevolent effort to deprive its teaching staff members of their statutory entitlements. I have reviewed the various decisions cited by the petitioners and find none of them to be persuasive. Clearly, where a reduction in force or other personnel actions take place which involve a subterfuge designed to deprive teaching staff members of their statutory rights, corrective action is obviously called for. See, e.g., Viemeister v Prospect Park Board of Education, 5 N.J. Super. 215 (App. Div. 1949). The situation in this case is not at all like that. Rather, the entire thrust of the petitioner's case amounts essentially to the contention that the Commission should have, but did not recognize and pursue other viable alternatives that conceivably could have preserved the employment by the

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Commission itself of its own teachers. That position, although it attracts some sympathy, has no legal persuasion. On the facts before it in 1980 the Commission took the action that it deemed appropriate. While the consequence was adverse to many of its employees, that was not the malevolent product of a preconceived plan to do them harm. The fact that preliminary, informal discussions were taking place with ETC as early as February 1980 does not prove bad faith. As Buehler noted, the question of maintaining a cash flow was a persistent one, and recognition of the need to avoid a repetition in September 1980 of the problem faced in September 1979 was quite logical. In order for bad faith to be proven there has to be evidence that the actions challenged were arbitrary, capricious or unreasonable and with respect to boards of education there is a presumption running against any such finding. See, e.g., Thomas v. Morris Township Board of Education 89 N.J. Super. 327 (App. Div. 1965), aff'd o.b. 46 N.J. 581 (1966). As the respondent aptly observed in its post-hearing brief, the actions taken by it need not be infallible. In 1980 the Commission reached the reasonable conclusion that it was not in a position lawfully to borrow money to deal with its perceived cash flow problem, having first been alerted to the legal problem by a bank, and then orally both by the Department of Education and by the Office of the Attorney General. Once the Commission came to the conclusion that there was no other palatable way for it to meet its expenses, the need to reduce its teaching staff salary obligations in order to resolve the problem became readily apparent. Nowhere in this entire scenario has bad faith been shown by petitioner.

In view of the foregoing discussion I make the following FINDINGS OF FACT:

1. Petitioner is the representative of teaching staff members formerly employed by the respondent Commission.

2. Respondent is an agency established under and by virtue of the provisions of N.J.S.A. 18A:6-51, et. seq. and is administered by a Board of Directors pursuant to N.J.S.A. 18A:6-54 et. seq.

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3. Among the powers and duties conferred upon the respondent and its Board of Directors is the authority to employ and discharge teachers.

4. The Executive Director of the Commission is Warren W. Buehler, who assumed that position in August 1979.

5. After entering upon the duties and responsibilities of his office, Buehler determined that the Commission faced a serious financial problem with respect to its ability to pay salaries of teaching staff members beginning in September 1979. In particular, funds to provide such salary expenses were expected to come from assessments placed upon local school districts utilizing the services of the Commission on a per pupil basis, and the billings for such assesment were not sent until the services were rendered and payment in response to those billings was not made until thereafter.

6. In order to overcome the problem of the cash shortage, arrangements were made by the Commission in September 1979 to obtain a loan from the Pilgrim State Bank in the amount of $50,000, at a favorable rate of interest.

7. As a result of the loan from Pilgrim State Bank the Commission was able to pay its employees and otherwise function at the beginning of the 1979-80 school year. The loan was repaid over the course of that school year from fees paid by the districts to whom services were provided.

8. By the Spring of 1980 the Commission employed over 100 full-time teachers on a contracted basis and was providing services to more than 100 local school districts. In April 1980 the Commission determined that it would have to release 61 of its teachers for the upcoming school year because of the lack of contracts received from the local districts for the 1980-81 school year.

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9. Accordingly, those teachers were notified by letter that in view of the fact that insufficient amount of funds had been allocated for the 1980-81 school year, and further in view of the fact that signed contracts from all of the local school districts had not yet been received, contracts for the 1980-81 school year could not be offered to them (J-1).

10. Sometime during May 1980 the Commission was advised by Pilgrim State Bank that no loan would be made to it by that institution (Exhibit R-1). Accordingly, other lending institutions were approached for a loan, including First National State Bank and Midlantic National Bank.

11. On May 5, 1980 a vice-president of First National State Bank wrote to Buehler and advised him that the question of the Commission borrowing from that bank was presently subject to the receipt of a written opinon from the office of the Attorney General, "indicating the permissible route to be taken" (Exhibit R-2). At or about the same time Buehler, on behalf of the Comission, had orally been informed by an Assistant to the Commissioner of Education, Arthur Winkler, Esq., that such a loan to the Commission would not be legal.

12. In a letter dated May 30, 1980 a branch manager of Midlantic National Bank told Buehler that Midlantic would extend a short term $200,000 loan to the Commission based upon certain stated conditions (Exhibit R-5).

13. In view of the legal opinion received orally from Winkler, as well as a confirming opinion received from its own counsel, the Commission determined that it would not be able to enter into a loan arrangement with Midlantic National Bank.

14. Beginning in or about February 1980, discussions had been initiated among Howard White, Superintendent of Schools of Essex County and a member of the Commission, Buehler and one Vincent Lasporgada the president of

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ETC with respect to the possibility that the Commission would contract out its teaching services to ETC beginning in September 1980. ETC did have such contracts with school districts in New Jersey and Pennsylvania.

15. From time to time Lasporgada met with Buehler, White and/or other members of the Commission's Board of Directors to further discuss the possibility of the contracting out of services. In late May, and again in early June 1980, Lasporgada made presentations to the Board indicating that his organization had sucessfully provided contracted services to other New Jersey school districts, as well as to some in Pennsylvania, and that it would be prepared to do so for the Commission.

16. On May 9, 1980, a letter was sent by Buehler to the remaining 42 teaching staff members who had not been informed in April that their services would be terminated. He advised them that although it was the present intention of the Commission to continue them in employment beyond June 30, 1980, further clarification of the exact terms and conditions of that employment would not be possible at that time because of, "lack of finalization on contractual agreements, funding allocations, negotiations, etc." (Exhibit J-2).

17. As the result of discussions conducted by the Commission during the period April-June 1980, a determination was reached by its Board of Directors that in view of its serious cash problems the only alternatives available to it with respect to providing services to non-public school students for 1980-81 were either the total suspension of those services, or entering into a contract with a private vendor for subcontracting out of those services.

18. At a special meeting held on July 1, 1980 the Board of Directors adopted the following resolution: "Mr. O'Connor moved approval of a contract for the provision of auxiliary services to non-public school students to be executed

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with Education and Training Consultants, Inc., the lowest responsible bidder, in accordance with their bid submitted on June 30, 1980 in the amount of $3,900,114, and that the President and Executive Director of the ECESC be authorized to execute same. Dr. Adams seconded the motion. A roll call vote was taken as follows: Mr. O'Connor - yes; Dr. Adams - yes; Sr. Kenny - yes; Mr. Griffith - yes; Mr. Rittweger - yes; Dr. White -present, not voting. Motion carried" (Exhibit J-3, p.5).

19. Previously, on June 24, 1980, Buehler was orally informed by the Deputy Attorney General then assigned as counsel to the Department of Education that it would not be lawful for the Commission to obtain a loan from a bank (Exhibit R-3). This conversation confirmed the previous information orally provided to the Commission both by its own counsel and by Winkler.

20. At the special meeting of July 1, 1980, the Commission also voted approval of the sale of 40 mobile classroom units to ETS for the sum of $300,000 (Exhibit J-3, p.5).

21. At the special meeting of July 1, 1980, the Commission also adopted a resolution for a total reduction in force of "all administrative and professional staff personnel of the Direct Services to Non-Public Schools of the ECESC" (Exhibit J-3, p.5 and attachment).

22. During the 1980-81 school year the provision of services by the Commission to non-public schools was undertaken by ETC under the contract that the Commission had with it. However, in August 1981, in an Initial Decision by former Chief Judge Kestin, it was determined that a renewal of that contract could not take place since ETC did not appear to have sufficient capital to guarantee that it could provide these services in an effective manner.

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23. As a result of the determination in August 1981 that its contract with ETC could not be renewed, the Commission engaged the services of another outside vendor, READS. Thereafter, in November 1981, a decision by the Superior Court, Chancery Division, held that the Commission had no statutory authority to subcontract out its services to any private vendor and, as a result, the contract with READS was terminated by the Commission. This decision was affirmed on appeal. See 191 N.J. Super. 524. The termination of the READS contract provided respondent with the sum of approximately $260,000, which had been reserved as a contingency in the event the READS contract was upheld. Those funds, together with funds which had been saved because of the Commission's contract with ETC and the proceeds of its sale of mobile classrooms to ETC, enabled respondent to again engage its own teachers, but on an hourly rate of pay basis. This arrangement has continued to the present time.

In view of the foregoing discussion and Findings of Fact the conclusion to be reached with regard to the "threshold issue" in this case become apparent. While one might quibble with the Commission's perception of the options it had in 1980 with regard to the cash flow problem, its failure to choose some option apart from subcontracting with ETC was neither arbitrary, capricious, unreasonable nor otherwise the product of some malicious effort to deprive any teachers employed by it of their lawful rights and entitlements under the education laws of this State. The wisdom reposed in the Board of Directors may not have been such as to render it infallible. The members may very well have exercised judgment which, in hindsight, appear either to have been precipitous or not made as a result of a full calculation of other potential alternatives. This is not to say that other viable options actually did exist, for there were a variety of legal hurdles that would have to be crossed by the Commission and/or the Department of Education in order to put into effect some of the proposals mentioned by the petitioner in its post-hearing brief, such as expediting State aid payments to local school districts. No discussion of these potential alternatives need take place as the basic issue of good faith has been determined favorably to the respondent.

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Accordingly, I **CONCLUDE** that the action taken by the respondent with regard to the termination of the employment of its teaching staff members in July 1980, and the contracting out of auxilliary services to non-public schools to a private vendor, was not shown by petitioner to have been the product of bad faith. Having reached that conclusion there is no need to consider the other issues raised with respect to possible remedies. Nor do I deem it appropriate to adopt the petitioner's suggestion that in any event this entire matter again be reviewed in an administrative fashion by the Department of Education. The Commissioner's Decision of March 1984 rejected that proposition and there is no reason to raise it again.

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 1666-82

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

August 15, 1984
DATE

Stephen G. Weiss
STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

August 17, 1984
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

AUG 21 1984
DATE

Ronald I. Parker/phm
FOR OFFICE OF ADMINISTRATIVE LAW

tw

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APPENDIX

WITNESS

Warren W. Buehler

EXHIBITS

J-1	Letter of April 25, 1980 from Buehler to 61 teaching staff members
J-2	Letter of May 9, 1980 from Buehler to 42 teaching staff members
J-3	Minutes of the special meeting of July 1, 1980, with attached resolution
R-1	Letter of May 13, 1980 from President, Pilgrim State Bank to Buehler
R-2	Letter of May 5, 1980 from Vice-President, First National State Bank to Buehler
R-3	Memorandum, June 24, 1980
R-4	Commission's anticipated expenditures, Summer 1980
R-5	Letter of May 30, 1980 from Branch Manager, Midlantic National Bank to Buehler
R-6	Letter of February 2, 1981 to Gustav H. Ruh, Deputy Assistant Commissioner of Education from Deputy Attorney General Duncan

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NEW JERSEY EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	
ESSEX COUNTY EDUCATIONAL SERVICES COMMISSION,	:	
RESPONDENT,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON REMAND
BOARD OF TRUSTEES, TEACHERS' PENSION AND ANNUITY FUND,	:	
THIRD PARTY RESPONDENT.	:	
	:	

The Commissioner deems it proper and necessary that reference be made herein to the long and convoluted history of this complex case. Accordingly, the Commissioner herewith incorporates by reference and attachment the Procedural Order on Motion for Summary Decision issued by the Honorable Howard K. Kestin, CALJ on June 23, 1982 and also that judge's Partial Summary Decision of January 26, 1984. Further, the Commissioner makes reference to and incorporates herein his own decision of March 22, 1984 where, for the reasons stated therein, the Commissioner reversed the findings of Judge Kestin with a remand to the Office of Administrative Law for a full hearing on the merits of the issues delineated in the Pre-hearing Order of April 10, 1982.

This is the record and initial decision resulting from that remand which has been thoroughly reviewed by the Commissioner. Exceptions by petitioner were filed within the time prescribed in N.J.A.C. 1:1-16.4a, b and c.

The Commissioner notes that petitioner takes exception to the ALJ's statement that a conference of counsel held shortly after the matter herein remanded resulted in a mutual agreement that if the threshold "good faith" issue were decided in respondent's favor, there would be no necessity for going further. Only a finding in the negative would require consideration of further issues. Petitioner contends that the issue as framed by the ALJ in the instant matter was not the way in which the Pre-hearing Order entered by Judge Kestin in 1982 was framed. Judge Kestin's order, claims petitioner, defined the threshold issue as being whether or not the teachers in question were "properly discharged." (Petitioner's Exceptions, at page 1) Petitioner contends that "good faith" is merely one of the standards for determining "proper discharge."

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Petitioner goes on to assert that even if the actions of respondent were deemed to have been taken in good faith, such action may still be deemed to be "arbitrary, capricious or unreasonable" or violative of law. (Petitioner's Exceptions, at page 2)

In the instant matter, petitioner contends that the actions of the Essex County Educational Services Commission (Commission) in seeking an alternative to a bank loan after having been informed of the illegality of its borrowing money were extremely selective, backing off from seeking further bank loans upon a verbal opinion as to their illegality but engaging in a long drawn out court fight to defend its right to subcontract educational services under Chapters 192 and 193, Laws of 1977.

Petitioner further alleges that even if the Commissioner agrees that there was no improper motivation on the Commission's part, that body did not comply with either the letter or the spirit of the RIF statute, N.J.S.A. 18A:28-9, which provides:

> "Nothing in the 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 ***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." (Emphasis supplied.)

Further, petitioner contends that the Commission was in violation of N.J.S.A. 18A:27-10 for its failure to notify all non-tenured teachers of its decision to not offer them employment for the subsequent school year prior to April 30 in support of which are offered the following citations: Sieja v. Board of Education of the East Windsor Regional School District et al., 1975 S.L.D. 823; Burgin v. Avalon Board of Education, 1974 S.L.D. 396.

Finally, petitioner argues that the ALJ's reasoning was faulty in determining that the Commission had not acted in bad faith when it determined to dismantle its total teaching force and subcontract the provision of services to a private concern. To adopt such reasoning, says petitioner, would have altogether a negative effect on education in New Jersey since it is obvious that the Commissioner would never let a local board of education "wash its hands" of its responsibility to provide a thorough and efficient education. Pursuant to the above reasoning, petitioner contends that the Commissioner should be strict in his interpretation of all applicable statutes and unforgiving of the Commission's errors in judgment and failure to exhaust all possible means of contracting to provide direct educational services as authorized by N.J.S.A. 18A:46-19.7.

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The Commissioner has carefully considered the exceptions raised to the initial decision by petitioner. Based upon such consideration, the Commissioner affirms the conclusion of the ALJ in this matter that the Commission acted in good faith when it terminated its entire teaching staff upon reaching a considered judgment that it could no longer continue to directly provide those services to nonpublic pupils under Chapters 192 and 193 after having been informed by the Department of Education that it lacked the legal authority to borrow money. Notwithstanding the fact that the Commission subsequently was successfully challenged in its legal authority to subcontract the provision of such services to a private vendor, petitioner has not provided any modicum of evidence to support a finding of bad faith on part of the Commission.

The Commissioner nonetheless must agree with petitioner's contention that the absence of "bad faith" in and of itself is not sufficient to decide the question of whether or not teaching staff members were "properly terminated" as delineated in the Pre-hearing Order of Judge Kestin. This issue in the Commissioner's view is worthy of proper and full consideration by him in reaching an ultimate conclusion in this matter. In undertaking such consideration, the Commissioner notes that petitioner's reliance upon N.J.S.A. 18A:28-9 is misplaced in that the aforementioned statute concerns itself essentially with those circumstances within which a reduction of staff of tenured teaching staff members may be undertaken. Since the teaching staff members (petitioners) herein were all, by admission, nontenured, such statute's applicability in this matter, in fact, provides a buttress to the position of respondent in this matter insofar as respondent contends, and the Commissioner has agreed, that the action herein was taken in good faith and for good cause. The Commissioner does, however, find merit in petitioner's assertion of the applicability of N.J.S.A. 18A:27-10, 11 and 12 which provide as follows:

> 18A:27-10. Nontenure teaching staff member; offer of employment for next succeeding year or notice of termination before April 30
>
> "On or before April 30 in each year, every board of education in this State shall give to each nontenure teaching staff member continuously employed by it since the preceding September 30 either
>
> a. A written offer of a contract for employment for the next succeeding year providing for at least the same terms and conditions of employment but with such increases in salary as may be required by law or policies of the board of education, or

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b. A written notice that such employment will not be offered."

18A:27-11. Failure to give timely notice of termination as offer of employment for next succeeding year

"Should any board of education fail to give to any nontenure teaching staff member either an offer of contract for employment for the next succeeding year or a notice that such employment will not be offered, all within the time and in the manner provided by this act, then said board of education shall be deemed to have offered to that teaching staff member continued employment for the next succeeding school year upon the same terms and conditions but with such increases in salary as may be required by law or policies of the board of education."

18A:27-12. Notice of acceptance; deadline

"If the teaching staff member desires to accept such employment he shall notify the board of education of such acceptance, in writing, on or before June 1 in which event such employment shall continue as provided for herein. In the absence of such notice of acceptance the provisions of this article shall no longer be applicable.

In reviewing the circumstances which prevailed in this matter, the Commissioner observes that the notification of April 25, 1980 in which petitioners herein were notified "...that at this time a contract for the 1980-81 school year cannot be offered to you..." (J-1) suffices to meet the requirements of 18A:27-10 and that such letter did, in effect, provide timely notice as prescribed by the provisions of 18A:27-11. As to the termination of the 42 additional nontenured teaching staff members whose services were also terminated by the action of the Commission at its meeting of July 1, 1980, the Commissioner finds and determines that the letters of May 9, 1980 which informed said persons that "...your employment with the Essex County Educational Services Commission will continue beyond June 30, 1980 under present terms and conditions of employment" (J-2) did indeed constitute an offer of employment within the intendment of 18A:27-10. The Commissioner notes, however, that such offer of contract and employment for the subsequent school year is itself subject to the notice period of 30 or 60 days by either party to the other which is normally found within the contracts between teaching staff members and employing boards. Therefore, the Commissioner finds and determines that the Essex County Educational Services Commission did provide to the 42 teachers to whom their May 9, 1980 letter was sent an offer of employment for the 1980-81 school year pursuant to at least the same terms and conditions of employ-

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ment which prevailed under their contract of employment for the 1979-80 school year. The Commissioner further finds and determines that such offer of employment was itself subject to the notice requirement contained within the terms and conditions of employment in the individual contracts for the 1979-80 school year and thus the notification of termination which issued as of the July 1, 1980 action of the Commission did meet the legal requirements of notice. See Patricia Fallon v. Board of Education of the Township of Mount Laurel, 1975 S.L.D. 156, rev'd/rem. State Board 162, decision on remand 1976 S.L.D. 75, aff'd State Board 76, rev'd N.J. Superior Court, Appellate Division, 1977 S.L.D. 1287, cert. denied 74 N.J. 275 (1977).

Consequently, for the reasons stated within the initial decision and as supplemented and expanded upon by the Commissioner herein, the initial decision is affirmed and the Petition of Appeal is herewith dismissed with prejudice.

COMMISSIONER OF EDUCATION

OCTOBER 9, 1984

PENDING STATE BOARD

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DOCKET NO. EDU 6160-83
AGENCY DOCKET NO. 271-8/83A

DANIEL W. GIBSON,
Petitioner
v.
NEWARK BOARD OF EDUCATION,
Respondent

APPEARANCES:

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

Robert L. Podvey, Esq.
(Podvey, Sachs & Catenacci, attorneys)

Record Closed: January 19, 1984 Decided: February 2, 1984

BEFORE ROBERT P. GLICKMAN, ALJ:

Petitioner, a member of the Newark Board of Education ("Board"), brings a declaratory judgment action seeking a declaration that certain meetings of the human resources committee were held in violation of the Open Public Meetings Act, that the July 13, 1983 meeting of the Board of Education was in violation of the Open Public Meetings Act, that the renewal or extension of the lobbyist/consultant contract between the Board and Alonzo Kittrels violated provisions of N.J.S.A. 18A:17A-3 et seq.; interpreting and declaring the relationship between the Executive Superintendent and those statutory powers possessed by him and the Executive Director of Board Affairs, and declaring that the Board exceeded its power in appointing an outside law firm to handle certain matters. Respondent contests each matter sought to be declared by petitioner and asserts that the legislative history and a reasonable interpretation of the statutes in question permitted the Board's actions.

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On August 8, 1983, a petition of appeal was filed with the Commissioner of Education. On August 9, 1983, the matter was transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

A first prehearing conference was held on August 23, 1983. A second prehearing conference was held on September 19, 1983 as a result of additional attorneys filing appearances for the unrepresented respondents. At the second prehearing conference, the following issues were identified:

Count One:

(a) Was the July 6, 1983, meeting of the Human Resources Committee held in violation of the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq.?

(b) Was the July 13, 1983, meeting of the Newark Board of Education and the actions taken in renewing/extending the lobbyist/consultant contract between Alonzo Kittrels and the Board from July 1, 1983 to June 30, 1984, in violation of the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq.?

(c) Was the action of tne Newark Board of Education on July 13, 1983 in renewing/extending the lobbyist/consultant contract between Alonzo Kittrels and the Board from July 1, 1983 to June 30, 1984, in violation of N.J.S.A. 18A:17A-3; N.J.S.A. 18A:17A-5; and N.J.S.A. 18A:17A-7? Was such Board action ultra vires?

(d) Is Kittrels an "employee" of the Board; if so, did his contract need to be proposed for Board action by the Executive Superintendent pursuant to N.J.S.A. 18A:17A-3, 5 and 7?

(e) Was the approved job description of "Legislative Analyst/Consultant" in violation of N.J.S.A. 18A:17A-3, 5 and 7, and N.J.A.C. 6:3-1.12? Are Kittrels'

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job duties as evidenced by the job description and contract in violation of N.J.S.A. 18A:17A-1 et seq.? Has he, in fact, been assigned by the Board or taken on those duties statutorily prescribed for the Executive Superintendent?

Count Two:

Are the Office of Board Affairs and Executive Director of Board Affairs, in their relationship with the Board, functioning in contravention of N.J.S.A. 18A: 17A-3?

Count Three:

Is the use by individual Board members of a law firm for legal opinions in violation of N.J.S.A. 18A:17A-1 et seq. and in violation of its Board resolution of appointment of legal counsel?

General Issues:

A) Does petitioner have standing to institute the within action?

B) Are the individual Board members and Alonzo Kittrels proper parties to this suit?

C) Is petitioner estopped from bringing this action by the doctrine of unclean hands and/or laches?

D) Does N.J.S.A. 18A:17A-1 et seq. presently apply to the Newark Board of Education?

E) What is the effect on the present suit of the change from a Type 1 to a Type 2 school system?

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F) If petitioner should prevail, what relief is he entitled to?

G) Is petitioner's counsel entitled to an award of counsel fees?

Issue Added at Time of Trial

Was the October 4, 1983, meeting of the Human Resources Committee held in violation of the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq.?

A hearing was held at the Office of Administrative Law, Newark, New Jersey, on November 28, 29, 30, and December 1, 1983. Post-hearing proposed findings of fact and conclusions of law were filed by the parties on January 19, 1984, on which date the record was closed. The witnesses who testified and the exhibits marked into evidence are set forth in the attached appendix.

INTRODUCTION

This matter involves a case of first impression in New Jersey. A first-time interpretation of the statute (N.J.S.A. 18A:17A-1 et seq.) establishing a new organizational structure for the Newark school district is sought. Initially, a petition was filed naming certain individual Board members as respondents, i.e., Carl Sharif, Charles A. Bell, Brenda Grier, Delores McNeil, and Rev. Granville Seward. Also, Alonzo Kittrels, Former Executive Superintendent, was named individually as a respondent. At the time of trial, petitioner dismissed his suit against all individuals, leaving only the Newark Board of Education as a remaining respondent.

BACKGROUND TO ENACTMENT OF N.J.S.A. 18A:17A-1 ET SEQ.

N.J.S.A. 18A:17A-1 et seq. (Senate No. 3166, introduced April 17, 1975, and becoming effective August 4, 1975, as L. 1975, chapter 169) was enacted to bring about certain reforms in the Newark school system. Since Newark is the only city with a population of over 325,000, this statute only applies to it.

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On February 4, 1975, Dr. Fred G. Burke, Commissioner of Education, issued an order directing the Newark school district to adopt and implement a unit control organization and adopt and implement remedial measures to correct deficiencies in such areas as operations, including purchasing and inventory, personnel, management, payroll, data processing, repair and maintenance, and budgeting and accounting. See Exhibit J-5. On February 5, 1975, Walter Wechsler, former director of the Division of Budget and Accounting for the State of New Jersey, was appointed by Commissioner Burke and Governor Byrne to serve as a special agent and directed to render a report dealing with those problems set forth in Commissioner Burke's order of February 4, 1975. The Wechsler report, more formerly known as "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" (J-5), resulted in the enactment of S-3166, more properly known as N.J.S.A. 18A:17A-1 et seq.

Those conditions which led to the action of Commissioner Burke on February 4, 1975, existed for many years in the Newark school district. As a matter of fact, there was a report by Columbia University in 1942 which called for several reforms which were not brought about. Additionally, there was a "Lilley Commission" report in 1968 which also recommended reforms, few of which were adopted. In 1971, the greater Newark Chamber of Commerce prepared a voluminous report and recommendations, with little action being taken (J-5). In each of the reports and studies, one similar recommendation was the need to establish a unit control organization. Up to the time of the passage of N.J.S.A. 18A:17A-1 et seq., there was a tripartite or troika management team which reported directly to the nine-member Board of Education appointed by the mayor of the City of Newark. 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 nonfiscal matters. This organizational structure produced confusion and lack of effectiveness in the management of the school district. There was no clear cut direction. The Newark Board of Education was faced with crisis after crisis. Part-time unpaid Board members became extremely frustrated (J-5). Additionally, it was found that the members of the Newark Board of Education had greatly involved themselves in the details of the administration of the school system.

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In the "STATEMENT" to S-3166, which was authored by Mr. Wechsler, it was stated as follows:

> This bill will establish a new organizational structure for school districts of the first class with a population over 325,000. Only the school district in the city of Newark is within this classification. It recognizes the exceptional conditions present in a large metropolitan school system. It proposes specific measures which are aimed at clarifying and simplifying lines of authority and minimizing conflicting responsibilities at the highest levels of administration.
>
> Three purposes of this bill are: (1) to establish a new position, chancellor, in lieu of the position of superintendent of schools as the chief school officer and vest in him complete authority over the educational, managerial and fiscal operations of the school district; (2) to relieve the board of education of routine administrative responsibilities which have been denying it time for its essential role as policy maker; and (3) to clarify in statute an on-going liaison between the board of education and the State, through the office of the commissioner of education.
>
> The administrative procedures presently in effect were instituted to serve the educational system of an earlier period. The many social and economic transformations which have occurred in Newark during recent decades have made it apparent that the laws and regulations which control its management are no longer in the best interests of the citizens of Newark, the children who attend its public schools, those employed to conduct the school system, nor the citizens of the State of New Jersey.
>
> State aid to Newark exceeds 70 percent of its operating budget, at the present time. Thus, it is the rightful concern of the entire State that resources from the State allocated to Newark are utilized in a manner which reflects the most sophisticated methodologies in fiscal management and accountability which can be applied to governmental institutions.

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> These recommendations have been made to the Commissioner of Education by the special agent, appointed by the commissioner, assigned to review managerial practices in the Newark schools. They have been developed following careful analysis of present problems and the procedures which existing statutes either permit or impose upon the operation of the Newark school system. The commissioner concurs in these proposals.

As a result of concern by members of the Newark Board of Education and by members of the Newark community with regard to the deletion of power from the Board of Education, S-3166 was amended before its final enactment. This amendment became memorialized in N.J.S.A. 18A:17A-7 which states:

> Except as otherwise provided in this act, the board of education in districts in cities of the first class with a population over 325,000 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 districts 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.

The July 21, 1975 legislative "statement" accompanying the amendments to S-3166 discusses the retention of Board authority (Exhibit R-9).

> There has been great confusion and fear about the effect of unit control on a board's power and authority. These amendments would make it clear that the bill is not intended to dilute the authority of a school board but actually strengthen its policy making role of the board. The first amendment would make it clear that the chief supervisor must act pursuant to policies and regulations of the board. The second amendment would add a section stating that the board retains all its powers under the law and it sets forth illustrative examples of such powers. In sum, the amendments would make it clear that the bill is intended to establish an administrative line of authority whereby one person would report directly to the board for all administrative operations of the district but his actions shall be undertaken pursuant to board policies.

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Walter Wechsler, the special agent who was instrumental in drafting the task force report and who was the moving force behind the eventual enactment of N.J.S.A. 18A:17A-1 et seq., testified at length before me regarding the intent of this statute. Mr. Wechsler pointed out that the concept behind the new organization of the Newark school district was modeled after the form of government found at both our federal and state levels. Thus, as the President of the United States and the Governor of the State of New Jersey are responsible for the operation of the federal and state governments, so is the Executive Superintendent responsible for the operation of the Newark school district. The Board of Education would be similar to the United States Congress and the State Legislature in that all of them are policy makers responsible for the formulation of policies, rules and regulations. As each branch of government must perform its functions within its own sphere of operations, so must the Executive Superintendent and board perform its functions within its own spheres. One branch of government operates as a check and balance against the other branch of government. So does the Executive Superintendent act as a check and balance against the excesses of the board of education and vice versa. However, Wechsler pointed out that it was not the intent of his task force report or of the legislation to deprive the Board of its inherent power to hire those employees to assist it in its policy-making functions.

According to Wechsler, there was a concern that the Executive Superintendent have the power to administer the school district. However, giving him this power, it was not viewed that the Board would be made impotent. Thus, Wechsler opined that the Board would be virtually without power if it could not have its own staff. Such people as the auditor, legal counsel, evaluators of the Executive Superintendent, and consultants hired to draft a policy manual all could be hired by the Board directly without the recommendation of the Executive Superintendent. The Board must have the power to make appointments to aid it in performing its policy-making functions. To be more concrete, if the Board were to hire a new Executive Superintendent, it possessed the power to employ staff to aid it in this function. It would be absurd to conclude that the Executive Superintendent had to recommend the employee to the Board of Education who would be hiring the new executive superintendent or evaluating the executive superintendent's performance. The Board of Education could not function without its own staff.

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The Board must perform a function of oversight. Part of this oversight function is assessing the performance of the system run by the Executive Superintendent. Putting it another way, the Board must evaluate the effectiveness of the Executive Superintendent. This is a check and balance on the power of the Executive Superintendent. Similarly, the Executive Superintendent in those areas designated to him by statute, which deal with the running of the school system, must make recommendations to the Board prior to the Board's action. The Board cannot act in those areas unless it is pursuant to a recommendation by the Executive Superintendent. Thus, in viewing the separation of powers between the Board of Education and the Executive Superintendent, it is clear that each operates within its own area. The check on the Executive Superintendent is that his recommendations are subject to Board approval. A primary goal of the new statute, according to Wechsler, was to gain unit control with separation of powers.

The present Office of Board Affairs was formerly the Office of Secretary of the Board. Although the Wechsler task force originally called the administrator of this office the assistant executive superintendent for board affairs, the title of this office was later changed and is now known as the Executive Director of Board Affairs. It was contemplated by the task force that the Office of Board Affairs would have multiple responsibilities and duties to assist the Board in carrying out its policy-making functions. This office and its director are responsible to the Board of Education and not the Executive Superintendent, according to Wechsler. Any secretary hired by the Office of Board Affairs should be appointed by the Board and not the Executive Superintendent. Since 1975, the Office of Board Affairs has reported to the Newark Board of Education rather than to the Executive Superintendent. The employees of that office assist the Board. In a table of organization, the Director of Board Affairs is looked upon as being a staff person to the Board rather than to the Executive Superintendent. This office provides support for the policy-making body. Some of the functions presently performed by the Office of Board Affairs consist of maintaining official records and minutes of meetings, advertising Board meetings in compliance with the Open Public Meetings Act, retaining documents and handling the day-to-day needs of Board members.

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According to Wechsler, it was intended that the Board of Education could maintain an office, such as the Office of Board Affairs, to assist it in its policy-making functions. It was also contemplated that this office would report directly to and be responsible to the Board. This office assists the Board in its policy-making functions. The Director of Board Affairs owes its allegiance to the Board. It was intended that the Executive Superintendent would have no control over this arm of the Board, as such control would violate the concept of separation of powers and would affect the checks and balances inherent in the system.

It was contemplated by the Wechsler task force that the Office of Board Affairs would prepare the Board's agenda. Certainly, the Executive Superintendent could and should suggest items for the agenda and could and should ask for supporting information regarding the agenda. Although originally after the 1975 reorganization, the Office of Board Affairs prepared and collated the agenda for the Board's meetings, sometime in 1976 the Executive Superintendent took over the function for collating the agenda because of the duplicating facilities possessed by the Executive Superintendent. Today, the Board's agenda is prepared by the office of Executive Superintendent in consultation with the Office of Board Affairs. The advertisements of the agenda are handled by the Office of Board Affairs (P-5 and P-9).

All of the above discussion is hereby adopted by me as part of my **FINDINGS OF FACT.**

INTERPRETATION OF N.J.S.A. 18A:17A-1 ET SEQ.

Having discussed the background to the enactment of N.J.S.A. 18A:17A-1 et seq. and, hopefully, providing some insight into those conditions which brought about the statute's passage, it now seems appropriate to interpret certain relevant parts of the statute in order to shed some light on the relationship between the Executive Superintendent and the Board of Education. It is important to consider three sections of the statute, which state:

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N.J.S.A. 18A:17A-3

EXECUTIVE SUPERINTENDENT: DUTIES AND POWERS

The executive superintendent shall be the chief executive officer and administrator of the district. Pursuant to rules and regulations established by the board of education, the executive superintendent shall have responsibility and general supervision over the organization and the educational, managerial, and fiscal operations of the district, including the schools therein, under rules and regulations prescribed by the State board. He has 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. He shall keep himself informed as to the condition and progress of the educational, managerial, and fiscal operations of the district and shall report thereon, from time to time, to, and as directed by, the board and he shall have such other powers and perform such other duties as may be prescribed by the board employing him.

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

N.J.S.A. 18A:17A-5

OFFICERS AND EMPLOYEES, PROFESSIONAL AND NONPROFESSIONAL: EMPLOYMENT, TRANSFER AND REMOVAL

All officers and employees, professional and nonprofessional, shall be employed, transferred and removed as provided below.

a. The executive superintendent may appoint, transfer, pursuant to the provisions of Title 11 of the Revised Statutes and, pursuant to Article 1 of chapter 17 of Title 18A of the New Jersey Statutes, remove clerks in his immediate office, but the number and salaries of the clerks shall be determined by the board.

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b. The executive superintendent, subject to the approval of the board, shall appoint and fix the compensation of such assistant executive superintendents as he shall deem necessary; provided, however, the number of assistant executive superintendents shall not exceed the number of persons serving immediately prior to the effective date of this act in the position of assistant superintendent of schools, school business administrator, school business manager, secretary to the board of education and assistant secretary to the board of education. An assistant executive superintendent shall not be appointed for a term exceeding the remainder of the term of the executive superintendent. Notwithstanding any other provision of law, no assistant executive superintendent shall acquire tenure.

c. The executive superintendent shall propose to the board of education all other officers and employees, professional and nonprofessional, for employment, transfer and removal.

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

BOARD OF EDUCATION; RETENTION OF POWERS AND RESPONSIBILITIES

Except as otherwise provided in this act, the board of education in districts in cities of the first class with a population over 325,000 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 in 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.

One of the threshold issues which I must address is whether or not the appointment of Alonzo Kittrels to the position of lobbyist/consultant, without the recommendation of the Executive Superintendent, violates the statutory scheme of N.J.S.A. 18A:17A-1 et seq. established by the Legislature in 1975. In order to decide this issue, it is first necessary to interpret the three statutes just enunciated in light of their legislative history and legislative intent.

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Although it is clear pursuant to the three statutes just cited that the Legislature intended to vest alot of power in the hands of the Executive Superintendent, power previously exercised by the troika in the Newark school system, i.e., superintendent of schools, business administrator and Board secretary, it is equally clear that a residium of power still remains with the Board. As testified to by Walter Wechsler, the Board is the policymaker analogous to the legislature at the State or Federal level and the Executive Superintendent is analogous to the Governor or President, whose function it is to administer or execute those laws passed by the policymaker. Under theories of separation of powers, each separate branch of government operates within its own domain. Additionally, one branch of government acts as a check and balance against the other. Wechsler commented that these conceptual theories applied when creating the Executive Superintendent under N.J.S.A. 18A:17A-1 et seq. Under the statutory scheme, it is clear to me that the Executive Superintendent is not required in all cases to make a recommendation with regard to an appointment in order for that appointment to be valid and not ultra vires. Clearly, the Executive Superintendent is not required to make a recommendation for a valid appointment for an auditor, evaluator of the Executive Superintendent, drafter of the policy manual, and any other person who would be aiding the policy-making functions of the Board of Education. Likewise, the Board could not appoint someone who was not aiding its policy-making function without the recommendation of the Executive Superintendent. Any person employed to aid in the operation of the schools would need the recommendation of the Executive Superintendent as a condition precedent to such employment. It is within the domain of the Executive Superintendent to be responsible for, and have general supervision over, the organization within the school district and the educational, managerial and fiscal operations within the district including all of the schools therein.

With this general discusion in mind, it is interesting to raise the question where on an organizational chart should be the Office of Board Affairs and General Counsel. Are these two entities ultimately responsible to the Board or to the Executive Superintendent? Do these entities owe their allegiances to and aid the Board in its policy making functions or do they aid the superintendent of schools in its function of running

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the schools? Wechsler reiterated in his testimony that the Board could not expect to function without its own staff owing allegiance to it. In the case of the Office of Board Affairs, Wechsler asserted that this was a support staff to the Board. As such, the Office of Board Affairs is responsible to the Board and would report directly to the Board. Its loyalty and allegiance would not be to the Executive Superintendent. Of course, the Executive Superintendent would have the right to use whatever resources are available to the Board. With regard to the office of legal counsel, it operates as an independent entity providing legal services to the entire district. In a sense legal counsel walks a tightrope, being required to provide legal opinions to both the Board and the Executive Superintendent and functions like a full-time consultant. Wechsler opines that if the Board needs information from legal counsel, it should have direct access to it without having to go through the Executive Superintendent. The Executive Superintendent has no need for its own personal legal counsel, but certainly the Board must have direct access to legal counsel.

Based on Wechsler's testimony, it is my opinion that both legal counsel and the Office of Board Affairs provide support services to the Board of Education, aiding it in its policy-making functions. Therefore, being analogous to the role of the auditor or evaluator of the Executive Superintendent or formulator of a Board policy manual, it is my judgment that the two positions just mentioned should be set forth on an organizational chart as directly responsible to the Board of Education, owing their loyalty and allegiance to the Board directly, and aiding with the Board's policy-making function. The Executive Superintendent has no statutory role in making recommendations to the Board with regard to any hiring within those offices in order for such hiring to be valid and such would be clearly beyond the scope of his power and would be within that domain exclusively reserved to the Board.

All of the above discussion is hereby adopted by me as part of my **FINDINGS OF FACT.**

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WAS ALONZO KITTRELS' APPOINTMENT TO THE POSITION OF LOBBYIST/CONSULTANT IN VIOLATION OF N.J.S.A. 18A:17A-1 ET SEQ.?

On October 26, 1982, the Newark Board of Education entered into an agreement to retain Alonzo Kittrels, the former executive superintendent of the Newark school district, as a consultant (J-1). This agreement was adopted by the Board without any recommendation by the Executive Superintendent, Dr. Columbus Salley, or without his objection. Sometime thereafter, a job description was prepared indicating what services were performed by Mr. Kittrels. According to the uncontroverted testimony, pursuant to the agreement, Kittrels worked three days per week at the Board office within the work location of the Office of Board Affairs. Kittrels was provided secretarial service and sent out on Board letterhead correspondence dealing with his duties as consultant. During the trial, Kittrels submitted into evidence (P-37) a detailed statement indicating all of the services he performed as consultant for the Newark Board of Education from November 1982 to June 1983.

Prior to July 13, 1983, Board President Carl Sharif requested that the Executive Director of Board Affairs place on the agenda for the July 13, 1983, meeting an item relating to the renewal or extension of the consultancy contract with Alonzo Kittrels. Sharif also informed the Executive Director of Board Affairs that there might be an additional proposal for a consultancy contract for a Clyde Dawson. No other details were provided by Sharif with regard to the type of consultancy agreements that would be proposed. In an attempt to comply with Sharif's request, the Executive Director of Board Affairs, Robert A. Ahmad II, authored one of the agenda items for the July 13, 1983, special meeting, Item V(b) entitled "Support Services-Consultancy Proposals/Office of Board Affairs" (J-3).

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On July 11, 1983, Marvin W. Wyche, Jr., Board Chief of Staff, sent a memorandum to Ahmad requesting that the proposed July 13, 1983, agenda not be released until Item V(b) was clarified. This request by Wyche was spelled out in more detail in a memorandum to Ahmad dated July 8, 1983 (P-11). According to Ahmad's testimony, he informed Wyche that the Item V(b) related to the agreement with Kittrels, but that Ahmad had neither details nor particulars regarding the contract nor could he supply any documentation. Ahmad emphasized the he was unable to supply the Board with any supporting materials to Item V(b) since he had none. Ahmad went ahead and published the agenda for the July 13, 1983 meeting.

On July 13, 1983, a resolution was passed by the Board with five 'yea' votes, three 'nay' votes and one Board member being absent. The resolution (J-2) reads as follows:

EXTENSION OF LOBBYIST/CONSULTANT CONTRACT

> WHEREAS, the Newark Board of Education approved a Lobbyist/Consultant Contract with Alonzo Kittrels for the period of November 1, 1982 to June 30, 1983; and
>
> WHEREAS, it is the desire of the Newark Board of Education to continue this Lobbyist/Consultant relationship with Mr. Kittrels;
>
> THEREFORE, BE IT RESOLVED that the Newark Board of Education approves a Lobbyist/Consultant Contract for the period of July 1, 1983 to June 30, 1984, under the same terms and conditions of the previous agreement;
>
> BE IT FURTHER RESOLVED that Mr. Kittrels' duties may be expanded beyond the duties specified in the November 1, 1982 to June 30, 1983 agreement as determined by the Board.
>
> FURTHER, BE IT RESOLVED that there be regular reporting provided to the Board of Education on a monthly basis concerning the activities and results therefrom by the individual so named and that there be developed some process for evaluation of the activities of same individual."

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The extension of Kittrels' agreement was done without the recommendation of the Executive Superintendent. Without now addressing the Open Public Meetings Act issue, I want to first consider the question of whether the Board of Education had the power to extend Kittrels' contract without the Executive Superintendent's recommendation?

In analyzing this problem involving the Board's power versus the Executive Superintendent's power with regard to the appointment of Kittrels, I must gratuitously indicate that it is my judgment that the creation of such a position and the initial appointment of Kittrels, as well as the extension of his contract, was unwise and uncalled for under all the circumstances. If I were a Board member on the Newark Board of Education, I would not have voted for the creation of such a position. Some of the functions performed by Kittrels, I suspect, are also performed by the New Jersey School Boards Association. However, it is not my function to substitute my judgment for the judgment of the Board members on matters which are by statute delegated to local Boards. See, Boult v. Harris, 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).

Based on the previously discussed background, legislative intent and interpretation of N.J.S.A. 18A:17A-1 et seq., it is clear to me, and I so **CONCLUDE**, that the Board had the power to initially appoint and then to extend Kittrels' contract without the recommendation of the Executive Superintendent. This is the type of support activity which falls within the domain of aiding the policy-making entity. Kittrels' activity has nothing to do with the running of the schools. The Board does have the power to appoint or hire staff to aid it in its policy-making function. I **FIND** and **CONCLUDE** that the Board, in hiring Kittrels and in extending his agreement on July 13, 1983, was hiring a consultant to aid it in its policy-making function which it has the power to do under statute and which it is not prohibited from so doing without the recommendation of the Executive Superintendent. The hiring of Kittrels by the Board directly was no different than the Board hiring a financial consultant (R-10) or outside legal counsel (R-11). The

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Board could also, without the recommendation of an Executive Superintendent, hire an auditor, an evaluator of the Executive Superintendent, or a firm to draft its policy manual. All of these functions are related to and in aid of the Board's policy-making function for which it has the statutory authority to hire staff.

All other types of employment related to the operation of the schools and not related to the Board's function as a policy maker must involve an initial recommendation from the Executive Superintendent prior to Board approval.

It is my **CONCLUSION**, therefore, that the action of the Newark Board of Education on July 13, 1983, in renewing/extending the lobbyist/consultant contract between Alonzo Kittrels and the Board from July 1, 1983 to June 30, 1984, was not in violation of N.J.S.A. 18A:17A-3, N.J.S.A. 18A:17A-5 or N.J.SA. 18A:17A-7, nor was such Board action ultra vires.

IS KITTRELS AN "EMPLOYEE" OF THE BOARD;
IF SO, DID HIS CONTRACT NEED TO BE PROPOSED
FOR BOARD ACTION BY THE EXECUTIVE SUPERINTENDENT
PURSUANT TO N.J.S.A. 18A:17A-3, 5 AND 7?

The previously discussed testimony on this subject, which I incorporate herein by reference, indicates that Kittrels worked at the Board offices three days per week, at a work location in the Office of Board Affairs, was provided with secretarial service by the Board, and mailed correspondence on Board letterhead. However, there is no testimony before me that either the Board of Education or the Office of Board Affairs controlled the manner in which Kittrels performed his services. I have nothing before me which indicates that he was supervised, was directed to perform certain duties, or that he was dependent on others. As a matter of fact, one of the complaints dealt with some members not knowing what Kittrels was doing until he submitted his detailed report (P-37).

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In determining whether Kittrels was a servant or employee or an independent contractor, the language of Miklos v. Liberty Coach Co., 48 N.J. Super. 591, 602 (App. Div. 1958), is helpful:

> . . .'Servant' has been defined as 'a person employed to perform service for another in his affairs and who, with respect to his physical conduct in the performance of the service, is subject to the other's control or right to control.' Restatement, Agency § 220, p. 483 (1933). In determining whether one acting for another is a servant or an independent contractor, the following elements are to be considered, among others: (1) the extent of control which, by agreement, the master may exercise over the details of the work; (2) whether or not one so employed is engaged in a distinct occupation or business; (3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (4) the skill required in the particular activity; (5) whether the employer or the person doing the work supplies the instrumentalities, tools in the place of work; (6) the length of time for which the person is employed; (7) the method of payment; (8) whether or not the work is part of the regular business of the employer; (9) whether or not the parties believe they are in the relationship of master and servant.
>
> An independent contractor has been defined as follows:
>
> An independent contractor is one who, carrying on an independent business, contracts to do a piece of work according to his own methods and without being subject to the control of his employer as to the means by which the result is to be accomplished but only as to the result of work. Wilson v. Kelleher Motor Freight Lines, Inc., 12 N.J. 261, 264 (1953).

I **FIND** and **CONCLUDE** that Kittrels performed work as an independent contractor rather than an employee or servant. The Board did not control the means by which the result was to be accomplished. The fact that he used a Board secretary, Board stationery and a desk at the Board is inconsequential, in the total context of what Kittrels did. Since I **FIND** and **CONCLUDE** that he was not an employee of the Board, there was no need for his contract to be proposed for Board action by the Executive Superintendent pursuant to N.J.S.A. 18A:17A-3, 5 and 7.

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WAS KITTRELS' APPOINTMENT TO THE POSITION OF LOBBYIST/CONSULTANT ON JULY 13, 1983 IN VIOLATION OF THE OPEN PUBLIC MEETINGS ACT, N.J.S.A. 10:4-6 ET SEQ.?

As stated before, the published agenda of the Board meeting for July 13, 1983, contained the following language under Item V(b): "Support Services-Consultancy Proposals/Office of Board Affairs."

Petitioner contends that this notice violates the "adequate notice" provision of the Open Public Meetings Act, N.J.S.A. 10:4-8d, which states:

> 'Adequate' notice means written advance notice of at least 48 hours, giving the time, date, location and, to the extent known, the agenda of any regular, special or rescheduled meeting, which notice shall accurately state whether formal action may or may not be taken.

As discussed previously, the testimony reveals that the aforementioned item was placed there by Board President Carl Sharif through his communicating it to Robert A. Ahmad II, Executive Director of Board Affairs. When this proposed notice was submitted to Marvin W. Wyche, Jr., Chief of Staff of the Executive Superintendent, he submitted a memorandum to Ahmad (P-11) questioning Item V(b) in the notice. Additionally, General Counsel submitted a memorandum to Dr. Columbus Salley dated July 11, 1983 (P-27) stating his opinion that the agenda Item V(b) violated the Open Public Meetings Act because its notice was vague.

I **CONCLUDE** that the notice to the public set forth in agenda Item V(b) was so vague as to violate N.J.S.A. 10:4-8(d) and N.J.S.A. 10:4-9(a). Any reasonable person would be unable to know what was the nature of the support services, to whom the support services would be rendered, the identity of the parties proposing the consultancy proposals, and the duration of any agreements. There is no way that the public could read such an agenda item and have any knowledge of what was to happen at the meeting prior to the meeting (emphasis added). The wording under that agenda item is so vague as to make its words meaningless.

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In the case of In Re Application of the County of Monmouth, 156 N.J. Super. 188 (App. Div. 1978), the court discussed the content of a notice in an agenda. The notice for the meeting stated: "The purpose of this meeting is for the Board to meet with Mr. J. McMahon, attorney." The actual purpose for the meeting was to bring about a settlement in a condemnation lawsuit won by Mr. McMahon. At the meeting, the director of the Board asserted that everyone would have to know why the Board was meeting with Mr. McMahon and that "we would be less than naive if we didn't." 156 N.J. Super. at 191. The court went on to state:

> Of course, whatever knowledge the director or other Board members may have had concerning the purpose of the meeting, such does not satisfy the statutory requirement that the public be provided with the knowledge prior to the meeting. N.J.S.A. 10:4-9(a) (emphasis in original). Ibid.

Thus, as in the case of In Re Application of County of Monmouth, I am satisfied and so **CONCLUDE**, that the notice of the July 13, 1983, meeting under agenda Item V(b) was inadequate to inform the public and in violation of the Open Public Meetings Act. All action taken at that meeting with regard to the extension or renewal of Alonzo Kittrels' contract shall be **SET ASIDE.**

WERE THE JULY 6 AND OCTOBER 4, 1983, MEETINGS OF THE HUMAN RESOURCES COMMITTEE OF THE BOARD OF EDUCATION HELD IN VIOLATION OF THE OPEN PUBLIC MEETINGS ACT, N.J.S.A. 10:4-6 ET SEQ.?

On July 6, 1983, in the Office of Board Affairs, a meeting of the Human Resources Committee of the Newark Board of Education took place. The following Board members were present: Charles A. Bell, Dolores McNeil, Rev. Granville Seward, Brenda Grier, and Board President Carl Sharif. According to the testimony at trial, Sharif was present for only part of the committee meeting. The meeting involved an inquiry by Board members into certain alleged political activities at Board meetings. One of the witnesses to appear at the Human Resources Committee Meeting was Dwayne C. Vaughn, an associate counsel in the General Counsel's office. No formal action was taken by the Human Resources Committee at that meeting.

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On October 4, 1983, a meeting of the Newark Board of Education Human Resources Committee was held to review the conduct of the executive director of security services. Attending this meeting were Dolores McNeil, Carl Sharif, Charles A. Bell, Brenda Grier and Daniel W. Gibson. No formal action was taken at this committee meeting.

At neither the July 6, 1983 nor October 4, 1983 meetings, was there any notice to the public of the meeting nor was there any attendance by the public. Although respondent claims that this is merely a meeting of one of the Board's committees, which is advisory in nature, and cannot take any action on its own, petitioner contends that there was a majority of the Board members at the meeting, at which Board members discussed Board business, and that such actions on their part violated the Open Public Meetings Act.

There is a clear public interest expressed in our Open Public Meetings Act that meetings of governmental officials constituted as a public body must be held in open meetings at which the public has the right to be present. Woodbury Daily v. Gloucester County Sewage Authority, 151 N.J. Super. 160 (Law Div. 1977), aff'd 158 N.J. Super. 448 (App. Div. 1978). There is also a public policy that members of the public must be invited to be present to hear not only the final vote but also be permitted to be present to hear the discussions of their officials and the verbalizations of the official's thought processes. 151 N.J. Super. at 164.

Applying the reasoning of Woodbury, to the instant matter, even though the Human Resources Committee took no action and held no vote, Board discussions of Board's business took place by a majority of the Board. That situation would give rise to the public's right to be present and right to hear what was going on.

I strongly condemn the activity of the Newark Board of Education in holding committee meetings containing a majority of the Board without complying with the Open Public Meetings Act. To prevent this from happening in the future, the Newark Board of

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Education is directed to pass a policy precluding any committee meeting from being held with more than four Board members. No other Board members should be present other than Board members appointed to the committee. If more than five Board members attend such committee meetings, the Board must fully comply with the Open Public Meetings Act.

Accordingly, I **CONCLUDE** that the meetings of the Human Resources Committee on July 6, 1983 and October 4, 1983, were held in violation of the Open Public Meetings Act. Since no action was taken, there is nothing for me to set aside. However, I direct the Board not to engage in such activity in the future.

SHOULD THE OFFICE OF BOARD AFFAIRS AND ITS STAFF AND THE OFFICE OF GENERAL COUNSEL AND ITS STAFF BE SUPERVISED BY THE OFFICE OF EXECUTIVE SUPERINTENDENT AND REPORT TO EXECUTIVE SUPERINTENDENT?

For those reasons enunciated previously, it is my **CONCLUSION** that both of these positions constitutes support positions for the policy-making functions of the Board of Education. Therefore, these positions should not be supervised by nor should their employees report to the Executive Superintendent, but rather such employees should report directly to the Board of Education.

IS THE USE BY AN INDIVIDUAL BOARD MEMBER OF THE LAW FIRM FOR LEGAL OPINIONS IN VIOLATION OF N.J.S.A. 18A:17A-1 ET SEQ. AND IN VIOLATION OF ITS BOARD RESOLUTION OF APPOINTMENT OF LEGAL COUNSEL?

A Board resolution dated April 13, 1982, (R-2) states:

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> WHEREAS the Board of Education of the City of Newark has need of outside counsel to represent its interest in a variety of matters involving, but not limited to personnel;
>
> NOW THEREFORE BE IT RESOLVED that the Board of Education of the City of Newark appoints the firm of Podvey, Sachs, Catenacci and Silber of Newark, New Jersey, to serve as its counsel at an hourly rate of $65.

On April 13, 1982, the Board passed a resolution (P-22) which states as follows:

> WHEREAS, on April 13, 1982, the firm of Podvey, Sachs & Catenacci was appointed by the Board of Education of the City of Newark to act as outside counsel on legal matters on an as needed basis; and
>
> WHEREAS, said firm has faithfully, diligently and professionally performed legal services for the Board since that date; and
>
> WHEREAS, the Board wishes to continue this professional relationship;
>
> NOW, THEREFORE, BE IT RESOLVED:
>
> 1. That the Board of Education reappoint said firm for one year beginning on April 14, 1983.
>
> 2. That said firm shall perform any and all services at the rate of Eighty-five ($85) dollars per hour.

Although it is a practice which I frown upon if it is abused, I cannot find any statutory or Board resolution to prohibit an individual Board member from using outside counsel for legal opinions. The use of outside counsel by Board members on Board business aids its policy-making function. Board members have to be able to ascertain whether their actions are within the law. I have nothing before me which would indicate that individual Board members have taken advantage of the use of outside counsel for legal opinions.

Absent a specific Board policy dealing with conduct by individual Board members using either in-house or outside legal counsel, I **FIND** and **CONCLUDE** that there is no prohibition placed upon any Board member

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ARE PETITIONER'S ATTORNEYS ENTITLED TO AN AWARD OF COUNSEL FEES?

All counsel are to be commended on the professional and creative way that this matter was presented. Many hours of hard work were spent by all counsel in the preparation of and presentation of this case. If I had the authority to award counsel fees to petitioner's counsel, I certainly would be most pleased to make such an award for the efforts expended by them in this matter. However, I feel that my hands are tied and that I have absolutely no authority to award counsel fees to petitioner. See Meisenbacher v. Bd. of Ed. of the City of Newark, 1 N.J. AR 162, 166 (1980).

All other issues set forth in the Prehearing Order are deemed to be either decided by this decision or to be without merit.

In summary, I **CONCLUDE** and declare the following:

1. That the Newark Board of Education pursuant to N.J.S.A. 18A:17A-1 et seq. properly extended the consultancy/lobbyist contract of Alonzo Kittrels at its July 13, 1983 meeting, without needing a recommendation from the executive superintendent;

2. That Alonzo Kittrels was an independent contractor and not an employee of the Board of Education;

3. That the notice of agenda Item V(b) for the July 13, 1983, meeting was inadequate and violated the Open Public Meetings Act, requiring that the action taken with regard to the appointment of Alonzo Kittrels be set aside;

4. That the meetings of the Human Resources Committees of the Board of Education on July 6, 1983 and October 4, 1983, violated the Open Public Meetings Act;

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5. That the Office of Board Affairs and Executive Director of Board Affairs are currently acting in accordance with the statutory authority set forth in N.J.S.A. 18A:17A-1 et seq. and that said office is a support office for the Board of Education and is independent of the Executive Superintendent;

6. That individual members of the Newark Board of Education may consult directly with outside counsel with regard to Board business, absent a specific Board policy prohibiting this;

7. That the Office of General Counsel and its staff should not be supervised by or report to the Executive Superintendent, but rather should report directly to the Board of Education; and

8. That no counsel fees be awarded to petitioner.

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 6160-83

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

February 2, 1984
DATE

ROBERT P. GLICKMAN, ALJ

Receipt Acknowledged:

Feb. 6, 1984
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

Feb. 8, 1984
DATE

Ronald L. Parker/pac
FOR OFFICE OF ADMINISTRATIVE LAW

md

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APPENDIX

WITNESSES:

Dr. Columbus Salley	Alonzo Kittrels
Marvin W. Wyche, Jr.	Robert A. Ahmad, II
Louis C. Rosen, Esq.	Walter Wechsler
Dwayne C. Vaughn, Esq.	Vickie A. Donaldson, Esq.
Daniel W. Gibson	

EXHIBITS:

J-1	Agreement dated October 26, 1982
J-2	Resolution dated July 13, 1983
J-3	Agenda for Special Meeting dated July 13, 1983
J-4	Resolution dated October 26, 1982
J-5	Wechsler Report
P-1	Policy No. 2010
P-2	Policy No. 2121
P-3	Policy No. 2000
P-4	Policy No. 9010
P-5	Policy No. 9323
P-6	Policy No. 2131
P-7	Policy No. 2131
P-8	Policy No. 9000
P-9	Policy No. 9121
P-10	Policy No. 9123
P-11	Memorandum to Ahmad, July 8, 1983
P-12	Job Description
P-13	Memorandum dated July 18, 1983

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P-14	Work Session Agenda, August 9, 1983
P-15	Proposed Resolution
P-16	Legal Notice, November 5, 1983*
P-17	Legal Notice, November 5, 1983*
P-18	Letter dated November 3, 1983*
P-19	Notice of Special Meeting, November 7, 1983*
P-20	Memorandum to Star-Ledger, November 3, 1983*
P-21	Handwritten Copy of Notice of Items, November 7, 1983*
P-22	Resolution Reappointing Podvey, Sachs & Catenacci
P-23	Resolution to Appoint Consultant, September 28, 1982
P-24	Resolution, December 21, 1982
P-25	Resolution, May 24, 1983
P-26	July 8, 1983 Memorandum
P-27	Memorandum, Rosen to Salley dated July 11, 1983
P-28	Letter dated July 14, 1983
P-29	Memorandum from Rosen, July 11, 1983
P-30	Letter, October 11, 1983
P-31	Resolution, April 3, 1982
P-32	For identification, Memorandum, August 16, 1983
P-33	Minutes, July 6, 1983
P-34	Memorandum, June 16, 1983
P-35	Letter, July 8, 1983
P-36	Letter, July 7, 1983
P-37	Document prepared by Alonzo Kittrels
P-38	Memorandum, October 11, 1983
P-39	Minutes of Meeting, January 3, 1978
P-40	April 3, 1982

*This evidence was stricken from the record.

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R-1	Board Policy 9127
R-2	Resolution, April 13, 1982
R-3	Policy No. 2120
R-4	Policy - Manuals and How to Use Them
R-5	Board Policy 9311
R-6	Board Policy 2210
R-7	Board Policy 9126
R-8	Table of Organization
R-9	Legislative Minutes - Senate No. 3166
R-10	Resolution, January 31, 1977
R-11	Resolution, June 25, 1976

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DANIEL GIBSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The Commissioner has reviewed the record of the instant matter including the initial decision rendered by the Office of Administrative Law, Robert P. Glickman, ALJ.

It is observed that the parties have filed exceptions and replies to exceptions to the initial decision pursuant to N.J.A.C. 1:1-16.4a, b and c.

Petitioner excepts to the judge's findings and conclusions set forth in paragraphs 1, 2, 5, 6, 7 and 8 on pages 26 and 27 of the initial decision for the following reasons:

1. The judge's finding that the Board acted within its authority pursuant to N.J.S.A. 18A:17A et seq. when it extended the consultancy/lobbyist contract (J-2) to Alonzo Kittrels at its meeting of July 13, 1983 without recommendation by the Executive Superintendent is clearly in error and contravenes statutory prescriptions as well as the judge's prior conclusion that the Board was prohibited from appointing someone who is not aiding in its policy-making functions without the recommendation of the Executive Superintendent. (Initial Decision, at p. 13)

2. The judge further erred in concluding that Alonzo Kittrels' employment by the Board was as an independent contractor. It is argued that Mr. Kittrels' job description (P-12) reveals the types of activities and duties contemplated for him are in fact those which are properly and legally functions within the purview of the authority of the Executive Superintendent. Every aspect of Mr. Kittrels' employment was regulated by the Board to the extent that his compensation was paid on a regular basis regardless of the work that he performed. Moreover, Mr. Kittrels was provided with an office, supplies, equipment and support staff by the Board in addition to the salary compensation paid to him. In this regard the weight of evidence and testimony clearly reveals that the nature of the duties to be performed by Mr. Kittrels were those of an individual holding a position of employment within the Newark School System and the Board's action in employing him without the required recommendation of the Executive Superintendent is violative of N.J.S.A. 18A:17A-5 and such contract of employment is thereby null and void.

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3. The judge erred in finding that the Office of Board Affairs and the Office of General Counsel are independent of the Executive Superintendent and are, therefore, properly considered to be support offices reporting directly to the Board.

The record establishes that the Board has previously resolved in part the fact that the Office of General Counsel has a direct reporting relationship to the Executive Superintendent. (P-31; P-40) Moreover, it is evident from a review of the functions assigned to the Office of Board Affairs that the activities and functions of this office fall within the statutory framework of the provisions of N.J.S.A. 18A:17A-1 and 3 to be placed directly under the supervisory and administrative authority of the Executive Superintendent.

4. The outside legal counsel appointed by the Board was on a retainer basis as needed. Petitioner argues that:

> "***It was highly improper for the Board President, without the knowledge or consent of either the Executive Superintendent or the General Counsel, to contact outside legal counsel and request a legal opinion on a matter which the General Counsel could have acted, thus obligating the Board to an unnecessary expenditure. Such action on the part of this individual Board member was without authorization as a matter of policy, practice or law. The General Counsel credibly testified that legal opinions would normally be requested through th Executive Superintendent. A determination would then be made as to whether research and legal opinion could be rendered through the Office of General Counsel or whether the issue involves a potential conflict of interest or other area of specialization such that outside legal counsel would be warranted and utilized. If a legal opinion was rendered by the General Counsel, the response would be directed to the Executive Superintendent to convey the opinion to the Board. If outside legal counsel were utilized, the written opinion would be directed back to the Executive Superintendent and/or the General Counsel as deemed most appropriate at the time. Any deviation from this established procedure is violative of Board policy and practice and should [not] be sanctioned." (Petitioner's Exceptions, at pp. 5-6)

5. The judge erred in denying petitioner an award of counsel fees inasmuch as this matter was brought in order to gain judicial interpretation of the language of N.J.S.A. 18A:17A-1 et seq. It is not a lawsuit by a member of the Board for personal reasons or monetary damage but rather it was advanced before the

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Commissioner to cause the Board to comply with statutory prescription, with regard to its organizational structure and day-to-day operation. It is fundamentally unfair for one person to absorb the cost of such litigation when, in fact, the decision rendered will benefit all of the Board members and the system as a whole. Precedent for the award of counsel fees under such circumstances has been established in Ross v. Board of Education of the City of Jersey City, decided March 9, 1981, aff'd State Board October 7, 1981.

The Board in its exceptions to the initial decision takes issue with the gratuitous comments of the judge challenging the wisdom of its actions in its initial appointment and extension of the consultant contract to Mr. Kittrels. The Board urges the Commissioner to order the judge's comments in this regard stricken from the record.

Additionally, the Board takes issue with the judge's conclusion that its meeting of July 13, 1983 violated the provisions of the Open Public Meetings Act because of insufficiency of notice in its agenda regarding the extension of Alonzo Kittrels' contract. The Board argues that it had complied with the provisions of N.J.S.A. 10:4-8(d) to the extent that the information contained in the public notice of the Board agenda was adequate because it reflected all of the information to the "extent known" by the Office of Board Affairs.

Finally, The Board argues that the wording of the particular agenda item was not so vague as to make it meaningless with regard to the action to be taken in awarding the consultancy contract.

The Commissioner has reviewed the entire record of this matter taking into consideration the exceptions filed by the parties.

Initially, the Commissioner is constrained to comment upon the heavy reliance accorded to the relevancy of the testimony of Walter Wechsler by the judge as it appears on pages 5-10 in the initial decision. All of Mr. Wechsler's testimony with respect to the background of the enactment of S-3166 (now N.J.S.A. 18A:17A-1 et seq.) was adopted by the judge in his findings of fact on page 10, ante.

It is further observed that the judge also places considerable reliance upon Mr. Wechsler's testimony (pages 13 and 14) to interpret the specific provisions of N.J.S.A. 18A:17A-3 (Executive Superintendent: Duties and Powers); N.J.S.A. 18A:17A-5 (Officers and Employees, Professional and NonProfessional: Employment Transfer and Removal) and N.J.S.A. 18A:17A-7 (Board of Education; Retention of Powers and Responsibilities). Similarly, the judge then bases his interpretive analyses of the above-cited statutes to render the following findings of fact:

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> "***Based on Wechsler's testimony, it is my opinion that both legal counsel and the Office of Board Affairs provide support services to the Board of Education, aiding it in its policymaking functions. Therefore, being analogous to the role of the auditor or evaluator of the Executive Superintendent or formulator of a Board policy manual, it is my judgment that the two positions just mentioned should be set forth on an organizational chart as directly responsible to the Board of Education, owing their loyalty and allegiance to the Board directly, and aiding with the Board's policy-making function. The Executive Superintendent has no statutory role in making recommendations to the Board with regard to any hiring within those offices in order for such hiring to be valid and such would be clearly beyond the scope of his power and would be within that domain exclusively reserved to the Board.***" (ante, at p. 14)

At this juncture the Commissioner takes official notice of those services rendered and the contributions made by Mr. Wechsler while serving in his capacity as special agent to the former Governor and Commissioner of Education in the Newark Public School System. The Commissioner further recognizes the valuable legislative assistance rendered by Mr. Wechsler which subsequently resulted in the enactment of N.J.S.A. 18A:17A-1 et seq.

The Commissioner finds and determines, however, that the legislative provisions of the above-cited statute are clear and unambiguous and are not open to further construction such as that relied upon by the judge through Mr. Wechsler's testimony. In support of this determination, the Commissioner relies upon Watt v. Mayor and Council of the Borough of Franklin, 21 N.J. 274 (1956) wherein the New Jersey Supreme Court held in pertinent part that:

> "***In every case involving the application of a statute, it is the function of the court to ascertain the intention of the Legislature from the plain meaning of the statute and to apply it to the facts as it finds them, Carley v. Liberty Hat Mfg. Co., 81 N.J.L. 502, 507 (E. & A. 1910). A clear and unambiguous statute is not open to construction or interpretation, and to do so in a case where not required is to do violence to the doctrine of the separation of powers. Such a statute is clear in its meaning and no one need look beyond the literal dictates of the words and phrases used for the true intent and purpose in its creation.***" (at 277)

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Moreover, the Commissioner finds and determines that, upon application of the pertinent sections of N.J.S.A. 18A:17A-1 et seq. to the relevant facts of this matter, the following findings and conclusions reached by the judge are hereby set aside:

> "***1. That the Newark Board of Education pursuant to N.J.S.A. 18A:17A-1 et seq. properly extended the consultancy/lobbyist contract of Alonzo Kittrels at its July 13, 1983 meeting, without needing a recommendation from the executive superintendent;
>
> 2. That Alonzo Kittrels was an independent contractor and not an employee of the Board of Education;***
>
> 5. That the Office of Board Affairs and Executive Director of Board Affairs are currently acting in accordance with the statutory authority set forth in N.J.S.A. 18A:17A-1 et seq. and that said office is a support office for the Board of Education and is independent of the Executive Superintendent;
>
> 6. That individual members of the Newark Board of Education may consult directly with outside counsel with regard to Board business, absent a specific Board policy prohibiting this;
>
> 7. That the Office of General Counsel and its staff should not be supervised by or report to the Executive Superintendent, but rather should report directly to the Board of Education***."
>
> 8. That no counsel fees be awarded to petitioner."

Alternatively, the Commissioner finds and determines that the following findings and conclusions of the judge are affirmed for the reasons expressed in the initial decision, exceptions of the parties notwithstanding:

> "***3. That the notice of agenda Item V(b) for the July 13, 1983, meeting was inadequate and violated the Open Public Meetings Act, requiring that the action taken with regard to the appointment of Alonzo Kittrels be set aside;

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> 4. That the meetings of the Human Resources Committees of the Board of Education on July 6, 1983 and October 4, 1983, violated the Open Public Meetings Act***."

The Commissioner rejects those findings and conclusions of the judge, ante, (paras. 1, 2, 5, 6, 7 and 8) for the reasons summarized below.

1. Initially, the Commissioner observes that the Board in its resolution of October 26, 1982 (J-4) awarded the original lobbyist/consultant contract to Alonzo Kittrel, stating in part that it had complied with the provisions of N.J.S.A. 18A:18A5(a)(2). This section of the statute refers to a contract agreement which may be awarded without bid for:

> "Extraordinary unspecifiable services which cannot reasonably be described by written specifications, which exception as to extraordinary unspecifiable services shall be construed narrowly in favor of open competitive bidding where possible and the State Board of Education is authorized to establish rules and regulations limiting its use in accordance with the intention herein expressed; and the board of education shall in each instance state supporting reasons for its action in the resolution awarding the contract for extraordinary unspecifiable services***."

The regulations adopted by the State Board of Education appear in N.J.A.C. 6:20-8.1. In reviewing the applicable sections of the Administrative Code, the Commissioner finds and determines that the Board in passing the original resolution (J-4) and contract agreement (J-1), as well as the resolution (J-2) for the extension thereof, violated provisions of N.J.A.C. 6:20-8.1 relating to those procedures to be followed when initiating a contract agreement for extraordinary, unspecifiable services. Moreover, it is found and determined that Mr. Kittrels did not periodically report to the Board the progress that he had made with regard to the services to be rendered under the original contract agreement (J-1); nor was any progress report forthcoming from him since the commencement of the extension of the second contract agreement (J-2) on July 1, 1983 until November 28, 1983, at which time he submitted an activity report (P-37) for the previous contract year.

It must be pointed out, however, that the Board did not institute a requirement for any such reporting accountibility from Mr. Kittrels until the time the Board approved of the extension of his contract agreement (J-2) on July 13, 1983. Finally, the Commissioner observes from a review of the job description (P-12) developed by the Board for Mr. Kittrels at the commencement of the

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period beginning with the extension of his consultant contract agreement (J-2) that all of the services he was expected to provide to the Board were similar to many of those duties contained in the job description of the Executive Superintendent. (P-7) It is further found and determined that the Board required Mr. Kittrels to be present in the Office of Board Affairs three days per week and further that Mr. Kittrels was given office space, clerical staff, Board supplies and access to office equipment in order to render consultant services to the Board. The Commissioner finds and determines that, in light of the foregoing, Mr. Kittrels was not an independent contractor as the Board argues but, in fact, he was an employee of the Board. As such, the position occupied by Mr. Kittrels was subject to the provisions of N.J.S.A. 18A:17A-3 and 5, subordinate to the supervisory authority of the Executive Superintendent. The Commissioner so holds.

2. The Commissioner finds and determines that the Board in establishing the Office of Board Affairs with an Executive Director and support staff responsible directly to it has violated the provisions of N.J.S.A. 18A:17A-3 which specifically provide that the Executive Superintendent "***shall have supervisory authority over all offices and employees, professional and nonprofessional of the district, all of whom shall report to him, and he shall prescribe their duties.***" (Emphasis supplied.) The Board's job description for the position of Executive Director of Board Affairs (P-10), as well as its policy for agenda preparation (P-5) have been established in contravention of N.J.S.A. 18A:17A-4. It is evident that the Board has used the authority cited in both P-10 and P-5 which formerly was vested in the Board Secretary to create the position of Executive Director of Board Affairs. Those duties and responsibilities are now placed under the authority of the Executive Superintendent pursuant to N.J.S.A. 18A:17A-4 and, while such duties may be delegated by him to one of his subordinate officers in accordance with N.J.S.A. 18A:17A-6, they may not be severed from his supervisory authority.

3. The Commissioner finds and determines that the Board properly used its authority under N.J.S.A. 18A:16-1 and N.J.S.A. 18A:17A-3 to place the office and staff of General Counsel under the supervisory authority of the Office Executive Superintendent. The Board's organizational chart (R-8) must, however, be revised to reflect this change by the Board on April 3, 1982 (P-31) in compliance with law.

The Commissioner cannot agree, however, that the Board's actions in appointing and retaining outside counsel (P-22; R-2) comply with the above-cited statutory provisions, notwithstanding that a board may retain outside counsel on an expertise or case load demand basis. While there is testimony in the record to reveal that the Board has for the most part followed the practice of consulting with the Executive Superintendent and General Counsel before employing outside counsel, there have been occasions when this practice was abandoned and occasions wherein such counsel was employed

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for services which should have and could have been rendered by General Counsel. The Commissioner finds and determines that the Board must adopt a policy which in effect allows it, as well as the Executive Superintendent with advice from the Office of General Counsel, to determine the manner in which outside counsel is to be retained for various legal matters. Such policy must also provide that the reporting authority with respect to the cases or legal matters assigned to outside counsel flow through the Office of General Counsel and the Office of the Executive Superintendent to the Board as a matter of effective procedural and unit control. In support of this determination, the Commissioner observes that the Office of General Counsel is the chief legal arm of the Board, attending at all meetings conducted by the Board. Moreover, the Executive Superintendent by law has a seat on the Board and is authorized to speak as a non-voting member on all educational and fiscal matters to be acted upon by the Board. The Executive Superintendent also retains all of the duties and functions of the former Board Secretary and/or Business Manager in all Board matters pursuant to the provisions of N.J.S.A. 18A:17A-3 and 4. Further support for the above finding and determination is evidenced by the adversarial positions in which General Counsel and outside counsel have been placed in the past when opposing legal opinions have been rendered with respect to the authority of the Executive Superintendent. (See Opinion Letter dated July 14, 1983 from outside counsel to Board President (P-28) and also Legal opinions rendered by General Counsel both dated July 11, 1983 respectively to Daniel Gibson, Board Member (P-29) and to Dr. Columbus Salley, Executive Superintendent (P-27).)

4. The Commissioner finds and determines that the practice of individual Board members, including the Board President, in obtaining legal advice of counsel (General Counsel or outside counsel) may not be condoned. The Commissioner finds such practices by individual Board members contrary to case law as well as its own policy related to the "Limit of Authority" of individual Board members which reads as follows:

> "All powers of the Board lie in its action as a body. Board members acting as individuals have no authority over personnel or school affairs.
>
> "The Board's powers are derived from the state legislature; consequently it may perform only those acts for which some authority exists. This authority may be expressly stated or implied either in state law or in rules and regulations of the State Board of Education. The Board's authority to exercise permissive powers within the framework of state laws and regulations allows extensive freedom of action." (P - 4)

5. Finally, the Commissioner finds and determines that petitioner is entitled to be awarded counsel fees inasmuch as the

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action which was initiated by him as a Board member before the Commissioner was taken at his own personal expense in an effort to force the Board to comply with statutory prescription with regard to the concept of unit control and organization pursuant to the enacted provisions of N.J.S.A. 18A:17A-1 et seq. This determination is consistent with the reasons laid down by the Commissioner's prior ruling in Ross, supra. The Commissioner so holds.

In view of the above findings and determinations the Board is hereby directed as follows:

1. The Board is directed to comply with the provisions of the Open Public Meetings Act (N.J.S.A. 10:4-6 et seq.) as it pertains to the preparation and public notification of the agenda for all Board meetings.

2. The Board shall promulgate the necessary Board rules with sufficient specificity pertaining to the employment of outside consultants which shall be in compliance with N.J.S.A. 18A:18A-3 et seq. and N.J.A.C. 6:20-8.1 et seq.

3. The Board shall promulgate the necessary rules specifying the manner and circumstances under which outside counsel is to be retained by the Board without compromising or diminishing the effectiveness of those powers and duties of the Executive Superintendent or the Office of General Counsel.

4. The Board shall further clarify through its rule-making authority the manner and conditions under which legal advice of Board counsel is to be obtained not inconsistent with this decision.

5. The Board shall take the necessary action to revise its chart of organization to comply with the Commissioner's decision herein, establishing the proper placement for the Offices of Board Affairs and General Counsel, under the authority and supervision of the Executive Superintendent.

6. The Board shall immediately take the necessary action to terminate the lobbyist/consultant contract in effect with Mr. Kittrels and shall reassign any or all of the duties described therein that the Board wishes to continue to the Office of the Executive Superintendent and/or his designee pursuant to N.J.S.A. 18A:17A-3 and 6.

7. The Board is directed to compensate petitioner for those fees which he personally incurred as the result of litigating this matter before the Commissioner.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 30, 1984

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DANIEL GIBSON,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, March 30, 1984

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)

In this matter the State Board is asked to decide the timeliness and validity of an appeal of a Decision rendered by the Commissioner on March 30, 1984. On April 30, 1984, the State Board received a Notice of Appeal, dated April 27, 1984, regarding Gibson v. Board of Education of the City of Newark. This Notice of Appeal was filed by Robert L. Podvey, outside counsel hired by the Newark Board to handle the Gibson case, but Podvey's filing was without authorization by the Newark Board of Education. The matter of an appeal of the Commissioner's decision in Gibson was not actually voted on by the Newark Board until May 14, 1984. Prior to his filing of the Notice of Appeal, Podvey had received letters of instruction from the President of the Newark Board of Education and from the General Counsel to the Board of Education. The former instructed Podvey to take no action to appeal without the direction of the Board President; the latter also instructed Podvey to take no action in the matter. Further, in the interim between Podvey's unauthorized filing and the Newark Board's vote to appeal, General Counsel to the Newark Board of Education wrote at length to the New Jersey State Board of Education that Podvey's appeal "was entirely without warrant and approval of the Newark Board of Education. Said "Notice" was void ab initio."

Thus, although Podvey's Notice of Appeal was submitted within the statutory 30-day period, N.J.S.A. 18A:6-28, it was without substance for its failure to have the requisite formal Board approval. In addition, the subsequent vote by the Newark Board to appeal, taken May 14, 1984, after the conclusion of the 30-day appeal period, cannot be given any effect. A recent decision by Commissioner upheld the principle that where the underlying act in question was void for lack of authority, as with Podvey's Notice of Appeal, no subsequent action or vote by a Board of Education can be

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said to ratify the earlier, unauthorized behavior. Shore Vans, Inc. v. Toms River Regional District Board of Education, 1983 S.L.D. (March 9).

Thus, no appeal may be had in Gibson as the timely action taken by outside counsel, Podvey, was without proper authority and the authorization finally given by the Newark Board was out of time and without effect.

Date: June 6, 1984

PENDING N.J. SUPERIOR COURT

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8764-83
AGENCY DKT. NO. 379-10/83A

MARCO LEYTON,
Petitioner
v.
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION and CARTERET BOARD OF EDUCATION,
Respondents.

APPEARANCES:

Stephen E. Klausner, Esq., for petitioner (Klausner & Hunter, attorneys)

Michael J. Herbert, Esq., for respondent New Jersey State Interscholastic Athletic Association (Sterns, Herbert & Weinroth, attorneys)

Jeremiah D. O'Dwyer, Esq., for respondent Carteret Board of Education (O'Dwyer & Malone, attorneys)

Record Closed: December 29, 1983 Decided: February.14, 1984

BEFORE BRUCE R. CAMPBELL, ALJ:

This matter concerns an action for an order declaring New Jersey State Interscholastic Athletic Association By-law, Article V, Section 4C in violation of N.J.S.A. 18A:38-1 and, therefore, void.

The petitioner has amended his initital petition of appeal, thereby eliminating several questions. The sole issue to be tried as stated, is the subject rule valid in face of N.J.S.A. 18A:38-1 and, if not, what is the appropriate relief in this case. The matter was

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opened before the Commissioner of Education and transmitted 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 held on November 23, 1983, at the Office of Administrative Law, Trenton. The petitioner amended his initial petition of appeal and by agreement of the parties the matter proceeds to summary judgment, there being no facts at issue. Petitioner and respondents timely submitted briefs and the record closed on December 29, 1983, the last date for submission of replies.

I

This case involves an appeal from a determination of the New Jersey State Interscholastic Athletic Association (NJSIAA) eligibility appeals committee that Marco Leyton is ineligible for participation in interscholastic sports in the 1983-84 school year by reason of having attained age 19 prior to September 1, 1983. Article V, Section 4C of the NJSIAA By-laws states

> Age - An athlete becomes ineligible for high school athletics if he/she attains the age of nineteen prior to September 1. However, any athlete attaining age nineteen on or after September 1 shall be eligible for the ensuing school year. A birth certificate, issued at the time of birth, is the normal proof of age; in the absence of this, other proofs may be used. The records used will be baptismal records or the earliest school records.

The petitioner argues that this by-law is invalid in the face of N.J.S.A. 18A:38-1. That statute provides, in pertinent part, that "Public schools shall be free to . . . persons over 5 and under 20 years of age. . . ."

The petitioner was born on June 13, 1964, in the Republic of Chile. He became 19 years of age on June 13, 1983. The petitioner resides at 33 Roosevelt Avenue, Carteret, and is a senior student at Carteret High School. NJSIAA is a voluntary association in the State of New Jersey authorized by statute to regulate the conduct of student activities between and among its members in interscholastic athletic competitions. Carteret Board of Education has joined the NJSIAA and has agreed to be bound by its rules and regulations.

After being selected for and participating on the Carteret High School varsity soccer team for five games in the 1983 season, petitioner's age was ascertained. He was suspended from further play. The Board, by letter dated September 29, 1983, advised

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NJSIAA of its suspension of petitioner and sought a waiver of the age requirement. After a hearing, NJSIAA, by letter dated October 17, 1983, denied the request for waiver. This appeal followed.

II

PETITIONER'S ARGUMENTS

The petitioner contends that NJSIAA is not a governmental agency. However, petitioner recognizes that, pursuant to N.J.S.A. 18A:11-3, NJSIAA as a voluntary association can become operative only upon the approval of its charter, constitution, by-laws and rules and regulations by the Commissioner of Education. The statute also makes NJSIAA rules and regulations policy of constituent boards of education. Any rule or regulation of the NJSIAA is binding upon any member board as if promulgated by the board.

A school board's authority to accept NJSIAA rules and regulations as its own policy is, therefore, limited by the authority granted to the school board by statute to make rules. Where there is no statutory authority, action by the board must be declared void. Missano v. Board of Education of Jersey City, 32 N.J. 561 (1960). In addition, any regulation which narrows or restricts the scope of an otherwise clear statute cannot withstand judicial review. Terry v. Harris, 175 N.J. Super. 482 (Ch. Div. 1980). Any rule of the NJSIAA must meet the statutory mandate concerning the powers of school boards found in N.J.S.A. 18A:11-1(c) to:

> Make, amend, and repeal rules, not inconsistent with this title or with the rules of the state board . . . .

Petitioner argues that any NJSIAA rule, regulation or by-law which is in conflict with any provision of N.J.S.A. 18A:38-1 et seq. must be declared null and void.

School athletics are a part of a full and complete public education curriculum. N.J.S.A. 18A:38-1 or its predecessor statute has been in existence since 1903. Its validity has been questioned yet upheld by the courts. See, e.g., In re Newark School Board, 70 A. 881 (Sup. Ct. 1907), in which Mr. Justice Swayze said:

> The objection that the school law provides for the education of children between the ages of five and twenty years, while the Constitution requires the Legislature to provide for the instruction

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> of children between five and eighteen only, does not appeal to me with any force. There is nothing in the Constitution to forbid the Legislature from providing for better school facilities than the Constitution itself requires. The school fund is devoted to the support of public free schools for the equal benefit of all the people of this state, but it is not limited to children between five and eighteen years of age.

In the petitioner's view, it is clear that the Legislature has throughout this century mandated free public education for all people of the State until age 20. Free public education includes far more than classroom instruction. "Extracurricular" or "extra-classroom" activities are an integral part of the total curriculum.

In disputes concerning coaching, extracurricular assignments and extra-classroom assignments, the Commissioner has consistently held that such are part of the total curriculum. Dallolio v. Vineland Bd. of Ed., 1965 S.L.D. 18; Willett v. Colts Neck Bd. of Ed., 1966 S.L.D. 202. In Smith v. Paramus Bd. of Ed., 1968 S.L.D. 62, aff'd, State Board (Feb. 5, 1969), the Commissioner stated that

> The existence of a broad and well-developed program of student activities is an essential factor in the approval or acreditation of any secondary school. . . . In the Commissioner's judgment, therefore, boards 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. [at 65-66].

In Asbury Park Bd. of Ed. v. Asbury Park Education Ass'n, 145 N.J. Super. 495 (Ch. Div. 1976), aff'd in part, dismissed in part, 155 N.J. Super. 76 (App. Div. 1977), the court stated

> This court is in accord with the Commissioner's decision in Smith and the approach taken by the courts in Burkhard and Moss, supra. Realistically, the term "extracurricular" activity is a misnomer; it is not an "extra" in the life of a student, nor has it traditionally been considered an "extra" for teachers. Such activities are an essential part of a child's overall education. Learning and self-realization cannot take place in a vacuum; rather, they are fostered in an atmosphere in social interaction and furthered by the development of a healthy group orientation. Teachers, therefore, in order to properly fulfill the responsibility they have undertaken to their profession, to their students, and to the community, must necessarily perform those activities deemed necessary and assigned to them by the board of education

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.....

> Based upon the foregoing considerations, the court holds that extracurricular activities are an integral part of a child's education and are incorporated into the duty to properly teach. [at 505-506].

The petitioner submits that the clear intent of N.J.S.A. 18A:38-1 is to provide a full and complete free education to all up to age 20. Extracurricular activities, such as athletics, being an integral part of an education, are thus guaranteed up through age 20.

Assuming, arguendo that the policy behind Article V, Section 4C is valid, the method used to effectuate its purpose is discriminatory in contravention of the statutory authority of the NJSIAA. The subject by-law holds all individuals who obtain the age of 19 prior to September 1 to be ineligible for participation in high school athletics. On October 12, 1983, the NJSIAA adopted supplemental guidelines concerning student athlete eligibility. The NJSIAA required all schools which were members of the association to certify that they have familiarized themselves with the regulations and the supplemental guidelines. (J-2).

As it now reads, the NJSIAA guideline concerning the subject rule, states:

> Age - Article V, -C.4 of the By-laws provides that an athlete cannot participate in interscholastic athletics if he or she has reached the age of nineteen (19) prior to September 1 of any year.... This rule is not only aimed at preventing "red shirting" but is also aimed at encouraging students to satisfactorily complete their academic studies starting with the elementary school level. It is also a safety measure to ensure that 13 and 14 year old students are not expected to compete against adults who are six or more years older, with substantially greater physical size, strength and skills. In view of this paramount safety factor, waivers of this rule will be granted by the NJSIAA in only truly extraordinary circumstances.

The petitioner notes that prior to the 1983-84 school year, the guideline held age to be an absolute bar to participation. It is argued that the use of age as the sole criterion for preventing an otherwise qualified student from competing is discriminatory and must be declared unenforceable. Further, in light of the underlying policy reasons for NJSIAA By-law V, -C.4, the recent amendment allowing for the granting of waivers in "only truly extraordinary circumstances" does not cure the defects.

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The New Jersey Supreme Court has held that public schools and public education are covered by the New Jersey Civil Rights Act, N.J.S.A. 10:5-1 et seq. Hinfey v. Matawan Regional Bd. of Ed., 77 N.J. 514 (1978).

The New Jersey Civil Rights Act provides, in pertinent part:

> All person shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities and privileges of any place of public accommodation. . .without discrimination because of race, creed, color, national origin, ancestry, age, marital status, or sex, subject only to the conditions and limitations applicable alike to all persons. . . . N.J.S.A. 10:5-4.

In Hinfey, above, the court held that "it is undeniable that a public school curriculum is one of the advantages, facilities . . . or privileges of a public school as a place of public accommodation." Hinfey, above, at 523. Clearly, the limitation contained in the subject rule impinges upon the ability of the student entitled to a free public education to participate in activities which are an integral part of his education. Once a free public education is guaranteed up through age 20, use of an age less than 20 as the sole basis for effectuating the policies behind the rule is in contravention of the New Jersey Civil Rights Act, and, therefore in contravention and violation of N.J.S.A. 18A:38-1.

The policies behind the rule are to prevent "red shirting," to encourage students to satisfactorily complete their academic studies, and a safety measure to assure that 13 and 14 year old students do not compete against adults who are six or more years older with substantially greater physical strength and skills. None of these enunciated policies are accomplished by the sole use of age as the determining criterion for eligiblity to compete.

The first justification concerning age is to prevent red shirting. In this regard, it should be noted that the rule which is commonly known as the eight semester rule is a specific attempt to deal with the problem of red shirting. The eight semester rule is not based on a criterion subject to strict scrutiny as potentially discriminatory and effectuates the desired purpose of eliminating red shirting. The eight semester rule also serves to effectuate the desired purpose of encouraging students to satisfactorily complete their academic studies.

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The only other delineated basis for the rule is the concern surrounding 13 and 14-year-old students competing against individuals with substantially greater physical size, strength and skills. The absolute prohibition based only upon age does not effectuate this policy. NJSIAA could achieve the same results without relying on the sole criterion of age. For example, size and weight limitations could be placed upon athletes for particular sports, as is found in the sport of wrestling.

In this matter, there is no allegation that the petitioner is a "red shirt" or has attempted to prolong his education so that he could continue to play interscholastic soccer. Nor is he an individual of substantially greater size or skill than younger students (J-14). Thus, the student who was not a red shirt, was not prolonging his education solely to participate in athletics and was not of substantially greater size or ability so as to present a safety hazard to younger students is denied the ability to participate in interscholastic sports solely on the basis of his age.

All residents of New Jersey are entitled, pursuant to N.J.S.A. 18A:38-1, to a free public education until the age of 20 including the ability to participate in extracurricular activities. The limitation contained in the subject rule based solely upon age is in violation of N.J.S.A. 18A:38-1 and is therefore void. In addition, the use of an age less than 20 as a cutoff for the availability of access to the accommodations and advantages of a public education is in contravention of the policies contained in the New Jersey Civil Rights Act, N.J.S.A. 10:5-4. The ability of NJSIAA to give waivers in "extraordinary circumstances" indicates that the age limitation is not in fact applicable to all persons. A review of the proceeding before the NJSIAA eligibility appeals committee (J-14) and the decision letter from the committee dated October 17, 1983 (J-3), indicate clearly that the determination regarding truly exceptional circumstances did not revolve around the concepts of red shirting, the completion of academic studies or the safety measures regarding size, strength and skill of student athletes. Accordingly, the age limitation placed upon student athletes is not applicable alike to all persons and therefore violates the spirit, if not the letter, of the New Jersey Civil Rights Act.

III

BOARD'S ARGUMENT

The Carteret Board of Education, although nominally a respondent herein, has cross-claimed against NJSIAA and essentially argues as does the petitioner. The

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Board suggests that although the Legislature has given school boards the authority to let the NJSIAA regulate interscholastic athletics, NJSIAA has not risen to the level of an administrative agency. They have no entry in the New Jersey Administrative Code. Given the clear status of administrative regulations and their subordinate status to statutes, something with even less authority than an administrative regulation cannot stand in the face of a clearly worded statute. The subject rule not only attempts to narrow or constrict but directly tries to overrule N.J.S.A. 18A:38-1.

The Board also urges an order permitting the petitioner to compete in spring sporting events. Although the sport from which the dispute arose has passed its season, the issue still is in need of redress. The petitioner's intention to participate in spring athletic competition should prevent this case from being declared moot. In Playcrafters' Student Members v. Teaneck Township Board of Education, 177 N.J. Super. 66 (App. Div. 1981), aff'd 88 N.J. 74 (1981), plaintiffs sought to declare void a board policy against scheduling co-curricular activities on Friday nights. Although the students had been graduated when the case finally reached the Superior Court, the court refused to rule the case moot, stating, "We also disagree with the Commissioner's contention that the appeal is moot because the individual plaintiffs may no longer be attending Teaneck High School. The public interest warrants a resolution of the matter since the issues are of public importance and are bound to recur in the future" 177 N.J. Super. at 73.

The Board concludes by urging that the laws of this State require thorough and efficient education for all persons between the ages of five and twenty. An integral part of this education is the availability of co-curricular activities such as interscholastic athletics. The NJSIAA, an association regulating interscholastic athletics, does not have the authority to controvert the Legislature's clear intent of extending education to the age of 20 by denying participation in interscholastic athletics to those persons who have atteined the age of 19 before September 1 of any school year. The particular by-law in question is in violation of N.J.S.A. 18A:38-1 and, therefore, is void. Thus, the petitioner should be allowed to participate in spring interscholastic athletics.

IV
NJSIAA ARGUMENTS

The essence of the petitioner's argument seems to be that N.J.S.A. 18A:38-1 compels a free public school education to persons up to the age of 20 years, and the

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NJSIAA is without authority to limit participation in interscholastic athletics to students who have not reached the age of 19 prior to September 1 of a given school year. The School Law Decisions cited actually clarify the capacity of local boards to exercise managerial prerogatives and require faculty members to devote their time to supervision of various student co-curricular activities.

These cases, while supporting the authority of local boards to so direct their faculty, are irrelevant for purposes of this matter.

N.J.S.A. 18A:11-3, the enabling legislation for the NJSIAA, provides as follows

> A board of education may join one or more voluntary associations which regulate the conduct of student activities between and among their members, whose membership may include private and public schools. Any such membership shall be by resolution of the board of education, adopted annually. No such voluntary association shall be operative without approval of its charter, constitution, by-laws, and rules and regulations by the Commissioner of Education. Upon the adoption of said resolution the board, its faculty, and students shall be governed by the rules and regulations of that association. The said rules and regulations shall be deemed to be the policy of the board of education and enforced first by the internal procedures of the association. In matters involving only public school districts and students, faculty, administrators and boards thereof, appeals shall be to the Commissioner and thereafter the Superior Court. In all other matters, appeals shall be made directly to the Superior Court. The Commissioner shall have authority to direct the association to conduct an inquiry by hearing or otherwise on a particular matter or alternatively, direct that particular matter be heard directly by him. The association shall be a party to any proceeding before the Commissioner or in any court.

Under the terms of the statute, the by-laws of the NJSIAA for the 1983-84 term were duly approved by the Commissioner and, in August 1983, the Carteret Board of Education notified the NJSIAA of its resolve to become a member of that organization for the 1983-84 school year. Having adopted this resolution, the board, its faculty and students are governed by the rules and regulations of NJSIAA and the rules and regulations are deemed to be the policy of the Carteret Board of Education.

NJSIAA argues that in challenging the subject rule on the basis that it violates N.J.S.A. 18A:38-1, the petitioner is unavoidably arguing that all eligibility rules promulgated by NJSIAA are void. This argument should be evaluated in view of the fact

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that the Commissioner has repeatedly and specifically upheld these restrictions and applauded the policy upon which they are bottomed. See, Van Note v. NJSIAA, OAL DKT. EDU 10260-82 (March 8, 1983) adopted, Comm'r of Ed. (Apr. 22, 1983); North Arlington Bd. of Ed. v. NJSIAA, OAL DKT. EDU 1369-83, (Sept. 26, 1983) adopted, Comm'r of Ed. (Nov. 14, 1983). For instance, in Van Note, the Commissioner affirmed the NJSIAA's enforcement of the eight semester rule and described this rule as "a laudable one." (Van Note, slip op. at 14). In addition, in North Arlington, the Commissioner specifically rejected a petitioner's argument that N.J.S.A. 18A:36-1 defines the term "school year" as the period from July 1 to June 30, that such definition must necessarily apply to the phrase "school year" as utilized in the NJSIAA's by-law, Article V, Section 4K(2). Thus, the Commissioner has expressly recognized that general education statutes do not necessarily dictate the meaning of specific terms utilized by NJSIAA, particularly where those statutes are ambiguous and where NJSIAA's interpretation of its own by-law was "consistent with its own past practice." North Arlington, slip op. at 9. Clearly, by its expressed terms, N.J.S.A. 18A:38-1 does not grant a student unrestricted access to interscholastice athletics. The NJSIAA's imposition of age restrictions upon potential participants is a long-standing practice in furtherance of a well-established policy.

In arguing that a local board is without authority, by virtue of its membership in NJSIAA and adherence to the latter's rules and regulations, to restrict eligibility for participation in athletic activities, the petitioner ignores the policy enunciated in case law favoring a local school board's autonomy in governing the conduct of its students through duly promulgated rules and regulations. For instance, in State v. Conk, 180 N.J. Super. 140 (App. Div. 1981), the court addressed a challenge to a local board's ability to suspend a student in the face of the student's statutory right to an education. Specifically, the court held

> There can be no doubt that defendant [the student] had the fundamental right to an education. However, this right to an education is basic but it is not absolute. The exercise of the right is subject to the student's adherence to lawful conditions. [Id. at 145]

Also, in G.F. v. Washington Township Bd. of Ed., 1 N.J.A.R. 55 (1979) an administrative law judge rejected the very argument advanced by petitioner here in the context of a challenge to a local board's imposition of a long-term suspension against a student. The judge stated:

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The N.J. Const., (1947), Art. VIII XV, Par. 1, provides:

> The legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years.

The Legislature has recognized this constitutional mandate at N.J.S.A. 18A:38-25, which requires the attendance at school of pupils between six and sixteen, and at N.J.S.A. 18A:38-1, which provides that such attendance shall be free of charge.

A pupil's constitutional right to attend public schools, free of charge is not unlimited. Pupils are subject to the authority of those over them and are required to obey the rules of the school, N.J.S.A. 18A:38-1.

The Carteret Board of Education subjected the petitioner to the terms of the subject NJSIAA rule through its resolution voluntarily choosing membership in the NJSIAA. Had the Board taken issue with the terms of this by-law it could have chosen not to join the NJSIAA or made some attempt to amend the by-law through the NJSIAA's internal procedure available for such purpose. It did neither. If the petitioner's argument were taken to its logical extreme, a student trying out for a particular team could never be denied a place on that team; a student could never be suspended or expelled; a student could never be deprived of, for example, the right to enroll in a Latin III course on the basis that he had never taken Latin II, and the like. Such was never the intent of the Legislature, which contemplated that local boards would set specific standards and apply rules and regulations to govern the conduct of their students in furtherance of those students' interests.

NJSIAA emphasizes that participation in interscholastic athletics has been specifically determined a privilege and not a right by other jurisdictions which have considered this question in the context of challenges to interscholastic athletic association eligiblity rules. See, Robinson v. Illinois High School Association, 195 N.E. 2d, 38 (App. Ct. Ill. 1963), cert. den. 379 U.S. 960 (1963); State of North Dakota v. North Central Association of Colleges and Secondary Schools, 23 F. Supp. 694 (E.D. Ill. 1938); Morrison et al. v. Roberts, 82 P. 2d, 1023 (Supreme Court Okla. 1938). The Robinson court rejected a petitioner's argument that the action of a high school athletic association which denied him eligibility on the basis of age was invalid. Specifically, the court stated, quoting State Ex rel Indiana High School Athletic Association v. Lawrence Circut Court, 240 Ind. 114, 162 N. E. 2d 250 (1942), which dealt with a similar issue, as follows:

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> The crux of the controversy in this case [according to] the Court, is whether Plaintiff's right to go to public school, to wit, Shields High School, and receive education and training includes such activities as "interscholastic" sports or games, viz.: inter-school basketball, as may be engaged in between picked teams of the 750 public, private and parochial schools embraced within the membership of relator Athletic Association. [citations omitted]
>
> The Court stated that the right of the plaintiffs in the Circut Court proceeding, to go to the public schools and receive education and training can not properly be said to include inter-school basketball as may be engaged in between picked teams of the various schools. . . . [Robinson at 43]

The basis for the Court's determination in this case was that the "determination of the ineligibility of [the student] to play inter-school basketball was made by those in whom the constitution, by-laws, and rules of the Illinois High School Association vested the power and duty to make that determination." Id.

Expanding on the theme enuncicated in Robinson, the court in Morrison, above, stated:

> The Plaintiff has many rights as a citizen and as a high school student, but he has no vested right in "eligibility" as dealt with at great length in the rules of the Oklahoma High School Athletic Association. The Defendant Board of Control was clothed with ample authority to so construe, apply and enforce this rule, with its specific provision for "ineligibility" for one year.
>
> These rules are subject to change if the member schools desire a change. This may be done at the annual meeting or by referendum vote according to specific provision. But so long as these member schools, including the Holdenville school, desire to attach all of these many conditions, limitations, and restrictions on their "eligibiles," then surely they should be permitted to do it, so far as the Courts are concerned. There is nothing unlawful or evil in any of those rules nor in the provision resting final authority in the Board of Control. Surely the schools themselves should know better than anyone else the rules under which they want to compete with each other in athletic events. And doubtless everyone of these rules is founded upon reasons wholely satisfactory to the member schools. Morrison, above, at 1025.

V

From a review of the whole record, including the pleadings, I **FIND**:

1. The petitioner was born in the Republic of Chile on June 13, 1964.

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2. The petitioner repeated one year of schooling, the fourth grade, in Chile because his family was forced to move for political reasons. The school in his new attendance district refused to enroll him until his records arrived. Because of the general upheaval in Chilean life in 1973, the records were many months in coming. He was considered absent for the time his records were held up and was forced to repeat the fourth grade.

3. In 1977-78, the family expected to emigrate to the United States. The family did not enroll the petitioner in seventh grade. Emigration papers and exit visas were not forthcoming and the family was delayed. The petitioner was enrolled in the seventh grade in 1978-79.

4. The petitioner arrived in the United States and began public schooling here in September 1981. He had completed one-half of the tenth grade in Chile.

5. In the present school year, the petitioner is a senior at Carteret High School.

6. The petitioner participated in the first five varsity soccer games on the school's 1983 schedule.

7. At some point in the 1983 season, the Carteret High School Director of Athletics discovered that the petitioner had turned 19 years old before September 1, 1983.

8. The Director of Athletics immediately contacted the NJSIAA, informed the Association of the facts, sent a transcript of pupil information and requested a waiver of Article V, Section 4C, Age. (J-9, J-6).

9. On October 12, 1983, the NJSIAA eligibility appeals committee considered the request and determined that, although mindful of the grave events in Chile that caused the petitioner's family to come to the United States, truly exceptional circumstances were not present so as to warrant the granting of a wavier from the age rule. (J-3).

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10. The eligibility committee found the petitioner to be a superior soccer player who has been continuously enrolled in secondary schools in Chile and the United States. (J-3).

11. The eligibility committee found that the petitioner had had the opportunity to participate in interscholastic soccer for two years. (J-3).

12. The eligibility committee based its decision on the aims of the rule, that is, to prevent red shirting, to encourage pupils to satisfactorily complete their studies, to prevent an overage pupil taking the place of a less-skilled, younger pupil and to act as a safety measure to assure that 13 and 14-year-old pupils are not expected to compete with those who are five or more years older and possessed of greater skills, physical size and strength.

VI

Attendance at and participation in the activities of the public schools is as of right to those who meet the criteria established by the New Jersey Constitution and the Legislature. Yet, this court can find no case that declares the right to be fundamental. The right of a pupil to an education is subject to that pupil's adherence to lawful conditions. N.J.S.A. 18A:37-1; State v. Conk, above.

NJSIAA's argument that a major portion of its structure would crumble if an exception to the age rule were permitted is, perhaps, overdrawn. An exception, in and on the facts of this case, would do no irreparable injury to the fabric of the Association.

The issue, however, is the validity of the agency rule in the face of N.J.S.A. 18A:38-1, above. That broad challenge cannot be supported on the present record.

No right is absolute. Even the most cherished first amendment rights are subject to limitation in a proper case. The right to attend the public schools free of charge, N.J.S.A. 18A:38-1, is not coextensive with the right to partake without let or hinderance of every program, service or activity the schools may provide.

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Curriculum is the ultimate responsibility of the board of education. Silverman v. Comm'r of Ed., et al., 1977 S.L.D. 724. The Legislature has seen fit to require a recorded roll call majority vote of a board when it acts to adopt curriculum. N.J.S.A. 18A:33-1. A board of education may properly establish prerequisites and qualifications for any aspect of its programs, services and activities. N.J.S.A. 18A:11-1. Moreover, athletic eligibility rules have several salutary effects.

First, they prevent red shirting whereby parents or coaches have promising athletes repeat a grade so as to insure another year of athletic eligibility. Second, they prevent pupils who are not as athletically gifted from being deprived of an opportunity to compete in an interscholastic sport by being replaced by a more athletically gifted student who is repeating a semester or more of secondary school. Third, they promote uniformity of eligibility throughout the State, so that no member school obtains an unfair advantage. Fourth, they provide motivation for athletics to observe appropriate academic standards. To allow a student to fail or repeat a semester or more of secondary school and to be benefited by continuing eligibility in interscholastic sports would make a mockery of the principal goal of the Association in maintaining and reinforcing high academic standards. Fifth, as with the other 49 members of the National Federation of State High School Associations, the atheltic eligibility rules are intended to correlate with a secondary school academic progression. To do otherwise would subordinate academic program to athletic endeavor. Van Note, above, at 6-7.

The rules, including the age rule, seem to me to be accepted standards that bear a clear and rational relationship to public policy. Of course, even such a rule can be applied arbitrarily, but such is not the complaint here.

VII
DETERMINATION

Having considered the findings of fact, the arguments of the parties and the foregoing discussion, I **CONCLUDE** that New Jersey Interscholastic Athletic Association By-Law, Article V, Section 4C does not violate N.J.S.A. 18A:38-1. The rule addresses sound public policy concerns and is surrounded by due process safeguards.

Accordingly, the petition of appeal is **DISMISSED.** It is so **ORDERED.**

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OAL DKT. NO. EDU 8764-83

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 February 1984
DATE

Bruce R. Campbell / lel
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

February 14, 1984
DATE

Seymour Ellis
DEPARTMENT OF EDUCATION

Mailed To Parties:

February 16, 1984
DATE

Ronald L. Parker /s.s.
OFFICE OF ADMINISTRATIVE LAW

bm/ee

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EXHIBIT LIST

J-1 1983-84 NJSIAA Handbook
J-2 NJSIAA Supplemental Guidelines on Student-Athlete Eligibility as amended 10/12/83
J-3 10/17/83 letter from Robert Kanaby to James Gilrain
J-4 10/12/83 Appearance sheet before NJSIAA Eligibility Appeals Committee
J-5 10/3/83 Letter from J. Gilrain and W. Gasier to Robert Kanaby
J-6 10/3/83 Transmittal Letter from W. Gasior to Robert Kanaby
J-7 Carteret High School Transcript
J-8 Carteret High School Information Sheet
J-9 9/29/83 Letter from J. Gilrain and W. Gasier to R. Kanaby
J-10 Typed Statement of Zerrilda Fuentes
J-11 Handwritten Statement of Zerrilda Fuentes
J-12 Typed Statement of Marco Leyton
J-13 Handwritten Statement of Marco Leyton
J-14 10/12/83 Transcript of NJSIAA Eligibility Appeals Committee Meeting

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MARCO LEYTON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTER-SCHOLASTIC ATHLETIC ASSOCIATION AND CARTERET BOARD OF EDUCATION, MIDDLESEX COUNTY,	:	DECISION
RESPONDENTS.	:	

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

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

The Board in primary exceptions to the initial decision by Judge Campbell repeats its sole contention, that the rule of the NJSIAA By-law Article V, Section 4C is in violation of N.J.S.A. 18A:38-1 and is therefore void. The Board claims that such rule contravenes the noted statute and therefore must be set aside by the Commissioner. Petitioner, nominally an adversary to the Board of Education in such a controversy, in his reply exceptions concurs in those filed by the Board and adopts them as his own. The Commissioner finds no merit in the arguments raised by the Board.

The Commissioner is constrained to observe that the self-same arguments raised by the Board in its exceptions were raised before NJSIAA and the court, were considered by the judge and rejected by him. The Commissioner, for the purposes of clarity and convenience, deems it proper that certain of the noted references be herewith set down.

The eligibility appeals committee of the NJSIAA ruled petitioner ineligible to participate in the 1983-84 school year by reason of Article V, Section 4C which states in its entirety:

> "Age - an athlete becomes ineligible for high school athletics if he/she attains the age of nineteen prior to September 1. However, any athlete attaining age nineteen on or after September 1 shall be eligible for the ensuing school year. A birth certificate, issued at the time of birth, is the normal proof of age; in the absence of this, other proofs may be used. The records used will be baptismal records or the earliest school records."

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This rule is explained in the NJSIAA guidelines as follows:

> "Age - Article V, -C.4 of the By-laws provides that an athlete cannot participate in inter-scholastic athletics if he or she has reached the age of nineteen (19) prior to September 1 of any year.... This rule is not only aimed at preventing 'red shirting' but is also aimed at encouraging students to satisfactorily complete their academic studies starting with the elementary school level. It is also a safety measure to ensure that 13 and 14 year old students are not expected to compete against adults who are six or more years older, with substantially greater physical size, strength and skills. In view of this paramount safety factor, waivers of this rule will be granted by the NJSIAA in only truly extraordinary circumstances."

Both parties argue that this by-law as explained contravenes N.J.S.A. 18A:38-1 which provides in its entirety:

> "Public schools shall be free to the following persons over 5 and under 20 years of age:
>
> (a) Any person who is domiciled within the school district;
>
> (b) Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the district, if so required by the board, a sworn statement that he is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term; provided, however, that the board of education may contest the validity of the sworn statement in proceedings before the commissioner, except that no child shall be denied admission during the pendency of any such proceedings before the commissioner and the board shall have the burden of proving by a preponderance of the evidence before the commissioner that the child is ineligible for a free education under the criteria listed in this subsection;

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> (c) Any person whose parent or guardian, even though not domiciled within the district, is residing temporarily therein, but any person who has had or shall have his all-year-around dwelling place within the district for 1 year or longer shall be deemed to be domiciled within the district for the purposes of this section;
>
> (d) Any person for whom the bureau of children's services in the department of institutions and agencies is acting as guardian and who is placed in the district by said bureau."

Petitioner (and Board) argues that the aforementioned rule based solely on age violates this statute and the spirit of the New Jersey Civil Rights Act as well. Contention is made that NJSIAA does not have the authority to controvert the Legislature's clear intent of extending education to the age of 20.

The Commissioner notes with approval and herewith repeats the emphasis placed by NJSIAA that participation in interscholastic athletics has been determined to be a privilege and not a right:

> "***Robinson v. Illinois High School Association, 195 N.E. 2d. 38 (App. Ct. Ill. 1963), cert. den. 379 (U.S. 960 (1963); State of North Dakota v. North Central Association of Colleges and Secondary Schools, 23 F. Supp. 694 (E.D. Ill. 1938); Morrison et al. v. Roberts, 82 P.2d. 1023 (Supreme Court Okla. 1938). The Robinson court rejected a petitioner's argument that the action of a high school athletic association which denied him eligibility on the basis of age was invalid. Specifically, the court stated, quoting State Ex rel Indiana High School Athletic Association v. Lawrence Circut (sic) Court, 240 Ind. 114, 162 N.E. 2d 250 (1942), which dealt with a similar issue, as follows:
>
> > 'The crux of the controversy in this case [according to] the Court, is whether Plaintiff's right to go to public school, to wit, Shields High School, and receive education and training includes such activities as "interscholastic" sports or games, viz.: inter-school basketball, as may be engaged in between picked teams of the 750 public, private and parochial schools embraced within the membership of relator Athletic Association.
> >
> > [citations omitted]

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> 'The Court stated that the right of the plaintiffs in the Circut (sic) Court proceeding, to go to the public schools and receive education and training cannot properly be said to include inter-school basketball as may be engaged in between picked teams of the various schools....[Robinson at 43]'***"
>
> (ante, at pp. 11-12)

The Court rebuffed the arguments advanced by the parties noting that the Board by choosing membership in NJSIAA (which was not mandated) subjected petitioner to the rules promulgated by NJSIAA which are deemed to be supportive of sound public policy concern and well surrounded by due process safeguards to be applied equitably.

The Commissioner notes with approval the cogent analysis set down herein by Judge Campbell and agrees with the determination advanced herein.

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

MARCH 30, 1984

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8401-83
AGENCY DKT. NO. 362-10/83A

PATRICIA PECK,

Petitioner

v.

BOARD OF EDUCATION OF THE TOWN OF NEWTON,

Respondent

APPEARANCES:

James F. Schwerin, Esq., for petitioner
(Greenberg, Kelly & Prior, attorneys)

Richard L. Clark, Esq., for respondent
(Dolan and Dolan, attorneys)

Record Closed: February 9, 1984 Decided: February 9, 1984

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

Petitioner alleged she was improperly compensated pursuant to her contract upon the cancellation of same.

The Board denies the allegation and avers her employment was terminated on the 60th day following the Board's action and notice to terminate, and is entitled to mitigation.

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The matter was transmitted to the Office of Administrative Law on October 21, 1983 as a contested case pursuant to N.J.S.A, 52: 14F-1 et seq. A telephonic prehearing conference was held on December 12, 1983 during which the parties agreed to submit the matter for Summary Decision. A jointly executed Stipulation of Facts was filed and the matter was briefed. The record was closed on February 9, 1984, the date established for the filing of an optional reply by petitioner. A review of the entire record reveals no material facts in dispute, and the matter is deemed ripe for Summary Decision.

The following material facts taken from the Stipulation and admissions in the pleadings are adopted herein as **FINDINGS OF FACTS:**

1) Petitioner is a non-tenured school nurse who was employed in that position by respondent during the 1982-83 school year.

2) Petitioner was renewed for the 1983-84 school year and signed a standard employment contract to provide her services "from the first day of September 1983 to the 30th day of June 1984, at the salary of $22,695. . . .

3) Petitioner's 1983-84 contract incorporated a termination clause which states that: "It is hereby agreed by the parties hereto that this contract may at any time be terminated by either party giving to the other 60 days' notice in writing of intention to terminate the same, . . ."

4) On July 19, 1983, in the presence of petitioner, the Board acted to abolish petitioner's position by a reduction in force caused by declining pupil enrollment and economic considerations.

5) Petitioner was advised of the Board's action on July 19, 1983 and her termination effective September 19, 1983, which was confirmed in writing.

6) Petitioner advised the Board of her claim for 60 days pay from September 1, 1983, the effective date of her employment contract, to October 30, 1983, the effective date of her termination pursuant to the contract.

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7) The Board advised petitioner, in response, that the effective termination date of employment was September 19, 1983, and her entitlement for 60 days' pay would run from July 19, 1983, the date of notice, and would be mitigated by her earnings from that date.

8) Petitioner was employed elsewhere from June 30 to August 30, 1983 and grossed $308 per week during that period.

9) Petitioner voluntarily resigned from the position she held during July and August 1983.

10) Petitioner applied for unemployment benefits and received $158 per week beginning October 5, 1983.

ARGUMENTS OF COUNSEL

Petitioner argues the 60 days incorporated in the termination clause begins to run on the effective date of the contract, which is when services are to be provided. She cites considerable case law which shall be addressed, post.

The Board argues that the principal cases cited by petitioner do not represent current law because of an unreported decision of the Superior Court, Appellate Division in Patricia Fallon v. Bd. of Ed. of Mount Laurel, 1975 S.L.D. 156, rev'd and rem'd St. Bd. 1975 S.L.D. 162, 1976 S.L.D. 75, aff'd St. Bd. 1976 S.L.D. 76, rev'd N.J. Super. (App. Div. 1977) 1977 S.L.D. 1289.

The briefs of the parties are incorporated herein by reference.

DISCUSSION AND THE LAW

There are two issues to be determined and addressed in this dispute. The first is whether the 60 days contractual termination clause runs from the date of termination

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notice or from the effective date of employment. The second is the matter of mitigation, which was incorporated in the Board's Answer to the Petition as an affirmative defense.

It is well established in decisional law that the effective date of an employment contract is the date when services are to begin and not the date a contract was executed. In this matter the effective date of the contract was September 1, 1983. It is equally well established, that upon the execution of a teacher's employment contract, the teacher acquires a vested property right and the Board acquires a vested right to the teacher's services beginning with the first day of the contract, which in this matter is September 1. See Klein v. Bd. of Ed. of Leonia, 1981 S.L.D. ____ (decided October 15, 1981); Contaldi v. Bd. of Ed. of Jersey City, 1981 S.L.D. ____ (decided January 23, 1981); Armstrong v. Bd. of Ed. of East Brunswick, 1975 S.L.D. 112, rev'd State Board, 1975 S.L.D. 117. The State Board relied in Armstrong on Canfield v. Board of Education of Pine Hill, 1966 S.L.D. 152, aff'd St. Bd. 1967 S.L.D. 345, aff'd 97 N.J. Super. 483 (App. Div. 1967), rev'd 51 N.J. 400 (1968) when it said:

> Therefore, we reverse the Commissioner's decision and hold that Petitioner-Appellant Armstrong be paid by Respondent a sum of money equal to what she would have earned from her teaching employment commencing with the first day of September 1974 and ending October 30, 1974, subject to mitigation resulting from her earnings during that period. (at 119)

The argument of the Board that Fallon represents current law and overruled Canfield and Armstrong is without merit. Fallon, a decision by the Appellate Division of Superior Court (not officially reported) cannot, as a decision of a lower court, overrule Canfield, a decision of the Supreme Court of New Jersey. Further, the court in Fallon held that matter and Canfield to be distinguishable.

I **FIND** the instant matter and Fallon to be distinguishable. In Fallon the termination clause required 30 days notice, and notice was given far more than the 30 days prior to September 1 (in the Spring). In the instant matter 60 days notice was required, but given less than 60 days prior to September 1.

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It would appear that the termination clause is incorporated in employment contracts for the protection of both parties. If the employee exercises her right to terminate, the Board is provided 60 days to seek a replacement without an interruption of the services provided by the employee during that period. If the employer exercises its right to terminate the contract, the employee is provided equal time to seek other employment with the economic protection of 60 days' pay resulting from her vested property right.

The State Board incorporated mitigation of earnings during the 60-day period in Armstrong, but did not address the duty of the Petitioner-Appellant to put forth good faith efforts to mitigate by reasonable diligence in seeking other employment of the same general kind of services as she had contracted to provide. The burden of showing what Peck could have earned during the 60-day period is clearly on the Board. The rule was succinctly stated by the Supreme Court of Iowa in Byrne v. Independent School District of Strubee, 139 Iowa 618, 117 N.W. 983:

> When such contract is disregarded by the school district and the teacher is denied the right to perform, it is her duty to find other employment, and when sued, the school district may show that she has found other employment, or that by the use of reasonable diligence she might have found other employment for the purpose of mitigating the damages; but, if the discharged teacher did not accept other employment, her damages should not be diminished for failure to secure it, unless it be shown that by reasonable diligence she might have secured employment of the same grade in the same locality where she was employed to teach. She was not required to accept employment in another locality or of a different or lower grade. The law is very clear on this proposition.

See also Shill v. School Township of Rock Creek, 209 Iowa 1020, 227 N.W. 412; School Directors v. Kimmel, 31 Ill. App. 537; School Directors of District No. 1 v. Birch, 93 Ill. App. 499; School Directors of District No. 2 v. Orr, 88 Ill. 648; School Directors v. Crews, 23 Ill. App. 367; Ottinger v. School District No. 25, 157 Ark. 82, 247 S.W. 789; School District No. 21 v. Hudson, 277 S.W. (Ark.) 18; Gardner v. North Little Rock Special School

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District, 161 Ark. 466, 257 S.W. 73; School District No. 65 v. Wright, 42 S.W. (Ark.) 555; Edwards v. School District No. 73, 297 S.W. (Mo.) 1001; Haddon School Township of Sullivan County v. Willis, 209 Ind. 356, 199 N.E. 251; State ex rel. Schmidt v. School District No. 2, 237 Wis. 186, 295 N.W. 36; School Directors of District No. 2 v. Orr 88 Ill. 648; Doyle v. School Directors, 36 Ill. App. 653; School Directors v. Crews, 23 Ill. App. 367; Edwards v. School District No. 73, 297 S.W. (Mo.) 1001.

In New Jersey decisional law, see Mullen v. Bd. of Ed. of Jefferson, 81 N.J. Super. 151, 160 (App. Div. 1963); Harvard v. Bushberg Brothers, 137 N.J. Super. 537 (App. Div. 1975); Sandler v. Lawn-A-Mat Chemical & Equipment Corp., 141 N.J. Super. 437 (App. Div. 1976); Sommer v. Kridel, 74 N.J. 446 (1977); White v. North Bergen, 77 N.J. 538 (1978); Talman v. Bd. of Trustees of Burlington County College, 169 N.J. Super. 535 (App. Div. 1979); and Zielenski v. Bd. of Ed. of Guttenberg, 1981 S.L.D. _____ (decided June 18, 1981), aff'd State Bd. of Ed., 1982 S.L.D. _____ (decided February 3, 1982).

This matter was submitted for Summary Decision as no material facts are in dispute. The Board's burden was met through the jointly executed Stipulation of Facts, wherein Peck voluntarily resigned from her June 30 to August 30 employment; earned $308 per week in that employment as a staff nurse at the Andover Nursing Home; and she applied for unemployment benefits and received $158 per week beginning October 5, 1983.

The obvious question arises as to the rationale upon which Peck was granted unemployment benefits when she voluntarily resigned from her $308 per week employment. There shall be no conjecture here as to whether said benefits were granted solely on the termination of her contract with the Board, or whether consideration was given to that fact plus special circumstances that may have surrounded her voluntary resignation of employment at Andover. That is not at issue here.

Peck's duty of reasonable diligence to mitigate during the 60-day period is at issue due to the Board's affirmative defense and as a matter of law.

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FURTHER FINDINGS OF FACTS AND CONCLUSIONS OF LAW

I FIND that Peck breached her duty to mitigate by reason of her voluntary resignation from her position as staff nurse at Andover. **I FURTHER FIND** said employment was generally of the kind she held with the Board and in the same geographical area.

It is clear by contract that Peck's earnings with the Board during the 60-day period would have been $4,539 (2/10th of her annual salary of $22,695). Her employment at Andover during that period would have yielded earnings of $2,684 (8 5/7th weeks at $308).

I FIND that Peck is entitled to compensation of $1,855 as a matter of contract and decisional law ($4,539 less $2,684). (Unemployment compensation is excluded as it is less, at $158, than the Andover mitigation, at $308, and she obviously could not have received both.)

I CONCLUDE, therefore, that Summary Decision is **GRANTED** to petitioner Peck on the issue of the 60-day termination clause, and that Summary Decision is **GRANTED** to the Board on the issue of mitigation.

The Board is hereby **ORDERED** to compensate Peck in the amount of $1,855, less the amount already paid to her for the period from September 1 to September 19, and to do so forthwith.

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 8401-83

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

9 February 1984
DATE

Ward R. Young
WARD R. YOUNG, ALJ

Receipt Acknowledged:

February 15, 1984
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

February 17, 1984
DATE

Ronald J. Parker /xs
FOR OFFICE OF ADMINISTRATIVE LAW

g

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OAL DKT. NO. EDU 8401-83

ADDENDUM

EVIDENTIARY DOCUMENTS

J-1: Jointly executed Stipulation of Facts

J-2: 1983-84 Employment Contract of petitioner

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PATRICIA PECK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF NEWTON, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The Commissioner has reviewed the record of the matter controverted herein including the initial decision rendered by Ward R. Young, ALJ.

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

Petitioner filed primary exceptions to the initial decision regarding the judge's findings and conclusions with respect to mitigation of damages, contending that the judge erred when mitigating damages with the amount which would have been earned if petitioner continued her summer employment. Petitioner claims that the option to continue employment was not available in that her term of employment at the nursing home was for the summer period, June 30 - August 30, 1983, as it had been for previous summer employment, and that arrangements had already been made by the nursing home to replace her. In addition, petitioner contends that she had been informed by at least one Board member at its July 19, 1983 meeting that the Board was contemplating having her work in the district from September 1 - September 19, 1983. Petitioner urges, therefore, that the Commissioner remand the case to the Office of Administrative Law so that the record may be clarified regarding her resignation from the nursing home, contending that the judge's own opinion acknowledges uncertainty surrounding petitioner's employment at the nursing home and the fact that unemployment benefits were granted. The Board objects to any attempt to reopen the matter, contending that the judge's determination regarding mitigation of damages is correct; that there was a duty to mitigate on the part of petitioner; and that it is unreasonable to say petitioner cannot obtain a nursing position in a school or other public or private sector position.

The Board, in its filing of primary exceptions, urges that the Commissioner reject the judge's determination that the 60-day period of notice commenced on September 1, 1983 rather than July 19, 1983, contending that his reliance on Klein, supra, and Armstrong, supra, was in error. It further avows that Fallon is dispositive of the instant matter and that it represents a better reasoning since it avoids what constitutes a windfall for petitioner, namely, being

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paid for a period of time she would have neither been working for the Board nor receiving remuneration from it. Petitioner, in her reply to the Board's exceptions, rejects the Board's contentions and avows that the judge was correct in his determination regarding the September 1, 1983 date for notice.

As regards the first controverted issue, commencement date of 60-day notice, the Commissioner believes that the judge's conclusions that Fallon is distinguishable from the instant matter and that Canfield, supra, and Armstrong, supra, are compelling are well-reasoned and, accordingly, finds the Board's legal argument without merit.

As regards the second controverted issue, mitigation of damages, the Commissioner determines that the judge's findings that petitioner breached her duty to mitigate by reason of her voluntary resignation from the nursing home position and that said employment was generally of the kind she had with the Board are not appropriate for the following reasons.

While the judge is correct in believing the Byrne ruling, supra, quoted in the initial decision is applicable to the instant matter, the Commissioner determines, however, that a critical point, not adequately addressed herein, pertains to that portion which rules that Byrne was not required to accept employment "of a different or lower grade." (at 983) The position of school nurse is that of a teaching staff member as defined in N.J.S.A. 18A:1-1 and N.J.A.C. 6:11-3.4. Individuals performing school nursing functions in public schools must hold a valid School Nurse certificate. N.J.S.A. 18A:26-2; N.J.A.C. 6:11-3.1 and 6:11-12.8, 12.9 Registered nurses are not allowed to function as school nurses, even with a bachelor's degree in nursing, unless they hold certification as a school nurse. Rooney et al. v. Bd. of Ed. of the Borough of Upper Saddle River, decided by the Commissioner January 22, 1982, aff'd State Board July 7, 1982, aff'd/rem'd New Jersey Superior Court, Appellate Division February 23, 1984

Consequently, the Commissioner determines that petitioner did not have a duty to continue her summer employment, a position of lower grade and different duties from those of a school nurse, even if said nursing home employment was in fact an option available to her. Scrutiny of the difference in remuneration between what would have been earned in the nursing home position during the 60-day period, $2,684, and that which petitioner is entitled to receive from the Board, $4,539, supports the fact that such nursing home employment is of a lower grade in that it represents a 41% reduction.

As regards a duty by petitioner to mitigate by seeking and accepting employment comparable to a school nurse, the Commissioner determines that the period of time in question is an unreasonable time frame to render petitioner negligent. Unlike Zielenski who was without employment for two academic years and was found negligent in her duty to mitigate damages for the second year, 1971-72, the time frame in the instant matter is only a matter of several months.

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Accordingly, the Commissioner reverses the ALJ's order to deduct $2,684, monies not actually earned by petitioner, from the $4,539 she would have earned by contract during the 60-day period. The Commissioner disagrees with the Board that payment for a 60-day period not actually worked constitutes a windfall; rather, it constitutes monies petitioner is entitled to by contractual agreement. He, therefore, orders that she be paid the $4,539 due her, less the amount received in unemployment compensation from October 5, 1983 to October 30, 1983.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

APRIL 2, 1984

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9609-83
(On Remand)
AGENCY DKT. NO. 196-6/77

MICHAEL ACCETTA, ET AL.,
Petitioners
v.
BOARD OF EDUCATION OF THE CITY OF HOBOKEN, HUDSON COUNTY,
Respondent.

APPEARANCES:

Ezra D. Rosenberg, Esq., for petitioners (Katzenbach, Gildea and Rudner, attorneys)

Ina B. Lewisohn, Esq., for respondent (Lowenstein, Sandler, Brochin, Kohl, Fisher, Boylan and Meanor, attorneys)

Record Closed: January 3, 1984 Decided: February 16, 1984

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

This matter is on remand from the Superior Court, Appellate Division, pursuant to a decision, dated May 17, 1982.

This matter was originally opened before the Commissioner of Education by way of a Petition of Appeal dated August 2, 1977, wherein 42 employees of the Board of Education of the City of Hoboken (Board) asserted that they each individually had

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completed various lengths of military service within the meaning of N.J.S.A. 18A:29-11 and that the Board had denied them salary credit mandated by statute. The Commissioner, in the matter of Michael Accetta, et al., v. Board of Education of the City of Hoboken, Hudson County OAL DKT. EDU 196-6/77 (June 11, 1979), granted partial summary judgment for 32 of the 42 petitioners.

On August 21, 1979, the ten remaining petitioners filed the additional records and information that were lacking in Michael Accetta, et al., supra, and thereby requested that a decision issue based upon their previous motion for summary judgment and the Commissioner's ruling. The Board did not file answering papers with regard to petitioners' motion. Subsequently, on February 25, 1980, the Commissioner transmitted the matter to the Office of Administrative Law for disposition as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq.

The undersigned, on May 19, 1980, rendered an initial decision dismissing the claims of three petitioners on the grounds that they failed to establish proof of the required military service and rejecting the remaining claims on the ground they were not filed within the applicable six-year statute of limitations. The matter was treated as a motion for summary judgment on behalf of petitioners, and the Commissioner of Education denied the motion but entered judgment in favor of the Board dismissing the petition with respect to said petitioners. An appeal was thereafter filed by these ten petitioners to the State Board of Education (State Board) from the Commissioner's decision, and the Board filed a cross appeal with respect to the partial summary judgment previously entered in favor of the 32 petitioners. However, the State Board regarded the Commissioner's earlier decision with respect to the 32 petitoners as a final judgment and dismissed the Board's cross appeal as having been untimely filed. The State Board upheld the decision with respect to the three petitioners whose claims were dismissed for lack of adequate proof of the required military service (one of the three petitioners had served as a volunteer in the Peace Corps). However, the State Board remanded to the Commissioner the claims of the remaining seven petitioners for further consideration of the defenses of estoppel and laches and for other matters. The appeal before the Appellant Division of Superior Court was taken by the Board from the decision of the State Board. No cross appeal was filed for any of the group of ten petitioners.

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On May 17, 1982, the Appellate Division of the Superior Court of New Jersey issued an opinion in the matter, holding that:

> With respect to the claims of 32 petitioners whose motion for partial summary judgment was granted, we reverse the decision of the State Board and enter judgment in favor of the appellant, the Hoboken Board of Education, as to all such claims for a period to the date when the claim petition was filed. With respect to the claims for periods of time less than six years prior to that filing date, we remand the matter to the Commissioner of Education for a determination as to whether those claims should be barred by reason of laches. We affirm the State Board's remand of the claims of seven petitioners to the Commissioner except as modified herein, namely, by barring the portion of such claims embracing periods of employment more than six years from the date the claim petition was first filed. We do not retain jursidiction.

On June 17, 1982, petitioners filed a Petition for Certification with the Supreme Court of New Jersey. This petition was denied on November 3, 1982.

On March 9, 1983, petitioners wrote to the Commissione of Education concerning the failure of his office to begin proceedings on remand in accordance with the Appellate Division judgment. On March 22, 1983, Deputy Assistant Commissioner, Seymour Weiss, advised petitioners that the matter was still an active case and requested the parties to attempt settlement in accord with the New Jersey Supreme Court's decision in Lavin v. Board of Education of the Borough of Hackensack, 90 N.J. 145 (1982).

After negotiations, the parties were able to reach settlement on the primary issue of prospective relief on the salary guide due each individual petitioner. Specifically, four petitioners were found to have been eligible for prospective relief, pursuant to Lavin; they are Maria Rivera, Luis Ortiz, Robert O'Keefe and Eleanor Goode. Of these, Luis Ortiz and Maria Rivera had already been paid their proper credit by the respondent school district. Respondent has agreed to pay O'Keefe $9,893 and Goode $4,758 in settlement of their claims. Accordingly, the parties executed a Stipulation of Partial Dismissal, dated September 26, 1983, which was filed with the office of the Commissioner.

The Commissioner transmitted the matter on remand to the Office of Administrative Law on December 7, 1983, for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. and N.J.S.A. 52:14B-1 et seq. On December 27, 1983, a telephonic prehearing conference was held at which the parties agreed that only one

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substantive issue remained to be determined: to wit, whether petitioners are due credit on the Board's negotiated salary guide towards longevity increments on the basis of their military service credit, pursuant to N.J.S.A. 18A:29-11. The parties agreed to have this matter determined by way of cross motion for summary decision. In support thereof, the parties submitted, in addition to letter memoranda, the following to this court:

1. Joint Stipulation of Partial Dismissal filed by the parties on September 28, 1983;

2. Motion for summary judgment with letter in lieu of brief and exhibits filed by petitioners on September 28, 1983;

3. Letter Brief with exhibits in opposition to petitioners' motion for summary judgment, dated October 14, 1983, and filed with the Commissioner of Education on October 17, 1983; and Affidavit of Grace Corrigan submitted therewith;

4. Reply Letter Brief on behalf of respondent Board, dated November 22, 1983, and filed with the Commissioner of Education on November 23, 1983; and Affidavit of Otto Hottendorf submitted therewith.

5. Petitioner's letter reply in lieu of brief filed on November 14, 1983;

6. Appellate Division opinion dated May 17, 1982.

Having carefully considered the entire record before me, I **FIND** and determine the sole issue before this court is ripe for summary disposition, Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67 (1954).

STATEMENT OF FACTS

The relevant contractural language is found on the Board's adopted Salary Guide (See: Exhibit A). From 1974-75 on, the relevant collective bargaining agreement set forth the payment to teachers of a longevity increment at the beginning of the 15th, 20th, 25th and 30th year. From 1974-75 until 1981-82, the relevant contractual provision stated simply "Longevity: At the beginning of the 15th year, an additional $750. . . ." From 1981-82 the relevant contractual provision merely stated "LONGEVITY" and set forth specified amounts for 15, 20, 25 and 30 years service. The relevant contracts contain no language limiting longevity increments to service within the district.

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PETITIONERS' LEGAL ARGUMENT

Petitioners observe that the only issue left before the Commissioner is whether the military service credit granted to teachers by N.J.S.A. 18A:29-11 applies to eligibility for longevity increments contained in the collective negotiating agreement in respondent school district. This precise issue was decided by the Appellate Division in Wall Township Education Association v. Bd. of Ed. of Township of Wall, 149 N.J. Super. 126 (App. Div. 1977). Petitioners submit that the Wall case is controlling here and that in consonance with Lavin, supra, the Commissioner should order respondent to credit petitioners with their years of military service toward longevity increments.

In Wall Township, the court held that:

> ...[T]he credit for military service entitles a teacher to a status equal to that of a teacher who has had employment credit for the same period of time up to a maximum of four years. This credit is not limited to the benefits of his status on the salary guide but extends also to any other benefits granted to other teachers because of longevity experience in the teaching field. We find nothing in the statute suggesting a contrary construction. As a consequence, when a teacher with military service is advanced on the salary guide because of the statutory credit, he remains in the position for equal treatment with those on the same step because of teaching experience. The statute is clear and unambiguous in its intent. [Id at 130-131]

Accordingly, petitioners assert, it is undisputed that military service credit pursuant to N.J.S.A. 18A:29-11 must be applied toward longevity increments.

Petitioners anticipate that respondent Board will take the position, as did the local board of education in Wall Township, that longevity increments under the collective negotiating agreements should apply to service for the requisite years within the school district and that military service credit therefore should not be counted. Id. at 131. The court and Commissioner should reject this argument as did the court in Wall Township.

Petitioners contend that the contractual provision in Wall Township is virtually identical to that in Hoboken. See Wall Township at 130. Indeed, the Wall Township longevity increment provision provided that the increment would be paid to teachers entering specified years "of teaching as a fully certified teacher." Nevertheless, the court found that:

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> As we read the pertinent provision which we have quoted above, teachers in Wall Township are entitled to longevity increments when they enter their 15th and 18th year of 'teaching as a fully certified teacher' in whatever system they have acquired their experience. A veteran, therefore, is entitled to the same increments if his total service as a fully certified teacher plus his military service credit equals the number of years required for eligibility. Since the statute mandates equivalency, the local board cannot apply the agreement in a manner which is violative of the statutory requirement. [Id. at 131]

Petitioners contend that the court distinguished a longevity increment provision which would recognize military service credit from one which would not, i.e., one which specifically limited a longevity increment to teaching within the district. Id. at 131-132. This latter situation is not present here. The Hoboken longevity increment provision is silent as to whether it applies to service within the district alone. Accordingly, in consonance with Wall Township and with the established precept that remedial legislation such as the military service credit act should be liberally construed and applied, it must be presumed that petitioners' military service is credited toward longevity in Hoboken.

For the reasons stated above, petitioners respectively request the Commissioner to declare that petitioners are entitled to prospective relief in accordance with Lavin supra, pursuant to N.J.S.A. 18A:29-11, so as to credit their years of military service toward longevity increments.

RESPONDENT BOARD'S LEGAL ARGUMENTS

Respondent does not dispute petitioners' statement of facts relevant to the contractual language regarding longevity increments as set forth in the Board's Salary Schedules pursuant to Exhibit A. It does, however, expand on petitioners' statement of facts to that from 1974-75 through 1980-81, the contracts provided that the longevity increments were to be paid "at the beginning of" the 15th, 20th, 25th and 30th years. From 1981-82 through the present, the contracts merely set forth the specified amounts for 15 years, 20 years, 25 years, and 30 years. The contracts are silent as to whether those payments are one-time only payments to be made at the beginning of each of those "landmark" years or whether they are to be paid continuously through intervening years (e.g., at the beginning of the 16th, 17, 18th, and 19th years). The contracts are also silent

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as to whether or not the increments are cumulative: that is, whether a teacher would continue to receive the 15-year increment in addition to the 20-year increment and so on throughout his or her years of service. The contracts are also silent as to whether the years of service must be continuous or whether a break in service would effect entitlement to a longevity increment, whether the service must be in the capacity of certified teacher or whether it can be service in any capacity, and, finally, whether the service must be within the Hoboken school system. It is, of course, this last condition—whether the service must be within the Hoboken school system—that is material to this motion.

The Board contends that these "silences" in the contract are filled in, as in most contracts, by the traditional "past practices" clause. The current contract provides:

> 30.8 Existing practices that have been changed as a result of negotiations for this agreement shall be null and void. However, those practices which were not specifically changed shall remain in full force and effect.
> [Exhibit A]

The Board assumes that petitioners are not advocating the nullification of the applicable past practices with respect to longevity increments. The increments are paid not only for the "landmark" years, but also for the intervening years, despite the fact that the contract does not expressly so provide. The increments are cumulative, despite the fact that the contract does not expressly so provide. The increments are awarded for years of continuous service only, and credit for previous service with the Hoboken school system is not given to teachers who resign and later return to the school system, despite the fact that the contract does not expressly so provide. It is the Board's contention that with respect thereto its practice of awarding longevity credit only for years of continuous service, and denying credit for previous employment in the Hoboken school system to teachers who resign and later return, was upheld in an arbitration between the Hoboken Teachers Association and respondent. (Case No. 18 39 0446 78D, on August 18, 1978.)

Finally, longevity increments are awarded for continuous service in any capacity of employment by the Board, but credit is not given toward those increments for years of teaching or other employment outside the Hoboken school system, despite the fact that the contract does not expressly so provide. That this is and has long been the practice of respondent is verified by the affidavit of Grace Corrigan, the employee of

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respondent with the responsibility of administering the payment of the longevity increments. Nowhere in petitioners' motion papers is it alleged that the practice between the parties is now or has ever been to consider service outside the Hoboken school system toward longevity increments; rather, petitioners note only that the contractual longevity provision is "silent as to whether it applies to service within the district alone."

Petitioners and respondent agree that the controlling case as to the applicability of military service credit toward contractual longevity increments is Wall Township Ed. Assn. v. Bd. of Ed. of Township of Wall, 149 N.J. Super. 126 (App. Div. 1977). Respondent submits that, under Wall Township, these petitioners are clearly not entitled to military service credit toward longevity increments.

The court in Wall Township had before it two specific longevity provisions in the same contract: one provided for increments for years of teaching in general; the other for years of teaching in Wall Township.

> LONGEVITY INCREMENTS: An additional $450 increment for teachers entering their 15th and 18th years of teaching as a fully certified teacher.
>
> An additional $450 increment for teachers entering their 21st year of teaching in Wall Township.
> [149 N.J. Super. at 130]

Respondent observes that N.J.S.A. 18A:29-11 provides that a teacher who has served in the military forces shall receive "equivalent years of employment credit for such service as if he had been employed for the same period of time in some publicly owned and operated college, school, or institution of learning in this or any other state. . . ."

Respondent observes that in construing the statute, the Wall Township court held that the statute mandated equivalent treatment for veterans and nonveterans, i.e., if a nonveteran teacher was to be awarded a longevity increment for years of service in "some school" within or outside the state, then a veteran would have to be given equivalent credit for his or her military service, since such military service constituted the equivalent of service in "some school." The court, comparing the two longevity increments in the Wall Township contract, found that the first provision (for the 15th and 18th year increments) clearly provided longevity increments for teaching in "some" school. The court also held, however, that were the longevity increments to be granted to

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nonveterans only for their teaching within a particular school system, then veterans would not be entitled to military service credit toward those increments. Such was the case with the 21st-year increment in the Wall Township contract. The Wall Township court's analysis bears quoting at length:

> Our construction of the contractual provision is confirmed by the final sentence which deals with an additional increment for teachers "entering their 21st year of teaching in Wall Township." By contrast with the remainder of the increments for the 15th and 18th years, this provision limits the 21st-year increment to service for the entire period in Wall Township. As already noted, veterans are granted equivalency with nonveterans; they are therefore equally subject to the provisions of the negotiating agreement which are not in conflict with the legislative policy. And since the 21-year increment is based upon such total service in the Wall community, credit for military service cannot be utilized in determining eligibility for this additional increment. The statutory credit applies as if the veteran had been employed for the period of his military service in "some publicly owned and operated college, school or institution or learning" [emphasis added.] Since the military service is not equated in the statute with employment in the same school system, the credit cannot be applied for eligibility for the extraordinary longevity increment due because of service in Wall Township. [149 N.J. Super. 131-132]

The Board argues that its longevity increments are analagous to the second (21st year) Wall Township increment. As the affidavit of Grace Corrigan, submitted herewith, makes clear, and as petitioners have not disputed, it has been and continues to be the practice of the Hoboken Board of Education to award longevity increments only for years of continuous service within the Hoboken school system. Article 30.8 of the contract expressly provides that existing practices that were not changed as a result of negotiations shall remain in full force and effect. Therefore, the practice of awarding longevity increments only for service within the Hoboken school system is contractually valid and binding, and "[s]ince the military service is not equated in the statute with employment in the same school system, the credit cannot be applied for eligibility" for the longevity increment due because of service in the Hoboken school system (149 N.J. Super. at 132).

The Board notes that petitioners attempt to analogize the Hoboken contractual provision with the first Wall Township provision (the provision for 15-year and 18-year increments); however, that provision awarded increments for years "of teaching as a fully certified teacher," and those increments were apparently paid to nonveteran

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teachers for years of teaching in any school system. Moreover, as the court noted, the juxtaposition of this provision with the one immediately following it, providing specifically for increments for teaching only within the Wall Township school system, made it clear that such a requirement was not intended with respect to the first provision. That is obviously not the case of the Hoboken provision.

The Board herein argues that its contractual provision is completely silent as to the terms and conditions of its application, and all of those terms and conditions have always been supplied by past practice, also pursuant to contract. In fact, respondent Hoboken Board of Education does not require, as did the Wall Township Board of Education, that service be "as a fully certified teacher" to qualify for the increment; rather, service in any capacity with the Hoboken school system is counted. As noted earlier, the increments are paid yearly and are cumulative, although the contract does not expressly provide for either. Obviously, the parties intended that the provision for longevity increments be rounded out by adherence to past practice, since the provision itself would be so vague as to be unenforceable without such interpretation. A provision that states only "15 years $900" and "20 years $250" is not clear on its face. If petitioners are actually arguing that past practice has no binding effect with respect to the longevity provision, then respondent Board would be free, for example, to decide to award the increments only for the specified 15th, 20th, 25th, and 30th years and not for the intervening years; to award a $900 increment for the 15th year and a $250 increment for the 20th year, rather than a cumulative $1,150 increment for the 20th through 24th years; or to award the increments only for years employed as a certified teacher, rather than for all years of service within the school system. Respondent assumes that petitioners are arguing instead that all other past practices with respect to the longevity increments be retained, despite the contract's silence on these issues, and that only the past practice of awarding the increments solely for teaching within the school system be stricken. Such a position is both disingenuous and inquitable, and does violence to the past practices article of the contract.

It is respondent's position that, as construed by the Appellate Division in Wall Township, N.J.S.A. 18A:29-11 provides that teachers be granted credit and benefits by virtue of their military service equivalent to those to which they would be entitled for a similar amount of service as a teacher in some other school system. The contract

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between the Hoboken Teachers Association and the Hoboken Board of Education does not entitle teachers to apply their years of teaching outside the Hoboken school system or their military service years toward their longevity increments.

DISCUSSION

Longevity pay is a rather recent development in the field of education. It has long been recognized as a form of compensation to those engaged in the military service. The United States Supreme Court has addressed issues concerned with military longevity pay where Mr. Justice Gray, delivering the opinion of the Court in United States v. Philip R. Alger, 151 U.S. 362 (1893), quoted with approval, Mr. Chief Justice Drake, who advanced the theory of longevity pay and said, in part, ". . . the whole basis of longevity pay is the officers capacity for duty, and his performance of it. In other words, longevity pay is for longevity in actual service." [citation omitted] Id. at 364. In a companion case decided the same day the Court held that the service must be "continuous." United States v. Albert W. Stahl, 151 U.S. 366 (1893). Thus, it may fairly be said that longevity pay is for "longevity in actual continuous service."

The Commissioner of Education has also had the opportunity to address the issue and has construed longevity pay, not as a bonus payment, for no statutory authority exists for local boards of education to grant "bonus" payments per se, but, rather, as an employment increment pursuant to N.J.S.A. 18A:29-6 et seq. George Hillman v. Bd. of Ed. of Caldwell-West Caldwell, Essex Co., 1977 S.L.D. 218, 226.

The sole issue before this court is whether the military service credit granted to teachers by N.J.S.A. 18A:29-11 applies to eligibility for longevity increments pursuant to the herein Board's adopted salary guides and salary schedules.

The Board contends that in order to be eligible for its scheme of longevity pay, the teacher's service must be continuous without interruption, and actually under its direction and control. This proposition appears to comport with the theory and holding of the United States Supreme Court. Alger, supra., Stahl, supra. However, another view is cast upon this proposition when consideration is given to the legislative intent of N.J.S.A. 18A:29-11. As Mr. Justice Schreiber, speaking for the majority of our Supreme Court in Lavin, supra. observed and said:

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> The legislative purpose of N.J.S.A. 18A:29-11 is to reward veterans for service to their country in time of war. The reward takes the form of crediting the military service as teaching experience even though there is no functional relationship between the two. The credit has the effect of increasing the number of dollars to which the teacher who is a veteran is entitled. The emolument is not for services rendered or to be rendered for school teaching as such. It was established by the Legislature as a reward or bonus for service in the military, and not for performance as a teacher. [Id. at 151] [emphasis added]

Thus, an exception to the "actual and continuous" service is created whereby the legislative intent of N.J.S.A. 18A:29-11 is to reward veterans to afford them credit for their military service time as teaching experience time and where there is no necessity for a functional relationship between the two. Where, as here, the contract is silent as to the "actual and continuous" service to be applied to its longevity payments, the Board relies upon its past practice in granting or denying such increments. Whether its reliance upon such past practice is applicable to nonveterans is not at issue here. As to veterans, however, the court's dicta in Lavin, together with the language of the statute which states, in part, that, "Every member. . . shall be entitled to receive equivalent years of employment credit for such service as if he had been employed for the same period. . . (N.J.S.A. 18A:29-11), dictates that such service credit as may be applicable attaches to the "actual and continuous" service time within the school district for credit towards longevity pay.

CONCLUSIONS

I **CONCLUDE**, therefore, that to the extent individual petitioners herein qualify and have had added military service credit to their teaching service credit in the Hoboken School District, pursuant to N.J.S.A. 18A:29-11, such military service credit is to be calculated and applied towards their individual service credit for purposes of longevity credit. Wall, supra.

Accordingly, the Hoboken Board of Education is hereby **ORDERED** to calculate the qualified petitioners' military service credit to be added to the service time actually and continuously served in the school district and forthwith provide longevity payment or payments where applicable.

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Summary judgment is hereby entered on behalf of petitioners and is denied to respondent Board of Education of the City of Hoboken.

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 February 1984
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

17 February 1984
DATE

Seymour Wilens
DEPARTMENT OF EDUCATION

Mailed To Parties:

Feb. 21, 1984
DATE

Gabriel Ingo, Esq.
OFFICE OF ADMINISTRATIVE LAW

ij/ee

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MICHAEL ACCETTA ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF HOBOKEN, HUDSON COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

The Commissioner has reviewed the entire record of the controverted matter herein including the initial decision rendered by Lillard E. Law, ALJ.

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

The Commissioner, after careful consideration of the entire record and initial decision, is constrained to disagree with the judge's conclusion that petitioners are entitled to military service credit toward the longevity increments under dispute in the instant matter for reasons which follow.

The Commissioner agrees that the controlling decision with respect to the sole issue before him is Wall, supra, which holds that military service credit must be granted for the purpose of longevity increments when the contractual agreement does not specify that service toward said increments must be solely within the specific school district. Where contractual agreements do specify that the longevity increments are based on services solely within the specific school district, military service credit does not apply. Regarding this, Wall, supra, states:

> "***Our construction of the contractual provision is confirmed by the final sentence which deals with an additional increment for teachers 'entering their 21st year of teaching in Wall Township.' By contrast with the remainder of the increments for the 15th and 18th years, this provision limits the 21st-year increment to service for the entire period in Wall Township. As already noted, veterans are granted equivalency with nonveterans; they are therefore equally subject to the provisions of the negotiating agreement which are not in conflict with the legislative policy. And since the 21-year increment is based upon such total service in the Wall community, credit for military service cannot be utilized in determining eligibility for this additional increment. The statutory credit

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> applies as if the veteran had been employed for the period of his military service in 'some publicly owned and operated college, school or institution of learning.' (Emphasis added.) Since the military service is not equated in the statute with employment in the same school system, the credit cannot be applied for eligibility for the extraordinary longevity increment due because of service in Wall Township.***"
>
> (149 N.J. Super. at 131-132)

As noted in the record and initial decision the contractual agreements in the instant matter are silent as to whether the longevity increments are based on teaching service only or teaching service solely within the Hoboken School District. The Commissioner finds that the Board's legal argument that its "past practices clause" (Exhibit A) fills said silence and is therefore controlling is persuasive. Evidence submitted to the record both by means of affidavit (Exhibit B) and by an American Arbitration Association opinion and award in favor of the Board (Exhibit B) clearly supports its contention that past practice for longevity increments has been to grant them for service solely within the district. Petitioners have not claimed nor have they submitted evidence to indicate that the Board has ever violated this practice.

The Commissioner therefore determines that the "past practices clause" of the contractual agreements in the controverted matter is compelling and that it dictates that longevity increments must be granted on the basis of service solely within the district. To do otherwise for either veterans or non-veterans would violate the terms of the contractual agreement.

Consequently, the Commissioner, pursuant to Wall, supra, reverses and declares null and void the order of the judge directing the Hoboken Board of Education to add military service credit to petitioners' service time actually and continuously served in the district.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

APRIL 2, 1984

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MICHAEL ACCETTA ET AL.,	:	
PETITIONERS-APPELLANTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF HOBOKEN, HUDSON COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, April 2, 1984

For the Petitioners-Appellants, Katzenbach, Gildea and Rudner (Arnold M. Mellk, Esq, of Counsel)

For the Respondent-Respondent, Lowenstein, Sandler, Brockin, Kohl, Fisher, Boylan and Meanor (Ina B. Lewisohn, Esq., of Counsel)

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

Robert A. Wolfenbarger opposed in the matter.

September 5, 1984

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5737-83
AGENCY DKT. NO. 207-6/83A

EDWARD C. WEIGAND,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF MARLBORO, MONMOUTH COUNTY,
Respondent.

APPEARANCES:

Thomas W. Cavanagh, Jr., Esq., for petitioner (Chamlin, Schottland, Rosen, Cavanagh & Uliano, attorneys)

Vincent C. DeMaio, Esq., for respondent

Record Closed: January 9, 1984 Decided: February 23, 1984

BEFORE **M. KATHLEEN DUNCAN**, ALJ:

This matter was commenced on June 24, 1983, with the filing of a Petition of Appeal seeking a determination that the Board of Education of the Township of Marlboro (hereinafter respondent) had violated the tenure rights of Edward C. Weigand (hereinafter petitioner) by failing and refusing to continue his employment for school year 1983-84. An Answer to the Petition was filed on behalf of respondent on July 11, 1983, and the matter was thereafter transmitted to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq.

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A prehearing conference was conducted in the matter on October 7, 1983, and the Prehearing Order which was issued as a result thereof on October 20, 1983, set forth the following issues for determination at hearing:

> Has petitioner acquired tenure in respondent's district pursuant to N.J.S.A. 18A:28-5?
>
> Does the Commissioner have jurisdiction to determine petitioner's claims which arise under statutes other than N.J.S.A. 18A:1-1 et seq?

The plenary hearing was scheduled for December 2, 1983. The hearing was conducted as scheduled at the Tinton Falls Municipal Building, Tinton Falls, New Jersey. Following the conclusion of the hearing, the record remained open for written submissions. Pursuant to an agreement between the parties, it was determined that the written submissions would address only the first issue set forth in the Prehearing Order and that the second issue would not be briefed unless the undersigned administrative law judge advised the parties that it would be necessary to brief the second issue. Respondent's brief was received on January 4, 1984. A letter memorandum on behalf of petitioner was received on January 9, 1984. Thereafter, on February 9, 1984, the undersigned administrative law judge advised the parties that it would not be necessary for them to submit any further briefs. This message was confirmed in writing by letter dated February 10, 1984, providing as follows:

> The following is a verbatim record of the message my secretary read to you on February 9, 1984:
>
> > I have reviewed the briefs which you have submitted in Edward C. Weigand v. Marlboro Board of Education and have researched the current state of the law concerning the first issue in the Prehearing Order dated October 20, 1983. Based upon my review, I am confident that I can issue an initial decision which will fully resolve this matter without the necessity for considering the second issue set forth in the Prehearing Order. Accordingly, no further briefs are required. The initial decision will be issued within 45 days of my receipt of the last brief, which was Mr. Cavanagh's, on January 9, 1984.

Accordingly, the record in this matter closed on January 9, 1984.

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FINDINGS OF FACTS

The relevant facts in this matter are not in dispute, and I, therefore, FIND the facts set forth in the following summary as uncontested facts.

Sheila Wosk, a regularly employed teacher in respondent's school district who was assigned to teach 7th grade Language Arts, submitted her resignation to respondent effective April 28, 1980. Ms. Wosk indicated as reason for her resignation that, following her impending marriage, she would be leaving the State. It is clear that respondent did not expect Ms. Wosk to return to her position.

Petitioner was employed by respondent and, commencing on Monday, April 28, 1980, was assigned to teach the 7th grade Language Arts classes previously taught by Ms. Wosk. From April 28, 1980, to the close of the 1979-80 school year, petitioner performed all of the duties and responsibilities previously assigned to Ms. Wosk. At all times relevant herein, petitioner has held a regular New Jersey certificate appropriate for his assignments.

By letter dated May 14, 1980, respondent's superintendent of schools wrote to petitioner as follows:

> Though we still have approximately one (1) month left of this school year, I do wish to take this opportunity to remind you of you [sic] status so that you may plan accordingly.
>
> You were employed as a substitute teacher for Mrs. Wosk until the end of this school year.
>
> Your principal will be making a recommendation to me in the near future regarding his choice of a permanent teacher for the position you now hold.
>
> If you hold the appropriate certification you will certainly be one of the people he will consider.
>
> In the meantime however, should you not be his choice, I would like to tell you that I sincerely appreciate having had you with us. It is only with the cooperation of dedicated substituted teachers such as you, that a school district can provide worthwhile programs for its children when vacancies occur during the year.
>
> Once again, my thanks and my best wishes. (R-1 in evidence)

Petitioner received the May 14, 1980 letter on May 27, 1980.

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By memo dated June 24, 1980, David Engebretson, petitioner's principal at the Marlboro Middle School, wrote to Mr. Frank Defino, Superintendent of Schools, as follows:

> Mr. Sitek, Mr. Shifrinson and I held an interview with Mr. Edward Weigand for the position of 7th grade Language Arts teacher for the next year. All of us concur that he has done an outstanding job this year when he took over Sheila Wosk's class.
>
> He worked extremely well with the children and developed a good rapport with them. They respect him as a teacher and work very hard for him. He has an in-depth knowledge of reading and of Language Arts and has used the I.L.A. Program with the students successfully.
>
> We feel that he will do an exceptional job and will be a credit to our teaching staff if he is employed, [sic] therefore, I am recommending him for employment. (R-2 in evidence)

Mr. Engebretson's recommendation was accepted and petitioner was thereafter employed as a regular classroom teacher for school years 1980-81, 1981-82, and 1982-83.

By letter dated March 22, 1983, Mr. Defino advised petitioner as follows:

> It has always been my practice to advise non tenure teaching staff members of their employment status as soon as possible.
>
> Though this is not a requirement of the law, I do so to afford those involved additional time to make any plans they deem necessary.
>
> As you are probably aware, seniority rights may not be extended to non tenure personnel. Therefore, the Board of Education retains the option to reemploy those teaching staff members regardless of length of service, that they feel best meet the needs of the district.
>
> Additionally, due to the indefiniteness of the intent of personnel now on leave, with regard to their return, we are forced to delay the reemployment of some non tenure teachers.
>
> The Board also has the option, due to a decline in enrollment, to accordingly decrease the number of teaching staff members.
>
> For these reasons, I regret to inform you that I shall not be recommending the renewal of your contract for the 1983-1984 school year.
>
> You will, of course, receive official word as required by law, from the Secretary of the Board of Education, should this recommendation be affirmatively acted upon by the Board at its next meeting on April 6, 1983.

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> You may, of course, appeal to the Board of Education for a hearing in this matter should you feel that the reasons for this action are not sufficient. (J-13 in evidence)
>
> The within action followed.

It is respondent's position that petitioner was a substitute teacher for the period April 28, 1980 to the end of the 1980 school year. In support of its position respondent has submitted a copy of its written policy concerning substitute teachers:

> The Board of Education shall approve individuals for substitute teaching and shall certify this approval to the County Superintendent of Schools. Approval shall be given on the recommendation of the Superintendent and final responsibility for meeting the conditions of employment set up by the State Department of Education shall rest with the individual. To qualify a substitute must possess a regular New Jersey teacher's certificate or County Substitute Certificate.
>
> Substitutes shall be paid at a rate established annually by the Board of Education. Those who continue in the same assignment for a period of more than 20 consecutive days shall be compensated on the basis of 1/200th of the existing minimum annual salary, retroactive to the first day of the assignment.
>
> A teacher who is engaged to replace a teacher who will be absent for the balance of the school year will be offered a contract and placed on the appropriate step of the guide if employment is to commence before March 16th. Otherwise, the teacher will be hired as a per diem substitute with payment based on the scale for substitute teachers unilaterally established by the Board of Education.
>
> Any individual who qualifies for a substitute position must not be gainfully employed in any other school district on a full-time basis.
>
> Substitute teachers who have been approved by the Board to be listed and who, during the course of a school year refuse an assignment six (6) times during said school year, are subject to removal from the approved substitutes list.
>
> A fully certified teacher serving as a substitute shall not be granted permission to plan or direct an instructional program without the permission of the Superintendent or his/her designated representative. (J-11 in evidence)

It is petitioner's position that the time he spent teaching in respondent's school system from April 28, 1980 until the end of that school year is time which must be counted toward tenure pursuant to N.J.S.A. 18A:1-1 and N.J.S.A. 18A:28-5.

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APPLICABLE LAW AND DISCUSSION

The body of law which is relevant to a determination in the present matter was discussed, explained, clarified, and changed by our Supreme Court in its decision in Spiewak v. Rutherford Board of Education, 90 N.J. 63 (1982). In Spiewak, the Supreme Court specifically overruled Point Pleasant Beach Teachers' Association v. Callam, 173 N.J. Super. 11, certif. den. 84 N.J. 469 (1980) and specifically disapproved Schulz v. State Board of Education, 132 N.J.L. 345 (E & A 1945); Biancardi v. Waldwick Bd. of Ed. 139 N.J. Super. 175 (App. Div. 1976), aff'd o.b. 73 N.J. 37 (1977); and Capella v. Camden Cty. Voc. Tech. Sch. Bd. of Ed., 145 N.J. Super, 209 (App. Div. 1976) saying, with respect to the latter cases:

> To the extent those decisions imply that the right to tenure derives from contract rather than statute, they are wrong. To the extent they suggest that courts may create exceptions to the clear language of N.J.S.A. 18A:28-5 based on policy considerations, they are disapproved. Spiewak, supra, at 80.

In overruling Point Pleasant, the Supreme Court said:

> Whether certain teachers are entitled to tenure never depends on the contractual agreement between the teachers and the board of education. Tenure is a "statutory right imposed upon a teacher's contractual employment." Zimerman v. Newark Bd. of Ed., 38 N.J. at 72. It may not be forfeited or waived, Red Bank Ed. Ass'n. v. Red Bank Bd. of Ed., 78 N.J. at 141.
>
> The "temporary employment" exception to N.J.S.A. 18A:28-5 created by the court in Point Pleasant not only erroneously focuses on the subjective intent of the parties rather than the objective statutory criteria, but it contradicts an express statutory provision. As noted above, the tenure statute itself contains an exception for "temporary employees." N.J.S.A. 18A:16-1.1. However, the exception is limited to employees hired to take the place of an absent teacher. The courts are not free to expand that exception by judicial fiat. Id., at 77.

In the present case respondent is no more free to expand the statutory exception by written policy statement than the courts are free to expand it by judicial fiat.

Pursuant to Spiewak, whether petitioner herein obtained tenure cannot be dependent upon "the nature of the employment tendered and accepted" from April to June of 1980, nor can it be determined on the basis of the school board's intention to hire petitioner on a temporary basis.

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The precise language of Spiewak, supra, in discussing the nature of tenure and the acquisition thereof, applies directly to the situation herein:

> The Tenure Act was originally enacted in 1909. L. 1909, c. 243. Since then, it has undergone numerous amendments. However, its purpose has not changed. The tenure statute prevents school boards from abusing their superior bargaining power over teachers in contract negotiations, Trenton Bd. of Ed. v. State Bd. of Ed., 125 N.J.L. 611, 614 (S. Ct. 1941). It protects teachers from dismissal for "unfounded, flimsy or political reasons." Zimmerman v. Newark Bd. of Ed., 38 N.J. at 71.
>
> This case concerns N.J.S.A. 18A:28-5, which provides in part:
>
> > The services of all teaching staff members including all teachers, principals, assistant principals, vice principals, superintendents, assistant superintendents, and all school nurses including school nurse supervisors, head school nurses, chief school nurses, school nurse coordinators, and any other nurse performing school nursing services and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect, shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title, after employment in such district or by such board for:
> >
> > (a) three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or
> >
> > (b) three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
> >
> > (c) the equivalent of more than three academic years within a period of any four consecutive academic years. . . .

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"Teaching staff member" is defined at N.J.S.A. 18A:1-1:

> "Teaching staff member" means a member of the professional staff of any district or regional board of education, or any board of education of a county vocational school, holding office, position or employment of such character that the qualifications for such office position or employment, require him to hold a valid and effective standard, provisional or emergency certificate, appropriate to his office, position or employment, issued by the state board of examiners and includes a school nurse.

By the express terms of these statutes, an employee of a board of education is entitled to tenure if (1) she works in a position for which a teaching certificate is required; (2) she holds the appropriate certificate; and (3) she has served the requisite period of time.

There is no question that the teachers in this case fall within the express terms of the statute. They are therefore presumptively eligible for tenure unless a statutory exception applies. The only statutory exception possibly relevant here in N.J.S.A. 18A:16-1.1. That statute denies tenure rights to substitute teachers. It provides that ...

> (a) board of education may designate some person to act in place of any officer or employee during the absence, disability or disqualification of any such officer or employee . . . (However,) no person so acting shall acquire tenure in the office or employment in which he acts pursuant to this section when so acting. (N.J.S.A. 18A:16-1.1).

Although this statute denied tenure to temporary employees, it extends only to those who "act in place of" another employee who is absent or disabled. None of the teachers in this case was a temporary replacement as defined by the statute.

Since the wording of N.J.S.A. 18A:28-5 is clear and unambiguous, we will apply it as written in the absence of any evidence of a contrary legislative intent. As Justice Clifford stated in construing a different portion of the Tenure Act:

> Fundamental principles of statutory construction require that if the statutory language is plain, unambiguous and uncontrolled by other parts of the act or other acts upon the same subject the court cannot give it a different meaning." [citation ommitted.] . . .

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...

> Our duty is to construe and apply the statute as enacted. We are not at liberty to presume the legislature intended something other than what it expressed by its plain language. This Court will not engage in conjecture or surmise which will circumvent the plain meaning of the act [In re Jamesburg High School Closing, 83 N.J. 540 (1980)].

Moreover, because of its remedial purpose, the Tenure Act should be liberally construed to achieve its beneficent ends. Spiewak, supra, at 73-74.

In accordance with the foregoing, a person is a substitute teacher only if he acts in place of another employee who is absent or disabled. In the present case, petitioner was not acting in place of another employee when he taught 7th grade Language Arts from April to June 1980, since Ms. Wosk had tendered her resignation effective April 28, 1980, and was no longer an employee. On April 28, 1980, when petitioner was assigned to teach 7th grade Language Arts he was not filling someone else's position. Ms. Wosk, having resigned, had no further claim to the position. Perhaps the outcome in this matter would be different if Ms. Wosk had commenced a maternity leave on April 28, 1980, or a leave of absence due to illness; such, however, was not the situation. Petitioner was not substituting for another employee when he 1) worked in a position for which a teaching certificate was required; 2) held the appropriate certificate; and 3) served the requisite period of time.

Driscoll v. Board of Educaton of Clifton, 165 N.J. Super. 241 (App. Div. 1977), cited by respondent, is distinguishable in that the position which Driscoll occupied for the school year 1973-74 was actually the position of a tenured teacher who had been on maternity leave and thereafter had failed to report to commence her teaching duties. It might have been more reasonable for the Clifton Board of Education to have acted at sometime during the 1973-74 school year to terminate the tenured teacher's rights to the position; they did not, however, and during the entire school year teacher Driscoll was taking the place of an absent employee. In the present matter there was no absent employee for whom petitioner was substituting.

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Accordingly, since whether a certain teacher is entitled to tenure never depends upon the contractual agreement between the teacher and the board of education, and since petitioner has satisfied each and every one of the statutory criteria for obtaining tenure, respondent violated petitioner's tenure rights when it failed to continue his employment for the 1983-84 school year.

For all of the foregoing reasons, it is hereby **ORDERED** that respondent reinstate petitioner forthwith to his tenured position and reimburse him for all salary and benefits which he would have received but for the wrongful termination; the amount of such reimbursement, of course, is to be mitigated by any income received by petitioner from other sources in the interim period.

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.

Feb. 23, 1984
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

Feb. 23, 1984
DATE

Seymour Ellis
DEPARTMENT OF EDUCATION

Mailed To Parties:

February 27, 1984
DATE

Ronald L. Parker /x.s
OFFICE OF ADMINISTRATIVE LAW

ks

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EXIBITS IN EVIDENCE

J-1 Employment Contract between petitioner and respondent for September 1, 1980-June 30, 1981

J-2 Employment Contract between petitioner and respondent for September 1, 1981 to June 30, 1982

J-3 Employment Contract between petitioner and respondent for September 1, 1982 to June 30, 1983

J-4 Certified copy of respondent's meeting minutes from May 7, 1980

J-5 Certified copy of respondent's meeting minutes from June 4, 1980

J-6 Certified copy of respondent's meeting minutes from July 2, 1980

J-7 Petitioner's Personnel Card, indicating days worked from April 28, 1980 through June 20, 1980 (two pages)

J-8 Petitioner's Payroll Records (eight pages)

J-9 Photocopy of Collective Bargining Agreement, 1979 through 1981 (four pages)

J-10 Certified copy of respondent's meeting minutes from March 30, 1982

J-11 Photocopy of respondent's personnel policy, re: substitute teachers

J-12 Certification of petitioner's payroll deductions, dated 5-1-81

J-13 Letter dated March 22, 1982, from Frank Defino, Superintendent of Schools, to petitioner

J-14 Marlboro Township Public Schools Classroom Observation Report, dated June 13, 1980 (two pages)

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J-15 Marlboro Township Public Schools Observation Report, dated July 17, 1980 (two pages)

P-1 Certificate of petitioner's Honorable Discharge from the Army of the United States, dated April 20, 1960

P-2 Certificate of Exemption for petitioner pursuant to Chapter 176 of the Laws of 1935, as amended Chapter 117, Laws of 1936

R-1 Letter dated May 14, 1980 from Frank Defino, Superintendent of Schools to petitioner

R-2 Memo dated June 24, 1980 from David Engebretson, Principal, to Mr. Frank Defino, Superintendent of Schools (two pages)

R-3 Memorandum prepared by petitioner, dated May 10, 1983, (two pages)

WITNESSES

For Petitioner: Edward C. Weigand

For Respondent: John A. Dugan
Frank Defino

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EDWARD C. WEIGAND,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MARLBORO, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law, M. Kathleen Duncan, ALJ. It is observed that the Board's exceptions to the initial decision, as well as petitioner's reply exceptions, have been filed with the Commissioner pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Board excepts to the findings and conclusion of the judge in the initial decision for the following reasons:

1. The Court's ruling in Spiewak, supra, did not involve the issue defining substitute teachers.

2. Petitioner's employment by the Board from April 28, 1980 to June 30, 1980 was that of a substitute teacher who was hired pursuant to the provisions of N.J.S.A. 18A:16-1.1 as a temporary employee.

3. The facts of this matter when applied to the provisions of N.J.S.A. 18A:16-1.1 must be construed as follows:

> "*** N.J.S.A. 18A:16-1.1 provides that a substitute is one who acts 'in place of any...employee during the absence, disability or disqualification of any such...employee.' Clearly, the statute envisions as a substitute a person who acts for another person who is himself/herself disqualified from acting. If a person is disqualified, that person is certainly not eligible to return. If the Administrative Law Judge's reading of the statute were to prevail, the replacement for a disqualified employee could not be deemed to be a substitute--in flat contradiction of the express statutory language.

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> "The suggested interpretation is not only an unwarranted amendment of the statute, but would create a myriad of unnecessary technical questions in future applications.***"
>
> (Emphasis in text.)
> (Board's Exceptions, at p. 8)

4. The Board's policy regarding substitutes is valid and the purpose of the introduction of such policy at the time of trial was to clarify the method by which his salary was calculated and not the basis for denying that tenure had accrued.

Petitioner rejects the Board's exceptions to the initial decision essentially for the following reasons:

> "*** Spiewak acknowledges that our statutes provide for an exception to the obtaining of tenure within N.J.S.A. 18A:16-1.1, which statute denies tenure rights to substitute teachers. Judge Duncan acknowledged this exception and examined the statutory language to determine if the Petitioner belonged in that category. It is respectfully submitted that the Commissioner of Education need only examine the language contained within that statute, which requires that a substitute teacher 'act in place of any officer or employee during the absence, disability or disqualification of any such officer or employee', in order to reach the same conclusion as did Judge Duncan. An analysis of the instant case indicates that the teacher who began the scholastic year teaching in the Petitioner's position, left the school system with no intention of returning, and tendered her formal resignation effective the date that Petitioner began his employment. The undisputed facts also show that the Petitioner undertook and conducted any and all tasks of the normal teacher in that position, and at no time acted 'in place of another employee who was absent or disabled.'
>
> "The Respondent attempts in Point II of its exceptions to erode the logical basis of Judge Duncan's decision to introduce different circumstances as evidence of a weakness in the reasoning utilized to reach the decision in the instant matter. However, a careful review of the Respondent's logic would indicate that based upon the Board's reasoning, even if the teacher who held the position prior to the Petitioner had died during the course of the year, the Peti-

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> tioner would still have been 'acting in her place', because she had a contract for the full scholastic year. The argument represents nothing more than an attempt to circumvent the relevant facts and sound logic.***" (Emphasis in text.)
> (Petitioner's Exceptions, at p. 3)

The Commissioner finds and determines that the facts of this matter clearly reveal that petitioner's employment service and status as a teaching staff member for the period from April 28, 1980 through June 30, 1980 was not that of a substitute teacher by virtue of the fact that, as of April 28, 1980, the person who formerly held such position voluntarily resigned and thereby terminated her employment relationship with the Board. Consequently, petitioner's initial employment as a teacher in the Marlboro School District was not that of a substitute teacher who was taking the place of someone who was temporarily absent from employment with every intent of returning to her former position of employment. In the Commissioner's judgment the judge properly found and concluded that petitioner's employment service for the period of time in question attached to his subsequent years of employment for the purpose of tenure acquisition pursuant to N.J.S.A. 18A:28-5.

The Commissioner cannot agree that the Board's position with respect to the employment of substitute teachers has been compromised pursuant to N.J.S.A. 18A:16-1.1 by virtue of this determination. The Board at all times prior to petitioner's acquisition of tenure could have exercised its lawful authority not to renew petitioner's employment for any one of the ensuing school years.

The Commissioner upon review of the exceptions filed by the parties herein is not persuaded by the position taken by the Board that the facts as applied to case law in Spiewak and Driscoll, supra, or to N.J.S.A. 18A:16-1.1 warrant a contrary finding or determination from that rendered in the initial decision. The Commissioner so holds.

Accordingly, the Commissioner concurs with the findings and determination reached by the judge in the initial decision and hereby adopts them as his own.

The Board is hereby directed to reinstate petitioner forthwith to his tenured teaching position and to reimburse him for all salary and benefits which he would have received but for the illegal termination of his employment as a tenured teaching staff member. Such reimbursement to petitioner by the Board shall be mitigated by any income received by petitioner from alternate employment during the interim period.

IT IS SO ORDERED.

APRIL 9, 1984 COMMISSIONER OF EDUCATION

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EDWARD C. WEIGAND,	:	
PETITIONER-RESPONDENT,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MARLBORO, MONMOUTH COUNTY,	:	DECISION
RESPONDENT-APPELLANT,	:	

Decided by the Commissioner of Education, April 9, 1984

For the Petitioner-Respondent, Chamlin, Schottland, Rosen, Cavanagh and Uliano (Thomas W. Cavanagh, Jr., Esq., of Counsel)

For the Respondent-Appellant, DeMaio and DeMaio (Vincent C. DeMaio, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein. Additionally, the State Board notes that the Commissioner's decision is supported by the Appellate Division's subsequent decision in Sayreville Education Association v. Board of Education of the Borough of Sayreville, No. A-4899-82T2 (New Jersey Superior Court, Appellate Division, April 12, 1984).

September 5, 1984

PENDING N.J. SUPERIOR COURT

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8247-83
AGENCY DKT. NO. 321-9/83A

MONTVILLE TOWNSHIP EDUCATION ASSOCIATION

and

MONTVILLE TOWNSHIP EDUCATIONAL SECRETARIES ASSOCIATION,

Petitioners

v.

BOARD OF EDUCATION OF THE MONTVILLE TOWNSHIP,

Respondent

APPEARANCES:

Douglas Lang, Esq., for petitioners

David B. Rand, Esq., for respondent
(Rand & Algeier, attorneys)

Record Closed: February 15, 1984 Decided: February 29, 1984

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

Petitioners alleged the Board's adoption, continued use and application of Teacher Attendance Evaluation Guidelines violates, and has a chilling effect on employees to exercise, their rights pursuant to N.J.S.A. 18A:30-2, 30-3 and 30.7. They seek a Declaratory Judgment of nullity in support of their allegations.

The Board avers the promulgation of said Guidelines represents a reasonable exercise of its discretionary authority, and further serves to promote classroom instruction continuity, as well as improved job performance and efficiency by its clerical and administrative personnel. The Board seeks dismissal of the petition in the absence of a judiciable controversy or dispute as no petitioner has been financially or otherwise prejudiced.

The matter was transmitted to the Office of Administrative Law by the Commissioner of Education as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. on October 17, 1983. A Prehearing Conference was held on December 23, 1983 at which the parties agreed to submit the matter for Summary Decision. The matter was briefed and the record closed on February 15, 1984, the date established for the filing of petitioner's optional reply Brief.

It is noted that the Board filed a Petition for Scope of Negotiations determination with the Public Employment Relations Commission (PERC) in seeking to restrain binding arbitration of a grievance filed by the Montville Education Association. The grievance alleged the Board had improperly considered a teacher's absenteeism record in rating her unsatisfactory in attendance on her Summary Performance Report. The Board's request for a permanent restraint of binding arbitration was granted on August 11, 1983.

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The disputed Teacher Attendance Evaluation Guidelines is reproduced here in full:

TEACHER ATTENDANCE EVALUATION GUIDELINES

DAYS*	REACTION	RATING	
0-6	**	Satisfactory	1 year
7-10	**	Needs Improvement	
11+	**	Unsatisfactory	
0-12	**	Satisfactory	2 years
13-20	**	Needs Improvement	
21	**	Unsatisfactory	

* Includes all absences except Death in Family Days and Professional Days.

** Must be cited in narrative form in the comment section of the Summary Evaluation. The number of occurrences must also be specified for the current year. An absence occurrence is defined as a period of continued absence.

NOTE: Teacher Attendance will be evaluated in accordance with the above guidelines beginning March 1, 1982 and will be reflected on the March 15, 1983 Summary Evaluation Forms.

The Board stipulated the fact that staff absenteeism is memorialized on evaluation documents and serves as input for the evaluation of staff members.

The statutes which incorporate the rights claimed by petitioners to be violated and/or chilled by the Guidelines are as follows:

N.J.S.A. 18A:30-2 states:

> All persons holding any office, position, or employment in all local school districts, regional school districts or county vocational schools of the state who are steadily employed by the board of education or who are protected by tenure in their

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> office, position, or employment under the provisions of this or any other law, except persons in the classified service of the civil service under Title 11, Civil Service, of the Revised Statutes, shall be allowed sick leave with full pay for a minimum of 10 school days in any school year.

N.J.S.A. 18A:30-3 states:

> If any such person requires in any school year less than the specified number of days of sick leave with pay allowed, all days of such minimum sick leave not utilized that year shall be accumulative to be used for additional sick leave as needed in subsequent years.

N.J.S.A. 18A:30-7 states:

> Nothing in this chapter shall affect the right of the board of education to fix either by rule or by individual consideration, the payment of salary in cases of absence not constituting sick leave, or to grant sick leave over and above the minimum sick leave as defined in this chapter or allowing days to accumulate over and above those provided for in section 18A:30-2, except that no person shall be allowed to increase his total accumulation by more than 15 days in any one year.

There are other statutes not cited in the pleadings by petitioners that are relevant. N.J.A.C. 18A:30-1 provides a definition of sick leave as follows:

> Sick leave is hereby defined to mean the absence from his or her post of duty, of any person because of personal disability due to illness or injury, or because he or she has been excluded from school by the school district's medical authorities on account of a contagious disease or of being quarantined for such a disease in his or her immediate household.

The discretionary authority vested in local Boards of Education by the Legislature is incorporated in N.J.S.A. 18A:11-1, which states:

> The board shall —
>
> a. Adopt an official seal:
>
> b. Enforce the rules of the state board;

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> 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.

The Board's position that this matter be dismissed in the absence of a judiciable controversy or dispute will be addressed first. The Board's position is indeed arguable as the matter does not appear to be a contested case in the absence of any disciplinary action taken by the Board against any employee due to the application of the Guidelines. However, N.J.A.C. 1:1-15(a) states that "a matter is a contested case where . . . a hearing is required before a State agency to determine rights, . . . or other legal relations of specific parties." It also appears that the right of this Board to adopt, continually use and apply the Guidelines is a genuinely disputed question of law pursuant to N.J.A.C. 1:1-1.6(a)(1) and a legal argument pursuant to N.J.A.C. 1:1-1.6(a)(6). Further, the Legislature vested jurisdiction to hear and determine all controversies and disputes arising under school laws in the Commissioner of Education pursuant to N.J.S.A. 18A:6-9, and it was the Commissioner who transmitted this matter to the Office of Administrative Law as a contested case. As a matter of reasonableness, it is not inconceivable that a declaratory judgment may preclude litigation of petitions of appeals filed by individual employees, which would indeed be in the public interest. The Board's request for dismissal for the aforementioned reason is **DENIED.**

DISCUSSION

It is not inconceivable that the gravamen of this dispute may relate to misconceptions concerning the rights of teaching staff members and the legislative intent incorporated in the cited sick leave statutes. The definition as stated in N.J.S.A. 18A:30-1

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is clear and unambiguous, that is, absence caused by personal disability due to illness, injury or medical exclusion. It appears that the Legislature fully intended to provide economic protection for teaching staff members when absent due to undisputed legitimate illnesses or injuries. This intention is not to be misconstrued as a salary entitlement for services not rendered under the guise of sick leave in the absence of a just cause by statutory definition.

This matter is distinguished from Marilyn Kuehn v. Teaneck Bd. of Ed., decided by the State Board of Education on February 1, 1983. In Kuehn, the Board had not prepared the policy in written form, publicly proposed or adopted it. But the Board implemented the policy without regard to the reason for Kuehn's absences by withholding her employment and adjustment salary increments. The State Board restored Kuehn to her proper position on the salary guide and said:

> For the Teaneck Board to determine that petitioner's absence exceeding 90 days, in and of itself, is sufficient reason for the withholding of increment, without consideration of the particular circumstances for the absence, is arbitrary and without any demonstrated rational basis. (slip opinion at 4)

In the instant matter, the Board adopted the Guidelines. There is no evidence in this record of disciplinary action taken by the Board against any staff member represented by petitioners, and therefore arbitrariness of Board action due to policy application is not immediately at issue. Such a determination remains for another time and must be based on particular circumstances on a case by case basis.

The Board's intent in adopting the Guidelines to improve the continuity of classroom instruction is within their discretionary authority pursuant to N.J.S.A. 18A:11-1. The policy does not have a chilling effect on, nor does it violate the rights of petitioners pursuant to the sick leave statutes. Those rights are fully protected by administrative remedy in the event of allegations of arbitrariness associated with policy application pursuant to N.J.S.A. 18A:6-9. It does appear that the policy is intended to have a chilling effect on staff absenteeism in the absence of a just cause of illness, injury or medical

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exclusion. For this the Board is to be commended, not condemned, as the schools are designed to provide educational growth for children, and the continuity of instruction is extremely important in the attainment of that objective.

The Board, however, must be cautioned to give careful consideration to the State Board guidelines in Kuehn before taking disciplinary action against a staff member for what it perceives to be excessive absenteeism. The administrative agents of the Board are likewise cautioned to be alert to the presence of an ill staff member who wishes to preserve an unblemished attendance record, and who should be absent to avoid pupil contact in the interest of both pupil and staff member health.

I **FIND** the adoption by the Board of its Teacher Attendance Evaluation Guidelines to be a reasonable exercise of its discretionary authority, and **CONCLUDE**, therefore, that this matter shall be and is hereby **DISMISSED**.

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

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

29 February 1984
DATE

WARD R. YOUNG, ALJ

Receipt Acknowledged:

March 2, 1984
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

March 6, 1984
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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MONTVILLE TOWNSHIP EDUCATION ASSOCIATION AND MONTVILLE TOWNSHIP EDUCATIONAL SECRETARIES ASSOCIATION,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONTVILLE, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the entire record of the controverted matter herein including the initial decision rendered by Ward R. Young, ALJ.

The Commissioner observes that primary exceptions were filed in a timely fashion by petitioners pursuant to N.J.A.C. 1:1-16.4a and b.

Petitioners except to Judge Young's finding that the Teacher Attendance Evaluation Guidelines constitute reasonable exercise of the Board's discretionary authority, avowing that said guidelines violate Kuehn, supra, and have a chilling effect on petitioners' legitimate exercise of statutory rights. Petitioners assert that the judge erred in his determination that the Board's application of said guidelines is not arbitrary because of an absence of evidence that disciplinary action is involved in the instant matter. More specifically, petitioners contend that the judge failed to consider the Board's application of the guidelines as found in teacher evaluation reports as a sufficient harm to require a determination of arbitrariness. Petitioners cite Piscataway Township Education Association v. Board of Education of Township of Piscataway, 1980 S.L.D. 483 in particular and Frederick Kauffman et al. v. Board of Education of Township of Lower Alloways Creek, decided November 12, 1981 by reference to support its contention that it is erroneous to determine that disciplinary action is a prerequisite to review. Piscataway states:

> "[T]he teacher evaluation report is not just an ordinary document. A reprimand placed in a teacher's personnel file, without restriction as to its use, may have an adverse impact upon that person's employment possibilities, assignment or earnings." (at 493)

The Commissioner agrees with the legal argument put forth by petitioners that Piscataway, supra, as cited has relevance to the controverted issue herein and he has weighed its import carefully in

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reviewing the entire record in the instant matter. While there is no one more concerned than the Commissioner that a local district's staff attendance be at the highest level possible and while he commends the Board's objective to improve continuity of instruction through a reduction in staff absenteeism, he nonetheless takes exception to the judge's determination that the attendance evaluation guidelines in the instant matter are reasonable. Attendance is without question an appropriate criterion in the evaluation of professional staff. The fact that professional staff attendance is one of the indicators reviewed by the State Department of Education in the evaluation of local school districts certainly illustrates the importance of said attendance. Notwithstanding its importance, the Commissioner cannot accept as reasonable an attendance evaluation system which would determine a teacher's attendance evaluation rating solely upon the basis of the accumulative number of days of absence, regardless of the circumstances of the absences or a teacher's previous attendance history. A board may certainly take steps to implement a policy to improve the attendance of its professional staff; to do so would constitute a reasonable exercise of its discretionary powers. However, if such a policy goes so far as to ignore legitimate extended illness or confinement at home or hospital by a physician in determining an unsatisfactory evaluation rating for attendance, such a policy must be deemed arbitrary, even if said policy allows for teacher reaction to the rating through narrative statements.

Consequently, the Commissioner reverses the finding and conclusion of the judge that the Teacher Attendance Evaluation Guidelines as stated herein are a reasonable exercise of the Board's discretionary authority. He, therefore, orders that the Board revise its policy and guidelines such that the determination of ratings takes into judicious consideration legitimate extended illness or confinement to home or hospital by a physician. This order, however, is not to be construed in any manner to prohibit the Board from ever determining an unsatisfactory rating when medically-excused absences are provided. Notwithstanding Kuehn, supra, high absenteeism has been deemed sufficient grounds for disciplinary action even with the existence of legitimate medical excuse. Trautwein v. Board of Education of Bound Brook, 1978 S.L.D. 445, aff'd with modification State Board of Education 1979 S.L.D. 876, rev'd N.J. Superior Court, Appellate Division, 1980 S.L.D. 1539, cert. den. 84 N.J. 469 (1980); Robert S. Kulik v. Board of Education of the Town of Montclair, decided October 3, 1983; and Angelucci et al. v. Board of Education of the Town of West Orange, 1980 S.L.D. 1066, St. Bd. aff'd February 4, 1981

Accordingly, the Commissioner directs the Board to revise its Teacher Attendance Evaluation Guidelines consistent with the decision herein.

APRIL 16, 1984 COMMISSIONER OF EDUCATION

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MONTVILLE TOWNSHIP EDUCATION ASSOCIATION AND MONTVILLE SECRETARIES ASSOCIATION,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONTVILLE, MORRIS COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, April 16, 1984

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 involves an appeal from the Commissioner's determination that Teacher Attendance Guidelines adopted by the Board of Education of the Township of Montville were arbitrary and unreasonable. The Board promulgated the Guidelines by formal action on August 10, 1982, for the purpose of improving overall teacher attendance. The Guidelines correlate the number of days absence with ratings of Satisfactory, Needs Improvement and Unsatisfactory, and require the inclusion of narrative explanation to be placed in the Comment Section of the Summary Evaluation. Exhibit A, Petition for Declaratory Judgment.

Following permanent restraint by the Public Employment Relations Commission of binding arbitration of a grievance challenging the Guidelines, the Montville Education Association petitioned the Commissioner of Education for a Declaratory Judgment concerning the legitimacy of the Guidelines. The matter was transmitted to the Office of Administrative Law where the Administrative Law Judge (ALJ) determined that adoption of the Guidelines was a reasonable exercise of the Board's discretion. He however cautioned the Board to follow the State Board's decision in Kuehn v. Bd. of Ed. of Teaneck, decided June 2, 1983, when it applied the Guidelines.

The Commissioner set aside the ALJ's findings and determination, concluding 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. Relying on

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Piscataway Township Ed. Ass'n. v. Piscataway Township Bd. of Ed., 1980 S.L.D. 483, the Commissioner reasoned that while attendance is an appropriate criteria for use in evaluation, the Guidelines arbitrarily ignored legitimate extended illnesses, confinements or hospitalizations in assigning the rating. He therefore ordered the Board to revise the Guidelines to take those situations into account in assigning the rating. At the same time, he emphasized that the Board was not prevented from ever determining an unsatisfactory rating when there is legitimate medical excuse.

The State Board agrees with the Commissioner that:

> ...the teacher evaluation report is not just an ordinary document. A reprimand placed in a teacher's personnel file, without restriction as to its use, may have an adverse impact upon that person's employment possibilities, assignment or earnings.

Piscataway, supra, at 493.

We are, however, constrained to point out that, unlike Piscataway which involved the Constitutional right of a teacher to speak at a public meeting without inclusion of that material in her evaluation, this case does not involve the application of the Guidelines. Rather, the challenge presented is to the Guidelines themselves.

The promulgation and implementation of evaluation guidelines is within the discretionary power vested by the Legislature in local boards of education. See N.J.S.A. 18A:11-1. The State Board, therefore, may not set aside the Guidelines adopted by the Board in this case unless there is an affirmative showing that they are arbitrary, capricious or unreasonable. Parsippany-Troy Hills Ed. Ass'n. v. Bd. of Ed., 188 N.J. Super. 161, 167 (App. Div. 1983); Thomas v. Morris Twp. Bd. of Ed., 89 N.J. Super. 327, 332 (App. Div. 1965); Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 228, 294 (App. Div. 1960). After careful consideration of the record, we conclude that such a showing has not been made.

The record reveals that the Board promulgated the Guidelines after perceiving a need to improve overall teacher attendance. Affidavit of Dr. Robert A. Winter, Board Exhibit A, and Board Exhibits 1-11. Only after careful consideration did the Board adopt the Guidelines by formal action. See Board's Exhibits 1-11. This is therefore not a case involving an unwritten practice that was not considered and adopted by the Board. See Keuhn, supra.

It is well established that a teacher's attendance record may be considered when evaluating his overall performance and that high absenteeism may be sufficient grounds for disciplinary action even where legitimate medical excuse exists. Trautwein v. Board of Education of Bound Brook, 1978 S.L.D. 445, aff'd with modification

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State Board, 1979 S.L.D. 876, rev'd New Jersey Superior Court, Appellate Division, 1980 S.L.D. 1539, 1542, cert. denied 84 N.J. 469 (1980); Robert S. Kulik v. Bd. of Ed. of Town of Montclair, decided by the Commissioner October 3, 1983; Angelucci v. Bd. of Ed. of the Town of West Orange, 1980 S.L.D. 1066, aff'd State Board February 4, 1981. However, under the standards established by Keuhn, disciplinary action may not be based solely on the number of absences because to permit such a practice would contravene the statutory guarantees of N.J.S.A. 18A:30-1 and -3, which grant an entitlement to annual and accumulated sick leave. Kuehn, supra. While the Guidelines here do assign a rating based on the number of days of absence, they also require narrative explanation in the Summary Evaluation and the record indicates that evaluators are in fact required to clarify any absences that were the result of major medical problems. Winter Affidavit, supra. We therefore conclude that the Guidelines adopted by the Board in this case reasonably consider teacher absences and do not violate the standards that we articulated in Kuehn.

Although the Guidelines may have a "chilling effect" on excessive absence without medical excuse, such effect is the essential to achieving the legitimate goal of improving overall teacher attendance. As stated above, we find no indication that the Guidelines have curtailed the statutory right to sick leave, See N.J.S.A. 18A:30-2, and there is no evidence in the record of any disciplinary action against any staff member. However, even though this is not a case in which action of the Board is alleged to have interfered with the exercise of the right to take sick leave, we caution the Board that before taking disciplinary action based on its Guidelines, it is required to consider the circumstances of the absences in each case, as well as the number. Kuehn, supra.

For the reasons stated, the State Board reverses the decision of the Commissioner.

Betty A. Dean, Deborah P. Wolfe and Robert J. Wolfenbarger opposed.
Maud Dahme abstained.
Attorney Exceptions are noted.
November 7, 1984

PENDING N.J. SUPERIOR COURT

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5347-83
AGENCY DKT. NO. 191-6/83A

HELEN C. UPPERMAN,
Petitioner
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF QUINTON,
Respondent.

APPEARANCES:

James F. Rowe, Esq., for the petitioner

Janet S. Lawrence, Esq., for the respondent

Record Closed: January 23, 1984 Decided: March 7, 1984

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

Petitioner, formerly employed as a teaching staff member by the Board of Education of the Township of Quinton (Board), alleges that her termination by the Board is improper. Petitioner alleges further that she relied on the Board's guarantee of employment for the 1983-84 school year to her detriment by electing to take a maternity leave for the 1982-83 school year when she could have exercised her bumping rights. She asserts, therefore, that the Board is estopped in its action to terminate her. Petitioner prays for reinstatement as a teacher together with back salary she would have earned in the 1983-84 school year.

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After filing of this appeal with the Department of Education 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. A hearing was conducted on December 20, 1983, in the Salem County Courthouse, Salem. Several witnesses testified and a joint exhibit containing seventeen documents was accepted as evidence. Additionally, counsel submitted a Joint Stipulation of Facts. The record closed on January 23, 1984, upon receipt of petitioner's reply letter memorandum.

The Joint Stipulation of Facts is set forth at length as follows:

1. Petitioner was employed by the Board as a teacher from September 1972 until June 1977 at which time she resigned from her position.

2. During the early part of the 1977-78 school year, petitioner was asked by her former school, Quinton Township School, to substitute on a long-term basis for a teacher who became ill.

3. Petitioner was asked and agreed to complete the remainder of the 1977-78 school year after the Board agreed to pay her full salary at the same step she would have been had she not resigned in June 1977.

4. Petitioner earned tenure initially on or about September 1975 and earned tenure a second time after her 1977 resignation on or about January 2, 1981.

5. Petitioner received a letter dated April 23, 1982 (J-1A), wherein the Board stated that her teaching position might be affected by a possible reduction in the number of teaching positions within the district.

6. Petitioner attended the April 28, 1982 Board meeting which was scheduled to discuss possible teaching position reductions and at which time she requested a closed session meeting to discuss the situation.

7. At the closed session of the April 28, 1983 [sic] meeting, one of the possibilities discussed between petitioner and the Board was a 7th and 8th grade language arts position which she was qualified for based on her certification. This was the only remaining position for which she was certified.

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8. Petitioner stated that she would take a maternity leave commencing September 1982, subject to two conditions.

9. The two conditions, that petitioner's medical benefits be continued and that the Board assure her employment for the 1983-84 school year in the capacity as a teacher within Quinton School District, were put into writing after having been voted on during the April 28, 1982 Board meeting (J-1B).

10. Petitioner received a subsequent letter from the Board dated June 9, 1982, wherein the Board stated that it voted to rescind her medical benefits for the 1982-83 school year because the granting of medical benefits during a leave of absence was prohibited by Section 114.2 of the State Health Plan (J-1C).

11. Petitioner, through her attorney James F. Rowe, sent a letter to the Board wherein it was suggested that petitioner and the Board discuss various alternatives which would thereby avoid the necessity of litigation (J-1D).

12. At the July 1982 meeting of the Board, petitioner discussed options related to the medical benefits issue and it was agreed by petitioner and the Board that she would take sick leave during the month of September and October 1982, and that she would then purchase group medical coverage for the remaining ten months prior to her reemployment--i.e., November 1, 1982 to August 31, 1983.

13. At no time during the discussions surrounding the medical benefits issue did the Board indicate that it intended to renege on its decision in regard to continued employment for petitioner as a teacher in the Quinton Township School District during the 1983-84 school year.

14. On or about February 24, 1983, petitioner notified the Board of her intent to return to the Quinton Township School for the 1983-84 school year (J-1E).

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15. At no time thereafter did the Board indicate that it would not honor their agreement to employ petitioner for the 1983-84 school year until petitioner received a letter dated April 20, 1983, wherein the Board stated that her job for the 1983-84 school year might be affected because of fiscal economy considerations (J-1F).

16. Petitioner attended the April 25, 1983 Board meeting wherein she presented her position, and, subsequent to her presentation, the Board voted to terminate her teaching position.

17. Petitioner received a letter from the Board, dated April 28, 1983, wherein the Board thanked her for her years of service as a teacher within the district (J-1G).

18. At the April 28, 1982 Board meeting, the Board discussed the possibility of offering a 7th and 8th grade position to petitioner at which time it also discussed the possibility of petitioner's taking a maternity leave during the 1982-83 school year with a guarantee of employment in the 1983-84 school year.

19. Petitioner decided to take a maternity leave for the 1982-83 school year and the Board agreed to hire her as a teacher within the school district for the 1983-84 school year.

20. The membership of the Board which guaranteed the reemployment of petitioner for the 1983-84 school year is different from the membership of the current Board.

21. The voters of Quinton Township defeated the proposed budget for the school year 1983-84, and it was necessary for the members of the current Board to reduce the expenses where possible.

22. Handwritten notes are kept at Board meetings and transcribed into the official Board notes.

23. There were no official recordings of the 1981-82 and 1982-83 Quinton Township School Board meetings.

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24. The following are true and correct copies of pertinent minutes of the 1981-1983 Quinton Township School Board meetings (J-1H).

25. J-1I is a listing of the names and terms of office of all current members of the Quinton Township Board.

26. J-1J is a listing of the names and terms of office of all Quinton Township Board members in office during the 1982 term.

27. Two teaching positions were eliminated as a result of the defeat of the proposed budget for the 1983-84 school year or for other reasons of fiscal economy.

28. The two teachers whose positions were eliminated were Helen Upperman (remedial teacher) and David Geist (gifted and talented teacher).

29. A seniority list of all teachers in the Quinton Township School District at the time petitioner took her leave of absence (1982-83 school year) and at the time of the decision by the Board not to offer her a contract for the 1983-84 school year (April 1983) is as follows: (J-1K).

30. All secondary and remedial or supplemental teachers in the Quinton Township School District as to the following:

    a.) the area(s) of certification for each teacher

    b.) the years of employment with the District

    c.) their respective tenure dates are as follows:

Supplemental:	Secondary:
Lois English	Ted Clarke 7-12
Sally Clauss	
Claudette Doerr	

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Lois English:

a.) Elementary school teacher - grade 7/8 reading/language arts
b.) Hired 9/1967 16 years as of 9/1983
c.) Tenure 9/1971

Sally Clauss:

a.) Elementary school teacher
b.) Hired 9/1972 11 years as of 9/1983
c.) Tenure 9/1975

Theodore Clarke:

a.) Teacher of Social Studies and English
b.) Hired 9/1977 6 years as of 9/1983
c.) Tenure 9/1980

Claudette Doerr:

a.) Elementary school teacher - grade 7/8 reading/language arts
b.) Hired 1/1976 7 years' experience as of 1/1983
c.) Tenure 1/1979

31. Petitioner had 20 days of sick leave at the time she was granted maternity leave (J-1L).

32. The school board policy regarding sick leave is set forth in J-1M.

33. The source of funding for petitioner's position is as follows:

Basic Skills Program Breakdown
Local .5%
State Compensatory Education 22%
Title I 77.5%
Basic Skills application for 1981-82.

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34. Subsequent to petitioner's maternity leave, no teacher was hired to replace her for the 1982-83 school year.

35. The names of any teachers who will absorb the duties of petitioner during the 1983-84 school year are Lois English and Sally Clauss.

36. The following is the Board's position with regard to the statement that "The voters of Quinton Township defeated the proposed budget for the school year 1983-1984, and it was necessary for the members of the current Board of Education to reduce expenses where possible (J-1N).

37. As to the issue of whether the Board is not obligated to effectuate any transfers in order to find a position for petitioner, the Board sought an Advisory Opinion from the State Department of Education as is reflected in the letter from Seymour Weiss (J-1O).

38. J-1P is the Resolution of the Board regarding reduction in staff.

39. J-1Q is a list of all the Quinton Township School teaching staff.

Petitioner bases her action against the Board on the theory of estoppel. Specifically, petitioner alleges that she relied, to her economic detriment, on the Board's promise of reemployment; therefore, the Board should be held accountable by way of damages in her favor.

The record shows that the asserted economic deprivation is petitioner's promised employment for the 1983-84 school year and her need for one and one-half months' more service which would enable her to vest her pension in the Teachers' Pension and Annuity Fund. Petitioner testified that if she fails to earn this service time, she will lose her entire pension.

Petitioner reasserts that she was "guaranteed" reemployment by the Board prior to agreeing to a year's maternity leave and that she would not have taken that leave had she known that the Board was without authority to enter that agreement; further, she would not have taken the leave had she known that the agreement would not be binding upon the 1983-84 Board.

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Petitioner concedes that the Board's action guaranteeing her reemployment was ultra vires and illegal under the circumstances. However, she asserts that the Board compounded its error when it notified her in July 1982 concerning her medical benefits and failed to tell her that their reemployment agreement might not be binding on a successor Board. Petitioner asserts that had she been so advised, she would have taken the minimum maternity leave and thereafter resumed her teaching duties.

Petitioner argues further that even if the Board had voted to terminate her in April 1982 effective at the end of the school year, she would have been free to explore other options such as seeking other full-time employment, substitute teaching, and/or unemployment compensation.

Petitioner has modified her claim for relief and is seeking damages against the Board based on the theory of equitable estoppel.

In my judgment, the theory of equitable estoppel is inapplicable in the present matter.

The Court has held that where the Legislature has specifically imposed limitations on the exercise of power by a public body, equitable principles of estoppel are not available. O'Neill v. New Jersey Treasury Dept., Pensions Division, 178 N.J. Super. 211, 214 (App. Div. 1981), citing, Slurzberg v. Bayonne, 29, N.J. 106, 115 (1959). In O'Neill, the court stated as follows:

> We agree with the administrative law judge that the doctrine of equitable estoppel is inapplicable here. Although there is growing liberality in the use of the rule against public bodies, see Tubridy v. Consolidated, etc., Pension Comm'n, 84 N.J. Super. 257, 264 (App. Div. 1964), there is here an absolute and unambiguous statutory declaration which deprives the agency of jurisdictional authority to award pension benefits under the circumstances. Thus, we distinguish this situation from those involving an irregular exercise of a basic power granted to a public body by statute where the doctrine of estoppel may be applicable in the interests of equity and essential justice. Summer Cottagers' Ass'n v. Cape May, 19 N.J. 493, 504 (1955). . . . See 405 Monroe Co. v. Asbury Park 40 N.J. 457, 463 (1963).

An ultra vires act has been defined by the courts as an act that is utterly beyond a corporation's jurisdiction, or, is within its general powers but void and unenforceable for lack of appropriation or nonconformance with a statutory condition

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precedent. In contrast, an act is intra vires and merely voidable for want of authority or for an irregularity in the exercise of contractual power, the opposite of ultra vires. Summer Cottagers Association, supra, Bauer v. Bayonne, 7 N.J. 426 (1951). While O'Neill involved an act beyond the agency's jurisdiction in Bauer the court held that the plaintiff's employment contract with the city was void for failure of the city to make an appropriation in its budget as required by statute.

In the instant matter, the petitioner concedes that the school board's action was ultra vires. Therefore, the Board's promise of continued medical benefits and reemployment was not within its authority. Its promise was not merely an irregular exercise of its authority; therefore, the guarantee must be considered ultra vires and the principles of estoppel do not apply.

In support of her position, petitioner cites Martin v. South Amboy Board of Education, 1973 S.L.D. 496, aff'd, State Board of Education, 1974 S.L.D. 1412 (February 6, 1974). In Martin, the Board had appointed the petitioner principal initially by a unanimous roll-call vote for the school year. His continued employment was terminated in the middle of Martin's third term. The Commissioner held that absent a written contract containing a notice clause, the principal was entitled to anticipate continued employment and, thus, was entitled to his salary for the entire year; however, he could not acquire tenure. Although the Commissioner ruled in favor of the principal on the basis of the school board's action, his reasoning was not based on estoppel principles. Furthermore, the school board's appointment by roll-call majority vote was not an ultra vires act; the Commissioner noted that local boards have the authority to employ and dismiss teaching staff members as an exercise of discretion. Thus, Martin does not provide support for the petitioner's position.

Finally, petitioner argues that her election of maternity leave was an alternative to reassignment as a seventh and eighth grade language arts teacher. Petitioner asserts, also, that the Board could not have known her seniority status at its meeting on April 28, 1982 because the advisory opinion issued by the Department of Education is dated May 4, 1982.

The record does not support petitioner's assertions. Although J-1,0 is the advisory opinion which was signed by the Acting Commissioner of Education on May 4, 1982 the letter is dated April 15, 1982. In that regard, the administrative principal

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testified that he received an unsigned opinion from the Deputy Assistant Commissioner of the Bureau of Controversies and Disputes prior to the April 1982 Board meeting and that the advisory opinion, disclaiming any seniority in this instance, was discussed at the closed meeting of the Board and it was read at the public meeting on April 28, 1982. The Administrative Prinicipal's testimony was not refuted at hearing; therefore, the date of the advisory opinion together with his testimony is adequate proof that the Board knew petitioner's seniority status at that meeting. In fact, the record shows that the real matter in consideration at that meeting was whether or not the Board should abolish petitioner's position at that time or postpone its action to some future date anticipating that the position would be funded for the following year. The record and the evidence support this conclusion since the subsequent board abolished petitioner's position based on financial considerations

Consequently, I **FIND** no factual basis on which to recommend any relief for the petitioner. Further, there is no legal authority for the contention that the Board is estopped from refusing to follow through on its agreement with petitioner.

Based on these conclusions, the petition of appeal is **DISMISSED WITH PREJUDICE.**

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

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

7 March 84
DATE

August E. Thomas
AUGUST E. THOMAS, ALJ

3/8/84
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

March 12, 1984
DATE

Ronald L. Lasek/sdc
OFFICE OF ADMINISTRATIVE LAW

ks/ee

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DOCUMENTS IN EVIDENCE

J-1	A	Bender Letter, dated April 23, 1982
	B	Smith Letter, dated April 29, 1982
	C	Bender Letter, dated June 9, 1982
	D	Rowe Letter, dated June 20, 1982
	E	Upperman Letter, dated February 24, 1983
	F	Bender Letter, dated April 20, 1983
	G	Bender Letter, dated April 28, 1983
	H	Board Minutes, dated April 28, 1982
		Board Minutes, dated May 11, 1982
		Board Minutes, dated May 26, 1982
		Board Minutes, dated August 10, 1982
		Board Minutes, dated April 25, 1983
		Board Minutes, dated April 27, 1983
		Board Minutes, dated May 10, 1983
		Board Minutes, dated May 17, 1983
	I	Board Members 1983-84
	J	Board Members 1981-82; 1982-83
	K	Seniority List 1982-83
	L	Sick Leave Record
	M	Maternity Leave Policy
	N	Defeated Budget Statement
	O	Acting Commissioner Letter, dated April 15, 1982
	P	Board Resolution
	Q	Teaching Staff

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HELEN C. UPPERMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF QUINTON, SALEM COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

Petitioner in primary exceptions contends that her only claim is for monetary damages against the Board based on the theory of equitable estoppel. Petitioner excepts to the position taken by Judge Thomas that the theory of equitable estoppel is inapplicable in the present case. Petitioner contends that the judge misapplied the doctrine of ultra vires citing favorably Summer Cottagers Ass'n, supra and Bauer, supra. The Commissioner notes that the same argument was made to Judge Thomas who considered and rejected it. The Commissioner has reviewed the ALJ's reasoning and adopts such findings as his own. Further, petitioner's exceptions that the Board openly and overtly misled the teacher to her detriment is a conclusional statement not supported by the record.

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

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

APRIL 23, 1984 COMMISSIONER OF EDUCATION

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INITIAL DECISION
OAL DKT. NO. EDU 7893-83
AGENCY DKT. NO. 335-9/83A

ALASKAN INSULATION, INC.,
Petitioner,

v.

BOARD OF EDUCATION OF THE TOWN OF HACKETTSTOWN, WARREN COUNTY,
Respondent.

_____,

APPEARANCES:

James P. Henry, Esq., for petitioner
(Meyner and Landis, attorneys)

Arthur K. Sirkis, Esq., for respondent

Record Closed: February 3, 1984 Decided: March 2, 1984

BEFORE **JAMES A. OSPENSON,** ALJ:

When the Board of Education of the Town of Hackettstown, Warren County, after advertising for, receiving and opening bids for roof repair work on two schools in the district, resolved on September 8, 1983, following recommendations of its Buildings and Grounds Committee to reject all bids, Alaskan Insulation, Inc., alleging itself to have been lowest responsible bidder, filed a petition of appeal with the Commissioner of the Department of Education seeking judgment awarding it the public school contract, or in the alternative, the cost incurred in preparing and submitting its bid, on the ground Board

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action was arbitrary, capricious and unreasonable and violative of the Public School Contracts Law, N.J.S.A. 18A:18A-1 et seq. The Board denied allegations of the petition generally, contending the Board had properly reserved its right to reject any and all bids expressly, pursuant to N.J.S.A. 18A:18A-22, and contending further petitioner's bid did not conform to specifications furnished in several respects, all of which required its rejection under N.J.S.A. 18A:18A-22.

The petition of appeal was filed in the Bureau of Controversies and Disputes of the Department of Education on September 19, 1983. The Board's answer was filed there on September 30, 1983. Accordingly, the Commissioner transmitted the matter to the Office of Administrative Law on October 5, 1983, for hearing and determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. On notice to parties, a prehearing conference was held in the Office of Administrative Law on October 27, 1983, and an order entered establishing, inter alia, a hearing date of February 1, 1984. The parties were directed to confer with a view towards stipulating all relevant and material propositions of fact, including relevant documentation thereof in the form of Board minutes, specifications, advertisements, notices and bids, as well as committee reports of its Buildings and Grounds Committee. Thereafter, it was ruled, matters at issue were to be addressed and resolved as if on cross-motions for summary decision in accordance with N.J.A.C. 1:1-13.1 et seq., on pleadings, admissions,[1] stipulations, documentation and memoranda of law, examination and cross-examination of witnesses having been waived. Submissions having been completed by February 4, 1984, the record closed then.

The prehearing conference order recited issues in the matter were the following:

A. Whether, in view of recommendations of the Buildings and Grounds Committee, the Board's action was arbitrary and capricious in failing to award petitioner the contract on its low bid and/or in rejecting all bids, despite reservation of the right to do so;

---

1 Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 12, and the first sentence of paragraph 13 of the petition of appeal were admitted by the Board.

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B. Whether, after receipt and opening of bids, petitioner's offer to the Board of a special discount and an extension of time for performance of contract constituted such change of bid as required rejection under N.J.S.A. 18A:18A-22;

C. Whether the Board was authorized under the Public School Contracts Law generally to accept such special discount from petitioner as bidder and/or to agree to an extension of time for completion of the contract;

D. Whether as a matter of law under the Public School Contracts Law, the Board had power if so reserved to reject all bids for any or no reasons; and

E. Whether, as demanded by petitioner under paragraph 2 of the ad damnum clause of the petition, money judgment for costs incurred in preparing and submitting bids was recoverable by petitioner in this administrative agency action.

ADMISSIONS, STIPULATIONS AND FINDINGS OF FACT

Evidence in the matter is not in substantial dispute. From admissions and stipulations of the parties, I make the following Findings of Fact:

1. Through its architect, the Board of Education of the Town of Hackettstown, Warren County applied to the Bureau of Facility Planning Services of the Department of Education on June 20, 1983 for final review approval of specifications for proposed roof repair work at Hatchery Hill Elementary School and Hackettstown High School, as required by N.J.S.A. 18A:18A-16 and N.J.A.C. 6:22-1.1 et seq. J-1.

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2. In specifications, the Board reserved the right to accept bid or bids in whole or in part which, in the opinion of the Board, were for the best interest of the school district, and further reserved the right to waive any informalities or to reject any or all bids. The reservation was contained in instructions to bidders. J-2. Required dated of final completion was October 14, 1983.

3. Specifications under job conditions, §1.11 required the roofing to be installed only when the following condition was assured: dry weather during installation and no rain anticipated within four hours after coating or foam installation at 72 degrees F. Fifty percent relative humidity. Colder temperatures or lower humidity will slow curing process, resulting in longer time before rain resistance is achieved.

4. On August 9, 1983, the Commissioner of the Department of Education through the Bureau of Facility Planning Services, approved final plans and specifications submitted.

5. The Board advertised a notice of receipt of bids on the specifications in the Star-Gazette, Warren County, on August 11, 1983. Bids were advertised to be received on August 22, 1983 at Board offices.

6. Petitioner's bid was submitted on August 19, 1983. J-5. A combined base bid and various alternate bids were tendered. In other respects, its bid form was in compliance with specifications except for a "metal deduct." A bond was posted.

7. After receipt and opening of bids on August 22, 1983, the Board unanimously adopted a resolution at its regularly scheduled meeting of August 29, 1983, deferring the award of the bid for roofing work at the

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High School and Hatchery Hill School until the September 8, 1983 special Board meeting. J-8. The action was taken because the Buildings and Grounds Committee of the Board had not met to make its recommendations. J-6, J-7 and J-8.

8. By letter dated August 30, 1983, petitioner offered to reduce its bids by $1,500 if it were awarded both contracts together for base bid No. 1 (High School) and base bid No. 2 (Hatchery Hill School). It also requested the Board to contact it concerning the savings offered in its original proposal for "metal deduct." J-10.

9. By letter dated September 2, 1983, the Board's architect reported to the Board petitioner was low bidder. The architect's analysis was, however, that petitioner's bid proposal contained irregularities and that the architect had turned over petitioner's bid documents to the Board's attorney for determination and report to the Board whether those irregularities were of a serious nature or not. It was noted petitioner's bid proposal contained two unsolicited informal bid reduction offers not called for in specifications. It was noted since other bidders had not had opportunity to bid competitively against petitioner on the inducement offers, the architect did not consider them in determining who was low bidder. The inducement offers were considered to be questionable. J-11 and J-12.

10. By letter dated August 29, 1983, another bidder informed the Board it viewed petitioner's bid as confusing and containing formal defects. It requested petitioner's bid be rejected for that reason and the bid be awarded to it as lowest responsible bidder. J-13.

11. The architect reported to the Board its reference checks on petitioner as to qualifications and performance on previous projects was satisfactory. J-14.

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12. Through its attorney, petitioner notified the Board, by letter dated September 8, 1983, that it understood the Board's Buildings and Grounds Committee would recommend to the full Board all bids for the project be rejected. Noting it had experienced considerable expense in estimating and bidding the project, petitioner proposed the Board award it the contract, that it proceed until directed by the Board to cease operation, that it extend completion date until August 31, 1984 and, finally, that it waive any claim it might have for delay damages to suspension of its work by the Board until August 31, 1984. J-15.

13. The Buildings and Grounds Committee of the Board reported to the Board of deliberations at its September 6, 1983 meeting. It recommended to the Board that all bids be rejected and the job be rebid next Spring so that work could start promptly following close of school in June 1984. The Committee's rationale was (1) deferral was educationally more feasible and (2) chances for a more satisfactory job would be improved if work were done in June or July rather than October, November or later. J-17.

14. Posted agenda for the special Board meeting of September 8, 1983 called for consideration of award of High School and Hatchery Hill School roofing bids. J-19.

15. Minutes of the special meeting of the Board on September 8, 1983 showed unanimous adoption of a motion that all bids for roof repair at Hatchery Hill School and the High School be rejected. J-20.

16. In an affidavit, the Board president said it was the position of the full Board at its September 8, 1983 special meeting that all bids for roof repair should be rejected for reasons given by the Board's Buildings and Grounds Committee. J-17 and J-18.

17. Petitioner conceded the Board rejected all bids for those reasons. See paragraph 13 of petition of appeal.

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DISCUSSION

The Public School Contracts Law contains the provision:

> Nothing contained in this chapter shall be construed as depriving any Board of Education of the right to reject all bids. [N.J.S.A. 18A:18A-22].

The Board advertised for bids for its roof repair work expressly reserving that right. J-4. It repeated the reservation in its instructions to bidders. J-2. The Board argued, first of all, it had an absolute right to reject all bids even, presumably, for no reasons at all. Petitioner disputed the contention: it said there is nothing in the Public School Contracts Law nor, indeed, in its analogue the Local Public Contracts Law, N.J.S.A. 40A:11-1 et seq., to permit or justify the inference the Legislature intended to give governmental bodies or school authorities such untrammeled power of arbitrary rejection. The present form of the Public Schools Contract Law was enacted to impose requirements on purchasing procedures utilized by local boards of education similar to those imposed by the Public School Contracts Law. F.S.D. Industries Inc. v. Bd. of Ed. of Paterson, 166 N.J. Super. 330, 334 (App. Div. 1979). Even before its effective date, June 2, 1977, it, the Public School Contracts Law, contained within it the power presently expressed in N.J.S.A. 18A:18A-22. But courts in construing the local Public Contracts Law, as argued by petitioner, have readily imposed the caveat by judicial construction that there is no unbridled power in a government instrumentality to reject bids arbitrarily. In Cardell, Inc., v. Twp. of Woodbridge, 115 N.J. Super. 442 (App. Div. 1971), the court said:

> The unbridled power to reject bids, even where such right is served in the invitation for bidding, if allowed, would violate our public policy, contravene our Legislature's intention in enacting the competitive bidding statute and, in fact, afford a means by which "the statute can be evaded under color of the rejection 'of any and all bids.' " . . . Even under the 1912 statute authorizing the rejection "of any and all bids," such action was wrongful. . . It is not less so today . . . [Citation omitted].

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> We do not imply that a municipal governing body is without power to reject all bids under proper circumstances. No municipal governing body could effectively engage in competitive bidding without such power. At the very least, the existence of the possibility of total rejection of bids serves as a strong inducement to bidders to keep their bids as low as circumstances permit. Suffice it to say that when a municipal governing body concludes in good faith that the purposes of the public bidding statute are being violated, it may reject all bids submitted and in its discretion order a readvertising of the contract. Furthermore, should the lowest bid substantially exceed the municipality's cost estimate or its appropriation for the job, or should circumstances arise which might cause the governing body to abandon or substantially revise the project, then a total rejection of bids might well be required. At 450-51; [emphasis supplied].

In Durling Farms Inc., v. Bd. of Ed., Twp. of Montville, Morris County, 1975 S.L.D. 733, the Board rejected petitioner's low bid and all other bids to supply milk to its various schools, readvertised for bids and thereafter awarded a contract to the then low bidder, a supplier other than petitioner, who appealed to the Commissioner of the Department of Education under the latter's dispute resolution jurisdiction in N.J.S.A. 18A:6-9. On recommendation of the Board secretary, the Board had rejected petitioner's bid, which was low, when through an error by the Board in specifications it failed to post five percent of the total bid amount and the next lowest bidder filed objection. The Commissioner said:

> Clearly, the Board was faced with a determination as to whether the discrepancy was a minor one, in which case it could, had it so chosen, have awarded a contract to petitioner. However, it was the judgment of the Board that its own error was not sufficiently minor to waive the defect in its specifications. Absent a show of statutory violation, collusion, arbitrariness, bad faith, favoritism or other impropriety on the part of the Board, the Commissioner finds no reason to interpose his judgment for that of the Board. . .

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> Petitioner complains the Board's action, and similar action by other boards, if allowed to continue, would discourage participation in competitive bidding. There is, however, no showing that it was intentional on the Board's part so to construct its specifications toward an improper end. Petitioner was properly notified of the rejection of bids and automatically provided with the revised specifications for rebidding. While it is true that the rebidding resulted in lower cost to the Board, it could have been otherwise as is sometime the case in the present inflationary economic environment.
>
> Specifications for bidding must supply all prospective bidders with a common standard for competitive bidding. . . The Board determined that it had failed to do so, rejected the original bids, and ordered the readvertisement and rebidding. This determination is entitled to a presumption of correctness absent impropriety on the part of the Board. The Commissioner so holds. . . The matter is dismissed. [At 736; citations omitted].

I am satisfied from the above the question whether the Board's right to reject all bids is unbridled, that is, whether it may be exercised arbitrarily for any or no reason, is settled. In my view, boards of education under the Public School Contracts Law may not exercise the rejection right in that way. The question results here, therefore, whether this Board's rejection of Alaskan's bid was a rejection for arbitrary reasons or whether rejection was for circumstances reasonably impelling it to "abandon or substantially revise the project," as in Cardell, supra.

Specifications for the roof work (J-2) made the required date of final completion of work by October 14, 1983 an essential condition of the contract. Job conditions under the specification required installation of roofing only when it was assured dry weather existed with no rain anticipated within four hours after coating or foam installation at 72 degrees Fahrenheit, 50 percent relative humidity. Colder temperatures or lower humidity, it was declared, would slow curing process, resulting in longer times before rain resistance was achieved. J1; J-2. After bids were received and opened on August 22, 1983, the Board's regular meeting of August 29, 1983 was deferred until the September 8, 1983 special Board meeting because the Board's Buildings and Grounds Committee had not yet met to review and make its recommendations to the full Board. J-6, J-7, J-8 and J-9.

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The Committee met on September 6, 1983 and reported its recommendation to the Board that bids be rejected and the job rebid next Spring so that work could start promptly following close of school in June 1984. Its rationale was the result would be educationally more feasible and that chances for a more satisfactory job would be improved if the work were done in June or July rather than October, November or later. J-17. The Committee's recommendation was made known to petitioner before the special meeting of the Board on September 8, 1983, since petitioner wrote the Board offering alternative proposals for extension of completion date and waiver of claim for damages if it were awarded the contract by the Board. J-15. The Board voted unanimously on September 8, 1983, at its special meeting to reject the bids. J-20. Although minutes of the Board meeting on that date did not specifically reflect the Committee's recommendation as predicate for the Board's action, that it was such a predicate seems reasonably inferable from the evidence, particularly the circumstance full Board action to reject followed in close proximity to Committee action on September 6, 1983, and the circumstance the originally scheduled meeting of August 29, 1983 of the Board was specifically adjourned because the Committee had not had a chance to review and make its recommendations at the time. Indeed, petitioner itself alleged such was the case in paragraph 13 of its petition of appeal. In any event, in my view, there is sufficient evidence of record here to permit a reasonable inference the Board acted as it did because of its Committee's report. Cf. Mears v. Bd. of Ed., Town of Boonton, Morris County, 1968 S.L.D. 108, 111 (the Commissioner recognized practical problems confronting boards of education in creating a record of all discussions and formulating statements of reasons for all decisions, as if to anticipate a need to defend litigation such as that herein. Evidence of reasonable action, it was said, is not always so formally generated).

In my view, it thus seems reasonable to regard the reasons for Board rejection as considered and fair, consistent with job conditions specified in the notice to bidders and, generally, beyond petitioner's legal reproach. No impropriety having been shown, the Board's determination is entitled to a presumption of correctness not shown to have been overcome by petitioner's proofs. To that extent, therefore, such action is hereby **SUSTAINED.**

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In view of the above, it becomes unnecessary to consider the Board's arguments petitioner's bids must be rejected for other reasons; that is, that petitioner's offer of "metal deducts," discounts for award of combined base bids and alternates and/or extensions of time for completion represented bids improperly nonconforming to specifications furnished therefor, contrary to N.J.S.A. 18A:18A-22.[2] Nor, in my opinion, does it become necessary to consider petitioner's claim for compensatory damages in the form of liquidated damages to the extent of expenses it incurred in preparation for and submission of its bid.[3]

CONCLUSION

Accordingly, based on the foregoing I hereby **ORDER** that the petition of appeal herein should be, and it is hereby, **DISMISSED** with **PREJUDICE.**

---

[2] All bids must comply with the terms imposed, it is said (Hillside Twp. v. Sternin, 25 N.J. 317, 323 (1957)), and any departure therefrom invalidates a nonconforming bid as well as any contract based upon it. If that were not the rule, the mandate for equality among bidders would be illusory and the advantages of competition would be lost. Petitioner here did not challenge the proposition the deviations were improper inducements; rather it argued, merely, they should be ignored as not affecting or tainting its basic bid proposal.

[3] Generally, it has been held, submission of the lowest bid in answer to an advertisement for bids by the State for public work cannot be the basis of a claim for damages based on the failure or refusal to accept such a bid. Commercial Clean. Corp. v. Sullivan, 47 N.J. 539, 546 (1966). More narrowly held perhaps is the proposition that award of damages to persons suffering monetary loss as the result of unlawful action of others has traditionally been limited to judicial proceedings. Power to award damages will not be extended to an administrative body unless the legislative purpose to grant such power is plainly indicated. No such power is given in the Public School Contracts Law. Cf. Robinson v. Bd. of Ed., Borough of Runnymeade, Camden County, 1975 S.L.D. 6, 9-10; David v. Bd. of Ed., Borough of Cliffside Park, Bergen County, 1967 S.L.D. 192, 195. Finally, one may note, petitioner adduced no evidence in support of its damage claim.

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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.

March 2, 1984
DATE

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

3/9/84
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

js

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LIST OF EXHIBITS

J-1 Architect's request to Bureau of Facility Planning Services, Department of Education, dated June 20, 1983, requesting final review approval of specifications for roof repair work at Hatchery Hill Elementary School and Hackettstown High School.

J-2 Specifications for roof repair work, Hackettstown High School and Hatchery Hill School, dated May 18, 1983.

J-3 Approval by Commissioner of Education of final plans and specification for roof repair work, dated August 9, 1983, pursuant to N.J.S.A. 18A:18A-16 and N.J.A.C. 6:22-1.1 et seq.

J-4 Advertisement of Notice of Receipt of Bids for roof repair work in Star-Gazette, Warren County, on August 11, 1983, with reservation of right of Board to reject any and all bids.

J-5 Bid of Alaskan Insulation, Inc., dated August 19, 1983, containing "metal deduct," and containing bids for base bids and alternate bids.

J-6 Affidavit of Gerald DiMaio, Board member, that no action could be taken on petitioner's bid on August 29, 1983 because, inter alia, the Buildings and Grounds Committee had not met to make its recommendations nor had it received recommendations of the architect at that time.

J-7 Affidavit of Douglas Wicks, petitioner's representative, saying, inter alia, prior to Board's decision to defer action, there was a public indication that deferral was intended to permit the Buildings and Grounds Committee to meet.

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J-8 Affidavit of Douglas Wicks, petitioner's representative, saying, inter alia, the Board deferred action on the bids at its public meeting of August 29, 1983 until September 8, 1983 to permit the Buildings and Grounds Committee of the Board to meet.

J-9 Minutes of the Board Meeting of August 29, 1983, showing unanimous adoption of motion that the award of the bid for roofing work at the High School and Hatchery Hill School be deferred until the September 8, 1983 special Board meeting.

J-10 Letter of petitioner to Board, dated August 30, 1983, offering to reduce base bids No. 1 and No. 2 by $1,500 if Board awarded it contracts for both base bid No. 1 and base bid No. 2.

J-11 Architect's report to Board, dated September 2, 1983, on bids received for roof repairs at Hackettstown High School and Hatchery Hill School, indicating, inter alia, petitioner's bid proposal, though low, contained some irregularities as noted on J-11; that petitioner's bid documents were given to the Board's attorney for opinion on irregularities; that petitioner's bid proposal contained two unsolicited informal bid reduction offers; that because of the questionable legal nature of the inducement offers, the architect was not using those offers in any award recommendation, which recommendation was that petitioner be awarded the contracts.

J-12 Architect's analysis of all bids received, dated August 22, 1983, showing petitioner as low bidder and showing also petitioner's bid proposal contained offer of reductions if petitioner were awarded both contracts.

J-13 Letter to Board attorney from attorney for competing bidder, Acoustical Spray Insulators, Inc., alleging that Acoustical was low bidder and that petitioner's bid was confusing, formally defective and should be rejected by the Board.

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J-14 Architect's report to Board for period from August 26, 1983 to August 29, 1983, concerning reference checks on petitioner as low bidder as to qualifications and performance on previous projects.

J-15 Petitioner's attorney's letter to Board attorney, dated September 8, 1983, noting Buildings and Grounds Committee would recommend to the Board all bids be rejected and proposing that Board award contract to petitioner which would extend completion date of contract until August 31, 1984 and waive any claim it might have for delay damages due to suspension of its work by the Board until August 31, 1984.

J-16 Memorandum to Board from J.S. Miller, Jr., dated September 6, 1983, concerning district financial status for awarding of contracts for roof repair.

J-17 Report of Buildings and Grounds Committee to Board concerning Committee meeting on September 6, 1983 at 8:00 p.m. to review bids on roof repair, containing recommendation that "all bids be rejected and the job be rebid next Spring so that work can start promptly following the close of school in June 1984. Rationale as follows: (1) educationally more feasible; (2) changes for a more satisfactory job would be improved if work is done in June or July rather than October, November or later."

J-18 Affidavit of Gerald DiMaio, president and Board member, saying, inter alia, his position that of the Buildings and Grounds Committee at its meeting of September 6, 1983 and the position of the full Board at its September 8, 1983 meeting was that all bids for roof repair should be rejected for several reasons, including that it would be educationally more feasible for the job to be accomplished during the summer months when school was not session and that the changes for a more satisfactory job would be improved if it were done during the warm summer months rather than the cooler autumn months of October, November or later.

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J-19 Agenda of Special Board Meeting on September 8, 1983, including, inter alia, award of High School and Hatchery Hill School roofing bids.

J-20 Minutes of Special Meeting of the Board on September 9, 1983, showing unanimous adoption of motion that all bids for roof repair at Hatchery Hill School and the High School be rejected.

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ALASKAN INSULATION, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF HACKETTSTOWN, WARREN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

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

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

APRIL 23, 1984 COMMISSIONER OF EDUCATION

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ALASKAN INSULATION, INC.,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF HACKETTSTOWN, WARREN COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, April 23, 1984

For the Petitioner-Appellant, Meyner and Landis
(James P. Henry, Esq., of Counsel)

For the Respondent-Respondent, Arthur K. Sirkis, Esq.

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

October 3, 1984

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ROBERT SCHMIDT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEEHAWKEN, HUDSON COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

For the Petitioner, Bucceri & Pincus (Louis P. Bucceri, Esq., of Counsel)

For the Respondent, Kreiger, Ferrara & Feinsilver, Flynn & Catalina (Brian N. Flynn, Esq., of Counsel)

This matter has been remanded to the Commissioner of Education for further consideration by virtue of the decision rendered by the Superior Court of New Jersey, Appellate Division, on February 1, 1984. Such remand is grounded upon the State Board of Education decision dated May 4, 1983 and the Commissioner's decision dated August 19, 1982. The pertinent language of the Superior Court's decision on remand held that:

> "***In our review of this record, the administrative code, and the Department's BSI [Basic Skills Improvement] guidelines we see nothing which compels the conclusion that a reading specialist is not, as a practical matter, as eligible to teach remedial reading as those who are specifically deemed to be qualified for that assignment. We are, however, of the further view that this is a question which in the first instance should be specifically and expressly addressed by the State Department of Education. The issue here involves matters within that agency's expertise, and it may be that there are reasons not readily apparent to us which would justify the distinction made here.***"
>
> "We therefore remand this matter to the State Department for its reconsideration of the eligibility of a reading specialist to teach BSI remedial reading.***" (Slip Opinion, at pp. 7-8)

The Commissioner has carefully reviewed N.J.A.C. 6:11-12.20, the requirements for the educational services certificate "Reading

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Specialist" endorsement and the requirements for the instructional certificate "Teacher of Reading" endorsement contained in Regulations and Standards for Certification, State of New Jersey Department of Education (1976). The definition of reading specialist contained within N.J.A.C. 6:11-12.20(b) is as follows:

> "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' difficulty in learning to read, plans developmental 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."

Specific requirements as cited in Regulations and Standards for said certificate include:

> " I. A regular New Jersey instructional certificate
>
> II. Two years of successful teaching experience
>
> III. Successful completion of one of the following:
>
> A. An approved graduate degree program - a college curriculum approved by the New Jersey State Department of Education as the basis for issuing this endorsement.***
>
> OR
>
> B. A program of 30 semester-hour graduate credits, or equivalent, consisting of the following:
>
> 1. Study in each of the following areas:
>
> a. Reading foundations
> b. Diagnosis
> c. Correction of reading problems
> d. Supervised practicum in reading
>
> plus

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2. Study in at least 3 areas chosen from the following:

a. Children's or adolescent literature
b. Measurement
c. Organization of reading programs
d. Psychology
e. Supervision
f. Linguistics" (at p. 38)

For an individual who seeks the teacher of reading endorsement on his/her instructional certificate, a 24 semester-hour credit specialization in reading is required. This includes a minimum of 12 semester-hour credits in reading and reading improvement and 12 semester-hour credits in either related areas of child psychology or tests and measures, or additional courses in reading and/or reading improvement.

It therefore appears that an individual who qualifies for the educational services certificate with a reading specialist endorsement would also be eligible for an endorsement as teacher of reading on the instructional certificate held by that individual. The reading specialist requirements stipulate 30 semester-hour credits in the specialization area of reading, whereas the teacher of reading endorsement requires 24 semester-hour credits.

Consequently, the Commissioner determines that an individual who qualifies for the reading specialist endorsement would be eligible to teach reading, be it for BSI programs or any other instructional assignments which require the teacher of reading endorsement. However, the Commissioner is constrained to point out that such eligibility does not absolve an individual who holds the reading specialist certificate from applying for and obtaining a teacher of reading endorsement on his/her instructional certificate when it is anticipated that the individual will be fulfilling reading instructional responsibilities.

This would not, however, preclude an individual who holds a reading specialist endorsement from being assigned or assuming instructional responsibilities requiring a teacher of reading endorsement pending issuance of the instructional endorsement.

It is firmly established in case law that a teacher need not possess, but must be eligible for, a certificate. Kane v. Bd. of Ed. of the City of Hoboken, 1975 S.L.D. 12; Fulton v. Bd. of Ed. of the City of Long Branch, decided by the Commissioner October 17, 1980, aff'd State Board February 4, 1981; Givens v. Bd. of Ed. of the City of Newark, 1974 S.L.D. 906; and Reinish v. Bd. of Ed. of Cliffside Park, 1965 S.L.D. 50 As indicated in Reinish, however, there is a responsibility to apply for the needed certificate. Specifically, Reinish states:

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> "***Application for a certificate is made when employment is obtained and for the particular license needed. Petitioner, having no need of a Social Studies certificate, could not be expected to apply for its issuance until he had need for it. The fact that he qualified for such a certificate is enough.***" (at 54)

Accordingly, since the reading specialist endorsement is not an instructional endorsement, application for the teacher of reading endorsement is necessary even though an individual is eligible for the teacher of reading endorsement in order to comply with N.J.S.A. 18A:26-2 which mandates that:

> "No teaching staff member shall be employed in the public schools by any board of education unless he is the holder of a valid certificate to teach, administer, direct or supervise the teaching, instruction, or educational guidance of, or to render or administer, direct or supervise the rendering of nursing service to, pupils in such public schools and of such other certificate, if any, as may be required by law."

IT IS SO DETERMINED.

APRIL 30, 1984 COMMISSIONER OF EDUCATION

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ROBERT SCHMIDT, :

PETITIONER-APPELLANT, :

V. : SUPERIOR COURT

BOARD OF EDUCATION OF WEEHAWKEN, HUDSON COUNTY, : APPELLATE DIVISION

RESPONDENT-RESPONDENT. :

:

Argued December 20, 1983-Remanded February 1, 1984

Resubmitted May 22, 1984; Supplemental opinion decided June 4, 1984

Before Judges Pressler and O'Brien.

On appeal from the State Department of Education.

Bucceri & Pincus, attorneys for appellant (Louis P. Bucceri, of counsel and on the supplemental brief).

Kreiger, Ferrara & Feinsilver, Flynn & Catalina, attorneys for respondent Board of Education of Weehawken, rely on the State's letter in lieu of supplemental brief).

Irwin I. Kimmelman, Attorney General of New Jersy, attorney for respondent State Board of Education (Michael J. Haas, Deputy Attorney General, on the letter in lieu of supplemental brief).

PER CURIAM

The question raised by this appeal is whether petitioner Robert Schmidt was entitled to seniority credit for the academic year 1980-81, during which he had been assigned by respondent Board of Education of Weehawken (Board) to teach reading in the basic skills improvement program (BSI). The resolution of this question in turn depended upon whether petitioner was "appropriately certified" to teach remedial reading at that time. The State Department of Education, affirming the determination of the Commissioner of Education, concluded that petitioner's certification as a reading specialist did not constitute such appropriate certification. For the reasons stated in our opinion dated February 1, 1984, we remanded for reconsideration of this determination. The decision of the Commissioner of Education on remand concluded again that petitioner was not appropriately certified. We now reverse.

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As we pointed out in our original decision, the BSI requirements, as stated in the Department's "Guidelines for Approval of Application for Basic Skills Improvement Program" (1981) and "Basic Skills Preventive and Remedial Programs Using State Compensatory Education Funds" (1979), do not precisely define the certification required for teachers of students in BSI programs but only require that such teachers be "appropriately certified." During the period in question, petitioner was the holder of a certification as a reading specialist. We pointed out 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 certification and that it appeared that a person holding a reading specialist certificate would be automatically entitled to endorsement as a reading teacher on his instructional certificate. Indeed, when petitioner learned that he also required the instructional endorsement, he obtained it, virtually automatically, by reason of his reading specialist certification.

Based on our original review of the record, we concluded that

> ***We would therefore be inclined to conclude that at least for purposes of the BSI guidelines, a reading specialist certificate is the functional equivalent of a reading teacher endorsement and hence that a reading specialist is eligible for assignment to teach BSI remedial reading.

The purpose of our remand was to require the Commissioner to consider whether, for purposes of the BSI program, a reading specialist certificate is the functional equivalent of a reading teacher endorsement and, if not, to explain that conclusion.

The Commissioner's decision on remand agreed "that an individual who qualifies for the reading specialist endorsement would be eligible to teach reading, be it for BSI programs or any other instructional assignments which require the teacher of reading endorsement." The Commissioner further pointed out that if an individual has a reading specialist certificate but has not yet obtained the reading specialist certificate but has not yet obtained the reading teacher endorsement, the necessity for obtaining the instructional endorsement "would not, however, preclude an individual who holds a reading specialist endorsement from being assigned or assuming instructional responsibilities requiring a teacher of reading endorsement pending issuance of the instructional endorsement."

Despite the foregoing and for no articulated reason that we can understand, the Commissioner apparently concluded that petitioner's reading specialist certificate did not, under all of the circumstances here, constitute adequate certification for his assignment as a BSI remedial reading teacher.

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We are constrained to conclude that the Commissioner did not address the basic question of the functional equivalence of the two certifications for purposes of eligibility for assignment to teach BSI remedial reading. We also conclude that there is no rational basis for a determination that petitioner was not appropriately certified for the year in question.

The determination appealed from is therefore reversed, and we remand to the Department of Education for redetermination of petitioner's seniority status and all other job-related rights on the basis of his entitlement to seniority credit for the academic year 1980-81. We do not retain jurisdiction.

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ROBERT SCHMIDT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEEHAWKEN, HUDSON COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

This matter has been remanded by the Superior Court of New Jersey, Appellate Division for determination of petitioner's seniority status and all other job-related rights on the basis of his entitlement to seniority credit for 1980-81. The court decision dated June 4, 1984 held that petitioner was qualified to teach basic skills reading during the 1980-81 school year by virtue of his certificate as a reading specialist.

N.J.A.C. 6:3-10(k)27, which was in effect during petitioner's employment, governed his accrual of seniority. It is repeated below:

> "***27. Secondary. The word 'secondary' shall include grades 9-12 in all high schools, grades 7-8 in junior high schools, and grades 7-8 in elementary schools having departmental instruction. Any person holding a secondary certificate shall have seniority in all subjects or fields covered by his certificate, except those subjects or fields for which a special certificate has or shall be required by the State Board of Education. However, if a person has held employment in the school district in any special subject or field endorsed on his secondary certificate, such special subject or field shall, for the purposes of these regulations, be regarded as any other subject or field endorsed upon his certificate***." (Emphasis supplied.)

Petitioner was initially employed by the Weehawken Board in 1972 as a teacher of English. In May 1972 he was issued a teacher of English certificate, a reading specialist certificate in June 1979, and a teacher of reading certificate in December 1982.

From the 1972-73 school year through the 1976-1977 school year, petitioner taught full time as a teacher of English in the secondary category. During the 1977-78 and 1978-79 school years petitioner taught English, except for one section of basic skills

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instruction (BSI) in reading. Petitioner was not authorized under his English certificate to provide BSI instruction; therefore, accrual of seniority attached to his English certificate. In 1980-81 (September 1, 1980 through May 31, 1981) petitioner taught BSI reading full time.

In June 1979 petitioner obtained a reading specialist certificate which qualified him to teach BSI reading in 1980-81 by virtue of his eligibility for a teacher of reading certificate. Therefore, during the 1980-81 school year, petitioner accrued 9 months seniority as a teacher of reading. (See Reinish v. Bd. of Ed. of Cliffside Park, 1965 S.L.D. 50, aff'd State Board 1966 S.L.D. 252, aff'd Superior Court, Appellate Division, 1966 S.L.D. 253.)

Consequently, it is determined that as of May 31, 1981, petitioner accrued 8.9 years of seniority as a teacher of English and 9 months seniority as a teacher of reading.

A review of the employment history, certifications and instructional assignments of those staff members assigned to teach BSI reading during 1981-82 as contained in the record makes it clear to the Commissioner that petitioner should have been assigned a full-time reading schedule during that year. There is nothing of a compelling nature in the record to support that petitioner's assignment to a full-time reading schedule in the district would have been disruptive or burdensome for the Board. At Weehawken High School alone petitioner's seniority accrual and certification entitled him to teach nontenured Luppino's three periods of reading (periods 2, 3, 4); Long's period 7 (because of inappropriate certification); Urchuk's period 7 (because of inappropriate certification); and Russo's period 6 since no seniority rights can be attached to an elementary certificate pursuant to N.J.A.C. 6:3-10(k)27.

Consequently, it is determined that petitioner was improperly denied employment by the Weehawken Board for the 1981-82 school year. Petitioner is entitled to immediate reinstatement as a teaching staff member and to receive all salary benefits and emoluments afforded to regular teaching staff members lost since September 1, 1981. He also accrues seniority credit for the three-year period of improper termination such that his seniority entitlement as of June 30, 1984 becomes 11.9 years as a teacher of English and 3.9 years as a teacher of reading.

Accordingly, the Board is ordered to reinstate petitioner to a teaching position as dictated by his seniority entitlement and to compensate him as determined above, less mitigation of any monies earned or unemployment benefits received since September 1, 1981.

IT IS SO ORDERED.

JULY 13, 1984

COMMISSIONER OF EDUCATION

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INITIAL DECISION
OAL DKT. NO. EDU 6203-83
AGENCY DKT. NO. 245-7/83A

E.P. REID, INC.,
Petitioner
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF HAZLET, MONMOUTH COUNTY, AND ROBERTS ELECTRONICS,
Respondent.

APPEARANCES:

James J. Guida, Esq., for petitioner

Robert H. Otten, Esq., for respondent Hazlet Board of Education (Crowell and Ottten, attorneys)

Mark L. Nichter, Esq., for respondent Roberts Electronics

Record Closed: January 30, 1984 Decided: March 15, 1984

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

Petitioner, E.P. Reid, Inc., a New Jersey corporation, alleges, among other things, that respondent Board of Education of the Township of Hazlet (Board), improperly awarded a contract for the maintenance of an installed intrusion and fire alarm system upon the Board's property to respondent Roberts Electronics (Roberts). Petitioner seeks, by way of relief, an order declaring the contracts entered into by respondents to be null

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and void; an order permanently restraining respondents from executing or performing said contracts; and, awarding the said maintenance contract for the three-year period to it commencing on July 1, 1983. The respondent Board answers, admitting and denying so much of the allegations together with three affirmative defenses. Respondent Roberts answers in like manner setting forth four affirmative and four separate defenses.

On August 9, 1983, 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. On September 1, 1983, a prehearing conference was held, at which, among other things, the court ordered the parties to submit briefs and memoranda of law with respect to the issue as to whether or not the Commissioner of Education has jurisdiction to hear and determine the herein matter. The submissions were received on October 29, 1983, and the undersigned issued an Order, Decision on Motion on November 4, 1983.

Respondents moved to dismiss the instant matter grounded upon their assertion that the issues for determination are not within the jurisdiction of the Commissioner. Petitioner opposed respondents' motion to dismiss. Having considered the arguments of the parties, the undersigned concluded that the underlying issue arose out of the Local Public School Contracts Law, N.J.S.A. 18A:18A-1 et seq., cognizable before the Commissioner by virtue of the authority vested in his office through N.J.S.A. 18A:6-9. Accordingly, respondents' motion to dismiss on jurisdictional grounds was denied with the issuance of an order joined by the parties to move forward to a plenary hearing on the issues.[1] A hearing was held on December 12, 1983, at the Monmouth County Hall of Records, Freehold, New Jersey. Thereafter, the parties submitted post-hearing memoranda of law together with proposed findings of facts and the record was considered closed on January 30, 1984.

UNCONTROVERTED FACTS AND PROCEDURAL ASPECTS

On November 16, 1982, the Board advertised for public bids for the purchase of a complete intrusion alarm system and for the service and maintenance of the intrusion and fire alarm systems for a period of three years. Petitioner submitted a bid proposal

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[1] See, E.P. Reid, Inc. v. Bd. of Ed. of Tp. of Hazlet, Monmouth County, and Roberts Electronics, Order, Decision on Motion, dated November 4, 1983.

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and was declared the lowest responsible bidder for the purchase, installation and maintenance of the alarm system. The Board, however, determined to split the bid, awarding the contract for the purchase of the intrusion alarm system to petitioner and to readvertise for bids for the service and maintenance of said system. On March 3, 1983, the Board advertised for bids for the maintenance of the intrusion and fire alarm systems for a period of three years and three months. Petitioner again submitted its bid, which was opened with others on March 24, 1983, and was determined to be the lowest of all bids submitted. The Board, however, awarded petitioner a contract for only three months and determined to solicit for a third round of bids for the service and maintenance contract of the said systems for a three-year period. Petitioner again submitted a bid pursuant to the Board's specifications (J-1), which was opened together with two other bids on June 2, 1983. Petitioner was declared the second lowest bidder, while Roberts, co-respondent herein, was declared the lowest bidder.

Included in the Board's specifications under the heading Qualifications Of Bidders is the statement, among other things, at paragraph 2 which reads:

> The bidder must be a licensed New Jersey electrical contractor and be listed by Underwriters Laboratories as a burglar alarm installation company.

On the basis of this statement, as well as other conditions in the Board's specifications, petitioner alleged that respondent Roberts, the successful bidder, was not a licensed New Jersey electrical contractor; and, further, petitioner contended that the work to be performed by the Board required that the bid be awarded to a licensed electrical contractor, pursuant to the Electrical Contractors Licensing Act of 1962, N.J.S.A. 45:5A-1 et seq. Petitioner set forth its allegations and contentions by way of letter to the Board dated June 7, 1983, requesting a hearing with the Board granting petitioner's request by subsequently holding a hearing before the Board's Buildings and Grounds Committee on June 13, 1983. Thereafter, on June 30, 1983, the Board awarded the contract to co-respondent Roberts and petitioner subsequently perfected its Verified Petition of Appeal before the Commissioner on July 15, 1983. The pleadings were joined by the submission of separate Answers to the Petition on August 2, 1983, through co-respondents Board and Roberts.

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STIPULATED FACTS

The parties stipulated that the receipt of bids as reported to the Board by its Board Secretary/School Business Administrator and as found on Exhibits R-2, were true and accurate, as follows:

RECEIPT OF BIDS June 2, 1983

The Board Secretary/School Business Administrator reports that bids were opened as per legal advertisement at 2:00 p.m. on Thursday, June 2, 1983, at the Offices of the Board of Education, 82 Bethany Road, Hazlet, New Jersey with the following vendors submitting bids for:

#83-21 INTRUSION & FIRE ALARM SYSTEMS MAINTENANCE

	Bidders		
	Garden State Fire & Security	E.P. Reid Inc.	Roberts Electronics
Bid Form	Yes	Yes	Yes
Submitted Current U.L. List	Yes	Yes	Yes
Non-Collusion Affdavit	Yea	Yes	Yes
Corporate Disclosure	Yes	Yes	Yes
Affirmative Action	Yes	Yes	Yes
Agreement of Surety	Yes	Yes	Yes
Bid Bond	$1,290	10%	$975.00
Notice of Classification	Yes	Yes	No
Total Amt. of Uncompleted Orders	No	Yes	No
Submitted Names and Addresses of 4 Similar Installations	Yes	No	Yes
MAINTENANCE COST:			
July 1, 1983 to June 30, 1984	$12,900*	$15,900	$9,750.00+

*Submitted letter indicating that the wire would have to be replaced at a cost of:

Labor 40 hours at $30.00 per hour	$1,200.00
Materials 2022 Ultrasonic Cable	300.00

+Submitted Price Schedule for Overtime and Emergency Service per unit due to vandalism, fire, water damage etc. Includes equipment and labor costs. [R-2]

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The issues to be determined by this tribunal as agreed to by the parties and as set forth in the prehearing order, dated September 1, 1983, are as follows:

1. Whether the Commissioner of Education has jurisdiction to determine the herein matter. The parties will submit [their] briefs of law on this issue pursuant to the schedule set forth under Motions hereinafter?

2. Whether the bidder is required to be a licensed electrical contractor under the bid specifications as submitted by the Board?

3. Whether the bidder is required to be a licensed electrical contractor under state statute, pursuant to N.J.S.A. 45:5A-1 et seq.?

4. Whether N.J.S.A. 45:5A-1 applies to the type of work to be performed under this contract?

5. Whether E.P. Reid, Inc., itself, is a licensed electrical contractor under state statute?

6. Whether licensure, as required by the bid, must be held by the bidder, or may held by the firm, an employee, agent or subcontractor or assignee available to the bidder?

7. Whether the Board had the authority to waive the requirement that the maintenance contract be awarded to and performed by an unlicensed contractor?

THE JURISDICTIONAL ISSUE

This issue of the Commissioner's jurisdiction was considered subsequent to the prehearing conference on September 1, 1983, and prior to the hearing held on December 9, 1983. The legal arguments of the parties as well as this court's determinations and conclusions are set forth in the court's Order, Decision on Motion attached hereto and need not be recited herein. In order to place this issue in its proper perspective and in order to consider the remaining issues, it is necessary, however, to summarize briefly and to supplement this court's determination with respect to this jurisdictional issue.

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First, this controversy arises out of the Board's requirement to comport with the statutory provisions, pursuant to the Public Schools Contracts Law as set forth at N.J.S.A. 18A:18A-1 et seq. N.J.S.A. 18A:18A-2 defines certain words and phrases found in this chapter including:

> a. "Board of education" means and includes the board of education of any local school district, . . . established and operating under the provisions of Title 18A of the New Jersey Statutes and having authority to make purchases and to enter into contracts, agreements or leases for the performance of any work or the furnishing or hiring of any materials, supplies, equipment or services usually required, the cast or contract price is to be paid with or out of board funds.
>
> b. "Contracting agent" means the secretary, business administrator or the business manager of the board of education having power to prepare advertisements, to advertise for and receive bids and to make awards for the board of education in connection with purchases, contracts or agreements as permitted by this chapter, but if there be no secretary, business administrator or business manager such officer, committee or employees to whom such power has been delegated by the board of education.
>
> c. "Contracts" for the purpose of this chapter means contracts or agreements for the performance of work or the furnishing or hiring of services, materials, or supplies as distinguished from contracts of employement.

The purpose of the New Jersey Legislature to enact the Public Schools Contracts Law was to impose requirements on purchasing procedures utilized by local boards of education similar to those imposed by the Local Public Contracts Law (N.J.S.A. 40A). See, F.S.D. Industries, Inc. v. Bd. of Ed. of the City of Paterson, 166 N.J. Super., 330 (App. Div. 1979). The statute therein governs the activities of local boards of education with respect to: purchases, contractors, agreements, advertising, exceptions (N.J.S.A. 18A:18A-3 through 10); specifications and plans (N.J.S.A. 18A:18A-11 through 14.4); bidding (N.J.S.A. 18A:18A-21 through 26); qualifications of bidders (N.J.S.A. 18A: 18A-27 through 33); awarding of contracts (N.J.S.A. 18A:18A-36 through 39); and other provisions. Thus, the herein matter lies within the ambit of the Commissioner's jurisdiction through the legislative grant of authority to hear and determine all cases and controversies "arising under the school laws," N.J.S.A. 18A:6-9.

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Second, the Commissioner's authority under N.J.S.A. 18A:6-9 is to be read broadly. The courts of this State have conferred "incidental jurisdiction" upon the Commissioner to determine those primary issues arising under the Education Laws, Title 18A, as such issues relate to and have a substantial impact upon education policies. In Sukin v. Northfield Bd. of Ed., 171 N.J. Super. 184 (App. Div. 1979), the court said:

> By virtue of the provisions of N.J.S.A. 10:4-15, any action taken by a public body which does not conform to the Open Public Meetings Act is reviewable in the Superior Court in an action in lieu of prerogative writs. That section, however, was not intended to confer exclusive jurisdiction in the Law Division or the Chancery Division. We have held that where an administrative agency of the State has primary jurisdiction to determine the underlying controversy between the parties, a trial judge should not undertake to decide issues presented under the Open Public Meetings Act but should refer those issues to the appropriate administrative agency. [citations omitted] [emphasis added] [at 186]
>
> The Commissioner of Education has complete power to hear and determine all controversies and disputes arising under the school laws. N.J.S.A. 18A:6-9. We are equally satisfied that the Commissioner has additional incidental jurisdiction to determine issues arising under the Open Public Meetings Act as they relate to controversies under the school laws. [citation omitted] [emphasis added] [at 187]

See also, Red Bank Bd. of Ed. v. Warrington, et al., 138 N.J. Super., 564, 571 (App. Div. 1976), wherein the court held that disputes over matters predominately within the scope of educational policy are cognizable by the Commissioner as a controversy arising under school laws.

Thus it can fairly be said, and our courts have so held, that where the primary or predominate interest lies with the Commissioner in the resolution of a controversy arising out of the school laws, the Commissioner has the additional "incidental jurisdiction" to determine issues arising under related laws which impact upon educational policy. Accordingly, those remaining issues herein are ripe for consideration and determination by this tribunal.

TESTIMONIAL EVIDENCE

Petitioner, E.P. Reid, Inc., in contesting the award to Roberts, alleges, among other things, that the Board's specifications clearly provided for the successful bidder to be a licensed New Jersey electrical contractor, pursuant to the provisions of N.J.S.A.

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45:5A-9; that the work to be performed was such that it required an electrical contractor license under the provisions of N.J.S.A. 45:5A-1 et seq.; that the Board was in error when it waived the provision in its specifications that the successful bidder be a licensed New Jersey electrical contractor; and that Roberts Electronics did not possess the required electrical contractor license. Mr. Edward Reid of E.P. Reid, Inc., testified, among other things, that he was familiar with the Board's intrusion and fire alarm system by virtue of having been the successful bidder for its installation and having performed the service and maintenance of the system prior to the award of contract in dispute herein.

Mr. Reid testified that he carefully examined the Board's Notice and Invitation to Bid, No. 83-21, Intrusion and Fire Alarm Systems Maintenance (J-1), and was aware that the specifications required the services be performed by a contractor who is regularly engaged with his own personnel in the maintenance of the equipment. The section of the Board's specifications referenced by Mr. Reid states as follows:

QUALIFICATION OF BIDDERS

> 1. . . . that the services be performed by a contractor who is regularly engaged with his own personnel in the maintenance of equipment of the grade and to the degree included in these specifications. [J-1]

Mr. Reid stated he had been in the electrical contracting business for fourteen years and at the time for the submission of bids, his firm employed some twenty electricians, four of whom had electrical contractor licenses in their own names. He asserted that the Board's specifications specifically set forth the provision to the successful bidder must be a licensed New Jersey electrical contractor and be listed by Underwriters Laboratories as a burglar alarm installation company (J-1). He contends that of the three bidders submitting proposals to the Board for the service and maintenance contract, his firm was the only one to meet the Board's specifications of possessing a New Jersey electrical contractors license.

Mr. Reid, opined, among other things, that the scope of the work to be performed was electrical in nature, which included in the service and maintenance of the systems, the necessity to install, remove, replate and reroute electrical power lines. Based upon his knowledge of the system, he testified that the fire alarm system was basically a 110-volt system; however, at some alarm bells, it could be as high as 220 volts. He asserted, moreover, that in no event was the fire alarm system less than 24 volts, nor was the intrusion alarm system less than 12 volts.

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Subsequent to the submission of the bids on June 2, 1983 (R-2), Mr. Reid was advised that the Board considered Roberts the low bidder and that it would award the contract to Roberts. Mr. Reid thereupon contacted the Board of Examiners of the Electrical Contractors to determine whether Roberts Electronics was, in fact, a business permittee and whether an officer, partner or employee actively engaged in Roberts' business had obtained an electrical contractors license. Mr. Reid, in making his inquiry, supplied the Board of Examiners with the license numbers that had been set forth by Roberts on the Board's bid form. Mr. Reid testified that he was advised that Roberts was not a business permittee; that no license was held by any person actively engaged in that business in Roberts' employ; and further, that the license number submitted on Roberts' bid was, in fact, issued to and held by one Leonard Richmond and the business permittee under that license was the Leonard Richmond Company. Petitioner thereafter objected to the Board's award of the contract to Roberts.

Over the objection of respondent Roberts, Robert Pilcher of Roberts Electronics was called as a witness for petitioner E.P. Reid. Mr. Pilcher was also called and testified on behalf of respondents. Mr. Pilcher asserted that his firm was disclosed the successful bidder and was awarded the contract by the Board for the service and maintenance of its intrusion and fire alarm system. He asserted that he was self-employed and had been engaged in the alarm installation and service business for approximately eight years. He admitted that neither he nor his company held an electrical contractors license. He contended, however, that he obtained the personal permission of Leonard Richmond, an independent contractor, to use Richmond's license number on the bid form Roberts submitted to the Board and, moreover, that he advised the Board's Secretary/School Business Administrator that an outside contractor would be called if necessary. Mr. Pilcher opined that he believed such advisement to the Board constituted a waiver by the Board of its sub-contractor's clause incorporated in the bid specifications. He further contended that it was his belief that the need was minimal for an electrical contractor in the servicing and maintenance of the system. He testified that he was not aware that the maintenance of a fire and intrusion system required an electrical contractors license. He contended that no license was required to do business in the trade of fire and intrusion and alarm systems. He admitted that he never made application to the Board for an exemption under the provisions of N.J.S.A. 45:5A-18 because he was not aware that his business required such an exemption.

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Mr. Pilcher asserted that since the award of the contract to Roberts he has worked on the Board's system and has not been required to run any power lines or work on any power circuits. He indicated that the nature of the service was generally confined to the replacement of indicator lights and fuses together with the replacement and adjustment of electronic/sound receptors/detectors which were supplied with minimal voltage and amperage.

The Board Secretary/School Business Administrator testified on behalf of respondents asserting, among other things, that he proposed the Notice and Invitation to Bid and the specifications contained therein. He asserted that the provision in the specifications which required the bidder to be a licensed New Jersey electrical contractor was carried over from the original bid form, which was for the installation of the fire alarm system. He contended that it was his concern that the work be performed for the protection of life and property and, as a secondary consideration, that the Board obtain the best price thereby saving the tax dollar. He testified that during the year preceding the bid and contract now in dispute, petitioner herein performed the servicing and maintenance of the system. During the year that petitioner was responsible for the maintenance, some 200 summonses had been issued by the Hazlet Police Department to the Board as a consequence of false alarms. No fines were imposed upon the Board as a result of the issued summonses. He testified that since Roberts has been performing the maintenance there has been a substantial decrease in the number of false alarms.

The Board Secretary/School Business Administrator testified that he was aware that the electrical contractor's license number shown on Roberts' bid was that of Leonard Richmond and that he had no objection to its inclusion on the bid. He asserted that on advice of the Board's counsel, it was understood that the Board had the right to waive the bid specification requirement that the successful bidder be a licensed New Jersey electrical contractor. He testified further, as the author of the bid form, that the specifications permitted the use of sub-contractors and the assignment of the bid, if necessary. He contended that the specifications contained the clause which reserved the Board's right to waive minor defects in the bid, or subsequently, to cancel the contract for noncompliance. He testified that the Board awarded the contract to Roberts with the knowledge that it did not comply with the license requirement.

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Mr. Eugene Ash, owner of the Garden State Fire and Security, Inc., an unsuccessful bidder for the Board's contract, testified, among other things, that he had been engaged in the security business for 26 years and is not a licensed electrical contractor in New Jersey. He asserted that he had installed intrusion and fire alarm systems for approximately ten other boards of education and that there had never been a requirement for a licensed electrical contractor on any of those projects. He stated that in his experience no other board of education had required an electrical contractor's license on a maintenance contract; however, where a board of education required such a license on an original installation, he used the license of a sub-contractor. He contended that he advised the Board Secretary/School Business Administrator, as did Roberts, that the license that appeared on his bid form was not a license issued to a member of his corporation.

Mr. Ash testified that sometime in the recent past, the State of New Jersey had a requirement that a licensed electrical contractor maintain and service intrusion and fire alarm systems; however, it removed the requirement from its bid specifications. He asserted that his corporation currently holds a number of service and maintenance contracts with public entities, including county, municipal and boards of education, none of which requires a licensed electrical contractor.

Mr. Leonard Richmond testified that he has been engaged in electrical work for approximately 30 years and that he has been a licensed electrical contractor since the passage of the Electrical Contractors Licensing Act. He is not an employee of Roberts; however, he works for the firm when called upon to do so. He gave Roberts permission to use his license number on Roberts' bid submission to the Board and, he asserted, that the Board knew the license was issued to Richmond because his name appeared on the license.

FINDINGS OF FACT

Having considered the entire record before me including the testimony and exhibits offered into evidence; and having given fair weight thereto; and having observed the demeanor of the witnesses and assessed their credibility, I **FIND** the following **FACTS:**

1. Those uncontested facts and stipulated facts set forth hereinbefore are adopted, by reference, as findings of fact.

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2. The Board's Notice and Invitation to Bid for a contract to service and maintain its intrusion and fire alarm system included in its specifications the provision, among others, that the bidder be a licensed electrical contractor of the State of New Jersey.

3. At the time of its bid submission to the Board, petitioner E.P. Reid, Inc., and Edward P. Reid was a business permittee and licensee pursuant to N.J.S.A. 45:5A-9; having been issued License Number 4065 by the Board of Examiners of Electrical Contractors of the State of New Jersey.

4. At the time of its bid submission to the Board, neither Roberts Electronics nor Robert Pilcher, its owner, was a business permittee or licensee, pursuant to N.J.S.A. 45:5A-9(a).

5. Petitioner E.P. Reid, Inc., has been engaged in the electrical contracting business for a period of 14 years, employing 20 service personnel on a full-time basis, with 4 such employees in possession of New Jersey electrical contractor licenses in their own name.

6. The Board waived the specification requiring Roberts Electronics to be a licensed electrical New Jersey contractor by permitting Roberts to use and submit the license of Leonard Richmond, a licensed electrical contractor.

7. Both of the Board's intrusion and fire alarm systems are in excess of 10 volts; the intrusion system operated through a 12-volt system and the fire alarm system is not less than 24 volts at a minimum to 110 volts at maximum.

8. Not all of the work to be performed by the contract is exempt, pursuant to N.J.S.A. 45:5A-18.

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DISCUSSION

The Board admits that its specifications included, among other things, the provision that the successful bidder ". . . must be a licensed New Jersey electrical contractor" (J-1). It excuses such included language by asserting that the phrase was an inadvertence, merely a carryover from its previous invitation to bid for the installation of its fire alarm system. Moreover, it contends that it was not bound by the language of its specifications by virtue of its disclaimer clause ". . . to waive minor defects" for "any good and sufficient reason" (J-1). The question here, therefore, is whether the Board's application of its waiver clause to the specification requiring the successful bidder to be a licensed New Jersey electrical contractor constitutes a "minor defect." While it is recognized that the law permits inconsequential variance to be waived by public entities, material or substantial departures from bidding specifications are impermissible. Hillside Tp. v. Sternin, 25 N.J. 317 (1957).

At this juncture, resort must be given to an examination of the statute N.J.S.A. 45:5A-9 and specifically to the provisions embodied in N.J.S.A. 45:5A-18, exemptions. N.J.S.A. 45:5A-9 provides, in pertinent part, as follows:

> (a) On or after July 1, 1963, no person shall enter into, engage in or work in business as an electrical contractor, unless such person has secured a business permit and such person or an officer, partner or employee who is or will be actively engaged in the business for which a business permit is sought has obtained a license from the Board in accordance with the provisions of this act, and such licensee shall assume full responsibility for inspection and supervision of all electrical work to be performed by the permittee in compliance with recognized safety standards. A licensee shall not be entitled to qualify more than one person for a business permit.
>
> Any single act or transaction shall constitute engaging in the business of electrical contracting within the meaning of this chapter. [emphasis added]

Certain electrical work, however, is exempt from the above statute and is set forth, in part, at N.J.S.A. 45:5A-18, as follows:

> Electrical work or construction which is performed on the following facilities or which is by or for the following agencies shall not be included within the business of electrical contracting so as to require the securing of a business permit under this act:

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(a) Minor repair work such as the replacement of lamps and fuses.

(b) The connection of portable electrical appliances to suitable permanently installed receptacles.

(c) The testing, servicing or repairing of electrical equipment or apparatus.

. . . .

(j) Any work with a potential of less than 10 volts.

. . . .

(l) Installation, repair or maintenance performed by regular employees of the State or of a municipality, county, or school district on the premises or property owned or occupied by the State, municipality, county, or school district.

. . . .

The board may also exempt from the business permit provisions of this act such other electrical activities of like character which in the board's opinion warrant exclusion from the provisions of this act. [emphasis added]

The facts herein clearly demonstrate that petitioner E.P. Reid, Inc., and Mr. Reid was licensed pursuant to N.J.S.A. 45:5A-9, while the successful bidder, Roberts Electronics was not. It is equally clear that at no time has Roberts sought an exemption from the Electrical Contractors' Board of Examiners to engage in "other electrical activities of like character" as provided by N.J.S.A. 45:5A-18. In addition, the work to be performed on the contract involved electrical power in excess of 10 volts; i.e., a 12-volt system for the intrusion alarm and a 24-volt system for the fire alarm installations. Thus, Roberts Electronics was not covered as a licensee or permittee under the statute, N.J.S.A. 45:5A-9, nor was he exempt under N.J.S.A. 45:5A-18(j) or (l). It would appear, therefore, that a single nonexempt act triggers the enforcement of N.J.S.A. 45:5A-9, and the work to be performed under the Board's contract requires that it be done by a licensed New Jersey electrical contractor. Bd. of Examiners v. S.T. Peterson & Co., Inc., 106 N.J. Super. 599 (App. Div. 1969).

Our courts have held that a public entity may not waive a statutory requirement in a competitive bidding system. George Harms Constr. Co. v. Borough of Lincoln Park, 161 N.J. Super. 367, 373, 377 (Law. Div. 1978). Nor may a public entity

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waive a material condition contained in its bidding specifications. Hillside v. Sternin, supra, George Harms, supra, Terminal Const. Corp. v. Atlantic Cty. Sewage Auth., 67 N.J. 403, 411-412 (1978). A minor or inconsequential irregularity in the specifications may be waived if it is one which is merely a matter of form or of some inconsequential defect. George Harms, supra. However, where there is any doubt as to the materiality of a bidding error, the public entity making the decision should resolve the error on the side of strictness. As the court said in George Harms, supra, at 375:

> Insistence on literal compliance with the letter of every specification serves to foster the public purpose of genuine competition on common terms. In this regard, our Supreme Court has stated that when in doubt as to the materiality of a bid error, the authority making the decision should err on the side of strictness, for "[i] in this field it is better to leave the door tightly closed than to permit it to be ajar, thus necessitating forevermore * * * speculation as to whether or not it was purposely left that way." Hillside Tp. v. Sternin, supra. 25 N.J. at 326. In Sternin the Supreme Court concluded:
>
> > * * * the efficacy of our competitive bidding statute depends upon its rigorous enforcement. Approval of a relaxation even to the extent sought in this instance [of failure to submit a certified check with the bid] would make necessary an evaluation in future cases of sensitive, subtle and subjective criteria, and such a practice does not harmonize with the underlying objective of the Legislature. [at 327-28]

Thus, under the statutes N.J.S.A. 45:5A-9 and 18, the Board was foreclosed from waiving the material requirement that the work of the contract be performed by a licensed New Jersey electrical contractor. Such a requirement is statutory, material and substantial and, in no manner can it be said to be minor or of no consequence. As the court further said in George Harms, supra:

> A competitive bidding system can only be fully effective if the advertised conditions and statutory requirements apply equally to all prospective bidders, since there is otherwise no common standard of competition. . . .[T] he "lowest bidder" is not simply the one who submits the lowest bid, but rather the one who submits the lowest bid which conforms with the specifications and statutory requirements.[Id. at 374]

See also, Tice v. Long Branch, 98 N.J.L. 214 (E.&A. 1922); Tp. of River Vale v. R.J. Longo Const. Co., 127 N.J. Super. 207 (Law Div. 1974); Longo Associates v. Bd. of Ed. of Pascack, 3 N.J.A.R. 66 (1981).

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CONCLUSIONS

Based upon the facts adduced at hearing together with the applicable statutes, case law and decisional law, I **CONCLUDE** that Roberts Electronics' bid was not responsive to the Board's specifications, pursuant to N.J.S.A. 18A:18A-22, requiring it to be a licensed New Jersey electrical contractor.

I **CONCLUDE** that by virtue of the prevailing statute, Roberts Electronics at no time sought an exemption from the Electrical Contractors Board of Examiners to engage in "other electrical activities of like character" as provided by N.J.S.A. 45:5A-18.

I **CONCLUDE** that the Board was without authority to waive the statutory provision requiring the work to be performed on its intrusion and fire alarm system, pursuant to N.J.S.A. 45:5A-9.

I **CONCLUDE** that the contract entered into between the Board of Education of the Township of Hazlet and Roberts Electronics grounded upon the Board's erroneous waiver of the statutory requirement is void and without force or effect.

ORDER

Accordingly, it is hereby **ORDERED** that the award and acceptance of the Roberts Electronics bid by the Board of Education of the Township of Hazlet be and is hereby vacated.

It is further **ORDERED** that the Board readvertise for bids for the service and maintenance of its intrusion and fire alarm system consistent with the findings, discussion and conclusions of this decision.

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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.

15 March 1984
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

3/15/84
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

March 20, 1984
DATE

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

ij/ee

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DOCUMENTS IN EVIDENCE

J-1 Notice and Invitation to Bid, Hazlet Township Board of Education

P-1 Letter, dated June 7, 1983, to the Hazlet Board of Education from E.P. Reid (For Identification Only)

R-1 Bid Submission by Roberts Electronics and Securities, dated June 2, 1983

R-2 Report of Bid Opening on June 2, 1983

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E.P. REID, INC.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAZLET AND ROBERTS ELECTRONICS, MONMOUTH COUNTY,	:	DECISION
RESPONDENTS.	:	

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

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

In its exceptions to the initial decision by Judge Law the Board argues that he erred in his Decision on Motion in this matter dated November 4, 1983. The Board declares that the reliance by the judge on Sukin, supra, is misplaced and, as a consequence, it must be concluded that the Commissioner has no jurisdiction in the present matter. The Commissioner deems it proper at this juncture to state that this contention is without merit. The Commissioner notes that N.J.S.A. 18A:18A-1 et seq., the Public Schools Contracts Law, governs activities of local boards of education with regard to bidding practices to purchase goods and services. Further, the Commissioner finds Sukin to be directly on point. The Commissioner so holds.

The Board's exceptions further state:

> "***It was totally unnecessary to develop an interpretation of an unrelated statute and then to hold that the statute in question could not be waived by the Board of Education without reference to its rights*** to waive minor defects.***" (at p. 4)

The Board continues in its exceptions:

> "***To saddle the taxpayers of this state with the additional cost attendant upon utilization of licensed electrical contractors when it is

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established that they are no more competent or proficient in delivering the specific services required is baffling indeed.***" (at p. 7)

The Commissioner must disagree with such contentions. He notes with approval the Findings of Fact herein listed by the judge, ante:

"7. Both of the Board's intrusion and fire alarm systems are in excess of 10 volts; the intrusion system operated through a 12-volt system and the fire alarm system is not less than 24 volts at a minimum to 110 volts at maximum.

"8. Not all of the work to be performed by the contract is exempt, pursuant to N.J.S.A. 45:5A-18."

The Commissioner observes further the judge's language, ante, concerning the prohibition that a public entity may not waive a statutory requirement in a competitive bidding system:

"***A minor or inconsequential irregularity in the specifications may be waived if it is one which is merely a matter of form or of some inconsequential defect. George Harms, supra. However, where there is any doubt as to the materiality of a bidding error, the public entity making the decision should resolve the error on the side of strictness. As the court said in George Harms, supra, at 375:

'Insistence on literal compliance with the letter of every specification serves to foster the public purpose of genuine competition on common terms. In this regard, our Supreme Court has stated that when in doubt as to the materiality of a bid error, the authority making the decision should err on the side of strictness, for "[i]n this field it is better to leave the door tightly closed than to permit it to be ajar, thus necessitating forevermore***speculation as to whether or not it was purposely left that way." Hillside Twp. v. Sternin, supra. 25 N.J. at 326. In Sternin the Supreme Court concluded:

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> "***the efficacy of our competitive bidding statute depends upon its rigorous enforcement. Approval of a relaxation even to the extent sought in this instance [of failure to submit a certified check with the bid] would make necessary an evaluation in future cases of sensitive, subtle and subjective criteria, and such a practice does not harmonize with the underlying objective of the Legislature. [at 327-28]"'

"Thus, under the statutes N.J.S.A. 45:5A-9 and 18, the board was foreclosed from waiving the material requirement that the work of the contract be performed by a licensed New Jersey electrical contractor. Such a requirement is statutory, material and substantial and, in no manner can it be said to be minor or of no consequence. As the court further said in George Harms, supra:

> 'A competitive bidding system can only be fully effective if the advertised conditions and statutory requirements apply equally to all prospective bidders, since there is otherwise no common standard of competition....[T]he "lowest bidder" is not simply the one who submits the lowest bid, but rather the one who submits the lowest bid which conforms with the specifications and statutory requirements.' [Id. at 374]***"

The Commissioner agrees with the judge, ante, that the "***requirement that the work of the contract be performed by a licensed New Jersey electrical contractor***is statutory, material and substantial and, in no manner can it be said to be minor or of no consequence." The Commissioner so holds.

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

The Commissioner agrees with the terms of the judge's order, ante, repeated herewith for convenience and clarity:

> "***Accordingly, it is hereby ORDERED that the award and acceptance of the Roberts Electronics bid by the Board of Education of the Township of Hazlet be and is hereby vacated.

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"It is further ORDERED that the Board readvertise for bids for the service and maintenance of its intrusion and fire alarm system consistent with the findings, discussion and conclusions of this decision."

IT IS SO ORDERED.

APRIL 30, 1984 COMMISSIONER OF EDUCATION

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INITIAL DECISION
OAL DKT. NO. EDU 6613-83
AGENCY DKT. NO. 264-7/83A

C.B., AN INFANT
BY HER MOTHER AND
NATURAL GUARDIAN, S.B.,
Petitioner,
v.
BOARD OF EDUCATION
OF THE CITY OF TRENTON,
MERCER COUNTY,
Respondent.

APPEARANCES:

David Kravitz, Esq., for petitioner (Weston, Kravitz & Rank, attorneys)

Robert G. Rottkamp, Jr., Esq., for resondent (Merlino, Rottkamp & Flacks, attorneys)

Record Closed: January 30, 1984 Decided: March 14, 1984

BEFORE **M. KATHLEEN DUNCAN**, ALJ:

This matter was commenced on July 26, 1983, with the filing of a Petition of Appeal seeking a determination that the Board of Education of the City of Trenton (hereinafter respondent) had wrongfully suspended C.B. (hereinafter petitioner) as a result of an incident on January 6, 1983. An Answer to the Petition was filed on behalf of respondent on August 11, 1983, and the matter was thereafter transmitted to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq.

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A prehearing conference was conducted in the matter on October 7, 1983, and the Prehearing Order which was issued as a result thereof on October 20, 1983, set forth the following issue for determination at hearing:

> Did respondent have a reasonable basis for its action suspending C.B. for three days?

The plenary hearing was scheduled for December 5, 1983, at the Trenton office of the Office of Administrative Law. That date was subsequently adjourned because petitioner's counsel had a conflicting obligation in Federal District Court. The matter was rescheduled and was heard on January 30, 1984, at the Trenton office of the Office of Administrative Law. Neither party indicated a desire to file any posthearing written submissions. Accordingly, the record closed at the conclusion of testimony on January 30, 1984.

FINDINGS OF FACT

Some of the relevant facts in this matter are not in dispute and I, therefore, **FIND** the facts set forth in the following summary as uncontested facts.

Petitioner is an eighth grade student in respondent's school district. The incident which gave rise to the three-day suspension which is the subject matter of the within proceedings occurred on January 6, 1983, in Mr. Eugene Podraza's English class. Petitioner, whom Mr. Podraza considers to be a polite, intelligent student, entered the classroom at approximately 2:00 p.m. with the other members of the class. Prior to commencement of the lesson, Mr. Podraza was having a conversation with a boy in the class about a problem he (Mr. Podraza) was having with his digital wristwatch and calculator. Mr. Podraza indicated that he did not know how to reset the time, so that the watch had been wrong ever since day-light savings time had changed. The boy indicated that he knew how to do it, so Mr. Podraza had handed the watch to the boy to reset it.

During the class period the boys in the class were passing the watch around the room; each was attempting to fix it. Towards the end of the period, Mr. Podraza asked that his watch be returned, and when no one would acknowledge then having the watch, Mr. Podraza went to the door and called Mr. Jones, the security guard. The seven girls who were in the class were escorted across the hall to the classroom of another teacher,

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where they remained until the end of the period. Mr. Jones and Mr. Podraza remained in Mr. Podraza's classroom and questioned the boys concerning the whereabouts of the watch. After the bell rang, indicating the end of the last period of the day, the girls returned to Mr. Podraza's classroom to get their books. Since Mr. Podraza had not recovered his watch at that point, he announced that everyone was going to have to stay until the watch was located, even if it took until 12:00 midnight. Mr. Jones was still attempting to retrieve the watch from the boys who were standing around at the back of the room. He indicated to them that if the watch were not returned there might be a "strip search". At this point the girls were standing around the front of the room near the doorway. The boys were grouping behind them. Mr. Podraza was standing in the doorway with one hand on each side of the door frame, blocking the students' exit. William B. Carter, a social studies teacher who was on hall duty and who had previously entered the classroom to try and persuade the boys to return the watch so that everyone could go home, was standing in the hallway behind Mr. Podraza. Three girls were standing directly in front of Mr. Podraza inside the classroom; petitioner was in the middle of this first group. A boy announced from the back of the group of students, "On the count of three, we're all going to push out of here;" he counted to three, and the students began pushing their way out of the room. Mr. Podraza, who was still standing in the doorway and who had momentarily turned his head to the side, felt an open hand slap him on the left side of his face. At this point, Mr. Podraza removed his hands from the door frame and was pushed out into the hallway.

Petitioner and another student were apprehended as they were leaving the building by the building principal, Mr. Williams, who said that he had heard them screaming in the hallway, and he took them to his office. Petitioner was then sent to the office of the vice-principal, Mr. Lacross, who in the interim had been informed of the earlier events by Mr. Podraza, and a suspension slip was issued.

Petitioner served a three-day-in-school-suspension as a result of the incident in Mr. Podraza's classroom; when the Board of Education considered the case at its April 28, 1983 meeting, it adopted the recommendation of the Legal Committee which had upheld the suspension, finding as follows:

> On the basis of testimony heard by the Director of Legal Hearings, witnesses for the district and testimony of the pupil, I find sufficient evidence for me to conclude that the above mentioned student, did in fact slap a teaching staff member, Mr. Podraza, in violation of school rules and regulations. However, given the

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> totality of the circumstances, it is recommended that no further punishment be given other than the 3 day suspension which has already taken place. (J-1 in evidence).

The within action followed. This concludes the recitation of the uncontested facts.

The contested facts relate solely to petitioner's contention that she was not guilty of intentionally slapping Mr. Podraza. Petitioner's mother testified in this regard that petitioner had said to her directly following the incident that she had been afraid that she was going to have to stay in the classroom until 12:00 at night and that she was afraid that there might be a strip search. Petitioner's mother stated, "She said she was fighting her way out of the classroom."

Petitioner testified that she remembered touching somebody while she was pushing her way out of the classroom, but she did not know who she "touched". She indicated that she did not touch or push anyone deliberately and that she did not slap anyone in the face.

Mr. Podraza testified that petitioner was standing directly in front of him as he was blocking the doorway. He indicated that a couple of times she had grabbed his wrist and had tried to remove his hand from the doorway. Although Mr. Podraza did not see who slapped him, he felt that because of petitioner's position it was not possible for someone else to have hit him. "After the slap came, I turned and looked back, and she turned around and looked back at me," Mr. Podraza testified concerning petitioner.

Mr. Carter, who was a candid, sincere and credible witness with no apparent bias or interest in the outcome of the case, indicated that from his location in the hallway, behind Mr. Podraza, he had a clear view of the classroom over Mr. Podraza's shoulder. He testified that from his position he observed the students, with arms flying, pushing through the doorway. He testified that he saw petitioner slap Mr. Podraza on the left side of his cheek; he said that he did not hear the slap and did not observe any red mark following the slap. He testified that the slap had caused Mr. Podraza to remove his hands from the doorway. He speculated that probably petitioner was just excited and upset, but he also indicated that he did not think that the slap was an accident.

With respect to this contested issue of fact, I **FIND** the facts to be as set forth in the testimony of Mr. Podraza and Mr. Carter. I **FIND** that in a moment of excitement and agitation, petitioner knowingly and willfully slapped Mr. Podraza on the side of his

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face with her open hand. Since petitioner is a quiet, pleasant, good student, not previously subject to any disciplinary action, she was undoubtedly immediately shocked by her own actions and most certainly regretted her momentary loss of control. I do not believe that petitioner was intentionally falsifying her testimony when she insisted that she had not slapped Mr. Podraza; in all likelihood, petitioner has convinced herself that she could not have done such a thing and, therefore, that she did not.

APPLICABLE LAW AND DISCUSSION

Power to suspend is vested in each building principal subject to review by the local school board. N.J.S.A. 18A:37-4. Respondent's Board meeting minutes for March 14, 1983, indicate that the charge considered with respect to petitioner was "assault on teacher". The Petition filed herein also refers to "assault upon a teacher" as the basis for the three-day-in-school suspension. The statutory provisions with respect to an assault by a pupil on a teacher are set forth at N.J.S.A. 18A:37-2.1 and provide as follows:

> Any pupil who commits an assault, as defined pursuant to N.J.S.A. 2C:12-1, upon a teacher, administrator, board member or or other employee of a board of education, acting in the performance of his duties and in a situation where his authority to so act is apparent, or as a result of the victim's relationship to an institution of public education of this State, shall be immediately suspended from school consistent with procedural due process pending expulsion proceedings before the local board of education. Said proceedings shall take place no later than 21 calendar days following the day on which the pupil is suspended.

N.J.S.A. 2C:12-1 defines assault, in pertinent part, as follows:

> a. Simple assault. A person is guilty of assault if he:
>
> (1) Attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or
>
> (2) Negligently causes bodily injury to another with a deadly weapon; or
>
> (3) Attempts by physical menace to put another in fear of imminent serious bodily injury.
>
> Simple assault is a disorderly persons offense unless committed in a fight or scuffle entered into by mutual consent, in which case it is a petty disorderly persons offense.

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"Bodily injury" is defined at N.J.S.A. 2C:11-1a as "physical pain, illness or impairment of physical conditions". Under the circumstances of the present matter, the slap on the face necessarily caused some physical pain, however minimal, to Mr. Podraza. Consequently, the Board was correct in concluding that petitioner was guilty of a technical assault upon a teacher.

The standard of review to be applied in determining the appropriateness of the Board's action in this matter is set forth in Kopera v. West Orange Board of Education, 60 N.J. Super. 288 (App. Div. 1960). The court therein held that where the issue is one involving the exercise of a local board's discretion, the scope of the Commissioner's review is "not to substitute his judgment for that of those who made the evaulation, but to determine whether they had a reasonable basis for their conclusions." Id. at 297. Under the circumstances in the present matter, the imposition of a three-day-in-school suspension was unquestionably a reasonable exercise of the Board's discretionary power. It is axiomatic that physical actions by students against teachers cannot be tolerated in a school system. To permit behavior such as petitioner's to go unpunished would be to erode respondent's ability to maintain discipline and a proper learning environment in its school system. Even if petitioner had not intentionally slapped Mr. Podraza, by her own admission she was "fighting her way out of the classroom". Such defiance of authority in and of itself would have warranted the imposition of a three-day-in-school suspension without anything further having occurred. Undoubtedly, respondent tempered its disciplinary action in petitioner's case because of her previously unblemished record. Accordingly, for all the foregoing reasons, respondent's determination with respect to petitioner's action of January 6, 1983, is hereby **AFFIRMED.**

It is further **ORDERED** that pursuant to E.E. v. Board of Education of the Township of Ocean, Monmouth County, 1971 S.L.D. 97, 101-102 and W.G. v. Board of Education of the Township of Ocean, Monmouth County, 1974 S.L.D. 781, 785, respondent is directed to refrain from placing any notation of the assault incident herein on petitioner's official transcript of permanent record. The reason for this restriction was set forth by the Commissioner in E.E. v. Board of Education of the Township of Ocean, supra:

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

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

See also, N.J.A.C. 6:3-2.1 et seq. If respondent has already made such a notation on petitioner's permanent record, it is **ORDERED** expunged.

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.

March 14, 1984
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

March 15, 1984
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

March 20, 1984
DATE

Ronald J. Parker Jr.
OFFICE OF ADMINISTRATIVE LAW

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OAL DKT. NO. EDU 6613-83

EXHIBITS IN EVIDENCE

J-1 Trenton Board of Education Minutes for April 28, 1983 (3 pages)

WITNESSES

For petitioner:	S.B., petitioner's mother
	C.B., petitioner
For respondent:	Eugene Podraza
	William B. Carter

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C.B., an infant by her mother and natural guardian, S.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the record of the controverted matter herein including the initial decision rendered by the Office of Administrative Law, M. Kathleen Duncan, ALJ.

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

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own. The Commissioner notes with approval the judge's direction to the Board that no notation of the incident herein appear on C.B.'s permanent record. Otherwise, the Petition of Appeal is hereby dismissed.

APRIL 30, 1984 COMMISSIONER OF EDUCATION

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INITIAL DECISION
OAL DKT. NO. EDU 8246-83
AGENCY DKT. NO. 317-9/83A

G.L.D. and H.W.D.,
on behalf OF F.D.,
Petitioners
v.
MANALAPAN-ENGLISHTOWN
REGIONAL BOARD OF EDUCATION
Respondent.

APPEARANCES:

G.L.D., petitioner, Pro Se

Sanford Brown, Esq., for respondent (Dawes & Brown, attorneys)

Record Closed: February 3, 1984 Decided: March 13, 1984

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

Petitioners are the parents of a daughter who is presently enrolled in the third grade of the Board's schools. Petitioners challenge a demand made upon them by the Board for payment of tuition for their daughter to attend school while in first grade during 1981. The Board contends the demand made is proper. After 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. 52:14F-1 et seq., a hearing was scheduled and conducted on January 10, 1984 at the Englishtown Municipal Court. Thereafter, counsel for the Board filed a letter brief in support of its position. After allowing ten days for petitioners to respond thereto, the record closed February 3, 1984.

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BACKGROUND FACTS

Prior to September 15, 1981 petitioners were residents of Jackson Township. On or about May 1, 1981 petitioners entered a contract (P-4) with a builder, since bankrupt according to petitioners, for the construction of a new home in the Twin Gates area of Manalapan. Petitioners, in reliance upon the builders representation to them that their home would be completed for occupancy prior to the start of the 1981-82 academic year, sold their Jackson Township home sometime in May, 1981. For whatever reason, construction on petitioners' new home in Manalapan did not commence until June 1981 and the foundation was not laid until late June or early July. Though petitioners remained in their Jackson Township home during June, July and August, occupancy of their Jackson Township home was commenced by the purchasers on or about September 14, 1981, following transfer of title and closing. On September 15, 1981, petitioners' home in Manalapan still was not ready for occupancy. The family, being required to vacate their Jackson Township home, secured temporary lodging at the Freehold Motor Lodge on September 15, 1981, located in Freehold Township. There are no similar facilities in Manalapan-Englishtown.

Shortly after entering the Freehold Motor Lodge, petitioner's wife visited the Board's school and explained to school authorities the situation in which they found themselves. Petitioner's wife explained they contracted with a builder for a new home in Manalapan; they anticipated that the home would be ready for occupancy prior to the commencement of the academic year; the builder was behind schedule and their home was not completed; they had every intention of establishing residency in Manalapan; they had a daughter who was then eligible for first grade enrollment, and they did not want to place their daughter into the Freehold Township school district for first grade, only to transfer her to Manalapan when their new home was finished; and, they wanted to enroll their daughter into the first grade of the Board's school. Petitioner admits that his wife was advised of the Board's policy on non-resident tuition and that while their daughter could be enrolled into the Board's first grade, the tuition policy would apply.

The Board's tuition policy for non-resident students provides in full as follows:

A. DEFINITION

> Non-resident students are defined as those students whose parents or guardians reside outside the school district or who are not included in any of the categories of resident students.

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B. ADMISSION

1. Non-resident students eligible for any special education classes conducted by the District may be accepted for enrollment upon the recommendation of the Superintendent. The student's resident district is responsible for tuition.

2. Tuition students other than special education students will not be accepted for enrollment.

3. Parents who present evidence that they have signed a contract to buy, build, or rent a residence within the school district may enroll their children at the beginning of the school year if they expect actually to become residents by November 1st of that school year. Parents who enroll their children under this provision must pay tuition costs from the beginning date of the child's school year to such date as evidence of residency has been presented. Monthly tuition rates will be the annual rate divided by 10.

Petitioners' daughter was enrolled in the first grade of the Board's school on or about September 15, 1981. In the meantime, petitioners' new home in Manalapan was the last one to be constructed by the builder. Petitioner and his family moved into their new home November 10, 1981. Closing on that home occurred December 1981. It should be noted that petitioner testified the contract with the builder called for a closing date of October 1, 1981 on the new home.

At a time prior to December 31, 1981 the Board sent petitioner a bill for his daughter's tuition for the days she was in attendance during October 1981 and November 2, 4, 5, 6, 9, 1981 in the amount of $266.11. The Board Secretary/Business Administrator testified that the Board made no tuition demand upon petitioner for September because the Board granted that month to petitioner as a grace period. November 9, 1981 was the last date for which tuition was assessed because petitioner and his family occupied their home in Manalapan on November 10, 1981 and, accordingly, acquired the status of residents and their domicile became Manalapan.

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Petitioner did not respond to the tuition bill received. Accordingly, he received a second tuition bill, for the same period, on or about March 30, 1982. Petitioner testified that he immediately contacted the Board Secretary by telephone to persuade her that he should not be billed for tuition under the circumstances. Petitioner testified that he was told that nothing could be done about the matter because all persons in his situation are treated the same. Petitioner appealed to the Monmouth County superintendent of schools, who could not resolve the matter. Finally, petitioner testified that he contacted the Division of Controversies and Disputes at the Department of Education where he received the advice that he should file a petition of appeal before the Commissioner.

The foregoing facts are undisputed in the record and, accordingly, I find the foregoing facts to be the facts of the matter.

DISCUSSION

It is recognized that all children in the State between the ages of five and eighteen years of age are entitled to "* * * a thorough and efficient system of free public schools* * *" N.J. Const., (1947), Art. VIII, Section 4, par. 1. N.J.S.A. 18A:38-1 provides that "Public schools shall be free to the following persons over 5 and under 20 years of age: (a) Any person who is domiciled within the school district * * *." A board of education, however, may admit non-resident pupils into their school district upon such terms as it deems necessary. N.J.S.A. 18A:38-3 provides in full as follows:

> 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.

In this case, the Board has a policy governing the enrollment of non-resident pupils in their schools. It is clear that at the time petitioner and his family were residing at the Freehold Motor Lodge, they were not residents of, nor domiciled in, Manalapan. Through an unfortunate circumstance, petitioners could not occupy their home in Manalapan at the commencement of the 1981-82 year. However, the builder with whom petitioner contracted appears, according to petitioner's testimony, to be the cause of that

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unfortunate circumstance. When petitioner's wife first appeared at the Board's school on or about September 15, 1981, and explained the circumstance to school officials, petitioner's wife, it is admitted, was immediately made aware of the Board's policy for non-resident pupils. Having that knowledge, petitioner elected to enroll his child into the first grade of the Board's school and to be bound by the terms of that policy. At all times material herein, the Board was candid with petitioners. Petitioners knew, well in advance of enrollment, that they would be charged tuition so long as they were not residents of Manalapan. That they resided in Freehold Township, but elected to enroll their daughter in the Board's school, is a choice petitioners made. Petitioner's position that he did not want his daughter to change schools midway through the first semester of first grade is appreciated. The choice was a wise one. However, at the time the choice was made, petitioner, as a non-resident, was subject to the terms of the Board's policy as it was explained to him.

In a similar matter, James J. White v. Boonton Township Board of Education, 1976 S.L.D. 876, White, who was a resident of Mountain Lakes, had contracted to purchase a home in Boonton. White offered for sale his home in Mountain Lakes and, on the day prior to the opening of school in September, enrolled his son in Boonton. White's son attended Boonton school the entire 1973-74 school year, notwithstanding the fact that White was unsuccessful in selling his Mountain Lake home. During February 1974, White sold the house earlier purchased in Boonton. Consequently, White's son attended the Boonton school for the entire 1973-74 year without White having been a resident of Boonton. The fact that a non-resident pupil was attending their schools, notwithstanding the board's existing policy of not accepting non-resident pupils, was not related to the board until June 1974. School officials had not informed petitioners of the board's policy. Petitioners did not conceal to school authorities the factual circumstance of having purchased a home in Boonton, while still residing in Mountain Lakes waiting for the sale of the Mountain Lakes home which, of course, never materialized. When the Boonton board attempted to collect tuition from White for the entire 1973-74 year the Commissioner rejected that request and noted that had White been advised of the board's policy at the commencement of the 1973-74 year, White would have had the opportunity to either accept and enroll his son, subject to tuition, or reject such financial obligation and enroll his son without charge in the district where he, White, was domiciled. 1976 S.L.D. 884.

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In this case, school authorities specifically advised petitioner's wife of the Board's conditions for accepting a non-resident pupil for enrollment in its schools. Petitioners accepted the conditions for such enrollment. I find nothing improper in respect of the demand made by the Board upon petitioners for tuition during the controverted period of time.

I **CONCLUDE** that petitioners have failed to establish by a preponderance of credible evidence that the Board, in respect of its demand made upon him for tuition payment on behalf of his daughter, is improper. The Board has statutory authority to adopt and implement a policy in regard to tuition for nonresident pupils so long as such policy is not arbitrary nor otherwise improper. The Petition of Appeal is **DISMISSED.**

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

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OAL DKT. NO. EDU 8246-83

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

DATE

DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

3/14/84
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

March 16, 1984
DATE

Ronald L. Lasker/pkw
OFFICE OF ADMINISTRATIVE LAW

ij

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LIST OF EXHIBITS

P-1 Letter, November 23, 1983, petitioner to Board counsel
P-2 Photocopies of back paid bank checks drawn on petitioners' account
P-3 Certificate of occupancy
P-4 Contract
P-5 Front page and first page of deed
P-6 Settlement Statement
P-7 Handwritten letter to the Board from petitioner

R-1 Board policy, non-resident students
R-2 Letter, April 5, 1982, to petitioner from Board secretary
R-2a Invoice from Board to petitioner

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G.L.D. AND H.W.D., on behalf of F.D.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MANALAPAN-ENGLISHTOWN REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

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

Accordingly, the Petition of Appeal is hereby dismissed. Petitioners shall comply with the Board's policy in regards to tuition for nonresident pupils.

APRIL 30, 1984 COMMISSIONER OF EDUCATION

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INITIAL DECISION
OAL DKT. NO. EDU 5222-83
AGENCY DKT. NO. 132-5/83A

CAROLYN MAHAN,
Petitioner
v.
HADDON HEIGHTS BOROUGH BOARD OF EDUCATION,
Respondent

APPEARANCES:

Steven R. Cohen, Esq., for petitioner (Selikoff & Cohen, attorneys)

Anne McDonnell, Esq., for respondent (Hannold, Caulfield, Marshall & McDonnell, attorneys)

Record Closed: February 1, 1984 Decided: March 19, 1984

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

Carolyn Mahan (petitioner), a teacher with a tenure status in the employ of the Board for 1982-83, claims that the determination by the Board that she undergo psychiatric examination is, under the circumstances, improper and violative of her constitutional rights. 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. 52:14F-1 et seq. A hearing was scheduled and conducted in the matter on December 14, 1983 and again on January 31, 1984 at the Gloucester County Courthouse Annex, Woodbury. The record closed February 1, 1984.

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BACKGROUND FACTS

The following background facts of the matter are undisputed.

On December 28, 1982 the Board adopted the following resolution, the contents of which forms the basis for the present action:

> WHEREAS, pursuant to N.J.S.A. 18A:16-2, whenever circumstances warrant, the Board of Education may require psychiatric or physical examinations of any employee; and
>
> WHEREAS, [petitioner] having consented to an examination by Richard Corbett, M.D., Board Physician, on December 17, 1982; and
>
> WHEREAS, Richard Corbett, M.D. having recommended to the superintendent that petitioner be examined by a psychiatrist.
>
> NOW, THEREFORE, BE IT RESOLVED by the Haddon Heights Board of Education,
>
> > That [petitioner] be and is hereby directed to attend an exmination by George W. Hager, M.D. * * * on Monday, January 17, 1983 at 3:15 p.m. o'clock * * * (J-12)

During the early morning of December 17, 1982, prior to the asserted physical examination by Dr. Corbett petitioner was "relieved" of her teaching duties by the superintendent at a meeting conducted in his office. That meeting was attended by petitioner, the superintendent, the president of the Haddon Heights Education Association and Philip Raimondo, the Board's elementary supervisor in charge of curriculum who also doubles as school principal. Petitioner contends, contrary to the assertion in the Board's resolution, that Dr. Corbett did not conduct a physicial examination of her nor, she alleges, did Dr. Corbett ever have access to, nor did he request, copies of her medical records. Petitioner contends that the asserted failure of her supervisors to allow her to respond to their criticisms of her classroom performance, which resulted in the Board's demand for her to submit to a psychiatric examination, deprives her of substantive due process in respect of a liberty interest within the meaning of the Fifth and Fourteenth Amendements to the United States Constitution and Article I, Paragraphs 1, 5 and 21 of the New Jersey Constitution. Furthermore, petitioner alleges that because her supervisors failed to conduct post evaluation conferences with her in respect of her classroom performance, such alleged failure, in violation of N.J.A.C. 6:3-1.21, renders the result of evaluations of her classroom performance void for any and all purposes.

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In order to place the Board's demand that petitoner he explained by a psychiatrist in proper perspective, it is necessary to consider petitioner's entire career performance in its employ since 1970. I **FIND** two distinct phases of petitioner's performance evaluations in the Board's employ; one, the period between first employment in 1970 through 1981-82, two; the period September 1982 through December 28, 1982.

PETITIONER'S HISTORY OF EMPLOYMENT AS A TEACHER AND PERFORMANCE EVALUATION THEREOF THROUGH THE 1981-82 YEAR

Prior to petitioner's employment by this Board in 1970, she had six years prior teaching experience with two other boards of education. In fact, the superintendent of this Board who employed her in 1970 had been the superintendent at one of the two other school districts where petitioner taught and he, in fact, employed her there. When he left that superintendency and joined this Board, petitioner applied to him for employment with the Board and he recommended her employment.

Petitioner has taught remedial reading and she has been assigned as a fourth grade teacher. In 1982-83, for the first time in her career, petitioner was assigned as a third grade teacher. Observations and evaluations of petitioner's classroom performance between February 15, 1971 through March 18, 1976, prepared by two school principals, one of whom, Philip Raimondo, is an actor in the present dispute, show that neither supervisor had concern for petitioner's classroom performance. In fact, a review of Exhibit J-1, the observations and evaluations between February 15, 1971 through March 18, 1976, show petitioner to be then considered a conscientious teacher (March 15, 1971), interested in each child (March 1, 1972), and who relates well with all who come in contact with her (March 15, 1974; March 21, 1975). In each of those evaluations or observations, each principal made note of the fact that petitioner was "quiet," her classroom of pupils was "quiet," and she has a "quiet" way about her. One of those evaluations, February 20, 1974, jointly prepared by both principals, states that their concern, if any, for petitioner was teaching, was "Possibly her health." Note that the concern was for petitoner's health, not her teaching performance. That concern was registered again by Raimondo on March 21, 1975 and again on March 18, 1976. The record is abscent of reasons why petitioner's health, of that time, may have been of possible concern to either supervisor. Perhaps petitioner manifested signs of physical ailments which subsequently required hospitalization.

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During June 1976, petitioner underwent a hysterectomy and, during July 1976, she underwent a surgical fusion. Petitioner was on medical leave of absence for 1976-77 from her employment with the Board. Petitioner returned to her duties for the 1977-78 year and, during Raimondo's first observation of her classroom performance in October 1977, he rated her "satisfactory" in all 12 areas of observation. (J-2a) It should be noted that the evaluation form contains only three ratings: satisfactory; needs improvement; and unsatisfactory. Petitioner's rating of "satisfactory" in all 12 areas so rated, of course, is the highest performance standard that could be achieved. However, approximately four months later on February 1, 1978, Raimondo, reporting on an observation of petitioner's performance the preceeding day, rated three of the 12 areas as being in need of improvement. Raimondo apparently perceived weaknesses in petitioner's preparation and teaching technique, in addition to a lack of pupil enthusiasm, and a lack of teacher enthusiasm. Raimondo also expressed concern about her low voice level and lack of expression. Raimondo did compliment petitioner on her sense of humor (J-2b).

Some time during January 1978, petitioner was advised by her physician of the need for immediate surgery on both wrists. Consequently, petitioner was absent from her school duties from a time after February 10, 1978 through May 1978. During her absence, Raimondo prepared a "Teacher Evaluation Report" (J-2c), a yearly evaluation, of petitioner's performance based on the observations he made October 1977 and February 1978, earlier discussed. Raimondo had a conference with petitioner on February 10, 1978, although the written report was not signed by Raimondo until March 23, 1978. Of 14 areas to be evaluated on the yearly evaluation report, Raimondo assigned ratings of "needs improvement" to nine areas, and satisfactory ratings to five areas. On June 1978, after petitioner had resumed her teaching duties, Raimondo attached an addendum to his early prepared evaluation report. Here, Raimondo registers his disappointment in petitioner's performance during 1977-78. He expresses concern that pupils in her classroom "* * * lost their zeal for learning and for school." Raimondo notes that he received complaints from parents in respect of the amount of time their children are required to spend on homework; that petitioner did not have a physical education program for her pupils; his concern that "* * * the negative atmosphere emanating from [petitioner's] classroom has impaired the good relationship between teachers and parents"; that he had received requests from parents to transfer their children to another school; and, that he is concerned with "the classroom climate." (J-2c, p.3) Raimondo does recognize that petitioner's health problems may be a factor in the deficiencies he perceived in petitioner's performance, but he also noted that the pupils' needs must be paramount.

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Even though petitioner recovered from her wrist surgery sometime in May 1978 and returned to her teaching duties in the Board's employ, her recollection, undisputed, is that the superintendent was of the view that whatever problem may have existed with her wrists was insufficient cause for her to have missed school between February through May 1978. Furthermore, it is petitioner's present undisputed recollection that Raimondo did not want her to return to her teaching duties during May 1978. Rather, Raimondo wanted her to return in the fall for the commencement of the 1978-79 year. In any event, petitioner did return during May 1978 and completed the 1977-78 year. Petitioner and Raimondo discussed his 1977-78 yearly evaluation report, during June 1978 and the concerns he raised therein and as discussed above.

Petitioner returned to her duties full-time in September 1978, notwithstanding that neither the principal nor the superintendent were desirous of her return because of a perceived, though unexplained, "parental uprising." There is evidence to show that upon petitioner's return Raimondo advised her, in writing, on September 15, 1978, as a followup to their evaluation conference the preceding June 1978, that she should undergo a physical examination to determine her physical capacity to perform her teaching duties; that she take college courses; that she review the Board's job description for her position as teacher; that she review the Board's policy concerning homework; and that she observe other teachers. (J-3). Petitioner does not recall receiving this memorandum, though she discovered a copy in her personnel file which she reviewed in anticipation of this hearing. In either case, there is no evidence to show petitoner had a physical examination performed as a result of the memorandum, nor is there evidence to show Raimondo followed up on the asserted request for her to undergo such examination.

Petitioner's performance began in 1978-79 in a positive fashion for Raimondo, in an observation dated December 14, 1978, rated 11 of the 12 areas as satisfactory. He discerned that improvement was needed in petitioner's confidence and enthusiasm. He noted on the observation, "Good lesson. I liked your movement throughout the room. I'd like to see you use a bit more expression. Keep up the good work." (J-4a) Petitioner apparently heeded Raimondo's advice, because on March 27, 1979 Raimondo rated all 12 areas as satisfactory. (J-4b) In fact, on the later yearly evaluation summary of petitioner's performance, (J-4c) Raimondo rated all 14 areas of observation and evaluation as being satisfactory. Raimondo also commented that

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> [Petitioner] has had a very good school year [1978-79]. She has conscientiously worked to overcome my concerns of last year. I commend her for this effort and improvement. [Petitioner] has worked hard and planned well. She seemed so much more at ease and it showed in her interaction with her class. She has communicated well with parents and related well with other staff members. I anticipate continued improvement and recommend her for reemployment. (J-4c)

Language of the last sentence is consistently used in petitioner's yearly evaluation. It is noted that petitioner's "reemployment" does not hinge upon the recommendation of Raimondo, nor any other supervisor, for she has acquired a tenure status in the Board's employ. In any event, petitioner's performance during the following year, 1979-80, was rated satisfactory in all areas on two observation reports by Raimondo (J-5a; J-5b) and upon his yearly evaluation report of petitioner's performance (J-5). In fact, on his yearly evaluation summary for 1979-80 Raimondo notes:

> [Petitioner] had another good school year. She exhibited much conscientiousness particularly in her concern over the slower student. Her plans were done well and her thoroughness in covering our curriculum was outstanding.
>
> [Petitioner] continues to relate well with her pupils. She had many conferences with parents during the year to discuss strengths and weaknesses of the students. Although quiet she related well to other staff members.
>
> [Petitioner] often remains at school quite late which reflects her dedication. She manages her class well and maximizes teaching time.
>
> [Petitioner] feels more at ease with the fourth grade curriculum and her class did a fine job this year. She seeks advice frequently to help do what is best for her class. * * *

Notwithstanding that petitoner had a successful year, petitioner, says, without controdiction, that near the end of 1979-80 a parent complained that petitoner accused her son of not taking papers home to be signed when a petitioner allegedly did not give the boy papers to be signed. Peititiojner testified, without regard to blame, Raimondo required her to apologize to the boy in front of the class.

Petitioner returned to her teaching duties for the 1980-81 academic year and on March 11, 1981 Raimondo, in an observation report (J-6a), rated her satisfactory in 14 of 14 areas. Raimondo noted that

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> * * * Class control was good. Bulletin boards were pertinent. Teacher movement around the room to check work and note weaknesses was good.
>
> Upon completion of the test pupils moved their desks to work in groups. Transition was smooth and pupils proceeded to work on previously assigned lessons.
>
> Keep up the good work (J-6a)

Raimondo observed petitioner again on March 11, 1981 and, together with the observation of March 9, 1981, prepared a yearly evaluation report of petitioner's performance on March 15, 1981 (J-6b). In the yearly evaluation report, Raimondo rates petitioner's punctuality and regularity of attendance at her duties as needing improvement. Raimondo also reports that petitioner needs improvement in fulfilling her related responsibilities as assigned her by the building principal. In the narrative portion of the 1980-81 yearly evaluation, Raimondo notes that:

> [Petitioner] has worked hard this year to make a successful adjustment to the Seventh Avenue Staff [petitioner had been transferred at the conclusion of the 1979-80 year]. She plans well and is thorough in her coverage of the fourth grade curriculum.
>
> Her attempts to understand and relate to the "problem" child is exemplary. She confers often with parents and relates well with staff members. Her class is well controlled.
>
> [Petitioner] has attended several conferences for professional improvement this year. She understands and implements the fourth grade curriculum very thoroughly.

And,

> Due to [petitioner's] back problems, she was not able to fulfill all teaching responsibilities. Often she was not able to accompany her class out of the building during fire drills. More time must be devoted to physical education activities; educational field trips are an important adjunct to the school curriculum and are encouraged by administration. This year [petitioner] was not able to take any trips with her class due to her health. [Petitioner's] health is a serious concern of mine. Since being hired in September of 1970, she has missed 341 1/2 days due to illness (up to 5/22/81).

There is no evidence of record to show how the 341 1/2 days of absences attributed to petitioner by Raimondo have been calculated. That is, it has already been reported that petitioner was on medical leave of absence during 1976-77 and, again,

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petitioner was absent from work between a date in February 1978, though after February 10, through sometime in May 1978. It is unknown whether those absences are included in Raimondo's calculation. Petitioner was also abscent from school for about six weeks between April-May, 1981.

Petitioner responded to Raimondo's yearly evaluation of her performance by the following memorandum:

> * * * Please note for the record that there are severe medical problems which have restricted total fulfillment of the above mentioned duties. The reader should be aware that these medical problems are currently under treatment.
>
> I sincerely hope that these medical problems will not be long term but rather temporary in nature. (Attachment to J-6b)

Petitioner explained in respect of fire drills that during 1980-81 her classroom was on the second floor of the building. Whenever a fire drill occurred, petitioner explained that her children would exit the building first, while she followed them. She explained that she does have difficulty walking up and down stairs and any delay in egress from the building should not be visited upon the children. Thus, she instructed the children that during a fire drill they would exit first and she would follow. My notes of the hearing do not reflect that petitioner testified in response to the courses related to physical education and field trips.

Petitioner was again hospitalized during July 1981 and again during February 1982. Petitioner was on a medical leave of absence the entire 1981-82 year. Both hospitalizations were due to surgical procedures performed on petitioner's spine. On or about July 19, 1982, petitioner's personal physician certified that petitioner was suffering from "cervical radiculitis" and that she was able to return to work on September 7, 1982. The physician advised that petitioner's physical limitations included "lifting, bending and climbing stairs" (J-7). Petitioner had her physician submit this note as the result of a meeting she had had with the superintendent during the 1982 summer, who advised that before she returned to her teaching duties in September 1982, he wanted a statement from her physician that she could, in fact, teach the entire year.

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PETITIONER'S PERFORMANCE BETWEEN SEPTEMBER 1982 THROUGH DECEMBER 28, 1982, THE DATE OF THE CONTROVERTED ACTION

Petitioner was assigned, as noted above, for the first time in her career, to teach third grade during 1982-83. Her classroom was located on the first floor. When the school year began, petitioner says she found her pupils to be "surprisingly hostile". Furthermore, parents of her third grade pupils who were having difficulty complained to her and to the principal of the lack of progress of their children. Four pupils in particular, petitioner says, were having difficulty and she attempted to work with their parents during conferences and by way of telephone communication. Petitioner explained that she would remain after class for 15 or 20 minutes with the youngsters in order to provide them extra help. Some time in October petitioner was advised, during a telephone conversation with Mrs. M., a parent of a pupil in her room, of general parent unhappiness with her teaching performance and that the parents had had meetings in that regard. Mrs. M. also advised petitioner that parents had had a meeting with Raimondo over their discontent. Petitioner admits becoming upset at being so advised by Mrs. M. and she, petitioner, was subsequently reduced to tears.

Mrs. M., who possesses a baccalaureate degree in elementary education from Eureka College, substantially corroborates petitioner's recollection of the telephone conversation. Mrs. M., who was the room mother for petitioner's third grade class, saw that role as a "buffer between pupils and teachers * * * through the parents." Mrs. M., who had met petitioner the previous year, explained that when she attended petitioner's open house in September 1982, after her child was assigned petitioner's third grade classroom, she observed other parents who were in attendance become drowsy with petitioner's "quiet" manner. Mrs. M. says petitioner spoke softly, almost in a monotone voice. In Mrs. M.'s view, it is "pure torture" to subject third grade pupils all day to a quite person, such as petitioner, and who has such a monotone voice.

Mrs. M. declared that within two to three weeks after being with petitioner, pupils were bored. In support of this latter conclusion, Mrs. M. says that parents S., L., R., and J. agree with her assessment. In fact, Mrs. M. says it was Mrs. S., not she, who began voicing complaints of petitioner's performance in the community. Mrs. M. says that her son, M., became confused in petitioner's classroom, that he complained of petitioner changing assigned desks every week, and that petitioner required all pupils to "take a

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number" to have their questions answered, in a fashion similar to a meat department in a food supermarket.

Mrs. M. explained that, at her request, petitioner telephoned her at home sometime during an evening the first week of October 1982. During that telephone conversation, Mrs. M. broached the question of the "take-a-number" system to petitioner. According to Mrs. M., petitioner began to cry. Notwithstanding Mrs. M.'s asserted efforts to help petitioner gain composure, petitioner, according to Mrs. M., became hysterical and blurted out that "* * * the rumors that I don't like boys is not true* * *." Mrs. M. admits she advised petitioner that "parents are unhappy" with her which judgment, it is noted, was based by Mrs. M. on telephone calls she made to and among parents who had children in petitioner's class. Mrs. M. contends that the telephone conversation with petitioner lasted approximately 25 minutes, 20 of which petitioner was to have been sobbing.

Mrs. M. admits that her son's grades did go down at the end of his second grade, prior to the time he entered petitioner's third grade class. It should also be noted that the boy had spent the 1982 summer months with friends away from home. The boy returned home immediately prior to the commencement of school for 1982-83 and his enrollment in petitioner's class. Mrs. M. admits that M.'s stay away from the home during the summer months may have contributed to his problems in school. Mr. and Mrs. M. have another younger boy who is at home. They learned in June 1982 that their other boy, N., has leukemia which diagnosis, in turn, lead to the decision of Mr. and Mrs. M. to have M. spend that summer with friends so that they could devote all their attention to N., without M. encountering sibling rivalry.

The school day following the telephone conversation with Mrs. M., petitioner unsuccessfully attempted to meet with Lewis A. Schopfer, her then assigned school principal. It appears Schopfer, who was now principal of the Seventh Avenue School, is a subordinate to Raimondo who, as the elementary supervisor in charge of curriculum, is the immediate supervisor of Schopfer. Schopfer, petitioner claims, told her he had no time to meet with her.

After the telephone conversation with Mrs. M., petitioner had, on a subsequent day, been advised by another parent that Mrs. M. was "agitating against her" in the community by saying she, petitioner, "put bad kids in boxes." Petitioner explained at

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hearing that her classroom did have study corrals which she allowed pupils to use to study, or she assigned them individual corrals when tests were being given.

Petitioner explained that Mrs. S., the parent whom Mrs. M. asserts initiated community complaints in regard to petitioner's performance, had a son in her room. Mrs. S. complained to the principal of the difficulty her son was having in petitioner's class. However, petitioner explained that she was advised by the boy's former second grade teacher that he was a "continuing problem." Petitioner says she was also advised by Schopfer that he was told by Raimondo that Mrs. S. complained to him, Raimondo, that she, petitioner, was rude and ignorant.

Mrs. M. explained that several days after the telephone conversation with petitioner, she visited petitioner in her classroom. Mrs. M. found it unnerving that petitioner failed to mention the conversation of several days prior and that petitioner behaved as if the telephone conversation did not happen at all. Petitioner, in Mrs. M.'s view, was very quiet to the extent that Mrs. M. characterized petitioner as manifesting "an abnormal calm and quiet." In fact, Mrs. M. testified she advised Raimondo that, in her view, petitioner was "unstable" to be in class because of petitioner's crying and inchorency during the first telephone conversation and subsequent calmness during the classroom visit.

Some time in October 1982 after the telephone conversation between petitioner and Mrs. M, a group of parents met at Mrs. M.'s home in respect of petitioner and her performance as a teacher in the Board's employ and, more particularly, as the third grade teacher of their children. Robert Powell, a Board member who is related to Mrs. L., referred to earlier by Mrs. M. as one of the four parents who agreed with her assessment of petitioner, was in attendance. Mrs. M. and Mrs. S. organized the meeting and actually called persons to attend the meeting in order to "iron out the problem." Though the result of that meeting in not clear in this record according to the testimony of Mrs. M., Raimondo explained that on a day following the meeting the superintendent advised him that Board member Powell told him, the superintendent, of the meeting. The superintendent, not having any prior knowledge of any concern in respect of petitioner's performance, inquired of Raimondo as to the reason for such a meeting to have been conducted in the community. My notes of the hearing do not reflect a specific response given by Raimondo to the superintendent's query but I infer, based on all the evidence, that Raimondo responded that some parents of pupils who were enrolled in petitioner's

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class were complaining of petitioner's classroom performance. It is noted that Raimondo testified he first became aware of parental concern with petitioner on or about October 14, 1982 when Schopfer informed him of parental complaints he received. Raimondo did not involve himself at that time with the complaint because, as he explained, Schopfer was the principal and it was his responsibility to take care of such complaints. Raimondo received a telephone complaint on or about November 1, 1982 from Mrs. M. and he advised her to contact Schopfer, the principal, who would handle her complaints. On or about November 14, 1982 Raimondo received a call from Mrs. S., earlier identified, and he advised her similarly; that Schopfer was handling complaints in respect of petitioner's performance. Schopfer explained to Raimondo that he did talk with the parents, with petitioner, and with the school social worker.

Schopfer explained that early in September, 1982, he was contacted by Mrs. M. and Mrs. S. They were concerned with the performance of their children; Mrs. S. was concerned with her child because of a perceived spelling problem he had, while Mrs. M. was concerned with her son completing assignments. Simultaneously, however, both parents expressed concern to Schopfer in regard to petitioner. Schopfer talked with both boy's second grade teachers who were to have explained to him that they were performing well at the end of second grade. Schopfer observed petitioner's teaching performance on October 25, 1982 and rated six of the observed areas as "satisfactory," one area, "respect, dignity, courtesy, and proper behavior [as] an integral part of the class" as needing improvement, one area as "not applicable," and six areas as "see comment." The "see comment" section of the observation report recites in its entirey as follows:

> RECOMMENDATIONS:
>
> 1. Some techniques should be implemented to keep the complete attention and motivate the reading group. Change in voice level to emphasize key points of lesson would be helpful in maintaining interest of students.
>
> 2. Language re-enforcement for one student (Korean) who finishes her work ahead of schedule to meet her needs. More language background, such as tapes, etc.
>
> 3. Assessment tests be teacher directed and closely supervised in the reading group rather than as a seatwork activity.
>
> 4. Plan activities for students who finish work early.
>
> Concern that a feeling of tenseness on your part exists and you are not relaxed or comfortable with the class.

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> Reading group was in progress upon entering the room. Remainder of the class was at their desks completing work assignments. Following the first reading group another reading group was called and lesson involved was the separation of the syllable with vowels and consonants, long and short vowel sounds.
>
> Opportunities were given to read the words aloud and write them on the board.

Inexplicably, Schopfer's observation occurred October 25, 1982, the date on the observation instrument (J-8), although it is signed by Schopfer on January 21, 1983, long after the date of the actual observation. Schopfer testified that he did discuss the observation results with petitioner on November 4, 1982, which conference resulted in the following memorandum from Schopfer to petitioner:

> The following was discussed with you in our conference on November 4, 1982 regarding your third grade class:
>
> 1. A feeling of whether or not there was an emotional problem since on several occasions this apparently came through when having conferences with parents. [Note that this is the first official mention of an emotional problem, of any sort, which may have been perceived by any school official in respect of petitioner.]
>
> 2. Did not answer specifically the questions of students.
>
> 3. The classroom did not have a good learning climate - students felt tense.
>
> 4. Indication that discipline was not administered equally to all students.
>
> 5. Soft spoken - low keyed personality.
>
> 6. Students do not feel motivated.
>
> 7. Teacher did not circulate around the room frequently to assist students.
>
> 8. Parents have expressed their concerns to administration and school board member.
>
> 9. Similar problems in previous school in the district.
>
> 10. Lesson planning is good and material is covered.
>
> However, my concern is that you came highly recommended 12 years ago to the district, but at this time you are not demonstrating your previous capabilities which is affecting your credibility in the classroom and rapport with parents.

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My recommendations are:

1. You take the opportunity to observe another third grade class.

2. Attend work shops available at [educational improvement] centers or other locations relative to the problems discussed.

3. You enroll in course work at college in areas that require improvement.

4. To look at yourself inwardly with the purpose of turning the current situation into a more positive one in order to be the effective teacher you once were.

I will be in to observe your class more frequently to assist you in any way I can. I will review with you weekly or as the need arises as to current progress.

Working together I am hopeful a satisfactory resolution to these concerns will be affected by the Christmas holiday period. (J-9)

Petitioner does not declare that Schopfer "discussed" parental concerns with her, but she does not see a copy Schopfer's observation (J-8) until January 1983.

Schopfer, who describes his conduct of writing such a memorandum (J-9) to any one of his teachers as highly unusual, discussed the contents of the memorandum with Raimondo, presumably at the same time it was written. Schopfer explains he "informally" checked with petitioner after his writing of the memorandum to carry out his promise to her "'* * * to assist [her] in any way I can * * *'".

Petitioner testified that on or about November 19, 1982, M., the son of Mrs. M., told her his mother had said that she, petitioner, would be "gone" after Christmas. Later the same day, petitioner testified that another pupil in her classroom told her the same thing. Petitioner explained that she relayed to Schopfer what the two pupils had told her and Schopfer was to have replied that there were so many parent complaints he found it difficult to explain each and every one of them. Petitioner testified that she then felt "parents" were banding together "to get her."

On or about December 13, 1982, Schopfer told petitioner that Mrs. M. and Mrs. S. wanted to meet with him and Raimondo to achieve the result of having their children transferred from her classroom or, alternatively, to get her fired. Mrs. M. admits she gave such an "ultimatum" to Raimondo and Schopfer in regard to petitioner.

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On December 14, 1982, Schopfer observed petitioner's performance for approximately 50 minutes during a mathematics class. As a result of that observation, Schopfer rated petitioner's performance "S" in four of twelve areas, one area was rated as "not applicable", another area as "could not be determined", and Schopfer, rather than rating eight other areas, noted "see comment." (J-10) The "See comment" section of the observation states as follows:

> Upon entering the classroom students were working on a spelling assignment on alphabetizing while teacher was taking the attendance and lunch count. Following the opening exercise, teacher reviewed the five steps in problem solving in math and various students gave response to questions in the text. Students had an opportunity to respond verbally and work out problems at the board. Teacher had prepared two charts on the side of the door to review the steps if they needed help in working on their problems. They were to label whether the problem was addition or subtraction and to label the answers.
>
> Although you were in control of the class with respect to discipline, you appeared to be very tense, similar to what we discussed on a number of occasions.
>
> Students cannot give continuous and complete attention when your voice at a low level is maintained without change to emphasis a point of a lesson. A more enthusiastic approach to the class would be beneficial for the students. (J-10)

At a meeting conducted after school on December 14, 1982, Schopfer and Raimondo met with petitioner to discuss Mrs. M.'s and Mrs. S.' complaints in respect of their children's performance in her class. Schopfer explained that while petitioner listened attentively at the meeting, she became emotional and began to cry. Schopfer did say, however, that petitioner participated in a mutual effort to look for viable ways to solve problems of pupils assigned to petitioner. Schopfer says that his sense of petitioner's tenseness, together with her apprehension and her upset, caused him concern for petitioner's well-being. This concern, he explains, was fortified in his mind by his sense that petitioner's pupils were hostile towards her. Nonetheless, Schopfer testified that in his 36 years of experience in public school education he does not deem it unusual for a teacher to be tense, apprehensive, or upset in the circumstances in which petitioner found herself during the first semester of 1982-83.

Petitioner did not see Schopfer's written evaluation report (J-10) until January 1983.

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The following day, December 15, 1982, Raimondo visited petitioner's class for one hour, twenty-five minutes and observed petitioner's performance during seat work, physical education, and reading. Raimondo's written observation report, prepared by him on December 17, 1983, rates petitioner as "satisfactory" in one of fourteen areas, "needs improvement" in four areas, and "unsatisfactory" in three areas. Six areas were rated by Raimondo as being not applicable" (J-1). In the comment section of the report, Raimondo states:

> When I entered the room petitioner was at her desk. After five minutes she began moving through the room commenting to pupils. During this period of time three pupils approached me with questions about their work. I advised them to seek help from their teacher. Their response was, "'[Petitioner] won't tell us, you know that." For the first fifteen minutes pupils were working on dittoes and work books at their desks. Next came "silent ball" - - pupils sit on their desks and thrown a sponge ball to each other. A bad throw or dropped pass eliminates the student from the game. Pupils enjoyed the game but kept looking at the teacher when anything other than a clean pass was completed. There was no spontaneity of laughter or fun. Pupils seemed to need the teacher's approval before they could act.
>
> Finally a reading group was convened. There was no motivation and little enthusiasm exhibited by the teacher. Pupils responded in a bored and uninterested manner. Students in their places were supposed to continue work on their previous assignments. At least four of them were fooling with seals for a fifteen minute before being chastised by the teacher.
>
> I would like to see more enthusiasm and motivation exhibited by [petitioner]. Her voice level is much too low to be understood by all. The class was sterile. A lot of dittoes and work book pages but little teaching. I didn't feel as though you had the full attention of your class.
>
> Improvement must be forthcoming in the checked areas. Confidence, enthusiasm, and motivation were clearly lacking. Many pupils lacked self-control but were not corrected immediately. Children approached me rather than you for help which should not be. You do not seem to be in charge of your class, but appear to be confused as to how you should proceed.
>
> I suggest you work on one area at a time. Enthusiasm must come from you. I can arrange to have you visit other teachers to observe teaching and management techniques. (J-11)

Petitioner was not made privy to this written document until sometime in January 1983.

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When Raimondo left petitioner's classroom on December 15, 1982, he immediately consulted with Schopfer. Schopfer and Raimondo then consulted with the superintendent and, a determination was made by the three administrators not to allow petitioner to see Raimondo's or Schopfer's evaluations because of their negative tone. Raimondo denies having a predetermined notion in his mind that petitioner's performance would be negative prior to the time of his actual observation on December 15, 1982 as a result of the meeting with her the previous day.

The day following Raimondo's evaluation, December 17, 1982, petitioner arrived at school to commence her teaching duties at approximately 8:15 a.m. As petitioner was parking her car, Schopfer approached her and told her not to enter the school building. Schopfer had already retained a substitute for petitioner that day and he directed petitioner to go to the superintendent's office for a meeting. Schopfer explained he told petitioner there was administrative concern of a "stress effect" upon her. As petitioner drove to the superintendent's office, Schopfer followed her in his car. When petitioner arrived at the superintendent's office, she found the president of the association and the superintendent already there. The superintendent, according to petitioner, advised her she was relieved of her duties and that he, the superintendent, wanted her to meet with the school physician for a physical examination. Petitioner testified she was upset at being relieved of her duties, and with the directive to immediately report to the school physician. Petitioner testified she cried, and felt humiliated and degraded by being told in the street by Schopfer not to enter the school building that morning.

The superintendent, since retired, testified that when Raimondo and Schopfer met with him on December 16, 1982, to discuss the parental complaints in respect of petitioner's performance, the school physician happened to be in the high school that day. The physician was asked to join the meeting by the superintendent because the three administrators felt "inadequate" as to the next steps which should be taken. It was agreed among the three administrators, and the school physician that the following day the superintendent would immediately direct petitioner to undergo a physical examination. The superintendent relieved petitioner of her teaching duties on the morning of December 7, 1982, with the consent of the Board President, and directed petitioner to undergo a physical examination by the school physician.

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Petitioner testified that though she immediately proceeded to the school physician's office for a physical examination following the superintendent's directive, she cannot recall how long she was there or what the physician did. She does recall the physician advising her that medicine would "help her". However, the superintendent explained that after petitioner left the physician's office, the physician called him on the telephone and advised that petitioner should be examined by a psychiatrist. The superintendent asked the physician to put that advice in writing, which he did. The school physician advised the superintendent, by letter dated December 23, 1982, as follows:

> I have concluded from my medical evaluation of [petitioner] on Friday, December 17, 1982, that she is suffering from organic depression.
>
> I feel it is important and recommend that [petitioner] pursue further psychiatric diagnosis, evaluation and treatment as soon as possible. [R-4]

It is to be noted that petitioner strenuously objected to the admission of the physician's memorandum to the superintendent set forth above as hearsay. The objection was overruled because the document was not offered for the truth of the contents therein; i.e., the Board did not offer the document nor was it accepted on the grounds that petitioner is, in fact, suffering from organic depression. Rather, it was accepted to allow the Board to show the basis upon which it adopted the controverted resolution by which petitioner was directed to consult with a psychiatrist.

After the Board adopted the controverted resolution (J-12, ante), the Board granted petitioner, and her representatives, a hearing on February 1, 1983 on the matter. As the result of that hearing, the Board determined to ratify its determination to require petitioner to undergo a psychiatric examination.

It is noted that the Board was aware of the superintendent's action in this matter since December 17, 1982, and that it conducted a special meeting at or about that time to discuss the matter with Raimondo, Schopfer and the superintendent, in conjunction with the school physician's report that petitioner should seek psychiatric assistance. The Board President testified that the Board, throughout the entire matter, relied upon the judgment of its administrators.

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I have reviewed the testimony of Jean Eicher, Constance Sylvester, and Mr. Perallo, each of whom are employed as teachers by the Board, and each of whom has known petitioner a number of years. Their collective testimony is that petitioner is a kind, gentle, loving, low-key kind of person who demonstrated no personality change in the fall of 1982, as compared to her personality in prior years. Eicher testified that, as building representative, she discussed the matter with Schopfer who, according to Eicher, admitted that petitioner reported to school early, remained late, and always had good lesson plans. According to Eicher, Schopfer's concern was that regardless of those qualities, parents were not satisfied with petitioner's performance. Sylvester described petitioner as competent, consciencious, and quiet. Perallo described petitioner as sincere, kind, professional and helpful. Though the president of the Haddon Heights Education Association testified before me, he does not personally know petitioner. His only involvement in this matter was at the meeting in the superintendent's office on December 17, 1982, and his attendance at the Board hearing on February 1, 1983.

Finally, it is noted that petitioner and the Board agreed that during 1983-84 petitioner would be on a sabbatical leave of absence at less than full pay.

This concludes the recitation of the uncontroverted background facts of the matter. From these uncontroverted facts, I also **FIND** the following to be relevant facts of the matter:

1. Petitioner's demeanor at the hearing can be fairly described as reserved in manner and in speech. Petitioner is found to have been a credible witness, and I find her testimony to be believable. This latter finding is not inconsistent with the former finding as to petitioner's demeanor. Petitioner has been "reserved" in demeanor since she was first employed by this Board.

2. Since at least 1971, petitioner's supervisors, including Raimondo, have specifically noted on performance evaluations, that she has a quiet voice and a retiring manner. However, petitioner's "enthusiasm" was not questioned until after February 1, 1978, at a time after she had informed her supervisors that she required hospitalization for surgery on both wrists. At that time, petitioner had already been on one medical leave of absence for 1977-78 as a result of the hysterectomy and surgical fusions she underwent during June and July 1976.

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does suggest, however, that following the open house meeting, Mrs. M. contacted other parents who had children in petitioner's classroom.

8. Notwithstanding that neither Raimondo nor Schopfer observed petitioner's performance during the first several weeks of 1982-83, Mrs. M., in conjunction with Mrs. S., voiced concerns over petitioner's performance to school authorities and to other parents in the community. The concerns which both parents voiced resulted from the parents' perception that their children were not doing well. Although both parents were advised by Raimondo that their complaints should be voiced to Schopfer, Mrs. M. and Mrs. S. saw fit to hold a meeting of parents at Mrs. M.'s home, with a Board member in attendance, to discuss petitioner's performance. The Board member reported to the superintendent the fact of its ocurrence. The superintendent, in turn, inquired of Raimondo as to what was occurring. It is interesting to note that at no time prior to the Board member contacting the superintendent, did Schopfer nor Raimondo perceive deficiencies in petitioner's actual classroom performance, nor personality, sufficient to specifically advise the superintendent of any concern they may have had. It is presumed that copies of petitioner's written evaluations and observation results were forwarded to the superintendent and it is further presumed, as fact, that the superintendent read those reports. There is no evidence to show that notations of petitioner's "quiet" voice, nor of her lack of enthusiasm, were considered by any administrator to be sufficient in scope or severity to discuss the matter with the superintendent.

9. During October, November and December, 1982, Schopfer and Raimondo advised petitioner, individually or collectively, of parental complaints being made to them about her performance. These "complaints" were led by Mrs. M. Mrs. M.'s concerns for petitioner's stability, according to the evidence before me, had its genesis in her lack of appreciation for petitioner's quiet manner and monotone voice observed during the open house meeting in September 1982. After the open house meeting Mrs. M., I find, began soliciting the perceptions of other parents who had children assigned petitioner and, I further find, Mrs. M., in conjunction

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3. Upon petitioner's return to her duties during 1978-79, her performance was rated in a positive manner and no mention was made of a deficiency in her "enthusiasm." In fact, no mention was made on observations of her performance during 1978-79 of her "quiet" voice, nor of her retiring manner.

4. Petitioner's performance during 1979-80 was rated equally as positive as was her performance during 1978-79. Raimondo mentions her "quiet" manner once during 1979-80, in his yearly evaluation summary (J-5), when he notes that "Although quiet [petitioner] related well to other staff members" (J-5, p.2).

5. Petitioner's performance during 1980-81 was rated in a positive fashion by Raimondo, although he did note that petitioner needs to improve her attendance. I am persuaded that Raimondo's criticism in this regard related to petitioner's six-week absence between April-May 1981. Other than that criticism, however, petitioner's classroom performance was rated in a positive fashion.

6. At the time petitioner was hospitalized during July 1981 for spinal surgery, the evidence shows that her performance as a teacher in the Board's employ was rated in a positive manner. The only concern that school administrators had at that time, if in fact it was a concern, was the amount of time petitioner missed from her teaching duties as a result of her hospitalizations. In any event, at the conclusion of the 1980-81 school year, the evidence of record shows that petitioner was perceived by supervisors as, at least, an effective teacher.

7. In September 1982, when petitioner returned from her leave of absence, she was perceived by Mrs. M. as being a quiet person, with a monotone voice. Apparently, Mrs. M. shared the view of petitioner's prior supervisors that she, petitioner, was in fact a quiet person, but Mrs. M. also perceived that petitioner had a "monotone" voice. There is no evidence to suggest that Raimondo, prior to the open house meeting Mrs. M. attended in petitioner's classroom during September 1982, discussed with Mrs. M. his perception that petitioner was "quiet." The evidence

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with Mrs. S., channeled concerns of petitioner from the community to petitioner's supervisors.

10. Petitioner was directed by the superintendent to submit to a physical examination to be performed by the school physician based on Raimondo and Schopfer's concerns for petitioner, as expressed to them by Mrs. M., S., and L. The concerns, I find, included petitioner's quiet manner, monotone voice, crying, and the parent's concern for their children's progress.

11. Prior to the date the superintendent directed petitioner to undergo a physical examination, the superintendent, Raimondo, Schopfer, and the school physician met. That meeting resulted in agreement among the four that the superintendent would direct, the following day, petitioner to undergo a physical examination.

12. There is nothing in this record to show the basis for the school physician's conclusion that petitioner is suffering "from organic depression" because there is nothing in the record to show the elements of the school physician's "medical evaluation."

This concludes a recitation of the uncontroverted facts of the matter together with recitation of relevant facts found from the uncontroverted facts.

DISCUSSION

N.J.S.A. 18A:16-2 provides:

> Every board of education shall require all of its employees, and may require any candidate for employment, to undergo a physical examination, the scope whereof shall be determined under rules of the state board at least once in every year and may require additional individual psychiatric or physical examinations of any employee, whenever, in the judgment of the board, an employee shows evidence of deviation from normal, physical or mental health.

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> Any such examination may, if the board so requires, include laboratory tests and fluoroscopic or X-ray procedures for the obtaining of additional diagnostic data.

The appropriate standard of review of the Board's action in this matter is not to substitute judgment for that "of those who made the evaluation but [to determine] whether they had a reasonable basis for their conclusions." Kopera v. West Orange Board of Education, 0 N.J. Super. 288, 296 (App. Div. 1960). The controverted action here was taken by the Board as an exercise of its discretion. The standard of review just stated for purposes of actions involving psychiatric examinations, was adopted by the Appellate Division in Gish v. Board of Education of Paramus, 145 N.J. Super. 96 (App. Div. 1976), certif. denied 74 N.J. 251 (1977), when the Court recognized the decision of a local board of education under N.J.S.A. 18A:16-2 is entitled to such deference. There, the Court held it was

> satisfied that the boards' determination was a fair and reasonable one - a determination which, as stated by the Commissioner, is "one which could logically be made by reasonable and fair-minded men who have evaluated petitioner's behavior and who are concerned with petitioner's fitness to be a teacher in intimate contact with numbers of impressionable, adolescent pupils." As noted, it was confirmed by two psychiatrists. It was based on credible evidence and did not constitute an abuse of discretion (citations omitted) 145 N.J. Super. at 105.

The issue to be determined is whether petitioner has shown by a preponderance of the credible evidence that it was unreasonable for the Board to conclude, based upon the facts before it on December 28, 1982, that there was "evidence of deviation from normal, physical or mental health."

The Board, through its administrators, had before it information from its administrators that petitioner, since early in her employment, was perceived to be a quiet person. Later, after a series of hospitalizations and operations, petitioner was perceived by Raimondo as lacking in enthusiasm. When petitioner returned in 1982 from her leave of absence the preceeding year, there were some parents who expressed concern over the performance of their children who were assigned to petitioner. Petitioner did, in fact, become upset and was reduced to tears during a telephone conversation with Mrs. M. It is clear that Mrs. M. was of the view that her child would not progress while he remained a member of petitioner's class. It is further clear that Mrs. M. was a vocal opponent of

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petitioner, as a teacher in the Board's employ, not only to petitioner's supervisors but in the community as well.

There is no doubt that petitioner felt pressured by Mrs. M. and that she further felt the administrators were less than supportive of her. However, it would be illogical to believe most teachers do not, from time to time, encounter parents who disagree with their style of teaching, or methodology, or personal characteristics. A board of education should reasonably expect that when a disagreement occurs between one of its teachers and a member of its community that the two parties could work out their disagreements in a reasonable manner. In this case, it must be remembered that petitioner had been subjected to a series of illnesses which caused her absence from school. It is reasonable to wonder whether such illnesses and absences may have had some emotional impact upon petitioner particularly when there has been observations made in preceding years in respect of a loss of enthusiasm by that person.

A requirement that a teacher subject himself to a psychiatric examination may not be classified as a penalty or sanction. Gish, supra at p. 106. In this case, the events between September through December 1982, and the objective evaluations of petitioner's performance in the classroom by the supervisors, lead the supervisors to believe, in conjunction with parental complaints, that petitioner may be suffering from some defect which they could not address. Even though the supervisors, including the superintendent, met with the school physician the day before the superintendent ordered petitioner to undergo a physical exmination, that prior meeting does not infringe upon petitioner's rights. Petitioner claims that she was not given a physical examination by the school doctor, but at hearing she testified that she cannot recall how long she was with him. When the superintendent was advised that in the physician's view petitioner was suffering from organic depression, that conclusion, together with the reports received by the two supervisors, caused the superintendent to discuss the matter with the Board president.

The Board did conduct a special executive meeting to inquire into the matter and, according to its resolution of December 28, 1982, determined that in the interests of all, petitioner should submit to a psychiatric examination. That Board member Powell attended Mrs. M.'s meeting earlier in October 1982 in respect of petitioner does not negative the propriety of the Board's resolution. Powell, it is presumed, attended that meeting as a member of the community and not as an official representative of the Board.

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Finally, the Board afforded petitioner, and her representative, the opportunity to be heard at a hearing it conducted on February 1, 1983. There is no allegation that that hearing was conducted in an arbitrary or improper manner.

Under the total circumstances of this matter, and notwithstanding that Mrs. M. played a pivotal role in respect of her complaints of petitioner to the supervisors, I FIND that petitioner has failed to establish by a preponderance of credible evidence that the Board, in its determination that she seek psychiatric examination, abused its discretion or in any way acted improper. In Gish, the court held:

> School boards are entrusted by our Legislature with the duty of determining the general issue of fitness of teachers. They are sufficiently equiped to conduct a fair and impartial inquiry whenever such issue legitimately comes into question. Laba v. Newark Bd. of Ed., 23 N.J. 364, 384 (1957). Their obligation to determine the fitness of teachers is a reflection of their duties to protect the students from a significant danger of harm, whether it be physical * * * or otherwise. [citation omitted] and they need not wait until the harm occurs; a reasonable possibility of its occurrence warrants such action. 145 N.J. Super. at 104-105.

In this case, the Board had a sufficient basis to request petitioner to submit to a psychiatric examination based on its school physician's conclusion that petitioner may be suffering from organic depression. Petitioner's liberty interest, the Board's responsibility to ensure the fitness of all of its teachers far outweighs whatever minimal liberty interest petitioner could validly claim. Kochman v. Keansburg Bd. of Ed., 124 N.J. Super. 203, 212-13 (Chan. Div. 1973). Finally, no authority has been suggested which would require the school physician to seek petitioner's medical records from her personal physician prior to the time he rendered his medical opinion, notwithstanding that such opinion was in the form of a conclusion.

For all the foregoing reasons, the petition of appeal is **DISMISSED.** The Board's action in respect of its resolution of December 28, 1982 by which petitioner is directed to undergo psychiatric examination is hereby **AFFIRMED.**

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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.

March 19, 1984
DATE

DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

March 19, 1984
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

March 22, 1984
DATE

OFFICE OF ADMINISTRATIVE LAW

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LIST OF EVIDENCE

J-1	Performance evaluations, February 1971 through March 1976
J-2a	Observation, October 1977
J-2b	Observation, January 1978
J-2c	Evaluation, March 1978
J-3	Memorandum, September 15, 1978
J-4a	Observation, December 1978
J-4b	Observation, March 1979
J-4c	Evaluation, March 1979, with attached memorandum dated May 29, 1979
J-5a	Observation, January 1980
J-5b	Observation, May 1980
J-5c	Professional improvement plan prepared May 1980, signed for by petitioner June 1980
J-5d	Yearly evaluation, May 1980
J-6a	Observation, March 1981
J-6b	Yearly evaluation, prepared March 1981, signed for by petitioner June 1981
J-7	Physician's note, July 1982
J-8	Observation, January 1983 (based on observation of October 1982)
J-9	Letter, November 10, 1982 to petitioner from school principal
J-10	Observation, prepared January 1983 (based on observation December 1982), signed for by petitioner February 1983
J-11	Observation, prepared December 1982, signed for by petitioner February 1983
J-12	Board resolution adopted December 28, 1982
R-1	Educational philosophy of the Board
R-2	Board's job description of teacher
R-3	Board's job description of school principal
R-4	Memorandum dated December 23, 1982 from superintendent to petitioner

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CAROLYN MAHAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HADDON HEIGHTS, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the record of the controverted matter herein including the initial decision rendered by the Office of Administrative Law, Daniel B. McKeown, ALJ.

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

Upon review of the record of the controverted matter herein, the Commissioner concurs with the judge's conclusion that the Board had sufficient justification to require petitioner to undergo a psychiatric evaluation based upon the school physician's recommendation; such action does not constitute abuse of the Board's discretionary authority nor is there evidence to support that the Board acted in an improper way.

The Commissioner observes that the initial decision does not specifically address petitioner's allegation that the asserted failure of her supervisors to conduct timely and meaningful post-evaluation conferences violates N.J.A.C. 6:3-1.21, therefore rendering the results of said evaluations void for any and all purposes. Upon review of the record, the Commissioner notes that the October 25, 1982 observation report (J-8) was developed in January 1983; however, a conference was held on November 4, 1982 between petitioner and the principal/evaluator which was summarized in a letter to petitioner from the principal dated November 10, 1982. (J-9) This letter includes a summary of concerns regarding petitioner's teaching performance and suggestions for improvement. With respect to the December 14 and 15, 1982 observations, the Commissioner finds that procedural flaws exist, particularly in regard to the length of time between the observations and informing petitioner of the results of said observations. The Commissioner notes that none of the three observation reports constitute petitioner's annual evaluation, nor is there a claim to that effect. The observation reports appear to represent data which would be considered at the time of her annual evaluation. Notwithstanding the presence of procedural flaws, the Commissioner determines that N.J.A.C. 6:3-1.21 was not violated and determines that there is insufficient cause to

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void the evaluation results. To place form over substance is not justified, particularly when the delay appears to be mitigated, at least in part, by the circumstances leading to the hearing of this controverted matter.

Therefore, the Commissioner affirms and adopts as his own the findings and determination as rendered in the initial decision with the modification noted herein.

Accordingly the Petition of Appeal is hereby dismissed.

MAY 3, 1984 COMMISSIONER OF EDUCATION

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BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,

PETITIONER,

V.

EDGAR BROWN AND OLIVER BROWN,

RESPONDENTS.

EDGAR BROWN AND OLIVER BROWN,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,

RESPONDENT.

WILNORA HOLMAN ET AL.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE CITY OF NEWARK ET AL., ESSEX COUNTY,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

This matter was opened before the Commissioner by the filing of Cross-Petitions for Declaratory Judgment requesting the Commissioner to construe the meaning of N.J.S.A. 18A:12-2 and 12-2.1 for purposes of determining whether or not Petitioners Oliver Brown and Edgar Brown were, by virtue of their being party to a suit against the Board of Education of the City of Newark wherein they sought, among other relief, the reimbursement of legal fees and costs, were disqualified by virtue of the provisions of N.J.S.A. 18A:12-2 from taking the oath of qualification required by the provisions of N.J.S.A. 18A:12-2.1. The provisions of the aforesaid statutes are set forth in their entirety below:

N.J.S.A. 18A:12-2 Inconsistent interests or office prohibited

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"No member of any board of education shall be interested directly or indirectly in any contract with or claim against the board, nor, in the case of local and regional school districts, shall he hold office as mayor or as a member of the governing body of a municipality, nor, in the case of county special services school districts and county vocational school districts, shall he hold office as a member of the governing body of a county."

N.J.S.A. 18A:12-2.1 Qualifying oaths of members

"Each member of a board of education shall, before entering upon the duties of his office, take and subscribe -

(1) an oath that he possesses the qualifications of membership prescribed by law and that he will faithfully discharge the duties of his office, and also

(2) the oath prescribed by section 41:1-3 of the Revised Statutes.

In the case of a type I school district the oath shall be filed with the clerk of the municipality and in all other cases it shall be filed with the secretary of the board of education of the district."

Inasmuch as the initial partial summary decision in this matter was rendered orally from the bench by the presiding judge, in order to expedite the proceedings, the Commissioner sets forth the following uncontroverted factual recitation by way of background:

1. Petitioners Edgar Brown and Oliver Brown were candidates for election to the Board of Education of the City of Newark pursuant to petitions properly certified.

2. On April 3, 1984, Petitioners Edgar Brown and Oliver Brown, along with Fred Stecher, not a petitioner herein, obtained the three highest vote totals for purposes of filling three, three-year terms to the said Board of Education of the City of Newark.

3. On April 4, 1984, the results described above were officially certified.

4. On April 10, 1984, Petitioners Brown and Brown appeared at the regularly scheduled reorganization meeting for purposes of being sworn in as board members pursuant to the provisions of N.J.S.A. 18A:12-2.1.

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5. The aforesaid meeting was convened by the Board President, Delores Polk McNeil, whereupon a motion to suspend the rules was approved by a vote of 4 to 0, with two abstentions.

6. Upon the passage of said motion, the president read a legal opinion from Board counsel, Louis Rosen, Esq., which is incorporated herein by reference and which sets forth the opinion that Petitioners Brown and Brown were ineligible to receive the oath of office required by N.J.S.A. 18A:12-2.1 because they were parties to a suit against the Board, said suit being a claim aginst the Board in contravention of N.J.S.A. 18A:12-2.

7. The lawsuit which is the basis of the claim of lack of qualification herein was an action undertaken by Petitioners Brown and Brown before the Superior Court, seeking to void the actions taken by the Newark Board of Education at its November 7, 1983 meeting on the grounds that said actions were taken in contravention of the New Jersey Open Public Meetings Act and the Constitution of the United States.

8. The aforementioned lawsuit was dismissed by Judge Paul B. Thompson on February 24, 1984 for failure to comply with statutory time frames, whereupon Petitioners Brown and Brown filed a Notice of Appeal before the Clerk of the Appellate Division on April 4, 1984 thereby creating the alleged claim against the Board of Education as set forth in the legal opinion rendered by counsel.

9. Upon the reading of the aforesaid legal opinion of counsel, the following resolution was introduced by the Board President and adopted by a vote of 4 yeas, 0 nays, 1 abstention, and 1 present, not voting:

> "WHEREAS, the Rev. Oliver Brown and Mr. Edgar Brown, both residents of th City of Newark, were elected to positions on the Board of Education of the City of Newark at the Annual School Board Election of April 3, 1984; and
>
> WHEREAS, Rev. Brown and Mr. Brown have filed a lawsuit against the Board of Education of the City of Newark and individual Board Members; and
>
> WHEREAS, said lawsuit was dismissed by the Hon. Paul B. Thompson, Superior Court, Law Division, following oral argument on February 24, 1984, and a formal order to that effect was filed on March 20, 1984; and
>
> WHEREAS, Rev. Brown and Mr. Brown filed an appeal with the Appellate Division on or about April 3, 1984; and

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WHEREAS, that appeal constitutes a claim against the Board of Education of the City of Newark pursuant to N.J.S.A. 18A:12-2; and

WHEREAS, as a consequence of said claim, Rev. Brown and Mr. Brown do not qualify to take their seats on the Board of Education; and

WHEREAS, two vacancies currently exist on the Board of Education as a result of the disqualification of Rev. Brown and Mr. Brown;

NOW, THEREFORE, BE IT RESOLVED that the Board of Education, pursuant to N.J.S.A. 18A:12-15(f), hereby appoints the following two individuals to serve pursuant to said statute until the organization meeting following the next Annual School Board Election for the Board of Education of the City of Newark:

1. Raymond J. Stabile
2. Brenda Grier"

The Commissioner notes that it is the aforesaid action contained in the resolution of which Petitioner Newark Board of Education by virtue of its Petition of April 13, 1984 seeks affirmance and Petitioners Brown and Brown seek reversal by virtue of their petition of April 16, 1984.

10. Concurrent with the actions before the Commissioner, Wilnora Holman et al. sought an Order to Show Cause seeking temporary restraints, permanent injunctive relief and Declaratory Judgment before Judge Scalera of the Superior Court, Law Division. Upon receipt of same and upon hearing oral argument, Judge Scalera signed an Order of Transfer of said matter on April 19, 1984 to the jurisdiction of the Commissioner, said Order of Transfer being incorporated herein by reference.

11. On April 19, 1984 upon hearing of oral argument relative to the granting of injunctive relief, the judge issued an Order directing that Respondents Brenda Grier and Raymond J. Stabile refrain from participation as members of the Newark Board of Education until such time as a decision was rendered on the merits. On April 23, 1984 the Commissioner affirmed the actions of Judge Weiss, both Orders being herein incorporated by reference.

Judge Weiss, upon consultation with the Commissioner's representative did also sign an Order of Consolidation, joining the action before the Law Division with the action before the Commissioner with the proviso that said act of consolidation be subject to the Commissioner's approval pursuant to N.J.A.C. 1:1-9.7 or at the conclusion of the case pursuant to N.J.A.C. 1:1-16.5, said Order of Consolidation likewise being incorporated herein by reference.

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12. On April 24, 1984 Judge Stephen Weiss, ALJ signed an Order granting Partial Summary Decision in the above-captioned matter declaring as follows:

> "1. Pursuant to N.J.S.A. 18A:12-2.1, Oliver Brown and Edgar Brown forthwith should be sworn in as members of the Newark Board of Education;
>
> 2. The appointments on April 10, 1984, of Brenda Grier and Raymond Stabile, as members of the Newark Board of Education, are declared null and void and of no effect;
>
> 3. The partial summary decision be submitted to the agency head for immediate review as an Initial Decision and all subsequent activities abide the Commissioner's final decision."

13. Concurrent with the reading of Judge Weiss' oral opinion from the bench, counsel for Petitioners Wilnora Holman et al. sought immediate injunctive relief from the judge restraining the Board of Education of the City of Newark from conducting any reorganization activities at its meeting set for the evening of April 24, 1984. Upon denial of said relief on procedural grounds by the judge, counsel for the aforesaid petitioners appealed to the Commissioner via telephonic communication. Upon the Commissioner himself hearing arguments of counsel from both sides, the Commissioner granted the relief requested barring the Newark Board of Education from carrying out any activities directed toward formal reorganization until a decision had been rendered on the merits, the aforesaid verbal restraint being confirmed by written order of the Commissioner on April 25, 1984 and incorporated herein by reference.

14. Because of the highly volatile nature of the issues involved herein and because of the necessity for rapidly reaching a determination to lift the restraints granted in this matter and concluding this case so that the Board of Education may proceed with its functions secure in the composition of its membership, the Commissioner's representative conferred with counsel for each of the parties and reached agreement to set 1:00 p.m. Monday, April 30, 1984 as the shortened timeline for receipt of exceptions.

15. Upon recitation of the facts as set forth herein, the Commissioner is prepared to render a decision upon consideration of the legal arguments set forth by the parties in their papers and oral argument before Judge Weiss and contained within the voice-activated recordings which are part of the record and incorporated herein by reference.

The Commissioner has reviewed the record in the instant matter, as well as the voice-activated audio tapes of all of the

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proceedings before Judge Weiss and the written transcript provided by the Board. The Commissioner notes that exceptions have been filed by each of the parties in the instant matter pursuant to a schedule established by the Commissioner in consultation with the parties.

Petitioners Brown and Brown except to the failure of Judge Weiss to address their plea for the awarding of legal costs and fees in the instant matter. Petitioners' request that the Commissioner address the aforementioned issue and exercise his authority to award said costs and fees. Further, Petitioners Brown and Brown and Petitioners Holman et al. take exception to Judge Weiss' finding of fact that the resolution of the Newark Board of Education referred to earlier in the factual recitation herein was indeed voted upon by the Newark Board of Education at its meeting of April 10, 1984. Petitioners argue that no vote ever took place.

Petitioners Wilnora Holman et al. take exception to the ALJ's failure to recognize the instant suit by the aforementioned petitioners as a class action. Petitioners contend that, as citizens and eligible voters of the City of Newark, they represent all the voters of the city who participated in the Board of Education election held on April 3, 1984. Petitioners Holman et al. further take exception to the ALJ's declination to address the constitutional issues raised by petitioners in their original papers, namely that the action of the Newark Board of Education represented a denial of the right to vote and be represented by duly elected officials of their choice as well as a denial of equal protection of the law by treating members-elect of the Board differently from members of the Board without legal justification.

Finally, Petitioners Holman et al. hold that the ALJ erred in failing to enjoin the Newark Board of Education from reorganizing until Brown and Brown were properly seated. Petitioners claim that the ALJ had the authority to grant the immediate relief requested and to have ordered Brown and Brown seated while removing Grier and Stabile.

Petitioner Newark Board of Education in lengthy exceptions incorporated herein by reference argues the following:

1. That the administrative law judge erred in failing to strictly construe the statutory language of N.J.S.A. 18A:12-2. The Board further contends that the ALJ in so failing to strictly construe the statute in question, in effect created a new standard which requires that a claim against the board must be "substantial and material" before it serves as a bar to qualification to serve. The Board contends that such misinterpretation flies in the fact of accepted principles of statutory construction and stands in contravention of existing case law. Further, as a subsidiary issue, the Board contends that it has properly construed the language of N.J.S.A. 18A:12-15 in filling the "vacancy" created by the disqualification of Brown and Brown. The Board argues that, since

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Brown and Brown were never sworn in as board members and they were not members, N.J.S.A. 18A:12-15(a) was not the appropriate portion of that statute to be applied in filling the vacancy. The only portion of said statute to apply in the instant matter, argues the Board, was paragraph (f) which provides that the Board shall fill vacancies "...in all other cases."

2. The Board contends that the ALJ erred by finding that the suit of Brown and Brown was designed to vindicate a public interest and was not pursued for selfish or personal motivation. The Board so contends because it alleges that the ALJ assumed the absence of the existence of material facts in dispute when he rendered his partial summary judgment. Notwithstanding such assumption, argues the Board, the ALJ proceeded to find that disqualification must be based upon a finding of "substantial and material benefit" and then further proceeded to find no such "benefit" without allowing a full finding of fact on this issue. In summary, it is the contention of the Board that the ALJ acted in haste to render summary judgment and without full deliberation or full opportunity to explore the factual circumstances. The Board's position is best summarized by the following direct quote from the Board's exceptions:

> "If substantial material claim is required for disqualification, the Board should should have been granted a full plenary hearing to illustrate that the lawsuit filed was filed primarily for the purpose of serving as a personal vehicle of Brown and Brown to run for election to the very Board they sued." (Board's Exceptions, at p. 42)

3. The Board's final exception contends that the ALJ erred in restraining Grier and Stabile from acting as de facto Board members. In the alternative, the Board argues that the two holdover Board members be permitted to serve until the matter herein is resolved. As support for the principle of a de facto board member being allowed to serve, the Board cites the circumstances surrounding Nina Robinson in the case of Brenda Grier v. Board of Education of the City of Newark, decided by the Commissioner May 11, 1982), wherein Ms. Robinson was sworn in and continued to serve as a de facto board member, notwithstanding the fact that such service was from September 8, 1981 until May 11, 1982 and the fact that the Commissioner ultimately found in favor of Petitioner Grier.

In addressing the very lengthy and voluminous arguments raised by the Board's exceptions in the instant matter, the Commissioner observes that the Board makes a very careful distinction between the right of a sitting board member to be involved or bring a suit against the board without automatically, by virtue of said suit, being disqualified pursuant to the provisions of N.J.S.A. 18A:12-2, while denying such right to board members-elect. South Plainfield Independent Voters v. Board of Education of the Borough

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of South Plainfield, 1975 S.L.D. 45 and Famette v. Board of Education of the Borough of Wood-Ridge, 1964 S.L.D. 42 The sole distinction between the two circumstances is the fact that the permissible action may be brought by a board member solely because he or she has been duly sworn in, while the absolutely barred circumstance is one in which the individuals have not as yet been sworn. Put another way, had Petitioners Brown and Brown been sworn members of the Board when the alleged act of violation of the Open Public Meetings Act took place, they could have with impunity instituted their alleged "claim" against the Board and even sued for court costs and legal fees without being in violation of N.J.S.A. 18A:12-2. However, in the instant case, pursuant to the Board's logic, petitioners were, by virtue of the selfsame suit, automatically disqualified from holding the public office to which they were duly elected. Not only were they held to be disqualified, in the Board's view, but such disqualification could be imposed by a board of education whose term of office had expired sine die upon the convening of the scheduled reorganization meeting of April 10, 1984 and under circumstances in which its successor Board had not as yet been reorganized pursuant to the provisions of N.J.S.A. 18A:10-3. See Jean Warren v. Board of Education of the Township of Neptune, Monmouth County, 1975 S.L.D. 251.

The Commissioner cannot accept such logic. It is clear to the Commissioner that there is no grant of authority within the confines of N.J.S.A. 18A:12-2 which leads to the conclusion set forth by the Newark Board of Education that said statute authorizes any board, much less an unconstituted board, the exercise of unilateral authority to invoke the specific provisions of the above-cited statute without having instituted formal proceedings before the Commissioner to substantiate its allegation of "inconsistent interest." The Commissioner notes that in no case involving a contention of inconsistent interest on the part of board members-elect were such board members denied an opportunity to be seated on the board pending the outcome of the litigation. The Commissioner observes that the actions of the Newark Board of Education in denying due process to duly elected board members may very well have raised issues of constitutional proportions which the Commissioner, however, finds unnecessary to address under the circumstances. See In the Matter of the Election of Dorothy Bayless to the Board of Education of Lawrence Township School District, Mercer County, 1974 S.L.D. 595, reversed State Board 1974 S.L.D. 603.

Consequently, the Commissioner affirms the finding of the ALJ that the actions of the Newark Board of Education in denying the seating of Oliver and Edgar Brown, two duly elected individuals, at its meeting of April 10, 1984 was a ultra vires act and therefore without legal effect. Having so determined, the Commissioner must further find that the subsequent act of appointing Brenda Grier and Raymond J. Stabile to fill the two allegedly vacant seats within the same resolution was likewise without legal effect and is therefore set aside.

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Having determined that the action of the Board of Education of the City of Newark in refusing to swear in and seat Petitioners Brown and Brown and seating Brenda Grier and Raymond J. Stabile in their place was without lawful authority and thus, ultra vires, the Commissioner must address the substantive issue herein, namely whether Petitioners Oliver Brown and Edgar Brown were, by virtue of their suit against the Board of Education of the City of Newark and their request for legal fees and costs, in violation of N.J.S.A. 18A:12-2 and thus disqualified from continuing in office, had they been appropriately sworn, seated and thereupon challenged.

The Commissioner notes that the argument of the Board of Education of the City of Newark in its exception is based on the contention that the ALJ has ignored the standard of strict application of the language of N.J.S.A. 18A:12-2 and substituted for such strict construction a new standard by which to determine whether or not a claim against the Board was sufficient to require disqualification, namely whether such claim would result in "substantial and material" benefit to the person or persons pursuing such claim. The Commissioner finds the Board's rigid interpretation of N.J.S.A. 18A:12-2 inconsistent with the statute and with a significant body of case law which holds otherwise. The Commissioner notes with approval the reliance of Judge Weiss upon the analysis and findings in Thomas D. Hogan et al. v. Kearny Board of Education and Kearny Board of Education v. Thomas D. Hogan, decided April 12, 1982, aff'd State Board of Education August 4, 1982. The Commissioner notes that said analysis and decision clearly stand for the proposition that, while a suit for reimbursement of legal fees does represent a claim against the board, every such claim does not automatically disqualify the person making such claim from serving on a board of education. The Commissioner further notes that support for the proposition that the individual circumstances in each case must be examined to determine whether the claim is substantial and material as to require disqualification may be further found in Bayless, supra, at 605. Therefore, contrary to the contention of the Board herein, it appears to be clear that the "substantial and material" test enunciated by Judge Weiss in his determination is not only not unique to him but has also been previously applied by the Commissioner and affirmed by the State Board of Education. See also Famette v. Board of Education of the Borough of Wood-Ridge, 1964 S.L.D. 42 and South Plainfield Independent Voters v. Board of Education of the Borough of South Plainfield, 1975 S.L.D. 47.

The Commissioner must next turn to the specific circumstances which prevail in the instant case as required by Bayless, supra. In the instant matter, the Commissioner finds and determines that Judge Weiss properly concluded that the circumstances herein do not support a contention that Petitioners Oliver Brown and Edgar Brown would benefit materially and substantially from a finding that they are entitled to reimbursement of legal fees and costs for the suit pending before the Appellate Division. The Commissioner, notwithstanding the contention of the Board, agrees with the ALJ's conclusion that Petitioners Brown and Brown were seeking to pursue a

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public interest and not personal aggrandizement and enrichment. While the Commissioner is mindful of the previous findings in case law that the advantage to be obtained in matters of this kind being adjudicated herein need not necessarily be pecuniary and material, he is likewise unconvinced by the claims elaborated herein by the Board that Petitioners Brown and Brown were primarily motivated by the desire to promote their political interest in pursuing the suit which has become the basis for the action herein.

The Commissioner notes that the Board as proof of such political motivation offers an affidavit from a Board employee attesting to the fact that Edgar Brown obtained a candidate's petition some five days after he had filed the suit and some four days after he and Oliver Brown held a press conference to publicize their suit. A second affidavit from an attorney employed by the Board attests to the fact that he attended a press conference held by supporters of Brown and Brown to publicize the suit at which time comments were made expressing dissatisfaction with the functioning of the Board. A third affidavit makes substantially the same statements. The rest of the exhibits offered as proof by the Board are newspaper articles dealing with the suit and/or publicizing the activities of Petitioners Brown and Brown and a series of circulars and flyers some of whose origins are clearly the organization supporting Brown and Brown and others of which have no clearly definable origin other than the fact that they are highly critical, perhaps even defamatory, concerning the Board and its employees.

In assessing the value of the Board's assertion of political motivation and the proofs offered, the Commissioner takes notice of the fact the positions on a board of education are elective offices which in our society are filled through a political process. That political process operates on the basis of each candidate trying to demonstrate to the voters that he or she can better serve the public good than the opposing candidate or candidates. Within the framework of that process, it is common practice to cast your opponents in an unfavorable light; to criticize their actions and their accomplishments; to individualize and personalize such criticism; to make promises of improvement; to sponsor meetings; and to hold press conferences and schedule events in such a manner as to maximize public exposure.

In acknowledging the above, the question of what motivates the actions of persons seeking public office may be considered. If we place any faith in the democratic process whatsoever, we must acknowledge that the campaign activities described above are undertaken by individuals so that they may be elected to serve the public interest. Where the balance point between personal aggrandizement and commitment to public service resides is almost impossible to discern since the perspective is so colored by the individual viewing the scene. Thus, a suit brought by two persons who turn out to be candidates for a board of education may be viewed by their supporters as a courageous act designed to right a public wrong, while the same suit may be viewed by opponents as having been primarily motivated to promote the election of the two candidates.

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Indeed, to the supporter, the candidacy itself may be deemed to have been motivated by the same "injustice" which the suit is designed to rectify.

Therefore, while the Commissioner deplores the invective and scurrilous nature of some of the campaign literature which circulated in Newark, and would wish the campaign for boards of education to be conducted on matters which relate more specifically to educational issues, he cannot reach the conclusions suggested by the Board in its exceptions.

Under the circumstances which prevail herein and in light of the aforesaid finding of the ALJ in the instant matter, the Commissioner finds and determines that the suit brought by Petitioners Brown and Brown will not, should they eventually prevail, result in "substantial and material" benefit to them to the degree that they should be disqualified from holding office as elected members of the Board of Education of the City of Newark. Nor does he find that there exists any proof substantial enough to demonstrate that the primary, or even secondary, motivation of Petitioners Brown and Brown in bringing their suit was the promotion of their own political interest. Nor in the Commissioner's view would any number of hearings succeed further in producing a finding of fact to demonstrate such motive.

Consequently, and for the reasons contained herein, the Commissioner affirms the findings of Judge Weiss that Petitioners Brown and Brown were not by virtue of their suit disqualified from holding office pursuant to N.J.S.A. 18A:12-2.

Having found that Petitioners Brown and Brown were improperly denied their seats by the action of the Newark Board of Education on April 10, 1984, the Commissioner finds no need to address or consider the constitutional issues raised by Petitioners Holman et al. nor to reach a conclusion relative to whether or not the resolution introduced on April 10, 1984 was indeed passed as allegedly verified in the minutes. Having determined such resolution to be null and void, the Commissioner holds that no further finding is required. The Commissioner likewise finds it to be unnecessary to address the issue of Judge Weiss' failure to grant injunctive relief relative to the reorganization of the Newark Board of Education since the Commissioner did grant such relief in his Order of April 24, 1984.

The Commissioner, having found that the Newark Board of Education acted without authority and in an unlawful manner to deny seats to two properly elected board members, finds it unnecessary to address the issue of class action as raised by Petitioner Holman et al.

The sole issue still unresolved and not addressed by the ALJ is that of the right of Petitioners Brown and Brown to recover legal fees and costs in pursuing the instant matter.

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In reaching a determination on this issue, the Commissioner is required to construe the provisions of N.J.S.A. 18A:12-20 which provide as follows:

> "Whenever a civil or a criminal action has been brought against any person for any act or omission arising out of and in the course of the performance of his duties as a member of a board of education, and in the case of a criminal action such action results in final disposition in favor of such person, the cost of defending such action, including reasonable counsel fees and expenses, together with costs of appeal, if any, shall be borne by the board of education."

In the Commissioner's view the question of whether or not Petitioners Brown and Brown are entitled to reimbursement for reasonable legal costs and court fees turns upon whether their status upon election was one of board member, though unsworn, and whether the action taken by the Board in denying them their rightful seats represented an action arising out of and in the course of their duties within the intendment of the statute. Since no argument was taken on this issue and since it was never properly addressed, the Commissioner directs that this issue be remanded to the administrative law judge for consideration and recommendation.

In summary, the Commissioner affirms the finding and determinations of the administrative law judge and makes them his own with the exception of the issue of legal fees which is remanded for consideration. The Commissioner therefore directs the Newark Board of Education to carry out the directives of this decision as previously ordered by Judge Weiss in his partial summary decision.

Upon the effectuation of the decision herein, all restraints upon the Newark Board of Education contained within the Order of the Commissioner dated April 24, 1984 are hereby lifted, except that the Newark Board of Education pursuant to the provision of N.J.S.A. 18A:15-1 is hereby precluded from electing a board president and vice president, said responsibility pursuant to the above-cited statute devolving upon the Essex County Superintendent of Schools. In fulfilling her statutory duty, however, the Commissioner does not preclude the County Superintendent from, in her discretion, consulting with the Newark Board of Education for purposes of soliciting input as to those appointees to the position of president and vice president.

IT IS SO ORDERED.

MAY 2, 1984 COMMISSIONER OF EDUCATION

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BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,

PETITIONER-APPELLANT,

V.

EDGAR BROWN AND OLIVER BROWN,

PETITIONERS-RESPONDENTS.

STATE BOARD OF EDUCATION

DECISION

WILNORA HOLMAN ET AL.,

PETITIONERS-RESPONDENTS,

V.

BOARD OF EDUCATION OF THE CITY OF NEWARK ET AL., ESSEX COUNTY,

RESPONDENTS-APPELLANTS,

Decided by the Commissioner of Education, May 2, 1984

For the Petitioner-Appellant, Newark Board of Education, Podvey, Sachs and Catenacci (Robert L. Podvey, Esq., of Counsel)

For the Petitioners-Respondents, Holman et al., Essex Newark Legal Services, (Junius W. Williams, Esq., of Counsel)

For the Respondent-Appellant, Raymond J. Stabile, Pro Se

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

October 3, 1984

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION DISMISSING PETITIONERS CLAIM FOR INDEMNIFICATION
OAL DKT. NO. EDU 2697-84
(ON REMAND)
AGENCY DKT. NO. 119-4/84

EDGAR BROWN AND OLIVER BROWN,
Petitioners,
v.
BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,
Respondent.

Wayland H. Goldston, Esq., for petitioners Edgar Brown and Oliver Brown

Robert L. Podvey, Esq., for respondent (Podvey, Sachs & Catenacci, attorneys)

Record Closed: October 18, 1984 Decided: November 2, 1984

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

This matter is now before the court on partial remand from the Commissioner of Education. The underlying litigation, which challenged the Board's refusal to swear in and seat petitioners Edgar Brown and Oliver Brown as Board members, resulted in a determination that their rights had been violated. This court's Order directing their

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immediate seating on the Board was affirmed by the Commissioner. However, as part of their petition, Messrs. Brown and Brown also sought reimbursement of their legal fees under N.J.S.A. 18A:12-20. Since that issue was not addressed during the preliminary consideration of the major issue in the case, the Commissioner remanded the matter for a determination as follows:

"In the Commissioner's view the question of whether or not Petitioners Brown and Brown are entitled to reimbursement for reasonable legal costs and court fees turns upon whether their status upon election was one of Board member, though unsworn, and whether the action taken by the Board in denying them their rightful seats represented an action arising out of and in the course of their duties within the intendment of the statute. Since no argument was taken on this issue and since it was never properly addressed, the Commissioner directs that this issue be remanded to the Administrative Law Judge for consideration and recommendation." See Decision of the Commissioner, May 2, 1984, p. 19.

Both sides have agreed that no issue of material fact exists and that the unresolved question can be determined by way of summary decision. To that end, briefs have been filed and the matter is now ripe for such a determination. See N.J.A.C. 1:1-13.1 et seq. The applicable statutory provision is N.J.S.A. 18A:12-20 which has been the subject of several decisions both by the Commissioner and the courts of this State. The statute provides in pertinent part as follows: "Whenever a civil . . . action has been or shall be brought against any person for any act or omission arising out of and in the course of the performance of his duties as a member of a board of education, . . . the board of education 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. Any board of education may arrange for and maintain appropriate insurance to cover all such damages, losses and expenses."

According to petitioners, they are entitled under the statute to be paid or indemnified in the total sum of $8,440.18, which consists of fees for legal services

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amounting to $8,197.95 and costs and disbursements of $242.23. No challenge is made by the Board to the reasonableness of the amount of services rendered and/or the hourly fees and costs. In support of their legal position, petitioners refer to the decisions in Jones v. Kolbeck, 119 N.J. Super. 299 (App. Div. 1972) and Seruda v. Jersey City Bd. of Education, 167 N.J. Super. 331 (Law. Div. 1979). While both of those cases touch upon the relevant statute, neither are of assistance with respect to the particular circumstances of the case sub judice. As respondent points out with respect to the Seruda case, for example, the challenge there was to action taken by the de facto Board members who had done certain things in their capacity as board members. In this case there was no such activity on the part of petitioners.

By its very terms the literal language of the statute would appear to me to preclude the relief sought by the two petitioners. The plain language of the law anticipates providing financial assistance to a Board member when a civil action has been brought against him and there is an obligation to defend. In this matter, that context does not apply. Beyond that, the statute anticipates that the action must concern some act or omission which arose out of and in the course of the performance of one's duties as a member of the Board of Education. See, e.g., Powers v. Bd. of Education of Union City, 124 N.J. Super. 590 (Law Div., 1973), aff'd. 127 N.J. Super 294 (App. Div. 1974), cert. den. 65 N.J. 575 (1974). That element is lacking here.

Further, as respondent observes in its brief, it would appear that the purpose of the statute was to permit members of boards of education to act in their official capacity without fear of being involved in litigation which would be a great personal financial burden. As respondent puts it, "This statutory purpose of diminishing the chilling effect of potential litigation on Board members is irrelevant to the petitioners, who never enjoyed the opportunity to express themselves as Board members before the suit was instituted." Brief of Respondent, pages 6-7.

The case for the petitioners clearly has a surface appeal. As it turned out, they had to seek the assistance of the administrative law forum in order to have their rightful

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claim to be sworn in and seated as Board members vindicated. In that effort, they had to expend money. However, it is not within the province of this tribunal to legislate with respect to that situation. The statute, on its face, does not in my opinion leave room for indemnification of those expenses in a situation of this sort and any change, if any, must come from the Legislative branch of government. Accordingly, summary decision is hereby entered dismissing petitioners' claims under N.J.S.A. 18A:12-20.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF EDUCATION, SAUL COOPERMAN,** who is empowered by law 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 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 2, 1984
DATE

Stephen G. Weiss
STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

Nov. 5, 1984
DATE

Seymour Wilens
DEPARTMENT OF EDUCATION

Mailed To Parties:

NOV 08 1984
DATE

Ronald L. Parker
FOR OFFICE OF ADMINISTRATIVE LAW

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EDGAR BROWN AND OLIVER BROWN,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

The record and initial decision on remand have been reviewed. No exceptions were filed by the parties pursuant to N.J.A.C. 1:1-16.4a, b and c.

The Commissioner notes that this appears to be a case of first impression given the absence of any case law addressing the factual circumstances as presented herein. Upon a careful review of the record and the judge's analysis, determinations and recommended dismissal of petitioners' claims, the Commissioner is constrained to reverse that recommendation for the following reasons.

Petitioners were duly elected to membership on the Newark Board of Education. A previous Commissioner's decision, Board of Education of the City of Newark v. Edgar Brown and Oliver Brown: Edgar Brown and Oliver Brown v. Board of Education of the City of Newark: Wilnora Holman et al. v. Board of Education of the City of Newark et al., dated May 2, 1984, determined that each petitioner was in fact qualified for membership on that Board. The Board illegally denied petitioners their rightful swearing in and seating on the Newark Board. But for the illegal action of the Board, there is no question that petitioners would be protected by N.J.S.A. 18A:12-20 for indemnification of legal fees and costs. In Suruda, supra, the Appellate Division determined:

> "***It is established that legal fees in connection with the defense of a challenge to board membership are within the ambit of N.J.S.A. 18A:12-20. Jones v. Kolbeck, 119 N.J. Super. 299 (App. Div. 1972), where it was held that members of the board of education were entitled to be indemnified for their legal fees in defending a suit challenging their board membership.***"
> (at 333-34)

In Suruda, two individuals who had been sworn in and functioned as board members were subsequently disqualified but were found to be entitled to indemnification as de facto board members. In the instant matter, petitioners were prevented by an illegal action on the part of the Newark Board to assume their duties and responsibilities as Board members.

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Notwithstanding the fact that petitioners were not duly sworn Board members at the time of the filing of this matter before the Commissioner, it is the belief of the Commissioner that the factual circumstances herein can be reasonably interpreted to represent an action arising out of and in the course of duties/ responsibilities related to board membership within the intendment of N.J.S.A. 18A:12-20. Having been elected by the voters of Newark to the office of Board member, petitioners had a duty and responsibility to defend a challenge to their Board membership so as to assure that the express will of the public could be realized. The Commissioner has a grave concern that a determination to the contrary would undoubtedly serve as a barrier or discouragement to other interested citizens from pursuing and assuming the duties and responsibilities of public service as members of a board of education.

Further, the Commissioner believes that it is not unreasonable to conclude that duly elected, qualified board members, prevented from assuming the duties of such membership by an illegal board action, are entitled, within the intendment of N.J.S.A. 18A:12-20, to the same protection of indemnification for defending a challenge to board membership as individuals who were sworn in and served as de facto board members but were subsequently determined to be disqualified. Suruda, supra

Accordingly, it is the determination of the Commissioner that petitioners are entitled to the attorney fees requested, there being no challenge to the reasonableness of those fees. Therefore, summary judgment for indemnification is granted to petitioners. The Newark Board of Education is hereby ordered to immediately provide to petitioners the sum of $8,440.18.

COMMISSIONER OF EDUCATION

September 19, 1988

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1871-83
AGENCY DKT. NO. 501-12/81A;
143-4/81A
(ON REMAND EDU 4597-82)

BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF UNION COUNTY REGIONAL HIGH SCHOOL DISTRICT #1,
Petitioner
v.
ANTHONY CASTALDO,
Respondent.

APPEARANCES:

Richard J. Kaplow, Esq., for petitioner
(Weinberg & Manoff, attorneys)

Frederic H. Pearson, Esq., for respondent
(Pearson & Shapiro, attorneys)

Record Closed: January 17, 1984 Decided: March 2, 1984

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

This matter is before me on remand from the Commissioner of Education. It concerns tenure charges certified in April 1981 by the Board against the respondent, Anthony Castaldo, a school psychologist. Castaldo had been employed in that capacity by the Board from January 1969 until the tenure charges were certified to the Commissioner

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and he was suspended without pay. The proceedings have had a somewhat convoluted history since then. As noted, the matter is on remand. This stems from the Commissioner's Order of Remand, dated March 9, 1983, which contains a chronological history of the events which led up to the remand. In summary, after the issues were joined in mid-1981, the parties engaged in settlement discussions. These led, ultimately, to the preparation and execution of a Stipulation of Settlement and Dismissal. That document was recommended for approval by an administrative law judge in an Initial Decision dated March 17, 1982. However, in May 1982, the Commissioner, noting the serious nature of the allegations, rejected the proposed settlement and remanded the matter to the Office of Administrative Law for further proceedings. However, between the date of the execution by the parties of the rejected settlement (March 1982), and the date of the Commissioner's first remand (May 1982), a lump sum payment of $52,000 was actually turned over to the respondent by the Board. Following the Commissioner's remand, an Order was entered directing respondent to repay the settlement sum to the Board. When he failed to do so, in violation of her Order, the judge, on motion of the Board, suppressed respondent's defenses. In addition, and because of that same conduct, the reinstitution of salary payments after 120 days to a tenured staff member who has been made the subject of certified charges (N.J.S.A. 18A:6-14) also was denied respondent.

Thereafter, respondent obtained new counsel and settlement discussions again took place. In early December 1982, a letter of resignation was submitted by respondent to the Board. However, within a few days thereafter, respondent dispatched a telegram to the law judge in which he noted he now had discharged his second attorney, revoked his purported resignation and requested a hearing. By then, the entire file had been transmitted to the Commissioner as a "withdrawal" and the Board took the position that the respondent's attempted revocation of his resignation was a nullity. In February 1983, a Deputy Assistant Commissioner wrote to the then Deputy Director of the Office of Administrative Law indicating that the matter would not be treated as a "withdrawal" since that would contravene the Commissioner's explicit direction that a hearing be held on the charges. In that same communication the Deputy Assistant Commissioner also

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pointed out that since respondent had accepted the sum of $52,000 and had not returned it, the Commissioner considered it to be a "blatant subterfuge" to permit him to resign. Accordingly, the Commissioner returned the case with a direction that there be an immediate hearing on the merits of the tenure charges.

Upon the return of the file to the Office of Administrative Law, newly retained counsel for respondent made a variety of motions. Most pertinent were requests that Judge Reiner's prior orders suppressing respondent's defenses and freezing his salary accrual be vacated. Oral argument was heard with respect to that requested relief and an order on April 11, 1983 was entered by the undersigned denying the same. A new prehearing conference was also conducted and several days during May 1983 were set down for conduct of the hearing. Prior to commencement of the hearings, an application was made by respondent to the Commissioner seeking an interlocutory review of my determination to deny the motions to vacate Judge Reiner's two orders. Under date of May 2, 1983, which was the first day of the hearing, the Deputy Assistant Commissioner informed counsel that the Commissioner had determined to review the order of April 11, 1983. The hearings nevertheless commenced promptly on May 2, 1983, continued for several days during that month, and were concluded on June 6, 1983. Counsel then were directed to file post-hearing memoranda, to include proposed findings of fact with respect to each of the charges that remained in the case.* However, on June 10, 1983, the Commissioner issued his decision with respect to the pending interlocutory review applications. In that decision, although he upheld the determination not to vacate Judge Reiner's previous order freezing Castaldo's salary accrual, the Commissioner reversed my refusal to vacate Judge Reiner's order suppressing respondent's defenses, holding that imposition of such a sanction was violative of due process. Both sides then filed appeals to the State Board of Education from the Commissioner's decision. Counsel and

* Certain of the charges were withdrawn by the Board or dismissed during the hearings; These will be noted with specificity, infra.

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the court were, at this point, caught somewhat between, "a rock and a hard place." On the one hand, the Commissioner had insisted upon the prompt scheduling and conduct of the tenure hearings, which took place with the defenses suppressed. On the other hand, the question of the precise nature of those hearings was then pending before the State Board of Education, since permitting presentation of the defenses, as the Commissioner directed, conceivably could require the calling of many, many witnesses on Castaldo's behalf. Accordingly, a compromise of sorts was reached whereby the case did continue with some testimony by way of additional cross-examination of Board witnesses, while both sides and the court hoped for some prompt action by the State Board. On November 2, 1983, the State Board issued a decision in which it reversed the Commissioner and determined that Castaldo was not, after all, entitled to present defenses. However, the State Board also reversed the Commissioner's determination that the salary accrual should continue to be frozen and directed that effective as of the date of its decision Castaldo should be restored to a pay status. That latter direction was, itself, the subject of subsequent motions for clarification and applications for various sorts of relief made both to the State Board and to the Appellate Division. With respect to the pay question, the undersigned rendered a decision on February 22, 1984 which determined that any salary to be paid to Castaldo on and after November 2, 1983 should be at the same rate of pay he was receiving when tenure charges were certified against him during the 1980-81 school year. See DeMarco v. Bd. of Ed. of Glassboro, OAL Dkt. No. EDU 0265-81, August 6, 1981, aff'd. Commissioner of Education, September 21, 1981, aff'd. State Board of Education, March 3, 1982. In addition, the court entered further directions with respect to the right of the Board to offset certain sums against the retroactive entitlement. That Order is presently before the Commissioner on application for interlocutory review.

THE TENURE CHARGES

The tenure charges filed against the respondent consist of six separate counts, four of which contain various subcounts (Exhibit C-1). While each will be addressed with more particularity, infra, the following is a summary of the charges.

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Charge #1 maintained generally that since 1974-75 respondent had knowingly and repeatedly failed to adhere to school district policies, rules and regulations regarding referral of students to the Child Study Team and testing of students, had disclosed the contents of student records in confidential discussions to persons not entitled to same, had made statements regarding student placements which compromised Child Study Team activities and, in general, had so conducted himself as to impede the ability of the Child Study Team, of which respondent was a member, properly to function.

Charge #2 alleged that since 1976-77 respondent had condoned, approved, acquiesced in and encouraged students to violate school rules and regulations governing attendance, student pass procedures and student behavior, said conduct constituting insubordination and conduct unbecoming a professional school psychologist.

Charge #3 alleged that since 1972-73 respondent had been absent and/or tardy on an excessive number of occasions without justification or proper permission, that he had left his assigned building without permission of his superiors on a regular basis despite instructions to the contrary and that such action constituted insubordinate behavior unbecoming a professional school psychologist.

Charge #4 set forth that since the 1974-75 school year respondent had conducted himself in a manner unbecoming a professional school psychologist in that he exercised poor judgment, publicly displayed his temper and used profanity and abusive language toward fellow staff members and administrators.

Charge #5 alleged that respondent's conduct, generally, had a negative effect upon the relationship between students and their parents resulting in numerous complaints about respondent, as well as his failure to require students to adhere to school rules and regulations.

Charge #6 alleged that with respect to one particular classified student the respondent had conducted himself in an unprofessional and unbecoming manner by

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improperly revealing confidential materials to the sister of the particular student and, as well, having been involved in an intimate personal relationship with that sister resulting in the necessity to disqualify him from further participation in a due process hearing involving the placement of that student. The charge concluded that respondent's actions, ". . . reflect moral turpitude and unfitness for the position of school psychologist."

As noted in the procedural history synopsized above, the respondent's defenses initially were suppressed. In fact, not all were so suppressed since the Board presumably had agreed that the defenses of laches and the statute of limitations would be considered to be a part of the case. See Amended Prehearing Order, April 12, 1983, paragraph 1; Prehearing Order, August 2, 1982, paragraph 1. The defenses that originally were suppressed included claims that the Board's charges were frivolous, that they were false in fact and constituted an effort to slander and malign respondent's reputation, that they contained immaterial, impertinent and scandalous matters, that they were an effort by the Board to squelch the honest, professional opinion of respondent in derogation of law and the rights of pupils and parents, that they penalized respondent for exericising his constitutionally protected right to free speech, that they displayed the Board's ignorance of the legal responsibilities of a school psychologist and/or the Child Study Team, as well as an understanding of the psychological needs and problems of pupils, that they were vague and did not permit respondent an ability to prepare a defense and, finally, that they did not set forth cognizable causes of action. An additional affirmative defense alleged that the charges were in the nature of claims of "inefficiency" and thus should have been brought pursuant to the procedures prescribed in N.J.S.A. 18A:6-11. This latter defense had previously been the subject of a motion to dismiss and was determined adversely to respondent. Apparently, no interlocutory appeal was taken from that determination.

The number of separate allegations under the six counts originally totaled 42. However, during the course of the hearing some of them were dismissed and as each charge is reviewed, infra, brief note will be taken of that fact.

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CHARGE NO. 1

The general introductory language of this charge alleged that between the 1974-75 school year and continuing until the certification of charges against Castaldo in March 1981, he had committed a variety of infractions with respect to district policies, rules and regulations and that such action had interfered with the effectiveness of the Child Study Team of which he was a member. The first specification alleged the following:

> Charge 1(a):
>
> During the period from approximately September of 1974 until April of 1975, Mr. Castaldo improperly rendered private counselling services to a graduated student on a fee basis who had been counselled by Mr. Castaldo when that person was a regular student. This was done without the knowlege of his administrators and in spite of the fact that Mr. Castaldo is not licensed to practice psychology for a fee.

There would appear to be little doubt that the respondent did, on a private basis, engage in counselling a former student as alleged, although there was some dispute over the nature and amount of the "payment" he received (Exhibits P-6, R-13, R-14). More importantly, however, is the fact that when Castaldo's activity was brought to the attention of the Superintendent of Schools, Dr. Donald Merachnik, he instructed Castaldo immediately to cease the counselling function. Castaldo apparently did just that. No disciplinary action was taken at or reasonably soon after the time of the incident and it would appear that no further thought was given to the events until March-April 1981 when the instant charges were being prepared for certification to the Commissioner.

It seems to me that the incident is quite "stale." In addition, it was apparently isolated in nature and does not appear to have been part of any similar continuous course of conduct. Shortly after it occurred, the respondent was directed to and did, in fact, cease the activity. Although Merachnik recommended that charges be pursued against Castaldo, the Board declined to do so. On balance, therefore, I am convinced that this charge, which concerns an incident occurring nearly six years before it was certified, should be DISMISSED.

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Charge 1(b):

On or about May 7, 1975, Mr. Castaldo left his assigned school without permission and delivered student classification records and other confidential pupil records to the office of then Senator Menza in Elizabeth, New Jersey. This was done without the prior consent, knowledge of, or approval by, Mr. Castaldo's superiors.

This particular specification has two separate components—leaving school without permission and then delivering certain confidential records to unauthorized persons. With respect to the first aspect, the evidence revealed that Mr. Castaldo had left word with a secretary that he would be leaving the building (Exhibit P-7). While technically there was no consent by a superior to his leaving, the fact is that the conduct did not appear to be so contumacious of authority as to justify bringing a charge against the respondent nearly six years later. The same can be said with respect to the so-called delivery of confidential records. While the testimony offered by the Board did establish that Castaldo had certain documents pertaining to students in his possession, no specific identity was made of them. Like the situation with respect to Charge 1(a), it seems to me that to pursue the allegation by way of a tenure charge some six years after the event, absent some overriding concern or continued nature of the conduct, should not be permitted. While Castaldo's conduct was not totally appropriate; nevertheless, it was not of such a nature as to support a tenure charge. I therefore recommend that Charge 1(b) be **DISMISSED.**

Charge 1(c):

On September 27, 1977, Mr. Castaldo informed Anita Williams, a member of the District Child Study Team, that he had taken upon himself to inform parents of her position on particular Team classifications and/or recommendations, which were confidential, and deliberately disclosed to dilute the effectiveness of the District Child's Study Team, and to inculcate and induce reliance upon his advice as being the only proper advice given.

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The evidence with respect to this charge consisted of the testimony of various persons, together with the introduction of certain written documentation pertaining to it (Exhibits P-8, P-9). It appeared that during September 1977 Anita Williams, a learning disability teacher consultant at David Brearly High School (hereafter "Brearly"), was on the same child study team as Castaldo. The team had before it a case involving a student who eventually was classified as perceptually impaired. Mrs. Williams felt that the ultimate classification did not take into account more serious emotional components of the handicapping condition. Be that as it may, the team's "consensus" was that the student should be classified as perceptually impaired. However, the parents confronted Mrs. Williams with the fact that they knew she disagreed with the particular classification and were therefore unhappy that she would be working with their child. Mrs. Williams suspected that Castaldo had told the parents about her particular position regarding the classification and felt that this disclosure compromised the effectiveness of the team. Further, it was Williams' belief that his revealing team discussions to parents was adverse to the best interests of the team and unless those discussions were kept confidential, there would be a "chilling effect" that would interfere with, if not destroy, the team's effectiveness. A confrontation of sorts took place between Williams and Castaldo over the event and, according to Williams, she was subjected to a stream of invectives (Exhibit P-8). Nevertheless, the ultimate upshot was that the particular incident was not the subject of any further discussion and Williams received an apology from Mr. Castaldo (Exhibit P-8).

With respect to this Charge, there was, in fact, a disagreement between Castaldo and Williams with regard to the classification of the student in question. The precise nature and extent of the disclosure made by Castaldo to the parents, which prompted them to challenge Williams' further contact with their child, was not amplified to any great extent. Since the incident ended with an apology, and was not made the subject of any further action between September 1977 and April 1981 when charges were certified, the decision by the Board to include it in the tenure charges seems to me to be inappropriate. On balance, those portions of Charge 1(c) which the Board proved do not amount to a serious enough allegation to justify a finding against respondent. In addition, it also is somewhat stale. I therefore recommend that Charge 1(c) be **DISMISSED.**

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Charge 1(d):

During the 1977-78 school year and continuing to present, Mr. Castaldo insisted upon filing minority reports regarding Child Study Team discussions, evaluations, and recommendations, despite being specifically instructed not to do so because of the deleterious effect of such practice upon the functioning of the Team. Mr. Castaldo's intentional violation of express district policy and his disclosure of majority and minority positions to both parents and students constitute acts of insubordination.

Charge 1(e):

During the 1977-1978 school year, Mr. Castaldo unilaterally informed students and their parents of his opinion regarding appropriate referrals and/or placements without prior discussion with or authorization by the District Child Study Team, in violation of District policies of which he had repeatedly been made aware.

These two charges, which will be considered together since they have a similar time frame, are similar in nature and the evidence offered by the Board to support them was essentially the same, form an essential prong of the Board's action in this case. They articulate what the Board believes to be one of the fundamental problems that it had with Castaldo and his functioning as a school psychologist and as an integral part of a child study team. Many of the Board's witnesses were asked to comment upon and did relate their recollections and experiences with regard to these charges. For example, Dr. Francis X. Kenny, who has been Director of Pupil Personal Services for the Board since 1974 and is responsible for the supervision of all special education instructional staff, stated that during the 1977-78 school year he had received information from a variety of his subordinates that Castaldo was rendering "minority reports" to parents concerning the decision-making of the team of which Castaldo was a member. According to Kenny, a "minority report" is a unilateral report which is contrary to a team "consensus." Kenny, and others, both orally and in writing, directed their concern to Castaldo (Exhibits P-17, P-23, P-24). Castaldo, said Kenny, was making recommendations outside of proper channels which were not part of the team consensus, was making premature disclosure of information to parents and was engaged in such conduct detrimental to the best interests of the school district effort to make its child study teams effective (see also Exhibit P-7).

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John B. Christiano, the Director of Special Services, works directly under Dr. Kenny. He explained that the proper functioning of child study teams requires bringing to team meetings the expertise of various disciplines so that a joint decision can be made on what is in the best interest of the student involved. Where conflicts exist between team members with respect to a determination as to a handicapping condition and/or the need for various services, the team has to reach a "consensus" decision concerning those conflicts. Indeed, if necessary, the Team can and does reach out for other specialists, such as a psychiatrist. Once a consensus is reached the team then drafts a proposed Individual Educational Plan (hereafter "IEP") and discussion then takes place concerning the current status of the student, the goals and objectives needed to remediate deficiencies and an appropriate program to carry out the same. After the draft is prepared the parent is called in to discuss it. Once mutual agreement is reached between the team and the parent the IEP will be signed and then carried out in due course. With respect to Castaldo's activities as a member of the team at Brearly, Christiano had concern because of several problems. Castaldo often refused to consider, no less accept the judgments of his colleagues and was continually proceeding on an independent course, contrary to the consensus of the other members. Christiano personally attended team meetings and observed for himself that such a problem did exist. He said that Castaldo often would remain silent and refuse to discuss or share with the team his point of view, even when pressed to do so. In some cases he would not offer an opinion at the meeting, but it was later determined that he actually had a very strong personal opinion concerning the particular student involved. His attitude, said Christiano, was definitely not a positive one and the effectiveness of the child study team was greatly impaired by Castaldo's conduct and attitude. Christiano's concern was memorialized in a memorandum he sent to the Superintendent in December 1977 (Exhibit P-4). Several specific incidents of Castaldo's unilateral activities were mentioned in the memorandum and all involved the fact that Castaldo, who disagreed with the team consensus, essentially went out on his own to make his disagreement with the determinations known informally to the parents. Further with regard to the "minority report" problem, Christiano dispatched a memorandum directly to Castaldo concerning it (Exhibit P-23).

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Christiano felt quite upset by Castaldo's orally informing parents of his, Castaldo's, own viewpoint regarding their child and Christiano felt that Castaldo simply had to stop disagreeing with the team consensus after it was reached and the IEPs prepared. Thus, Christiano advised Castaldo that he was no longer to make such minority reports and while he was certainly free to put his own ideas down in a report to his fellow team members, and even to discuss it with parents, it must be with child study team knowledge. Essentially, once the team had reached a consensus opinion, there was to be no expression of any contrary view which would only undermine the team's effectiveness. Christiano believed, however, that even after getting his memorandum, Castaldo continued unilaterally to contact parents about his own contrary opinions regarding the team's proposed actions.

Christiano was adamant that while a school psychologist could contact a parent about a child without always having to get clearance from fellow team members, those individual contacts should not be made after the team has met to draft an IEP and reached a consensus. According to Christiano, it was expected that the team would work out any differences beforehand and present the "best plan" to the parents. No team member thereafter should be permitted to state or infer that some other plan would be better for the pupil. During cross-examination Christiano amplified further with regard to the attitude demonstrated by Castaldo during team meetings which he attended. Respondent, he said, was often silent. When he did speak he was often unintelligible. By this he meant that Castaldo did not often talk loudly or clearly enough—he tended to describe matters in "jargon." Similarly, although Castaldo never in Christiano's presence refused to answer any questions, he rarely volunteered any information. Christiano then discussed some of the individual students who he had referred to in his memorandum. Essentially, he described actions taken by Castaldo which involved his personally communicating with parents about the team's activities and discussions.

Mr. Joseph Malt is Principal of Brearly and was the principal at the same time Castaldo served on the child study team there. Malt recalled that he attended a child

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study team meeting during the 1977-78 school year which also involved a conference with the parents of a student (R.G.) and her brothers. As he recalled the situation, the student apparently had been told that she did have to go to certain classes and she refused to attend them even though her IEP required her to go. According to the student's adult brother, Castaldo had called him and said that in his opinion the student need not have to attend the class. That conduct, said Malt, created a great deal of upset and compromised the entire IEP. Malt was so distressed that he dispatched a memorandum to Castaldo complaining about that incident (Exhibit P-36). George Scheer, a job placement coordinator at Brearly also corroborated this incident, and others like it. (See Exhibit P-57.) According to Scheer, the student's brother told him that Castaldo said that he, Scheer, was out to get his sister. Castaldo, said Malt, claimed that the entire incident was the result of "a misunderstanding," that he had been misquoted about what he told the student's brother. Malt reiterated that such unilateral contacts simply were not proper. He pointed out to Castaldo that the place to discuss differences between or among team members is at their meetings and conferences and that unilateral contacts with parents or other relatives of students should not take place. Malt also recalled that there were other instances in which the respondent would tell students and/or their parents he would change their schedules or get them out of certain classes. When confronted with those situations Castaldo, said Malt, either would deny making the contacts or claim that he had been misinterpreted.

Testimony then was offered on behalf of the Board by Ronald J. Benford, the Child Study Team Supervisor in Union County. His responsibilities include monitoring local special education programs and supervising implementation of Department of Education rules and regulations concerning the same. Benford said he first became aware of Castaldo in June or July 1977 when he was asked by Dr. Kenny to review Child Study Team evaluations prepared in the district (Exhibit P-18). According to Benford, he had a conversation the following year with Castaldo who called to speak to him. Castaldo complained about Christiano and the workings of the Child Study Team—stating he was frustrated with his not being given an opportunity to do counselling. Benford said he pointed out to Castaldo that the regulations defining Child Study Team activities moved

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them much more closely to the evaluation function and deemphasized individual counselling activities. According to Benford, proper team procedure involves each individual member making his or her own evaluation of the case and a determination within the parameters of the member's particular discipline. No single member can make a final determination. The group must meet as a team, share their views, discuss the situation with the parent and then decide, as a team, what appropriate action should be taken. It is improper, said Benford, for any individual team member to disclose the preliminary findings of other team members. If this occurs, there will be a great deal of difficulty in dealing with parents and turmoil would result. Benford also discussed the concept of the "minority report." In general, it was his understanding that there was no reference to the concept in the rules and regulations nor any particular policy statement developed concerning the notion. However, Benford repeated that individual team members should not be communicating their private opinions to parents during the formulation of the team consensus in a manner which would interfere with, frustrate or otherwise get in the way of the team's proper functioning.

A specific example of Castaldo's alleged unilateral, interfering conduct was testified to by Christiano and Williams. In one case a student was evaluated by the team and the opinion of the team members other than Castaldo was that there would be no need to classify because he was achieving in a most satisfactory manner in a regular program. Castaldo disagreed—insisting that there should be a classification and the receipt of certain kinds of special education services. Nevertheless, the team decision was not to classify and it was determined that the parents would be so informed. However, soon thereafter Christiano received a call from the student's mother stating that she had learned of the team's decision, but that Castaldo had also contacted her and told her that the team's determination was not proper. The parent then requested a due process hearing. Eventually, the matter was resolved and the student was not classified.

Based upon my consideration of the testimony with respect to Charges 1(d) and 1(e), I am convinced that the Board has carried the burden of proving the allegations by a fair preponderance of the credible evidence. Kenny, Christiano, Malt, Williams and Scheer all provided examples of respondent's commission of the conduct charged. While

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respondent questioned the notion of a "minority report" with his superiors and with state officials, he knew full well that he had been instructed to cease his disruptive activities. So, too, with respect to unauthorized disclosures. None of the instances cited by the Board's witnesses were satisfactorily explained by the respondent—except for his insistence that he felt entitled to discuss his opinion with parents in a unilateral fashion. That habit was working totally at cross-purposes to the function of the Brearly child study team and caused it no end of grief. Accordingly, Charges 1(d) and 1(e) have been **SUSTAINED.**

Charge 1(f):

> During the 1977-78 school year, Mr. Castaldo made an unauthorized referral of a student to a psychiatrist other than the district's consultant psychiatrist, in violation of established policy regarding psychiatric evaluations. This action necessitated the payment by the Board of an unnecessary expense.

A motion to dismiss this charge was made by the respondent during the course of the proceedings and was granted. Accordingly, it will be considered **DISMISSED** for purposes of this Initial Decision.

Charge 1(g):

> During the 1978-1979 school year and continuing until the present, Mr. Castaldo has repeatedly seen various students in excess of three times without referrals being made to the Screening Committee. This is in violation of District policy and constitutes a continuing course of insubordinate conduct.

Testimony with respect to the allegations of this particular charge, which concerns the so-called "three time rule," was offered by a variety of witnesses. Initially, the Superintendent, Dr. Marachnik, identified the rule as having been created sometime during 1975. He said that it was designed to limit the discretion of the school psychologist to enter into any continuing counselling relationship with a student, absent approval of the child study team. He explained that it was felt at the time of the adoption of the rule that in order for a team member to see a student more than three times it should be done

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only at the direction of the entire child study team, which can assess all factors. Part of the reason for the rule had to do with time constraints, since the school psychologist had a large number of potential cases with which to deal and ought not enter into any long-term psychologist-patient relationship without a formal referral for that purpose. Dr. Marachnik said that he often had to speak to Castaldo about his consistent failure to abide by the rule. In addition, in 1979, Dr. Marachnik sent a memorandum to Castaldo reminding him that, "The Administrative procedure has been that you can see a student for 3 times only. If a 4th conference is needed, the student must be referred to the Child Study Team for evaluation. This procedure is in the best interests of our student body and is to be honored. No one is to violate this procedure" (Exhibit P-10). Castaldo apparently continued to question the propriety of the rule and in a letter to him from Patricia M. Brady, an employee of the Department of Education, dated August 4, 1980, he was advised that although there was no legal basis with regard to the number of times a student could be seen, it was in the best interests of pupils or school districts to adopt policies in this regard. As Ms. Brady put it, "It is difficult to imagine the contradictory situation of a student who needs ongoing assistance but whose case does not need to be reviewed by your 'Screening Committee'" (Exhibit P-11) (See also Exhibit P-38). Nevertheless, according to Dr. Marachnik, respondent had difficulty adhering to the rule and he was told by several persons that Castaldo consistently saw individual students more than three times without referring them. Dr. Marachnik believed that the policy had been reduced to writing and made available to child study teams although no such written document ever was produced. However, Marachnik was convinced that all of the child study teams and their individual members were well aware of the rule.

Dr. Kenny, who helped develop the rule, said it was intended to comport with a change in the special services regulations during 1975 which required a team approach with regard to student classification and evaluation procedures. According to Kenny, although it was recognized that contacts with students were certainly necessary and desirable, there should not be an abuse of the function. Accordingly, following a dialogue between and among the child study teams, principals, central administrative office personnel and county office personnel, the "three-time rule" was adopted. Kenny said the rule was orally communicated to appropriate persons and also believed it was contained in

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written memoranda. He knew that Castaldo certainly was aware of it because he questioned the propriety of the rule (See also Exhibit R-33).

Christiano maintained that to his knowledge Castaldo violated the rule quite often. As a result, Christiano had to talk to Castaldo about it many times since it was such a chronic problem. Castaldo took the position that although he would attempt to follow the rule, he did not agree with it. In particular, during 1979-80, when Castaldo was assigned to the Arthur L. Johnson High School (hereafter "Johnson") he was told by the principal, the vice-principal and others that Castaldo continued to see students more than three times without referral either to a Screening Committee or to the Child Study Team. Those other staff members were quite concerned about Castaldo's continued violation of the rule. In fact, in his evaluation of Castaldo in April 1980, Christiano specifically referred to the respondent's, "inability or unwillingness to follow procedures developed by the administration," including Castaldo's practice of meeting with students more than three times each without an appropriate referral (Exhibit P-28) (see also Exhibits P-26, P-30, P-42, P-43 and P-55).

Mr. Benford, the Union County representative, also spoke about his knowledge of the three-time rule and Castaldo's violation thereof. Benford agreed that there ought to be an appropriate limit on the number of contacts by the school psychologist with unclassified students since the primary role of the psychologist is in the area of educational programming—not clinical work or counselling services. According to Benford, psychologists should avoid establishing a counselling pattern without a referral taking place. Specific testimony with regard to the three-time rule also was offered by Nancy Nelson, a guidance counselor at Brearly. According to Nelson, Castaldo saw the same student many, many times without a referral. She specifically recalled that with regard to one female student, R.T., she had been told by the student that Castaldo had seen her about 15 times.

The principal of Johnson, Mr. Louis DeRosa, also testified at length with regard to this charge. When, during the summer of 1979, Castaldo was transferred to Johnson he met with DeRosa and others to discuss what would be expected of him. Among the problems that Castaldo had at Brearly, which were discussed at that time, was his

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violation of the three-time rule. According to DeRosa, he explained to Castaldo that he now was getting "a fresh start" and if he followed rules and regulations there would be no problem. Nevertheless, while at Johnson, Castaldo continued to see students as much as eight or nine times each without a referral. As a result, DeRosa said he spoke to Castaldo about it to tell him to stop. Apparently, it was to no avail and in October 1980, following a meeting the previous day with Castaldo, DeRosa sent a memorandum to the respondent which memorialized the fact that Castaldo was continuing to meet with students more than the prescribed number of times (Exhibit P-43). DeRosa expressed frustration over Castaldo's failure to cease this continued unauthorized practice.

The school social worker on the team at Johnson, Karen Vinacour, also testified with regard to the three-time rule. Vinacour explained that she and other Child Study Team members were well aware of it. After seeing a pupil for the third time, the school psychologist was required either to refer the pupil to a screening committee for further review, or to stop seeing him or her altogether. Although Vinacour and others felt that the rule was perhaps too inflexible, the administration was firm about it and that was that. Vinacour personally was aware that during 1979-80 Castaldo had seen many students more than three times. Specifically, Vinacour identified students whose initials are K.B., S.S. and K.M. as students who either told her or who she had seen in Castaldo's office on more than three occasions prior to any referral.

The Assistant Principal at Johnson, David Carl, testified that to his knowledge, too, Castaldo often violated the three-time rule. According to Carl, Castaldo was constantly reminded of his violations and told to abide by the rule even though he disagreed with it. In fact, Carl felt that Castaldo was being "used" by students who just wanted to get out of class. According to Carl, the following students saw Castaldo more than three times without a referral: R.T., S.H., C.C., T.K. and others—perhaps a dozen or so. Castaldo, he said, insisted that he saw students because they needed to see him.

In addition, other teachers at Brearly testified with regard to the three-time rule violations by Castaldo, including Michael Londino, a mathematics teacher, and William Puglisi, a teacher of the handicapped.

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A former student, B.S., also testified at the hearing. She said that during the 1979-80 school year she saw respondent practically every day for about one hour without having been referred.

Castaldo testified that in most cases where he saw a student more than three times without making a referral it would either be in a group (not a prearranged session) or would be otherwise informal. He did not feel that the rule applied in such circumstances.

Without doubt, the Board's evidence in support of this charge is overwhelming. There was a known rule and Castaldo flouted it openly. Charge 1(g) has clearly been **SUSTAINED.**

Charge 1(h):

> In March of 1980, Mr. Castaldo allowed T.D., a student at Arthur Johnson Regional High School, to have access to a confidential psychological report and California Occupational Preference System Report without first discussing the same with T.D.'s parents or obtaining a parental release, in violation of District policies and against the wishes of T.D.'s parents. Mr. Castaldo showed the report to the student even though the Child Study Team had decided not to classify the student, based upon the psychiatric evaluation and the reports and observations of other Team members.

Testimony with regard to this charge was received from T.D.'s guidance counselor, Joseph Striet, Mr. Carl and respondent himself. According to Striet, T.D. came into his office one day with a copy of a psychological report (Exhibit P-56) prepared on him by Castaldo. He said that Castaldo had given it to him. At that time, according to Striet, the child study team had not made any decision regarding potential classification of T.D. Striet said that T.D. told him, as well, that he saw Castaldo about ten times even though a Screening Committee had recommended that Striet provide counselling. Further according to Striet, by giving the report to the student without parental knowledge or permission Castaldo had violated the District's pupil records policy.

Carl testified that after receiving the report from Castaldo, in which T.D. was described as having a "psychoneurosis . . . phobic reaction" and was recommended to be

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classified as emotionally disturbed, T.D. was observed telling a group of students in the cafeteria that he was "off his rocker." No classification was ever made by the team of T.D.

Castaldo testified at some length with regard to the T.D. incident. He admitted giving the psychological report to the student since he had been treating him as a school phobic. According to Castaldo, the pupil asked him a few weeks after the evaluation what the final conclusion was and wanted to know what was so bad about it that he couldn't see it. Castaldo said he resisted, but the student persisted in wanting to see it and was manifesting behavior which concerned Castaldo. Thus, he gave the report to T.D. in order to prove to the student that he would hold nothing back and to alleviate anxiety and fear that Castaldo was hiding something from him. In addition, according to Castaldo, he explained the "emotionally disturbed" classification to T.D. in order to allay his fears and said he should take the report home and give it to his mother to set up an appointment. In short, Castaldo felt impelled to disclose the contents of the report to the student in order to interdict the growing anxiety and the irrational fear that he had not told him everything. According to respondent, he was ethically obliged to do this since certain ethical standards of the profession dictated that "disconfirming data" should not be suppressed.

Castaldo also claimed that he told the student to take the report home and show it to his mother. However, a letter from the mother to the principal of Johnson revealed that while cleaning her son's room she found the report, although her son had never even mentioned it to her. As the mother put it, "I am very concerned over this and I do not feel he [her son] should have been given these before we received them!" (Exhibit P-44).

The allegations of this charge have been proven by the Board. Respondent's action in respect to T.D. was disgraceful. The charge is **SUSTAINED.**

Charge 1(i):

During the 1979-1980 school year, and continuing to date, Mr. Castaldo has repeatedly refused to share student records and personal

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> knowledge of students' problems with members of the District Child Study Team, which has led to a lessening of overall Team efficiency and the loss of confidence on the part of the teaching staff in the ability of the Team to perform its intended function.

This particular charge more or less synopsizes a criticism made by Christiano in his April 2, 1980 summary evaluation of Castaldo (Exhibit P-28). In that document Christiano upbraided Castaldo for his insisting on attempting to function independently of other Team members, guidance counselors and administrators and that this lack of communication, according to Christiano, ". . . is significant enough in my opinion to seriously impede the functioning of the Child Study Team."

Several Board witnesses testified with respect to the conduct of the respondent either at child study team meetings or otherwise during which he acted in a manner which was, to say the least, mystifying insofar as a school psychologist is concerned. Christiano's specific reference in the summary evaluation (Exhibit P-28) was only one of them. During the hearing Christiano also testified that at some of the meetings he attended of the child study team he noted that often the respondent would not share information which he must have had in his possession. Christiano knew that Castaldo had such information since he found out later that this was so.

Mrs. Vinacour, the school social worker, said that Castaldo often refused even to talk at the meetings when discussions were going on with respect to students with whom he was dealing as a psychologist. One glaring instance involved a student named J.S. who had been absent quite a bit. After the team, other than respondent, discussed the student for about 15 or 20 minutes, Castaldo, for the first time, observed that the student had actually left the State—information which the other team members did not have. They were upset because he did not make this known earlier. Corroboration of this incident came, as well, from Mr. Carl and Edward Sanfillippo, a guidance counselor, who were both present. In a lengthy memorandum sent to Castaldo by the principal of Johnson, Mr. DeRosa, in April 1980, it was noted, among other criticisms, that Castaldo had demonstrated a refusal to share knowledge of students' problems with other team members. This overall conduct, including lack of cooperation, in DeRosa's opinion has, ". . . hurt the Team, the staff and most of all, the students at A.L. Johnson" (Exhibit P-42).

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With regard to that portion of the charge which alleges that Castaldo refused to make student records available, testimony was offered by both Mrs. Vinacour and Mrs. Williams. In particular, Vinacour said that Castaldo refused to make available to her certain records which he had in his possession regarding students, telling her that he either did not have them or that he had them at his home. At some point during the 1979-80 school year, said Vinacour, all child study team files in Castaldo's office were ordered removed due, Vinacour believed, to the complaint which she and another person had made concerning the particular problem.

On balance, there is clearly sufficient credible evidence in the record to demonstrate that the conduct alleged in the charge did take place. A strong picture emerged throughout the hearing with regard to the difficulties which fellow team members had in obtaining information from Castaldo and the incidents cited above are exemplary of that conduct. Accordingly, Charge 1(i) has been **SUSTAINED.**

Charge 1(j):

> On April 18, 1980, Mr. Castaldo deliberately attempted to bypass his Building Principal and to discuss a matter involving a student directly with a Central Office Administrator, in violation of District policy.

On the date set forth in the charge the respondent called the Assistant Superintendent of Schools, Mr. Charles Bauman, in order to discuss an "emergency." According to Bauman, as Castaldo began to relate the details he, Bauman, interrupted him and said that the immediate source with whom to deal should be the building principal. Bauman said that Castaldo indicated he could not locate the principal (DeRosa). Bauman told Castaldo that he had spoken to DeRosa a bit earlier and that he knew he was in the building. Thus, Bauman terminated the conversation, immediately dialed Johnson, asked to speak to DeRosa and reached him. Bauman memorialized the incident in a memorandum to Castaldo in which he said that the incident constituted a "deliberate attempt to bypass your Principal" (Exhibit P-45). DeRosa testified that he was in the building and available the entire morning and that Castaldo deviated from standard policy by attempting to go directly to Bauman without speaking to him first.

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Castaldo testified that a particular student on the day in question had come to his office near tears as a result of a problem at home. Since he had already seen her three times he felt obliged, accordig to the three-time rule, to call DeRosa for permission to see her again. According to Castaldo, he did place the call, but was told by a secretary that he was not at the phone and that she would page him. Because of the emergent nature of the problem, Castaldo then called Bauman and about a minute after his conversation with Bauman, Castaldo did get a call from DeRosa and the problem was thereafter resolved.

Based upon the testimony, I cannot conclude that the Board proofs sufficiently demonstrated a deliberate effort by Castaldo to bypass the authority of Mr. DeRosa. Accordingly, this charge should be **DISMISSED.**

Charge 1(k):

> In May of 1980, Mr. Castaldo improperly advised R.J., a student, that she would be allowed to participate in a work study program for the 1980-81 school year, without discussing the matter with or obtaining the approval of the District child study team, in violation of District policies.

The Board's proofs with respect to this charge consisted of the testimony of Mr. Scheer. According to Scheer, he was told by the student, R.J., that Castaldo had assured her that she would have only a half-day schedule the following year. Scheer, however, was unaware of any child study team decision to that effect at the time and he memorialized the incident in a memorandum to Christiano in which he noted that during a conversation with the student she told him that she, ". . . was advised by the school psychologist that she could continue this arrangement [babysitting] next year as a work-study student" (Exhibit P-58).

According to respondent, he had met with R.J. during the 1979-80 school year in order to discuss her schedule for the following year. The student, he said, wanted to have some sort of a work program and a discussion took place concerning this. Castaldo opined that the student apparently misunderstood what he had told her. The student was

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classified as emotionally disturbed at the time and had been helping out in the nurse's office, in the guidance office, etc.

Based upon my review of the evidence with respect to this charge, I believe that the Board has carried its burden of proof. While the exact discussion between Castaldo and the student was testified to by Castaldo alone, the Board did produce a sufficient amount of evidence through Scheer's testimony to convince me that Castaldo's explanation that the student may have misunderstood was not an appropriate one. Accordingly, this charge is **SUSTAINED.**

Charge 1(l):

This charge was withdrawn by the Board.

Charge 1(m):

> During the 1980-1981 school year, Mr. Castaldo has continued to report the content of District child study team meetings to students and parents and to offer programs to students without first consulting Team members in violation of District policies. These continued actions, in the face of repeated instructions to the contrary, constitute willful acts of insubordination.

Testimony with regard to this particular allegation came from a variety of witnesses. The charge, of course, is one of the more serious ones insofar as the alleged improprieties in Castaldo's conduct as school psychologist is concerned. It alleges not only that he acted independently of the team, but, in addition, he repeatedly did so despite instructions not to.

Mrs. Vinacour related several examples with respect to a student named J.L. who had been classified at the end of the 1979-80 school year. Castaldo, she said, independently and without authority of the child study team offered the student a shortened program. With regard to a student named J.K. who had been classified as perceptually impaired during 1978-79, he began to demonstrate behavior problems during

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the following year and told members of the team that Castaldo told him he did not have to adhere to certain programs.

With regard to M.C., Castaldo was critical of the programs recommended by the other members of the team and it was Vinacour's belief that Castaldo was feeding him information contrary to his best interests regarding those programs.

Mr. Sanfillipo, a guidance counselor at Johnson, testified to other incidents involving alleged unilateral actions by Castaldo contrary to team activities. With respect to a female student, A.M., who had been classified, Castaldo, said Sanfillipo, was pushing for a program change which the majority team members did not approve. A day after a meeting concerning A.M., Castaldo asked Sanfillipo if he had made the change. Sanfillipo said that it was his recollection that no change was supposed to be made and, accordingly, Castaldo dropped the subject. With respect to K.B., Sanfillipo said that here again although there had been no mention of any change at any child study team meeting, Castaldo asked him if the change had been made. Sanfillipo was mystified by the inquiry since he was sure that no change had been recommended. He checked with the other team members and they corroborated his belief. When Sanfillipo told Castaldo to produce team minutes with regard to any change, the respondent again dropped the issue.

Direct testimony with regard to the conduct alleged also came from the former student, B.S. She attended Johnson at the beginning of 1979-80, but was transferred to Jonathan Dayton High School that year. According to B.S., while attending Dayton she saw Castaldo from time to time and he told her the child study team at Johnson had agreed she could return to that school for 1980-81. As it turned out, no such recommendation was made and B.S. dropped out of school. In point of fact, the other team members at Johnson had determined that B.S. should not be returning to the school and it was the Board's contention that B.S. may even have dropped out because of her disappointment over that fact. Although not necessarily conclusive evidence of the team's handling of the B.S. matter, the Board did introduce a child study team report regarding B.S., dated January 8, 1980, which makes no mention, at that point in time, of her possible return to Johnson (Exhibit P-63).

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Mr. Carl, Vice Principal at Johnson, revealed that he was told by the mother of a student that Castaldo had promised her son a particular program even though the team had not discussed his status. So too, with regard to another student (J.K.) the team had determined that a student should be disciplined by removal from a specific class, but that respondent directed the teacher nevertheless to allow him to remain in that class contrary to the IEP directive (See Exhibit P-55).

Castaldo testified with regard to this charge that he never told any student or parents that the child would receive a certain program contrary to the majority team's thinking or recommendation. As to B.S., respondent insisted that the team had in fact been thinking about returning her to Johnson at the end of the 1979-80 school year, if she performed well at Dayton.

Based upon the testimony related above, and my review and consideration of the evidence, I believe that the Board easily has carried its burden of proof with respect to this particular charge. Respondent's contention that he either did not give contrary information to students or parents, or that they misunderstood him, does not ring true. There are simply too many incidents of the sort of behavior alleged in the charge. While in some cases misunderstandings do occur, I do not believe that this explains the number of situations in this particular charge. Accordingly, I **FIND** that Charge 1(m) has been **SUSTAINED.**

Charge 1(n):

This charge was withdrawn by the Board.

Charge 1(o)

During the 1980-81 school year, Mr. Castaldo has on at least one occasion tested a nonclassified student, in violation of District policies.

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The predicate for this charge is contained in a memorandum sent to DeRosa and Christiano by Carl (Exhibit P-55). In it Carl stated that a certain student, T.K., told him that he had seen Castaldo on several occasions (even though not classified) and that at one time Castaldo gave him "an I.Q. test." Giving a student a test of that sort without prior notice to parents was said by Kenny to be a violation of policy. For his part the respondent denied giving any such tests to any nonclassified student in violation of policy, law or otherwise in 1980-81.

Another aspect of this charge had to do with an effort by the Board to demonstrate that Castaldo had attempted to give a certain word association test to a student, which test contained words that were inappropriate for the particular sort of evaluation being made. On balance, I see no reason to discuss this particular charge since an objection to the introduction of an exhibit, which was supposed to be similar to the word association test used (Exhibit P-13 Id.) was sustained.

Having reviewed and considered the testimony in regard to this charge, I **FIND** that the Board has failed to carry its burden of proof and it is **DISMISSED.**

Charge 1(p):

> In the case of M.K., Mr. Castaldo, acting unilaterally, suggested to M.K. that she have an "educational sabbatical" despite the fact that other teachers, the Guidance Counselor, Social Worker and Learning Consultant were all attempting to encourage this student to maintain her attendance at school.

Mrs. Vinacour provided the Board's evidence with respect to this charge. It was her testimony that M.K., who was classified as emotionally disturbed, was on home instruction during 1979-80 and the team was attempting to encourage her to come back to school. A particular effort was made to carefully choose her teachers and courses and the program selected, according to Vinacour, was not objected to by Castaldo. However, when a conference was held with M.K.'s parents and team in November 1979, Castaldo suggested, "out of left field," that M.K. should have a "rest" from school and take an

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"educational sabbatical." Vinacour said that the team members were appaled by the suggestion since it was never an option being considered. As Vinacour put it, you can't offer "no program" as a "program." Further according to Vinacour, M.K.'s private therapist had expressed concern about Castaldo's relation to M.K. and that the private therapist was of the opinion that the girl should be in school. Although she had an I.Q. of about 140, the child was withdrawn from school later that year.

Respondent testified that with respect to M.K., she had been in and out of school for a long stretch of time and an abbreviated schedule did not seem to be working for her--it was actually increasing her anxiety. According to respondent, during discussions with M.K.'s therapist, it was the latter who suggested that she should take an educational sabbatical. A memorandum from the therapist dated January 28, 1980 to respondent set forth that in view of her problem it would not appear to be appropriate to "force her" to attend school (Exhibit R-26).

I have no doubt that Vinacour was appaled by Castaldo's springing a diverse opinion at the conference in November 1979. From the evidence before me it appeared as if he was deliberately attempting to interfere with the functioning of the team in M.K.'s case. Indeed, a review of the excerpt from child study team minutes concerning M.K. (Exhibit R-27) reveals a sad history of a potentially academically talented student. In short, the charge has, in my opinion, been **SUSTAINED** by the Board by a preponderance of the credible evidence.

Charge 1(q):

A portion of this charge was withdrawn and the balance was added to Charge 1H and was discussed supra.

Charge 1(r):

In the case of B.S., Mr. Castaldo informed the student that she would be returning to Arthur Johnson Regional High School, despite the fact that the child study team had recommended the continuation of the student's previous placement in another school.

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This charge deals with the subject matter of B.S.'s school attendance which has previously been discussed in Charge 1(m) supra. That charge, of course, alleged that the respondent was offering programs to a student without first consulting with his fellow team members. The instant charge goes further and alleges that respondent was feeding information to B.S. that was, to his knowledge, directly contrary to the team's actual decision and recommendation. I see no need to devote any additional attention or discussion to this particular charge as it is, in my opinion, amply covered in the prior discussion. On balance, I believe that this charge has been **SUSTAINED.**

Charge 1(s):

> In the case of J.M., Mr. Castaldo refused to participate in a discussion with members of the Child Study Team regarding possible modification of J.M.'s educational program. This refusal to communicate created an impasse situation and severely affected the Team's ability to operate effectively.

The student in this case, J.M., was identified by Scheer as a habitual truant and that efforts were made by the team at Brearly to modify his program to attempt to encourage more regular school attendance. According to both Scheer and Mrs. Williams, at a meeting to discuss J.M. the respondent did not participate at all nor did he provide any information concerning the student other than to express an opinion that they simply could not see the progress he had been making. (See also Exhibit P-57).

While I can appreciate the general sense of frustration which led to the inclusion of this charge against the respondent, I cannot conclude that it is one which can be sustained in the context of a tenure case. In fact, although respondent did not participate as much as he could have in the discussion about J.M., the fact is that he did express an opinion and simply said nothing further thereafter. Accordingly, it is therefore recommended that this charge be **DISMISSED.**

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Charge 1(t):

In the case of R.S., Mr. Castaldo advised the student that she would be placed on a half-day schedule, when in fact such a placement had not been discussed by the members of the Child Study Team. This unilateral and unauthorized action by Mr. Castaldo had the effect of making it extremely difficult for any of the Team members to disagree with the half-day placement for fear of being placed in a negative role in the eyes of the student.

Testimony with regard to the incident set forth in this charge came from Mrs. Williams, the learning disability teacher consultant member of the Brearly Child Study Team. According to Williams, R.S. was being evaluated by the team and on the day scheduled for a team meeting to present her case R.S. asked to see Williams. R.S. told Williams that respondent had called her, asked what sort of program she wanted and when advised that the student wanted only a half-day schedule that Castaldo said that it would be okay. Williams expressed a great deal of distress over the fact that Castaldo had discussed the student situation with her before the team even met, not to mention the student's claim that Castaldo said that she would only have to go on a half-day session. According to Williams, Castaldo made it appear as if he was "on the student's side" and thereafter made it extremely difficult for the entire team to deal with the student and her problem. Williams was particularly disturbed by the precipitous action by Castaldo since it compromised the other team members and destroyed the team concept. Williams confronted Castaldo, but he denied promising the student any particular schedule.

My review and consideration of the evidence dealing with this charge leads me to conclude that the Board has failed to sustain its burden of proof and it is **DISMISSED.** While Williams was firm in her recollection, the fact is that Castaldo denied giving the student false hopes and the student, herself, did not testify about the incident. On balance, I will accept respondent's contention in this case that although he might have had a discussion that day with R.S., her conclusion that she was "promised" a particular schedule was a misunderstanding on her part.

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By way of summary, then, I have determined that the Board has sustained its burden of proof with respect to the allegations of Charges 1(d), (e), (g), (h), (i), (k), (m), (p) and (r). Charges (a), (b), (c), (f), (j), (l), (n), (o), (q), (s) and (t) have either been withdrawn or dismissed.

CHARGE NO. 2

The general introductory language of this charge alleged that between 1976-77 and continuing until the certification of charges, the respondent had condoned and encouraged violations of the school district's and building rules and regulations by students in the areas of attendance, pass procedure and student behavior. There were eight separate specifications in support of the general charge. The first specification alleged the following:

Charge 2(a):

> During May of 1977, Mr. Castaldo excused two students from school without referring such students to either the building Principal or Vice-Principal for permission to be absent from school, in violation of building rules and regulations.

The allegations of this specification are similar to the allegations of the remaining portion of Charge 2(b) which will be set forth below and both specifications will be discussed together.

Charge 2(b) (as modified):

> During the 1977-1978 school year, Mr. Castaldo made unilateral decisions to excuse students from school, in knowing violation of building rules and regulations.

The incident with respect to the two students in May 1977 was related by Mr. Malt who also memorialized the same in a memorandum to Castaldo dated May 24, 1977

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(Exhibit P-37). Although Malt could not recall the names of the particular students, he had no trouble remembering the incident itself. It seems that he had found the two students outside school during class hours and they told him that respondent had excused them so that they could go to a coffee shop. Malt reminded the students that they were not allowed out of the building during class time without permission from the principal or vice-principal, reprimanded them and told them to return. Malt confronted respondent concerning the matter and said that Castaldo told him that they needed a break from school. Nevertheless, because of the nature of the matter Malt dispatched the memorandum to Castaldo. Apparently, similar conduct had previously occurred since, in the memo, Malt said that he, ". . . must again remind you that only the principal or vice-principal has the authority to excuse a student from school. Please see to it that this type of incident does not occur again" (emphasis added).

Castaldo testified that to his recollection he had been counselling a female student who had some sort of a problem. Because of the impact of it on her, Castaldo told the student, together with a friend that was with her, that they should go out for coffee. Apparently, Mr. Malt found them and later confronted Castaldo about it. According to Castaldo, he told Malt that the student had been upset and when Malt said he should not have let the student leave school, Castaldo agreed with him. Thereafter, that sort of conduct with respect to Castaldo's excusing students from school never occurred again.

As modified, the charges relate only to excusing students from the school building itself. Other than the incident related above, there appears to be no further testimony in this respect. There was other testimony with regard to students not attending classes in order to see Castaldo, etc., but they are covered under other charges.

While it is clear that Malt felt that he had good and sufficient reason to chastise Castaldo based upon the information he had, and to send a memo in that respect, the fact is that the incident was an isolated one, occurring nearly four years before charges were certified, and never repeated. Under those circumstances, it seems to me that the staleness of the charge, combined with a lack of any repetition, justifies a

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decision that it be **DISMISSED.** Accordingly, I recommend to the Commissioner that these combined charges be **DISMISSED.**

Charge 2(c):

> During the 1977-78 school year, Mr. Castaldo repeatedly allowed students to 'drop in' and see him at will, without first securing a pass or notifying their regularly scheduled teachers of their whereabouts, in violation of building rules and regulations.

According to the Board, this was one of Castaldo's habits that was particularly aggravating and disruptive of proper administration of the affairs of the school district. Testimony with regard to Castaldo's permitting students simply to "drop in" and see him almost at will, without following the established procedure of first obtaining a pass, was offered by various witnesses. Quite damning in this respect was the testimony of Michael A. Londino, who teaches mathematics at Brearly. Part of Londino's duties included supervision of in-school suspension, and in that capacity he said that he came in contact with Castaldo's course of conduct often. Specifically, Londino would maintain a student log book in which a student would show where he or she would be, if not present for suspension. According to Londino, it was "almost like a running joke," i.e., some students simply would not even show up the entire day having signed themselves out to Mr. Castaldo. On one occasion Londino came across a student, L.L., off school grounds during class hours. When he checked the log book, her name appeared as having been signed out to respondent. When Londino confronted Castaldo, he was told that L.L. had been with him the entire day and that he had been treating her. However, when L.L. was confronted, she admitted that she had been outside the building because she had been given a pass from Castaldo.

Other teachers at Brearly testified similarly to Londino. William J. Puglisi, a teacher of the handicapped, said that students often would be found outside of classes without passes and simply say that they were going to respondent's office. William L. Gorski, a physical education teacher, complained that he and other teachers were consistently getting "retroactive passes" from Castaldo with regard to students who were not in class and who boasted that they can get out of class anytime they wanted to. The

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situation got so bad, said Gorski, that the principal, Mr. Malt, had to send a memorandum informing teachers not to honor any of Castaldo's passes. Malt had testified that the problem of students going to see Castaldo without obtaining passes had reached epidemic proportions. In fact, according to Malt, the teachers stopped making referrals to Castaldo since they did not want the students simply "hanging out" at his office. Many teachers, he said, particularly complained that students went to see respondent instead of attending class without any advance notice.

Ellen Spingler, who teaches social studies at Brearly, also had serious problems with the pass procedure abuse. According to Spingler, students would get passes to see the respondent three or four times a week. It was so bad that she complained to Malt about the fact that students were missing so much work. Ultimately, she refused to honor any pass from Castaldo because of the abuse. Two female students, in particular, regularly failed to come to her class. On one occasion she checked out a pass which had been left in her mailbox and found out that Castaldo was out of the building during the time when the pass indicated that the student was to be with him.

The respondent, for his part, denied permitting students to see him without a pass. While such incidents sometimes occurred, it would be in rare emergent situations where a student was rather upset. Castaldo did not recall Spingler having refused to honor his passes and he insisted that he did make efforts to avoid removing students from major subject areas. While he also recalled that on one occasion a teacher had called to complain that a student had used his name, at no time was he ever confronted by any teachers about a practice of removing students from classes an inordinate number of times or under circumstances in violation of any pass procedures.

The evidence presented by the Board with respect to the allegations of the specification of Charge 2(c) convinces me that it has sustained its burden of proof. A number of teachers, together with Malt, confirmed that there was a serious problem of the sort described in the specification and respondent's denial does not nearly overcome the great weight of evidence presented on the Board's behalf. Accordingly, the allegations of Charge 2(c) have been **SUSTAINED.**

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Charge 2(d):

> During the 1978-79 school year, and continuing to present, Mr. Castaldo has continued to violate established student pass procedures by allowing students to visit him without first obtaining a pass or informing the assigned classroom teacher. Mr. Castaldo also continued to repeatedly take students out of major subject classrooms on occasions when this was not absolutely necessary, in violation of express directives to the contrary. These actions resulted in the students being deprived of necessary classroom instruction time and further caused an unnecessary increase in work for the attendance office.

Most of the evidence with respect to this charge has already been covered under Charge 2(c), supra. In addition, the continuing nature of the conduct as alleged is reflected in a memorandum from DeRosa to Castaldo in October 1980 (Exhibit P-19). In it DeRosa points out the nature of Castaldo's continuing, ". . . to violate the school policy by permitting students to leave school for class periods and you cover up for these students who miss class by giving them passes. This procedure must stop immediately." DeRosa's written criticism was supported by the testimony of Carl, who also mentioned the failure by Castaldo properly to adhere to procedures. A former student also testified concerning the situation. B.S. said that when she was at Johnson she would merely ask Castaldo for a pass in order to avoid taking a test, or simply to get out of class. She also said that she observed similar conduct involving other students.

Thus, the particular allegations of Charge 2(d) have been **SUSTAINED.** However, for purposes of consideration of any sanction, Charges 2(c) and 2(d) will be considered as one course of conduct.

Charge 2(e):

> During the 1979-1980 school year, and specifically on March 28, 1980, Mr. Castaldo again allowed a student or students to smoke a cigarette while in his office, despite having received explicit instructions to the contrary on numerous occasions as being expressly contrary to Board of Education policies and building rules and regulations.

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This charge will be considered in tandem with Charge 2(f).

Charge 2(f):

During the 1980-1981 school year, Mr. Castaldo allowed J.D. and B.S., students, to smoke in his office, in violation of building rules and regulations. Other students have also been observed smoking in Mr. Castaldo's office, and one student was observed leaving said office with a lighted cigarette in his hand.

Several persons testified with respect to Castaldo's permitting students, contrary to Board regulations, to smoke in his office. Londino said that he saw students smoking in Castaldo's office many times—and that it was "very, very common." He said that another teacher, a Mrs. Simpson, was also upset by Castaldo's practice in this regard. Puglisi also observed students smoking many times and said he even spoke to Dr. Kenny about it. Carl said that he saw a student, J.R., smoking in Castaldo's office while being tested. He also saw B.S. smoking there. Further, Carl maintained that other students told him that Castaldo instructed them to try and hide their cigarettes if he or the principal, DeRosa, should happen upon them. B.S., of course, directly testified that she always smoked in respondent's office.

With respect to a particular incident on March 28, 1980, Castaldo explained that when Carl came into the office, although he did see a student with a cigarette in his hand and told him to put it out, there was a viable excuse. According to Castaldo, a ninth grade student had come into the office with a student who had graduated and it was that latter person who had been smoking. Unfortunately, just as Carl came into the office, the ninth grader picked the cigarette up. With regard to another incident concerning cigarette smoking, Castaldo claimed that he was "set up." It seems that a student came to his office with a cigarette cupped in his hand. Castaldo told him that he should not have it, but the student pushed his way into the room anyway. Apparently, another staff member saw this and reported the matter to the principal. Castaldo believed that the other staff member had set the scene up because he, Castaldo, had complained to DeRosa about that staff member's handling of two students.

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Clearly, in view of the testimony of a variety of witnesses, including students, staff members and administrators, Castaldo regularly permitted smoking to take place in his office in violation of the rules. Castaldo, himself, never actually denied the conduct except to attempt to explain away certain specific instances. Accordingly, the Board has established the truth of the allegations of Charges 2(e) and 2(f) by a preponderance of the credible evidence and they are **SUSTAINED.**

Charge 2(g):

This charge was dismissed on motion without objection by the Board.

Charge 2(h):

In the case of N.M., Mr. Castaldo deliberately misrepresented to William Gorski, a teacher, that N.M. was participating in a consultation with Mr. Castaldo during a particular class period. It was later determined that N.M. had left the building prior to the class period in question, and that Mr. Castaldo was covering up for her. During the incident, Mr. Castaldo lost his temper, shouted in a loud voice, and otherwise conducted himself in a manner unbecoming his position as a school psychologist.

According to Gorski, he was in charge of corridor supervision at Brearly during a lunch period one day when he tried to locate a student named N.M. in order to have her report to the attendance office. When told that she was in respondent's office he went and knocked on the door. Castaldo called out to him that N.M. was there and Gorski said he had to give her a pass. He then stepped into the room, but did not see that student or any other. He asked Castaldo where N.M. was. Castaldo insisted that she was with him (the room was approximately 10 x 10). Castaldo, according to Gorski, began raising his voice and so Gorski simply left. Castaldo followed him out of the room shouting that, "she's here" while Gorski proceeded on down the hall. Gorski later found out that the student was not even in the building and he believed that another teacher had seen her that day in New Brunswick.

Castaldo testified that he actually did see N.M. on the day in question. While doing so, another student knocked on his door and appeared to be crying. At that point

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Castaldo said he told N.M. to leave for a few minutes. He believed she went to the lavatory. Soon thereafter, Gorski knocked on his door and asked if N.M. was with him, and he said that she was. Gorski came into the room and Castaldo told him to leave since he was counselling someone else. Castaldo also maintained that he told Gorski that N.M. did have an appointment with him and that he, Castaldo, knew where she was. Later that same day Castaldo said that Malt told him N.M. had been seen leaving the building. Since N.M. had not returned to his office, Castaldo later saw N.M. and asked her what happened. She claimed that when she did attempt to come back she saw Castaldo was with another student, and so she left. Castaldo said he told N.M. that she should have gotten a pass.

Based upon the testimony with respect to this charge, I am convinced that the Board has sustained its burden of proof. Gorski was entirely credible and quite convincing with regard to the incident and the untoward, inappropriate conduct and behavior exhibited by Castaldo at that time. This charge has been **SUSTAINED.**

By way of summary then, as to Charge 2 the Board has been sustained with respect to Charges 2(c), (d), (e), (f) and (h). Charges 2(a), (b) and (g) have been dismissed.

CHARGE NO. 3

> Since the 1972-1973 school year and continuing up until the present, Mr. Castaldo has been absent and/or tardy on an excessive number of occasions without legitimate justification or permission from his superiors. During this time period, Mr. Castaldo has, on an ongoing basis, frequently left his assigned school building without the permission of his department coordinators or building Principal, despite express instructions to the contrary. These continuing actions constitute insubordinate behavior which is unbecoming to a professional school psychologist, and have resulted in an increased workload for the members of the District Child Study Team as well as delays in the completion of work assigned to the Team.

There is no doubt from the testimony and documentary evidence in this case that

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the respondent was absent a number of days during various school years throughout his tenure in the district. The Assistant Superintendent of Schools, Mr. Bauman, identified certain tabulations with regard to the respondent's attendance record. For the school years 1973-1974 through April 15, 1981, nearly eight years, the total number of his absences, including illness, personal days, family illness, death in the family, for Castaldo was as follows: 16 1/2, 17, 28 1/2, 24, 24, 23 1/2, 24 and 14 1/2 (Exhibit P-59A). According to Bauman, Castaldo was entitled to ten sick days per year, two personal days and one to five days for death of a family member. In addition, after five years, employees were entitled to five additional noncumulative sick leave days. Bauman's review of the respondent's attendance record led him to conclude that it began to go bad in 1973. According to Bauman, Castaldo established a pattern of using up all of his available days.

Christiano testified that he, too, was concerned over the high absence and tardiness record of Castaldo which caused child study team meetings to be cancelled. During one span of time over a several month period Castaldo, he said, missed about 50 percent of the scheduled meetings at Brearly. As a result, Christiano had to ask the other school psychologist in the district to review respondent's cases so that if he was going to be absent from a team meeting this other school psychologist could cover for him to avoid a cancellation. After transferring to Johnson, Castaldo's record during 1979-80 with respect to attendance and lateness continued to create concerns to the administration. Thus, in April 1980, DeRose sent a memorandum to respondent listing his absences and tardiness occurrences for that school year and noting that the attendance, ". . . has been getting progressively worse." During the seven-month period covered by the memorandum Castaldo had been absent 15 days for his own illnesses, 5 days for family illness, 2 1/2 personal days and 1 professional day and that on some of those instances either he called in late or did not call at all. So too, with respect to tardiness, DeRosa pointed out that this, ". . . has also been a problem." The instances of tardiness covering the same period numbered at least 12 (Exhibit P-42). As a result of the number of Castaldo's absences while at Johnson, DeRose said that the efficiency of the child study team was impaired.

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Vinacour also noted that Castaldo's absences and/or failure to attend meetings made it rather difficult for the team to complete its work. Indeed, she said that during 1979-80 the team fell far behind because of the attendance problem, although she did indicate that Castaldo's attendance improved during the following school year. However, in the summer of 1980, the team's work could not be completed in timely fashion because of the backlog created by Castaldo's absences.

With respect to his allegedly leaving his assigned building without appropriate permission, despite express instructions to the contrary, there was testimony that Castaldo violated the procedure many times. In September 1977, the Superintendent sent a letter to Castaldo chastising him for his absences on three occasions during the previous June and synopsizing a conference that he had with Castaldo concerning that sort of conduct. In it Dr. Marachnik reminded respondent that he was not to leave the school during the working day, other than during lunch, without obtaining specific permission from an appropriate supervisor. Dr. Marachnik specifically noted that Castaldo's absenting himself from the building created a problem with respect to the time needed to work up the student classifications. Further, Dr. Marachnik specifically noted as follows: "The stipulation regarding your gaining permission to leave the building is not new to you. You were informed of this in memos on May 3, 1973, by Dr. Tipton and on January 31, 1975 and May 8, 1975 by Dr. Kenny; yet, you have demonstrated through your actions to disregard the stipulation." (Exhibit P-16).

Castaldo testified with regard to the absence and tardiness record as well. He insisted that he never took more days off than was allowed, and that he still had accumulated days until 1977. At that point his wife became quite ill and was in and out of the hospital for long periods of time. In fact, at the end of 1977-78 school year, he reached an agreement with the Assistant Superintendent, Mr. Bauman, that he could have an additional five-day absence without loss of salary for a period in May, provided he made up the days following the close of school (Exhibit R-43).

Respondent maintained, as well, that he was never excessively tardy, nor was he ever absent without permission. While he admitted missing a number of child study team

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meetings during 1977-78, he claimed it was due to extenuating circumstances. Furthermore, Christiano told him that the other psychologist would cover the cases if he could not be there.

Accordingly, with respect to the allegations of this charge, Castaldo clearly was absent from school a substantial number of days. The Board maintains that even if Castaldo did not exceed the total number of authorized days (including accumulated days) of absence; nevertheless, they were so numerous as seriously to affect his ability to carry out the functions of school psychologist. I do not agree. As he observed during the course of his own testimony, the respondent unfortunately had family illness and other problems which were extremely serious and necessitated his taking time off to deal with them. While some of the senior administrators and child study team members believed that his absences were creating a backlog, and also caused meetings to be cancelled, in the overall I do not believe that the pattern of conduct was so deliberate or of such a nature as to justify a finding against the respondent in the context of this tenure case. Although respondent also appears to have been the subject of criticism with regard to leaving the school building without permission, that conduct does not seem to have occurred during the latter years of his employment in the school district. To the extent that he did leave without permission from time to time, I find that most of the instances occurred too remote in time from the filing of charges and therefore can be considered stale. Accordingly, despite the large number of absences, tardinesses and incidents of leaving school without permission, I believe that the particular allegations of this charge are essentially de minimis and/or stale and the charge therefore should be **DISMISSED.**

CHARGE NO. 4

The general introductory language of this charge alleged that since the 1974-75 school year Castaldo had conducted himself in an unbecoming manner in that he exercised poor judgment and publicly displayed his temper by using profanity and abusive language toward colleagues.

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Charge 4(a):

> During July of 1975, during a conference phone call between himself, the Director of Pupil Personnel Services and a member of the District Child Study Team, Mr. Castaldo abruptly and without comment hung up his telephone thereby refusing to answer legitimate questions from the other parties to the phone call. Such conduct was unprofessional, unjustified and unbecoming a person in Mr. Castaldo's position.

The incident in question occurred more than five and one-half years prior to the filing of the tenure charges. Neither at that time nor reasonably soon thereafter was disciplinary action sought to be taken against him because of the alleged conduct. Moreover, from the testimony received with regard to the incident, it is by no means clear that the respondent committed any act which would justify the filing of a tenure charge in the first place. According to Castaldo, while he may have appeared to have acted somewhat abruptly by terminating his participation in the phone conversation, he said this was due to the fact that a parent was waiting for him to come to a conference and that took precedence. On balance, the Board has not sustained its burden of proof, even assuming the charge can be considered to be a viable one despite the lengthy delay between the conduct alleged and the inclusion of it in a certification. Accordingly, Charge 4(a) should be **DISMISSED**.

Charge 4(b):

> On July 12, 1977, Mr. Castaldo, despite a request by the Superintendent of Schools that he make himself available to discuss numerous absences from school, abruptly exited from a conference with the Superintendent, Principal and Director of Pupil Personnel, thereby refusing to discuss the issue of his absentee record as requested. This action reflected a lack of mature behavior and constituted conduct unbecoming a school psychologist.

With respect to this charge, the Superintendent testified that on the day in question the respondent was in attendance at a conference with the parents of a certain student and with the Superintendent. At the conclusion of the conference, the

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Superintendent requested respondent to remain to discuss another subject. When asked to discuss the other matter (his attendance) the respondent angrily left the room and said that he would not discuss those sorts of subjects with the Superintendent without representation. Apparently some shouting took place at that time and, according to Dr. Marachnik, the respondent, "stormed out" of the room. (See Exhibit P-12). Kenny described Castaldo's tone as "antagonistic."

According to Castaldo, following the particular conference on that date he was not feeling well and wanted to go home. When he was confronted by the Superintendent with allegations about his missing days from school during the previous month, he did not feel able to discuss them at that time. When Marachnik pressed him, Castaldo said that if this line of questioning was to continue, he would have to be represented.

Although there clearly was an incident of some verbal hostility between respondent and the Superintendent of Schools on the date and place in question, I do not believe that the Board has demonstrated by a preponderance of the credible evidence that Castaldo's conduct was unbecoming a school psychologist. There was no dispute that Castaldo was not feeling well and that the subject concerned a matter wholly foreign to the purpose of the meeting for which Castaldo was in attendance in the first place. Beyond that, it seems to me that Castaldo may even have had the right to call a halt to the session and asked to be represented when it appeared as if it was touching upon an area for which disciplinary action might be involved. On balance, then, I do not believe that the Board has sustained its burden of proving that the respondent's conduct in this instance was so improper as to constitute conduct unbecoming a school psychologist and I therefore recommend that Charge 4(b) should be **DISMISSED.**

Charge 4(c):

> During June of 1979, Mr. Castaldo failed to make himself present at two parent conferences, despite being notified of the conferences in advance, and without requesting that the conferences be cancelled. This behavior indicates a lack of proper judgment and caused unnecessary inconvenience to the parents and child study team members involved.

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The allegations of this specification touch upon another aspect of Castaldo's employment which particularly aggitated and aggrieved both his colleagues and his superiors. With respect to these incidents, Anita Williams testified as follows. It seems that a meeting had been scheduled with the parent of a student (J.S.) and Castaldo was supposed to attend. At that time the parent was having difficulty walking because she had been in a car accident. At the time of the scheduled conference respondent could not be located and it had to be cancelled. Since the boy was the subject of a potential classification, both the other team members and his mother were extremely upset. When Castaldo later was confronted about his absence, he became upset because the conference was not held without him. Williams explained that because much of the information was in the area of Castaldo's discipline, there was no point in having the meeting at all without his presence.

Christiano, too, testified about the incident. When he confronted Castaldo about it (on the complaint of the child study team), he said that Castaldo claimed he did not get proper advance notice. On the other hand, Christiano said that he had been told that Castaldo had at least four days' notice of the meeting and never said that he would not be there. Apparently, with respect to the meeting with the mother of J.S., Castaldo claimed that the meeting had been cancelled. Christiano pointed out in a reply memorandum (Exhibit P-31) that this was not the case. Rather, Mrs. S. refused to proceed because of Castaldo's absence and since the major thrust of the conference had to do with the student's emotional problem, it was the opinion of Christiano that Castaldo's attendance was critical.

With respect to the other incident, it involved the student named R.G. The conference had been specially scheduled for a night meeting. Respondent did not appear, but the student's older brother came and said that Castaldo had called him and said that the student's parents should not come to the conference because the girl had been "set up." Her brother was extremely upset about the phone call. According to Williams, the conference was planned especially to accommodate the schedule of the relatives.

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According to respondent, he missed the R.G. meeting because of a prior committment and that while he did speak to the girl's brother beforehand, it was simply to advise him of his findings so that the meeting need not be cancelled because of his absence. As to the meeting with Mrs. S., Castaldo claimed "confusion" (Exhibit R-39).

From the evidence offered with respect to this charge, I am convinced that in fact Castaldo was aware of both meetings in advance, and at least with respect to the conflict with the mother of J.S., clearly should have had the courtesy to advise that he would not be coming. Certainly the actions were lacking in professionalism. They reflected an aspect of Castaldo's conduct which, as noted, was particularly aggravating and annoying; namely, his failure to attend properly to expected obligations within the areas for which he was responsible. The allegations of Charge 4(c) have been proven by a preponderance of the credible evidence and it is **SUSTAINED.**

Charge 4(d):

> On March 18, 1980 at a Child Study Team meeting, Mr. Castaldo told a member of the Child Study Team to 'kiss my ass' when said member made an inquiry to which he took exception. This comment to a colleague demonstrates an indifference to the common goal of maintaining a satisfactory working relationship among members of the Child Study Team, and further constitutes conduct unbecoming a school psychologist.

The colleague to whom Castaldo allegedly made the particular remark was a guidance counselor at Johnson. The individual, now living in Florida, sent a letter in connection with the hearing in which he indicated that he took no offense to the remark and while the particular conversation may have been "rather abrasive and direct," it did not reflect any personal animosity between the individuals (Exhibit R-10). Under all of the circumtances, I believe that the charge should be **DISMISSED.**

Charge 4(e):

> During May of 1980, Mr. Castaldo on several occasions became abusive and demonstrated a lack of respect while speaking to his building principal, Louis DeRosa.

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Mr. DeRosa, as noted, is the principal of Johnson. When Castaldo transferred to his school from Brearly in August 1979, DeRosa met with him in the presence of others in order to advise Castaldo that insofar as he was concerned the psychologist now had a "fresh start." Castaldo, he said, seemed pleased at getting this sort of opportunity. In fact, Castaldo, himself, was a product of the regional school system and DeRosa was his football coach while the respondent was in high school.

With respect to the particular allegations of Charge 4(e), DeRosa described the following circumstances. On May 15, 1980, Castaldo and another teacher, a Miss Povanda, were seen coming into the building by DeRosa and Carl. They noted that Miss Povonda was supposed to have been in class at that time and started to question her as to why she had been out of the building. Just as DeRosa asked Povonda about it, Castaldo interfered and, "got very irritated." He challenged DeRosa's right to confront Povonda about missing her class and raised his voice in so doing. As a result of the incident, DeRosa sent a memorandum to respondent (Exhibit P-46) reconstructing the scene and pointing out, "at that time you questioned my motives in a tone of voice which I didn't like." In addition, DeRosa observed that Castaldo was, ". . . out of order at that time. I expect you to treat me properly at all times and respect my position." (Exhibit P-46).

Carl also recalled the incident. He was accompanying DeRosa during a lunch period to check the halls when he saw respondent come into the building with Miss Povonda. When DeRosa asked why they were out of the building, Castaldo, he said, raised his voice and said that DeRosa had no right to question Miss Povonda. According to Carl, no mention was made as far as he could recall about Povonda having had to leave the building in order to get a student.

A second incident covered by Charge 4(e) allegedly took place on May 20, 1980, during a child study team meeting. At that meeting while a student was being discussed Castaldo raised his voice and became, according to DeRosa, ". . . a little nasty" toward him. The meeting, said DeRosa, was disrupted. As a result of that conduct, DeRosa felt impelled to send Castaldo a memorandum the following month. In it, he advised Castaldo that at the meeting Castaldo had become, ". . . abusive while talking to me" and that he,

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DeRosa, ". . . will not tolerate this type of behavior. If you continue to do so, I will take disciplinary steps to stop it." (Exhibit P-46A).

If one credits the testimony of DeRosa and Carl, Castaldo did, at the very least, challenge DeRosa's authority on the two occasions related above. I do not doubt that the incidents occurred as those gentlemen testified. The explanation as to why Miss Povonda was out of the building at the time, which Castaldo offered during his testimony, (attempting to retrieve a student who had left the building after some sort of problem with DeRosa), even if true, would not excuse Castaldo's behavior toward him. With respect to the incident at the child study team meeting, Castaldo claimed that the exchange took place between DeRosa and Christiano, not between DeRosa and himself.

With respect to this latter incident, I find that the Board has carried its burden of proof. The incident was memorialized by DeRosa in his memorandum of June 20. From my consideration of the DeRosa testimony, I believe that Castaldo did become nasty and abusive. Accordingly, the Board has sustained its burden of proof with respect to the allegations of Charge 4(e) and it is **SUSTAINED.**

Charge 4(f):

> On January 13, 1981, Mr. Castaldo failed to appear at a pre-arranged Child Study Team work session, giving the excuse that he was going to lunch. His absence from this session created unnecessary pressure on the other members of the Child Study Team.

During the 1980-81 school year the child study team at the Johnson was composed of Mrs. Vinacour (school social worker), Castaldo (school psychologist), and one Myrna Schneider (the learning disabilities teacher consultant). According to Vinacour, a team meeting had been scheduled to begin at 1:15 p.m., at the end of a lunch period. A morning meeting already had been held among the team that day. At 1:30 respondent, she said, called to say that he was going to eat lunch. Vinacour said that she told Castaldo that there was work to do and that he should come to the meeting, but he did not appear until sometime after the dismissal bell at 2:50 p.m. At no time did Castaldo offer any

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explanation for his whereabouts and his nonappearance interfered with the work of the team. It was so distressing to Castaldo's fellow team members that each sent a memorandum the following day to Christiano about it. Schneider's memorandum pointed out that certain IEPs would not be completed by the due date of January 16, 1981 because a planned meeting in Mrs. Vinacour's office did not take place because Mr. Castaldo arrived after 3:00 p.m. when they were on to another problem (Exhibit P-33). In Vinacour's memo she advised Christiano that despite a prearrangement to meet following the child study team regular meeting, Castaldo called at approximately 1:30 to say that he was going out to lunch. Thus, the necessary work did not take place and Vinacour felt obliged to advise Christiano as follows: "With this kind of cooperation there is no way to keep the work current and I personally resent the pressure that comes from his [Castaldo's] lack of cooperation" (Exhibit P-33A). According to Christiano, he spoke to Castaldo about the incident and was told by respondent that although he had hoped to get to the meeting he was detained and could not get away and when he finally did arrive at approximately 2:30 to 2:45 the other team members said it was too late. Castaldo testified that a full child study team meeting had been held earlier that day and although an IEP discussion was scheduled for about 1:00 the team meeting ran to that time and it was agreed to take a one-half hour lunch break. However, during that lunch break a student came with a problem and he had to spend some time on it. He said he called Schneider to say he couldn't make it at 1:30 and after finishing with the other student went to lunch and returned at about 2:30 and was told that they would have to meet another time.

Neither Vinacour's testimony nor the memoranda to Christiano from Vinacour and Schneider contained any reference to Castaldo's having claimed to have been detained with respect to that meeting in order to see a student. Both stressed that he simply failed to appear for a prearranged meeting on an important subject. Obviously, as reflected in the Schneider memorandum, it was important to speed up preparation of IEPs and for that reason both of the other team members apparently felt obliged to reduce to writing the reason why they would be late in this respect. In short, the Board has carried its burden of proof with respect to the allegations contained in Charge 4(f) and it is **SUSTAINED.**

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Charge 4(g):

In the case of H.H., as well as in other cases, Mr. Castaldo verbally abused Mrs. Karen Vinacour, a school social worker, in a situation where her opinion differed from his.

From the testimony offered by Mrs. Vinacour in a variety of areas, it is plain that there was little "love lost" between Castaldo and her. Indeed, during the course of her testimony the former student, B.S., said that respondent referred to the social worker as "a living abortion!" In any case, with respect to this particular specification, Vinacour recalled that she felt that H.H. should be assigned to the resource room for two periods a day since he needed support in English in order to graduate and the resource room would be a good place for H.H. to relieve tension. Castaldo, she said, did not want the child to go to the resource room, but did not tell her why. During the course of a child study team discussion Castaldo, she said, became abusive and called her a "bitch." He charged, as well, that she, ". . . didn't give a shit about the kids and was selling them down the river. . . ." Vinacour said she complained about the abuse to Christiano, but even though he asked her to "write it up" she simply didn't bother with it on this occasion.

Castaldo recalled that he did have a disagreement with Vinacour about H.H. Castaldo was the case file manager and wanted a half-day program and said he told that to Vinacour. After the meeting, he discussed the case and admitted telling her, at least, that he thought she had, ". . . sold him down the river."

Although Mrs. Vinacour impressed me as a professional perfectly capable of resisting intimidation or hostility; nevertheless, I believe that she was verbally abused in the manner indicated. The incident concerning H.H. seemed to me to have gone far beyond what might ordinarily be called a candid disagreement among colleagues (see e.g., discussion of Charge 4(d), supra.). To the contrary, Castaldo acted toward Vinacour in a manner which was disgraceful. I find that the Board has proven the allegation of this charge insofar as the "H.H." incident is concerned and, to that extent, it is **SUSTAINED.**

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Charge 4(h):

During September of 1978, in the case of C.W., Mr. Castaldo, while interviewing C.W. for the first time, focused his questions upon the nature and extent of C.W.'s sexual activities and repeatedly demanded personal information regarding sexual experiences and word associations involving sexual terms. These actions by Mr. Castaldo had the effect of making C.W. extremely upset and required repeated assurances by C.W.'s guidance counselor that she need not see Mr. Castaldo again. Mr. Castaldo's actions in this situation were highly unprofessional and demonstrated poor judgment as well as conduct unbecoming a school psychologist.

Testimony with regard to this charge was offered on behalf of the Board by the guidance counselor, Nancy Nelson. According to Nelson, there was some question as to C.W.'s placement in history and Nelson recommended that the student see Castaldo for a quick assessment. She felt the girl had a high potential, but was not achieving up to that potential. Nelson thus arranged for C.W. to see Castaldo and was under the impression that he was going to test her for achievement—an I.Q. test. However, on September 27, 1978, C.W. came to Mrs. Nelson and was quite upset. She said that she had met with Castaldo and that a lot of the time was spent on personal questions, many of a sexual nature. C.W. also claimed that Castaldo asked her if she would go to bed with him. C.W. was very upset with Nelson and said she didn't know why she had referred her to Castaldo for that purpose. As a result of that incident, Nelson never again referred a female student to Castaldo.

Castaldo also testified with respect to the incident. He said that the referral by Nelson was not only to test C.W., but also to assess why she was not working up to her ability. Thus, after getting background information, he gave the girl a word association test to see whether there was some blocking of learning that might have an emotional base. The session took more than one period and Castaldo determined that the student had enough of an emotional problem related to her home environment to interfere with her performance. As far as Castaldo could recall, he did not upset her by giving her the test—she handled the interview very well. Her sensitivity, if any, might have related to the fact that he knew her parents' situation and her mother's change of boyfriends. He

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conceded that the test did contain some words that were sexually oriented, but were no different from words used during health class. Further, he placed no pressure on her to respond to them. The conference, he said, focused primarily on the home situation and her mother's romantic involvement. Castaldo could not recall when he learned from Nelson that C.W. expressed concern about the visit. For her part, Nelson could not recall if she even confronted Castaldo with the version of the interview given her by the student. Nor did she report the incident to her superiors.

An effort by the Board to introduce a test which it was claimed was similar to that presented to C.W. was rejected by the court (Exhibit P-13 for id.). Since C.W., herself, did not testify no direct evidence was received, other than Castaldo's version, as to what took place during his meeting with C.W. Although Nelson's testimony was, standing alone, quite damaging, it was predicated solely upon what C.W. allegedly told her and was not corroborated in any way. While Nelson thereafter decided never again to refer a female student to the respondent at Brearly, the fact is that despite the serious nature of the alleged incident, she did not bring it to the attention of the administration nor could she recall even confronting Castaldo about it. Accordingly, given the totality of the particular evidence with respect to this charge, I do not believe that the Board has sustained its burden of proof and I therefore recommend that it be **DISMISSED.**

By way of summary, then, Charges 4(c), (e), (f) and (g) have been **SUSTAINED.** Charges 4(a), (b), (d) and (h) have been **DISMISSED.**

CHARGE NO. 5

The general introductory language of Charge 5 maintained that by his conduct Castaldo had a negative effect upon the relationship between students and their parents resulting in numerous complaints concerning him. In addition, those complaints, it is alleged, also touched upon his failure to require students to adhere to rules and regulations.

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Charge 5(a):

> Mrs. T.D. has complained in writing about attempts by Mr. Castaldo to have her write letters complaining about Louis DeRosa, Mr. Castaldo's Principal. Mrs. D. also complained that her son, J.D., is allowed to smoke in Mr. Castaldo's office and goes at will to see Mr. Castaldo without a pass first being issued. She has also expressed concern over the fact that Mr. Castaldo has discussed the withholding of his salary increments with students in the building.

Testimony with respect to this allegation was offered by Mrs. T.D. She said that she had called Christiano to tell him that Castaldo had called her one night to ask if she would make calls on his behalf with regard to a complaint against the principal, Louis DeRosa, for his handling of her son, J.D. She said that she knew Castaldo and that he previously had helped her son in getting a work study program. She had already resolved the problem with DeRosa before Castaldo called her and she told him that she "wasn't about to fight his battles for him." Subsequently, Mrs. D. prepared a statement which memorialized the events. In it she stated that at respondent's suggestion she sent Castaldo a letter regarding complaints against DeRosa. Although the problems subsequently were resolved and things, ". . . seemed to be going pretty well," Castaldo nevertheless telephoned her at home and asked her to write yet another letter to him about the principal. Castaldo, she said, also wanted to get a group of parents together to complain to the Department of Education in Trenton. Indeed, her son came home from school one day with a telephone number Castaldo had given her for the Department of Education and the names of individuals whom Mrs. D. might call. She stated that she believed Castaldo was trying to use her in order, ". . . to get even with Mr. DeRosa because he has told J. that Mr. DeRosa was the cause of his being denied a salary increment for this school year. I am very much concerned about Mr. Castaldo's influence on my son . . . and do not believe that a withholding of a salary increment should be discussed by the school psychologist with students in the building. I also believe that Mr. Castaldo may be using my son . . . in trying to get back at Mr. DeRosa." (Exhibit P-15).

With regard to smoking, Mrs. D. maintained that her son told her he smoked in Castaldo's office and that the respondent gave his approval.

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Castaldo testified that J.D., Mrs. D.'s son, had a "run-in" with DeRosa who had grabbed him by the neck and thrown him against the wall. Thus, J.D. came to his office highly upset. There was no denial that he had asked Mrs. D. to intervene on his behalf and to file a complaint or to join a group of parents in doing so.

From the testimony by Mrs. D. with respect to this charge it is clear that Castaldo deliberately attempted to solicit a parent to file a complaint against DeRosa. Apparently his efforts were so disturbing that the parent complained directly, in writing, to the administration about it. According to Dr. Marachnik, Mrs. D.'s statement (Exhibit P-15) accurately reflects what she told him at the time of the discussion with her. The Board has thus **SUSTAINED** its burden of proof with respect to the allegations contained in Charge 5(a).

Charge 5(b) and 5(c): These charges were dismissed without objection.

Charge 5(d):

Mrs. H.H. has complained that Mr. Castaldo has discussed aspects of personal family life with her daughter, S., without the family ever having been notified that S. was engaging in regular consultations with the school psychologist. Mrs. H. also complained that S. is allowed to smoke in Mr. Castaldo's room, and that he has encouraged S. to turn against her parents and to do whatever she likes. Mrs. H. has demanded that Mr. Castaldo stop seeing or speaking to S.

Testimony with respect to this charge was offered by Mrs. H.H., the mother of the student involved. She explained that during the 1980-81 school year, her 16-year-old daughter, S., was a sophmore at Johnson. Her daughter had given her parents a lot of problems one day and there was, "a bad scene." She told her parents that the respondent had told her that if she was not happy at home, she should simply pack up and leave. Their daughter also told them that Castaldo would let students smoke in his office. Her husband, she said, went directly to the school the next day and spoke to DeRosa about the situation. Subsequently, at a back-to-school night Mr. and Mrs. H. learned that their daughter was still seeing Castaldo even though she didn't want her to see him any more.

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As a result, Mrs. H. dispatched a letter to the principal and informed him, in writing, that under no circumstances was Castaldo to speak or to meet with S (Exhibit P-49). In that letter Mrs. H. offered the belief that the students had a frightening loyalty and allegiance to Castaldo and that he has turned their daughter against them. She also said that at the very time her husband was meeting with DeRosa, Castaldo called her and said that he really didn't know who her daughter was. Also, at the back-to-school night, although Castaldo said he had not talked to their daughter during the day except to see her in the hall, another teacher said that the girl was with Castaldo during that day when she was supposed to be in class.

Carl also testified that Mrs. H.H. had complained about Castaldo seeing her daughter, particularly since there had been no referral to any screening committee or to the child study team and her daughter had seen him many times.

According to Castaldo, he believed he might have seen S.H. when she came in with another student. He never counselled her and he does not recall making any telephone calls to her mother. He remembered that at a back-to-school night he saw the parents in his office and they told him he should not counsel their daughter. He categorically denied ever telling her that she should pack up and leave home.

The testimony in this matter convinces me that the respondent did act in the manner charged. The mother unhesitatingly charged that Castaldo had attempted to influence her daughter with regard to her relationships with her parents and her anger both as a result of discussions with her daughter, together with confrontations with Castaldo, prompted her to send the letter described above. In short, the Board has demonstrated by a preponderance of the credible evidence that the allegations contained in this specification did occur as charged and Charge 5(d) is **SUSTAINED.**

By way of summary, then, Charge 5(a) and 5(d) have been sustained. Charges 5(b) and 5(c) were dismissed without objection.

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CHARGE NO. 6

During the 1980-1981 school year, in a case involving N.A., a student, Mr. Castaldo demonstrated conduct which was unprofessional and unbecoming a school psychologist in that he improperly disclosed to S.A., the sister of N.A., the substance of confidential discussions between members of the child study team. Mr. Castaldo furthermore involved himself in an intimate personal relationship with S.A., which relationship resulted in S.A. being named as the co-respondent in a matrimonial action between Mr. Castaldo and his wife. Said matrimonial action, in which Mr. Castaldo was charged with, among other things, the commission of adultery with S.A., was not contested by Mr. Castaldo before the Superior Court of the State of New Jersey. Mr. Castaldo's improper and unprofessional personal involvement in the situation regarding N.A. resulted in considerable unnecessary expenditure of time and money by the Board of Education and caused Mr. Castaldo to be disqualified from further participation in N.A.'s case. Mr. Castaldo's actions in the case of N.A. reflect moral turpitude and unfitness for the position of school psychologist.

The thrust of this charge is that the respondent's conduct as alleged constituted the commission of acts of moral turpitude and demonstrated his total unfitness to hold the position of school psychologist. The Board's evidence in support of this charge consisted of the following. N.A. was a female student who prior to 1980-81 had been classified as trainable mentally retarded. She had been placed in a private, sectarian school for her education for several years. Shortly before the commencement of the 1980-81 school year her legal guardian, an older sister named S.A., determined to seek to enroll N.A. in the regional school district. Accordingly, the child study team met to discuss N.A. and to consider her classification, her placement and her program. Castaldo participated in those discussions. The team was unable to reach agreement with the guardian as to the development of an acceptable IEP. At a meeting with S.A., she sharply questioned the learning disability teacher consultant's evaluation from a technical standpoint. Christiano, who also was present, concluded that S.A., had been "coached" to ask those sorts of questions. When no conclusion acceptable to all was reached at the meeting, a due process hearing procedure then was invoked through the Department of Education. Basically, S.A. was pushing for placement at the same private school, but at Board

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expense. Thereafter, the due process hearing was convened and Castaldo, the team's psychologist, was disqualified from participation when it was revealed that he had a personal and allegedly intimate relationship with S.A. Christiano, himself, had no personal knowledge of this alleged close relationship.

Mrs. Vinacour was more directly involved in the N.A. matter. As school social worker, she was asked to participate in the evaluation of N.A. in order to plan a program for her during the 1980-81 school year. The team, she said, met and again felt the girl should be classified as trainable mentally retarded. Castaldo, however, took the position that the classification should be changed to neurologically impaired. When the team met with the girl's sister, S.A., to draft an IEP, S.A. questioned the report of the learning disability teacher consultant, Mrs. Schneider, in such a way as to cause both Schneider and Vinacour to wonder how she could be in possession of such detailed information as to provide a basis for those specific questions. No progress was reached during the Summer of 1980 and before the team could meet again a due process hearing was sought. In preparation for that hearing the Board had the regional Educational Improvement Center Child Study Team review the records, interview the student and visit the trainable class. That group submitted an opinion which supported the proposed classification and program which Vinacour and Schneider believed to be the appropriate ones. According to Vinacour, at the due process hearing conducted before a Department of Education Classification Officer, Castaldo had to be excused from participation because of a personal relationship he had with S.A. As a result, the Board was required to engage an independent psychologist. Ultimately, the Board's decision as to classification, placement and program was upheld, but the girl was still sent to the private school. Vinacour was so concerned about the potential conflict involving respondent's participation as a member of the Board's team that she specifically mentioned it in a memorandum to the Superintendent, noting that she had seen Castaldo and S.A. having breakfast at a diner during October 1980 (Exhibit P-51). Vinacour recalled that the hearings took place sometime between December 1980 and February 1981.

Additional evidence with respect to the relationship between Castaldo and S.A., was also found in a Verified Complaint for Divorce which had been filed by Castaldo's

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former wife in April 1980. In that complaint it was alleged, inter alia, that in February 1979 Castaldo had committed adultery with S.A. (Exhibit P-34).

The decision of the Classification Officer in the N.A. case was issued in May 1981. In it he found as a fact that it was never intended by S.A. or her parents that N.A. attend the public schools. Rather, their intent clearly was that N.A.'s attendance at the private facility should be underwritten at public expense (Exhibit P-68). Although no reference was made in that report to the problem that arose because of Castaldo's relationship to S.A., the Classification Officer did observe that since the district's own psychologist's recommendation was, "discounted by the other Team members", he directed that, ". . . another psychological evaluation be done so that that discipline could be included and not simply disregarded". (Exhibit P-68, page 6).

Castaldo, of course, also testified with respect to Charge 6. He first came to know N.A. in the early 1970's and started dating S.A., N.A.'s sister, in 1976 or 1977 when he was separated from his wife. He continued to date her until 1980-81. Although S.A. was named in a count of the divorce complaint charging adultery, Castaldo did not hire an attorney. The divorce, he said, went through as an uncontested matter and was granted upon the ground of "extreme cruelty." The count which contained the adultery allegation was dismissed.

With regard to his making any disclosures to S.A., Castaldo conceded that he discussed his psychological findings with both S.A. and her parents and maintained that this was a perfectly appropriate course of action. He said he was disqualified from participation in the due process hearing at the request of the Board's attorney following a conference among the attorney, the Classification Officer, S.A. and himself. When the attorney maintained that his further participation was inappropriate he did step aside. According to Castaldo, the Classification Officer saw nothing improper in the circumstances and even said that he could submit a report as part of the case. Castaldo vehemently denied that he "coached," "prepped" or otherwise improperly aided S.A. with regard to the team conferences or the hearing. He insisted that he felt N.A. did have a neurological problem which had to be accommodated. According to respondent, the Board

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was aware long before the hearing that he was dating S.A. He saw no conflict because of that fact and pointed out that he had done psychological workups on relatives during the course of his career. Although he remained in the hearing room, he insisted he did not help S.A. He expected to be called as a witness, but was not.

Finally, the respondent pointed out that although the Classification Officer felt that an appropriate placement and program for N.A. was in the public schools, he roundly criticized the Board's procedures in many respects.

My review of the evidence with respect to Charge 6 convinces me that the Board has sustained its burden of proof. It has demonstrated beyond cavil that Castaldo's egregious conduct with regard to the N.A. matter constituted conduct unbecoming a school psychologist. Despite his protestations to the contrary it appeared plain to me that the respondent, because of his close personal relationship with S.A., had a personal stake in the outcome of the child study team's activities, both in the insistence that N.A. be classified neurologically impaired rather than trainable mentally retarded (which implicated continued placement in the private school), and in the private school placement at public expense which the relatives urged. Castaldo's actions, I believe, stemmed from that personal motivation rather than from a wholly independent judgment. It behooved him to have stepped aside as soon as the N.A. file was presented for consideration to the child study team prior to the beginning of the 1980-81 school year. Further, it was highly inappropriate for the respondent to have consulted with S.A. almost as an adversary to the Board during the course of the team's consideration and discussions with S.A. The Board's witnesses were firm in their conviction that S.A. had been coached to ask specific, technical questions. The irresistible inference to be drawn is that the source of her information came from the school district's own psychologist. In sum, the Board has demonstrated that the allegations of Charge 6 have been proven by a preponderance of the credible evidence and Charge 6 is **SUSTAINED.**

A listing of my determinations with regard to the charges made against respondent would appear to be in order at this time. Accordingly, they are set forth below:

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Charge 1	(a):	Dismissed
Charge 1	(b):	Dismissed
Charge 1	(c):	Dismissed
Charge 1	(d):	Sustained
Charge 1	(e):	Sustained
Charge 1	(f):	Dismissed
Charge 1	(g):	Sustained
Charge 1	(h):	Sustained, as amended
Charge 1	(i):	Sustained
Charge 1	(j):	Dismissed
Charge 1	(k):	Sustained
Charge 1	(l):	Withdrawn
Charge 1	(m):	Sustained
Charge 1	(n):	Withdrawn
Charge 1	(o):	Dismissed
Charge 1	(p):	Sustained, as amended
Charge 1	(q):	Withdrawn, as amended
Charge 1	(r):	Sustained
Charge 1	(s):	Dismissed
Charge 1	(t):	Dismissed
Charge 2	(a):	Dismissed
Charge 2	(b):	Dismissed, as amended
Charge 2	(c):	Sustained
Charge 2	(d):	Sustained
Charge 2	(e):	Sustained
Charge 2	(f):	Sustained
Charge 2	(g):	Dismissed
Charge 2	(h):	Sustained
Charge 3		Dismissed
Charge 4	(a):	Dismissed
Charge 4	(b):	Dismissed
Charge 4	(c):	Sustained
Charge 4	(d):	Dismissed
Charge 4	(e):	Sustained
Charge 4	(f):	Sustained
Charge 4	(g):	Sustained
Charge 4	(h):	Dismissed
Charge 5	(a):	Sustained
Charge 5	(b):	Dismissed
Charge 5	(c):	Dismissed
Charge 5	(d):	Sustained
Charge 6		Sustained

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Of the original 42 separate allegations, divided among the six counts, the Board voluntarily withdrew or did not object to the dismissal of seven of those charges. With regard to the remaining 35 charges, I have sustained 21 of them. A consideration of the consequences which ought to flow from these findings does not necessarily depend upon the number of those charges proven. Rather, consideration should be given to the overall nature and scope of the determinations in light of the totality of all those circumstances.

Reference to what the Commissioner has done in other tenure cases is helpful, but not always dispositive. On the other hand, from the cases there has arisen certain fixed principles which can and should be applied to matters of this sort. The Board appropriately cites the decision in Redcay v. State Bd. of Ed., 130 N.J.L. 369 (Sup. Ct. 1943), aff'd 131 N.J.L. 326 (E. & A. 1944). The lower court in that case articulated the following standard which has been cited on many, many occasions since then when tenure cases have been brought to the Commissioner:

> Unfitness for a task is best shown by numerous incidents. Unfitness for a position under the school system is best evidenced by a serious of incidents. Unfitness to hold a post might be shown by one incident, if sufficiently flagrant, but it might also be shown by many incidents. Fitness may be shown either way. Redcay v. State Bd. of Ed., supra, 130 N.J.L. at 371. (Emphasis added).

Surely, this is a case which involves "numerous incidents" of misconduct. Indeed, what emerged from the testimony was a picture of a school psychologist who, although perhaps well intentioned at times, seemed almost to delight in "bucking the system". Time and again, despite remonstrations from his superiors, criticism from his colleagues and complaints by parents, he nonetheless persisted in "going his own way" with regard to his bending and/or breaking established rules and policies. It seemed at times as if he took perverse delight in ignoring the established procedures. Much testimony was devoted to the way in which the respondent presumably viewed himself insofar as his psychologist functions were concerned. The Superintendent, Dr. Merachnik, stressed that during the mid-1970's a major change took place with regard to the role of the school psychologist. No longer was he or she to act like a private clinician. Rather, the school psychologist

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was expected to be a member of a team, and expected to cooperate in team assessments. While individual input based upon particular expertise in one's discipline was certainly encouraged, a school psychologist was not to act as an individual diagnostician. To that end, it became important to limit the discretionary parameters of the school psychologist's activities to assure that the major objective of alleviating handicapping conditions in the educational context was achieved. Examples of these sorts of appropriate limits were the "three-time rule" and the stress placed upon the need for child study teams to reach consensus decisions. Often, and from many quarters, senior administrative staff and fellow child study team members received information that the respondent simply could or would not abide by reasonably established rules. For example, while smoking was absolutely prohibited, Castaldo, despite his denials, was clearly shown to have regularly permitted students to smoke in his office. I reject his claim that this only occurred in stress situations when he felt the student's need to smoke outweighed the applicability of the rule. Parental and administrative complaints about this were more than scattered.

So too, Castaldo's obvious dislike for the established pass procedure was further evidence of his disdain for his employer's requirements. Administrators and teachers were greatly upset and concerned over his laxness in this respect and despite their complaints, both orally and in writing, he consistently continued either to issue passes under circumstances which did not warrant the same, or to provide passes in a post-facto manner to cover up a student's otherwise unexcused absence.

Another sore point surrounded the question of the so-called "minority reports". While there plainly was some ambiguity concerning what the term meant, there is little room to doubt that Castaldo regularly called or spoke to parents of students who were being evaluated by the team of which he was a member and either disclosed information that should have been kept confidential or expressed his own opinion which was adverse to the other team members. To compound and exacerbate his malconduct Castaldo, as noted by several of the witnesses, often was not a full participant at child study team meetings. Beyond that, he made it difficult for his colleagues promptly to do their own work since he failed to provide records and other information that was needed.

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Particularly distressing was the respondent's apparent pattern of making certain representations either to students or their relatives that he knew or should have known would create false hopes and expectations in them. The circumstances with respect to the placement of B.S. in a particular school is such an example. So too, the situation with R.G.; particularly, the fact that Castaldo called her brother in advance of a scheduled meeting to express his disagreement with what the brother and other family members were going to hear at that meeting.

In addition to his general attitude of disdain with regard to the proper functioning of the child study team, and his failing to obey rules and regulations of the school district, were certain specific incidences of misconduct which, in some respects, were even bizarre. The incident involving his giving T.D. the psychological report, which led to a further problem when his mother accidentally came across it, is an example. Castaldo's claim that he gave the student the report in order to alleviate anxiety smacks of a weak attempt to excuse the inexcusable. The consequences on the student were plainly damaging. So too, the incident involving Mr. Gorski, who was told that a certain student was with Castaldo when she plainly was not. To add insult to injury not only did Castaldo not tell the truth, he publicly and loudly berated Gorski immediately following the incident.

In its post-hearing brief the Board observes that, "virtually very staff member who came into contact professionally with Mr. Castaldo in both the David Brearly and Arthur Johnson Schools testified to Mr. Castaldo's inability and refusal to work within the confines of a Child Study Team, or to adhere to rational and legal policies and procedures within the District." Brief of Petitioner, page 79. That observation, sadly, is perfectly accurate. Castaldo's unilateral activities not only ran counter to established policies and procedures, they represented an actual threat to the proper functioning of the school district and, even importantly, the best interests of the students. It is not within the discretion of a school psychologist blithely to ignore smoking policies, pass procedures and other such rules. Nor is it acceptable behavior to lie to colleagues with regard to the whereabouts of students. By the same token no teaching staff member, be he a school psychologist or otherwise, should be allowed to orally berate colleagues and superiors.

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Castaldo worked for the school district - it did not work for him. From the evidence it would seem he had difficulty in accepting this fact.

A startingly improper course of conduct was respondent's activities in connection with the N.A. matter. There is no doubt that a personal, romantic relationship existed between Castaldo and S.A., the sister of N.A., prior to and during the time when the N.A. case was before the very team of which Castaldo was a member. It was perfectly obvious that Castaldo had aligned himself with N.A.'s family in an effort to achieve what the Classification Officer ultimately noted to have been their major objective: To have the public school district approve placement of N.A. at a private school with the Board bearing the costs thereof. It takes little imagination to picture the scene described by Christiano and Vinacour whereby in the course of a meeting S.A. would pose questions that demonstrably were not normally within her expertise. Quite aside from that is the compelling fact that as a school psychologist it was the duty and responsibility of Castaldo to deal with independence, objectivity and, most importantly, professional integrity when considering an individual case before him. His behavior failed utterly to meet that salutary standard. That charge, standing alone, gives rise to conduct so unbecoming as perhaps to overshadow even all of the other specific and general incidents of conduct unbecoming a tenured teaching staff member and his insubordination.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In view of the foregoing discussion, I herewith make the following Findings of Fact:

1. During the 1977-78 school year and continuing to the 1980-81 school year, respondent filed minority reports regarding child study team discussions, evaluations and recommendations in the form of orally disclosing the same to parents of students who were being evaluated for classification and/or placement despite being instructed specifically not to so act, which conduct was insubordinate.

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2. During the 1977-78 school year and thereafter respondent unilaterally informed students and their parents of his own personal opinion regarding appropriate referrals and/or placements without having prior or adequate discussion with or authorization by the child study team of which he was a member, which conduct was insubordinate and unbecoming a tenured teaching staff member.

3. During the 1978-79 school year and continuing to the 1980-81 school year respondent consistently saw various students, who were not classified, more than three times without referring them to a screening committee in violation of District policies and contrary to directives to cease such activity, which conduct was insubordinate.

4. In March 1980, respondent gave T.D., a minor student, a confidential psychological report, and California Occupational Preference System Report, which contained information that would disturb and upset the particular student. Moreover, respondent released the report directly to the student without first informing his parents of superiors of his intention or obtaining a parental release, all of which were in violation of District policies and which conduct was unbecoming a tenured teaching staff member.

5. During the 1979-80 school year and continuing to the 1980-81 school year respondent from time to time refused to make student records and his own personal knowledge of student problems available to other members of the child study team, all of which conduct resulted in an interference with the proper functioning of the team and a loss of confidence in Castaldo on the part both of his team member colleagues and other teaching staff members, which conduct was unbecoming a tenured teaching staff member.

6. In May 1980, Castaldo improperly advised R.J., a student, that she would be allowed to participate in a certain work study program the following school

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year without first having discussed the case in the respect with his child study team colleagues or obtaining their approval, all of which was in violation of District policies, and was conduct unbecoming a tenured teaching staff member.

7. During the 1980-81 school year the respondent reported the discussions and preliminary findings of team meetings to both students and parents and unilaterally suggested that he would see to it that certain programs would be provided to students without first consulting with his colleagues, no less obtaining their approval for such representations, which conduct was unbecoming a tenured teaching staff member.

8. During the 1980-81 school year, in the case of a student named N.K., respondent unilaterally suggested to her, contrary to the expectations and intentions of his fellow team members, that she have "an educational sabbatical", which conduct interferred with the proper functioning of the child study team and was unbecoming a tenured teaching staff member.

9. With respect to a student named B.S., Castaldo informed her during the 1979-80 school year that she would be returning from one high school to another despite the fact that the child study team, to his knowledge, did not support any such recommendation, which conduct was unbecoming a tenured teaching staff member.

10. In the case of student J.M., Castaldo refused to participate in a discussion of possible modifications of his program with fellow members of the child study team, which refusal impaired the team's ability to properly function, and was conduct unbecoming a tenured teaching staff member.

11. During the 1977-78 school year Castaldo repeatedly permitted students informally to "drop-in" and see him without first securing a pass or notifying their regular scheduled teachers of their whereabouts, said conduct being in violation of building rules and regulations, and conduct

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unbecoming a tenured teaching staff member.

12. During the 1978-79 school year and continuing thereafter respondent violated established pass procedures by repeatedly taking students out of major subject classes when not necessary, thereby depriving students of necessary classroom instruction, which conduct was unbecoming a tenured teaching staff member.

13. During the 1979-80 school year Castaldo regularly permitted students to smoke while in his office despite having received express instructions to the contrary on numerous occasions from superiors and contrary to Board policies and building rules and regulations, which conduct was insubordinate and unbecoming a tenured teaching staff member.

14. Castaldo on one occasion deliberately misrepresented to a teacher, William Gorski, that a certain student was with him during a class period when, in point of fact, that same student had left the building prior to the period in question. During that same incident Castaldo loudly berated the other teacher which conduct was unbecoming a tenured teaching staff member.

15. In June 1979, Castaldo failed to attend two parent conferences, both of which he knew of in advance and was expected to attend, said conduct causing unnecessary inconvenience and distress to relatives of the students involved and to the child study team members, which conduct was unbecoming a tenured teaching staff member.

16. In May 1980, on two separate occasions, Castaldo spoke to his building principal, Louis DeRosa in a disrepectful and abusive manner, which conduct was unbecoming a tenured teaching staff member.

17. In January 1981, Castaldo failed to attend an important scheduled child study team work session thereby creating unnecessary inconvenience and

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putting pressure on the other members of the team who had expected his presence, which conduct was unbecoming a tenured teaching staff member.

18. Castaldo orally abused a colleague, Karen Vinacour, a school social worker, by uttering profanities to her, which conduct was unbecoming a tenured teaching staff member.

19. In or about October 1980, Castaldo solicited T.D., the mother of a student, to write a letter of complaint about the principal, Louis DeRosa, in a situation where the matter already have been resolved between the principal and the parent. Moreover, during or about that same period Castaldo permitted the student, J.D., to smoke in his office and regularly to see him without first having to obtain a pass, all of which conduct was unbecoming a tenured teaching staff member.

20. During the 1980-81 school year respondent discussed with a student, S.H., her personal family life and not only failed to notify the student's parents that such discussions were taking place, but denied such discussion when they confronted him. In addition, during the course of such discussions with S.H., Castaldo encouraged the student to leave home and he permitted her to smoke in his office, which conduct was unbecoming a tenured teaching staff member.

21. During the 1980-81 school year, in a case involving N.A., who had previously been classified, respondent demonstrated conduct unbecoming a teaching staff member in that he improperly disclosed to S.A., the sister of N.A. the substance of confidential discussions between the members of the child study team pertaining to the student. At that same time respondent was involved in an intimate personal relationship with S.A. During the course of a team meeting to discuss an IEP for N.A., her sister, S.A., asked questions of other team members in an adverse manner which indicated that she had been "coached" and/or "prepped" to ask said

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questions by the respondent. Subsequently, when the matter become the subject of a request for a due process hearing, respondent had to be disqualified from participation because of his relationship with S.A. All of the foresaid was unprofessional, demonstrated unfitness for the position of school psychologist and was conduct unbecoming a tenured teaching staff member.

The foregoing Findings of Fact inexorably lead to the conclusion that the respondent has so compromised his position as a school psychologist that the only appropriate sanction for his many defalcations must be his dismissal and consequent forfeiture of tenure entitlement in the school district. The scope of his improper activities, the nature of many of them and his persistence in deliberately ignoring efforts by his colleagues and superiors to correct him in a constructive way leave no reasonable room for consideration of any lesser sanction. The students, faculty, administrators and members of the Board all were adversely impacted by the respondent's activities in a variety of ways. They need not be required to tolerate any further his continued employment in the district. Accordingly, I **CONCLUDE** that the respondent should be **DISMISSED** from his position as a tenured school psychologist in the employ of the Board of Education.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF EDUCATION, SAUL COOPERMAN**, who is empowered by law 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 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 1871-83

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

March 2, 1984
DATE

Stephen G. Weiss
STEPHEN G. WEISS, ALJ

March 2, 1984
DATE

Receipt Acknowledged:

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

March 6, 1984
DATE

Ronald L. Parker/sko
FOR OFFICE OF ADMINISTRATIVE LAW

ms

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IN THE MATTER OF THE TENURE	:	
HEARING OF ANTHONY CASTALDO,	:	
SCHOOL DISTRICT OF THE UNION	:	COMMISSIONER OF EDUCATION
COUNTY REGIONAL HIGH SCHOOL	:	DECISION ON REMAND
NO. 1, UNION COUNTY.	:	
	:	

The Commissioner has reviewed the record of this matter including the initial decision on remand rendered by the Office of Administrative Law, Stephen G. Weiss, ALJ.

It is observed that counsel for respondent has filed reply exceptions to the initial decision and, further, that cross (primary) exceptions and reply exceptions have been filed by the Board. These exceptions were filed in accordance with the applicable provisions of N.J.A.C. 1:1-16.4a, b and c.

Finally, the Commissioner observes that respondent, without the advice or knowledge of counsel, has filed lengthy exceptions to the initial decision on his own behalf, indicating to the Commissioner that such exceptions taken by him are to be considered as "Part I: Respondent Authored Exceptions," and that his attorney's exceptions should be considered as "Part II: Attorney for Respondent Exceptions."

The first page of respondent's exceptions is dated March 16, 1984 and is typed on plain bond paper. However, each of the remaining eighteen pages of exceptions were typed on paper containing the letterhead of respondent's counsel who denies granting respondent permission to use his stationery. (See letter dated April 4, 1984 from respondent's counsel.)

The Board strenuously objects to respondent's action in filing these exceptions as being in violation of the provision within the Uniform Procedure Rules of Practice which prescribe the manner in which both attorney-authored and pro se exceptions are to be filed in a contested matter. The Board therefore urges the Commissioner to disregard those exceptions which were filed by Respondent Anthony Castaldo. (See Board letter dated March 30, 1984.)

The Commissioner has reviewed the provisions of the Uniform Procedure Rules of Practice (N.J.A.C. 1:1-1 et seq.) and finds no rule of procedure set forth therein which would permit respondent, who is represented by counsel, to independently file exceptions to the initial decision in the instant matter. Accordingly, the Commissioner finds and determines that the exceptions individually filed by Respondent Castaldo will not be considered in reaching a final determination in the instant matter.

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Prior to addressing the exceptions of the parties in the instant matter, the Commissioner takes notice of the fact that an interlocutory appeal had been taken by respondent against an order issued by the judge on February 22, 1984. Said appeal was filed with the Commissioner on February 23, 1984, approximately one week before the initial decision was rendered in this matter (March 2, 1984).

Judge Weiss' Order of February 22, 1984 reads as follows:

> "This matter having been opened to the Court by Pearson and Shapiro, Esqs., counsel for respondent Anthony Castaldo, on an application to dismiss tenure charges and seeking sanctions against the petitioner and by Cross Motion of Weinberg and Manoff, Esqs., on behalf of petitioner seeking allowance of credits against any salary due the respondent and the Court having reviewed the briefs and papers submitted by both the counsel for respondent and counsel for petitioner, and for other good cause shown,
>
> It is on this 22nd day of February 1984,
>
> ORDERED, that the Motion by the respondent to dismiss tenure charges against the respondent and seeking sanctions therefor against the petitioner be and the same is hereby denied and it is further
>
> ORDERED, that the salary rate to be credited for the respondent shall be at the rate of $26,000.00 per year, and it is further
>
> ORDERED, that the petitioner's claim for deductions for delay in the proceedings be charged against any monies due the respondent for the period from August 30, 1983 to October 24, 1983 be and the same is hereby denied, and it is further
>
> ORDERED, that no determination can be made at this time as to whether or not credit should be given to the petitioner and charged to the respondent for delays in the proceedings from December 1, 1982 to May 2, 1983 and both the petitioner and the respondent shall be given the opportunity to request a hearing, file affidavits, and schedule oral arguments with the undersigned as to the appropriateness of any credits due for the aforesaid period of time, and it is further

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> ORDERED, that the respondent be credited with salary on and after November 2, 1983 at the rate of $26,000.00 per annum and from any said sums due the respondent the petitioner shall withhold pension contributions, social security contributions, withholding taxes, SUI contributions, insurance and any other appropriate deductions from those salary credits as well as appropriate deductions, if any, for the period from March 1, 1982 to November 1, 1983 and retain the same in one of its interest bearing accounts."

On March 18, 1984 the parties were advised by the Director of the Bureau of Controversies and Disputes as follows:

> "***It is our understanding that an initial decision on the merits of this case is to be rendered by the judge during the first full week in March 1984.
>
> "In view of the above, the Commissioner will consider respondent's application for interlocutory review and the supporting legal arguments of the parties in conjunction with this final determination of the entire matter.
>
> "The parties are further advised that any further legal arguments they may wish to submit to supplement the record regarding the application for interlocutory review are to be filed within the same time periods permitted for the filing of exceptions to the initial decision.***" (C-2)

The Commissioner has reviewed the memorandum submitted by respondent (February 21, 1984), as well as the reply memorandum filed by the Board (February 24, 1984), setting forth their respective arguments with regard to the February 22 Order of Judge Weiss. In the Commissioner's judgment the claims raised by the parties are essentially monetary issues emanating from the State Board's Decision on remand of November 2, 1983, which held that respondent was entitled to have his salary payments by the Board resumed as of November 2, 1983 pending the outcome of the proceedings on the merits of the tenure charges against him.

The Commissioner finds and determines that he is without sufficient factual information to render a determination with respect to the claims of either party regarding the amount of salary to which respondent was to be accorded as of November 2, 1983. Additionally, the factual and legal basis upon which the Board is entitled to deduct those sums of money from respondent's salary prior to November 2, 1983 is also unclear. Accordingly, the Commissioner hereby directs that such claims pertaining to the resumption of respondent's salary be separated from the instant proceedings and

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be remanded to the Office of Administrative Law for a further finding and determination with respect to the merits of the claims of either party. In rendering this determination the Commissioner, without prejudice to the parties, will not disturb Judge Weiss' Order issued during the pendency of such proceedings. IT IS SO ORDERED.

The Commissioner will address the exceptions filed by the parties with regard to those recommended findings and conclusions set forth in the initial decision.

Initially, the Commissioner observes that respondent has filed two general exceptions to the initial decision:

1. Respondent excepts to that earlier determination of the State Board on November 2, 1983, which affirmed the judge's prior ruling suppressing his defenses in the instant tenure proceedings. Respondent contends that such determination has violated and compromised his due process rights. Respondent further relies on the provisions of N.J.S.A. 18A:6-20 in support of his contention that he has the right to testify, produce witnesses on his own behalf and be afforded all other protections incorporated within the concept of due process. Respondent maintains that he was prepared to produce forty pupil witnesses to testify on his behalf but, because of the suppression of his defenses, he was denied the right to have them testify.

2. Respondent claims that the judge erred in denying his request to examine the minutes of the child study team in defending himself against the Board's tenure charges. Respondent in taking this exception specifically refers to two separate Orders issued respectively by Judge Elinor Reiner on February 9, 1982 and Judge Stephen G. Weiss on October 24, 1983.

The Board in its reply to respondent's exceptions relies upon the language contained in the State Board's decision of November 2, 1983 which holds in pertinent part as follows:

> "***Respondent's defenses were suppressed because of his own improper conduct. We believe the suppression here was a reasonable and responsible method of sanctioning Respondent's improper conduct.***" (Slip Opinion, at p. 2)

It is the Board's further contention that respondent completely ignored the highly relevant fact that, although his defenses were suppressed, he was nevertheless permitted to testify on his own behalf, as well as enter some 48 exhibits into evidence pertaining to the tenure charges against him. (Board's Reply Exceptions, at p. 2)

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Additionally, the Board rejects respondent's contention that he was improperly and illegally denied an opportunity by the judge to review the minutes of the child study team. The Board's reasons as they appear in its reply exceptions are as follows:

> "***Petitioner (Board) next replies to Respondent's contention that Judge Weiss's order of October 24, 1983, denying Respondent access to all Child Study Team minutes and records for all students serviced by all Teams during his entire tenure in the District constituted 'reversible error' in the proceeding before the Office of Administrative Law. Petitioner submits that Judge Weiss's ruling was in accordance with applicable Federal and State regulations governing the access to and disclosure of pupil records, 45 C.F.R. Sec. 99.1, et seq., and N.J.A.C. 6:3-2.1, et seq., and, further, that said decision was mandated by the total lack of specificity of Respondent's demand.
>
> "At no time while this issue was being raised did Respondent ever indicate with any degree of specificity what he was looking for in the voluminous Child Study Team records which were requested. He simply stated that the records would exculpate him in some general manner, but would not even offer specific names or dates with regard to this self-serving claim. Judge Weiss's reluctance to allow such an obvious 'fishing expedition' almost a year after the identical motion was denied by Judge Reiner is both understandable and legally correct. Disclosure of any single pupil record, even to Respondent in the course of a tenure proceeding, would by law require formal written notification to the parents of minor students or adult students named in each record. That requirement alone would have literally brought the entire hearing process to a grinding halt given the hundreds of students named in the records encompassed by Respondent's blanket request. Judge Weiss allowed Respondent to specifically proffer the relevance of any particular documents, however, Respondent insisted upon demanding all of the records without making such a proffer.***" (Emphasis in text.)
>
> (Board's Reply Exceptions, at pp. 3-4)

The Commissioner, having considered and reviewed the above exceptions, finds the arguments advanced by respondent to be without merit for precisely those reasons set forth in the Board's reply exceptions. The Commissioner so holds.

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Additionally, the Commissioner observes that respondent has filed specific exceptions to the twenty-one separate findings of fact related to the tenure charges rendered by the judge as they appear, ante, in the initial decision. Therein respondent relies, in part, upon certain proposed findings of fact which were filed as a separate document before the judge under date of December 28, 1983, for his consideration prior to the time the initial decision was rendered in the instant matter. In considering respondent's exceptions herein, the Commissioner has determined not to include these proposed findings of fact inasmuch as due consideration was been given to them in the initial decision. Moreover, the Commissioner has further determined not to comment further upon those references respondent has made in his exceptions to the twenty-one separate findings of fact which refer to the judge's failure to consider or allow testimony of those witnesses he would have produced to testify on his own behalf had his defenses not been suppressed. In the Commissioner's judgment respondent's general exceptions pertaining to the suppression of his defenses as a matter of due process have been ruled upon, ante. The Commissioner so holds.

It is noted by the Commissioner that the judge's Finding of Fact No. 10 of the initial decision, ante, refers to the allegation in Charge 1(s) which is recommended for dismissal. The Commissioner concurs with the judge's recommendation and hereby dismisses the corresponding Finding of Fact (No. 10), ante.

The Commissioner observes that the six major tenure charges (1-6) have been summarized by the judge in the initial decision. Each of the separate allegations or subcharges in support of the six major tenure charges have been identified by the number of the charge in alphabetical sequence; e.g. Charge 1(a), Charge 1(b), Charge 2(a), Charge 2(b), etc. The summary of the findings with respect to these charges appears in the initial decision.

In addressing the exceptions to the findings of fact rendered by the judge pertaining to the subcharges which were sustained in the initial decision, the Commissioner shall identify the subcharge. Next to the subcharge will appear the appropriate number identifying the specific finding of fact referred to by the judge in the initial decision.

CHARGE 1

Charge 1(d) (Finding No. 1)
Charge 1(e) (Finding No. 2)
Charge 1(g) (Finding No. 3)
Charge 1(h) (Finding No. 4)
Charge 1(i) (Finding No. 5)
Charge 1(k) (Finding No. 6)
Charge 1(m) (Finding No. 7)
Charge 1(p) (Finding No. 8)
Charge 1(r) (Finding No. 9)

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Respondent's exceptions to the Findings of Fact (Nos. 1-9) with regard to Charge 1, ante, are as follows:

Findings Nos. 1 and 2: The judge's exclusion of Exhibit R-1A in evidence authored by Dr. James Richardson of the New Jersey State Department of Education is in error.

This letter, dated July 27, 1979, was a reply to respondent's inquiry regarding whether or not "minority" reports could be included and filed with regard to child study team decisions. Respondent maintains that R-1A supports his contention that it was permissible to file said minority reports and that this information was made available to Mr. Benford of the Union County Superintendent's Office and also forwarded to Mr. Christiano, the Board's Director of Special Services.

The judge failed to apply the provision of N.J.S.A. 18A:46-5.2 which specifies that any decision of a child study team regarding a pupil must be done with full participation of the parent or guardian.

Finding No. 3: In regard to this finding of fact, respondent maintains that the judge improperly relied upon hearsay evidence in rendering this finding. Respondent maintains that there was no direct evidence adduced at the hearing to establish that he violated the "three-time rule" in his contacts with pupils. Moreover, it is respondent's contention that, absent written Board policy or statutory prohibition, there were many diverse interpretations of that rule.

Finding No. 4: Contrary to the judge's finding, N.J.A.C. 6:3-2.2(e) clearly indicates that it is within the discretion of the professional to determine whether a report should be released to a non-adult pupil. Furthermore, the statement by the judge that obvious irreparable harm was done to the pupil in question is unsupported, absent any direct testimony adduced from the pupil or his parents. Consequently, respondent argues that the Board's testimony in support of this charge amounts to nothing more than hearsay.

Finding No. 5: Respondent contends that he did, in fact, share information with the child study team concerning Pupil J.S. His ability to support this contention, however, has been improperly denied to him because of the suppression of his defenses.

Finding No. 6: Respondent takes exception to Finding No. 6 by virtue of the fact that the Board produced hearsay evidence rather than direct pupil or parental testimony in support of its allegation that he improperly advised Pupil R.J. during the 1980-81 school year.

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Finding Nos. 7-9: The judge's Findings Nos. 7, 8 and 9 with respect to respondent's improper behavior during the 1979-80 and 1980-81 school years are in error. Respondent argues that the minutes of the child study team would have supported his position with respect to these findings had he not previously been denied access to these minutes by the judge. Moreover, with regard to Pupil B.S., the child study team's refusal to have her placed in attendance at her former high school was the reason she dropped out of school enrollment temporarily. B.S. did, in fact, return to her former high school and thereafter go on to college. Respondent maintains that he was correct in advocating in the first instance that her original placement in the Arthur Johnson Regional High School was proper, notwithstanding the position taken by the child study team presented in this matter.

The Board relies primarily upon those written findings and conclusions in the initial decision which establish that the testimony of its witnesses, as well as respondent's own testimony, in part support the findings of fact related to Charge No. 1. (Board's Reply Exceptions, at pp. 4-10)

CHARGE 2

Charge 2(c) (Finding No. 11)
Charge 2(d) (Finding No. 12)
Charge 2(e) (Finding No. 13)
Charge 2(f) (Finding No. 13)
Charge 2(h) (Finding No. 14)

Respondent's exceptions to the above-referenced findings of fact related to Charge 2 are listed in part below as follows:

Finding No. 11: Respondent denies that he allowed pupils to "drop-in" his office and see him at will without securing passes from their regularly-scheduled teachers. Respondent argues that the judge's reliance solely upon the testimony of Michael Londino, mathematics teacher, without the Board having produced pupil testimony to that effect is in error. Respondent further argues that the seriousness of this charge is suspect inasmuch as it pertains to alleged incidents which occurred during the 1977-78 school year. Additionally, respondent argues that such charges amount to inefficiency and are therefore improperly before the Commissioner without the Board having certified them as such in accordance with law.

Finding No. 13: Respondent rejects the judge's finding that he regularly permitted pupils to smoke in his office during the 1979-80 school year in violation of directions from his superiors and Board policies. Respondent maintains that he originally had permission from his superior to allow pupils to smoke in his office until such permission was rescinded. He discontinued this practice after permission was withdrawn. Respondent argues that the Board had not produced sufficient credible testimony with respect to Charge 2(e) and (f) for them to be sustained.

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Finding No. 14: Respondent maintains that the circumstances related to this finding resulted from a misunderstanding pertaining to his response to Mr. Gorski's question regarding whether or not N.M. was present in respondent's office. Respondent urges the Commissioner to reject this finding on the grounds that the Board has not produced sufficient credible testimony.

In reply to respondent's exceptions to the five allegations sustained by the judge in his Findings of Fact (Nos. 11-14, ante), the Board maintains that there is sufficient credible testimony in the record of this matter recited in the initial decision by the judge to establish respondent's guilt as to Charge 2 beyond question. (Board's Reply Exceptions, at pp. 11-12)

CHARGE 4

Charge 4(c) (Finding No. 15)
Charge 4(e) (Finding No. 16)
Charge 4(f) (Finding No. 17)
Charge 4(g) (Finding No. 18)

Finding No. 15: Essentially, respondent in excepting to this finding maintains that his failure to attend two parent conferences scheduled by the child study team during June 1979 was because of improper advance notice in one instance and that another conference had been cancelled. Respondent relies on the testimony to that effect ante in the initial decision.

Finding No. 16: Respondent excepts to this finding on the grounds that it was an emotionally-charged incident and, further, because he was denied an opportunity to produce witnesses on his own behalf to testify with respect to the incidents in which he was charged with using abusive language toward Principal DeRosa during May 1980.

Finding No. 17: Respondent excepts to this finding that he failed to appear at a pre-arranged child study team work session on January 13, 1981 on the grounds that there was a breakdown in communications between himself and the other members of the child study team. Nevertheless, respondent argues that the other members of the child study team could have continued their work session with input to be supplemented by him after he concluded his meeting with other pupils.

Finding No. 18: Finally, with regard to this finding respondent rejects it without further clarification except that it was for those reasons set forth in his proposed findings of fact previously submitted to the judge prior to the issuance of the initial decision.

The Board in its reply exceptions to the findings of fact sustained in Charge 4(c), (e), (f) and (g) relies on the record and

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rejects respondent's arguments advanced by way of his exceptions to these charges as being an attempt to misdirect the Commissioner's attention from the actual weight and preponderance of credible evidence in support of its tenure charges.

The Commissioner will now consider the remaining findings of fact which sustain Charge 5(a) and (d) and Charge 6 as indicated by the judge, ante, in the initial decision.

CHARGE 5

Charge 5(a) (Finding No. 19)
Charge 5(d) (Finding No. 20)

CHARGE 6

Charge 6 (Finding No. 21)

Respondent excepts to each of the above findings of fact as follows:

Finding No. 19

"As to finding number 19, exception is taken because of the heresay nature of the testimony. The primary witness would have clearly been the student, J.D., who would have been able to testify as to the actual conversations which occurred with the Respondent. Furthermore, without the testimony of the student, and because of the strained relationship between parent and student, the testimony of the parent should be discounted and accordingly, the finding made by the Administrative Law Judge must be rejected.

Finding No. 20

"As to the 20th. finding, this is one of the most spurious of all, and as such, Respondent takes exception thereto, based upon fatal defects in the presentation of the evidence. Specifically, the student in question should have been the one to testify as to what occurred, and it then would have become increasingly clear that what was related to the parent was not in fact what was related to the student. As such, we hereby adopt and incorporate by reference the argument in the Respondent's proposed findings of fact as to specification 5D, and accordingly, the finding as made by Judge Weiss must be rejected, and/or modified.

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Finding No. 21

"As to the last or 21st. finding of fact, it is noteworthy that wherein the original charge alleged 'moral terpitude' (sic), that the finding was that by virtue of the Respondent's aiding a family with a problem, he is considered to be guilty of conduct unbecoming a school psychologist. To begin with, there are severe factual deficiencies in the evidence which was presented, including the fact that the Respondent voluntarily withdrew from the case, and was not disqualified therefrom. This occurred when he learned of the questions about his objectivity, and, as stated above, voluntarily withdrew. Furthermore, there are great inconsistencies due to the fact that the administration of the school allowed the Respondent to evaluate, and even counsel his own relatives, but somehow, it is felt that there is a conflict in his evaluating the sister of a girlfriend. Frankly, it is my feeling that this is an overreaction by the Judge to what might be termed at best, a minor conflict. The rules of conflict are not the same within the field of psychology as they are within the legal profession, and as such, I feel that the Respondent has suffered by the increased awareness of conflict of interest within the law. Accordingly, we must take exception to the finding, and unless it is shown that his, the Respondent's, findings were somehow tainted, there can be no finding that he operated in any way other than as a professional should have in the situation. Accordingly, we also incorporate herein the arguments set forth in the Respondent's proposed findings of fact as to charge number 6, and request that the Commissioner reject this finding. It should also be noted that none of the individuals involved in this case, N.A., S.A., the hearing officer, or even the representative of the Petitioner at that due process hearing were called as witnesses, which, it seems to me, would have resulted in a full airing of the facts of the situation and would have enabled the Judge to make a fair and just finding. However, because of this failure to produce the witnesses, who certainly would have been called by the Respondent had he been allowed the opportunity to do so, and because of the missed misplaced emphasis on conflict, we respectfully submit that this finding must also be rejected."

(Respondent's Exceptions, at pp. 14-15)

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The Board in its reply exceptions rejects respondent's exceptions to Findings Nos. 19 and 20 in support of Charge 5(a) and (d) relying upon the records of the testimony produced by the witnesses, as well as the judge's analysis of that testimony, ante.

The Board in its reply to Finding No. 21 in support of Charge 6 emphatically rejects respondent's exceptions to the initial decision for the following reasons:

> "The intimate personal relationship between Respondent and S.A., which forms the factual basis for Finding No. 21, was never denied by Respondent during his testimony. Respondent attempts to characterize his actions as 'aiding a family with a problem,' yet Judge Weiss was absolutely convinced that Respondent's behavior in this particular matter was 'startingly (sic) improper':
>
> > 'A startingly (sic) improper course of conduct was respondent's activities in connection with the N.A. matter. There is no doubt that a personal, romantic relationship existed between Castaldo and S.A., the sister of N.A., prior to and during the time when the N.A. case was before the very team of which Castaldo was a member. It was perfectly obvious that Castaldo had aligned himself with N.A.'s family in an effort to achieve what the Classification Officer ultimately noted to have been their major objective: To have the public school district approve placement of N.A. at a private school with the Board bearing the costs thereof. It takes little imagination to picture the scene described by Christiano and Vinacour whereby in the course of a meeting S.A. would pose questions that demonstrably were not normally within her expertise. Quite aside from that is the compelling fact that as a school psychologist it was the duty and responsibility of Castaldo to deal with independence, objectivity and, most importantly, professional integrity when considering an individual case before him. His behavior failed utterly to meet that salutary standard. That charge,

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> standing alone, gives rise to conduct so unbecoming as perhaps to overshadow even all of the other specific and general incidents of conduct unbecoming a tenured teaching staff member and his insubordination.'
> (Initial Decision [ante], emphasis supplied.)
>
> Respondent's claim that he was involved in only a 'minor conflict' (Respondent's exceptions at p. 14) in the N.A. case strains the limits of common standards of ethical propriety. Respondent simply abandoned his professional obligation to the District in this case and instead openly assisted his paramour in an improperly motivated litigation against his employer and the very Child Study Team of which he was supposed to be a cooperating member. The Charge and corresponding Finding should be sustained." (Board's Reply Exceptions, at pp. 15-16)

The Commissioner, upon review of respondent's exceptions and the Board's reply exceptions to the initial decision, observes that the record of this matter has been developed in exhaustive detail and great length. In the Commissioner's judgment, except for the Finding of Fact No. 10, ante, which relates to Charge 1(s) which has been dismissed by the judge, all of the remaining Findings of Fact Nos. 1-9 and 11-21 have been comprehensively reviewed and are supported by the weight of credible evidence, respondent's exceptions notwithstanding.

It is noted that the sole cross-exception to the initial decision filed by the Board urges the Commissioner to reverse the judge's finding and conclusion which dismisses Charge 3 alleging that respondent was guilty of excessive absenteeism.

The Board in its exceptions attempts to reargue the position which it had taken before the judge by way of the testimony of witnesses and documentation produced at the hearings held in this matter. The Commissioner has reviewed the record of this matter including the findings of the judge as set forth with regard to this specific charge and finds and determines the Board's exceptions thereto to be without merit.

In conclusion, the Commissioner finds no compelling reason in the record of this matter to reach a contrary finding and determination with respect to the specific tenure charges of unbecoming conduct of which respondent has been found guilty. The Commissioner hereby finds and determines that respondent is guilty of tenure Charges 1, 2, 4, 5 and 6 as described in detail in the initial decision.

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The Commissioner in arriving at this determination with respect to the tenure charges against respondent further adopts his own the conclusional statement in the initial decision, ante, which reads in part:

> "***The foregoing Findings of Fact inexorably lead to the conclusion that the respondent has so compromised his position as a school psychologist that the only appropriate sanction for his many defalcations must be his dismissal and consequent forfeiture of tenure entitlement in the school district. The scope of his improper activities, the nature of many of them and his persistence in deliberately ignoring efforts by his colleagues and superiors to correct him in a constructive way leave no reasonable room for consideration of any lesser sanction. The students, faculty, administrators and members of the Board all were adversely impacted by the respondent's activities in a variety of ways. They need not be required to tolerate any further his continued employment in the district.***"

Accordingly, it is found and determined that respondent has forfeited his tenured position in Union County Regional High School District No. 1 as of the date of this decision.

IT IS SO ORDERED.

MAY 7, 1984 COMMISSIONER OF EDUCATION

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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.	:	
	:	

Decided by the Commissioner of Education, May 7, 1984

For the Petitioner-Respondent, Weinberg and Kaplow
(Richard J. Kaplow, Esq., of Counsel)

For the Respondent-Appellant, Oxfeld, Cohen and Blunda
(Sanford R. Oxfeld, Esq., of Counsel)

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

December 5, 1984

PENDING N.J. SUPERIOR COURT

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7185-83
AGENCY DKT. NO. 303-8/83A

STANLEY BOSNER,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE,
Respondent.

APPEARANCES:

Sanford R. Oxfeld, Esq., for petitioner
(Rothbard, Harris & Oxfeld, attorneys)

Stephen J. Tripp, Esq., for respondent
(Wilentz, Goldman & Spitzer, attorneys)

Record Closed: February 14, 1984 Decided: March 23, 1984

BEFORE KEN R. SPRINGER, ALJ:

This matter comes before the Office of Administrative Law on respondent's motion to dismiss the petition for failure to comply with the 90-day limitation set forth in N.J.A.C. 6:24-1.2. On August 18, 1983, petitioner Stanley Bosner filed a petition with the Commissioner of Education in which he alleged that his resignation from the position of Director of Special Services in the Old Bridge School District was obtained by duress or

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coercion. In its answer filed on September 3, 1983, respondent denied these allegations. Further, respondent raised several defenses, including the argument that petitioner could not rescind his resignation after it had been accepted by the board of education.

Subsequently, the Commissioner of Education transferred the matter to the Office of Administrative Law for handling as a contested case. Prior to the hearing date, respondent brought the present motion, accompanied by a supporting affidavit and legal brief. Petitioner filed a brief in opposition to respondent's motion. The motion was submitted on February 14, 1984 for ruling on the papers.

Findings of Fact

All of the material facts are undisputed. From the pleadings, affidavit and other moving papers filed by the parties, I **FIND:**

Stanley Bosner had been employed by the Old Bridge Board of Education since September 1965. Initially, he worked as a school psychologist. In September 1970, he became the Director of Special Services for the entire district. On or about March 4, 1982, Bosner submitted his letter of resignation to the Superintendent of Schools. Relevant portions of that letter recite:

> Because of personal problems, I will retire from my position as Director of Special Services effective September 1, 1983. I enjoyed my association with the professional staff in the district and appreciate all the support that I have received.

At its meeting on March 9, 1982, the board of education adopted a resolution approving the retirement of Stanley Bosner to take effect on September 1, 1983, "with gratitude for his years of dedicated service to this school district." Shortly thereafter, on March 24, 1982, the Superintendent of Schools sent Bosner a letter advising him of the board's acceptance of his offer of resignation. Consistent with the understanding that Bosner would remain in his position until September 1, 1983, the board of education

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adopted two subsequent resolutions, on April 5, 1982 and April 11, 1983 respectively, which had the effect of continuing his employment "through August 31, 1983, the date of his retirement." Meanwhile, at its meeting on April 11, 1983, the board of education adopted a separate resolution abolishing the position of Director of Special Services as of September 1, 1983.

More than one year after receipt of notice of the board's acceptance of his resignation, on May 5, 1983, Bosner wrote to the Superintendent of Schools indicating that after "painstaking review" he was "rescinding [his] request for a September 1, 1983 retirement." While his letter refers to "monetary loss" and "the needs of the district" as causing his change of mind, it is devoid of the details of any alleged duress or coercion. Additionally, the letter mentions "certain seniority entitlements" which Bosner now wanted to protect. In response to this letter, on May 10, 1983 the board of education unanimously agreed to adhere to its earlier resolution by which Bosner's retirement had been "accepted and approved." By letter dated May 18, 1983, the Superintendent of Schools informed Bosner of the board's rejection of the attempted rescission of his resignation.

There followed the bringing of this action, which was commenced by filing a petition of appeal with the Commissioner of Education on August 18, 1983.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the bringing of this action is barred by the 90-day rule.

N.J.A.C. 6:24-2.2 provides that a proceeding before the Commissioner of Education is initiated by petition which,

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> must be filed within ninety days after receipt of notice by the petitioner of the Order, ruling or other action concerning which the hearing is requested.

Here petitioner received notice of the acceptance of his resignation on or about March 24, 1982. Yet he allowed a lapse of almost one year and five months before filing his petition on August 18, 1983. No explanation has been forthcoming as to the reason for this lengthy delay. Generally, the 90-day rule has been strictly applied to preclude the bringing of appeals after the expiration of the limitation period. Riely v. Hunterdon Central High Bd. of Ed., 173 N.J. Super. 109 (App. Div. 1980). Cases of the Commissioner of Education have consistently held that failure to comply with the rule will result in dismissal of an appeal. Hall v. Englewood Bd. of Ed., 1982 S.L.D. ___ (Jan. 26, 1982); DeRisi v. Teaneck Bd. of Ed., 1981 S.L.D. ___ (Sept. 22, 1981); Bailey v. Bd. of Ed. v. Mansfield Bd. of Ed., 1980 S.L.D. ___ (June 20, 1980). Even assuming that the Commissioner has authority to relax the rule in the interest of justice and fairness, see N.J.A.C. 6:24-1.19, the existing record discloses no extenuating circumstances as a basis for the exercise of such discretion.

To escape application of the rule, Bosner argues that the 90 days began to run on May 18, 1983 (when the board informed him of its refusal to rescind his retirement) rather than on March 24, 1982 (when his retirement was originally accepted). This argument is specious. Once properly accepted by the offeree, an offer to resign cannot be unilaterally withdrawn by the offeror. Haber v. Umansky, 121 N.J.L. 230 (E. & A. 1938); Annot., 82 A.L.R. 2d 750 (1962). As noted with approval in Kozak v. Waterford Bd. of Ed., 1976 S.L.D. 633, 638, "after the resignation has been accepted it is effective as against a subsequent attempt to withdraw or offer to serve, even though the teacher attempts to withdraw before the effective date of his resignation." Petitioner cannot be allowed to revive a moribund claim simply by asking the board of education to reconsider its prior decision. If such practice were permitted, the 90-day rule would be rendered meaningless. Then anyone could reactivate a stale claim at any time by presenting to the board a request for fresh consideration of a settled issue.

Insofar as Bosner asserts a violation of his seniority rights, his petition fails to state a claim for which relief can be granted. On its face, his resignation letter of March

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4, 1982 cannot be reasonably read to reserve any rights to a lesser position. When Bosner stated his intention to retire "from my position as Director of Special Services," the descriptive language was used merely to identify his current position in the school system. Nothing contained in the letter suggests that Bosner intended his offer of resignation to be conditioned upon his continued employment as a school psychologist or in any other capacity. Taken as a whole, the letter clearly states that Bosner would be leaving his employment on September 1, 1983. Only much later did Bosner introduce the possibility of "certain seniority entitlements." Somewhat inconsistently, he tried at the same time to withdraw his resignation and resume his former position as Director of Special Services.

Importantly, there are no seniority rights which arise in connection with a voluntary resignation. Seniority rights spring into being when a tenured employee is subject to "dismissal" resulting from a reduction in force. N.J.S.A. 18A:28-10. The word "dismiss" has the connotation of sending away or removing a person from employment. Webster's New International Dictionary (3rd ed. 1976), p. 652. Bosner was not "dismissed" from his position in the commonly-understood sense. Rather, it was he who offered to "retire" because of his own "personal reasons." Although the position he vacated was ultimately abolished by the board of education, such action did not occur until after the board had already voted to accept his resignation. Thus, Bosner's resignation does not constitute a "dismissal" as that term is used by N.J.S.A. 18A:28-10. Absent a genuine "dismissal" resulting from a reduction in force, a tenured teaching staff member has no "bumping rights" over others now occupying positions he previously held.

Order

For the foregoing reasons, it is **ORDERED** that respondent's motion is hereby **GRANTED;**

And further **ORDERED** that the petition in this case is **DISMISSED.**

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

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

March 23, 1984
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

March 26, 1984
DATE

Seymour Wilf
DEPARTMENT OF EDUCATION

Mailed To Parties:

March 26, 1984
DATE

Ronald L. Lankenau
FOR OFFICE OF ADMINISTRATIVE LAW

al

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APPENDIX

List of Documents Considered in Deciding this Motion

No.	Description
1.	Petition of appeal, filed August 18, 1983
2.	Answer of respondent, filed September 6, 1983
3.	Affidavit of Patrick A. Torre, dated December 13, 1983
4.	Copy of letter to Patrick A. Torre from Stanley Bosner, dated March 4, 1982
5.	A copy of portions of the minutes of a meeting of the Old Bridge Board of Education held on March 9, 1982
6.	Copy of a letter to Stanley Bosner from Patrick A. Torre, dated March 24, 1982
7.	Copy of portions of the minutes of a meeting of the Old Bridge Board of Education held on April 11, 1983
8.	Copy of a letter to Patrick A. Torre from Stanley Bosner, dated May 5, 1983
9.	Copy of a letter to Stanley Bosner from Patrick A. Torre, dated May 18, 1983

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STANLEY BOSNER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

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

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

MAY 10, 1984 COMMISSIONER OF EDUCATION

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4662-83
AGENCY DKT. NO. 151-5/83A

BOARD OF EDUCATION OF THE WEST MORRIS REGIONAL H.S. DISTRICT,
Petitioner,
v.
BRUCE AND CAROL HAWTHORNE AND RICHARD AND BEVERLY CONGDON,
Respondents.

APPEARANCES:

David B. Rand, Esq., for petitioner
(Rand & Algeier, attorneys)

Bruce Hawthorne, pro se, for respondents

Record Closed: February 16, 1984 Decided: March 26, 1984

BEFORE ELINOR R. REINER, ALJ:

On May 19, 1983, petitioner filed a declaratory judgment action to determine whether minor children residing in respondents' homes are entitled to a free public education in petitioner's district. On June 24, 1983, the Department of Education, Bureau of Controversies and Disputes, transmitted this matter to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq.

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After notice to all parties, a prehearing conference was held on August 9, 1983, at which time the following issues were isolated:

1. Are certain persons of school age who reside in respondents' homes entitled to a free public education in petitioner's district pursuant to N.J.S.A. 18A:38-1?

2. To what extent may respondents receive monies or tangible property or services for the care and support of such residents pursuant to N.J.S.A. 18A:38-1, i.e., what is the meaning and interpretation of the term "gratis" as set forth in N.J.S.A. 18A:38-1?

3. Does the affidavit required by petitioner to be signed by respondents comport with the requirements of law?

4. Are respondents entitled to reimbursement for transportation costs incurred from the period of February 6, 1983 to March 21, 1983, based on the alleged failure of petitioner to register certain students residing with respondents?

Thereafter, a hearing was held on October 7, 1983. At that time, it became apparent that respondents Richard and Beverly Congdon no longer had students residing with them and, therefore, the action and request for relief as to the Congdons was dismissed. Therefore, the trial proceeded on the issues outlined above only in relation to respondents Carol and Bruce Hawthorne. Witnesses who testified and documents considered in deciding this case are listed in the appendix attached hereto.

It became apparent at the hearing that the relevant facts essential to a determination of the issues raised herein are essentially undisputed and are, thus, found as fact:

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1. Respondents Bruce and Carol Hawthorne maintain a residence located at Mile Drive, Chester, New Jersey.

2. Respondents have resided at this address for nine years.

3. Respondents have five children of their own who reside in their household.

4. As of the date of hearing, nine other persons were living in the residence.

5. M.L., S.V. and K.S. are among those individuals.

6. None of the persons who live in the Hawthorne residence (other than the five Hawthorne children) are natural children of the Hawthornes, adopted or persons for whom the Hawthornes serve as legal guardians in accordance with a court order. However, at the time of the hearing, one Division of Youth and Family Services (DYFS) child was in residence at the Hawthorne home. Since that time, two additional children have been placed in the Hawthorne home by DYFS.

7. About two years ago, the Hawthornes physically expanded their home to accommodate four additional bedrooms, a bathroom, attic and full basement.

8. The funds required to build the addition were primarily derived from personal assets which the Hawthornes had set aside for the education of their own children. However, they also received money from sympathetic people in the community, financial aid from a variety of different organizations, i.e., Rotary etc., as well as from anonymous donors. They received two anonymous thousand dollar checks.

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9. Since the time the Hawthornes commenced their "ministry" they have provided a residence for over 40 young persons.

10. The average stay by these persons in the home of the Hawthornes has been approximately six months to a year.

11. Of the 40 persons who have lived in the Hawthorne residence, approximately ten were placed by DYFS.

12. Of the 40 children approximately 15 were of school age and were, under various circumstances, enrolled in public high school.

13. With regard to the children in residence under the age of 18, the Hawthornes developed relationships with the natural parents only after it was determined that the Hawthornes were willing to take the children into their home. The persons who left their children in the Hawthorne home were not necessarily friends or relatives of the Hawthornes.

14. Approximately four years ago, the Hawthornes came to realize that they were more than just a normal family. They realized that they had been called to open themselves and their home to anyone the Lord would bring.

15. Many different persons and groups have come to realize that the Hawthornes have made their home available for children. This knowledge has come from various sources, including information passed by the children who live in the home, information passed by the Hawthorne children, as well as information distributed by persons in the Hawthornes' church and other sources such as physicians and Mendham High School counselors and officials.

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16. On occasion Mrs. Hawthorne gives public presentations to church groups describing the nature of the Hawthorne "ministry."

17. Children who reside in the Hawthorne home are expected to follow written rules and regulations adopted by the Hawthornes. In this connection, they are required to attend weekly church services and Sunday School.

18. Initially, the rules and regulations were unwritten. However, matters have now become more formalized. Before any child is permitted to join the Hawthorne home that person receives two documents. One is a document describing the Hawthornes, and the other is a list of the "rules of the family," i.e., what is expected of them, the chores that they are required to perform, their responsibilities and the rules regarding their rooms (see P-6 and P-7 in evidence). Persons residing with the Hawthornes are required to follow the rules and regulations promulgated by the Hawthornes. The Hawthornes believe that if they refuse to follow the rules, they would be making the determination that they did not want to live in the Hawthorne home.

19. The Hawthorne home has been a formal "mission project" of the First Congregation Church of Chester. Whenever the family is a "mission project," money is received from the church as a gift and the Hawthornes utilize it as they see fit.

20. From time to time, children of school age living in the Hawthorne family have received funds (generally in the form of a gift to the child) from their natural parents.

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21. The Hawthornes have been approached by parents who have offered to pay money for support of their children while the children were residing with the Hawthornes. At least three children (although not the subject matter of this action) M.S., M.G. and J.C., received parental support while they were living in the Hawthorne home.

22. In early 1983 the Hawthornes and others formed a corporation, Day Spring Ministries, which was intended to provide financial help to families who are willing to open their homes to children (as the Hawthornes have done) and to help match up families in need with families who are willing to provide the requisite help. (See P-5 in evidence.)

23. Day Spring Ministries is a non-profit corporation that is affiliated with the First Congregation Church of Chester. Day Spring's Board is composed of the church's pastor and four lay leaders. Mrs. Hawthorne is the director of the organization. The Hawthorne family is only one of several Day Spring "families."

24. At the present time, the Hawthornes receive funds from Day Spring Ministries as support money for certain persons living in their home. More specifically, since March 19, 1983, they have received money from the corporation for C.F. and other children.

25. A child only becomes eligible to receive money from Day Spring Ministries if the child is living with the Hawthornes (or any similar family) and the family has not signed an affidavit stating that they do not receive support.

26. At the current time Day Spring Ministries is able to provide the same support as DYFS provides, $220 per month per child.

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27. When funds are received by the Hawthornes from Day Spring they are utilized to pay the family Master Card charge plate expense. Essentially, the funds are utilized in the identical fashion as foster care payments received from DYFS. They are deposited in the family account and used to offset general family expenses. There is no specific account set aside for each child.

28. For the future, the Hawthornes contend that as long as they have a bed and there is a need, they will continue to receive children. However, the Hawthornes intend that the 16 beds which are available in their house would be the maximum number of children that could be living with them.

29. Supervision in the home is provided by Carol and Bruce Hawthorne. The Hawthornes own children, who are very accustomed to the rules and regulations, help monitor the activities which occur in the home.

30. The Hawthornes have signed affadavits for S.V., M.L. and K.S. (P-1, P-2 and P-3 in evidence). These students are currently attending West Morris Mendham High School. They were placed in the Hawthorne house privately; there exists no DYFS or court ordered placement relating to these children.

Based upon the foregoing facts, petitioner argues that the students in question (S.V., M.L. and K.S.), as well as similarly situated persons for whom the Hawthornes may present affidavits in the future, do not qualify for a free education at West Morris pursuant to the requirements of N.J.S.A. 18A:38-1. Referring to the statute, petitioner alleges that an initial determination must be made as to whether the Hawthornes support the children "gratis" as if they were their own children and whether this gratuitous support is intended to last for a longer time than merely through the school term.

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Moreover, petitioner contends that by the design of the Hawthornes, they do not maintain a household or "home" in the generally accepted or normal sense of this concept; rather, the Hawthornes in actuality maintain a structured home environment, with written rules and regulations and with a specified maximum occupancy, which most closely resembles a "group home" as defined by New Jersey law. It is petitioner's position that when viewed in an objective and dispassionate manner, the Hawthorne residence is a defacto "group home" for which educational costs incurred in connection with students must be borne by the "resident school district," i.e., the district where the legal guardian resides.

In response to petitioner's allegations, respondent contends that, while it is true that the Hawthorne family has received gifts from various individuals and organizations that encourage the family ministry, they are not funded on a regular basis. They allege that in fact they have been supporting the three school age children in question "gratis," as if they were their own children. In support of this contention, they note that they have assumed full responsibility for the children in question, who are domiciled in their home, are treated the same as the other members of the family, and have joined the family on an open-ended basis with the intention of going beyond the current school year.

Moreover, respondents allege that the evidence presented at the hearing clearly does not support a ruling that they are in fact a defacto "group home." Rather, they opine that it alternatively reinforces the position that the Hawthorne home is merely a large extended family, comprised of two parents and children ranging in age from two years to twenty-two years. Respondents note that their home is not, nor has it ever been, classified as a "group home" by the State of New Jersey, Division of Youth and Family Services. On the contrary, respondents allege that DYFS recognizes the Hawthornes as a qualified "foster family." Respondents point out that a "group home" would have the following major characteristics:

1. Under the authority and auspice of a private social agency or school or an appropriate public agency.

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2. Employs full-time staff including house parents, social workers, and/or psychologists.

3. Less than 12 children.

4. Has formal programs for the treatment, maintenance and social services provided for each child at the facility.

Based on the above, respondents conclude that they cannot be considered to be a "group home" under the stated definition. They request that this court determine that each school age child in their home be treated for educational purposes on an individual basis in order to best meet his or her needs.

This court has reviewed the testimony and evidence presented in this matter and must agree with the position espoused by petitioner. In so doing, however, this court does not find merit in petitioner's contention that the Hawthornes are operating a "group home." Clearly, pursuant to N.J.A.C. 10:128-1.1 et seq., there are various standards and requirements for operating a "group home," which must be complied with. The code's guidelines do not extend to merely similar situations, but require compliance for the operation of such a home. The Hawthornes cannot be deemed to be operating a "group home" as they have not complied with a single regulation. The fact that they have written rules to help govern their household and, in addition, do not foresee accommodating more than 16 beds, is simply insufficient justification for the conclusion that they have established a "group home."

However, even though this court has concluded that the Hawthornes are not operating a "group home," this court is of the view, and feels constrained to conclude, that the children residing in respondents' home, for whom an affidavit has been signed, are not entitled to a free education at the expense of the regional board in accordance with N.J.S.A. 18A:38-1(b). The statute at issue, N.J.S.A. 18A:38-1(b), permits any person of

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school age kept in the home of a domiciliary of the school district to attend the public schools of that district free, if the person "is supported by such other person gratis as if he were such other persons own child. . ." At issue, therefore, is whether it can be said that respondents are supporting the "affidavit" children "gratis" as if they were their own children. In an effort to resolve this question, this court has been unable to find any statutory or case law defining or interpreting the term "gratis." "Gratis," however, has been defined as "without reward or consideration done or received." See Black's Law Dictionary 630 (5th Ed. 1979). The determination must, therefore, be made as to whether the Hawthornes support these children without reward or consideration done or received and as if they were their own children, and whether this gratuitous support is intended for a time longer than merely through the school term.

While clearly it cannot be said that respondents are receiving anything in the nature of a salary or compensation for their efforts in regard to these children, it still does not appear to this court that the Hawthornes are supporting the children in question "gratis." Respondents are receiving funds from various sources, such as Day Spring Ministries, the Rotary Club, their local church and other organizations, to pay for the support of the children in their home and to help them run their home. In addition, and impossible for this court to discount, is the fact that the Hawthornes have also received monies from parents or legal guardians whose children resided in the Hawthorne home. Clearly, if the Hawthornes did not open their door to these children, they would not receive financial assistance from any of the various sources. Thus, the children in their home are not being supported in the same manner as the Hawthornes support their own children.

In addition, the Hawthornes do not possess the requisite intent of keeping and supporting the children beyond the school year. This is so even though the duration of the children's stay is left open. As can be gleaned from the undisputed facts outlined above, the population of children previously residing in the Hawthornes' home has been of a very transient nature. The average stay has been from six months to a year. Apparently, there is no positive intention to keep and support the children gratuitously for a longer time than merely through the school year. Rather, there is quite simply a desire to provide a

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home for the children for as long a time as is necessary to provide Christian care and nurturing to people in need of a home, a family and a Christian witness in the community. The presence of the children in the Hawthorne home is subject to change in an instant. Such change can occur if the situation which prompted the child to live with the Hawthornes has changed, or if the child simply will not follow the rules and regulations of the household. Clearly, the children are free to leave at any time before the school year ends. This latter fact has also had some bearing on this court's determination that the children who live in the Hawthorne home are treated differently from the Hawthornes' natural children whose presence in the home is of a definite duration and whose support comes solely from the Hawthornes own finances.

In light of the above discussion, and in view of the fact that the Hawthornes have not, and do not intend to, set aside and maintain a specific account for the support of each child, this court **CONCLUDES** that the children residing in the Hawthorne home cannot be treated on an individual basis in regard to a determination as to whether they are entitled to receive a free public education at the expense of the regional board. Rather, this court **CONCLUDES** that the children residing with the Hawthornes from outside the district, are not entitled to a free public education in petitioner's district at petitioner's expense pursuant to N.J.S.A. 18A:38-1(b).

In view of this determination, this court **CONCLUDES** that respondents' arguments on the remaining issues are without merit. More particularly, the affadavit required by petitioner is considered not to be overly broad and, in fact, may well need to be revised in conformity with this decision. Moreover, inasmuch as petitioners are not responsible for providing a free public education to those children who reside in respondents' home, respondents are not entitled to reimbursement for transportation costs incurred from the period of February 6, 1983 to March 21, 1983, based upon petitioner's failure to register certain students residing with respondents. Rather, the domicile of the legal guardian or parents of the students in question is solely obligated to fund the educational costs related to these students.

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For the foregoing reasons, it is hereby **ORDERED** that the students for whom affidavits have been filed by the Hawthornes do not qualify for a free education at the expense of the West Morris Regional High School District Board of Education. It is **FURTHER ORDERED** that the school district of residence, i.e., the domicile of the legal guardian or guardians of the students in question, are obligated to fund the educational costs related to those students.

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.

March 26, 1984
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

March 28, 1984
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

March 30, 1984
DATE

Ronald S. Lieberman
FOR OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

WITNESSES

Carol Hawthorne

EXHIBITS

P-1 Certification of Legal Residence for K.S., dated September 15, 1983, attached to Consent to Guardianship, signed by Dolores Sasso, attached to letter, dated August 3, 1983, and attached to Board minutes adopted August 16, 1983 (4 pages).

P-2 Certification of Legal Residence for M.L., dated September 15, 1983, attached to letter from Sharron P. Brust, attached to Board minutes adopted August 16, 1983 (4 pages).

P-3 Certification of Legal Residence of S.V., dated September 15, 1983, attached to letter, dated August 9, 1983, attached to Board minutes, dated August 16, 1983 (3 pages).

P-4 Memorandum to Child Study Supervisors from Richard K. Scott, Assistant Director of Bureau of Special Education, dated March 22, 1982.

P-5 Description of Day Spring Ministries.

P-6 Hawthorne family rules.

P-7 Description of the Hawthorne family.

R-1 Letter to Mrs. Hawthorne from David Rand, dated March 25, 1983 regarding S.V.

R-2 Letter to Mrs. Hawthorne from David Rand, dated March 25, 1983 regarding M.L.

R-3 Certification of Legal Residence regarding A.T., dated August 19, 1982.

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BOARD OF EDUCATION OF THE WEST MORRIS REGIONAL HIGH SCHOOL DISTRICT, MORRIS COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BRUCE AND CAROL HAWTHORNE AND RICHARD AND BEVERLY CONGDON,	:	DECISION
RESPONDENTS.	:	

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

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

The Commissioner concurs with and accepts as his own the determination of Judge Reiner that the students for whom affidavits have been filed by respondents, Mr. and Mrs. Hawthorne, do not qualify for a free education at the expense of the West Morris Regional High School District Board of Education pursuant to N.J.S.A. 18A:38-1. The compelling reason for this determination is that respondents do not support the students "gratis" but receive funds from a variety of sources. The Commissioner agrees with Judge Reiner's reasoning that, if the Hawthornes did not open their home to young people such as the students herein, they would not receive financial assistance from any of the various sources. Further, the Commissioner agrees with the determination that the Hawthornes do not operate a de facto group home, as contended by the Board, for the reasons stated by Judge Reiner in the initial decision.

However, the Commissioner is constrained to clarify the judge's order with respect to the financial obligation of the students' school districts of residence, i.e. the domicile of the parent(s) or legal guardian(s). Because the students in the matter herein do not qualify as affidavit students in the West Morris Regional High School District pursuant to N.J.S.A. 18A:38-1, their education, therefore, is the responsibility of the school district of residence. This does not in any way mean, however, that said districts are obligated to pay tuition to or to reimburse petitioner for any expenses incurred during the pendency of this dispute. There is no legal basis in statute, code, or case law to require such action.

The Commissioner observes that the students who reside with respondents appear to have been placed with them due to parental difficulty in maintaining the children in their own homes. Therefore, he wishes to point out that said parents could seek assistance

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from the State's Division of Human Services. In the event that the students were to come under the auspices of this or another state agency while residing with the Hawthornes, financial responsibility for their education could then be determined pursuant to N.J.S.A. 18A:38-1 or any other applicable statute, dependent upon the individual circumstances of the case.

Another option available would be for the parent(s) to seek student admittance to the West Morris Regional High School District pursuant to N.J.S.A. 18A:38-3.

Accordingly, the Commissioner determines that the Board of Education of the West Morris Regional High School District is not responsible for providing a free education for the students in this controverted matter. Such responsibility rests with the school districts of residence as indicated herein.

IT IS SO DETERMINED.

MAY 14, 1984

COMMISSIONER OF EDUCATION

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2701-83
AGENCY DKT. NO. 58-3/83A

MARY C. SCHOELER,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF CLAYTON, GLOUCESTER COUNTY,
Respondent.

APPEARANCES:

Daniel A. Zehner, Esq., for petitioner

Richard E. Hickey, III, Esq., for respondent (Hickey & Rozanski, attorneys)

Record Closed: February 7, 1984 Decided: March 27, 1984

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

Petitioner Schoeler, who had been employed since January 21, 1980, by the Clayton Board of Education (Board), alleges that the Board's action on December 13, 1982, terminating her from her position as Assistant Board Secretary, effective January 15, 1983, was illegal. She seeks relief in the form of reinstatement with back salary, attendant emoluments and legal fees. The respondent Board contends that it had good cause to terminate petitioner and that its action was a proper exercise of its discretionary authority to staff its school system.

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When petitioner appealed to the Commissioner of Education, the matter was transmitted to the Office of Administrative Law for processing as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. At a prehearing conference held on May 24, 1983, counsel for petitioner gave notice of motion for summary decision. Subsequently, a stipulation of facts was submitted by counsel of record. Briefing on the motion was completed on October 12, 1983. On October 20, 1983, Administrative Law Judge Eric G. Errickson issued an Order denying petitioner's motion on grounds that essential facts had not been established. After this interlocutory order was appealed, the Commissioner, on November 2, 1983, advised that he would not review the order. Accordingly, the plenary hearing set for November 9, 1983, was conducted as scheduled. Counsel, relying on briefs filed in connection with the motion for summary decision, made further closing arguments thus completing the record at the end of the day of hearing.

Judge Errickson died suddenly in December 1983, before completing his written decision in this matter. Counsel for the litigants entered a joint stipulation on January 6, 1984, that the transcript and record of proceedings in this matter be referred to another ALJ for Initial Decision. Consequently, the record and transcript were hand delivered to the undersigned on February 7, 1984. At that time, the matter was assigned to me by the Acting Director and Chief Administrative Law Judge of the Office of Administrative Law, Ronald I. Parker, and the record was closed.

Fortunately, for the litigants, Judge Errickson completed the findings of fact, and as will be seen below, he included in his written summary his observation of the demeanor of the petitioner.

UNCONTROVERTED FACTS:

The following facts as stipulated by the parties are set forth below:

1. Petitioner has served as Assistant Secretary to the Respondent Board of Education since her appointment on January 21, 1980, continuously until January 15, 1983, the date of the termination which is the subject of the within action. Petitioner is a twelve month employee. Her appointments are from July 1 to June 30.

2. Petitioner's attendance record as Assistant Secretary to the Respondent Board during the hereinabove referenced period of time is as follows:

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(a) 1979/1980 year:

Benefits Available - One Week Vacation
Five Sick Days
Two Personal Days

Benefits Used: - Seven and one-half sick days
Personal days used to cover sick time

Benefits Left at end of 1979/1980 year

Five Vacation Days
27 3/4 hours (work done at home)

(b) 1980/1981 year:

Benefits Available: - Two Weeks Vacation
Ten Sick Days
Two Personal Days

Benefits Used: - Eighteen and one-half sick days
Ten Vacation Days
Two Personal Days to cover sick time
Five Vacation Days from 79/80 to cover sick time
Fourteen and one-half hours overtime to cover sick time

Benefits Left at end of 1980/81 year
13 1/4 hours overtime

(c) 1981/1982 year:
Benefits Available - Two Weeks Vacation
Ten Sick Days
Two Personal Days 29 1/2 hours overtime at home

1981/1982 year:
Benefits Used: - 24 Sick Days
3 Vacation Days
7 Vacation Days used to cover sick time
2 Personal Days used to cover sick time
All overtime hours used to cover sick time
Docked for 4 sick days pay

(d) 1982-1983 year:

(i.e., July 1, 1982 to January 15, 1983)

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Benefits Available - Two Weeks Vacation
10 Sick Days
2 Personal Days

Benefits Used: - 1/2 day on two occasions for illness (i.e., 1 full day)
1/2 day on three occasions for personal (i.e., 1 1/2 days)
Vacation - 2 weeks (all taken after notice of termination)

3. Petitioner was duly appointed as Assistant Board Secretary for the year July 1, 1982, to June 30, 1983, at the salary of $10,161.00 by action of the Respondent Board at its regular meeting of April 19, 1982. A certified true copy of the minutes of said meeting are marked Exhibit A, annexed hereto and incorporated herein by reference.

4. A contract of employment between Petitioner and Respondent for Petitioner's position as Assistant Board Secretary for the year July 1, 1982, to June 30, 1983, at the salary of $10,161.00 is dated April 26, 1982, and duly executed by Petitioner and Respondent. A copy of said employment contract has been marked Exhibit B, annexed hereto, and incorporated herein by reference.

5. Petitioner received a written evaluation dated June 7, 1982, from Respondent of her performance as Assistant Board Secretary from the time of her initial appointment until the date of the evaluation. The said written evaluation has been marked Exhibit C, annexed hereto, and incorporated herein by reference.

6. On December 13, 1982, the Respondent Board voted to terminate Petitioner as Assistant Board Secretary, effective January 15, 1983. Petitioner received notice of said termination by letter to her from Helen B. Vail, Secretary, dated December 14, 1982, a copy of which has been marked Exhibit D, annexed hereto, and incorporated herein by reference.

7. By letter to Petitioner from Board President, Alan L. Streitz, dated December 22, 1982, the Respondent provided Petitioner with a statement of reasons for her termination. The said letter has been marked Exhibit E, annexed hereto, and incorporated herein by reference.

The Board's letter giving its reasons for petitioner's termination reads as follows:

The Clayton Board of Education decided to terminate your employment for the following reasons:

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1. Absences because of sickness unreasonably interferring [sic] with your ability to efficiently complete the assigned duties as assistant board secretary especially in light of the fact that the board secretary's staff consists of two employees.

2. Your demeanor with staff members and others with whom the board secretary's office must work and come in contact has adversely interferred [sic] with the effective administration of the responsibilities and duties of the board secretary's office.

The two week vacation period that you requested has been granted, along with the week following the Christmas holiday. The memorandum regarding your evaluation as assistant board secretary will be placed in your personnel file. [Exhibit E]

TESTIMONY OF WITNESSES:

Petitioner MARY E. SCHOELER testified that at all times, she completed her duties in a competent and efficient manner and that she never was criticized for her demeanor, technical competence, or performance of her duties by any member of the Board or by the Board Secretary who was her supervisor.

Schoeler testified that during September 1981, she had an acute attack of vasculitis and polymyositis, muscular conditions with which she has occasionally been afflicted. She testified that this attack caused her to be absent from work for three weeks during which she was hospitalized for one week. She testified and the Board Secretary corroborated that, during this period, she completed work from her office while recuperating at home. She also testified that from July 1, 1982 until the time of her termination on January 15, 1983, she has had no recurrence of the affliction and that during this period she had only two half-day absences both of which were for reasons unrelated to any muscular disorder.

When queried concerning her contacts with supervisors, teachers, business representatives and members of the public, petitioner testified that those contacts have been free from acrimony. She testified that her relationship with her immediate supervisor, the Board Secretary, Helene Vail, has been pleasant and free from dissension. That this is so was corroborated by Vail in her testimony.

In regard to her competence as a keeper of financial records, Schoeler testified that when she devised an improved system of monthly reporting, she was

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commended by the Board's auditor, the custodian of school funds, the Board Secretary and the Board President. In regard to taking work home and being credited with compensatory time, a practice once permitted by the Board, Schoeler and the Board Secretary both testified that after her three-week illness in September 1981, the Board directed that all work of the office thereafter must be completed on the Board's premises. Schoeler testified that although this occasionally made it difficult for her to meet some deadlines, she did, in fact, meet all deadlines by giving up her lunch hour on certain days.

MAY SCHOELER, petitioner's mother, testified that since she lives nearby, cared for her daughter in her home during part of September 1981, and frequently visits with petitioner, she has had ample opportunity to witness her conscientious and enthusiastic attitude toward both her job as Assistant Board Secretary and her association with her fellow employees, including the Board Secretary. When asked to describe petitioner's telephone manner, May Schoeler testified that her daughter is pleasant, courteous and considerate of the dignity of others.

HELEN LUTZ, a nurse and social worker employed by the Board, testified that in her frequent inquiries of petitioner, she has found her to be patient in explaining details, friendly, pleasant in manner, conscientious and competent. Similar testimony was elicited from ELAINE ATKINSON, a teacher who testified that she was both pleased and impressed with petitioner's patience and professionalism when petitioner had to repeat directions she previously had given to her.

HELENE VAIL, the Board Secretary, testified that petitioner had consistently handled her duties in an efficient manner and had met all time deadlines both before and after her illness in September 1981. She testified that when the Board President, on one occasion, asked that the payroll be prepared several days prior to the usual deadline, petitioner told him that it would not be possible. She testified, however, that petitioner did in fact get it prepared by the date requested by the Board President.

FINDINGS OF FACT:

On the basis of a preponderance of the credible evidence within the record, ALJ Errickson found the following to be additional relevant facts to be considered when reaching a determination, together with those stipulated by the parties:

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1. Petitioner's contracts, including her contract from July 1, 1982 to June 30, 1983 as prepared by the Board, contained no termination clause (Exhibit B).

2. Petitioner was not notified by the Board that it intended to discuss her employment status on December 13, 1982; nor was she invited by the Board to attend that meeting or any other meeting of the Board. She did, however, attend one meeting after receiving her termination notice, asked the privilege to speak and attempted, unsuccessfully, to dissuade the Board from terminating her, effective January 15, 1983.

3. When petitioner requested reasons for the Board's actions, the Board President gave her a statement of reasons in writing (Exhibit E).

4. The only written evaluation of petitioner's work performance dated May 26, 1982 commended her for initiating "many new systems and ideas in the Board office," which made the office more efficient. It characterized her work as excellent and commended her for being conscientious. That evaluation, while expressing concern over her health, also stated the following:

> Even though she has had to be absent quite a bit due to her physical condition, she has always made sure her work is caught up even if she had to take it home with her.
>
> The board president expressed his concern regarding the illness and the work load involved in the board office. Due to the unusual nature of her illness, (Polymyositis/Vasculitis) Mary has had to be hospitalized only one time during her length of employment here. At that time she missed 15 days from work. This illness could re-occur [sic] at any time or it could be a matter of years before another attack. The board was made aware of this illness when Mary way interviewed for employment.
>
> [Exhibit C]

5. From July 1, 1982 when her last contract became effective until January 15, 1983 the date of her termination, petitioner was absent a total of the equivalent of one working day.

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6. Petitioner's demeanor, as shown by the credible evidence within this record, is not shown to be abrasive or disruptive. While she had a habit of slamming the phone to its cradle, there is no evidence that this was even heard by parties at the other end of the line. Nor is there evidence that the occasional expletives she uttered after a difficult telephone conversation were heard by persons with whom she had spoken. The closest to admonishment by the Board Secretary who occasionally heard them was that she asked her once who the caller was. There is within this record no evidence that petitioner either before or after she received her 1982-83 contract, was ever rude, ill-mannered or abrasive with any members of the Board, the Board Secretary, any member of the public, any teachers or any other employee of the Board.

Based on these findings of fact by ALJ Errickson, I **CONCLUDE** that the Board has failed to show any rational cause as to why petitioner was terminated. N.J.S.A. 18A:17-1 provides that a board of education may not dismiss an "assistant secretary... during the term for which he was appointed . . . except for neglect, misbehavior or other offense unless it is otherwise provided in his contract" (emphasis added).

In the instant case, the contract did not provide a termination clause. Thus, it was incumbent upon this Board when it acted to terminate petitioner to give reasons when asked the basis for its actions. The reasons it gave are a matter of record. There is, however, in this record of the hearing, no proof whatsoever that petitioner's demeanor adversely interferred with the effective administration of the responsibilities and duties of the Board secretary's office. In fact, the witnesses testified very favorably about petitioner's patience, efficiency and dedication, to the point of taking work home so that it might be completed on time.

Consequently, there is a complete absence of proof regarding the Board's allegation of petitioner's demeanor.

Regarding petitioner's absences, the record shows that during her final contractual year (July 1982 through June 1983) petitioner was absent for one-half day for illness on two occasions (equaling one day's absence). This absence is certainly within the 10 days allowable for legitimate illnesses (uncontroverted facts, supra).

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The record shows also that the one evaluation of petitioner's work performance on May 26, 1983, was rather laudable of her performance. And even though the evaluation expressed concern over her health, it commended petitioner for making sure her work was caught up even if it meant that she had to take it home with her.

CONCLUSIONS OF LAW

Petitioner claims that upon the facts of the matter her termination of employment by the Board on December 13, 1982, is in violation of N.J.S.A. 18A:17-1 and that the substantive rights afforded her by the statute in respect to continued employment entitle her to Fourteenth Amendment due process protections, which were not granted by the Board. Petitioner seeks reinstatement as Assistant Board Secretary, a declaration that she has acquired a tenure status in the employ of the Board, and, she seeks back pay, costs, and counsel fees.

I

N.J.S.A. 18A:17-1 provides in full as follows:

> No secretary, assistant secretary, school business administrator or business manager of a board of education of any school district shall, during the term for which he was appointed, be dismissed or reduced in compensation, except for neglect, misbehavior or other offense unless it is otherwise provided in his contract of employment.

The plain words of the statute, as applied to the facts here, demonstrate that petitioner has, by virtue of a written employment contract, without a termination clause, for the period July 1, 1982 through June 30, 1983, at a salary of $10,161, a recognizable property interest in that employment as that interest is created and defined by the terms of the contract. Petitioner's employment interest was that her employment was secure through June 30, 1983.

However, the statute also provides authority for such a written employment contract, or term of appointment, to be abrogated upon specific grounds of "neglect, misbehavior or other offense." The Board suggests that it is upon that statutory authority to abrogate petitioner's property interest and continued employment that it took the

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action here. In this regard, the Board notes that petitioner was assertedly of ill temper, in possession of poor human relation skills, and was insubordinate. Even assuming that the Board, on December 13, 1982, had those kinds of allegations against petitioner before it, N.J.S.A. 18A:17-1 requires more from the Board to terminate petitioner's employment. Here, the Board reached its determination based on such allegations and, in a closed session, determined the truth or falsity thereof, without listening to petitioner.

The referenced statute, N.J.S.A. 18A:17-1, is found in Article 1, which is entitled "Tenure." Within the same article of Chapter 17 of Title 18A, is N.J.S.A. 18A:17-2, tenure of secretaries, assistant secretaries, school business administrators, business managers and secretarial and clerical employees. Though this statute addresses the legislative status of tenure, as opposed to a property interest in employment growing from a contract of employment as herein, an analogy can be made between the procedure to be applied for the termination of an employee with the legislative status of tenure and the termination of employment of one, as petitioner, who has a recognizable property interest anchored in a statutorily authorized written employment contract without a termination clause. Procedurally, a board may seek the termination of employment of a secretary, assistant secretary, school business administrator or business manager who has acquired a tenure status "* * * only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title [N.J.S.A. 18A:6-9] N.J.S.A. 18A:17-2(c). N.J.S.A. 18A:6-9 grants to the Commissioner jurisdiction "* * * to hear and determine, without costs to the parties, all controversies and disputes arising under the school laws* * *." The Tenure Employees Hearing Law, codified at N.J.S.A. 18A:6-10 et seq., provides that an employee who has acquired a tenure status may not be dismissed or reduced in compensation:

> * * * except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided.

This procedural process, that is, the filing of charges and subsequent hearing by the Commissioner in order to terminate a fixed term written contract of employment without a termination clause, was recognized as the required statutory procedural due

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process in an earlier ruling by the Commissioner of Education. In McLean v. Glen Ridge Bd. of Ed., 1973 S.L.D. 217 aff'd St. Bd. of Ed., 1974 S.L.D. 1411, the Commissioner held that the board was obliged "* * * to file charges [against McLean] and request a hearing by the Commissioner [citation omitted]" 1972 S.L.D. at 227. McLean was employed by the board as a janitor under a written fixed term contract for one year without a termination clause. McLean was granted money damages, not reinstatement. In another case, Parachini v. Union City Bd. of Ed., 1976 S.L.D. 515, aff'd St. Bd. of Ed. 1976 S.L.D. 519, Parachini, employed by that board as board secretary, was found by the Commissioner to have been appointed by the board to a fixed term which was to expire June 30, 1974. Prior to that date, however, the board, without notice to Parachini, terminated his employment on April 8, 1984. There was no notice of termination clause in the authorizing resolution to appoint Parachini to that fixed term. The Commissioner, granting Parachini relief to the extent of his salary expectation through June 30, 1974, found that:

> Absent an individual contractual provision for notice of termination and any showing by the Board of neglect, misbehavior or other offenses on the part of petitioner, the action of the Board summarily dismissing him on April 8, 1974, was contrary to law. [1976 S.L.D. at 518]

It is noted that Parachini's employment as board secretary began as "acting secretary" on December 20, 1972. Consequently, Parachini would not have acquired the legislative status of tenure until at least sometime in the 1975-76 year.

In this case, petitioner would have acquired a tenure status of employment after January 20, 1983, approximately five weeks after the controverted action taken by the Board on December 13, 1982. It is clear that N.J.S.A. 18A:17-1 provides protection for petitioner against dismissal or reduction in her compensation for the entire 1982-83 year. Because the Board summarily took action on December 13, 1982, to terminate petitioner's protections against such dismissal, that action must be declared unlawful as having been taken without regard to petitioner's legally enforceable interest.

II

Petitioner contends that the Board's failure to give her notice and a hearing prior to its action of December 13, 1982, violates her procedural due

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process rights under the Fourteenth Amendment to the United States Constitution. Perry v. Sindermann, 408 U.S. 593 (1972); Buff v. North Bergen Bd. of Ed., 1981 S.L.D. _____, (Feb. 4, 1981). It is noted that the Supreme Court decided the Perry case on the same day it decided Bd. of Regents v. Roth, 408 U.S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972).

Perry was employed ten 10 years as a college teacher at three different institutions in a state college system. He had been employed as a professor at the last of the institutions for four years under a series of one-year contracts, and at one time had he served as co-chairman of his department. During the 1968-69 year, Perry had aligned himself with a group critical of the college governing board's position on certain issues, and when his teaching contract expired at the end of the year the governing board voted not to offer him a new contract for the following year. Perry was provided no reasons for the nonrenewal of his contract, nor was he allowed an opportunity to challenge any basis for the renewal. Perry alleged that he was not rehired because of his criticism of the board's policies and that its action was an infringement of his right of free speech. He alleged further that the board's failure to provide him with an opportunity for a hearing violated the Fourteenth Amendment's guarantee of procedural due process. Justice Stewart, in writing for the Court, noted as follows:

> We have made clear in Roth, supra, at 571, 572 that "property interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather "property" denotes a broad range of interests that are secured by existing rules or understandings" [citation omitted]. A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing [citation omitted].
>
> A written contract with an explicit tenure provision clearly is evidence of a formal understanding that supports a teacher's claim of entitlement to continued employment unless sufficient "cause" is shown. Yet absence of such an explicit contractual provision may not always foreclose the possibility that a teacher has a "property" interest in re-employment. For example, the law of contracts in most, if not all, jurisdictions long has employed a process by which agreements, though not formalized in writing, may be "implied" [footnote omitted].
>
> In this case the respondent [Sindermann] has alleged the existence of rules and understandings, promulgated and fostered by state officials, that may justify his legitimate claim of entitlement to continued employment absent "sufficient cause." [408 U.S. at 601, 602, 33 L.Ed. 2d 580]

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In the instant matter there is no "explicit tenure provision" in the terms of petitioner's written employment contract; nevertheless, N.J.S.A. 18A:17-1 does afford her a tenure-like protection, at least for the 1982-83 year. That is, petitioner was entitled to continued employment with the Board as Assistant Secretary unless it showed sufficient cause to terminate that employment by following the process set forth at N.J.S.A. 18A:6-9 et seq. In Bd. of Regents v. Roth, supra, Justice Stewart, once again writing for the Court, discussed the Fourteenth Amdendment's procedural protection of property as a safeguard of the security of interests a person already has acquired in specific benefits. Justice Stewart noted as follows:

> These interests — property interests — may take many forms.
>
> Thus, the Court has held that a person receiving welfare benefits under statutory and administrative standards defining eligibility for them has an interest in continued receipt of those benefits that is safeguarded by procedural due process. Goldberg v. Kelley, 397 U.S. 254 [footnote omitted] * * * Similarly, in the area of public employment, the Court has held that a public college professor dismissed from an office held under tenure provisions, Slochower v. Board of Education, 350 U.S. 551, and college professors and staff members dismissed during the terms of their contracts, Weiman v. Updegraff, 344 U.S. 183, have interests in continued employment that are safeguarded by due process. Only last year, the Court held that this principle "proscribing summary dismissal from public employment without hearing or inquiry required by due process" also applied to a teacher recently hired without tenure or a formal contract, but nonetheless with a clearly implied promise of continued employment. Connell v. Higginbotham, 403 U.S. 207, 208. [408 U.S. 576, 577, 33 L.Ed. 2d 560-61]

Clearly, N.J.S.A. 18A:17-1 provided petitioner with the "benefit" of employment and security under the terms of her written employment contract. The Board's summary termination of that employment contract, without notice and hearing to petitioner prior to such action, is violative of petitioner's Fourteenth Amendment due process rights particularly where, as here, the Board ignored petitioner' statutory due process rights. Bishop v. Wood, 426 U.S. 341, 48 L.Ed. 2d 684 (1974).

In Nicoletta v. No. Jersey District Water Supply Commission, 77 N.J. 145, our New Jersey Supreme Court, though recognizing that public employers have a common law right to discharge employees with or without cause who have no statutory tenure, contractual commitment, civil service tenure, or other protection, also recognized that the due process shield of the Fourteenth Admendment is implicated in a case where a legitimate "property" interest is demonstrated. 77 N.J. 154.

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It is nonetheless arguable that the Board's violation of petitioner's statutory procedural rights, and her Fourteenth Amendment due process rights, has been cured by the fact of the plenary hearing afforded petitioner here following the verified complaint she filed before the Commissioner of Education. Upon the assumption that the administrative hearing afforded petitioner as the result of her filing the verified complaint cures the Board's violation of her statutory and constitutional due process rights, consideration must be given to the burdens assigned the respective parties. For the Board to terminate petitioner's statutory entitlement to continued employment under the terms of the written employment contract, it must bring charges against petitioner. Because it has that initial burden of bringing charges, it has the concomitant burden of proof, by a preponderance of credible evidence, to establish the truthfulness of the charges.

Assigning those burdens to the Board as the result of the administrative hearing in this forum, it has met its burden with respect to notice of charges that petitioner was insubordinate, manifested ill temper, ostensibly, during the course of the performance of her duties, and possessed poor human relations skills which, ostensibly, had a negative impact on the proper conduct of the Board Secretary's office. Notwithstanding that the Board may have carried this initial burden of specifying the charges against petitioner, it has failed to bring forward a preponderance of credible evidence to establish the truthfulness of the charges. There is not a scintilla of evidence in the record to show that petitioner was at any time insubordinate to any agent, officer, or employee of the Board. Nor is there evidence to demonstrate that petitioner is possessed of ill temper or poor human relation skills which negatively impact on either the conduct of the Board Secretary's duties, or the school district as a whole. What has been demonstrated is that, for whatever reason, the Board rushed to judgment on December 13, 1982, in order to foreclose petitioner from acquiring the legislative status of tenure the following month. There is no competent credible evidence in this record to show any rational basis why the Board took such action. Having found no rational basis to support the Board's controverted action of December 13, 1982, that action, along with it's being in violation of petitioner statutory procedural rights and constitutional due process rights, is also found to be an inherently arbitrary, capricious, and unreasonable action which must be set aside.

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III

Petitioner is entitled to relief. Though the Commissioner in the McLean, supra, and Parachini, supra, matters declined reinstatement of those persons to their former positions of employment and granted only money damages, the Commissioner has, on other occasions, ordered reinstatement of nontenured teacher's in circumstances whereby it was found that the board acted arbitrarily, capriciously, or unreasonably or in violation of the nontenure teachers constitutional rights. In Rockenstein v. Board of Education of the Borough of Jamesburg, 1974 S.L.D. 260; 1975 S.L.D. 191; aff'd State Board of Education, 1975 S.L.D. 195; aff'd Superior Court (App. Div) 1975 S.L.D. 1167; and Patricia Meyer v. Board of Education of the Borough of Sayreville, 1971 S.L.D. 140 reversed State Board of Education 1972 S.L.D. 673 the remedy applied for a non-tenure teacher dismissed for arbitrary reasons was reinstatment. In both of those cases the reinstated teachers acquired tenure upon reinstatement.

In this case, but for the Board's summary dismissal of petitioner on December 13, 1982, without regard to her statutory and constitutional rights, petitioner would have acquired a tenure status in the Board's employ on January 23, 1983. Not only did the Board violate petitioner's property interest in her employment, and her valid expectation of security in that employment through June 30, 1983, it also violated her valid expectation that, upon successful performance of her duties, she would, by law, acquire the legislative status of tenure. There is no evidence to show petitioner was not, in fact, successfully completing her duties at any time while in the Board's employ. Accordingly, she must also be made whole.

Therefore, the Board is **ORDERED** to compensate petitioner the money she would have earned but for its unlawful termination of her employment and, in recognition of the Board's unjustified interference with petitioner's valid expectation of an acquisition of the legislative status of tenure, it is directed to reinstate petitioner to her position of employment as Assistant Board Secretary and it is declared that petitioner has, in fact and in law, acquired a tenure status. Petitioner's request for costs and counsel fees must be denied as being beyond the authority of the Commissioner of Education.

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OAL DKT. NO. EDU 2701-83

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.

March 27, 1984
DATE

August E. Thomas
AUGUST E. THOMAS, ALJ

Receipt Acknowledged:

March 28, 1984
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

March 30, 1984
DATE

Ronald I. Packenham
OFFICE OF ADMINISTRATIVE LAW

ks

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DOCUMENTS IN EVIDENCE:

Exhibit A	Excerpt from Board Minutes of April 19, 1982 (attached to and part of the Stipulation of Facts)
Exhibit B	Schoeler's 1982-83 contract
Exhibit C	Evaluation of Schoeler, May 26, 1982
Exhibit D	Vail to Schoeler, December 14, 1982
Exhibit E	Streitz to Schoeler, December 22, 1982
R-1	Contracts prior to 1982-83
R-2	Painter to Vail, September 30, 1981

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MARY C. SCHOELER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF CLAYTON, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

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

Accordingly, the Board is directed to compensate petitioner and reinstate her to her position as Assistant Board Secretary as ordered in the initial decision. Petitioner's acquisition of tenure is affirmed.

IT IS SO ORDERED.

MAY 14, 1984 COMMISSIONER OF EDUCATION

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6699-83
AGENCY DKT. NO. 284-83A

BOARD OF EDUCATION OF BLACK HORSE PIKE REGIONAL SCHOOL DISTRICT,
Petitioner,
v.
JANICE MOONEY,
Respondent.

APPEARANCES:

Jean Blanken Ramsay, Esq., for the petitioner (Wade & Friedman, attorneys)

Steven R. Cohen, Esq., for the respondent (Selikoff & Cohen, attorneys)

Record Closed: February 14, 1984 Decided: March 26, 1984

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

At the request of the Black Horse Pike Regional School District Board of Education (Board), pursuant to its letter filed on June 16, 1983, the Commissioner of Education issued an Order to Show Cause why respondent's teaching certificate should not be suspended for ceasing to perform her duties before the expiration term of her contract. Respondent asserts that she was led to believe that her early resignation was acceptable.

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., and a prehearing conference was conducted on October 12, 1983. A hearing was conducted on January 17, 1984, in the

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Haddonfield Municipal Building, Haddonfield. Several documents were submitted in evidence and counsel filed proposed findings of fact and conclusions of law following the hearing. The last letter brief was filed on February 14, 1984, at which time the record was closed.

FINDINGS OF FACT

1. Respondent was employed by the Board as a teacher of distributive education since approximately 1980 until her resignation in May 1983. Respondent is the holder of teaching certification issued by the State of New Jersey in the area of distributive education.

2. On April 23, 1982, the Board and respondent entered into an employment contract for the period July 1, 1982 through June 30, 1983 (J-1). Respondent was assigned to the position of Marketing and Distributive Education Teacher-Coordinator.

3. On or before May 3, 1983, respondent informed the Superintendent that her husband had received a promotion that would require relocation to the state of California, and that she would be resigning her teaching position effective May 27, 1983. The Superintendent directed respondent to place her request in writing.

4. Respondent placed the aforementioned request in a letter to the Superintendent dated May 3, 1983 (J-2). The Superintendent acknowledged receipt of this letter on May 4, 1983.

5. Between May 4 and May 10, 1983, the Superintendent informed respondent that her resignation as of May 27, 1983, would be acceptable to the Board and would be acted upon at its meeting in late May.

6. On May 10, 1983, the Superintendent met with respondent at her behest. They discussed the Distributive Education Clubs of America (DECA) National Competition scheduled for June in New Orleans, Louisiana. Respondent, who was previously scheduled to attend that DECA conference, was advised by the Superintendent that another staff

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member would serve as chaperone for her pupil. (The litigants do not agree as to whether or not respondent advised the Superindent, at this meeting, that she would have to leave the district one week earlier, on May 20, 1983, because of a change in her husband's transfer plans.)

7. By letter to the Superintendent dated May 10, 1983 (J-3), respondent formally advised the Board of the need to accelerate her resignation by one week. No reason is stated in her letter.

8. By letter dated May 11, 1983 (J-4), the Superintendent informed respondent that "it is not mutually agreeable to accept May 20, 1983, as the effective date of your resignation," and that if respondent chose to leave her teaching position on that date, he would recommend to the Board that it institute license suspension proceedings before the Commissioner of Education.

9. Respondent's last day with the district was May 20, 1983. She did not leave the area until May 27, 1983 (P-1).

Under cross-examination the Superintendent testified that respondent had successive contracts for employment and that she was an above-average teacher. He testified that her rapport with the administration was good and that respondent was involved in school activities which were above and beyond her normal teaching requirements. Respondent submitted R-1 in evidence in support of this testimony. Submitted also in support of her service are evaluations R-2 through R-6, and her annual performance report (R-7).

The Superintendent testified that he had a substitute for respondent who would replace her for the remainder of the year and that this substitute would have been used whether respondent left on May 20 or 27, 1983, even though he was not certified as a distributive education teacher. The Superintendent conceded that nothing critical occurred involving respondent's classes during the week of May 20, 1983.

The Superintendent testified, finally, that he did not know at their May 10, 1983 meeting of respondent's intent to leave five days earlier than they had agreed and that he learned of her decision on May 11, when he received her letter dated May 10,

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1983. He testified that he felt that her second notice was inadequate and he cautioned her about leaving earlier.

Respondent's supervisor was called as her witness. He testified that he discussed with respondent the termination of her employment with the Board and the turning over of her class to the substitute. The supervisor testified that respondent advised him that she was at a point in her teaching where she could reasonably stop. Respondent discussed with her supervisor her teaching plans that the substitute should continue, and she submitted final grades for her pupils.

The record indicates that the substitute who was employed had substituted for respondent during the course of the 1982-83 school year, and thus, was familiar with her classes.

All of the foregoing testimony and evidence represent additional findings of fact.

The Board asserts that respondent did not have good reason to leave a week earlier than she had agreed and that the real reason for her letter of May 10, 1983, was to show her displeasure with the Superintendent because she was denied the opportunity to chaperone her pupils to New Orleans in June. The Board contends also that respondent remained in Philadelphia during the week of May 20 and could have taught until she departed for California on May 27, 1983.

I **FIND** these assertions by the Board to be speculative and not supported by the evidence. The Superintendent testified that he did not know respondent's departure date for California; consequently, this knowledge was gained only when the interrogatories were answered. Further, in her interrogatory, respondent indicated that she remained in Pennsylvania with her husband until her departure. Although the record shows that her husband worked in Philadelphia, it is only speculation that they lived in Philadelphia, and there is no residuum of competent evidence which would confirm that fact. Finally, petitioner's assertion that respondent could have traveled from Philadelphia to her teaching job during the week of May 20, 1983, is also unsupported by any evidence.

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CONCLUSIONS OF LAW

N.J.S.A. 18A:26-10 is entitled: Suspension of certificate for wrongful cessation of performance of duties. The statute provides:

> 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. [emphasis added]

By using the term "may" as opposed to "shall" in this statute, it appears that the Legislature did not intend the suspension of a teacher's certificate to be automatic, even if the board's consent is not obtained prior to the cessation of performance of duties. Rather, it is evident that the Legislature vested the Commissioner of Education with discretion to withhold such action if, under the facts and circumstances presented in an individual's case, a teacher wrongfully ceases to perform his/her duties.

This construction of the statute is reinforced by the Commissioner's decision in In the Matter of the Suspension of the Teaching Certificate of Robert J. Burgess, School District of the Township of Clinton, Hunterdon County, 1983 S.L.D. ____, OAL DKT. EDU 4920-82 (Feb. 10, 1983), decided by Commissioner, March 17, 1983.

In Burgess, the Clinton Board of Education petitioned the Commissioner of Education for an order suspending the teaching certificate of the respondent, who gave less than 60 days' notice when terminating his employment. The respondent had received a lucrative offer of employment on January 28, 1982, provided that he attend a training program commencing on February 16. The next day, January 29, 1982, respondent submitted a letter of resignation to his Superintendent, effective February 15, 1982. On February 1, 1982, the Clinton Board acted to accept the respondent's resignation "effective sixty days from January 29, 1982, or when an acceptable replacement can be found." The Clinton Board also advised the respondent at the February 1, 1982 meeting that "they would do all in their power to try and replace him by February 15."

Administrative Law Judge (ALJ) Eric G. Errickson did not recommend the suspension of respondent Burgess' teaching certificate, finding that the Clinton Board had failed to fulfill its promise to accelerate the replacement process, and that the

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respondent had acted in a manner calculated to make the transition to his replacement orderly and successful. In this regard, ALJ Errickson stated as follows:

> It is unquestioned that Burgess gave the Board less than 60 days' notice. The statute, however, does not specify, in every instance in which less than 60 days' notice is given, that the teacher's certificate shall be suspended for one year by action of the Commissioner. Rather, it provides that the Commissioner may take that action. Implicit in the use of the word may is the exercise of discretion by the Commissioner. Thus, in considering such action as the Board requests, the Commissioner is called on to view all of the attendant circumstances. In re Joseph Choplick, 1979 S.L.D. unpublished (decided November 2, 1979).
>
> The facts here presented contrast sharply with the facts presented in In the Matter of the Suspension of the Teaching Certification of Lance Cronmiller, School District of Willingboro, 1970 S.L.D. 147. In that case, Cronmiller, also a tenured teacher, because of a dispute with his superiors, submitted a resignation on January 19, 1970, which stated, '. . . This is my resignation effective immediately,' (1970 S.L.D. 148). He thereupon left the district. The Commissioner, in that case, suspended Cronmiller's certificate stating:
>
> > The provocation under which he acted, whether fancied or real, is not relevant. Whatever feelings the teacher may have had cannot constitute a valid excuse for flouting the law and unilaterally abrogating the terms of his employment. Moreover, the teacher had avenues of appeal by which he could have sought a resolution of his grievances which he failed to employ. Nor did he attempt to arrange terms under which he could be relieved of his duties, obtain an early release, or in any other way reach an agreement. Instead, he walked off the job. Under such circumstances the Commissioner can find no justification for or condonation of the teacher's actions. [1970 S.L.D. at p. 148]
>
> Burgess' action was not precipitated by such rashness of dissent. He did not 'walk off' the job without notice but, in exemplary fashion, left carefully made plans as well as personally owned teaching materials for the benefit of the successor, his pupils, his administrators and his employer. His act was not one in which he took employment in another school, an action which has in the past been adjudged by the Board of Examiners to be sufficient reason to suspend a teaching certificate. [Slip op at 8-9]

In affirming the decision reached by ALJ Errickson, the Commissioner stated as follows:

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> The Commissioner deems it proper that at this juncture he stress his entire agreement with the initial decision herein by the Honorable Eric G. Errickson, ALJ. The teacher by all reports from his principal and superintendent had an exemplary record; nor in his leaving the system, did he exhibit a truculent or defiant attitude. In fact, his actions were to his credit by making detailed plans forhis successor and offering assistance on his own time if necessary. A teacher of experience in the system with a good record was known to be available as respondent's replacement as early as February 8. The fact that the Board, for whatever reason, took no action to fill the position until March 8 should not be counted against the teacher nor tarnish his admittedly excellent record. The Commissioner so holds. [Slip op at 13-14]

The circumstances presented in the current case are similar in many respects with the analysis and conclusions reached by ALJ Errickson in the Burgess decision.

In the matter considered here, respondent did not walk off her job without notice. Rather, she attempted to arrange terms under which she could be relieved of her duties and obtain earlier release. Under cross-examination, the superintendent testified that he did not recall any conversation with respondent about her reasons for changing her moving day. However, he did not deny that they had had such a conversation. Consequently, I **CONCLUDE** that there was an attempt by respondent to reach an agreement on an earlier release date. Further, the evidence shows that respondent did in fact leave earlier than originally anticipated. The record shows that respondent left New Jersey on May 22, 1983, and remained in a hotel provided by her husband's company in Pennsylvania until May 26, 1983, at which time she departed for California on the following morning.

Other factors which make this matter similar to the Burgess matter are as follows:

(1) Respondent had a compelling need for an early release and her action was not precipitated by rashness or dissent.

(2) Respondent gave immediate notice to the Board in writing and she assisted in the development of a program through the end of the school year.

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(3) Respondent met with her successor in order to establish the program, including lesson plans, and she left final grades for her classes.

(4) The record shows that the Board had the ability to replace respondent as of the requested release date and it did in fact replace respondent with the same teacher who would have replaced her whether she left on May 20 or 27, 1983.

(5) Further, respondent did not seek release from her employment in order to obtain employment elsewhere in New Jersey.

(6) Finally, respondent's annual performance report for the 1982-83 school year shows that she had an above-average record in the district at the time her relationship with the school district terminated.

It would appear that the central purpose of N.J.S.A. 18:26-10 and the "notice" provision contained in New Jersey teacher employment contracts is not to prevent a teaching staff member from leaving his or her teaching position; rather, it is to provide the local board of education with a reasonable opportunity to obtain a replacement and acquaint the replacement with the background of the students and the duties and responsibilities of the particular teaching position. In the current matter, there is a preponderance of evidence in the record to support the conclusion that such an opportunity was provided to the Black Horse Pike Regional School District, meeting this legislative and contractual goal.

None of the cases cited by the Board presents factual circumstances which are comparable with the matter at bar. Nor are the other cases involving the Black Horse Pike school district, In re Barbara Cohen, OAL DKT. EDU 1955-80 (August 23, 1982) and In re Michael Fox, OAL DKT. EDU 218-83 (Oct. 5, 1983) apposite.

In the Fox case, the Superintendent averred that:

> [R]espondent made no attempt to contact me personally to discuss his situation, to correlate his leaving with an arrival of a suitable replacement or a mutually agreeable termination date, either prior to or after his resignation, and that no extenuating circumstances were presented to the Board for leaving on such short notice. [Slip op at 5]

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It cannot be argued that respondent conducted herself in a similar fashion. Respondent apprised the Superintendent of the exigent circumstances necessitating her early departure, and the Superintendent found a suitable replacement for her. Her replacement was available and was counseled by respondent to assume responsibility for her classes as of the date of her departure.

Unlike the instant matter, no suitable replacement was available for the respondent in Cohen. In Cohen, the superintendent had agreed to release the respondent "as soon as a suitable replacement was found." The respondent chose instead to terminate her employment and to accept employment in another school district, leaving the Black Horse Pike school district without a prepared replacement who could reasonably be expected to provide educational continuity to the affected classes. On the other hand, respondent personally prepared her replacement for the transition, and even prepared final grades for her classes.

Based on the foregoing, I **CONCLUDE** as follows:

1. Respondent's cessation of performance of her teaching duties in the Black Horse Pike Regional School District was not wrongful.

2. The Board has not demonstrated sufficient basis or "just cause," for the suspension of respondent's teaching certificate pursuant to N.J.S.A. 18A:26-10.

Accordingly, respondent's teaching certificate shall not be suspended.

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 6699-83

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

26 March 84
DATE

August E. Thomas
AUGUST E. THOMAS, ALJ

Receipt Acknowledged:

March 28, 1984
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

March 30, 1984
DATE

Ronald L. Tabakman
OFFICE OF ADMINISTRATIVE LAW

ml/E

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DOCUMENTS IN EVIDENCE

J-1 Contract, dated April 23, 1982
J-2 Letter, dated May 3, 1983
J-3 Letter, dated May 10, 1983
J-4 Letter, dated May 11, 1983

P-1 Interrogatory No. 9, dated January 5, 1984

R-1 Letter to Mooney, dated January 11, 1983
R-2 Evaluation, Supervisor, dated October 22, 1982
R-3 Evaluation, Vice Principal, dated November 9, 1982
R-4 Evaluation, Supervisor, dated January 10, 1982
R-5 Evaluation, Supervisor, dated March 1, 1983
R-6 Evaluation, Vice Principal, dated March 21, 1983
R-7 Annual Performance Report, dated June 20, 1983

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BOARD OF EDUCATION OF BLACK HORSE PIKE REGIONAL SCHOOL DISTRICT, CAMDEN COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
JANICE MOONEY,	:	
RESPONDENT.	:	

The Commissioner has reviewed the record of the controverted matter herein including the initial decision rendered by the Office of Administrative Law, August E. Thomas, ALJ.

The Commissioner observes that primary exceptions were filed by the Board pursuant to N.J.A.C. 1:1-16.4a, b and c.

The Board excepts to the judge's finding that respondent attempted to reach agreement on the earlier release date of May 20, 1983, asserting that no testimony or credible evidence exists to support said finding. It also objects to the finding that its contention that respondent moved up her departure date in retaliation for refusal to pay for her attendance at a June convention in New Orleans is speculative and not supported by evidence. Further, the Board excepts to the judge's conclusion that the instant matter is analogous to Burgess, supra, avowing that In re Fox, supra, is controlling, thus requiring a determination that respondent's certificate be suspended.

Upon careful review of the record and legal arguments put forth by the Board in its exceptions, the Commissioner observes that the Board provided no evidence to support a contention that respondent left the district for any reason other than a change in her moving plans as stated in her May 10, 1983 letter (J-3). Nor is there evidence to substantiate any claim that respondent did not, in fact, leave New Jersey and Philadelphia on the dates and under the circumstances avowed by her.

The Commissioner agrees with the judge's conclusion that the assertion respondent could have continued her teaching responsibilities for the controverted 5 days by commuting from Philadelphia is speculative and not supported by evidence. With respect to the controversy as to whether respondent did or did not converse with the superintendent on May 10, 1983 regarding the need to accelerate her departure date, the Commissioner concludes that the more pertinent controlling issues are that respondent notified the superintendent in writing on May 10, 1983 of such need; the Board had the ability to replace respondent as of the requested release date and it did replace respondent with the same teacher whether she left on

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May 20 or May 27, 1983. Further, the Commissioner does not find merit in the Board's argument that the judge erred in relying upon Burgess, supra. He agrees with the judge that the circumstances presented in the instant matter are similar to Burgess as opposed to In re Fox and considers the judge's analysis well reasoned.

Consequently, the Commissioner affirms the findings and determination as rendered in the initial decision and adopts them as his own.

Accordingly, the request of the Board for suspension of respondent's teaching certificate pursuant to N.J.S.A. 18A:26-10 is denied. The Petition is herewith dismissed.

MAY 14, 1984 COMMISSIONER OF EDUCATION

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
ON REMAND
OAL DKT. NO. EDU 338-83
AGENCY DKT. NO. 203-6/82A
(OAL DKT. NO. EDU 6443-82 on remand)

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

APPEARANCES:

James F. Schwerin, Esq., for petitioner (Greenberg, Kelley & Prior, attorneys)

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

Record Closed: February 23, 1984 Decided: March 29, 1984

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

PROCEDURAL BACKGROUND

The Commissioner of Education rejected the terms of a proposed settlement entered into by the parties and remanded the case "* * * for a resolution of the apparent conflict * * *" perceived as emerging between the terms of the settlement and the state of existing law which governs assignments a board may impose upon a teacher who has

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acquired a tenure status. A hearing on remand was conducted on November 4, 1983, after which the record closed February 23, 1984, upon the filing of petitioner's reply brief.

The dispute began on April 30, 1981, when the superintendent advised petitioner, who was then assigned as a fourth grade classroom teacher, that effective May 1, 1981, she was to be "* * * reassigned as an auxiliary teacher and assigned to the Cramer Elementary School and all East Camden elementary schools as your service is needed * * * as a substitute. This action is made necessary because of you (sic) completely unsatisfactory attendance and lateness record and other factors * * *" (R-7). Petitioner continued in the assignment of auxiliary teacher through May and June 1981 and, also, through the 1981-82 academic year and, as will be seen shortly, to the present time.

During 1981-82, petitioner retained counsel, different than the present counsel of record, to press a grievance against her assignment as auxiliary teacher. Petitioner continued throughout 1981-82 as auxiliary teacher. On June 7, 1982, the superintendent filed charges against petitioner with the Board pursuant to the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq. On the same day, June 7, 1982, petitioner's original verified petition was received by the Department of Education. In that petition, petitioner challenged the propriety of her assignment as auxiliary teacher as being "* * * in violation of her rights guaranteed under the constitution and under the school laws * * *" (original petition of appeal, para. 18). After that pleading was joined by the Board's answer, the matter was transferred to the Office of Administrative Law as a contested case and a hearing was scheduled for October 7, 1982. No action had been taken by that date by the Board on the charges filed with it by the superintendent against petitioner, nor has there been a resolution of the grievance petitioner filed.

After some testimony was elicited on October 7, the Board and petitioner agreed that the matter could be amicably settled. The terms of that settlement, rejected by the Commissioner and which form the basis for the remand, are reproduced here in full:

> (1) The assignment of [petitioner], as an auxiliary teacher in the Camden City School District, will continue throughout the remainder of the 1982-83 school year.
>
> (2) [Petitioner] will be assigned, within the scope of her certificate, to long term absences of other teaching staff

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employees as they develop from time to time. Long term absences shall be defined as those that will exceed two weeks in duration.

(3) When long term absences do not occur, [petitioner] will be assigned to the Cramer School. At the direction of the principal, [petitioner] will be assigned to instruct small groups of students to assist them in attaining proficiency in the basic skills.

(4) [Petitioner] will not be directed to perform any duties not usually performed by other teaching staff members, within the scope of their certificates.

(5) [Petitioner] will be evaluated by her superior, from time to time, in accordance with the policy of the Camden City Board of Education, state statutes and administrative code regulations governing the evaluation of teaching staff members.

(6) [Petitioner] will have the opportunity to apply to the Board of Education for a transfer, to commence at the beginning of the 1983-1984 school year. Such a request, if made, will be considered in accordance with Board policy, statutes and regulations governing such requests.

(7) The Superintendent will withdraw tenure termination charges filed against the Petitioner.

Once the Board, its counsel, petitioner, and her counsel affixed their signatures to the written settlement agreement, and the undersigned endorsed the terms thereof, the matter was forwarded to the Commissioner for his final determination. The decision of the Commissioner is reproduced here in full:

The Commissioner has examined the resolution and order herein jointly prepared by the parties and notes petitioner's prospective assignment to cover long-term absences of other teaching staff employees as such absences may develop. The Commissioner finds such prospective assignment of petitioner to be in violation of her admitted tenure status. The Commissioner in a markedly similar case has previously considered such circumstances in Marjorie S. Payne v. Board of Education of the Village of Ridgewood, 1976 S.L.D. 605, 610 wherein was said in part:

"* * * Thus, the power of a board of education to transfer teaching staff members to comparable positions within its school district is clear, absent a showing that in some manner the Board's discretion has been abused.

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> "In the instant matter, however, the Board violated not only the provisions of statutory law, N.J.S.A. 18A:25-1 and N.J.S.A. 18A:28-9 et seq., in its attempt to either transfer, reassign, and/or abolish the position of general teacher to which petitioner had been assigned, but it also violated petitioner's expectation to be assigned as teaching staff member. The assignment of petitioner as a substitute teacher is clearly not an assignment as a teaching staff member. A substitute teacher is not a teacher within the contemplation of N.J.S.A. 18A:1-1. Zielenski v. Board of Education of the Town of Guttenberg, Hudson County, 1970 S.L.D. 202, reversed State Board of Education 1971 S.L.D. 664, aff'd Superior Court of New Jersey 1972 S.L.D. 692. * * * (emphasis supplied)

In the present matter the Commissioner does not find a definition of auxiliary teacher with accompanying job description in duties of such a teacher but notes the intent of the board to have petitioner substitute for regular teaching staff members as absences might develop. The definition of the Board that absences constitute two weeks or more, in the opinion of the Commissioner, does not alter petitioner's function to act as a substitute teacher. For the aforestated reasons this matter is remanded for a resolution of the apparent conflict.

IT IS SO ORDERED.

After the matter was remanded to the Office of Administrative Law, petitioner's then present counsel advised me he had been relieved by petitioner. A prehearing conference scheduled for February 28, 1983, was adjourned to allow petitioner to secure substitute counsel. Thereafter, petitioner either initiated, or caused to be initiated, certain communications by which she represented she had secured counsel, or caused such counsel to represent they probably would be representing petitioner, only to have petitioner make subsequent contrary determinations. Finally, the Board was instructed by letter dated August 24, 1983, to file a motion to dismiss for petitioner's refusal to move the matter or, alternatively, to retain counsel to move the matter on her behalf. Thereafter, still another law firm advised that it was retained to represent petitioner, only for that firm to be dismissed three weeks later. It was on the latter counsel's representation that a hearing was scheduled for November 4, 1983. Though the Board moved to dismiss, upon counsel's representation that it was retained by petitioner, this forum declined to rule on the motion. When the hearing commenced on November 4, 1983 the present counsel of record did, in fact, appear to represent petitioner's interest.

This concludes a recitation of the procedural facts of the matter.

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BACKGROUND FACTS
ESTABLISHED AT REMAND HEARING

Preliminarily, it is noted petitioner does not allege her assignment as auxiliary teacher by the superintendent was made in violation of N.J.S.A. 18A:25-1 which provides "No teaching staff member shall be transferred, except by a recorded roll call majority vote of the full membership of the board of education by which he is employed." The superintendent's report to the Board at a meeting conducted July 27, 1981, shows that the superintendent recommended to the Board it ratify the assignment of petitioner as auxiliary teacher effective May 1, 1981 (R-1). Though a copy of the actual resolution by which the Board adopted that recommendation and, in fact, ratified the superintendent's action is not in evidence, it is presumed, absent evidence to the contrary, that such an action was ratified by the Board.

Next, it is noted that the Camden County Superintendent of Schools, by letter dated October 7, 1982, advised the superintendent

> In keeping with our recent telephone conversation, it is my opinion that the position auxiliary teacher falls under the scope of an elementary certificate and therefore no approval for the position is required from this office. (R-10)

The superintendent, who has occupied that position for 15 years, and the director of elementary education, both explained that the title "auxiliary teacher" has been in existence as a position title in the school district for at least 20 years. The purposes for the existence of such a title are two: one, to accommodate teachers who return from leaves of absences when a regular classroom position does not exist and, two, to assist a teacher who is suffering physical or emotional problems who may be in need of extra assistance. It is clear petitioner was not of the former category, but of the latter.

It is also preliminarily noted that during petitioner's assignment as auxiliary teacher from May 1981 through the present, she has suffered no reduction in compensation, nor loss of any tangible benefits received by teachers assigned to regular classroom duty. Petitioner's seniority as an elementary teacher continues to accrue, and her legislative status of tenure is recognized by the Board.

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When petitioner began her employment in 1973 with the Board, she was assigned to teach fifth grade at the Sumner School. Between 1973 through May 1981, petitioner was assigned as an elementary teacher at several schools and grade levels throughout the district. At least two of those assignments were at her request. Petitioner had also been assigned the extra duty of being grade level chairperson in 1976, and she was responsible for candy sales and a school newspaper.

Before petitioner's reassignment controverted here, she tendered a written resignation from her employment to the Board. (C-1) There is no explanation in the record why petitioner so acted, but the Board did allow her to rescind the resignation.

Following petitioner's reassignment as auxiliary teacher on May 1, 1981, petitioner was advised by the principal of the Cramer School that she would be assigned different classrooms, with different teachers, to assist the teacher in working with pupils, or taking the place of absent regular teachers. Towards the end of May 1981, the principal assigned petitioner to take the place of a regular teacher who commenced a maternity leave. Petitioner remained in that one classroom, with the same pupils, to the conclusion of the 1980-81 year.

The following year, 1981-82, the Cramer School principal assigned petitioner to take the place of another teacher who was on a leave of absence. Petitioner remained in that one classroom for the first three weeks of school. Notwithstanding that the teacher who was on the leave did not yet return, petitioner testified that the principal removed her from that classroom because he did not want her working in one classroom for more than three weeks at a time. Thereafter, petitioner explained she was assigned different grade levels at the Cramer School, filling in for absent regular teachers. Next, petitioner was assigned a third grade classroom to take the place of that regular teacher who commenced a leave of absence. Petitioner remained in this latter classroom for approximately three weeks when she was again removed. Subsequent to this removal, petitioner was assigned various classrooms, on various days, to fill in for various regular teachers who were absent. If all regularly assigned teachers were in attendance on any given day, petitioner would be assigned to work in the school office on pupils' permanent record cards, or to assist other teachers at a school book fair.

The Cramer School principal observed and evaluated petitioner's performance during 1981-82. On June 3, 1982, the principal advised the superintendent as follows:

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> For the past few months, I have been attempting to formulate observations and opinions relative to [petitioner] which will perhaps enable you and the members of the Board to make the best informed decision regarding her future employment. It must be remembered that [petitioner] was assigned to Cramer School as an auxiliary teacher and performed only substitute teacher functions as needed and these opinions are based on the fact that at no time did she assume the many and varied responsibilities of a permanently assigned classroom teacher. Furthermore, an evaluation of her emotional stability is also necessary in an attempt to construct an accurate profile for her.
>
> [Petitioner] has the potential and technical ability to perform satisfactorily as a classroom teacher. This opinion is based on the fact that as a substitute in both long and short term situations, she maintained discipline and provided adequate instruction in virtually all assignments dispite the fact that children can be difficult and disruptive when their regular teacher is absent. Her classroom, attendance and attitude were more than satisfactory which is understandable considering her experience coupled with the fact that her position is in jeopardy.
>
> I do feel that petitioner has emotional problems which need to be considered. This emotional instability probably accounts for her having difficulty in previous schools and positions. She is a very insecure individual and strongly influenced from a continuing sense of being persecuted by administration and other staff members. Almost every day she "'confides'" to me about some problem, either personal or professional. In most cases, it is merely a repeat of something mentioned on a previous occasion. If given the opportunity, she would be the type of individual who would report teacher activities to the principal and potentially causing many problems with this type of behavior.
>
> I could not recommend [petitioner] for continued employment because although she has performed well as assigned and could probably be a good teacher, her emotional problems will eventually have a negative effect on her teaching effectiveness. (RP-1).

Petitioner continued as an auxiliary teacher into the 1982-83 year. Between the opening of school in September 1982 through October 7, 1982, the date of the settlement subsequently rejected by the Commissioner as set forth above, petitioner, according to a purported daily diary (RP-2) she maintained, spent the first week in September working with student folders in the office. The second week, according to the purported diary, petitioner was assigned to a second grade classroom where she remained for approximately one week. Thereafter, petitioner was assigned different classrooms to cover for different teachers during their absence and, if regular teachers were not absent, petitioner would assist regularly assigned teachers by passing out reading tests, taking

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pupils to a book fair in the gymnasium, checking papers, and assisting at the book fair in the gymnasium.

Following the settlement, but before the Commissioner's rejection, petitioner was assigned by the principal to work with small groups of pupils in reading and mathematics skills. This assignment lasted a short time, petitioner says, because regularly assigned teachers informed the principal that they did not need her nor require her services.

Thereafter, petitioner was assigned to the Board's Powell School, as a fourth grade teacher, to replace a regularly assigned teacher who commenced a leave of absence. Petitioner remained at Powell School until about the middle of December 1982. Petitioner was then sent to the Board's Sharpe School, as a second grade teacher, in place of that regularly scheduled teacher who was on a leave of absence. It was while petitioner was assigned to the Sharpe School that the Commissioner issued the decision by which the settlement was rejected and the case remanded.

During early April 1983, petitioner was reassigned from the Sharpe School back to the Cramer School. Petitioner began again to work with small groups of pupils in reading and mathematics skills. Specifically, petitioner was assigned a third grade classroom in place of that regularly assigned teacher for two weeks, then she was assigned to a first grade classroom for that regular teacher through the end of the school year.

Petitioner's assignment as auxiliary teacher continues through the present 1983-84 year. Petitioner is at the Cramer School, and she began the year assigned to a third grade to replace that regularly assigned teacher who was ill. At or about October 1983, petitioner commenced assisting pupils in various classrooms in the reinforcement of their mathematics and reading skills. She has not been assigned office work since the ill-fated settlement agreement was executed in October 1982.

Finally, it is noted that petitioner was requested to accept a long term auxiliary assignment at the Board's McGraw School which she declined. It must be reported that petitioner did testify that she was told by an unidentified principal that she cannot be on any curriculum committee because of her position as auxiliary teacher. Petitioner admits that the work she does with small groups of pupils facilitates growth in the learning process but the growth she facilitates is not to the degree she would like.

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And, there is no dispute that when petitioner is assigned to take the place of teachers who are on leave that she then performs all duties of "a teacher" regularly assigned.

The Board has employed at least seven other auxiliary teachers, assigned to various schools, since 1975 (R-9). The superintendent explains that the auxiliary teachers are not "substitute teachers," in that auxiliary teachers receive a regular teachers salary, are supervised in their performance by supervisors, have assigned duties, are members of the teachers' pension and annuity fund, acquire tenure, and enjoy all the benefits regular teachers enjoy. The director of elementary education testified that it is not unusual for regularly assigned teachers to do work in the school office; however, the director does admit that regularly assigned teachers do work in the office only after school hours, not during school hours, and then only upon their own pupil records. The director explains that auxiliary teachers do, in fact, perform some of the same duties as regular teachers in that auxiliary teachers are expected to prepare lesson plans, that auxiliary teachers teach by objective; and, that auxiliary teachers are expected to teach.

Finally, it is noted that while the Board has not adopted a formal job description for the position auxiliary teacher, the Board's formal job description for teacher (RR-1) provides that a teacher is directly responsible to the building principal, and that the "function" of the teacher is "to instruct children in his/her charge in accordance with the curriculum adopted by the Board of Education." Seventeen specific duties are assigned the position of teacher, some of which are

* To implement by instruction and action the district's educational goals and objectives;

* To meet and instruct classes as assigned;

* To utilize lesson plans and instructional material;

* To provide for continuous evaluation of pupil progress consistent with district established goals and policy;

* To maintain student record and other pertinent data;

* To facilitate pupil progress and growth towards stated objectives of instruction within the limits of the resources provided; and

* To strive to establish cooperative relations with parents, to participate in curriculum development programs, in faculty meetings, and to maintain professional competence.

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The foregoing background facts are not disputed in the record and, I **FIND**, the foregoing facts to be the facts of the matter.

DISCUSSION AND ANALYSIS

Petitioner contends the responsibilities assigned her as auxiliary teacher are qualitatively less than the responsibilities expected of teachers assigned specific classrooms, at specific grade levels, in any one of the Board's elementary schools. Petitioner contends that the obligation of lesser responsibility imposed upon her is a violation of her tenure status for these reasons:

(1) The Commissioner of Education has already declared his finding and conclusion that the terms of the settlement agreement violates petitioner's tenure status because of petitioner's "* * * prospective assignment to cover long-term absences of other teaching staff members as such absences may develop * * *";

(2) The principal's report (RP-1) to the superintendent admits that her assignment, regardless of the fact she receives the same salary and emoluments classroom teachers receive, has been to perform "substitute teacher functions" which, it is alleged, according to prior decisions of the Commissioner, presumptively violate tenure rights of a teacher; and

(3) The Board's intent in its ratification of the superintendent's assignment of her as auxiliary teacher, as imputed to the Board through the testimony of the superintendent and principal, was and continues to be to punish or discipline her for perceived, though unproven, deficiencies without affording her procedural rights as required by the Tenure Employee Hearing Law, N.J.S.A. 18A:6-10 et seq.

The Board contends its assignment of petitioner as auxiliary teacher is not violative of her tenure status because during short-term assignments, petitioner has the opportunity to carry out duties of a regularly assigned teacher, including attendance at parent meetings, in-service training, preparation of lesson plans, and assignment of homework. The Board notes that petitioner at all times has received compensation and benefits in the same manner that regularly employed teachers receive; that while

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petitioner's initial assignment as auxiliary teacher was because of poor attendance, lateness, and other reasons, her continuing assignment in that position makes no reference to any perceived deficiencies; and, finally, the Board contends that the legislative status of tenure which accrues to a teaching staff member does not guarantee continuity of assignment or the acquisition of a vested right to any particular assignment, class, or school.

The issue to be addressed, in light of petitioner's admitted tenure status as a teaching staff member, is the measure such protection that status affords her. A similar, though not identical, question was addressed by the State Board of Education in 1913 when it decided the case of Davis v. Overpeck Township Board of Education, 1938 S.L.D. 466, aff'd Sup. Ct. (not officially reported) 1938 S.L.D. 469. Davis had acquired tenure as principal of the Overpeck high school. During May 1912 the Board determined, without charges nor hearing, that Davis should not be reemployed as principal and, after Davis' reassignment as teacher of the eighth grade, another person was employed by the Board to be the high school principal. The State Board, in reversing the then commissioner's determination that Davis' reassignment was proper, held that the reassignment of a principal to the position of teacher is a reduction in rank and, as such, cannot lawfully be made absent a hearing on charges. 1938 S.L.D. 467. Note that the Davis case involved a clear separation of "rank" between teacher and principal.

In this case, petitioner asserts her assignment as auxiliary teacher is an improper reduction of her rank of teacher to that of substitute teacher because she is obliged to perform substitute functions. The logic of this contention is questionable for it appears to be internally inconsistent. There is no recognized "rank" of substitute teacher under the tenure law for such persons are excluded from tenure acquisition. And, it is noted ". . . all substitutes do the work of regulars when the need to perform those duties arises." Biancardi v. Waldwick Bd. of Ed., 139 N.J. Super. 175, 179 (App. Div. 1976). Surely petitioner does not complain that she is assigned duties of regular teachers; rather, the essence of her complaint is in not being assigned her own classroom of pupils which, and whom, remain constant, September through June.

The facts disclose that petitioner is accorded all benefits and emoluments "regular" teachers enjoy. That is, the Board recognizes her legislative status of tenure; she receives the same salary and benefits all other regularly employed teachers receive; and, she has the same protection from dismissal for "unfounded, flimsy or political

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reasons" all other teachers with a tenure status in the Board's employ have Zimmerman v. Newark Bd. of Ed., 38 N.J. 65 (1962), certif. den. 371 U.S. 956 (1963). It has long been established that there is a "* * * cleavage between the status of such a substitute teacher and that of a regularly employed teacher." (Emphasis supplied) Schulz v. State Board of Education, 132 N.J.L. 345, 353 (1944). In fact, on the same day the Schulz case was decided, the case of Gordon v. State Board of Education, 132 N.J.L. 357 (1944) was also decided by our former Court of Errors and Appeals. Justice Case, in the Gordon case, in addressing the duties of Gordon, who claimed tenure resulting from her employment as a substitute teacher, discussed the facts of Gordon's employment in that regard.

> Respondent [Gordon], as we have seen, was hired as a substitute teacher and was paid as such at the rate of $5 for each 5 1/2 hour day of actual employment. Her assignment was from day to day. The department [Newark Board of Education] was under no obligation to offer, or the respondent to accept, any of those assignments. Each day represented a separate contract. No such irregularity of engagement and no such opportunity to determine not to do the day's work rests with a regular teacher. The assignment might consist of merely hours and not a full day, or of a full day and a fraction, or it might be continued over a week or longer. That service was without seniority, without paid vacations and without the benefit of scheduled increases or increases of any character, without steady employment even at the per diem rate, and was in a diversity of schools, grades and classes. The maximum which respondent could earn each school year under her employment as substitute teacher on daily assignment was 191 times $5 - $955. * * * [A]ccording to the contention here, she would not only be awarded tenure, in the sense of permanency and continuity in her employment, but her compensation would be increased to $1,500, the amount annually paid to teachers regularly and permanently employed in the grade where she substituted * * * 132 N.J.L. 359.

In this case, though petitioner's classroom assignment was on a day-to-day, or longer basis, the Board recognized its obligation to maintain petitioner's employment. But, petitioner's assignment "... in a diversity of schools, grades and classes ...", standing by itself, does not end the inquiry. Petitioner was not employed each day by way of a separate contract, nor was she considered a substitute teacher, an independent contractor, subject to daily contracts. Petitioner's employment has been regular and she does not have the opportunity "* * * not to do the day's work * * *" as assigned. Petitioner's seniority continues and she receives the same benefits and emoluments as other regularly employed teachers receive. Petitioner is not a substitute teacher, nor has she been employed on the basis of a substitute teacher, nor can it be said that petitioner's

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employment is of the legal nature of a substitute teacher. N.J.S.A. 18A:16-1.1 provides that

> * * * [a] board of education may designate some person to act in place of any officer or employee during the absence, disability or disqualification of any such officer or employee * * * [However], no person so acting shall acquire tenure in the office or employment in which he acts pursuant to this section when so acting.

That statute provides authority for boards of education to employ day-to-day substitute teachers as the need arises. Spiewak, et al. v. Rutherford Bd. of Ed., 90 N.J. 63 (1982). Petitioner's employment is not day-to-day; rather, petitioner's employment is continuous. Petitioner has not been demoted, for she is not employed as a substitute teacher. If petitioner's complaint in respect of her assignment as auxiliary teacher has merit, the merit must be found other than in the allegation that the Board has relegated her to the status, or function, of a substitute teacher.

The Board's discretionary authority to transfer teaching staff members is not disputed. N.J.S.A. 18A:25-1. A board of education action to transfer a teacher from one grade level to another grade level is not a demotion nor dismissal. Cheeseman v. Gloucester City, 1 N.J. Misc. 318, 319 (1923). Transfers may be advisable in the administration of schools for many reasons. Id. See also, Greenway v. Board of Education of Camden, 129 N.J.L. 461, 465 (1942). The principle that the Board has discretionary authority to transfer teachers is reaffirmed in Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978) which holds that a teacher transfer is an inherent managerial responsibility of a board of education and, hence, non-negotiable. The authority of a board to transfer, as in all discretionary authority of boards of education, must not be exercised in an arbitrary, capricious, or unreasonable manner nor may such action be taken in bad faith.

Petitioner relies on Payne v. Ridgewood Village Bd. of Ed., 1976 S.L.D. 605, as cited by the Commissioner in his Order of Remand, in support of her position that the asserted lesser qualitative duties assigned her, that is the substitute "function," is a violation of her tenure status, which assertion has already been addressed and that the assignment is a clear abuse of the Board's discretionary authority. In that case, Payne was an elementary teacher who had been employed by the board for 32 years. The superintendent then assigned her the position of substitute teacher and teacher resource

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center associate for 1975-76. It was found that the motive of the board in its transfer of Payne was based on its perception that her performance as a regularly assigned teacher was of such poor quality she could not be assigned to work with pupils on a continuous basis. The Commissioner found that "* * * the Board violated not only the provisions of statutory law, N.J.S.A. 18A:25-1 and N.J.S.A. 18A:28-9 et seq., in its attempt to either transfer, reassign and/or abolish the position of general teacher to which petitioner had been assigned, but it also violated petitioner's expectation to be assigned as a teaching staff member." 1976 S.L.D. at 610. The Commissioner did hold, as petitioner contends, that a board may not reassign a teacher "* * * to responsibilities less than those responsibilities similarly assigned to other teaching staff members employed by the Board." Id., 610. See also, In re Anne Simmons, 1974 S.L.D. 763.

The Payne case, however, must be seen in light of a later case, Bigart v. Paramus Bd. of Ed., 1979 S.L.D. 123 where Bigart, who had tenure as a teacher, was assigned the position of "unassigned teacher" and for which position a specific job description existed. Notwithstanding that Bigart was assigned to provide "substitute services" for regular teachers who were temporarily absent, that fact was found by the Commissioner to be an insufficient basis to support petitioner's claim that her assignment as unassigned teacher was invalid. The Commissioner distinguished Payne and relied upon evidence of a benefit innuring to the board's instructional program by having petitioner, as an unassigned teacher, take the place of regularly assigned teachers who are temporarily absent. The Commissioner found that "the Board presented bona fide reasons in support of the assignment and petitioner has not claimed the assignment was motivated by bad faith." 1979 S.L.D. at 128. The Commissioner identified the following standards against which he will make determinations whether a board has abused its discretion in the exercise of its authority to transfer teachers: the board's legislative authority to assign and reassign teachers (1) must be reasonably and properly exercised in good faith, (2) for the best interests of the school district, (3) the work assigned must be of a rank equivalent to that by which the tenure status was acquired, (4) the assignment must be one for which the teacher is properly certified, and (5) the board must not seek to invade the plain intention of the tenure statute. These standards imply that no presumption of invalidity attaches to a board action by which a teacher is transferred as asserted by petitioner.

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ADDITIONAL FINDINGS AND CONCLUSIONS OF LAW

Applying the Bigart standards to the present case, petitioner was initially assigned the position of auxiliary teacher by the superintendent, effective May 1, 1981, because of her "unsatisfactory attendance and lateness record and other factors" (R-7). Though this is not a tenure hearing, there is no suggestion in the record that the superintendent did not have some basis upon which to assess petitioner's attendance record, promptness in reporting to work, and 'other factors'. There is no evidence to suggest that the superintendent reassigned petitioner to the position of auxiliary teacher to force her to resign, or to place her in an untenable position within which she was not competent to perform, or that he intended to assign her duties which would be clearly beyond the scope of a regularly employed teacher. The superintendent's intent in the reassignment was to assist petitioner to overcome perceived deficiencies and to benefit her pupils by placing a teacher in charge without such deficiencies. It is recognized that prior to the settlement, petitioner was assigned by the principal to perform clerical kinds of duties. That kind of specific assignment ceased, however, subsequent to the settlement agreement. Between the time that the settlement was reached to the present time, petitioner has not been assigned clerical duties. Recall that on April 7, 1981, petitioner tendered her written resignation (C-1) from the Board's employ prior to her being informed on April 30, 1981, she would be reassigned as auxiliary teacher on May 1, 1981. Had the Board, or the superintendent, taken the action to assign petitioner to the position of auxiliary teacher in bad faith, for the purpose of evading petitioner's tenure protection or to force her from her job, the Board and the superintendent would have rushed to accept petitioner's resignation prior to her written rescission on or about April 27, 1981. To the extent that the superintendent gave petitioner the reasons for her assignment as an auxiliary teacher, I must find that the superintendent, and the Board, did not act in bad faith. The first standard has been met or, more properly, petitioner failed to demonstrate the Board acted in bad faith.

The reasons expressed to petitioner by the superintendent in respect of her assignment as "auxiliary teacher," (attendance, promptness for reporting to duty, and other factors) would tend to have an impact upon the pupils with whom she worked in a regular classroom. Those kinds of deficiencies, if eliminated by reassigning petitioner to the role of auxiliary teacher and assign a teacher without those deficiencies to petitioner's classroom, would result in a benefit to the Board's instructional program. Consequently, the assignment is in the interests of the school district, and the second standard is satisfied.

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Petitioner's assignment, following the settlement agreement, has been to perform the duties of regularly assigned teachers during the regularly assigned teacher's absence on a day-to-day, week-to-week, or month-to-month basis. It is fair to note that all public school teachers have, from time to time, tasks which can best be characterized as clerical in nature. The problem, of course, was when petitioner was assigned early on to perform clerical duties almost exclusively. That kind of an assignment cannot be upheld; but, the evidence shows that since October 1982 petitioner has not been assigned clerical kinds of duties to any greater extent than regularly assigned teachers. When petitioner is assigned to classrooms, she does in fact teach and she performs the duties of the regularly assigned teacher, Biancardi, supra. Moreover, the position of auxiliary teacher has existed in the Board's schools for twenty years, and the duties involved have been and are as heretofore described. The position was not created for petitioner as punishment; it was created in response to a perceived legitimate need. Furthermore, the Camden County Superintendent of Schools acknowledges that the duties of auxiliary teacher requires the possession of an instructional certificate, with an elementary endorsement. Finally, petitioner's admitted tenure status provides no guarantee, nor expectancy as she argues, of ". . . any particular assignment, class, or school." Bigart, supra, 1979 S.L.D. at 131; cf. Spiewak, et al. v. Rutherford Bd. of Ed., supra. The expectancy of a greater "qualitative" assignment is not a legally protected interest. Petitioner teaches. What is protected is the expectancy of continued employment as a teacher. The third standard is satisfied.

Petitioner is properly certified to be an elementary school teacher and, it has already been found, the Board did not assign petitioner as auxiliary teacher in an effort to evade the tenure statute. This is so for the Board admits, in its words and conduct, that petitioner enjoys tenure in its employ. The fourth and fifth standards are satisfied.

Each of the five standards articulated by the Commissioner in Bigart in respect of a board's proper use of its discretionary authority to transfer teachers has been satisfied in this case. However, it is recognized that application of the rule of Payne, supra, would tend to reach a contrary result. The Commissioner, in his Order of Remand, states his finding that the "* * * prospective assignment of petitioner to be in violation of her admitted tenure status" and proceeds to cite Payne in support of that finding. Notwithstanding the earlier analysis, it appears that the Commissioner views an attempt by a board to assist a teacher to overcome perceived deficiencies by a transfer of that teacher to a position such as auxiliary teacher, is an abuse of the board's discretion.

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Following the Payne rule, and assuming its continued vitality, such a determination would be a logical result. To the extent that the Commissioner remanded specifically on the Payne rule and the facts on remand do show that petitioner, as an auxiliary teacher would be assigned to "cover long-term absences of other teaching staff employees as such absences may develop", the Board appears to be prohibited from continuing its assignment of petitioner in the role of auxiliary teacher. Accordingly, the Board is **DIRECTED** to cease its assignment of petitioner as an auxiliary teacher, and, under the Payne rule, should deficiencies in petitioner's performance persist, the Board is **DIRECTED** to avail itself of its authority under the Tenure Employee Hearing Law, N.J.S.A. 18A:6-10 et seq.

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.

March 29, 1984
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

3/30/84
DATE

Receipt Acknowledged:
Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

April 3, 1984
DATE

Ronald L. Parker
OFFICE OF ADMINISTRATIVE LAW

ml

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LIST OF EXHIBITS

P-1	Notice of transfer
*P-2	Notice of Warrant with attachments
P-3	Charges filed by superintendent
*P-3a	Letter, June 8, 1982
RP-1	Letter, June 3, 1982
RP-2	Petitioner's "diary"
R-1	Extract of superintendent's report to Board, July 27, 1981
*R-2	Petitioner's attendance report, 1977-78
*R-3	Petitioner's attendance report, 1978-79
*R-4	Petitioner's attendance report, 1979-80
*R-5	Petitioner's attendance report, 1980-81
*R-6	Petitioner's attendance report, 1981-82
R-7	Letter, April 30, 1981 to petitioner from superintendent
R-9	List of auxiliary teachers
R-10	Letter, October 7, 1982 to superintendent from Camden County Superintendent of Schools
RR-1	Teacher job description
RR-2	Letter, August 30, 1983 to petitioner from director of elementary education

* These documents, the parties contend, are not relevant to the instant matter.

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

The Commissioner has reviewed the record of the controverted matter herein including the initial decision on remand rendered by the Office of Administrative Law, Daniel B. McKeown, ALJ.

The Commissioner observes that no exceptions were filed by either party pursuant to N.J.A.C. 1:1-16.4a, b, and c.

The Commissioner concurs with the determinations rendered in the initial decision that the Board cease its assignment of petitioner as an auxiliary teacher and, pursuant to Payne, supra, that it avail itself of its authority under the Tenure Employees Hearing Law (N.J.S.A. 18A:6-10 et seq.) if deficiencies in petitioner's performance persist. The Commissioner is constrained to emphasize that the transfer of a tenured teacher to a nontenure-eligible position cannot be used as a strategy to negotiate the withdrawal of tenure charges as in the instant matter. Such assignment cannot be used as a disciplinary measure, nor can it be used as a means to assist a teacher to overcome perceived deficiencies as asserted herein.

However, the Commissioner takes exception to the judge's conclusion with respect to the instant matter and Bigart, supra. There are major substantive differences between Bigart and the matter herein. The reassignment of Bigart was not based upon perceived teacher deficiencies nor were tenure charges an issue. The substitute teaching involved therein constituted only a portion of her assignment and was restricted to the same English department she had taught within previously. It was determined that the board therein demonstrated bona fide reasons in support of that assignment. In contrast, petitioner herein was reassigned because of perceived deficiencies; tenure charges were being pursued; the substitute teaching constituted her entire instructional assignment; and clerical tasks ceased only as a result of the matter being brought to hearing pursuant to N.J.S.A. 18A:6-9. Consequently, the Commissioner finds Payne, supra, to be the controlling case herein and that there are similarities to Simmons, supra, and In re Beverly Stipo (Commissioner's decision dated July 15, 1980).

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Therefore, the Commissioner affirms and adopts as his own the directives issued by the judge in the initial decision on remand and further orders that the Board develop a written job description for the unrecognized title "auxiliary teacher" and submit said description in writing to the Camden County Superintendent of Schools for approval.

MAY 14, 1984 COMMISSIONER OF EDUCATION

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 10688-82
AGENCY DKT. NO. 199-5/78
(remanded)

HAMILTON TOWNSHIP SUPPLEMENTAL TEACHERS' ASSOCIATION, ARLENE BARTOLOMEI, EDITH BLOOMER, JOYCE BRUGNOLI, SUE COLBERT, LORRAINE B. CORYELL, CAROLYN FORNEY, GAIL FOUSE, BARBARA GORDON, BONNIE GROCOTT, JOANNA HULSEY, ROSEMARY KESSLER, VEARIAN S. KROECK, BARBARA KYRITSIS, GRACE LOYACK, AMY G. MALICK, FRANCES A. MANDL, RITA MILLNER, KATHY MOORE, PEG MOORE, ROSEMARY NAPLES, DIANE NIES, ELAINE POLIZZI, GAIL SHUMAN, ROSEANN SZILVASI, and CHERYL VECCHIOLLA,

Petitioners,

v.

HAMILTON TOWNSHIP BOARD OF EDUCATION,

Respondent.

APPEARANCES:

Arnold M. Mellk, Esq., for petitioners (Katzenbach, Gildea & Rudner, attorneys)

Ellen S. Bass, Esq., for respondent (Aron & Salsberg, attorneys)

Record Closed: February 15, 1984 Decided: March 30, 1984

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OAL DKT. NO. EDU 10688-82

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

This matter comes before the Office of Administrative Law by way of remand from the New Jersey Supreme Court to the Commissioner of Education.

This matter and two related matters were decided by the Supreme Court on June 23, 1982. In its decision as to this matter, the Court affirmed the Appellate Division holding that teachers serving in remedial instruction and supplementary instruction capacities are tenure eligible, provided they meet the service requirements of N.J.S.A. 18A:28-5. The Court remanded the case to the Commissioner of Education for his determination as to "what retroactive benefits are owed to the teachers." Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63, 84 (1982).

It at first appeared that the parties would be able to settle most of the issues which arose as the result of the remand. Such complete settlement, however, proved unsuccessful. A substitution of counsel was filed with the Office of Administrative Law on or about October 18, 1983. Subsequently, the court was advised that the only issue remaining was application of the Board's "90-day rule" regarding salary guide advancement. Counsel for the Board was subsequently advised by the school administration that the Board had not authorized any settlement on the question of retroactive entitlements and wished to litigate this issue.

While the Board has provided prospective salary adjustments to the petitioners, the following issues, as determined at a conference of counsel on December 12, 1983, remain:

1. Do petitioners have any entitlement to retroactive pay?

2. Does the 90-day rule that provides for service increments on the salary guide for full-time teaching staff members apply to petitioners?

3. Should costs be levied against the Board because of alleged renunciation of an agreement in this matter?

4. Are the petitioners entitled to interest from the date of the New Jersey Supreme Court decision in this matter?

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The parties filed papers addressing these issues. The schedule for submission was, for good cause shown, slightly enlarged.

I

PROCEDURAL HISTORY ON REMAND

June 23, 1982: Supreme Court remanded the case to the Commissioner of Education to determine what retroactive benefits are owed to the petitioners.

January 24, 1983: Case is transmitted to the Office of Administrative Law for limited hearing based on the Court's directive. Parties directed to proceed with discovery.

March 14, 1983: Petitioners' counsel files proposed stipulation of facts, including:

1. A list of individual instructors who fall within the Court's order;

2. Payroll distribution records;

3. Agreements between the Respondent Board and the Hamilton Township Education Association from 1969 to 1983.

April 11, 1983: Presettlement conference. Parties agree that if the case is not settled by April 25, 1983, hearing on the remaining issues will commence.

April 25, 1983: Settlement conference. Parties reach agreement on the following points:

1. Each of the petitioners will receive pay for all their years of employment as supplemental teachers on a ratio basis of full-time employment at the appropriate step of the salary guide.

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2. The appropriate step of the salary guide would be calculated as it is for all part-time teachers using the Board's salary under which a part-time teacher advances one step on the guide if the teacher worked one-half the number of days in a school year.

3. The above will constitute the complete and full settlement and all other claims will be dismissed with prejudice.

4. The parties will complete their calculations of salary entitlement on or before May 25, 1983. They will then compare and agree on the exact dollar entitlement which will be listed by years and amounts and totals through June of 1982. Also listed will be the adjusted entitlement for the current (1982-83) school year and how this will be handled. All of this will be reduced to writing in a signed stipulation of settlement which will be placed on an official record on a date to be requested by the attorneys of record.

5. No payment or adjustments will be made until approval of the settlement by the Commissioner of Education.

Hearing adjourned.

September 26, 1983: Conference of counsel. Settlement prevented by disagreement on two issues:

1. Whether a supplemental teacher with less than one-half the number of teaching hours of a full-time teacher should be advanced on the salary scale one step during an ensuing school year. It appears that there is no written policy in the district, but there is past practice which may be relevant.

2. Whether W-2 forms for some supplemental teachers showing greater amounts of earnings indicate that those teachers worked a greater number of hours than the Board's calculations show.

Opportunity for testimony on these issues set down for November 14, 1983.

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October 18, 1983: Substitution of attorney for the Respondent Board.

November 14, 1983: Adjournment of hearing based on possible settlement.

November 15, 1983: Conference call. The remaining issue concerns application of the 90-day rule to petitioners' movement on salary scales. The parties agreed to brief the remaining issue.

Due to the untimely death of the Honorable Eric G. Errickson, ALJ, responsibility for this matter was transferred to the undersigned. On December 12, 1983, I conducted another conference of counsel. The four issues set forth above were agreed to be in controversy, notwithstanding prior negotiations between the parties. The issues were addressed in briefs submitted as outlined above.

II

The parties disagree as to whether petitioners have any entitlement to retroactive pay. I **FIND** for the following reasons that they do.

In Spiewak, at footnote 3, at 84, the Court states:

> We do not decide what, if any, additional benefits the teachers in these cases are entitled to, either retroactively or prospectively. That is primarily a matter of contract and the relevant collective bargaining agreements are not part of the record. Further, the parties for the most part did not brief this question and the Appellate Division did not address it. We therefore remand to the Commissioner of Education to make that determination in accord with the principles laid down in this opinion.

In other matters involving other litigants, it may be arguable that there is no entitlement to retroactive pay. Here, however, we deal with persons who were parties to the action that was ultimately decided by the Supreme Court.

In the decision on remand in Spiewak, the Commissioner determined that petitioners there were entitled to salary compensation and non-monetary benefits consistent with the Supreme Court decision. Spiewak v. Rutherford Bd. of Ed., OAL DKT. EDU 8956-82 (July 20, 1983) adopted, Comm'r of Ed. (July 26, 1983).

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There is an abundance of decisions consistent with Spiewak. See, e.g., Piscataway Tp. Ed. Ass'n v. Piscataway Bd. of Ed., OAL DKT. EDU 8903-81 (Aug. 29, 1983) adopted with modf'n Comm'r of Ed. (Oct. 14, 1983). In addition, I have reread each of the 16 cases cited by the petitioners in their brief on this point (petitioners' brief at 2-4). The clear pattern in the cases among these that are apposite is full retroactive application of the panoply of benefits. The Commissioner has consistently said that Spiewak-type petitioners are entitled to the same pay, prorated according to time worked, as are all teachers under the terms of the relevant collective bargaining agreements.

In consideration of the long line of Commissioner's decisions affirming this position, I **CONCLUDE** that petitioners in this matter shall 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.

This question having been determined on the basis of case precedents, I expressly refrain from addressing the petitioners' arguments that the Board has waived its right to assert the position it here took, that the Board was estopped to deny petitioners' right to back pay based upon the regular teacher salary guides, and that the Board's position was in violation of the tenure laws.

III

The remaining issue as to compensation has to do with advancement on the salary guide. The Board takes the position that advancement on the salary guide occurs only if the petitioner has worked the equivalent of 50 percent of the available school hours during the school year. Petitioners take the position that they are entitled to such advancement if they worked the equivalent of one-half of the school year, i.e., 90 days or more.

In Scotch Plains-Fanwood Ed. Ass'n v. Scotch Plains-Fanwood Bd. of Ed., AGENCY DKT. 264-7/78 (Aug. 24, 1983), the administrative law judge stated, and the Commissioner affirmed, that the words "placement on the guide(s)" shall mean the placement on annual guides to which any regular teaching staff member was entitled consistent with then applicable Board policies, practices or provisions in negotiated agreements, by reason of the teachers' educational background and prior part-time and/or full-time services in or out of the district. Teaching experience as a part-time or full-

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time Title I, Compensatory Education or supplemental teacher from the date first employed by the board shall, in such computation, be considered the equivalent of any other regular part-time or full-time classroom teaching experience.

It is not denied that any teacher in the Hamilton district who has worked 90 days or more during the school year is entitled to advancement on the salary guide the next year. Given these facts, I **FIND** and **CONCLUDE** that petitioners here are entitled to advancement on the salary guide for every school year in which they worked 90 days or more. Such calculation is consistent with the reckoning of tenure acquisition in a part-time capacity.

IV

The petitioners contend and the Board strongly denies that the Commissioner should award attorney's fees, costs and interest in this matter. The Board asserts the Commissioner has consistently held that he has no authority to make such awards. See, e.g., Coyle v. Maple Shade Bd. of Ed., 1979 S.L.D. 522, 526; Fallon v. Scotch Plains-Fanwood Bd. of Ed., 185 N.J. Super. 142, 147-148 (Law Div. 1982).

The petitioners argue that, unlike the cases cited by the Board, the award of interest sought here is not interest from the date of the decision of the Commissioner or interest preceding the determination of a Commissioner's decision. Rather, the petitioners were awarded a judgment for the liquidated sum of damages by the New Jersey Supreme Court in June 1982. Petitioners seek interest on that judgment from that date. R. 4:42-11.

In addition, petitioners argue that this is in accord with the general law that school districts may become liable for the payment of interest even in the absence of a contract or statute in terms including it, if there is wrongful delay in the payment of an accrued obligation. The petitioners, as does the Board, cite Fallon, above.

As I read Fallon, the award of interest there was predicated on an unwarranted and unreasonable refusal by a board of education to reclassify a child as neurologically impaired and its refusal to reimburse her parents for tuition and transportation expenses. The court specifically invoked considerations of equity and justice in mandating an award of interest at the rate of eight percent per year. And I note that at 151 the court

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specifically determined not to award counsel fees, holding such to be inappropriate. Costs of the suit were similarly denied.

The petitioners' argument has two prongs. First, petitioners contend they should be awarded interest from the date of the decision in Spiewak as post-judgment interest pursuant to R. 4:42-11 and second because of the wrongful delay in the payment of this accrued obligation because the Board was at best dilatory and at worst acting in bad faith when it moved back from a position expressed in settlement negotiations. The position, simply, was that the petitioners were due compensation based upon the difference between the amounts paid regular teachers on the salary guides and the amounts petitioners actually received. The petitioners argue further that the Board itself manifested its acceptance of this position when, on October 19, 1983, it approved a retroactive salary adjustment for the school year 1982-83 for each petitioner still employed by the Board. In the view of petitioners, the Board's action constituted a ratification of the position taken in settlement negotiations and in itself constituted a waiver of its position which it now takes.

It is a matter of common experience that positions often are taken in negotiations that do not necessarily reflect the true positions or desires of the parties. It is not uncommon for positions to be put forth as no more that strawmen or bargaining chips.

The Board argues that the petitioners' citation to Fallon, above, simply confirms that the Commissioner cannot award interest. In that case, upon prevailing before the Commissioner, the petitioner therein was forced to bring his interest claim in Superior Court. The validity of his claim in that forum did not cure the Commissioner's lack of jurisdiction.

R. 4:42-11 clearly applies to practice in the Superior Court and Surrogate's Courts. The extent to which any of the New Jersey court rules shall apply in the Office of Administrative Law is clearly specified in the Uniform Administrative Procedure Rules of Practice (N.J.A.C. 1:1-1 et seq.). See, e.g., N.J.A.C. 1:1-5.5(d). There is no adoption of R. 4:42-11 in the UAPR.

Although the question of wrongful delay is arguable, I **FIND** that the Commissioner of Education lacks the authority to award interest in matters before him. I **FIND**, similarly, as to attorney fees. Fallon, above, at 151.

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V

In consideration of the foregoing, it is **ORDERED** that the Hamilton Township Board of Education compensate petitioners and credit them for non-monetary benefits in accord with these findings. The schedule and method of payments, as in Spiewak, above, are left to the Commissioner who has knowledge of the fiscal status of the school district and can best determine the schedule and method so as to avoid any undue hardship on the district. It is further **ORDERED** that, in the calculation of retroactive compensation to the petitioners, that each be credited with advancement on the salary guide for every school year in which she worked 90 days or more. Attached to this initial decision is an executed agreement regarding the amounts due to the respective petitioners which may aid the Commissioner's consideration.

In all other respects, the petition of appeal is **DISMISSED.** It is so **ORDERED.**

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

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

30 MARCH 1984
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

March 30, 1984
DATE

Seymour Wiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

April 3, 1984
DATE

Ronald L. Parker/sh
OFFICE OF ADMINISTRATIVE LAW

bm

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HAMILTON TOWNSHIP SUPPLEMENTAL TEACHERS' ASSOCIATION ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
HAMILTON TOWNSHIP BOARD OF EDUCATION, MERCER COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

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

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

Petitioners in primary exceptions do not object to Judge Campbell's determinations in Parts I, II and III differing only in concluding that the Commissioner should require the payment of interest, citing Fallon, supra. Petitioners threaten that, in the absence of an award of interest by the Commissioner, they will be forced to bring a separate action before the Superior Court of New Jersey. The Commissioner notes with approval the language set down, ante, by Judge Campbell in this regard pertaining to Fallon above:

> "***In that case, upon prevailing before the Commissioner, the petitioner therein was forced to bring his interest claim in Superior Court. The validity of his claim in that forum did not cure the Commissioner's lack of jurisdiction.***"

The same conditions prevail in the present case. The Commissioner so holds. Coyle, supra

The Board in primary exceptions urges the denial of all relief requested by petitioners herein. While conceding that petitioners have offered citations which support the judge's findings, the Board reasserts its arguments that these holdings incorrectly interpret Spiewak. The Commissioner simply cannot agree. He finds the judge's conclusions to be directly on point according petitioners retroactive compensation. The Commissioner so holds.

Petitioners in reply exceptions refute the arguments of the Board and urge their rejection.

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The Commissioner notes with approval the decision by Judge Campbell that petitioners herein have entitlement to retroactive pay in accordance with the joint understanding submitted by the parties under date of January 10, 1984. This submission attached hereto is adopted by reference by the Commissioner and shall form a part of the initial decision in settlement of this controverted matter. Spiewak, supra; New Milford Education Association, Anita Scult et al. v. Board of Education of the Borough of New Milford, decided by the Commissioner September 20, 1982 and April 13, 1983, aff'd State Board May 4, 1983, rev'd/rem'd Superior Court of New Jersey, Appellate Division, March 14, 1984, Docket No. A-4740-82T3

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

From his own records the Commissioner determines that the payments to petitioners listed in the joint understanding can and shall be made from the current expense budget for the school year 1983-84 without impairment to the thorough and efficient education for the pupils of the district. This determination is made in light of the notice available to the Board as to its potential obligation since the rendering of the decision in Spiewak, June 23, 1982.

IT IS SO DETERMINED.

MAY 14, 1984 COMMISSIONER OF EDUCATION

PENDING STATE BOARD

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5667-83
AGENCY DKT. NO. 181-6/83A

THOMAS J. SANTARSIERO, DONALD H. BABB, EMIL FAHRMAN, MORTON R. SPORN, KATHLEEN L. ZEEK AND NANCY V. BLAKELY,
Petitioners,
v.
PARSIPPANY-TROY HILLS BOARD OF EDUCATION,
Respondent.

APPEARANCES:

Robert M. Schwartz, Esq., for petitioners

Kenneth C. Schneier, Esq., for respondent
(Dillon, Bitar & Luther, attorneys)

Record Closed: February 14, 1984 Decided: March 30, 1984

BEFORE ELINOR R. REINER, ALJ:

On June 3, 1983 petitioners, Thomas J. Santarsiero, Donald H. Babb, Emil Fahrman, Morton R. Sporn, Kathleen K. Zeek and Nancy V. Blakely, filed a Petition of Appeal with the Commissioner of Education alleging that they had acquired tenure as supervisors in their positions as area chairpersons and seniority in the position of district program supervisor. Respondent filed its answer to the petition on June 29, 1983 denying that the position of area chairperson was a position for which tenure could be acquired.

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On July 26, 1983 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 October 17, 1983 at which time the following issues were isolated:

(1) Did petitioners acquire tenure as supervisors in their positions as area chairpersons?

(2) If so, can petitioners' seniority in the positions of area chairpersons be applied to the newly created position of district program supervisor?

Pursuant to the Prehearing Order, the parties provided the court with a Stipulation as to the pertinent facts and documents regarding this matter. The Stipulation of Facts, as well as the attached exhibits, received into evidence as PR-1, are incorporated by reference herein and constitute this court's partial findings of fact. In addition, a hearing was held before this judge on December 1, 1983. Witnesses who testified and documents considered in deciding this case are listed in the appendix attached hereto.

As may be gleaned from a review of the Stipulation of Facts filed in this matter, the majority of the relevant facts essential to a determination of the issues raised herein are essentially uncontroverted. Of particular import is the fact that petitioners are tenured teaching staff members in respondent's school district and until July 1, 1983 also served in the positions of area chairpersons. The area chairperson position entailed supervisory responsibilities and "it was imperative that all Area Chairmen . . . hold a certificate which authorizes them to supervise and evaluate personnel" due to the "growing complexities of the evaluation process and the advent of stricter rules and regulations." As a result of a reorganization which occurred in January 1983, the position of area chairperson was abolished effective July 1, 1983. In its place, respondent created

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two positions, district program supervisor and department head. None of the petitioners was selected for the position of district program supervisor; however, each petitioner who applied for the department head position received appointment as such.

In view of the stipulation entered into between the parties, testimony at the trial centered upon a factual consideration of the requirements of the three positions at issue (area chairperson, district program supervisor and department head). More to the point, the focus was directed to the issue of whether the duties of area chairperson are essentially the same as, or identical to, that of district program supervisor, the positions to which petitioners were not appointed and the positions which they seek to gain as a result of this litigation. In support of their allegation that the position of area chairperson is closely akin to the position of district program supervisor, petitioners relied upon the testimony of Thomas J. Santarsiero.

Petitioner Santarsiero testified with great specificity as to his duties as area chairperson. His testimony as to each of his functions in that capacity may be summarized as follows:

1. Santarsiero recalled that as area chairperson for the science department, he had evaluated and observed every teacher in his department. He indicated that from 1977 on he observed nontenured teachers three to four times a year and tenured teachers two times a year. On those occasions he sat in on a full class period, wrote an official evaluation, and held a post-conference meeting with the teacher. The process also involved meeting with the principal and, at times, with the vice principal regarding his evaluation. Santarsiero indicated that the principal would then incorporate those evaluations into the final evaluation of the teacher which was sent to the Board of Education under the principal's name. Although the principal discussed his evaluation of a teacher with Santarsiero before

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submitting it to the Board, Santarsiero stated that he did not see these written evaluations and did not meet with the central administration regarding them.

2. Santarsiero indicated that as part of his responsibility as area chairperson he worked with the teachers who he observed in preparing professional improvement plans. The plan, which involved a decision as to which area a teacher would be working in, normally was arrived at jointly between the teacher and the department chairperson. Then in the upcoming year the professional improvement plan was monitored in order to determine the progress the teacher was making. The plan was to be completed by the teacher prior to the time the evaluation was accomplished in March.

3. Santarsiero indicated that he made recommendations to the principal when it became apparent that some form of disciplinary action against a teacher was necessary. More particularly, he stated that he had made a recommendation on an occasion to withhold an increment from a teacher and, in addition, over the years had recommended certain nontenured teachers not be rehired.

4. Santarsiero testified that he was involved in the hiring of teachers in the science area in his school. The process usually involved screening applications, contacting the applicants who he believed were best qualified for the job and, thereafter, making a recommendation as to the three individuals who should be seen by the principal and/or the vice principal of his particular school. He recalled that when the prospective employees were interviewed by the principal or vice principal, he usually sat in on the interviews. He noted that the three administrators would make a joint decision as to who would be hired.

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5. Santarsiero testified that as an area chairperson he was involved in providing in-service programs for the teachers in the science areas. He stated that on assigned "curriculum" days (one or two a year), he was responsible for coordinating with his counterpart at the other high school to develop a program for that particular day.

6. Santarsiero testified that, as an area chairperson, he was involved in developing continuity between a science program at the junior high school and a freshman science program at the high school. In fact, Santarsiero indicated that the assistant superintendent called one or two meetings a year with the four area chairpersons (area chairpersons of the two junior high schools and the two senior high schools), apparently in an effort to maintain the necessary continuity.

7. Testifying as to the involvement of area chairpersons in student evaluation programs, Santarsiero recalled that standardized exams were developed jointly by the departments of both schools so that every student would take the same final exam at the end of the year. He stated that this program was coordinated by the area chairpersons and developed through the cooperation of the teachers.

8. As to his responsibility with regard to the science curriculum while he served as the area chairperson for the science department, Santarsiero stated that after a request had been made by Dr. Talty, the assistant superintendent in charge of curriculum, he and the science area chairperson in the other high school drafted an "outline for a K-6 enrichment science summer program." Moreover, Santarsiero indicated that he was responsible on an ongoing basis for monitoring, updating and keeping abreast of current materials. He stated that this responsibility involved text selection and the updating of curriculum. Santarsiero noted that he served on a K-12 curriculum committee that was responsible for monitoring and developing science programs on a K-12 level.

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9. In regard to his involvement with the teachers in his department, Santarsiero stated that he had called meetings with the teachers at least twice a month. Additionally, he had occasion to have meetings with teachers outside of his school (but within the science area) on curriculum days. On such days, time was put aside for subject-area curriculum development, and he and the science chairperson in the other high school would have joint meetings with the respective teachers in both schools.

10. Santarsiero recalled that the principal and vice principal would meet at least two times a month with the administrative council (principals, vice principals and area chairpersons).

11. Santarsiero stated that he was involved every year in conducting an inventory of instructional materials and equipments.

12. Santarsiero noted that he had prepared a district summary report for his department which summarized the accomplishments and needs of the department over the year. This report was sent to the principal and, apparently, became part of the school report, the total report that the principal sent to the Board office.

13. Testifying as to an area chairperson's role in effecting school policy, Santarsiero indicated that the Board of Education requested a meeting with each department at least once a year. At these meetings, the area chairpersons (the two junior high school area chairpersons and the two senior high school area chairpersons) would make a presentation to the Board and present either new courses or books or discuss any other timely issue.

14. Santarsiero stated that as an area chairperson he was involved in scheduling teacher assignments. Thus, when students made their subject selections and the numbers were known, he would make recommendations

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to the principal as to the assignment of teachers to teach certain courses. He noted that these recommendations were almost always followed.

15. Referring to the budgeting process, Santarsiero indicated that approximately a year and one-half to two years prior to each budget year, he would get involved in what is called a PPBS Program (a planned budget). This would require that he project a budget in the area of equipment and supplies for the upcoming year and one-half to two years for the science department at Parsippany High School. He indicated that on the "immediate level" the figures would be looked at, approved by the Board and then sent back with the requirement that he work around those figures.

16. Santarsiero indicated that he received his assignments either from Dr. Talty, the assistant principal, or the vice principal.

17. Santarsiero stated that he taught two classes (12 periods a week) out of a possible four, and that the rest of the day was utilized for supervising and managing the department. Santarsiero indicated that at present certain district-wide supervisors also teach, i.e., the supervisor of language, the home-economics supervisor, and the business-education supervisor.

In further testimony, Santarsiero contrasted his present position as department head with his prior position of area chairperson. Thus, Santarsiero stated that a department head is required to only hold a teacher's certificate and is supervised by the district-wide supervisor. Further, and in terms of functioning, Santarsiero stated that as a department head he teaches a full load (24 periods per week), is no longer involved in observing or evaluating teachers, and is involved in curriculum formation or monitoring in the science area only insofar as the current supervisor might request his involvement. (Santarsiero did indicate that he meets with the district program supervisor regarding curriculum planning approximately two to three times a month.) In addition, as of the

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date of the hearing Santarsiero indicated he had not been involved in formulating the budget for the science department (that responsibility would be exercised, if at all, later in the year) nor had he been involved in the scheduling of teachers or been asked to prepare department reports, a function which would not occur until May or June.

In an effort to place the reorganization in its proper context, respondent called Arthur P. Mildner, director of personnnel and employee relations at respondent, to the stand to testify. Mildner, who participated in the reorganization of the school district, sought to explain the three positions at issue. Referring to the area chairperson position, he explained that it existed at all four secondary schools. He considered the position to be building-based, inasmuch as the area chairperson reported to the principal. He stated that area chairpersons were required to assist the principals in a number of quasi-administrative functions. Although considered to be regular teachers, they received a stipend, which was negotiated by the bargaining unit, for this extra responsibility. He noted that the assignment was considered to be subject to annual reappointment by the principal and was not viewed as tenurable. (In fact Mildner indicated that prior to 1982, when the area chairpersons were represented by the teachers' union, there was no expectation by them that they were tenurable in that position.) Although Mildner did not dispute the fact that area chairpersons dealt with substitutes, helped in terms of staffing, were involved in the budgeting process, and assisted the principal in ordering equipment, he was quick to point out that area chairpersons did not report to the central administration, operated on a teacher's calendar, and were paid twice a month in the same manner as classroom teachers.

Referring with greater specificity to the functions of an area chairperson, Mildner indicated that area chairpersons were given release time from their teaching load in order to perform the functions required of that position. Thus in general, in an eight-period day an area chairperson taught three periods rather than five and had two periods of release time. Although admitting that area chairpersons performed some supervisory functions, he contended that a minor portion of their day was devoted to such functions. In fact, Mildner indicated that the requirement for observation and evaluation (at least

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three observations and a final evaluation) rested with the building principal. Noting that an observation could be accomplished by the building principal, the assistant principal or the area chairperson, Mildner advised that if an area chairperson were to perform such a function, the observation form would be submitted to the building principal. Moreover, an evaluation (a compilation of the total year's work) would be prepared by the building principal, signed by the building principal or the assistant principal, and submitted to this witness. An area chairperson was not responsible for signing a final evaluation form.

Referring to the reorganization, Mildner indicated that it was a serious attempt by the board to upgrade the staff in terms of evaluation, supervision, and the development of curriculum. He recalled that after the Board took action on the reorganization, it advertised for the ten positions. He stated that the Board was looking for individuals strong in their subject field, employed in a supervisory level with advanced degrees, a supervisory certificate, and a strong curriculum background. Noting that they had, in fact, hired such individuals, Mildner indicated that none of the petitioners holds a doctorate degree, has district-wide supervisory experience, has held a position which has primarily supervisory or administrative functions, or held a position which reports to the central administration. He, therefore, contended that they did not fulfill the requirements for the district supervisor's position.

Referring to that position, Mildner informed the court that it is a central office position (a program supervisor reports to the superintendent, Dr. Talty, and works an administrator's calendar) which requires responsibility for curriculum K-12 in a specific subject area (with regard to curriculum in the K-6 level, the supervisor would work with all teachers in that area), and supervision of staff in the area on all levels. Referring to the role that the district program supervisor plays in the evaluation and observation of teachers, Mildner stated that it is the prime responsibility of district program supervisors to observe and evaluate, in conjunction with building principals, the teachers within their department. More specifically, he stated that they are to observe K-12 in those instances

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where there are specialists at the lower level and 7-12 for the more traditional secondary areas. Noting that there are two senior high schools, two junior high schools, eight elementary schools, and one special school, Mildner indicated that a district program supervisor has responsibility for 12 and, possibly, 13 schools. He stated that it was anticipated, however, that more observations would be done by the district program supervisors than had been done by the area chairpersons and alleged that, in fact, there have been more observations of a formal nature under the new system than there had been in the past. Admitting that in some cases an evaluation might be done by the building principal or assistant principal, Mildner indicated that for the most part it should be done by the district program supervisor, who would, in fact, sign the final evaluation. Mildner stated that this approach places the district program supervisor in a better position than an individual principal to decide, based upon the abilities and performance of a teacher, the appropriate slot for that teacher. Referring to a district program supervisor's responsibility with respect to curriculum, Mildner stated that a district program supervisor has, as a prime responsibility in the subject area, the development and articulation of curriculum on a K-12 district-wide basis. Thus, the district program supervisor is responsible for working with teachers at every level within the particular subject area, is part of a district standing committee and has a leadership position in needs assessment in terms of the various curriculum areas. In addition, a district program supervisor has a leadership role in the preparation of the budget on a program basis.

In contrast, Mildner explained that a department head, the position in which Santarsiero is now functioning, is more like a head teacher, a master teacher in the field. As such, a department head has chief clerk-type functions and is not responsible for observation and supervision of staff. Thus, although a department head is not responsible for a duty assignment, a department head has no release time. Referring to the area chairperson position, it was Mildner's opinion that it is in fact more similar to a department head than a program supervisor. Mildner based this conclusion on the fact that there is a stipend for both positions, both are building-based, and department heads are included in the teachers' bargaining unit. Moreover, Mildner stated that in the past Dr. Talty met at least once or twice a year with all the area chairpersons from junior and

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senior high schools; area chairpersons have never attended administrative council meetings. Under the present system the administrative council, consisting of all the administrative and supervisory personnel of the district, meets two times a month; district program supervisors are part of this administrative council.

Mildner did admit, however, on cross-examination that both area chairpersons and district program supervisors assisted in observations and were involved in, and responsible for, professional improvement plans with respect to teachers. Mildner indicated, however, that in his opinion there is a difference in the involvement in such functions as evaluations and withhholding of increments between program supervisors and area chairpersons. In addition, Mildner admitted on cross-examination that although the three area chairpersons who were selected for the position of district supervisor had been involved in committee work, they did not have district-wide supervisory experience.

This court has reviewed the testimony and evidence presented in an effort to determine the similarities and differences in the three positions which are at issue. In so doing, this court finds that the three positions may properly be characterized as follows:

The Area Chairperson Position

The position of area chairperson was an extra-responsibility assignment performed by a teacher as an adjunct to his primary teaching responsibilities from which he was granted "release time." It was primarily a building-based position, confined to a single department in a single high school or junior high school. The position was selected annually by the building principal and approved by the Board. An area chairperson essentially had no responsibilities outside of his school and particular department in which he taught, and no area chairperson had responsibilities for any grade level below grade 7.

Each area chairperson reported to his building principal and not to the central administration of the district. An area chairperson worked an 184-day teacher's calendar and, as a teacher, was paid bimonthly over a ten-month year. He received an annual

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stipend for his area chairperson function, reflected by a "notification of extra responsibility," separate and distinct from his teacher's contract and issued at a different time. Until the 1982-83 school year, area chairpersons were represented for collective bargaining purposes by the districts teachers' union, the Parsippany-Troy Hills Education Association. For the 1982-83 school year, area chairpersons chose to be, and were, represented by the Parsippany-Troy Hills Supervisors' Association. Each area chairperson performed some limited supervisory function, including observing teachers within the department and making personnel recommendations to the building principal. Clearly, all such services were restricted to the department and building in which the chairperson taught. Moreover, although an area chairperson would submit periodic observation reports to the building principal relating to teachers within the department, all final evaluations were prepared, signed and submitted to the central administration by the building principal. Of particular import is the fact that the supervisory functions of an area chairperson were minimal on a quantative scale. In the first place, each area chairperson spent the majority of assigned time teaching. Furthermore, a substantial portion of the function involved nonsupervisory responsibilities, such as making budget recommendations and ordering department materials and equipment.

District Program Supervisor Position

The position of district program supervisor is a district-wide position covering all grade levels (It is to be noted that in grades K-6 the building principals remain responsible for evaluating teachers who are not separately certificated.) and is not building based. The primary responsibility of the position is the effective evaluation of teaching staff members and the development of consistent district-wide curriculum. District program supervisors are responsible for observations and evaluations and, more particularly, for signing and delivering final evaluations to the central administration.

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The position reports directly to the assistant superintendent for curriculum and instruction and not to any building principal. It is a full-time administrative position requiring a single contract which calls for a 212-day year based upon the administrator's calendar and payment over a 12-month year. District program supervisors are incorporated into the districts administrators' union, the Association of Parsippany School Administrators (APSA) for collective bargaining purposes. District program supervisors participate in semi-monthly meetings of the administrative council, which is comprised of all administrative and supervisory personnel in the district.

Department Head Position

The position of department head was designed to perform "chief clerk" or "head teacher" functions. Department heads have no responsibility for observation or supervision of staff. The position of department head is a building-based, stipended, extra-responsibility assignment. The department head is selected by the appropriate building principal and represented by the teachers' union. It is primarily a teaching job with release time granted by the building principal for administrative work. Department heads have no district-wide responsibility and no responsibility below grade 7.

PETITIONERS' ENTITLEMENT TO TENURE

As discussed above, at issue in the instant case is whether petitioners acquired tenure as supervisors in their positions as area chairpersons. In support of their claim to tenure, petitioners argue that they accrued tenure as supervisors while serving in the position of area chairperson, since the position required a general supervisory certificate. In fact, and more specifically, petitioners contend that when a Board of Education assigns duties that are basically supervisory in nature to individuals who are designated as

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"supervisors" in a district's table of organization, there can be no question that service in such position for the requisite period of time pursuant to N.J.S.A. 18A:28-5 and 28-6 confers tenure upon such individuals as supervisors. Petitioners allege that in this instance the positions held by petitioners were supervisory in nature because of the certification required and the duties performed. Accordingly, petitioners contend that they acquired tenure as supervisors since they met all the precise requirements of the Tenure Law.

Respondent does not agree with petitioners' contention. Rather, respondent opines that the testimony and stipulations of the parties in this case demonstrate that the Board at no time considered or portrayed the position of area chairperson as tenure eligible. Respondent believes that petitioners' acknowledgement of the status of the position as an extra-responsibility assignment, confirmed annually in writing, coupled with the service as area chairperson fail to satisfy the legal prerequisites for tenure. In sum, respondent contends that the position of area chairperson, as it existed in the district, was simply not tenure eligible.

This court has considered the arguments presented by both parties and must agree with the conclusion urged by petitioners. Tenure is a statutory right which inures to all teaching staff members who meet the precise condition of the statute. Spiewak v. Rutherford d. of Ed. 90 N.J. 63, 77 (1982); Zimmerman v. Bd. of Ed., 38 N.J. 65, 72 (1962), cert. den., 371 U.S. 956 (1963). Generally, tenure is available to teaching- staff members who work in positions for which a certificate is required, who hold valid certificates, and who have worked the requisite number of years. Thus, N.J.S.A. 18A:28-5 provides that teaching-staff members who hold proper certificates shall obtain tenure status after having been employed in a local school district for (1) three calendar years; (2) three consecutive academic years, with employment at the beginning of the next succeeding academic year; or (3) the equivalent of three academic years within a period of four consecutive academic years. Once tenure as a teaching-staff member within the

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school district has been attained, additional tenure protection may be achieved in a specific work category. See, Keane v. Flemington-Raritan Reg'l. School Dist. Bd. of Ed. 1970-71 S.L.D. 162, 164. N.J.S.A. 18A:28-6 controls this categorical tenure and provides that such protection may be obtained in a position 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 . . . .

With reference to the position of area chairperson, and, in general in order to achieve tenure in that position, the tenured teaching-staff member must be assigned to that position with full knowledge and approval of the local Board, and serve, holding a Board-required supervisor's certificate or its equivalent, for the period prescribed by N.J.S.A. 18A:28-6. Support for this conclusion can be gleaned from McCormick v. Hunterdon Center Reg'l. H.S. Dist. Bd. of Ed., 1978 S.L.D. 160, 169, aff'd, 1980 S.L.D. 155, aff'd, St. Bd. of Ed. (June 11, 1980), which indicates that one way to demonstrate that a chairperson's position is tenurable is to show that the local Board adopted a policy or a job description requiring supervisory certification. In McCormick, petitioner, by assignment, and with full knowledge and approval of the Board, was required to supervise instruction. By existing Board policy, he was required to be certified as a supervisor. In that capacity, he served as a tenured teacher with a supervisor's certificate for a period in excess of two years. According to the Commissioner, "[t]hat service, by statutory prescription,

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established him as a supervisor of instruction with a tenure status." N.J.S.A. 18A:28-6, 1978 S.L.D. at 169. The Commissioner rejected the argument that only by the Board's act of conferring tenure could he gain that status. See, Zielensky v. Bd. of Ed. of Guttenberg, 1970 S.L.D. 202, den., St. Bd. of Ed., 1971 S.L.D. 664, aff'd, 1972 S.L.D. 692 (N.J. App. Div., Feb. 16, 1972) (unreported). See also, Vieland v. Princeton Reg'l. Sch. Dist. Bd. of Ed., 1976 S.L.D. 892, aff'd, St. Bd. of Ed., 1977 S.L.D. 1308 in which the Commissioner in determining that petitioner held tenure as director of staff services indicated that "petitioner clearly performed supervisory duties in the period July 1, 1972 to June 20, 1975 at the direction and knowledge of the Board. Such duties, in a full-time position were those within the parameters of the supervisor's authority . . . and they were performed with the full knowledge of the Board which approved them as part of a job description." 1976 S.L.D. at 898.

Clearly, and more particularly, with respect to the requirement of Board approval, both the job description and the employment of a particular person in that position must be approved by the local Board pursuant to N.J.S.A. 18A:27-1 and 18A:27-4. See, Buehler v. Ocean Tp. Bd. of Ed., 1970 S.L.D. 436, 440-442, aff'd, St. d. of Ed., 1971 S.L.D. 660, aff'd, 1972 S.L.D. 664 (N.J. App. Div., Nov. 2, 1972)(unreported). Moreover, the job description should apparently be analogous to that of some expressed category under the statute or the regulations in order for a chairperson to acquire tenure. See, Wilson v. New Brunswick Bd. of Ed., 1977 S.L.D. 555, 560 in which the Commissioner, recognizing that the title of department chairperson is not a title set forth in the tenure statute or in the relevant provisions of the New Jersey Administrative Code, Title 6, Education, found that the record in that case failed to disclose a preponderance of evidence to support a finding that the Board had knowledge of the specific duties performed by petitioner other than those of department chairperson, which it correctly assumed required no other certification than that of a teacher of social studies. Thus, the Commissioner determined that the superintendent and his administrative staff had exceeded their authority in assigning petitioner supervisory duties, notwithstanding the

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fact that petitioner had acquired a supervisor's certificate issued by the State Board of Examiners. Id. at 562-563. See also, Van Houten v. Middletown Tp. Bd. of Ed., 1977 S.L.D. 984, 1978 S.L.D. 1044, Comm'r. of Ed. (March 6, 1981). Further, it has been determined that for an area chairperson to acquire tenure in that position, a certificate other than that of a teaching staff member must be held. Wilson, at 562-64; Boney v. Pleasantville Bd. of Ed., 1971 S.L.D. 579, 582-84. Thus, apparently because there is a supervisor category in the administrative regulations concerning certification within which tenure may be obtained (See N.J.A.C. 6:11-10.4(c)) many cases have turned on whether a supervisor's certificate was required by a local board for the position of department chairperson. See, e.g., Van Houten, Wilson, Buehler. See also, Dignan v. Rumson-Fairhaven Reg'l. H.S. Bd. of Ed., 1971 S.L.D. 336, aff'd, St. Bd. of Ed., 1974 S.L.D. 1376, aff'd, N.J. App. Div. 1975 S.L.D. 1003 in which the Commissioner considered whether a certificate other than that of a teacher was required in order to determine whether petitioner had tenure in his extra-responsibility assignment.

The prior discussion clearly shows that when a Board of Education assigns an individual to a supervisory position (apparently by approving a job description which indicates such responsibility), the individual may acquire tenure in that position if he serves the requisite length of time and is in possession of a proper certificate. Tenure cannot be defeated because a Board at no time considered or portrayed a position such as area chairperson as tenure eligible. See, Paternoster v. Boro of Leonia Bd. of Ed., OAL DKT. EDU 5989-80 (August 19, 1981), rev'd on remand, Comm'r. of Ed., Nov. 9, 1982, rev'd, St. Bd. of Ed. 1984 S.L.D. _____ (March 8, 1984). In addition, once the statutory time period has been served in a supervisory capacity, a chairperson's tenure is not limited to a particular subject area, but rather such individual would have tenure as a supervisor generally. See, Flanningan v. Camden Bd. of Ed., 1980 S.L.D. 1283, aff'd, Comm'r. of Ed. 1980 S.L.D. 1289.

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In the instant case, petitioners were clearly assigned to the position of area chairperson with the full knowledge and approval of the local Board. Likewise, there was a formal adopted job description outlining the duties of an area chairperson. These duties were sufficiently supervisory in nature to place petitioners within a category in which they could obtain tenure. While the job description failed to give a specific certification requirement, the undisputed testimony elicited at the hearing indicated that a supervisor's certificate was required. In fact, it was apparent to all that pursuant to N.J.A.C. 6:3-1.19 a department chairperson was required to hold either an administrative or supervisory certificate if he or she were required to periodically observe and evaluate non-tenured teaching-staff members. Thus, it appears that tenure status accrued to petitioners because they served at the direction of the Board for the requisite period, functioned as supervisors at the direction of the Board, and were certified as such.

PETITIONERS' ENTITLEMENT TO THE POSITION OF DISTRICT PROGRAM SUPERVISOR

Based on the facts outlined above, it is petitioners' contention that although the position of area chairperson may have been abolished, there presently exists the newly created supervisory position of district program supervisor. It is this position to which petitioners claim to be entitled. Referring to this position, it is the contention of petitioners that the position of district program supervisor requires the performance of duties identical to those performed by the previous area chairpersons, petitioners. More particularly, it is their view that the only difference between the two positions is a matter of degree, not substance. In contrast, they contend that in light of the fact that only a teacher's certificate is required and no actual supervision or observation takes place, the position of department head, in which most of the petitioners presently serve, is not a supervisory position. Therefore, a comparison of the duties of the position, as well as an acknowledgement of their certification, requires that they have seniority in the position of district program supervisor.

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In contrast, respondent recognizes its inherent right to change the administrative or supervisory organization of the district pursuant to N.J.S.A. 18A:28-9 and argues, more to the point, that the characteristics and demands of the area chairperson and district program supervisor positions are too disparate to permit service in one to accrue seniority in the other. In support of its position it cites Jablonski v. Emerson Bd. of Ed., (N.J. App. Div., March 6, 1984, A-6100-82T2) (unreported) in which the question at issue was whether a new position created by the Board required responsibilities which were substantially identical with the position and responsibilities of the previous position. Referring to that case, respondent contends that petitioners failed to establish that the positions of area chairperson and district program supervisor are "substantially identical," as required by Jablonski. Rather, it is respondent's belief that the bulk of the testimony underscores the striking dissimilarity between the two positions.

In reaching a determination on this issue, this court must agree that the question of whether petitioners' service and tenure in the position of area chairperson can be applied to the newly created position of district program supervisor depends upon whether the duties performed in both positions are substantially the same. See, Luppino v. Bayonne Bd. of Ed., 1980 S.L.D. 1028, aff'd, Comm'r. of Ed. 1980 S.L.D. 1039. See also, Jablonski, where the administrative law judge in a similar circumstance stated:

> The central issue in this case is whether or not, when the Board created the new position of Administrative Assistant to the High School Principal in 1982, it created a position whose responsibilities were substantially identical with the position and responsibilities of the Director of Guidance. The answer to that question is no. The Board created a position which included all the duties of Director of Guidance but which had greater and additional responsibilities. Having decided the major question in the negative, it follows that Mr. Jablonski's seniority and tenure rights were not violated when he was not employed as the Administrative Assistant to the high school principal. He was not automatically entitled to that position as it was not substantially the same in duties or in title, to the one he had had before. See N.J.S.A. 18A:28-9 and N.J.A.C. 6:3-1.10 . (f) . . .

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See also, Boesure v. No. Bergen Tp. Bd. of Ed., 1974 S.L.D. 805; and Quinlan v. No. Bergen Tp. Bd. of Ed. 1959-60 S.L.D. 113, aff'd, 1960-61 S.L.D. 243, aff'd, N.J. Super. 40 (App.Div. 1962).

It is, therefore, clear that here, as in Luppino and Jablonski, if it is found that the duties performed by petitioners as area chairpersons are substantially similar to the duties performed in the new position of district program supervisor, then petitioners' seniority in the positions of area chairpersons could be counted towards the position of district program supervisor. Clearly, petitioners' claim to the new position of district program supervisor rests on a theory of identity between the two positions. That being so, it therefore behooves this court to compare the two positions in an effort to determine whether the duties performed in both positions are substantially similar.

In so doing, this court notes that although both positions involve some supervisory functions, the duties of district program supervisor differ from, and are greater than, the duties of area chairperson. Clearly, the district program supervisor's position involves a great deal more supervisory-type tasks on a larger scale than the position of area chairperson. It is the view of this court that service in the building-based extra responsibility of area chairperson is different from the new district-wide, K-12 full-time role of the district program supervisor. As is apparent from a review of the facts outlined with specifity above in regard to the three positions at issue, in comparison to the district program supervisory position, the supervisory functions of an area chairperson were minimal on a quantitative scale. The fact of the matter is that area chairpersons were primarily teachers who were required to expend the majority of the assigned time teaching and the remainder performing area chairperson tasks. In contrast, a district program supervisor is a full-time administrative position. The supervisor is responsible for all grade levels and reports to the central administration. Far from reflecting a mere "difference in degree," the Board's 1983 reorganization implemented a fundamental change

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in supervisory philosophy by establishing for the first time, full-time supervisor positions in the district. Simply because the two positions may have at times required similar duties does not make them substantially similar so as to require that petitioners be entitled to the positions of district program supervisor.

Based on the foregoing discussion and findings of fact, I **CONCLUDE** that petitioners have acquired tenure as supervisors in their positions as area chairpersons. However, this judge **CONCLUDES** further that that inasmuch as the position of area chairperson is not substantially similar to the position of district program supervisor, petitioners are not entitled to be appointed to the newly created position of district program supervisor.

Accordingly, it is hereby **ORDERED** that petitioners be afforded their tenure rights as supervisors in accordance with this opinion.

It is further **ORDERED** that petitioners' claims for entitlement to the position of area chairperson are **DENIED** and in that regard petitioners' appeal 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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OAL DKT. NO. EDU 5667-83

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

March 30, 1984
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

March 30, 1984
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

April 3, 1984
DATE

Ronald L. Lakerfeld
FOR OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

List of Witnesses:

Thomas J. Santarsiero
Arthur P. Mildner

List of Exhibits:

PR-1	Stipulations of Facts as to documents dated November 17, 1983
P-1	Memo to Dr. M. Talty from E. J. Helmeier, T. J. Santarsiero, dated March 10, 1982, re Summer Science Enrichment Program - Grades 1 through 6
R-1	Memo to Thomas Santarsiero from Joseph R. Windish, dated April 29, 1982
R-2	Notification of extra responsibilty assignment for the school year 1982-83
R-3	Acknowledgement of receipt of notification of employment, contract and salary status, dated June 23

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THOMAS J. SANTARSIERO ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF PARSIPPANY-TROY HILLS, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the entire record of this case including the initial decision rendered by the Office of Administrative Law, Elinor Reiner, ALJ.

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

Petitioners take exception to the judge's determination that the majority of an area chairperson's time was spent in teaching, asserting that it is incorrect to characterize said position as primarily that of a teacher who was required to expend extra or remaining time performing supervision. The area chairperson's role in evaluation, observation and other supervisory tasks was not minimal; it was a key component of the position.

Petitioners further contend that the judge appeared to base her conclusions with respect to seniority on the regulations contained in N.J.A.C. 6:3-1.10 which became operative on September 1, 1983 when, in point of fact, the regulations in effect prior to that date constitute the governing law.

Petitioners contend that prior to September 1, 1983 seniority regulations contained the following basic categories for the position of supervisor which were:

No. 10 General Supervisor
No. 11 General Secondary Supervisor
No. 12 General Elementary Supervisor
No. 13 General Vocational Supervisor
No. 22 Subject Supervisor (N.J.A.C. 6:3-1.10)

They aver that both positions controverted herein, area chairperson and district program supervisor, are subject supervisor positions and the only distinguishing difference between the two positions is the number of individuals for whom there is supervisory responsibility. Therefore, petitioners contend that the seniority rights that accrued while serving as area chairperson should be

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applied to the current district program supervisor position, particularly since said regulations do not distinguish between a subject supervisor position limited to a building and one which is district-wide.

Lastly, petitioners assert that the judge totally ignored Flanagan, supra, a matter which the Commissioner cites as controlling case law in Rudolph-Nachtman v. Board of Education of Middletown Township (decided by the Commissioner September 29, 1983). Pursuant to these cases, petitioners avow that they should be placed in the new subject area supervisory positions created as a result of the Board's reorganization.

The Board in its reply to these exceptions asserts that the judge's determination that the supervisory aspect of the area chairperson position was quantitatively minimal is correct and that she appropriately characterized the central issue as being whether the duties performed by virtue of the two positions were substantially the same. Pursuant to this, the Board asserts that the judge correctly recognized that the two positions were qualitatively different in that the area chairperson position was a building-based, limited grade level title which reported to the school principal; moreover, the judge accurately characterized the supervisory responsibilities as minimal when compared to their responsibilities as teachers. Petitioners were paid on a ten-month teacher's contract and received an annual stipend for extra responsibility. The Board points out that, although they were provided with release time from their teaching duties, no area chairperson taught less than half-time. In contrast to the area chairperson position, district program supervisors are fulltime supervisors who work on an administrator's calendar, are included in the administrators' bargaining unit and are compensated in accordance with the administrators' salary scale for duties which are solely supervisory.

In addition, the Board contends that a claim to seniority is also defeated by N.J.A.C. 6:3-1.10(e) which permits teaching staff members holding employment in more than one category to accrue seniority only in the category in which the greatest percentage of time is spent. It also asserts that the judge does not purport to base her conclusions on the regulations operative on September 1, 1983, an assertion with which the Commissioner agrees.

As regards the controlling case in the instant matter, the Board asserts the judge was correct to rely on Jablonski, supra, and other case laws cited in the initial decision, to reject petitioners' claims to seniority. To strengthen its assertion that such a determination is appropriate, the Board cites at length Franklin Twp. Ed. Assoc. v. Franklin Twp. Bd. of Ed., decided by the Commissioner December 22, 1980 as factually identical to the instant matter. In Franklin the Commissioner upheld the respondent board's supervisory reorganization whereby district-wide subject supervisors

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replaced building-based department chairpersons. In addition, the Board asserts that petitioners' reliance on Flanagan, supra, and Rudolph-Nachtman, supra, is misplaced. It contends that, even if Flanagan, which is currently on remand to the State Board of Education by the Appellate Division, remains good law, there are substantive differences between that case and the instant matter. It involves full-time supervisory positions, not part-time as herein.

The Commissioner has carefully reviewed the entire record of the controverted matter herein and the legal arguments put forth in petitioners' exceptions and the Board's reply to said exceptions. The Commissioner is in agreement with the Board and with the conclusion of the judge that the two positions are not substantively the same or identical. Mere overlap of duties between the two positions does not make them identical nor is the difference between the two positions merely quantitative. While the area chairperson position entailed subject area supervisory responsibilities, the two positions differ in terms of primary responsibility, scope of functions, calendar years, type and manner of compensation, and line of authority and reporting. The area chairperson position was a teaching position with additional supervisory responsibility, compensated in the form of stipend and carried out with "release time" during the academic year.

The abolishment of the area chairperson positions and creation of the district program supervisory positions was motivated by the Board's desire to restructure and strengthen the supervision, evaluation and curriculum of the district's programs. Its action was neither arbitrary nor capricious but was, rather, a reasonable exercise of its discretionary authority. The Board has the power to determine who is best qualified to be appointed to the newly-created district supervisory program positions. Therefore, it is the Commissioner's determination that Jablonski, supra, is controlling in the instant matter and that the Board is correct in asserting that Franklin, supra, is similar.

The Commissioner agrees with the judge's determination that tenure was acquired by petitioners for the reasons stated in the initial decision. However, the Commissioner is constrained to point out that in view of the determination that the Board abolished the area chairperson position in good faith as part of a bona fide reorganization, a position no longer exists for which tenure or seniority rights can be afforded because the newly-created positions have been found to be substantively different.

Accordingly, the Commissioner orders that petitioners' claims for seniority and entitlement to the positions of district program supervisor are denied. (The Commissioner notes and corrects the error with respect to this order in the initial decision, ante.) Petitioners' appeal is herewith dismissed with prejudice.

MAY 14, 1984 COMMISSIONER OF EDUCATION

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THOMAS J. SANTARSIERO ET AL., :

PETITIONERS-APPELLANTS, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF PARSIPPANY-TROY HILLS, MORRIS COUNTY, : DECISION

RESPONDENT-RESPONDENT. :

:

Decided by the Commissioner of Education, May 14, 1984

For the Petitioners-Appellants, Robert M. Schwartz, Esq.

For the Respondent-Respondent, Dillon, Bitar and Luther
(Kenneth C. Schneider, Esq., of Counsel)

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

October 3, 1984

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6617-83
AGENCY DKT. NO. 241-7/83A

MICHAEL FURST,

Petitioner

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF ROCKAWAY,

Respondent

APPEARANCES:

Richard A. Friedman, Esq., for petitioners
(Ruhlman, Butrym & Friedman, attorneys)

Paul H. Green, Esq., for respondent
(Green and Dzwilewski, attorneys)

Record Closed: March 26, 1984 Decided: April 2, 1984

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

Furst alleged his transfer from his position as a Learning Disabilities Teacher Consultant (LDTC) to teacher of Science was in violation of his tenure and seniority rights.

The Board denies the allegations and avers that Furst has failed to state a claim for which relief can be granted.

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The matter was transmitted to the Office of Administrative Law on August 26, 1983 as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on October 14, 1983 and a hearing scheduled for December 19 and 20. Upon the completion of Discovery and the filing of Stipulations of Facts, later amended, the parties continued to put forth efforts to amicably resolve the matter. Having failed to settle the dispute, the parties agreed, however, that no material facts were in dispute and submitted the matter for Summary Decision. A briefing schedule was established with the direction that third parties, whose employment could be impacted, be noticed and provided an opportunity to file a Brief. The record was closed on February 3, 1984, the date established for the filing of Briefs. Responses were waived. The parties and non-party Pecca filed Briefs.

The relevant facts that follow are taken from admissions in the pleadings, the stipulations, and amendments thereof, and are adopted herein as **FINDINGS OF FACT:**

1) Furst was initially employed as a teaching staff member as of September 1, 1971, possessed the instructional certificate with endorsement in Science and taught in that capacity until February 1, 1981.

2) Furst was issued an educational services certificate with a student personnel endorsement in 1976, and subsequently was issued an LDTC endorsement in 1980.

3) As of February 1, 1981, Furst was reassigned to a full-time position of Project MATTHEW Specialist and LDTC.

4) Project MATTHEW required the LDTC endorsement.

5) The reassignment consisted of the devotion of approximately 50 percent of full-time to MATTHEW and the remaining time as an LDTC.

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6) Furst was employed in that position from February 1, 1981 until the abolishment of same, which was effective June 30, 1982.

7) Furst was reassigned as a teacher of Science for the 1982-83 school year, but consented on or about August 25, 1982 to further reassignment as Computer Specialist/LDTC for 1982-83.

8) The position of Computer Specialist/LDTC was abolished by the Board, effective at the conclusion of the 1982-83 school year. No certificate for Computer Specialist was required.

9) Furst was reassigned as a teacher of Science for the 1983-84 school year.

10) Furst acquired tenure as a teacher of Science pursuant to N.J.S.A.. 18A:28-5.

11) Furst acquired tenure as a LDTC pursuant to N.J.S.A. 18A:28-6.

12) The reduction in force by the Board of the part-time LDTC position (with the part-time Computer Specialist position held by Furst in 1982-83) effectively reduced the LDTC staff from two full-time and two part-time positions to two full-time and one part-time positions for the 1983-84 school year.

13) The 1983-84 LDTC staff consisted of full-time and most senior (12 years) Elizabeth Eades, full-time non-tenured Joyce Drinkard, and tenured part-time Barbara Pecca.

14) Pecca was employed as a part-time LDTC since March 5, 1979 as follows:

a) March 5, 1979 - June 30, 1979 at 10 hours per week

b) 1979-80 at 15 hours per week

c) 1980-84 at 14 hours per week

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15) Pecca acquired tenure as an LDTC pursuant to N.J.S.A. 18A:28-5.

16) The workweek for pro-rating seniority pursuant to Lichtman v. Bd. of Ed. of Ridgewood, 93 N.J. 362 (1983) is 30 hours.

DISCUSSION

The parties have agreed to grant greater consideration to the children and programs in respondent's schools than to the tenure and seniority rights of petitioner by stipulating that the status quo should exist for the current 1983-84 school year. However, the parties jointly requested a Declaratory Judgment on the seniority to be credited to Furst and Pecca as of June 30, 1984. Consequently, the Initial Decision and Final Decision of the Commissioner should incorporate legal guidelines to avoid further litigation in the 1984-85 school year.

The seniority to be credited to Furst is not relevant to the issue herein for the 1983-84 school year as only he filed a timely Petition in claiming the LDTC position currently held by Drinkard.

Furst's seniority credit is relevant for the guidance of the Board in determining its LDTC staff for 1984-85, as is the seniority credit acquired by Pecca. Furst's seniority credit is in dispute and is deemed to be a material fact precluding a summary decision determination as a matter of law for 1984-85 guidance. There is insignificant disagreement on the seniority credit for Pecca but only due to mathematical computation. The disputed seniority credit focuses on the 1982-83 services provided by Furst as a LDTC. There is also disagreement on the interpretation and applicability of N.J.A.C. 6:3-1.10, the revised regulation and its precedent. The seniority credit for 1983-84 services must be tacked on for Declaratory Judgment.

The matter was set down for a limited hearing to determine the seniority credit to be granted Furst as an LDTC for the 1982-83 school year. The record has therefore been reopened. The parties were directed to be prepared for oral argument at the

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conclusion of hearing on the interpretation and applicability of N.J.A.C. 6:3-1.10. However, Partial Summary Decision shall be entered on the issues framed at prehearing in the instant matter, and due to the status quo agreement of the parties, shall be incorporated in the Initial Decision of Declaratory Judgment for the Board's 1984-85 guidance.

The record was closed on March 26, 1984, upon the stipulation of remaining facts in dispute, as the parties waived oral argument and Briefs.

SUPPLEMENTAL FINDINGS OF FACT

1) The tenure and seniority rights of petitioner Furst were violated by Board's employment of a full-time non-tenured LDTC, one Joyce Drinkard.

2) Pecca did not file a claim for the 1983-84 full-time LDTC position currently held by non-tenured Drinkard.

CONCLUSIONS OF LAW

I **CONCLUDE** that Summary Decision is **GRANTED** to petitioner and **DENIED** the Board. In the absence of economic deprivation the only relief to which petitioner is entitled is immediate assignment as an LDTC. The petitioner consents in this instance to a delay of said relief so as not to disrupt the educational process for the remainder of the 1983-84 school year, and a status quo is hereby approved for that period of time. (The contract of non-tenured Drinkard would be terminated; petitioner would be reassigned as an LDTC in her place, and the Board would have to seek a teacher of Science as his replacement, thereby disrupting the instructional process.

It is deemed here that the equitable principle of fundamental fairness requires that the consensual attitude of petitioner in this entire matter (his re-reassignment in 1982-83 and the status quo for 1983-84) not be held to his detriment.

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DECLARATORY JUDGMENT

In anticipation of a further reduction in force by the Board of its LDTC staff for the 1984-85 school, counsel for the parties jointly requested a Declaratory Judgment on the seniority to be credited to Michael Furst and Barbara Pecca. Said request was granted to avoid further litigation in the public interest.

It is undisputed that tenure is acquired in a position while seniority is acquired in a category. See Howley v. Ewing Township Bd. of Ed., 1982 S.L.D. _____ (decided December 20, 1982). It is also undisputed that the required certificate for an LDTC is the Education Services Certificate with an endorsement as a Learning Disabilities Teacher - Consultant. Said certificates and endorsements are held by both Furst and Pecca.

The category in which seniority is to be credited herein through the 1982-83 school year is deemed to be N.J.A.C. 6:3-1.10(k)(30), pursuant to N.J.A.C. 6:11-12.15, as the cause of action occurred prior to September 1, 1983. The category in which seniority shall be determined for the 1983-84 school year is N.J.A.C. 6:3-1.10(l)(17), as the effective date of the revised regulation was September 1, 1983.

SENIORITY CREDITED TO BARBARA PECCA

The employment data for Pecca is set forth in Stipulation #14. The workweek was stipulated in #16 at 30 hours. The proration of Pecca's seniority pursuant to Lichtman is as follows:

1978-79:	4 months at 10 hours per week (4/10 x 10/30	.133
1979-80:	1 year at 15 hours per week (15/30)	.500
1980-83:	3 years at 14 hours per week (3 x 14/30)	1.400
1983-84:	1 year at 14 hours per week (14/30)	.467

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I FIND that Barbara Pecca acquired 2.033 years of seniority in category N.J.A.C. 6:3-1.1.10(k)(30) through June 30, 1983. **I FURTHER FIND** that Pecca will have acquired 2.5 years of seniority in that same category through June 30, 1984, pursuant to N.J.A.C. 6:3-1.10(1)(17).

SENIORITY CREDITED TO MICHAEL FURST

The parties were ordered to a limited hearing to enable the court to make its findings of fact concerning the 1982-83 seniority credit accrued by petitioner as an LDTC. It was determined prior to hearing that the dispute arose for Declaratory Judgment at a point above which Furst accrued greater seniority than Pecca. It was therefore determined that a dispute above that point was clearly a difference without significance.

The parties stipulated at hearing on March 26, 1984 as to the following LDTC time accrued by petitioner Furst for the purpose of determining his seniority:

1980-81:	full-time from February 1, 1981 through end of year	.500
1981-82:	full-time	1.000
1982-83:	2/5 time	.400

I FIND that Michael Furst acquired 1.9 years of seniority in category N.J.A.C. 6:3-1.10(k)(30) through June 30, 1983. **I FURTHER FIND** that Furst will have acquired 2.9 years of seniority in that same category, now (1)(17), through June 30, 1984. This results from tacking on the credit of one full year for 1983-84 due to entitlement to the position held by non-tenured Drinkard, and his non-prejudicial consent to the status quo to avoid a disruption in the school system.

SUMMARY OF RELEVANT FINDINGS OF FACT

1) Barbara Pecca will have acquired 2.5 years of seniority through June 30, 1984.

2) Michael Furst will have acquired 2.9 years of seniority through June 30, 1984.

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CONCLUSIONS OF LAW

I **CONCLUDE** that Michael Furst is entitled to the full-time LDTC position held by a non-tenured staff member in 1983-84. Immediate reinstatement by transfer to that position is hereby **ORDERED** as a matter of law, but is held in abeyance until the conclusion of the current school year due to Furst's non-prejudicial consent. Summary Decision is **GRANTED** to petitioner and **DENIED** the Board.

I also **DECLARE** that Michael Furst has greater seniority as an LDTC than Barbara Pecca for the Board's consideration in its staff planning for the 1984-85 school year.

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.

2 April 1984
DATE

WARD R. YOUNG, ALJ

Receipt Acknowledged:

April 3, 1984
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

April 5, 1984
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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MICHAEL FURST,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ROCKAWAY, MORRIS COUNTY.	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the record in the controverted matter herein including the initial decision rendered by the Office of Administrative Law, Ward R. Young, ALJ.

The Commissioner observes that exceptions were filed by the parties in a timely fashion pursuant to N.J.A.C. 1.1-16.4a, b, and c.

Petitioner's primary exceptions urge that the Commissioner note that he acquired a year's seniority as LDTC for 1983-84 not only for the reasons cited in the initial decision but also as required by law, under N.J.A.C. 6:3-1.10(h).

The Board excepts to the judge's finding that petitioner was entitled to appointment as a full-time LDTC, asserting that the critical date for a determination in the contested matter is June 30, 1983, the effective date of the abolishment of petitioner's position. The Board contends that since the judge found that at that time petitioner had acquired 1.9 years of seniority as an LDTC and that Barbara Pecca had acquired 2.033 years of seniority, she therefore has entitlement to the full-time position rather than petitioner, even though her position had not been reduced. The Board further contends that its obligation to ensure the seniority rights of its employees is at issue in the instant matter. With respect to this, the Board asserts that the fact Barbara Pecca did not file a claim for said position is immaterial and that pursuant to Lichtman, supra, she is entitled to the position.

The Board also contends that the judge apparently applied the seniority regulations which became effective on September 1, 1983, rather than those which were in effect prior to that date. Therefore, pursuant to N.J.A.C. 6:3-1.10(e), petitioner did not accrue seniority as an LDTC for 1982-83 because he served less than half-time in that position. Consequently, petitioner lacked the necessary seniority to lay claim to the full-time position.

In response to the Board's exceptions, petitioner rejects the claim that Barbara Pecca was entitled to the full-time position because she had not in any way been affected by the reduction in

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force. In support of this, petitioner cites Kinney v. Bd. of Ed. of Sparta, decided February 1, 1984 which, according to petitioner, stands for the proposition that unless a teaching staff member's position is eliminated or reduced, seniority rights cannot be asserted.

Petitioner contends that the current N.J.A.C. 6:3-1.10 should be applied in the instant matter since Barbara Pecca did not assert any seniority claims in June 1983 and the controversy between them relates to a September 1, 1983 position. He cites West Orange Supplemental Instructors Association v. Bd. of Ed. of West Orange, decided February 23, 1984 in support of this. Notwithstanding this contention, petitioner avers that he acquired greater seniority than Barbara Pecca regardless of whether the current or prior regulations are applied.

Petitioner further contends that he is entitled to accrual of a full year's seniority for 1982-83 rather than the .40 year's seniority determined by the judge because the only endorsement required for the LDTC/Computer Specialist position was that of an LDTC. He argues that in view of the fact that since no further certification was required for the position and since said position was an unrecognized title, seniority accrued under the LDTC position. Dedrick v. Bd. of Ed. of Hammonton, 1977 S.L.D. 1043 and Quinlan v. Bd. of Ed. of North Bergen, 73 N.J. Super. 40 (App. Div. 1962) are cited in support of this.

The Commissioner has carefully reviewed the record and legal arguments in the instant matter and is compelled to agree with petitioner's assertion that he accrued a full year's seniority as an LDTC for 1982-83. The computer specialist position is clearly an unrecognized title. There is nothing contained in the record to indicate that a written request to use said title was submitted to the county superintendent of schools for approval and determination of appropriate certification pursuant to N.J.A.C. 6:11-3.6(b). Therefore, tenure and seniority with respect to petitioner's assignment for 1982-83 must be attached to the LDTC position, a recognized, tenurable position.

Petitioner is correct in his assertion that he accrues a full year's seniority for 1983-84 pursuant to N.J.A.C. 6:3-1.10(h) of the current regulations.

As regards the disagreement with respect to whether the current or prior regulations apply in the instant matter, the Commissioner determines that the prior regulations apply because the Petition of Appeal was filed prior to the effective date of the current regulations. He observes that the issue is of no moment in that petitioner is correct in his assertion that regardless of which regulations are applied, he has accrued greater seniority than Barbara Pecca.

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Consequently, the Commissioner finds and determines that petitioner acquired tenure as an LDTC in February 1983 pursuant to N.J.S.A. 18A:28-6. His seniority accrual as an LDTC is as follows:

	Years
1980-81	.5
1981-82	1.0
1982-83	1.0
1983-84	1.0
Total	3.5

Accordingly, the Commissioner concurs with and adopts as his own the findings and determination of the judge except as modified herein. The Board is, therefore, ordered to comply with the directive of immediate reinstatement of Michael Furst as an LDTC; however, such reinstatement is to be held in abeyance until the conclusion of the current school year due to his non-prejudicial consent. Summary decision is, therefore, granted to petitioner and denied to the Board.

IT IS SO DETERMINED.

COMMISSIONER OF EDUCATION

MAY 18, 1984

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MICHAEL FURST,	:	
PETITIONER-RESPONDENT	:	
V.	:	STATE BOARD
BOARD OF EDUCATION OF THE TOWN-	:	DECISION
SHIP OF ROCKAWAY, MORRIS COUNTY,	:	
RESPONDENT-APPELLANT	:	

For the Petitioner-Cross Appellant, Ruhlman, Butrym and Friedman
(Richard A. Friedman, Esq., of Counsel)

For the Respondent-Appellant, Green and Dzwilewski
(Paul H. Green, Esq., of Counsel)

Michael Furst was initially employed by the Rockaway Board of Education in September 1971, as a science teacher. In 1980, he acquired an educational services certificate with endorsement as a Learning Disabilities Teacher Consultant (LDTC). As of February 1, 1981, Furst was reassigned to a full-time position as LDTC and Project MATTHEW Specialist, which also required LDTC endorsement.

On June 30, 1982, Furst's position as Project MATTHEW Specialist/LDTC was abolished and he was reassigned as a science teacher. In August, 1982, his assignment was changed with his consent to Computer Science Specialist/LDTC. At the conclusion of the 1982-83 school year, that position was abolished and Furst assigned as a science teacher for the 1983-84 school year.

At the time Furst's position as Computer Science Specialist/LDTC was abolished, the Board employed a full-time non-tenured LDTC and a part-time tenured LDTC, Barbara Pecca. Furst asserted that the Board had improperly reassigned him as a science teacher and that he was entitled by seniority to the full-time position held by the non-tenured employee. In anticipation of a further reduction in force, the parties also jointly requested a Declaratory Judgment as to the relative seniority of Pecca and Furst. Although Pecca was not a party in the matter, she was included in the briefing because of the possibility that her employment would be impacted. Accordingly, Pecca did submit a brief and the Administrative Law Judge considered her seniority in arriving at his decision.

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The initial decision considered whether Furst's seniority rights were violated by the Board's employment of the full-time non-tenured LDTC, as well as the relative seniority rights of Furst and Pecca. The ALJ concluded that Furst was entitled to the position held by the non-tenured LDTC. He then prorated Pecca's seniority pursuant to Lichtman and calculated that 2/5 of Furst's time while serving as Computer Science Specialist/LDTC should be credited toward his seniority as LDTC. Based on that calculation, he concluded that as of June, 1984, the time at which further reduction in force might occur, Furst would have accrued 2.9 years seniority in the category of LDTC, while Pecca would have only 2.5 years seniority. In the interest of preserving continuity in the educational process, Furst consented to the maintenance of the status quo as to both determinations for the remainder of the 1983-84 school year.

The Commissioner affirmed the ALJ's determination with the modification that, because Computer Specialist was an unrecognized title, Furst's service in that position be attached to the LDTC position. Thus, he concluded that by June, 1984, Furst's seniority accrual as an LDTC would be 3.5 years.

The State Board agrees that Furst was entitled to the full-time LDTC position held by the non-tenured employee. We also agree that as of June, 1984, Furst had accrued greater seniority than Pecca and, further, that his service in the position of Computer Science Specialist/LDTC attached fully to his seniority as LDTC. The State Board notes that although Pecca was not a party, she was afforded the opportunity to litigate her rights in this matter and that those rights were fully considered in reaching the decision. Therefore, for the reasons expressed therein, we affirm the decision of the Commissioner.

October 24, 1984

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6359-83
AGENCY DKT. NO. 203-6/83A

JEANETTE JOHNSON,

Petitioner

v.

BOARD OF EDUCATION OF THE BOROUGH OF GLEN ROCK,

Respondent

APPEARANCES:

Barbara G. Rapkin, Esq., for petitioners
(Ruhlman, Butrym & Friedman, attorneys)

Reginald F. Hopkinson, Esq., for respondent
(Jeffer, Hopkinson & Vogel, attorneys)

Record Closed: March 21, 1984 Decided: April 2, 1984

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

Petitioner alleged violation of her seniority rights due to the assignment of a non-tenured or less senior teacher to teach a subject which her certificate entitles her to teach. Respondent denies any improprieties in staff assignments or violation of petitioner's seniority right .

The matter was transmitted to the Office of Administrative Law on August 15, 1983 as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on November 4, 1983 and a plenary hearing was held at the Office of

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Administrative Law, Newark, on January 24, 1984. At the close of the hearing, a briefing schedule was established and timely Briefs were filed by the parties. A joint Motion to Depose was also granted, and the parties agreed that the transcript of same would be admitted into evidence. The record closed on March 21, 1984 upon receipt of the official transcript of depositions.

The following stipulation of facts are adopted herein as **FINDINGS OF FACT:**

1. Petitioner Jeannette K. Johnson has been employed by the Glen Rock Board of Education since September 1969, as a certified teacher of Home Economics.

2. Petitioner's employment was full-time through the 1979-80 school year, after which reductions in force resulted in part-time employment from 80 percent in 1980-81 to 40 percent for the 1983-84 school year, which was further reduced in November 1983 to 30 percent.

3. Petitioner taught Home Economics at all times during her Glen Rock employment.

4. Petitioner is neither certified as a Health teacher or Health Education specialist, and at no time was assigned to teach any course in Health.

5. Petitioner requested relief from part-time employment in order to teach full-time in another district while retaining her tenure and seniority rights in Glen Rock.

TESTIMONIAL EVIDENCE

Petitioner testified that she has instructed in safety and other related areas of health in Home Economics besides Food and Nutrition, and that she was an unsuccessful candidate for the position of Health Coordinator.

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The Superintendent of Schools testified as to the districts' compliance with N.J.A.C. 6:29-7.1 in the development of the program in Family Life Education for implementation. She further testified that an inter-disciplinary approach had been decided for program implementation, and that segments are incorporated in Home Economics 7, Home Economics 8, Child Care and Development, Science 9, Biology, Sociology and Psychology, but the bulk of the program is found in Health. There is no separate course offering in Family Living.

The Superintendent also testified that she sought advice from staff members of the State Department of Education who had advised as to the wisdom of predominantly incorporating the program in Health.

The Superintendent further stated that the Health curriculum incorporates requirements of instruction for which a teacher with a Home Economics endorsement is not qualified. Her final testimony revealed a query made to the State Department of Education, Office of Teacher Certification and Academic Credentials as to certificate endorsements required for assignment to teach health Education, and that the Home Economics endorsement was excluded from the authorized list transmitted by the Director. See R-1.

THE UNDERLYING ISSUE

Although a violation of petitioner's seniority right is alleged, the gravamen of this dispute is the intendment of the State Board of Education in the promulgation of N.J.A.C. 6:29-7.1 as to who may teach Family Life Education. A determination of this issue will result in an inevitable conclusion as to which party prevails in this dispute.

EXPERT TESTIMONY

Depositions were taken of the former Director of the Office of Teacher Certification and Academic Credentials, Fred A. Price, as well as the current Director, Celeste Rorro. The transcript was admitted into evidence, and is incorporated herein by reference. See J-1. The parties did not dispute the expertise of witnesses.

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Dr. Price testified that a teacher with an endorsement in Home Economics may teach any segment of Family Life regardless of the course of study which integrates the segment, such as Health or Biology. He stated that the State Board intended to provide flexibility to local Boards for the implementation of its Family Life program relative to its organization and teacher assignments. On cross-examination, Dr. Price stated that the regulatory scheme may have limitations, that are not clearly enunciated, in questioning whether a Nursery or Elementary endorsement may teach Family Life at the secondary level.

Mrs. Rorro testified that the only endorsements which qualify for the teaching of Health Education are Health, Health and Physical Education, and School Nurse, and specifically that the Home Economics endorsement does not qualify one to teach Health Education. She also testified that any teacher possessing an endorsement listed in N.J.A.C. 6:29-7.1(e) are authorized to teach in the Family Life program.

THE REGULATION

The relevant sections of N.J.A.C. 6:29-7.1 which need to be addressed in this dispute are as follows:

> (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.
>
> (d) Districts that develop their program with an interdisciplinary approach may use teachers from other disciplines to assist those staff members authorized to give instruction in family life education.

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(e) Teaching staff members holding one of the following certificates are authorized to teach in the district's family life education program:

1. Biology;
2. Comprehensive science;
3. Elementary;
4. Health education;
5. Health and physical education;
6. Home economics;
7. Nursery;
8. School nurse;
9. Teacher of psychology.

DISCUSSION

The depositions in this matter were approved in order to elicit testimony in the form of opinions from witnesses who had been and/or are closely associated with teacher certification to assist the undersigned in understanding the evidence to determine findings of fact. A careful reading of the transcript generates a feeling that said witnesses were placed in adversarial positions to support the position of the party responsible for his or her testimony.

The testimony of Dr. Price and Mrs. Rorro is viewed here solely as their perceptions of the State Board's intendment promulgating N.J.A.C. 6:29-7.1, and shall not be discredited herein.

The mandate of the State Board to local Boards to develop and implement Family Life Education as well as procedural provisions incorporated in the regulation are undisputed. The discretionary segments of the regulatory scheme has created the interpretive dispute.

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The Glen Rock Board undisputedly complied with (c) through the implementation of a comprehensive program "through the coordinate sequential elementary/secondary curriculum," but this dispute deals with the secondary program only. The testimony of the Superintendent and a review of the curriculum in evidence clearly establishes the Board's choice to "develop their program with an interdisciplinary approach" pursuant to (d).

(d) also clearly provides for permissiveness to "use teachers from other disciplines to assist those staff members authorized to give instruction in family life education."

(e) provides a list of endorsements authorized "to teach in the district's family life education program." [emphasis added]

The testimony of Dr. Price that the regulatory scheme was promulgated to provide flexibility to local boards in compliance with the mandate is sound. This is further evidenced by the State Board's declaration that uncertified resource people may "assist with their program" pursuant to (f).

The State Board addresses the appropriateness of instructional units in respect "to the age, growth and development, and maturity of the pupils" in (c).

A review of the State Baord's authorizations incorporated in its regulations and standards for certification in the endorsements found in (e) reveals a limitation of grades K-8 for elementary (excepting common branches at the secondary level) and a limitation of Nursery and Kindergarten under the Nursery education services endorsement. I believe the State Board tacitly repealed those grade limitations exclusively in the family life education program to provide the greatest flexibility for local Boards.

The only conflict of substance in the testimony of Dr. Price and Mrs. Rorro seems to have arisen from a perceptual distinction that must be made between the State Board's authorization to teach in the family life education program and teaching a course in which

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segments of the program are integrated. I believe Dr. Price's testimony in support of petitioner's contention that she has a right by endorsement and seniority to teach Health was based solely on the Superintendent's testimony that family life is predominantly integrated in the Health curriculum.

I do not believe the State Board intended its authorization of the possessor of a Biology endorsement to teach in the family life program at grade 6 to be a tacit authorization of the Biology teacher to be a grade 6 teacher. Nor do I believe the State Board intended its authorization for a Home Economics teacher to teach in the family life program integrated in the Health curriculum to be a tacit authorization for that teacher to teach Health.

In the absence of Family Life endorsements, the State Board wisely promulgated a regulation to incorporate who may teach in the program to provide the needed guidance and flexibility for local Boards. An interpretation of the State Board regulation that a local Board is required to grant a priority on a seniority basis to teach in a discipline which encompasses family life but also instructional units beyond the scope of one's endorsement is over-broad.

ARGUMENTS OF COUNSEL

The Briefs of counsel are incorporated herein by reference. Their arguments have been addressed, ante. Petitioner cites many cases wherein the expertise of Dr. Price was referred to for reliance. I see no compelling need to address them as none deal with N.J.A.C. 6:29-7.1 and are not on point. I perceive the determination herein to be a matter of first impression.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I **FIND** that petitioner has failed to meet her burden of proof that the Glen Rock Board of Education abused its discretionary authority in the assignment of staff to implement the family life program or that the Board acted in violation of petitioner's tenure or seniority rights.

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I **CONCLUDE,** therefore, that this Petition of Appeal shall be and is hereby **DISMISSED.**

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

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

2 April 1984
DATE

Ward Young
WARD R. YOUNG, ALJ

Receipt Acknowledged:

April 4, 1984
DATE

Seymour Ellis
DEPARTMENT OF EDUCATION

Mailed To Parties:

April 6, 1984
DATE

Ronald L Tarkenton
FOR OFFICE OF ADMINISTRATIVE LAW

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OAL DKT. NO. EDU 6359-83

ADDENDUM

WITNESSES

Jeanette K. Johnson, petitioner

Dr. Bett Ostroff-Carpenter, Superintendent of Schools

WITNESSES BY DEPOSITION

Dr. Fred A. Price, former Director, Office of Teacher Certification and Academic Credentials

Celeste Rorro, current Director, Office of Teacher Certification and Academic Credentials

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OAL DKT. NO. EDU 6359-83

EVIDENTIARY DOCUMENTS:

C-1:	Transcript of depositions of Dr. Price and Mrs. Rorro
R-1:	September 23 and 30, 1983, correspondence between Dr. Carpenter and Mrs. Rorro
J-1:	Seniority list
J-2:	Petitioner's certificate - Home Economics endorsement
J-3:	Petitioner's certificate - Principal/Supervisor's endorsement
J-4:	Petitioner's MA degree
J-5:	Petitioner's graduate record at Montclair State
J-6:	Home Economics curriculum
J-7:	Health curriculum
J-8:	1983-84 Program of Studies
J-9:	1983-84 Departmental sections
J-10:	October 15, 1983 letter, Johnson to Carpenter

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JEANETTE JOHNSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF GLEN ROCK, BERGEN COUNTY.	:	DECISION
RESPONDENT.	:	
	:	

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

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

Petitioner excepts to the determination of Judge Young, asserting that the Board is obligated to assign her to teach family living education which is being taught by less senior or nontenured teachers because, pursuant to N.J.A.C. 6:3-1.10(k) 27, she acquired seniority in all subjects and fields covered by her certification. Petitioner cites Proebstle v. Bd. of Ed. of Burlington County Voc.-Tech. High School, decided by the Commissioner dated October 29, 1982; Freeman v. Bd. of Ed. of Boonton Twp., decided by the Commissioner September 12, 1983; and Jarrett v. Bd. of Ed. of Watchung Borough, decided by the Commissioner October 5, 1981.

Petitioner asserts that it is clear that any portion of the health curriculum in the instant matter which petitioner is not authorized to teach could be taught by someone with another endorsement. She purports further that there is no requirement in N.J.A.C. 6:29-7.1, the regulations governing family life education, that one who is authorized to teach in that program must do so only within the areas of his or her endorsement; to require this would defeat the goal of flexibility intended by the State Board of Education.

The Board, in its response to these exceptions, rejects petitioner's legal argument and contends that there is not a single decision that remotely suggests such an interpretation of seniority rules or the application of N.J.A.C. 6:29-7.1. It asserts that the mere fact that a district may utilize any of a variety of disciplines within which to include family life education, or to use various disciplines to teach excerpts of such in a variety of courses, cannot by any convoluted reasoning compel a school district to divide in two its courses to implement such a tortured interpretation of the seniority rules.

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The Commissioner has carefully considered the record and legal arguments of the parties and agrees with the Board that petitioner's claim has no rational or legal basis. Clearly, the Board's decision to implement its family life curriculum in an interdisciplinary manner, with the major portion thereof being taught through its health courses, represents a reasonable exercise of its discretionary authority. The Commissioner rejects the assertion that the Board is legally obligated to implement its family life curriculum in order to accommodate petitioner's seniority claims. Judge Young's conclusion that such an interpretation of the seniority and family life regulations is over-broad is correct, as is the board's assertion that there is nothing in case law to support petitioner's claims.

The Commissioner finds the ALJ's analysis in the instant matter well reasoned. Consequently, he concurs with the findings and determination in the initial decision and adopts them as his own.

Accordingly, the Petition of Appeal shall be and is hereby Dismissed.

MAY 21, 1984 COMMISSIONER OF EDUCATION

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INITIAL DECISION
OAL DKT. NO. EDU 6361-83
AGENCY DKT. NO. 233-7/83A

YVONNE MELI,
Petitioner,
v.
BOARD OF EDUCATION OF THE BURLINGTON COUNTY VOCATIONAL-TECHNICAL SCHOOL,
Respondent.

APPEARANCES:

Douglas B. Lang, Esq., for the petitioner (Katzenbach, Gildea & Rudner, attorneys)

John E. Queenan, Jr., Esq., for the respondent

Record Closed: February 22, 1984 Decided: April 6, 1984

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

A petition of appeal contesting the action of the Board of Education of the Burlington County Vocational and Technical School (Board) withholding petitioner's employment and adjustment increments for the 1983-84 school year was filed with the Commissioner of Education.

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. After the prehearing conference on October 5, 1983, hearings were conducted on December 1, 5 and 9, 1983 and on January 3, 1984 in the Burlington Township Municipal Building, Burlington.

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The record shows that the Board acted on April 18, 1983 to withhold respondent's employment and adjustment increment for the 1983-84 school year because of her excessive absences. In support of its action, the Board submitted to petitioner the reasons for withholding her increment as follows:

> (1) You have been absent for 25 sick days and two personal days during the period of September 1, 1982 to March 8, 1983 out of 119 possible school days.[1]
>
> (2) The Board has directed that a vaporizer be furnished, which was done. Somehow the vaporizer was damaged while in your custody.
>
> (3) Your absence from school has been cited before and your students have lost teacher contact time as a result of your absences. The Board has been seeking improvement in your attendance to the extent that it withheld an increment for the 1981-82 school year. There still has been no improvement in your attendance. (R-6).

Petitioner concedes that she has been absent on many occasions; however, she asserts that she has a chronic sinusitis and allergic rhinitis condition and she blames the environment of her classroom for the recurrent flare-ups which caused her to be absent from school. Petitioner kept daily logs of her absences for the 1981-82 and the 1982-83 school years which detail the dates and reasons for her absences (P-106, 107). The Board contends that many of petitioner's absences were on Mondays or days immediately following holidays; consequently, the Board alleges that her classroom environment could not have contributed to her absences on those days.

Petitioner was employed by the Board initially in 1971 and her attendance record showing her total absences for all of the years beginning in 1971 is set forth below. (P-13a)

---

[1] (1) The record shows 25 absences through April 14, 1983 which includes two personal days. The Board acted on April 18, 1983.

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School Year	Total Days Absent
1971-72	10
1972-73	11
1973-74	11
1974-75	13
1975-76	14
1976-77	13
1977-78	14
1978-79	22
1979-80	34
1980-81	43-1/2
1981-82	28
1982-83	30

Petitioner presented several documents from her physicians showing that she is ill, under their care, and suffering with chronic sinusitis and allergic rhinitis. Petitioner notified the Board by letters from her physicians that an excessively hot and dry classroom condition had an irritant effect on her respiratory tract resulting in recurrent flare-ups of respiratory infections (P-1b). The Board asserts that its medical inspector has requested the medical records from petitioner's personal physician; however, her physician has not forwarded them. The Board's medical inspector reported to the Board on February 13, 1982 and asserted that petitioner had no symptoms of nasal congestion, post-nasal drip or headaches (P-1i).

Petitioner submitted in evidence numerous documents from her own physicians, her own medical records, evaluations, letters from others familiar with her condition and correspondence with school personnel, some supportive of her contention that the environment in her classroom, which she described as hot and dry, contributed to her chronic sinusitis and allergic rhinitis condition.

Because the Board contends that many of petitioner's absences occurred on Mondays or on days following holidays, the undersigned administrative law judge takes official notice of the calendar for the 1982-83 school year and utilizing that calendar, an analysis is set forth below based on petitioner's own records of her absences and the reasons therefore (P-107).

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Despite the numerous documents in evidence, there is no document which lists the school holidays for the 1982-83 school year; nevertheless, P-114 in evidence is the 1983-85 agreement between the Board and the Teachers' Association and it lists on page eight, under holidays for custodial employees, holidays which are recognized by the Board during the school years of that agreement. Among the holidays recognized in that document are Columbus Day (which was on October 11, 1982) and President's Day (which fell on February 21, 1983). Based on a presumption that teacher's enjoyed those same two holidays in the previous 1982-83 school year, the following analysis is made of petitioner's absences for the 1982-83 school year.

Petitioner was absent on October 5, 12 and 27, 1982. October 12 was a Tuesday; however, it follows Monday, October 11 which presumably was a holiday (Columbus Day) and consequently petitioner's illness on October 12 could not be blamed on conditions in her classroom. Petitioner was absent on November 4 and 5, 1982 which were a Thursday and Friday, and November 23, 1982 which was a Tuesday. Although the November 23 absence might be blamed on the conditions of her classroom, petitioner's notes state that she was absent on the 4th and 5th because of muscle spasms and sore muscles from exercising after school on Wednesday (Nov. 3, 1982). Petitioner was absent again from Monday, December 6 through Friday, December 10, 1982; consequently, none of these absences could have been caused by the condition in her classroom since she was out of school on Saturday and Sunday preceding the December 6 through 10 absences. She was again absent on Monday and Tuesday December 20 and 21, 1982.

Petitioner's next absence occurred for the week of January 3 through 7 (Monday through Friday) which week traditionally follows the closing of school prior to December 25 for the Christmas Holidays. This five-day absence could not have been caused by conditions in petitioner's classroom. Petitioner was again absent on Monday, January 17, 1983 and Monday and Tuesday, January 24 and 25, 1983. Therefore, these absences could not be caused by conditions in petitioner's classroom. (January 25, 1983 was a personal day according to petitioner's notes; P-107).

Petitioner's next two absences occurred on Tuesday and Wednesday, February 22 and 23, 1983; however, if my earlier calendar analysis is correct, February 21 would have been President's day and petitioner would not have been in school for Saturday, Sunday and Monday in any event. Consequently, her absence on these two days could not be caused by the conditions in her classroom. Petitioner's last two days of

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absences were March 8, 1983, a Tuesday and April 14, 1983, a Monday on which petitioner used a personal day. A regular meeting of the Board was held on April 18, 1983 at which time it acted to withhold petitioner's increment (P-13g; P-107).

Based on my analysis of petitioner's recorded reasons for being absent from school and what I perceive to have been the school calendar for the 1982-83 school year and comparing this information with a 1982-83 calendar, I **CONCLUDE** that 20 of the 25 sick days utilized by petitioner could not be related to conditions in her classroom even if her description of the environmental conditions in her classroom is true. However, even if school was not closed for Columbus Day or President's Day, 17 of the 25 absences could not be blamed on the environment of her classroom because she was not in school on the day or days preceding her absences..

At this point, the record should reflect my observation of petitioner during the three days of hearing she attended in this matter. Petitioner called in ill and was not able to attend the fourth and final day of hearing; however, during the three days she was present and during the time of her testimony, I noticed that petitioner did not sniffle, did not blow her nose, did not have weeping eyes or any of the outward symptoms that one might expect from someone having a sinus condition. Petitioner appeared to be in good health despite the chronic sinusitus and allergic rhinitis condition she documented during the hearing. She also appeared to be well when examined by Dr. Harrington (P-1i). Incidentally, included with her voluminous prescription submissions for her illnesses is a cancelled check dated January 10, 1982 which appears to have no relation whatever to any illness which petitioner described at the hearing (P-116).

Although petitioner testified that her classroom, room 409, was hot and dry and that it aggravated her chronic sinusitis and allergic rhinitis condition, I was not convinced by the totality of the evidence that room 409 was noticeably different from other classrooms in the school. The record shows that petitioner has had a record of ten or more absences per year since her initial employment with the Board, and that her absences during the last five years have greatly exceeded ten absences per year. The record shows that since 1978-79, petitioner taught in room 409 for three forty-five minute teaching periods per day and in the 1982-83 school year petitioner taught in room 409 for four forty-five minute teaching periods per day. Petitioner requested a humidifier for her room which was not initially provided for her; however, the humidifier was later provided and used in her room.

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The record shows also that room 409 was shared with other teachers and that no other teacher complained about the heat in that room. Under cross-examination, petitioner conceded that she asked another teacher to write a letter of complaint to the Board about the heat in room 409 and that that teacher refused to do so. Petitioner testified also that she would not turn her heating unit down when the room was hot because a supervisor told her not to change the thermostat.

Based on my review of this record, I **CONCLUDE** that petitioner has failed to show that classroom 409 was much different from other classrooms in the school. However, even if room 409 was hotter and drier than any other classroom, the record of petitioner's absences are such that of those absences cannot be blamed on her presence in her classroom. I **CONCLUDE** from this analysis that petitioner has failed to show that the cause for her absences was the environmental condition of her classroom.

APPLICABLE LAW AND DISCUSSION

N.J.S.A. 18:29-14 provides, in pertinent part 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 . . . .

The standard for review of a local board's action pursuant to the statute is set forth in Kopera v. West Orange Board of Education, 60 N.J. Super 288 (App. Div. 1960) where the court said that "the scope of the Commissioner's review is. . .not to substitute his judgment for that of those who made the evaluation but to determine whether they had a reasonable basis for their conclusions." (At p. 296).

According to Kopera, there are only two determinations to be made when reviewing a board's determination to withhold a teacher's increment: (1) Whether the underlying facts were as those who made the evaluations claimed, and (2) whether it was unreasonable for them to conclude as they did based upon those facts. The burden of proving unreasonableness is upon petitioner.

In the matter here controverted, I have determined that the majority of petitioner's absences were not caused by the environment in her classroom which she

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described as being hot and dry; rather, the timing, dates, and reasons recorded for those absences by petitioner herself, are clearly for reasons other than the environment in her classroom. Consequently, the only matter left to be determined is whether or not the Board had a reasonable basis to conclude as it did to withhold her increment for the 1983-84 school year.

The discussion of salary increments by the Supreme Court in Bernards Tp. Bd. of Ed. v. Bernards Tp. Ed. Assoc., 79 N.J. 311 (1979) provides additional guidance concerning the withholding of salary increments. In its review of N.J.S.A. 18A:29-14, the Supreme Court stated in part as follows:

> [t]he decision to withhold an increment . . . is . . . dependent upon an evaluation of the quality of the service in which the teacher has rendered . . . The purpose of the statute is thus to reward only those who have contributed to the educational process thereby encouraging high standards of performance. In determining whether to withhold a salary increment, a local board is therefore making a judgment concerning the quality of the educational system. It is reasonable to assume that an adversely affected teacher will strive to eliminate the causes or bases of "inefficiency". The decision to withhold an increment is therefore a manner of essential managerial prerogative which has been delegated by the Legislature to the board [of education]. . . . [citations omitted]. (at p. 321).

The Board asserts that Angelucci v. Bd. of Ed. of the Town of W. Orange, 1980 S.L.D. _____ (decided by the Commissioner September 15, 1980); Virgil v. Bd. of Ed. of the Town of W. Orange, 1981 S.L.D. _____ (decided by the Commissioner of Education January 2, 1981); and In the Matter of the Tenure Hearing of Catherine Reilly, Sch. Dist. of the City of Jersey City, 1977 S.L.D. 403, 414, support the proposition that a board of education may decide to withhold a salary increment based solely on the number of absences incurred by a teaching staff member irrespective of the reasons for those absences. Petitioner argues that to the extent Angelucci Virgil and Reilly, stand for that proposition, they are no longer controlling. In support of this statement, petitioner cites Kuehn v. Bd. of Ed. of the Tp. of Teaneck, 1981 S.L.D. _____, decided by the Commissioner November 25, 1981, (reversed State Board of Education February 1, 1981); and Law v. Bd. of Ed. of the Tp. of Parsippany-Troy Hills, N.J. Super. (App. Div.) DKT. NO. A-280-82T2 (decided October 21, 1983) (unreported opinion) which require a board of education to consider the particular circumstances for the absence and determine whether that teacher's absences have led to a discontinuity of instruction, prior to withholding a teaching staff member's increment.

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The factual circumstances in Law are different than those in this case, and Kuehn is distinguishable. In Kuehn, the Board had an unwritten policy to withhold a teacher's increment if absent more than 90 days, irrespective of the reason. (Kuehn was absent for more than seven months because of major surgery).

Although Kuehn holds that a teacher's absences do not constitute excessive absenteeism when they are legitimate and do not lead to a discontinuity of instruction, the facts in those cases can be distinguished from the facts in the instant matter where it has been demonstrated that petitioner's absences were not as she has alleged, i.e., poor environmental conditions in her classroom.

In Trautwein v. Bd. of Ed. of the Borough of Boundbrook, A-2773-78, decided April 8, 1980, certif. den., 84 N.J. 469 (1980), the Supreme Court reaffirmed the rationale used in Kopera, supra. In Trautwein, the Appellate Division concluded that it was not unreasonable for a board of education to conclude that absenteeism can diminish a teacher's effectiveness. Accord, Angelucci, Virgil, and Reilly, supra.

From my review of the pertinent decisional law on the subject of withholding a teacher's increment, I **CONCLUDE** that the Board had a reasonable basis for its action in the instant matter (Kopera, supra; Bernards Tp. Bd. of Ed., supra).

Common sense dictates that a teacher's continued absence must, at some point, have a negative impact upon her pupils even if a board of education is unable to prove the relationship between a teacher's attendance and pupil progress. This conclusion is summarized by the Commissioner in Reilly, supra, where the Commissioner stated as follows:

> 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 a teacher directing the classroom activities and learning experiences in order to reach the goal of maximum

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> educational benefit for each individual pupil. The regular contact of the pupils with their assigned teacher is vital to this process.

Although the Appellate Division decision in Law, supra, clearly holds that a teacher's absences do not constitute excessive absenteeism when they are legitimate and do not lead to a discontinuity of instruction, there is sufficient decisional law which holds that (1) the Commissioner may not substitute his judgment for that of the board absent an arbitrary and capricious determination by a board, and (2) that a board of education must merely show that it had a reasonable basis for its action (Kopera, Trautwein, supra).

In Ronald S. Kulik v. Bd. of Ed. of the Town of Montclair, decided by the Commissioner September 26, 1983; aff'd., State Board of Education February 3, 1984, the Commissioner affirmed the opinion of Administrative Law Judge Moses holding that "frequent absences are more harmful than one long absence, due to the difficulty of finding a competent substitute and the resulting lack of continuity in a class." (Slip. Op., 13).

None of the opinions cited by petitioner in support of her petition can overcome her failure to demonstrate that the environmental conditions in her classroom were responsible for her absences. Consequently, the rationale set forth in Reilly, Kopera, and Trautwein, provides more than sufficient basis to conclude that it was reasonable for the board to withhold petitioner's increment. See also, Bd. of Ed. of Clifton v. Kathleen DeRose, 1983 S.L.D. _____, decided by the Commissioner in June 1983.

For all of the above reasons, the action taken by the Board of Education of the Burlington County Vocational and Technical High School, withholding petitioner's increment for the 1983-84 school year, is in accordance with its statutory and discretionary authority and is adequately supported by the above-cited decisional law.

The Board's action is limited to the 1983-84 school year.

The Petition of Appeal is hereby **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.

6 April 84
DATE

August E. Thomas
AUGUST E. THOMAS, ALJ

Receipt Acknowledged:

4.6.84
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

4/10/84
DATE

Ronald L. Tankenfeld
OFFICE OF ADMINISTRATIVE LAW

bm

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WITNESS LIST

1. Yvonne Meli - teacher
2. Anne Banks - teacher's aid
3. William Spicer - teacher (instructor applicance repair)
4. Cynthia Lopez - teacher's aid
5. William Weissman - custodian/bus driver
6. William Kochersperger - maintenance man
7. Benjamin Verdile - superintendent of schools

DOCUMENTS IN EVIDENCE

P-1(a)	Letter from Driesbach, dated January 8, 1980
P-1(b)	Letter from Markunas, dated November 12, 1981
P-1(c)	Letter from Markunas, dated December 21, 1981
P-1(d)	Letter from Markunas, dated June 3, 1982
P-1(e)	Letter from Lane, dated January 31, 1983
P-1(f)	Letter from Lane, dated April 4, 1983
P-1(g)	Letter from Lane, dated May 4, 1983
No P-1(h)	document
P-1(i)	Meli's Medical Report by Harrington
No P-1(j)	document
P-1(k)	Meli's medical records from Driesbach and Markunas
P-1(n)	Meli's medical records from Lane
P-2(a)	Evaluation by Lucia, dated September 24, 1971
P-2(b)	Evaluation by Lucia, dated December 1, 1972
P-2(c)	Evaluation from Lucia, dated December 5, 1972
P-2(d)	Evaluation from Lucia, dated November 12, 1973
P-2(e)	visiation report by Lucia, dated March 8, 1974
P-2(f)	Evaluation from Lucia, dated January 23, 1975
P-2(g)	Evaluation from Jordan, dated October 24, 1974
P-2(h)	Evaluation from Jordan, dated February 23, 1976
P-2(i)	Evaluation from Jordan, dated November 29, 1976
P-2(j)	Evaluation from McFarland, dated May 29, 1977
P-2(K)	Evaluation from Tarantino, dated October 14, 1977
P-2(l)	Evaluation from McFarland, dated November 9, 1978

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No P-2(m) or (n) documents

P-2(o) Narrative report from Stevens, dated December 16, 1981

P-2(p) Evaluation from Lucia, dated March 8, 1983

P-2(u) Evaluation from Lucia, dated June 17, 1982

P-2(q) Evaluation from Lucia, dated November 1, 1982

P-2(r) Evaluation from Clancy, dated April 26, 1983

No P-2(s) or (t) documents

No P-3 through P-12 documents

P-13(a) through (g) Meli's absences

No P-14 documents

P-15 Teaching staff members with ten of more absences and whether their increment or adjustment was withheld

P-16 Letter from Queenan, Jr. to Meli re physical exam, dated December 8, 1981

No P-17 through P-19 documents

P-20 Work Orders

No P-21 through P-42 documents

P-43 Letter from Banks, dated June 11, 1982

No P-44 documents

P-45 Letter from Mamie, dated June 25, 1982

P-46 Letter from McFarland, dated November 2, 1982

No P-47 through P-61 documents

P-62 Memo from Verdile, dated May 5, 1982

No P-63 through P-66 documents

P-67 Memo from Meli, dated May 9, 1979

P-68 Memo from Meli, dated January 21, 1980

P-69 Memo from Meli, dated October 28, 1980

No P-70 through P-74 documents

P-75 Memo from Verdile, dated December 8, 1981

No P-76 through P-78 documents

P-79 Memo from Verdile, dated January 5, 1982

No P-80 through P-83 documents

P-84 Memo from Verdile, dated January 29, 1982

No P-85 through P-89 documents

P-90 Memo from Verdile, dated May 18, 1982

No P-91 through P-93 documents

P-94 Memo from Verdile, dated January 20, 1983

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No P-95 through P-100 documents

P-101 List of all teachers' absences

No P-102 through 103 documents

P-104 1980-81 school year

No P-105 documents

P-106 1981-82 school year

P-107 1982-83 school year

P-108 Diagram of Room 409

P-109 1978 prescriptions

P-110 1979 prescriptions

P-111 1980 prescriptions

P-112 September 1981 through October 1983 Room 409 temperatures

P-113 Requisition for humidifier

P-114 1983-85 agreement between the Board of Education of the Vocational Schools of Burlington and Burlington County Vo-Tech Education Association

P-115 1981 prescriptions

P-116 1981 prescriptions

R-1 Picture, Room 409

R-2 Picture, Room 409

R-3 Air Conditioner, Room 409

R-4 Medical report, dated May 13, 1982

R-5 I.D. (only) Memorandum, dated February 22, 1982

R-6 Letter reasons, dated April 21, 1983

R-7 Memorandum to Meli, dated December 8, 1981

R-8 Memorandum to Meli, dated March 21, 1983

R-9 Memorandum to Meli, dated April 15, 1983

R-10 Letter to Meli, dated April 21, 1983

R-11 Resolution withholding increment, 1983-84

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YVONNE MELI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BURLINGTON COUNTY VOCATIONAL-TECHNICAL SCHOOL, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

Petitioner excepts to the initial decision by the Honorable August E. Thomas, ALJ, claiming that the judge improperly denied her relief, citing Kuehn v. Teaneck, decided November 25, 1981, rev'd State Board February 1, 1983, to support her allegations. Petitioner contends that a teacher's absences do not constitute excessive absenteeism when they are legitimate and do not lead to a discontinuity of instruction. Further, petitioner argues that the judge erred in his determination that petitioner's absences were not legitimate. Petitioner in final argument urges the Commissioner to condemn the action of the Board in withholding her increment for excessive absenteeism as being violative of Kuehn and arbitrary and capricious and, therefore, must be rejected and petitioner's salary increment be restored. The Commissioner finds no merit in petitioner's arguments.

The Commissioner notes that the arguments advanced by petitioner in her primary exceptions refute the right of a board of education to withhold a salary increment based on the number of absences received by a teaching staff member, irrespective of the reason for the absences. Kuehn, supra; Law, supra. These arguments were advanced before the judge and refuted by him. Accord, Angelucci v. West Orange, 1980 S.L.D. 1066, aff'd State Board February 4, 1981; Virgil v. West Orange, decided January 2, 1981, aff'd State Board May 6, 1981; Reilly, supra. The Commissioner agrees with the reasons set down herein by the judge wherein he states, ante:

> "***Common sense dictates that a teacher's continued absence must, at some point, have a negative impact upon her pupils***."

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The Commissioner observes that this conclusion is summarized in Reilly, supra, wherein is stated:

> "***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 a 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.***" (1977 S.L.D. at 414)

The rationale set forth in Reilly, Kopera, and Trautwein, supra, confirms that it was reasonable for the Board to withhold petitioner's increment.

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

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

COMMISSIONER OF EDUCATION

MAY 21, 1984

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YVONNE MELI,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BURLINGTON COUNTY VOCATIONAL-TECHNICAL SCHOOL, BURLINGTON COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, May 21, 1984

For the Petitioner-Appellant, Katzenbach, Gildea and Rudner (Arnold M. Mellk, Esq., of Counsel)

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

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

October 3, 1984

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INITIAL DECISION
OAL DKT. NO. EDU 8251-83
AGENCY DKT. NO. 338-9/83A

WILLIAM B. KING,
Petitioner,
v.
KEANSBURG BOROUGH
BOARD OF EDUCATION,
Respondent.

APPEARANCES:

Dorothy L. Argyros, Esq., for petitioner (Chamlin, Schottland, Rosen, Cavanagh & Uliano, attorneys)

John O. Bennett, III, Esq., for respondent (Bennett, Davidson & Munoz, attorneys)

Record Closed: February 23, 1984 Decided: April 4, 1984

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

William B. King (petitioner), formerly employed by the Keansburg Board of Education (Board) as a teaching staff member, alleges that the Board's determination to terminate his employment following a reduction in force violates his "tenure protection" and seniority rights. 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. 52:14F-1 et seq. Following a telephone prehearing conference conducted November 23, 1983 the parties elected to have the matter adjudicated on stipulated facts and letter memoranda. The record closed February 23, 1984 following receipt of the Board's reply.

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UNCONTESTED FACTS

The uncontested stipulated facts of the matter are as set forth in petitioner's letter dated January 13, 1984. They are as follows:

1. Petitioner was employed by the Board between February 1, 1973 through June 30, 1974 as a multi-media coordinator/career department multi-media specialist. At that time no separate certificate was required for either position by the State Board of Examiners, pursuant to N.J.A.C. 6:11-1.1 et seq.[1] Petitioner was assigned such position on the strength of his possession of an instructional certificate, as a teacher of English, since June 1968.

2. In 1974-75, petitioner was employed by the Board as acting director of career education and he performed those duties under the authority of his instructional certificate as a teacher of English.

3. Petitioner was thereafter assigned by the Board to be a teacher of English for the following academic years:

   1975-76
   1976-77
   1977-78, and
   1978-79.

4. In academic years 1979-80 petitioner was employed by the Board as "educational media specialist." Petitioner applied for the educational services certificate known as Educational Media Specialist on September 17, 1979. That certificate was issued him during October 1979.

5. Petitioner continued in the assignment of Educational Media Specialist for academic year 1980-81. On April 22, 1981 the Board determined not to grant petitioner tenure as educational media specialist. Rather, it determined to assign petitioner as a teacher of English for 1981-82 and it employed an individual from outside the district as educational media specialist for 1981-82. That person presently remains in the Board's employ as educational media specialist.

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1 As of May 16, 1975, N.J.A.C. 6:11-12.21, the endorsement, Educational Media Specialist, upon the certificate known as Educational Services Certificate, N.J.A.C. 6:11-11.1, et seq., has been necessary for ". . . any person who is asigned to develope and coordinate educational media series in the public schools. . . ."

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6. Petitioner continued in his assignment as a teacher of English for 1982-83. Petitioner was notified by the Board sometime during the spring 1983 that his employment, as a teacher of English, would be terminated as the result of a reduction in force.[2]

7. Petitioner's employment with the Board terminated June 30, 1983.

8. Job descriptions submitted by petitioner, as attached to his affidavit in support of his motion for summary decision, show the following:

   a. Audio Visual Aid Coordinator. Qualifications for this position were to be determined by the building principal. It also appears that the building principal had the discretion whether to appoint someone to that position, the duties of which are at best ministerial in nature.

   b. Multi-Media Specialist. A job description was approved by the Board on October 12, 1972. This position required a baccalaureate degree in instructional media, communications, or the equivalent thereto. The "certificate" required for such position was at the discretion of the Board.

   c. Director of Career Education, the job description for which was adopted by the Board, October 12, 1972, the same date it adopted the Multi-Media Specialst job description. This position of Director required a Masters degree, and a "New Jersey standard teaching certificate."

   d. Multi-Media Education Specialist. No date is shown on the face of the job description when, or if, the document was adopted by the Board. Furthermore, there is no educational requirement, nor certificate requirement, stated on the face of this job description. However, it is noted that there appears no dispute that the position "Media Education Specialist" presently in existence requires the endorsement of education media specialist, pursuant to N.J.A.C. 6:11 12.21.

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2 Petitioner does not challenge the underlying basis upon which the Board determined its need for the reduction in force of its tenured teachers.

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LEGAL ARGUMENTS

Petitioner contends that because the position of educational media specialist is presently occupied by one who has asserted lesser seniority than he and who, in fact, has not acquired tenure of employment with the Board, he, petitioner, has a superior claim to that position "* * * by virtue of both his tenure and greater seniority within the district." (Petitioner's letter memoranda, p. 1) Petitioner reasons that by virtue of any one of his discrete assignments as multi-media coordinator/career department multi-media specialist between February 1, 1973 through June 1974, or as acting director of career education in 1974-75, notwithstanding that both assignments were under an instructional certificate with an endorsement as teacher of English, or as educational media specialist in 1979-80 and 1980-81 with an educational media specialist endorsement on an educational services certificate, affords him "seniority" to the position of educational media specialist as against the incumbent. Petitioner, while acknowledging a legal distinction between tenure and seniority, contends that his failure to achieve tenure in the position of educational media speciliast does not negative his accumulated "seniority" which he says he earned in that position by virtue of his prior assignment to the same, or substantially the same, position. Petitioner anchors this latter position on the fact that he has acquired tenure as a teacher under his instructional certificate as a teacher of English and that because he acquired such tenure, he acquires seniority in any assignment given him prior to May 16, 1975 and, particularly so, after that date when a separate endorsement for educational media specialist became of requirement.

The Board contends, to the contrary, that petitioner has no claim to seniority as educational media specialist because, quite simply, he has served an insufficient period of time to have first acquired a tenure status in that position. The Board does not dispute the fact that petitioner has acquired tenure as a teaching staff member in its employ, for he has served the requisite period of time. However, the Board argues that the time served by petitioner between February 1, 1973 through June 30, 1975 attaches to petitioner's seniority rights as a teacher, by virtue of his instructional certificate, with an English endorsement. Seniority, the Board contends, does not attach to petitioner as an educational media specialist. Finally, the Board points out that petitioner served only two years as educational media specialist, subsequent to May 1975, when the endorsement of educational media specialist was promulgated by the State Board of Examiners which must be possessed by one to be appointed as educational media specialist.

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DISCUSSION

There is a distinction between tenure and seniority.[3] The issue of whether the action of the Board by which petitioner's employment was terminated June 30, 1983 violates his tenure protection or seniority rights requires an identification of those "rights".

TENURE

N.J.S.A. 18A:28-5 specifies those eligible to acquire tenure as follows:

> The services of all teaching staff members including all teachers, principals, assistant principals, vice-principals, superintendents, assistant superintendents, and all school nurses * * * and such other employees as are in positions which require them to hold appropriate certificates issued by the Board of Examiners * * * shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation * * *.

Thus, tenure, as a legislative status, protects an employee in a particular position from dismissal, or reduction in salary, except for cause and then only according to law, or as a result of a reduction in force. Seniority is implicated only upon a reduction in force and attaches only to categories of employment N.J.A.C. 6:3-1.10, et seq. For purposes of this case, particular positions which tenure protect are teacher and "such other employees as are in positions which require them to hold appropriate certificates issued by the Board of Examiners." It is undisputed here that petitioner has acquired tenure in the Board's employ as a teacher by virtue of his service as teacher under his instructional certificate, with an English endorsement. Prior to May 1975, petitioner's assignment as multi-media coordinator/career department multi-media specialist, or as acting director of career education, were all assignments undertaken by him on the strength of his instructional certificate. And, because prior to May 1975 there was no specific endorsement required for the position of multi-media specialist or any of the other titles petitioner assumed, petitioner's seniority, accrued through such assignments, is "* * * in all subjects or fields covered by his certificate* * *." N.J.A.C. 6:3-1.10(k)27. Thus, seniority accrued to petitioner in the category of teacher of English.

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3 Because the reduction in force occurred prior to September 1, 1983 the amended seniority regulations do not apply here.

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When the State Board of Examiners adopted the separate endorsement of educational media specialist, upon the educational services certificate, the adoption of that "appropriate certificate" allows for the acquisition of a tenure status pursuant to N.J.S.A. 18A:28-5 because the position educational media specialist requires the possession of that "appropriate certificate."

But because petitioner has already acquired a tenure status, he could have acquired tenure in the position of educational media specialist by meeting the precise requirements of N.J.S.A. 18A:28-6 which provides:

> Any such teaching staff member under tenure or eligible to obtain tenure under this chapter, who is transferred or promoted with his consent to another position covered by this chapter on or after July 1, 1962, shall not obtain tenure in the new position until after:
>
> * * *
>
> (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
>
> * * *
>
> 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.

It is clear that petitioner did not acquire a tenure status of employment in the position of educational media specialist for he was not employed by the Board in that position for two academic years together with employment at the beginning of the next succeeding academic year. Petitioner's reliance upon Euell v. Princeton Regional Bd. of Ed., 78 S.L.D. 666, aff'd N.J. Super. (App. Div. 1980) (unreported) 1980 S.L.D. 1489 for the proposition that his two years as a teacher of English between 1981 through 1983 "* * * would add 2 years to his pre-existing 2 years of seniority as an Educational Media Specialist [thus acquiring four years seniority as Educational Media Specialist] * * *" (petitioner's reply letter, p. 2) is misplaced. In Euell, the Commissioner

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ruled that Euell had in fact served a sufficient period of time under N.J.S.A. 18A:28-6 for the acquisition of a tenure status as an assistant principal by virtue of time served as assistant principal and principal under the same administrative certificate. Here, petitioner did not serve the requisite period of time to have acquired tenure under N.J.S.A. 18A:28-6 as educational media specialist under the educational media services certificate. This then leads to the issue of seniority.

Seniority rights follow the acquisition of tenure. Without tenure in the employ of the Board, seniority rights for purposes of a reduction in force do not exist. Petitioner's argument that all tenurable service in the employ of a board of education counts towards seniority is a valid argument. However, it is not true that petitioner can acquire a seniority claim, as he seeks here, to a position in which he has not acquired tenure. Time served by petitioner as eduational media specialist is credited to his former position, or the category teacher of English, to which he had been returned.

The recent, though unreported, case of Mulhearn v. Bd. of Ed. of Sterling Regional High School District, Camden County, New Jersey Superior Court, App. Div., A-5123-81T2, decided October 31, 1983, does not support petitioner's position. In that case, Mulhearn held an instructional certificate, with endorsements in English and French, but had only taught French during a 17 year teaching career in the board's schools. The issue decided by the Appellate Division was whether Mulhearn was entitled to employment as an English teachers upon a reduction in force among French teachers, based upon her seniority in the school district over certified English teachers who had been teaching English but who were non-tenured. Though the administrative law judge rejected Mulhearn's claim to seniority, which rejection was affirmed by the Commissioner, as well as the State Board of Education, the Appellate Division noted that N.J.A.C. 6:3-10(k)(27) was clear on its face and held that the rule provided Mulhearn with seniority as an English teacher, notwithstanding her assignment to teach only French. The rule cited by the court provides that "* * *Any person holding a secondary [instructional] certificate shall have seniority in all subjects or fields covered by his certificate, except those subjects or fields for which a special certificate has or shall be required by the State Board of Education* * *." In Mulhearn, the instructional certificate in question authorized the teaching of English as well as French. The court, applying the clear meaning of the cited rule, held that Mulhearn acquired seniority as a teacher of French and as a teacher of English.

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In this case, petitioner seeks to tack on his experience as a teacher of English, by way of an instructional certificate, to his experience as an educational media specialist authorized by his educational media specialist endorsement on his educational services certificate, two different certificates. Such "* * *principle of accreditation - backwards* * *" (petitioner's reply letter, p. 2) has no authority in the statute, nor the standards for determining seniority, N.J.A.C. 6:3-1.10 et seq., absent the acquisition of tenure in the new position. Petitioner's essential argument is that some how he could have a valid claim to a tenurable position in the Board's employ, by way of seniority, without first having acquired a tenure status. Upon the principle that seniority follows the acquisition of tenure in that position, petitioner's basic thesis must fall. If petitioner's argument is valid in this regard, then it would be equally valid that a tenured teacher who, upon application, is appointed by the board to be a school principal but, after one year and for whatever reason, was reassigned to the classroom, would have a seniority claim to the position of school principal notwithstanding the fact the person had not acquired tenure as a principal, but by virtue of his/her tenure as a teacher. Such a result is not the intent of seniority regulations.

I **CONCLUDE,** based on the stipulated facts of the matter together with a consideration of relevant statutory authority, as well as the standards for determining seniority, prior to September 1983, that petitioner's claim to seniority in respect of the Board's position of multi-media specialist is without merit. The petition of appeal is **DISMISSED.**

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

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OAL DKT. NO. EDU 8251-83

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

DATE

DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

April 5, 1984
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

April 10, 1984
DATE

OFFICE OF ADMINISTRATIVE LAW

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WILLIAM B. KING,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF KEANSBURG, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

Petitioner in primary exceptions to the initial decision by Judge McKeown contends that the judge fails to properly credit petitioner's experience as an educational media specialist. Petitioner cites Euell, supra, in support of his argument that he be accorded seniority and tenure rights as a media specialist. He states that the general purpose of tenure/seniority laws are to reward and retain experienced employees. Petitioner seemingly argues that he acquires a seniority claim to a position in which he has not acquired tenure. The Commissioner finds no merit in such argument.

As is clearly set down in the discussion by Judge McKeown, he states, ante:

> "***Seniority rights follow the acquisition of tenure. Without tenure in the employ of the Board, seniority rights for purposes of a reduction in force do not exist. Petitioner's argument that all tenurable service in the employ of a board of education counts toward seniority is a valid argument. However, it is not true that petitioner can acquire a seniority claim, as he seeks here, to a position in which he has not acquired tenure. Time served by petitioner as educational media specialist is credited to his former position, or the category teacher of English, to which he had been returned.***"

The Commissioner finds that petitioner has not met the precise requirement of N.J.S.A. 18A:28-6. Petitioner's claim to seniority with respect to the position of multi-media specialist is without merit. The Commissioner so holds.

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

Accordingly, the Petition of Appeal is hereby dismissed.

MAY 21, 1984

COMMISSIONER OF EDUCATION

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INITIAL DECISION

OAL DKT. NO. EDU 6197-83

AGENCY DKT. NO. 213-6/83A

ANDREW T. CORRADO,

Petitioner

v.

BOARD OF EDUCATION OF THE BOROUGH OF NEWFIELD, GLOUCESTER COUNTY,

Respondent.

APPEARANCES:

Arnold M. Mellk, Esq., for petitioner (Katzenbach, Gildea & Rudner, attorneys; **Ezra D. Rosenberg**, on the briefs)

Carl W. Cavagnaro, Esq., for respondent (Reuss & Cavagnaro, attorneys)

Joseph J. Hoffman, Esq., for participant (Hoffman, DiMuzio & Hoffman, attorneys)

Record Closed: January 27, 1984 Decided: March 5, 1984

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

Petitioner, a teaching staff member in the employ of the Board of Education of the Borough of Newfield (Board), alleges it violated his tenure protection and seniority rights by abolishing his position and terminating his employment in favor of other teaching staff members with less seniority in the same category in which he is certificated. The Board denies the allegations and asserts that its actions with respect to the termination of petitioner's employment and its recognition of his seniority rights are in all respects proper and legal. 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.

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PROCEDURAL HISTORY AND STATEMENT OF FACTS

Petitioner Andrew Corrado is a certificated special education teacher and was employed as a teacher of the handicapped within the Board's school district from September 1979 through the conclusion of the 1982-83 school year (Petition, ¶1). Petitioner obtained tenure on September 1, 1982. He is a retired United States Air Force Sergeant with more than 20 years of active military service (Petition, ¶2 and Exhibit A).

On April 14, 1983, at a special meeting, the Board effected a reduction of its teaching staff, including petitioner. At that same meeting, the Board employed Joan Kargman for the single position of special education teacher for the 1983-84 school year because of the fact that she had ten years' seniority in the district (Board Minutes, special meeting - Thursday, April 14, 1983, attached hereto as Exhibit "B"). In making its determination, respondent credited petitioner with four years' seniority (Respondent's answers to petitioner's Interrogatory No. 6 as attached hereto as Exhibit "C"). Petitioner was not credited by respondent with his years of military service in calculating his seniority rights (Id.)

By letter dated April 28, 1983, from Linda J. Marino, Board Secretary, petitioner was informed that respondent had terminated petitioner because of a reduction in force (Petition ¶3, admitted in Answer).

Petitioner perfected his Verified Petition of Appeal on June 29, 1983, with the Board's submitting its Answer and Separate Defenses before the Commissioner on July 15, 1983. On August 9, 1983, the Commissioner transmitted the matter to the Office of Administrative Law. A prehearing conference was held on October 3, 1983, at which the issues to be determined were agreed to by the parties and leave was granted to the parties to move for summary disposition in the event all material facts could be stipulated.

On November 14, 1983, petitioner submitted his Motion for Summary Judgment with Brief in support thereof, together with Proof of Service. On November 28, 1983, counsel for the Board submitted its brief in opposition to petitioner's motion, together with the advisement that Mr. Joseph Hoffman was authorized by the New Jersey Education Association (NJEA) to represent the interests of Ms. Joan Kargman and, therefore, would make the appropriate application to the court to intervene in this matter. Board's counsel, on November 28, 1983, further requested that final disposition of

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the matter be held in abeyance to permit Mr. Hoffman to perfect his application to intervene. On December 14, 1983, the court was in receipt of Mr. Hoffman's Motion for Intervention or, in the alternative, Participation in this matter on behalf of Ms. Kargman, together with Supporting Affidavit. On December 16, 1983, the undersigned advised the parties that Mr. Hoffman's Motion for Participation was granted, pursuant to N.J.A.C. 1:1-12.6.

On December 29, 1983, respondent submitted an Amended Brief in opposition to petitioner's motion for summary judgment. On January 13, 1984, the court was in receipt of Participant's brief and, thereafter, petitioner submitted his reply on January 27, 1984, at which time the matter was considered closed.

ISSUES TO BE DETERMINED

Pursuant to the Prehearing Order, dated October 4, 1983, the issues set forth therein are:

1. Whether the Board granted petitioner the appropriate military service credit for time served, pursuant to N.J.S.A. 18A:28-12?

2. If not, whether the Board applied the appropriate time credit to petitioner for purposes of seniority when it authorized a reduction in force?

The parties agree there are no material facts in dispute. Therefore, according to the criteria set forth in Judson v. Peoples Bank and Trust Company of Westfield, 17 N.J. 67 (1954), the herein matter is ripe for summary disposition.

LEGAL ARGUMENTS OF THE PARTIES

Petitioner's Argument

Petitioner notes and observes that both petitioner and Ms. Kargman, participant herein, enjoy tenure status as teachers pursuant to N.J.S.A. 18A:28-5. Because of their status, the Board was compelled to conduct any reduction in force

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pursuant to seniority. N.J.S.A. 18A:28-9 and 18A:28-10. It is undisputed that the Board, at the time of its decision to reduce its force, properly credited Mrs. Joan Kargman with ten years' seniority as a special education teacher within the district. Conversely, respondent miscalculated petitioner's seniority by failing to add petitioner's 20 years of military service to his four years of employment by respondent.

N.J.S.A. 18A:28-12 provides, in pertinent part, as follows:

> If any teaching staff member shall be dismissed as a result of such reduction, such person shall be and remain upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified * * * and 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]

Petitioner contends that this statute is clear and unambiguous. See Lang v. Princeton Regional Board of Education, 1979 S.L.D. 245. Under the statute, once a teacher has acquired tenure status, he is entitled to have his years of military service added to his total years of teaching service in calculating seniority status. Id. Indeed, the Commissioner has applied it without exception to reductions in force. See Howley and Brookholdt v. Board of Ed., Ewing, 1982 S.L.D. ____ (Comm'r of Ed., 1982); Davis v. Bd of Ed., Cape May, 1983 S.L.D. _____ (Comm'r of Ed., 1983). Accordingly, when petitioner acquired tenure status on September 1, 1982, he became entitled to have his 20 years of active military service added to his years of employment by respondent for purposes of calculating seniority rights. His total seniority as a special education teacher within respondent's district should have been fixed at 24 years of teaching service instead of the fours years' seniority credited by respondent.

Petitioner argues that his 24 years' seniority in the school district is greater than the 10 years' seniority accrued by Mrs. Joan Kargman as of June 30, 1982. Therefore, by failing to add petitioner's 20 years' military service to his years of employment within the district, respondent miscalculated petitioner's seniority rights and improperly

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dismissed him while retaining a fellow teacher with less seniority contrary to N.J.S.A. 18A:28-9 and 18A:28-10. Petitioner, therefore, requests that this tribunal recommend to the Commissioner of Education that he (1) direct respondent to rehire petitioner for the single position of special education teacher within the district; and (2) order respondent to grant petitioner all back salary, emoluments and seniority which he lost because of respondent's unlawful action.

Respondent Board's Arguments

ARGUMENT I

RESPONDENT PROPERLY DISMISSED PETITIONER PURSUANT TO REDUCTION IN FORCE AS REQUIRED BY N.J.S.A. 18A:28-9 and 18A:28-10

It is agreed upon by respondent that both the petitioner and participant had acquired tenured status pursuant to N.J.S.A. 18A:28-5. As a result, Reduction in Force (RIF) required the respondent to be controlled by N.J.S.A. 18A:28-9 and 18A:28-10. Petitioner does not assert that the Board failed to comply with said statutes but, rather, asserts that the calculations of seniority for the reduction in force were in error. N.J.S.A. 18A:28-11 requires the Board of Education to determine the seniority of persons who are to be affected by the reduction in force.

The Board contends that petitioner's reliance upon N.J.S.A. 18A:28-12 is misplaced. That statute has been cited by the petitioner with emphasis added. However, the emphasis and intention of that statute should be considered with a full reading of the statute, including the title of said statute. For that reason, the statute is recited in full as follows:

18A:28-12. DISMISSAL OF PERSONS HAVING TENURE ON REDUCTION: RE-EMPLOYMENT

> 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 vacancy occurs and in determining seniority, and in computing

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> 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 and 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]

The Board asserts it is important to note that this section of the statute relates to the eligibility list which is required to be maintained by the Boards of Education who in fact rif teachers. Under this provision, teachers who are riffed and who have prior military service are to receive credit for the military service when they are to be rehired or reemployed pursuant to this statute.

The petitioner has cited the case of Lang v. Princeton Regional Board of Education, 1979 S.L.D. 245, and Davis v. Board of Education of Cape May, 1983 S.L.D. _____ (Comm'r of Education, 1983). The Board submits that these cases fail to support the position as stated by the petitioner.

In the matter of Davis v. Board of Education of Cape May County Vocational School, the language set forth by the court is dictum. A review of the case clearly indicates that regardless of any military credit which the teacher who was not riffed may have received as a result of military service, that teacher had seniority without any such military service. The language of the court was not dispositive of the issue before the court and should not be considered as precedent for the position taken by the petitioner.

In the case of Lang v. The Board of Education of Princeton Regional School, the petitioner had two years of military service for which he requested to obtain credit in determining his seniority status. The Commissioner cited N.J.S.A. 18A:28-12 but failed to recognize that said statute concerns only reemployment of teachers and not the determination of the seniority status of a teacher who has not been riffed.

In addition to the status of the cases cited by the petitioner, the Board argues that an interpretation of N.J.S.A. 18A:28-12 as asserted by the petitioner, gives rise to bizarre and confusing results which was not the intention of the Legislature at the time said statute was passed.

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ARGUMENT II

THE COMMISSIONER OF EDUCATION'S ISSUANCE OF N.J.A.C. 6:3-1.10(c) TO CREATE FULL SENIORITY CREDIT FOR MILITARY SERVICE REGARDLESS OF WHETHER THE TEACHERS HAD TAUGHT IN THAT DISTRICT PRIOR TO ENTRY INTO MILITARY SERVICE IS VOID AS BEING ULTRA VIRES

The Board observes that pursuant to N.J.S.A. 18A:28-11, the Commissioner of Education, through the Administrative Code, has set forth standards for determining seniority which are promulgated under N.J.A.C. 6:3-1.10. Although the Administrative Code has recently been amended with an operative date of September 1, 1983, whereby N.J.A.C. 6:3-1.10(c) requires, for the purpose of seniority, that full recognition be given to service in the military or naval forces, that provision was not placed at the time of the action of the respondent Board and should not be considered in regard to this case. In the alternative, should N.J.A.C. 6:3-1.10(c) be given consideration in regard to this case, the Board submits that the issuance of N.J.A.C. 6:3-1.10(c) to create full seniority credit for military service regardless of whether the teacher had taught in that particular district prior to entry into said military service is void as being ultra vires.

N.J.A.C. 6:3-1.10(c) was published by the Commissioner of Education and states:

> 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.

N.J.S.A. 18A:28-12 reads, in part:

> . . .[i]n 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 with the district during the time of such military or naval service.

The Board asserts that N.J.S.A. 18A:28-12 cites as its source N.J.S.A. 18:13-19 which states virtually the same language as 18A:28-12 — or did when 18:13-19 became law in 1942 (See Exhibit A). Therefore, to determine the intent of N.J.S.A. 18A:28-12, it is

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necessary to determine the intent of N.J.S.A. 18:13-19 which gave rise to it. Once the intent of those two statutes is determined, it will then be possible to determine whether the Commissioner of Education is correct in his promulgation of N.J.A.C. 6:3-1.10(c) in that he specifically cites 18A:28-12 as his authority in said promulgation.

The Board contends that the statement that accompanied N.J.S.A. 18:13-19 when it became law in 1942 read in part:

> The purpose of this bill is to provide that teachers who are serving in the military services shall not lose their relative seniority rank UPON RESUMING SERVICE IN THE SCHOOL DISTRICT. [emphasis added] [See Exhibit B]

Thus, asserts the Board, it would seem that the bill was passed to provide for and to protect the brave lads who answered the call to arms after Pearl Harbor. It was designed to protect the seniority of teachers who left to fight in the war upon their return after the war. It was not designed to give a retired service man or woman with 20 years in the service, 23 years' seniority upon his or her obtaining tenure and thus leapfrogging 90% of the teachers in the district.

The Board argues that the Commissioner is wrong in his interpretation of N.J.S.A. 18A:28-12 and thus by definition his promulgation of N.J.A.C. 6:3-1.10(c). Since the Commissioner is wrong, it makes Plaintiff's position in this case untenable. The Board, therefore, requests that this tribunal deny petitioner's application for summary judgment and recommend the dismissal of the petition of appeal to the Commissioner.

Participant's Arguments

Participant asserts that the central issue before this court is one of statutory construction in order to determine whether or not respondent Board acted improperly in crediting Mrs. Kargman with 10 years of seniority and petitioner with four years of seniority. The particular legislation to be interpreted is codified at N.J.S.A. 18A:28-9 through N.J.S.A. 18A:28-13.

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Initially, participant urges and notes that the headnotes of the relevant provisions are not part of the legislation to be interpreted. N.J.S.A. 1:1-6. Accordingly, a proper statutory construction can be obtained only by removing the headnotes from consideration and closely scrutinizing the literal language of the legislation itself.

In interpreting statutory language, the judicial function is to effectuate legislative intent. Marsh v. Finley, 160 N.J. Super. 193 (App. Div. 1978). Strict or literal meanings cannot be given to legislative language when it is apparent that such meaning was not intended by the legislature. Board of Education of Manchester Township, Ocean County v. Raubinger, 78 N.J. Super. 90 (App. Div. 1963). Moreover, the sense of a statute controls over its literal terms and, accordingly, interpretations which lead to absurd or unreasonable results should be avoided. Schwartz v. Dover Public Schools in Morris County, 180 N.J. Super. 222 (App. Div. 1981); Citizens for Charter Change in Essex County v. Caputo, 151 N.J. Super. 286 (App. Div. 1977). In addition, statutes should not be interpreted in a manner which makes them unconstitutional as the Legislature is presumed to have intended its enactments to meet constitutional requirements. Schwartz v. Grunwald, 174 N.J. Super. 164 (Chan. Div. 1980). Where there are two possible interpretations of a statute, one which will uphold the law is to be adopted in preference to one under which the law will be unconstitutional. Silco Automatic Vending Company v. Puma, 105 N.J. Super. 72 (Law Div. 1969), reversed on other grounds, 108 N.J. Super. 427; State in the Interest of L.N., 109 N.J. Super. 278 (App. Div. 1970), affirmed, 57 N.J. 165.

Participant observes that keeping the above principles of statutory construction in mind, N.J.S.A. 18A:28-9 through 18A:28-13 proceeds in a natural and orderly fashion. In the first paragraph, the legislation provides that boards of education shall not be required to employ even tenured teachers where such positions should be abolished for economical or other good reasons. The law goes on to state that dismissals resulting from reductions in force 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 legislation then states that the board is to determine seniority of persons affected by reductions in force according to the Commissioner's standards.

Participant notes that at the conclusion of the portion of the legislation dealing with tenure, seniority, and reduction in force, N.J.S.A. 18A:28-12 begins with the following introductory clause: "If any teaching staff member shall be dismissed as a

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result of such reduction.... " Clearly, the remainder of that sentence has to do with teaching staff members who are already dismissed as a result of a reduction in force. N.J.S.A. 18A:28-12 is a single sentence which is entirely dependent upon the introductory clause.

Participant contends that N.J.S.A. 18A:28-12 applies only to teachers with tenure who are dismissed as a result of a reduction in force pursuant to N.J.S.A. 18A:28-9. The intent of N.J.S.A. 18A:28-12 is to set out guidelines to determine how these teachers are to be rehired. The statute provides that they be placed on a preferred eligible list in the order of "seniority." In determining seniority and in computing length of service for reemployment, full recognition shall be given for previous years of service and time of service by any such person in or with the military subsequent to September 1, 1940.

Importantly, asserts participant, the Legislature set out specific guidelines for determining seniority for ranking purposes in the preferred eligible list for reemployment while it leaves to the discretion of the Commissioner of Education the determination of seniority standards for the purposes of reduction in force dismissals.

Participant observes that petitioner contends that once a teacher obtains tenure, his seniority is determined by adding his total years of service within the district with his time of service in the military or naval forces of the United States or the State of New Jersey subsequent to September 1, 1940. Participant asserts that this contention is absurd.

Participant argues that the whole concept of seniority is one based on fairness. It revolves around conceptions which are mutually beneficial to the employer and the employee. Seniority quite simply provides that those employees working for the employer for the greatest amount of time will be preferred to those employees working for the employer for the least amount of time in the event of a layoff or any other type of preferential treatment. The benefit to the employer is that the remaining employees have more experience and are, as a result, able to contribute more to the efficient operation of his business. The benefit to the employee is that employees investing the most time with the employer are preferred over persons who have invested less time and, as a result, have the opportunity to work longer somewhere else. The concept is based on a fairness notion that one who has worked a long time in a certain position has a right to continue to work there.

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Participant contends that to apply petitioner's construction would contravene the basic purposes of seniority without any benefit whatsoever to the State of New Jersey or its public school system. The case at hand is a perfect example. Mrs. Kargman has ten years' experience as a special education teacher; yet, should petitioner's interpretation of N.J.S.A. 18A:28-12 be applied, she would be replaced by a person with only four years' experience. Moreover, this construction would have a profound impact on the educational system as a whole. If teachers with over 20 years' experience can be riffed by those with only three years' experience yet 20 years of military service, there will be little, if any, job security on the part of our state's educators. Participant points out that our state's educators are already underpaid and overworked and this construction would provide one further reason to seek a career in something other than education.

Participant contends that her proposed interpretation is far more consistent with legislative intent and is certainly more reasonable than that espoused by petitioner. In essence, the legislation sets up two types of seniority: one for determining who shall be dismissed in reduction in force situations and the other for determining who shall be rehired in reduction in force situations. In the dismissal seniority situations, we are concerned with years of service within the district prior to the date of the reduction in force and the teachers with the most years of experience will retain their positions while those with less experience will unfortunately be dismissed. In the reemployment situation, however, we are not only concerned with years of experience prior to the reduction in force state but also years of military service both prior to and subsequent to the date of reduction in force. In essence, by adopting a broader definition of seniority in the re-employment situation we are rewarding those who enter the military upon being riffed as opposed to taking up some other form of private sector job.

Participant argues that her proposed interpretation would further legislative intent of N.J.S.A. 18A:28-9 through N.J.S.A. 18A:28-13. It would have a profound beneficial impact on our educational system since teachers with the most experience would retain their positions in reduction in force situations over teachers with less teaching experience but more military experience, thus, creating further job security for our state's educators. It would also advance important state interests in encouraging riffed professionals to seek military service as opposed to beginning new careers in other non-professional fields. Most importantly, however, it appeals to a basic sense of fairness and equity which would definitely be thwarted if participant, after putting in over ten years of service, is dismissed by someone with only four years' experience.

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B. N.J.A.C. 6:3-10(c) [6:3-1.10(c)] does not apply to this controversy.

Participant observes that the Commissioner of Education, pursuant to N.J.S.A. 18A:28-10 and N.J.S.A. 18A:28-13, has authority to set forth standards for determining seniority. On September 1, 1983, these standards were amended by the introduction of N.J.A.C. 6:3-1.10(c), which requires that in computing length of service for seniority purposes, full recognition must be given to the time and service in or with the military or naval forces of the United States or this state, pursuant to N.J.S.A. 18A:28-12. Since this new standard was promulgated after respondent's action, it has no bearing on the controversy presently before the court and should, as a result, not be considered by this court in determining this controversy.

In any event, argues participant, it is clear that the Commissioner of Education has exceeded his authority under this statute to establish standards for seniority purposes. While the legislation appears to give the Commissioner of Education unbridled discretion in establishing seniority standards, it is clear that such standards must be related to the field of education. The Commissioner, through the enactment of N.J.A.C. 6:3-1.10(c), has not only exceeded the intent of the legislature but has established a seniority standard that has nothing whatsoever to do with experience in the field of education. This standard is as invalid as if the Commissioner had proposed a standard for seniority dealing with the length of service in the egg industry Apparently, it is based on confusion emanating from previous erroneous interpretive rulings of N.J.S.A. 18A:28-12 from the Commissioner's office. It is invalid and should not be considered by this forum.

C. The 14th Amendment's due process clause compels an interpretation of N.J.S.A. 18A:28-12 which permits Participant to retain her employment.

Participant contends that the United States Supreme Court in Board of Regents of State College v. Roth, 408 U.S. 564, held that whether or not public employment rises to a property right protected by the 14th Amendment's due process clause, is a matter of state law. Clearly, a tenured teacher has a state-created expectancy of continued employment which operates to establish a constitutionally protected property interest in that employment. As a result, a tenured teacher cannot be deprived of her position without good cause.

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Participant argues that depriving her of a position which she has held for over ten years, merely because another tenured teacher has worked in the military for 20 years, does not constitute sufficient good cause as required by the 14th Amendment. Accordingly, petitioner's interpretation of N.J.S.A. 18A:28-12 would give rise to an unconstitutional result. Where a statute is susceptible of two interpretations, one constitutional and one unconstitutional, the constitutional interpretation must hold. Accordingly, participant asserts, respondent's determination must stand.

PETITIONER'S ARGUMENTS IN REPLY TO THOSE ADVANCED BY RESPONDENT BOARD AND PARTICIPANT

Petitioner asserts that: (1) his position is fully supported by express decisions of the Commissioner of Education; (2) his interpretation of the statute is supported by its legislative history and by established canons of statutory construction; (3) the issue of the regulation's applicability is irrelevant to this litigation and, in any event, the regulation—which is valid—is indicative of the Commissioner's consistent interpretation of N.J.S.A. 18A:28-12; and (4) N.J.S.A. 18A:28-12, as construed by petitioner, is constitutional.

POINT I
N.J.S.A. 18A:28-12 MANDATES PETITIONER'S REINSTATEMENT

Petitioner notes that the Board claims that Lang v. Princeton Regional Bd. of Ed., 1979 S.L.D. 245 and Davis v. Bd. of Ed. of Cape May, 1983 S.L.D. _____ (Comm'r of Ed. 1983), "fail to support the position as stated by the petitioner." Significantly, participant fails to discuss these cases in any manner. Petitioner urges this tribunal to scrutinize these cases and that of Howley, et al. v. Bd. of Ed. of Ewing, 1982 S.L.D. _____ (Comm'r of Ed. 1982). They could not be more express on the point: a tenured teacher's seniority, when calculated for the purposes established in N.J.S.A. 18A:28-9 et seq., must include credit for his military service pursuant to N.J.S.A. 18A:28-12. The Board and the participant ignore these cases and offer various interpretations of N.J.S.A. 18A:28-12 at odds with its language and historical application.

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The Board, relying wholly upon a phrase contained in the Sponsor's Statement of S. 145, which was enacted into law as R.S. 18:13-19 (now N.J.S.A. 18A:28-12), argues that the statute was enacted "to provide for and protect the brave lads who answered the call to arms after Pearl Harbor." The Board would limit the application of the statute to teachers who left the Board's employ to join the armed forces and then returned to teach. Clearly, the Board's interpretation cannot be sustained by a plain reading of the statute. It credits "full recognition . . . to previous years of service" in the armed forces after September 1, 1940, without regard to whether or not there was an interruption in teaching service. Accordingly, there is no need to resort to the sponsor's statement. See, Bd. of Ed. of Mountain Lakes v. Maas, 56 N.J. Super. 254 (App. Div. 1959), aff'd, 31 N.J. 537 (1960), cert. den. 303 U.S. 843 4 L.Ed. 2d 1727 (1960).

Petitioner contends that participant propounds a complex two-tier seniority system whereby military service is not credited when determining seniority for purposes of a "RIF" situation, but is credited when determining seniority for purposes of a "reemployment" situation. Although such a scheme would appear to jive precisely with participant's interests here, this two-tier seniority system is unheard of in New Jersey education law and is certainly not supported by N.J.S.A. 18A:28-9 et seq. The fallacy in the participant's argument lies in her distortion of the method of seniority calculation. Prior credit toward a tenured teacher's seniority — be it employment credit or military credit — is not a number which changes depending on whether the teacher's position is subject to a reduction in force or whether the teacher is eligible for reemployement. Prior credit toward seniority is an immutable figure. It vests at the moment a teacher attains tenure in his/her position. Lang v. Bd. of Ed. of Princeton Regional School District, supra, at 247. As explained at length by the Commissioner:

> Petitioner . . . is, therefore, entitled to have his years of military service added to his years of employment by respondent for purposes of calculating seniority rights. This entitlement arose on the first day he acquired a tenure status in the district, approximately 15 years ago. [Howley at 26] [emphasis added]

Petitioner cites Howley as significant for several reasons. First, as demonstrated above, it stands for the express proposition that the grant of credit toward seniority for military service pursuant to N.J.S.A. 18A:28-12 occurs at the beginning of the teacher's seniority accrual. Second, it applies this seniority to a position abolishment case virtually identical to that at bar. Thus, contrary to the participant's assertion, the

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credit under N.J.S.A. 18A:28-12 is not applied only to the "reemployment" situation. Third, the Commissioner of Education did not merely affirm the findings of the administrative law judge in this record. He cited Judge Duncan's "most comprehensive analysis of pertinent statutory prescription and State Board regulations affecting tenure and seniority of teaching staff members including applicable case law":

> The Commissioner regards the treatment of this subject as a significant contribution in placing the matters of tenure and seniority in their proper perspective. . . . The Commissioner encourages local school districts to review the content of this decision in applying those criteria affecting the seniority of tenured teaching staff members whose positions are under consideration by virtue of a reduction in force. [Howley at 30-31]

Thus, petitioner observes that as recently as December 1982, the Commissioner expressly affirmed the applicability of N.J.S.A. 18A:28-12 to a reduction in force situation and, moreover, reiterated the decision in Lang. (See, Howley, at 25-26.) That seniority is a single calculation for an individual teacher's job "category"—whether for the purpose of determining "bumping" rights in a RIF situation or for the purpose of determining placement on a reemployment list—is clear not only from the Commissioner's decisions, but also from the express language of the relevant statutory authority and its history. In conducting this analysis, one must read the entire statute in pari materia. Loboda v. Clark Tp., 40 N.J. 424 (1963). N.J.S.A. 18A:28-10 provides that any reduction in force "shall be made on the basis of seniority" according to standards to be established by the Commissioner with the approval of the State Board of Education. (Petitioner here notes that in Lang, Davis, and Howley, the Commissioner did set such a standard and the State Board has never disapproved of it.) The local board effectuating such a reduction in force must determine "the seniority of the persons affected . . .," N.J.S.A. 18A:28-11, and must prepare a preferred eligible list for reemployment "in order of seniority." N.J.S.A. 18A:28-22. "[I]n determining seniority, and in computing length of service for reemployment," credit must be given for military service N.J.S.A. 18A:28-12 (emphasis added).

Petitioner asserts that it is apparent from this summary that military service credit is applied toward seniority for all purposes related to N.J.S.A. 18A:28-9 et seq. If the Legislature intended the credit to be limited to placement on the reemployment list, there would have been no need for it to include both the phrases "seniority" and "length of service for reemployment" in N.J.S.A. 18A:28-12. It could have merely provided that

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military service be credited "in computing length of service for reemployement." Its additional mandate that the credit be extended "in determining seniority" is consistent with petitioner's position here. Moreover, when using the word "seniority" in N.J.S.A. 18A:28-12, obviously the Legislature was aware of its intended use in the other subsections of the act. The word's import is controlled accordingly, Loboda v. Clark Tp., supra. In fact, it is an established canon of statutory construction that where a word or phrase is used more than once in a statute, it has the same meaning throughout, unless there is a clear indication to the contrary. Petition of Byron, 165 N.J. Super. 468, 473 (Law. Div. 1978), aff'd, 170 N.J. Super. 410 (App. Div. 1979); Keith Machinery Corp. v. Borough of South Plainfield, 89 N.J. Super. 584, 590-91 (Law. Div. 1965), aff'd, 91 N.J. Super. 469 (App. Div. 1966). Here, the Legislature intended that the word "seniority," which it used throughout N.J.S.A. 18A:28-9 et seq., have the same meaning, i.e., by statutory definition it included military service credit.

Petitioner contends that any doubt as to this interpretation is dispelled when it is realized that N.J.S.A. 18A:28-12 was originally drafted as part of one long paragraph, which included the procedure for both reductions in force and for establishment of preferred eligibility lists. The original statute, R.S. 18:13-19, L. 1942, c. 269, established a seniority system applicable to RIF's (". . . teachers having the least number of years of service to their credit shall be dismissed in preference to those having longer terms of service . . .", and directed that military service be credited "in determining seniority under this act." There is no doubt that the "seniority" to which the credit extended was that to be used as a basis for determining the order of the RIF. In the same paragraph, the preferred eligibility list for reemployment was established "based on full recognition to previous years of service." (R.S. 18:13-19, L. 1942, c. 269).

Petitioner observes that in 1951, R.S. 18:13-19 was amended to include, among other things, the procedure now found in N.J.S.A. 18A:28-10 and 28-11 whereby the Commissioner sets the standards for determining seniority. The preferred eligibility list provision was amended so as to include an express reference to "seniority" as its basis. The military service credit provision remained intact, clearly modifying both the RIF and reemployment provisions (". . . service . . . with the military . . . shall be credited in determining seniority under this act . . ."[emphasis added]). L. 1951, c. 292. The same language was carried forward when the act was amended with minor editorial modifications in L. 1957, c. 181, 63. With the recodification of Title 18A, the long

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paragraph was split into sections. However, the applicability of the military service credit provision to the whole act was not changed. In its most recent manifestation it was extended to "determining seniority," and to "computing length of service for reemployment," clearly just another way of applying the credit to all seniority calculations "under this act." To construe it otherwise would turn this clear legislative history on its head.

POINT II

N.J.A.C. 6:3-1.10(c) REFLECTS THE CONSISTENT POLICY OF THE COMMISSIONER IN HIS APPLICATION OF N.J.S.A. 18A:28-12

Petitioner notes that both the Board and the participant argue against the validity and applicability of N.J.A.C. 6:3-1.10(c), as amended effective September 1, 1983. There, the Commissioner ruled that, in computing length of service for seniority purposes, full recognition must be given to military service credit. The Board and the participant take the position that the regulation exceeds the Commissioner's statutory authority. Petitioner contends that the regulation is consonant and, indeed, mimics the language of N.J.S.A. 18A:28-12. (Petitioner notes that because of the express statutory directive, it would have been illegal for the Commissioner to promulgate a regulation prohibiting the extension of military service credit toward seniority.)

Petitioner contends that the regulation is superfluous. First, it is superfluous because the statute expressly directs boards to credit military service toward seniority. The regulation neither adds nor detracts from the statute. Second, the Commissioner has already ruled in Davis, Lang, and Howley to the same effect as the regulation. The regulation merely restates the Commissioner's long-standing interpretation and application of N.J.S.A. 18A:28-12. Thus, this tribunal need not rule as to whether or not the regulation was applicable to this case retroactively.

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POINT III

NO CONSTITUTIONAL ISSUES ARE RAISED

BY APPLICATION OF N.J.S.A. 18A:28-12

Petitioner notes that participant argues that she has a property interest in her tenured position protected by the due process clause of the Fourteenth Amendment to the United States Constitution which cannot be deprived except for "good cause" and, further, that if petitioner "bumps" her on the basis of his military service credit, such "good cause" would be lacking. Petitioner asserts that participant is wrong.

Petitioner argues that participant's protective property interest in her job is defined by the Fourteenth Amendment, but by the applicable statutes:

> Property interests, of course, are not created by the constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Bd. of Regents v. Roth, 408 U.S. 564 , 33 L.Ed. 2d 549, 561 (1972); accord: Bishop v. Wood, 426 U.S. 341, 344-45, 48 L.Ed. 2d 684, 690 (1976). Here, as participant notes, the State of New Jersey has granted certain teachers—participant and petitioner among them—a protectional property interest in their jobs. N.J.S.A. 18A:28-5 et seq. Participant enjoys the right to be protected against termination except in accordance with the statutory scheme. That statutory scheme prohibits the dismissal of a tenured teacher except for "just cause" and except in accordance with the procedure established in N.J.S.A. 18A:6-10 et seq.

Petitioner argues, however, that participant overlooks another portion of the statutory scheme, equally part of the statutory definition of participant's property rights: the reduction in force provisions of N.J.S.A. 18A:28-9. These include the controverted provision of N.J.S.A. 18A:28-12, which defines petitioner's and participant's seniority and which defines an aspect of participant's property right in her job. N.J.S.A. 18A:28-12 was enacted in 1942, before participant obtained her tenure. Thus, at the time her property interest vested, petitioner's "understanding" of the nature of her property interest

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included the "understanding" that in the case of a RIF, her seniority might be calculated at a lesser number than that of a teacher with military service. Under these circumstances, petitioner's (and the Commissioner's) interpretation of N.J.S.A. 18A:28-12 does not affect a property right of participant and cannot lead to an unconstitutional result.

DISCUSSION AND CONCLUSIONS

The Board's assertion and argument that the State Board's promulgation of N.J.A.C. 6:3-1.10(c) is void as being ultra vires is not at issue in these proceedings. Petitioner neither asserted nor placed reliance upon that section of the Administrative Code in his Petition of Appeal but, rather, placed his claim for relief upon the statute, N.J.S.A. 18A:28-12, from which the above rule was fashioned. That issue not having been joined by the pleadings will not, therefore, be given consideration in the disposition of this matter.

Similarly, participant's asserted protected property interests are not at issue here and, accordingly, will not be addressed.

The Board and participant challenge petitioner's interpretation of the statute N.J.S.A. 18A:28-12, whereby petitioner asserts that 20 years of military service attaches to his seniority upon his having acquired a tenure status in the school district, together with the four years of teaching service within the school district to give him a total of 24 years of seniority. The Board and participant contend, among other things, that petitioner's relief lies only for a recognition of his military service credit on a preferred eligibility list subsequent to his dismissal by way of a reduction in force, pursuant to N.J.S.A. 18A:28-9, and for reemployment purposes only. Such a contention is not supported by the weight of decisional and statutory authority and, if applied, would lead to anomalous results. Howley, supra; Long, supra.

To suggest, as the Board and participant have, that military service attaches only upon the dismissal of a tenured teaching staff member as a consequence of a reduction in force and, further, that such military service credit is recognized only for purposes of reemployment does not, in this court's judgment, harmonize with statutory

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construction. Thus, as petitioner urges, resort must be given to the rule of in pari materia construction. The challenged statute, N.J.S.A. 18A:28-12, is found at Chapter 28 of Title 18A, which commences with Article I. "Acquisition and Effect of Tenure," (N.J.S.A. 18A:28-1 through 28-7) continues to Article 2, "Termination of Employment" (N.J.S.A. 18A:28-8) and ends with Article 3, "Effect of Reduction of Force Upon Persons Under Treasure," (N.J.S.A. 18A:28-9 through N.J.S.A. 18A:28-14), the Article under which the challenged statute appears.

The rule of statuory construction is most applicable to statutes which relate to the same subject matter and were passed at the same session of the Legislature or where the later statutes relating to the same subject matter refer to the earlier. Statutes are to be construed as in pari materia when they pertain to the same subject matter and if they:

> . . . relate to the same person or thing, or to the same class of persons or things or have the same purpose or object. As between characterization of the subject matter with which a statute deals and characterization of its object or purpose, the latter appears to be the most important factor in determining whether different statutes are closely enough related to justify interpreting one in light of the other. [2A Sutherland, Statutory Construction, §5103, p. 298 (4th ed. 1973)]

In a 1975 case, the New Jersey Supreme Court noted that "it is identity or similarity of purpose or object that most convincingly justified resort to the rule of in pari materia as in aid in statutory construction." State v. DiCarlo, 67 N.J. 321, 325 (1975). In the DiCarlo case, the issue before the Court was whether the Controlled Dangerous Substance Act was in pari materia with N.J.S.A. 39:4-0(a), which provided for imposition of a fine or prison sentence, as well as temporary forfeiture of driving privileges, in the event a person was found to have been operating a motor vehicle while under the influence of liquor or a narcotic drug. In particular, the question was whether the definition of narcotic drug found in the Controlled Dangerous Substance Act should be applied to the same term as it appeared in N.J.S.A. 39:4-50(a). The court ruled that the statutes were not in pari materia, stating that the "adventitious occurrence of like or similar phrases, or even of similar subject matter, in laws enacted for wholly different ends will not justify applying the rule of in pari materia." Id. at 325. The court found that the object of the Controlled Dangerous Substance Act was "suppression of illegal

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traffic in narcotic drugs." Id. However, the purpose of N.J.S.A. 39:4-50 was found to be to "prevent the operation of motor vehicles by those whose facilities are so impaired as to present a danger to the safety of others as well as themselves." Id. See, also, International Brotherhood of Elec. Workers v. Gillen, 174 N.J. Super. 326 (App. Div. 1980).

In Mimkon v. Ford, 66 N.J. 426 (1975), the issue before the court was whether the rule of in pari materia construction should be applied to two statutes. One statute provided for visitation rights of grandparents when a parent has died and the other protected the adopting parents from disturbance to their relationship with their child by the natural parents. The court found that the purpose of both statutes was the same, i.e., to "provide substitute parental relationships for children . . . who have been deprived . . . of a healthy relationship with one or both natural parents." Id. at 433. In that case, both statutes were in the same title and chapter. In addition, the particular facts of that case appeared to influence the court greatly. A similar argument may be made with regard to the cases of Giles v. Gassert, 22 N.J. 22 (1956) and State v. Green, 62 N.J. 547 (1973).

Judge Lora dissenting In re Bergwell, 173 N.J. Super. 431, subsequently adopted by the Supreme Court at 85 N.J. 382, 383, stated, "the courts will interpret and enforce the legislative will as written and not according to some supposed unexpressed intention." [citation omitted] 173 N.J. Super. 431, 437.

It can fairly be said that Article 3 of Chapter 28 (N.J.S.A. 18A:28-9 through N.J.S.A. 18A:28-13) applies to tenured teaching staff members affected by a reduction in force and the crediting of seniority rights to those teachers so affected. It is equally clear that the legislative will of N.J.S.A. 18A:28-12 was and is to grant full recognition of a teaching staff member's military service time to be credited to him as though he had been regularly employed within the school district during the time served in military service. Respondent's and participant's disjunctive reading of the statute that the computation of military service credit is for reemployment purposes only does not comport with the legislative intent, nor is such a reading harmonious with the in pari materia construction of Article 3.

As Mr. Justice Hanemon, speaking for the court in Loboda v. Clark, supra, said:

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> . . . words alone do not control; rather it is the internal sense of the law which controls. The intention comes from a general view of the whole expression rather than from the literal sense of the particular terms. Palkoski v. Garcia, 19 N.J. 175, 181 (1955). The nature of the subject matter, the contextual setting, and statutes in pari materia must all be viewed together in seeking the legislative intent. The import of a particular word or phrase is controlled accordingly. Isolated expressions cannot be invoked to defeat a reasonable construction Giles v. Gassert, 23 N.J. 22, 33-34 (1956).

I **CONCLUDE**, therefore, pursuant to facts on the record and an application of N.J.S.A. 18A:28-12 that petitioner has credited to his seniority as a special education teacher in the Newfield School District the amount of four years' service as a teacher in the district together with the 20 years served in the military for a total of 24 years seniority status. Howley, supra; Long, supra.

I further **CONCLUDE** that under the circumstances extant in this matter, petitioner was improperly dismissed as a consequence of the Board's action to effectuate a reduction in force, pursuant to N.J.S.A. 18A:28-9.

Accordingly, it is **ORDERED** that the Board of Education of the Borough of Newfield reinstate petitioner forthwith with such salary and other emoluments consistent with the Board's policies as would have pertained to petitioner had he not been dismissed, less mitigated sums from his termination of employment until the date of reinstatement.

Summary judgment is hereby entered on behalf of petitioner and the Board's and participant's Motions in opposition thereto are hereby **DENIED**.

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 6197-83

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

5 March 1984
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

March 6, 1984
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

March 6, 1984
DATE

Ronald L. Lauber/pbb
OFFICE OF ADMINISTRATIVE LAW

ij/ee

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ANDREW T. CORRADO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NEWFIELD, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

It is observed that the primary exceptions to the initial decision individually submitted by the Board and participant, as well as those reply exceptions submitted by petitioner, have been filed with the Commissioner pursuant to the applicable provisions of N.J.A.C. 1:1-16.4a, b and c.

Although the three main points of exceptions to the initial decision argued by both the Board and participant are essentially the same, the Commissioner observes that they do not appear in identical order. The points of exception taken by the Board and/or participant have been summarized below.

1. The administrative law judge failed to properly interpret the construction principle of in pari materia in construing the legislative intent of N.J.S.A. 18A:28-12.

The Board argues as follows:

> "***The principle of in pari materia has been defined as 'upon the same manner or subject.' Statutes in pari materia are to be construed together. Black's Law Dictionary, 898 (4th. Ed. 1968). However, it should be noted that the principals (sic) of in pari materi (sic) should not be utilized unless it becomes necessary where the terms of the statute to be construed are ambiguous or insufficient or is (sic) sufficiently doubtful. See 73 Am. Jur. 2nd Statutes Subsection 187 (1974).
>
> "Therefore, in order for the principles of in pari materia to be applicable to the case at hand, the court must reach a decision that the statutes are ambiguous or that their meaning is doubtful. It is only then that the other sections should be utilized in order to determine

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> the legislative intent at the time in which the statute was passed. It is also important to note that if the statute is deemed to be doubtful and ambiguous, that the legislative history is also a proper mechanism to be utilized in order to determine the legislative intent. See 73 Am. Jur. 2nd Statutes Subsection 192 (1974).
>
> "In the case at hand, it is respectfully submitted to the Commissioner that N.J.S.A. 18A:28-12 although not artfully drafted, clearly applies to employees who are under tenure and have been riffed. The administrative law judge's dismissal of the two tier arguments presented by the Board of Education and by the Intervenor fails to comport with a clear reading of N.J.S.A. 18A:28-12; a review of the sections of Article 3 of Chapter 28 in pari materia and the legislative history of the intent of the statute when it was originally passed in 1942 as set forth in Respondent's Brief. It is respectfully submitted to the Commissioner that the trial judge's inclusion utilizing the principle of in pari materia is erroneous and that the conclusions reached thereof should not be approved by the Commissioner.***" (Board's Exceptions, at p. 2)

2. The administrative law judge failed to properly interpret N.J.S.A. 18A:28-10, the regulations set forth in N.J.A.C. 6:3-1.10(c) and N.J.S.A. 18A:28-12.

The Board maintains that the judge improperly dismissed its argument that the provisions of N.J.A.C. 6:3-1.10(c) do not apply to the matter herein controverted inasmuch as its action taken with regard to petitioner's seniority predates the enactment and effective date (September 1, 1983) of the above-cited regulation. This section pertains to the computation of seniority for teaching staff members who rendered military service. Moreover, the Board submits that, in the event that N.J.A.C. 6:3-1.10(c) is to be viewed in reaching a final determination regarding the issue of petitioner's seniority, then the judge was required to consider those provisions in pari materia with N.J.S.A. 18A:28-9 through 29-14. (Board's Exceptions, at pp. 2-3)

3. The administrative law judge's failure and/or refusal to address participant's asserted constitutionally-protected property interest in employment under the due process clause of the Fourteenth Amendment to the U.S. Constitution results in a gross injustice to her. (Participant's Exceptions, at pp. 1-2)

4. The administrative law judge erred in refusing and/ or failing to address participant's claim that the proposed statutory

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construction of N.J.S.A. 18A:28-12 by petitioner would give rise to an unconstitutional result.

Participant contends that, where a statute is susceptible of two interpretations, one that is constitutional and the other unconstitutional, the former interpretation of such statute must prevail. (Participant's Exceptions, at pp. 2 and 5)

Petitioner relies on his reply exceptions to those exceptions of participant in also rejecting the arguments advanced by the Board in its exceptions to the initial decision.

Petitioner's specific reply exceptions are set forth below in pertinent part:

> "***Participant places great emphasis on her argument that if petitioner were credited with military service pursuant to N.J.S.A. 18A:28-12 and respondent were forced to terminate participant, such termination would deprive her of a property interest without due process in violation of the Fourteenth Amendment to the United States Constitution, relying upon Bd. of Regents v. Roth, 408 U.S. 564, 577, 33 L.Ed.2d 548, 561 (1972). Participant alleges that Judge Law did not address this issue.
>
> "At the outset, we note that Judge Law accurately stated the constitutional issue presented by participant at pages 12-13 of his opinion and accurately stated petitioner's reply thereto at pages 18-19 of the Initial Decision. As is indicated there, participant's constitutional argument is completely devoid of merit.
>
> "Participant's protectible property interest in her job is defined not by the Fourteenth Amendment, but by the applicable statutes:
>
> > 'Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.'
>
> Bd. of Regents v. Roth, supra at 577, 33 L.Ed.2d at 561; accord: Bishop v. Wood, 426 U.S. 341, 344-45, 48 L.Ed.2d 684, 690 (1976).

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"Here, as participant notes, the State of New Jersey has granted certain teachers -- participant and petitioner among them -- a protectible property interest in their jobs. N.J.S.A. 18A:28-5 et seq. Participant enjoys the right to be protected against termination except in accordance with the statutory scheme. That statutory scheme prohibits the dismissal of a tenured teacher except for a 'just cause' and except in accordance with the procedure establishes in N.J.S.A. 18A:6-10 et seq.

"However, participant overlooks another portion of the statutory scheme, equally part of the statutory definition of participant's property rights: the reduction in force provisions of N.J.S.A. 18A:28-9 et seq. These include the controverted provision of N.J.S.A. 18A:28-12, which defines petitioner's and participant's seniority and which defines an aspect of participant's property rights in her job.

"N.J.S.A. 18A:28-12 was enacted in 1942, before participant obtained her tenure. Thus, at the time her property interest vested, participant's 'understanding' of the nature of her property interest included the 'understanding' that in the case of a RIF, her seniority right might be calculated at a lesser number than that of a teacher with military service. Under these circumstances, petitioner's (and the Commissioner's and Judge Law's) interpretation of N.J.S.A. 18A:28-12 does not affect a property right of participant and cannot lead to an unconstitutional result.*/

---

*/ Although participant does not expressly articulate this argument, her argument may be construed as a challenge to N.J.S.A. 18A:28-12 on substantive due process grounds: i.e., is there any rational basis for the veteran's preference contained in this statute? Similar statutes have been challenged on similar grounds and rejected by the highest courts of the Nation and this State. Personnel Administrator of Mass. v. Feeney, 443 U.S. 256, 60 L.Ed.2d 870 (1979); Ballou v. State Department of Civil Service, 75 N.J. 365 (1978). The courts have articulated the rational basis of such statutes as 'justified as a measure designed to reward veterans for the sacrifice of military service, to ease the transition from military service, to encourage patriotic service and to attract loyal and well-

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"***Judge Law's harmonious construction of Article 3 of Chapter 28 (N.J.S.A. 18A:28-9 through N.J.S.A. 18A:28-13) was proper and in consonance with established canons of statutory construction. As we demonstrated in our reply brief, the express statutory language and the undisputed legislative history make it apparent that seniority is a single calculation for an individual teacher's job 'category' -- whether for the purpose of determining 'bumping' rights in a RIF situation or for the purpose of determining placement on a reemployment list.***

"Specifically, if the Legislature intended military service credit to be limited to placement on the reemployment list, there would have been no need for it to include both phrases 'seniority' and 'length of service for reemployment' in N.J.S.A. 18A:28-12. It could have merely provided that military service be credited 'in computing length of service for reemployment.' Its additional mandate that the credit be extended 'in determining seniority' is consistent with petitioner's position here.

"Moreover, when using the word 'seniority' in N.J.S.A. 18A:28-12, obviously the Legislature was aware of its intended use in the other subsections of the Act. It has the same meaning throughout the Act unless there is a clear indication to the contrary. Petition of Byron, 165 N.J. Super. 468, 473 (Law Div. 1978), aff'd o.b. 170 N.J. Super. 410 (App. Div. 1979). Here, the Legislature intended that the word 'seniority', which it used throughout N.J.S.A. 18A:28-9 et seq. have the same meaning, i.e., by statutory definition, it included military service credit.

"Finally, any doubt as to this interpretation is dispelled when it is realized that N.J.S.A. 18A:28-12 was originally drafted as part of one long paragraph, which included the procedure for both reductions in force and for establishment of preferred eligibility lists.***"

(Emphasis in text)

(Petitioner's Reply Exceptions, at pp. 1-6)

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*/ disciplined people to civil service occupations.' Feeney, supra, 442 U.S. at 265, 60 L.Ed.2d at 879. Even though an absolute veteran's preference may appear unfair to some, it does not offend due process. Ballou, supra at 371.

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The Commissioner has carefully considered the arguments of the parties advanced by their exceptions in the matter herein controverted.

Initially, the Commissioner is constrained to comment upon those exceptions of the parties which focus upon those legal arguments regarding whether or not it is appropriate to rely upon the legislative history as it relates to the enactment of R.S. 18:13-19 as amended, and subsequently recodified as N.J.S.A. 18A:28-9 through 28-13 in reaching a final determination in this matter. The Commissioner finds and determines that a review of the legislative history of the pertinent statute in question is indispensable in order to arrive at a justiciable disposition of the instant matter. The Commissioner so holds.

The Commissioner observes that the legislative source of the enactment of this specific legislation first appears in Chapter 243, Laws of 1909, which reads as follows:

> "3. Nothing herein contained shall be held to limit the right of any school board to reduce the number of principals or teachers employed in any school district when such reduction shall be due to a natural diminution of the number of pupils in said school district; and, provided further, that the service of any principal or teacher may be terminated without charge or trial who is not the holder of a proper teacher's certificate in full force and effect."
> (L. 1909, c. 243, Section 3, at p. 399)

It is further observed that, although Section 1 of the above-cited statute initially states the manner in which tenure by "teachers, principals and supervising principals" occurs, however, there is no provision contained in Section 3, according seniority protection to tenured "teachers, principals or supervising principals." In fact, the Legislature did not grant seniority protection to tenured supervising principals, principals or teachers, until 1935 when it amended Section 3 by virtue of its enactment of Chapter 126, Laws of 1935, which reads as follows:

> "BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:
>
> 1. Section three of the act to which this is an amendment and supplement shall be and the same hereby is amended and supplemented so as to read as follows:
>
> 3. Nothing herein contained shall be held to limit the right of any school board to reduce the number of supervising principals, principals or teachers employed in any school district when

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such reduction shall be due to a natural diminution of the number of pupils in said school district; provided, however, that the dismissals resulting from such reduction shall not be by reason of residence, age, sex, marriage, race, religion, or political affiliation, but when principals, supervising principals or teachers under tenure are dismissed by reason of such reduction those principals, supervising principals or teachers having the least number of years of service to their credit shall be dismissed in preference to those having longer terms of service, and should any supervising principal, principal or teacher under tenure be dismissed as a result of such reduction such supervising principal, principal or teacher shall be and remain upon a preferred eligible list in the order of years of service for re-employment whenever vacancies occur and shall be re-employed by the body causing dismissal in such order when and if a vacancy in a position for which such supervising principal, principal or teacher shall be qualified and that such re-employment shall give full recognition to previous years of service; and provided, further, that the services of any principal or teacher may be terminated, without charge or trial, who is not the holder of a proper teacher's certificate in full force and effect.

2. This act shall take effect immediately. Approved March 26, 1935." (Emphasis supplied.)

In the Commissioner's judgment it is apparent from a review of the above-cited amendatory legislation that as of March 26, 1935 all tenured "***principals, supervising principals or teachers***" were to be accorded seniority which was to be taken into consideration by a local board of education at the time it acted to cause a reduction in force.

Moreover, the Commissioner is constrained to further observe that Chapter 126, Laws of 1935 requires local boards of education to give all affected tenure employees dismissed as the result of a reduction in force full recognition of their prior employment service rendered in the school district upon their reemployment in the district when such vacancies occurred for which they are qualified.

The effect of the language of the above-cited statute is best illustrated by the following example:

Tenured Teacher Jones has been in the board's employ for five (5) years. He holds an appropriate teaching certificate. At the conclusion of his fifth year of employment, the board has suffi-

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cient reason to cause a reduction in force. Teacher Jones has sufficient years of teaching service in the board's employ to have acquired a tenure status pursuant to statutory prescription. Based upon the number of teaching positions which had to be eliminated, the board was required to dismiss Teacher Jones because he, with five years of teaching service, had the least seniority of all of the other tenured teachers. Consequently, Teacher Jones was dismissed by the board and placed on a preferred eligibility list in the order of years of service for purposes of reemployment. Teacher Jones was notified two years later that a teaching vacancy would be opening for the following year for which he was qualified and eligible to fill by virtue of his seniority. Teacher Jones accepted the position offered and was thereby reemployed by the board. At the time of his reemployment, the board was required by law to fully recognize the seniority he had accrued from his prior five years of teaching service and to cause those years of seniority to be attached prospectively to those years of ensuing teaching service he would render upon his reemployment in the event that it was confronted with another reduction in force. Assuming this was the case and the board was in fact confronted with another reduction in force three years after it had reemployed Teacher Jones, he would at that time have acquired and accumulated 8 years of actual teaching service and 8 years of seniority.

As of December 20, 1937, the Legislature, through the enactment of Chapter 188 of the Laws of 1937, caused all public laws to be compiled, revised and/or consolidated into codified law to be known as the Revised Statutes (R.S.).

Consequently, the Laws of 1909, Chapter 243 and the Laws of 1935, Chapter 126, previously cited herein appear without further amendment under the Revised Statutes as R.S. 18:13-16 through 18:13-19. Section 3 of both of the prior Laws of 1909 (Chapter 243) and Laws of 1935 (Chapter 126) was specifically codified as R.S. 18:13-19. This section of law related in part to the acquisition of seniority by tenured principals, supervising principals and teachers in connection with reductions in force and reemployment subsequent thereto.

The first amendment to R.S. 18:13-19 by the Legislature was prompted by World War II. On March 16, 1942 Senate Bill 146 amended R.S. 18:13-19 in pertinent part as follows:

> "***In computing length of service within the district, the time of service by such supervising principals, principals or teachers in or with the military or naval forces of the United States of America or of this State subsequent to September first, one thousand nine hundred and forty, shall be credited in determining seniority under this act as though such supervising principals, principals or teachers had been regularly employed within the district during the time of such military service.***"

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The statement attached to the amendment to R.S. 18:13-19 clearly and unequivocally identifies its purpose:

"STATEMENT

> "When there is an excess of tenure teachers in relation to pupils enrolled in a school district, the board is authorized to dismiss teachers beginning with those having the least number of years of service to their credit in that district. The purpose of this bill is to provide that teachers who are serving in the military services shall not lose their relative seniority rank upon resuming service in the school district." (Emphasis supplied.)

Senate Bill 146 was adopted by the Legislature without revision or modification and became effective on June 30, 1942.

Thus, in the Commissioner's judgment it is clear from a reading of the statement that tenured principals, supervising principals and teachers, who were in the Board's employ after September 1, 1940 could not be denied seniority accrual during the intervening periods of time they were required to serve in the military or naval forces of the United States and upon resuming such tenured employment in the school district.

The significant factors to consider with regard to the construction of the amendatory language to R.S. 18:13-19 is that in order for seniority to accrue to a tenured principal, supervising principal or teacher who served in the armed forces of this country after September 1, 1940 he or she must first have been in the employ of a local board of education and have acquired a tenure status which affords seniority protection prior to their being called into the armed forces of the United States. Thereafter as provided in law their seniority accrues during such service and is accorded to them upon the resumption of their employment by a local board of education upon their return to employment in the school district. Consequently, if an affected tenured employee had entered the armed forces of this country during the time of war or state of emergency, his or her seniority accrual would be uninterrupted from the time he or she commenced employment in the school district and would continue to accrue during the time spent in the armed forces to be credited to that person as of the time he or she was entitled to resume the tenured employment after the termination of such service in the armed forces.

At this juncture the Commissioner observes that the pertinent provisions of R.S. 18:13-19 as amended and effective June 30, 1942 have remained unchanged regarding the seniority accrual expanded only by those categories of certificated persons who are now considered tenured teaching staff members in accordance with N.J.S.A. 18A:28-12 as defined by N.J.S.A. 18A:1-1.

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The Commissioner does observe, however, that R.S. 18:1-1 et seq. was recodified and revised pursuant to L. 1967, c. 271, into Title 18A: Education and expanded into three volumes now cited as N.J.S.A. 18A:1-1 et seq.

According to "Schedule A" contained in the third volume of N.J.S.A. 18A: Education under "Allocation of Source" on page 314, the former R.S. 18:13-19 has now been reallocated into the following sections:

"Source Sections

R.S. 18:13-19 ... As am. L. 1942, c. 269
L. 1951, c. 292
L. 1952, c. 236, sec. 14
L. 1952, c. 231, sec. 3

"Revised Sections

18A:28-9
18A:28-10
18A:28-11
18A:28-12
18A:28-13" (at p. 341)

N.J.S.A. 18A:28-12 is the current section of law dealing with the seniority issue controverted herein. Subject only to those applicable amendments cited ante, the statute reads as follows:

> "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.)

Although the language as it appears in N.J.S.A. 18A:28-12 is not identical to the former R.S. 18:13-19, nevertheless it was never

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subject to legislative amendment or modification after its incorporation into Title 18A: Education. The only explanation for such change of wording may be found in "Schedule B" of the third volume at page 362. It is stated on this page that the specific provisions of N.J.S.A. 18A:28-12 have been "[r]evised to consolidate source sections."

Accordingly, the Commissioner finds and determines that there were no substantive changes to be implied from the wording as it appears in N.J.S.A. 18A:28-12 which would lend a different interpretation from that which is to be construed from Chapter 231, Laws of 1962 which appeared under former R.S. 18:13-19 when last amended and reads in pertinent part as follows:

> "***All [tenured teaching staff members] dismissed shall be placed on a preferred eligible list to be prepared by the board of education of the school district, and shall be reemployed by the board of education of the school district in order of seniority as determined by the said board of education. In computing length of service within the district, the time of service by such superintendents of schools, whether served as superintendents of schools, city superintendents or supervising principals, assistant superintendents, principals, teachers, or other employees holding tenure pursuant to section 18:13-16 in or with the military or naval forces of the United States of America or of this State subsequent to September 1, 1940, shall be credited in determining seniority under this act as though such superintendents, assistant superintendents, principals, teachers, or other employees holding tenure pursuant to section 18:13-16 had been regularly employed within the district during the time of such military service. Should any superintendent of schools, assistant superintendent, principal, teacher, or other employee holding tenure pursuant to section 18:13-16 under tenure be dismissed as a result of such reduction, such person shall be and remain upon a preferred eligible list in the order of seniority for re-employment whenever vacancies occur and shall be re-employed by the body causing dismissal in such order when and if a vacancy in a position for which such superintendent, assistant superintendent, principal, teacher, or other employee holding tenure pursuant to section 18:13-16 shall be qualified. Such reemployment shall give full recognition to previous years of service.***"
>
> (Emphasis supplied.)

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Contrary to those assertions made by participant and the Board, all of the former statutory provisions of R.S. 18:13-19 as amended, now N.J.S.A. 18A:28-9 through 13, are required to be read in pari materia in order to arrive at a fair and equitable determination of the interrelated issues of tenure and seniority controverted herein. The Commissioner so holds.

In summary, therefore, the Commissioner finds and determines as follows:

1. Both the legislative history and the former provisions of R.S. 18:13-19, currently incorporated and allocated by source under N.J.S.A. 18A:28-9 through 13, are relevant to determination of the matter controverted herein.

2. The specific provisions of R.S. 18:13-19, now N.J.S.A. 18A:28-12, as related to the acquisition of seniority and the seniority rights of tenured teaching staff members may only be construed to grant accrued seniority to tenured teaching staff members who were required to serve in the armed forces after September 1, 1940, provided they previously enjoyed a tenure status in the Board's employ which was subsequently interrupted by being called into the armed forces of this State or the United States.

3. Tenured teaching staff members in the Board's employ after September 1, 1940 who were subsequently called into the armed forces of this State or the United States were entitled to have their seniority accumulate without interruption during the period of time such service in the armed forces was rendered and credited to them upon their resumption of employment by the Board subsequent to their termination from the armed forces.

4. Petitioner's 20 years of service in the armed forces of the United States do not qualify him for an equal amount of seniority credit by the Board inasmuch as his service was voluntarily rendered prior to the time he entered an employment relationship with the Board without first having acquired a tenure status pursuant to N.J.S.A. 18A:28-5 or seniority protection pursuant to N.J.S.A. 18A:28-12 as regulated by N.J.A.C. 6:3-1.10(c) as amended.

5. Petitioner therefore may only claim as a matter of seniority those four years of tenured employment service rendered to the Board after he retired from the armed forces until the Board's reduction in force which resulted in his dismissal and placement on a preferred eligibility list for reemployment.

6. Participant, by virtue of her ten years of tenured employment service with the Board, enjoys 10 years of seniority protection and is therefore more senior to petitioner pursuant to N.J.S.A. 18A:28-12 and N.J.A.C. 6:3-1.10(c) as amended.

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7. The Board's action in retaining participant in its employ over petitioner was in all ways proper and legally correct pursuant to N.J.S.A. 18A:28-12 and N.J.A.C. 6:3-1.10(c).

In view of the above findings and determination the Commissioner further finds and determines that the constitutional issue with respect to her property interest in continued employment by the Board need not be determined. This determination is based upon the fact that the statutory provisions of N.J.S.A. 18A:28-9 through 13 are controlling herein.

Moreover, to the extent that this determination is contrary to the prior decision rendered by the Commissioner in Lang, supra, that decision is hereby overruled.

In rendering the determination herein, the Commissioner is mindful of the consequences of this decision upon the seniority entitlement of those teacher veterans whose careers, while not interrupted, were perhaps delayed in being launched by virtue of time spent in service. In the Commissioner's view, such justifiable recognition of military service contributions may and should be accomplished through statutory modification which could accord seniority entitlement to veterans for up to four years of service to the same degree as is accorded for salary purposes by N.J.S.A. 18A:29-11. Such solution would accord reasonable recognition for services rendered without the anomalous result, as contended by petitioner herein, of a 20-year career serviceman with four years of teaching obtaining seniority preference over a person whose entire career has been spent in educational service.

Consequently, the Commissioner hereby reverses those recommended findings and conclusions rendered in the initial decision for the reasons set forth in the Commissioner's determination herein.

Accordingly, the instant Petition of Appeal can be and is hereby dismissed.

IT IS SO ORDERED.

MAY 24, 1984 COMMISSIONER OF EDUCATION

PENDING STATE BOARD

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INITIAL DECISION
OAL DKT. NO. EDU 5146-83
AGENCY DKT. NO. 186-6/83A

MELINDA SHAFRAN,
Petitioner,
v.
BOARD OF EDUCATION OF THE
TOWNSHIP OF MIDDLETOWN,
MONMOUTH COUNTY,
Respondent.

APPEARANCES:

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

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

Record Closed: March 2, 1984 Decided: April 12, 1984

BEFORE LILLARD E. LAW, ALJ:

Petitioner, a tenured teaching staff member in the employ of the Board of Education of the Township of Middletown (Board), alleges, in a three-count verified Petition of Appeal, that the Board improperly withheld her employment and adjustment salary increment for the 1983-84 school year without good cause and no reasonable basis in fact; that its actions were arbitrary, capricious and unreasonable; and, that its actions were in violation of the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq., and, therefore, void. The Board denies petitioner's allegations and sets forth three affirmative defenses in support of its actions to withhold petitioner's salary increment, pursuant to N.J.S.A. 18A:29-14.

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On July 11, 1983, the Commissioner of Education transmitted the herein 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 September 1, 1983, a prehearing conference was held at which the parties agreed to, among other things, the issues for determination. A hearing in this matter was held at the Little Silver, New Jersey Borough Hall on November 9, 10, 14, 15 and 16, 1983, and January 23, 1984. Thereafter, the parties submitted post-hearing memoranda together with proposed findings of fact and the matter was considered closed on March 2, 1984.

ISSUES TO BE DETERMINED

By way of agreement of the parties at the prehearing conference held on September 1, 1983, the following are the issues to be determined by this tribunal:

1. Whether the Board had good cause to withhold the employment and adjustment increment of petitioner?

2. Whether the Board violated the Open Public Meetings Act on May 5, [sic] 1983, by its failure to provide petitioner with adequate notice of its proposed action to withhold her employment and adjustment increment?

BACKGROUND MATERIAL AND UNCONTROVERTED FACTS

Based upon a complete review of the record including the pleadings, testimony adduced at the hearing, exhibits proffered by the parties together with their post-hearing submissions, certain facts are set forth hereinbelow which are neither disputed nor controverted and are adopted, by reference, as FINDINGS OF FACT.

Petitioner is a tenured teaching staff member in the employ of the Board, having commenced employment in the school district in January 1979. Petitioner was first assigned to the Board's Lincroft School Annex as a teacher of special education in charge of pre-vocational and trainable pupils representing ages ranging from 7 to 21 years.

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In summer 1979, petitioner was employed as the coordinator of a new Summer Youth Employment Program (SYEP) for handicapped pupils, which was a cooperative program between the Board and the Comprehensive Employment Training Act (CETA).

In September 1979, petitioner was assigned by the Board's Assistant Superintendent of Pupil Personnel Services as a pre-vocational counselor with the responsibility to report to a number of school buildings within the school district. Petitioner was primarily assigned to Middletown High School South (High School South); however, she was required to travel to three junior high schools and to the Lincroft School during each school week. Petitioner's duties at these various schools included, among other things, working with trainable pupils by performing tests and interviews and working with the Board's Cooperative Industrial Education Coordinator. There was no job description executed by the Board or its agents which set forth petitioner's duties and responsibilities.

The Board imposed certain administrative procedures upon its professional staff members with respect to absence from duty for work-related activities. These procedures included, but are not limited to: Application for School Trip (P-30), Request to Work Outside of District (P-28), and Request to be Absent from Duty (P-28, P-29). Those teaching staff members who were required to move from school to school in the performance of their duties were exempt from a written notice upon leaving a school building; however, all were required to advise the building administrator or his secretary upon their leaving. During the 1979-80 and 1980-81 school years, petitioner generally used the procedure of notifying the building administrator's secretary when she was required to leave a school building to travel to another.

During the 1980-81 and 1981-82 academic years, petitioner was assigned as a teacher of handicapped pupils, performing her duties with trainable pupils in the morning hours at High School North and with pre-vocational pupils in the afternoon at High School South. Petitioner also traveled to the district's three junior high schools and to the Bedford School. The Board's Supervisor of Special Education was designated as petitioner's evaluator (P-3).

During the school years 1980-81 and 1981-82, while performing her regular assigned duties, petitioner planned for the summer youth program. This planning required her to make visits in the community to subscribe potential summer youth employers; to

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work with the CETA officials; to attend various meetings and conferences within and without of the school community; and to interview pupils and their parents with respect to the prospective summer vocational placement. In the summer of 1981, 96 pupils were accommodated and in the summer of 1982, 106 pupils were placed into summer jobs as participants in the program.

On March 23, 1982, the Board gave petitioner notice that it would not offer petitioner an employment contract for the 1982-83 school year (P-9). Subsequent correspondence by petitioner (P-10) and the president of the Middletown Township Education Association (MTEA)(P-11, P-13) advised the Board that petitioner had acquired a tenure status in the Board's employ, effective January 1982. The Board, thereafter, on June 23, 1982, advised petitioner of her reappointment in the school district by action of the Board on June 21, 1982, and that she had, in fact, acquired tenure on January 9, 1982 (P-14).

Prior to the commencement of the 1982-83 school year, the Board's Assistant Superintendent of Pupil Personnel Services left the Board's employ. His position was not filled by the Board and his former duties for the school district's special education services were then placed under the control of its Supervisor of Special Education and its Director of Guidance.

It was the former Assistant Superintendent of Pupil Personnel Services who had the responsibility to assign special education teachers, petitioner among them, to their duty stations for each school year. In August 1982, petitioner's assignment as a teacher of Special Education for the 1982-83 school year was issued through the Office of the Superintendent of Schools (P-15). The parties herein dispute the scope of petitioner's assignment at the commencement of the 1982-83 school year; i.e., petitioner claims that her assignment was district-wide while the Board asserts that her assignment was confined to High School North. Notwithstanding the contentions of the parties, the herein record reveals that at the commencement of the 1982-83 school year, petitioner was assigned to and responsible for special education trainable pupils' testing and evaluation at High School North and, further, for the continued planning of the school district's involvement in the 1983 SYEP.

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Pursuant to her duties with respect to the SYEP, petitioner requested and was granted permission to leave her assigned duty station at High School North to attend and participate in conferences and meetings (P-17, P-18). Petitioner's requests to attend such activities were approved, at various times, by the Board's Supervisor of Special Education, the Assistant Superintendent of Schools for Personnel, the Director of Guidance and/or the Principal of High School North (P-17, P-18). On or about October 7, 1982, petitioner was advised of a meeting to be held on October 20, 1982, by the Private Industry Council (PIC), the successor to CETA, to discuss the In-School Work Program for the year (P-16). Petitioner completed a written request to attend the PIC meeting, which was approved by the Director of Guidance, but denied by the Principal of High School North (P-19). A subsequent conference between petitioner and the Principal was held with regard to the Principal's denial of petitioner's request to attend the PIC meeting at which the Principal advised that while petitioner was assigned to High School North, she would be required to seek the Principal's written permission or that of his appointed designee prior to petitioner's leaving the school building. The Principal also asserted that a secretary was not his appointed designee and that advising a secretary before leaving the school was insufficient. The Principal again denied petitioner's request to attend the PIC meeting, asserting that he would determine the individual most appropriate to represent the school and, in her stead, assigned the school's guidance counselor to attend the PIC meeting. The Principal advised petitioner that she would be evaluated by the Vice-Principal assigned to High School North.

The parties stipulated that there is no language in the negotiated agreement between the MTEA and the Board which specifically addresses the issue as to whether a teacher must acquire permission to leave an assigned building during the normal working hours of the school day (P-35, Article XIX).

Subsequent to the Principal's denial for petitioner to attend the PIC meeting on October 20, 1982, petitioner's position with the In-School Vocational Programs and the SYEP was confused and unsettled. The Board's administrators, including its Assistant Superintendent, its Supervisor of Special Education and its Director of Guidance, either failed or refused to advise petitioner as to her duties and responsibilities, or the lack thereof, with respect to the two programs. In November 1982, parents of handicapped pupils, known as the Concerned Parents, and some of whom were participants in the in-school vocational and summer youth programs, invited members of the Board and its

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administration to a meeting to discuss the progress of the two programs. The Board's Supervisor of Special Education addressed the parents, in petitioner's presence, and assured the parents that the two programs were to be continued as in the past. Whether the Supervisor of Special Education informed the Concerned Parents that petitioner would be in charge of the SYEP was contested by the testimony of the Supervisor and petitioner. Nonetheless, it can be inferred fairly that petitioner and the Concerned Parents left the November meeting with the understanding that petitioner was to continue performing the same duties with the programs that she had been assigned to perform in the past.

This concludes a recital of the uncontested background facts.

ISSUE NUMBER ONE

THE CHARGES

Subsequent to the November 1982 meeting with the Concerned Parents, a series of incidents occurred which ultimately led the Assistant Superintendent for Personnel to recommend to the Board the withholding of petitioner's employment and adjustment increment and which are the basis of this controversy. Each of these complaints and petitioner's defenses are set forth herein seriatim as follows:

COMPLAINT NO. 2

> 2. [Petitioner] continued to leave High School North during regular school hours without authorization after being directed by her superiors not to leave the building. [P-24]

On January 7, 1983, petitioner left High School North at approximately 1:00 p.m., purportedly to deliver a purchase requisition for a new piece of equipment installed in her classroom to the Director of Guidance at the New Monmouth School. Petitioner asserted she received a telephone call from the Director's secretary that the Director was in need of the purchase requisition, whereupon she used her lunch period to make the delivery. Petitioner also testified that she advised a general secretary at High School North that she was leaving the building. Petitioner admitted she did not have the permission of the Principal or Vice-Principal to leave the building, nor could she identify by name the secretary she was alleged to have advised of her leaving.

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The Director of Guidance testified that the equipment in question, known as Apticon, was delivered to High School North on or about December 15, 1982, and upon its delivery, petitioner had telephoned the Director to so advise him. The equipment was purchased for special education activities through the use of "flow-through" funds supplied by the New Jersey Department of Education. The Director asserted that petitioner appeared at his office on January 7, 1983; however, he did not recall instructing his secretary to request petitioner to deliver the equipment delivery slip to him. He contended that the document in question was not a purchase requisition as petitioner had characterized it, nor was it a voucher; but, rather, it was a delivery slip acknowledging delivery and receipt of the equipment and should have been transmitted to him through the Board's inter-school mail on or about December 15, 1982.

Subsequent to petitioner's arrival at the Director's office, the Director inquired of petitioner as to whether she had permission to leave High School North. He testified that petitioner responded that she did not need such permission, although he understood otherwise, and advised petitioner that all staff members were required to have the permission of the building's administrator before leaving during normal school duty hours. While petitioner was in the Director's office, the Vice-Principal of High School North, and petitioner's evaluator, appeared to attend a meeting of special education staff members. Petitioner left the Director's office immediately thereafter. The Director advised the Vice-Principal that he had not requested petitioner's appearance.

The Vice-Principal testified that on January 7, 1983, he appeared at the New Monmouth School to attend a meeting at approximately 2:00 p.m. and observed petitioner in the Director's office, long after the last lunch period at High School North had ended. He asserted that he was petitioner's evaluator and, as such, had discussed and informed petitioner in October 1982 of the procedure petitioner was to use to leave the school building. The procedure required that before she left the building, petitioner was to get the permission of the Principal, the Vice-Principal, or alternatively, if the Supervisor of Special Education required petitioner to leave the building, the Supervisor would endorse the request to leave with the permission of the Vice-Principal. The Vice-Principal did not discuss petitioner's presence at the New Monmouth School with petitioner on January 7, 1983. At the meeting held with the Special Education staff, the Vice-Principal inquired of those present, including the Director of Guidance and the Supervisor of Special Education,

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as to whether petitioner's appearance was required at the New Monmouth School and if any one of them had given her permission to be there. All responded in the negative. Subsequently, on January 8, 1983, the Vice-Principal spoke to petitioner and petitioner confirmed that she had not received permission from the Principal to leave the school building on January 7, 1983.

FINDINGS OF FACT WITH REGARD TO COMPLAINT NO. 2

In the years prior to 1982-83, petitioner was granted considerable freedom to absent herself from her primary classroom duties in connection with her secondary responsibilities vis-a-vis the SYEP. This freedom was authorized, in major part, by the Board's then Assistant Superintendent of Pupil Personnel Services. The Board determined to eliminate the position of Assistant Superintendent of Pupil Personnel Services prior to the commencement of the 1982-83 school year and, as a consequence, petitioner's various roles and responsibilities became confused. Petitioner was not certain as to what her primary and secondary duties were and the Board's administration was either unable or unwilling to clarify the situation by way of a definitive statement and/or job description of petitioner's duties and responsibilities.

Although petitioner's assignment for the 1982-83 school year issued by the Superintendent of Schools did not specify a school building assignment (P-15), the record herein clearly demonstrates she was, in fact, assigned to High School North. The record also shows that petitioner was given explicit directions by the high school Principal and Vice-Principal as to the procedure she was to follow upon leaving the premises of the school building. Petitioner was specifically advised that she was required to seek and procure the permission of the Principal, or his designee, prior to her leaving High School North. By her own testimony, petitioner asserted that she informed an unidentified school secretary that she was leaving the school building on January 7, 1983, and, she did so without authorized permission. I, therefore, **FIND** that Complaint No. 2 is true in fact.

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COMPLAINTS NOS. 3 AND 4

Complaint No. 3 arises out of an allegation by the Board that petitioner used a handicapped pupil field trip to New York City for the purposes of seeing her personal physician rather than fulfilling her obligations and responsibilities as a chaperone. Complaint No. 4 alleges that subsequent to the field trip, petitioner withheld certain pertinent information with regard to her activities while on the field trip. Petitioner denies both complaints.

In December 1982, Amy Faith Schloeder, a teacher of trainable pupils at High School North, planned a pupil field trip to Radio City Music Hall in New York City, to attend its annual Christmas performance on December 16, 1982. In addition to taking her own class, Ms. Schloeder invited two other teachers of handicapped pupils to have their classes join in on the trip together with parents, petitioner and Marilyn Halpin, a supplementary teacher, to act as chaperones. The group consisted of 30 to 35 individuals including the pupils and adults. Petitioner had made the ticket arrangements for the 10:30 a.m. performance at Radio City Music Hall and, as was the plan for the day, petitioner was to guide the group to Citicorp Center for lunch following the performance, and thereafter, each class was to take a walking tour of that part of the city until the bus departed for Middletown. The plan called for the group to leave Middletown between 8:00 a.m. and 8:30 a.m., leave New York at approximately 4:30 p.m. and return to Middletown at approximately 6:30 p.m. (R-3, R-4). Petitioner's class of handicapped pupils did not participate in this activity.

The testimony with respect to the events of December 16, 1982, are in conflict. Petitioner asserts that on days prior to the date of the trip, she was physically ill and had so advised Ms. Schloeder and Ms. Halpin. Petitioner asserted that notwithstanding her illness, she felt compelled to accompany the group because she had made the ticket arrangements and, further, that she was more familiar with the city than others on the trip and would be able to better guide the group to its luncheon at Citicorp Center. Petitioner asserted that she felt ill on the bus trip and she so advised Ms. Schloeder. She contended that her condition worsened during the performance at Radio City Music Hall. Petitioner testified that at sometime during the performance, she left the group and placed a telephone call to her personal physician, who had offices on East 68th Street in New York City. She returned to the performance and after its conclusion,

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petitioner guided the group to Citicorp Center. Petitioner did not have lunch with the group. Petitioner testified on cross-examination that while ill she walked 20 city blocks to the physician's office. She was examined by the physician who diagnosed her illness as an upper respiratory infection and thereafter, she walked 20 blocks back to Radio City Music Hall, arriving at the bus at approximately 4:00 to 4:10 p.m.

Ms. Schloeder corroborated petitioner's testimony that she knew of petitioner's illness before the trip. Ms. Schloeder did not know when or if petitioner left the group during the performance of the Christmas program, nor did Ms. Schloeder know where petitioner went after the group arrived for lunch at the Citicorp Center.

Ms. Halpin also corroborated petitioner's testimony with respect to petitioner's illness prior to and while on the bus trip to New York. Ms. Halpin testified, among other things, that she did not observe petitioner make a telephone call but at some unspecified time, petitioner had given Halpin petitioner's physician's telephone number. Later in the day when Halpin returned with her group to the bus at 4:30 p.m., she observed that petitioner had not returned. Ms. Halpin then left the bus to place a call to the physician's office; however, she received no answer. Ms. Halpin returned to the bus to discover that petitioner had arrived with petitioner's sister. It is not disputed that on December 16, 1982, petitioner's sister was a resident of New York City.

The Board contends that petitioner gave various and conflicting versions of her activities following the performance at Radio City Music Hall. At a meeting on January 21, 1983, with the Assistant Superintendent, petitioner was reported to have said that she went to a restaurant by herself because she did not want to eat where the others ate (R-1, p.5). At a meeting on March 4, 1983, with the Assistant Superintendent, petitioner was reported to have said that she called her sister and left the group to have lunch with her (R-1, p.6). In her answers to the Board's Interrogatories, petitioner stated, among other things, that she did not have lunch but, rather, went to a fast food establishment and ate a yogurt (R-6).

It is neither disputed nor contested that subsequent to petitioner's escorting the group to the Citicorp Center, petitioner left the group and did not thereafter act as a chaperone.

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Petitioner denies that she made arrangements to visit her physician prior to the performance at Radio City Music Hall on December 16, 1982. This denial was refuted by two adults accompanying the group on the field trip, i.e., the operator of the bus and a fellow teaching staff member.

DENNIS SMITH, an employee and driver for the R. Helfrich and Sons, Corp., West Keansburg, New Jersey, testified, among other things, that he was assigned to transport the group from Middletown to New York City and return to Middletown between 6:00 and 6:30 p.m. on December 16, 1983. While in transit to New York City, Mr. Smith stated that the group should be assembled and ready to leave at 4:00 p.m. to avoid the rush hour traffic. He is an experienced bus driver and understood that it took from 10 to 15 minutes for a group to assemble. Moreover, because the pick-up location was at 50th Street and 6th Avenue (Avenue of the Americas) during the Christmas shopping season, he wanted to allow sufficient time for the traffic congestion. Upon arrival at Radio City Music Hall, Mr. Dennis testified that as petitioner was departing the bus, she stated that she had a doctor's appointment and could not return to the bus at 4:00 p.m. She also complained that the departure time of 4:00 p.m. was unnecessary because it would not take from 2 to 2 1/2 hours to return to Middletown.

Mr. Smith testified that he arrived at the pick-up area before 4:00 p.m. and he was advised by the police, on two occasions, that he could not remain there. He asserted that the group had assembled at approximately 3:55 p.m. and all of the group had boarded the bus by 4:15 p.m. except petitioner. He asserted that petitioner arrived at 4:30 p.m. and he immediately departed for Middletown.

NANCY BALDYGA, a teacher of the handicapped, testified that the group left Middletown at approximately 8:30 a.m. in bad weather, i.e., a hard driving rain. In transit, she discussed with the bus driver the suggested departure time from New York. She testified that he suggested the departure time of between 3:30 p.m. and 4:00 p.m. Ms. Baldyga advised other teachers and her pupils that they should return to the pick-up area between 3:30 and 4:00 p.m. Ms. Baldyga testified that petitioner advised her that petitioner could not return to the bus at 4:00 p.m. because she had an appointment. Ms. Baldyga asserted that all of the group had returned to the bus by 4:00 p.m. except petitioner, who returned at 4:30 p.m.

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FINDINGS OF FACT WITH REGARD TO COMPLAINT NO. 3

Having considered the testimony with respect to Complaint No. 3, and having given fair weight thereto, and having observed the demeanor of the witnesses and assessed their credibility, I **FIND** that there is sufficient credible evidence on the record to support the Board's complaint against petitioner. This is so for the following reasons, which are adopted as FINDINGS OF FACT:

1. Ms. Schloeder and Ms. Halpin knew that petitioner had been ill prior to the field trip and that petitioner was ill on December 16, 1982, the day of the trip.

2. Petitioner's personal physician has his offices at East 68th Street in New York City.

3. Mr. Dennis Smith, an employee and bus driver of an independent contractor and who does not know petitioner, testified that petitioner advised him that she could not return to the bus before 4:30 p.m. because she had a doctor's appointment. I **FIND** Mr. Smith's testimony entirely credible. Close v. Kordulak Bros., 44 N.J. 589 (1965); Jackson v. Concord Co., 54 N.J. 113 (1969); Garden State Farms v. Mathis, 61 N.J. 406 (1972).

4. No one observed petitioner leave the group at any time during the day of the field trip in order to place a telephone call to her personal physician. Her assertion that she did so during the performance of the Christmas program at Radio City Music Hall is neither corroborated nor supported by a residuum of credible evidence. I **FIND**, therefore, that petitioner's testimony with respect to this assertion to be incredible. Close, supra.; Jackson, supra,; Garden State Farms, supra.

5. That petitioner left a group of handicapped pupils she was under an obligation to chaperone and supervise is not in dispute, by her own admission, and I so **FIND**.

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6. The weight of the credible evidence, both testimonial and circumstantial, can only result in a finding that petitioner had, in fact, prearranged to meet with her personal physician prior to the field trip on December 16, 1982, and that she used this activity to her advantage and to the detriment of the pupils.

Complaint No. 4, as forwarded to the Board by its Assistant Superintendent for Personnel, alleges that:

> [Petitioner], when questioned by me concerning the field trip to Radio City Music Hall, withheld certain pertinent information even though she was given every opportunity to explain what had occurred on the trip. [P-24]

The above allegation was grounded upon a meeting that the Assistant Superintendent had with petitioner and her union representative on January 21, 1983, and upon petitioner's response to certain questions put to her. The Assistant Superintendent had been in receipt of a variety of complaints concerning petitioner, one of which was petitioner's conduct on the December 16, 1982 field trip to Radio City Music Hall. It had been reported to the Assistant Superintendent, and he operated under the misapprehension, that petitioner had left the field trip group for the purpose of visiting a dentist in New York City. When the Assistant Superintendent inquired of petitioner as to whether she had visited a dentist during the course of the December 16, 1982 field trip, petitioner responded that she had not. Petitioner neither elaborated nor explained to the Assistant Superintendent the nature of her activities which prompted the inquiry.

Petitioner's defense to Complaint No. 4 was proffered through the testimony of **FRANK D'ALESSANDRO**, the then president of MTTA and petitioner's representative at the January 21, 1983 meeting with the Assistant Superintendent. Mr. D'Alessandro testified, among other things, that prior to the meeting with the Assistant Superintendent, he had given specific instructions to petitioner that she was to answer all questions put to her concisely; however, she was not to volunteer any information. He advised petitioner that under no circumstances was she to go beyond the scope of the questions asked.

Mr. D'Alessandro testified that at a time between the January 21, 1983 meeting and a subsequent meeting on March 4, 1983, with the Assistant Superintendent, he and petitioner met with the MTTA's attorney who advised petitioner that she reveal to the Assistant Superintendent the fact that petitioner had left the group on the New York

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field trip on December 16, 1982. The Assistant Superintendent testified, however, that at the March 4, 1983 meeting, it was not until he confronted petitioner with a statement made by the field trip bus driver that petitioner asserted that there was more to the incident than petitioner had reported at the meeting on January 21, 1983. The Assistant Superintendent's summary of petitioner's statement at the March 4, 1983 meeting of petitioner's activities on the field trip of December 16, 1982, is, in part, as follows:

> . . .[Petitioner] said that she reported to work feeling ill, continued to feel ill during the day and by the time the group reached the Citicorp center she needed to see a doctor. [Petitioner] called her sister, who was in New York, the two met, left the group to have lunch, and [Petitioner's] sister escourted her to her doctor (who practices in New York City). [Petitioner] said that she told one of the other teachers of her illness, but not the other two. [Petitioner] indicated that she reached the bus at 4:10-4:15 and that there was chaos at the bus. Her sister left, [petitioner] boarded the bus and it left.
>
> The [Assistant Superintendent] asked [petitioner] why she had not told him this information at the first meeting. [Petitioner] responded that [the Assistant Superintendent] did not phrase the questions to draw that response at the first meeting. [The Assistant Superintendent] indicated that he had left the questions wide open, ie. "tell me what happened . . . ." [R-1, p.6]

FINDINGS OF FACT WITH REGARD TO COMPLAINT NO. 4

The basis of this complaint, i.e., that petitioner withheld certain pertinent information concerning her activities on the December 16, 1982 field trip, is true in fact, and I so **FIND**. Petitioner's lack of candor and forthrightness in response to the Assistant Superintendent's inquiry as to whether petitioner had visited a "dentist" during the course of the December 16, 1982 field trip can only be viewed as the withholding of pertinent information of petitioner's activities. Petitioner knew, by the nature of the question put to her by the Assistant Superintendent, that he was operating under a misapprehension, yet she failed and refused to disclose the truth of the matter that she had, in fact, visited her personal physician on the occasion of the field trip. Mr. D'Alessandro's exculpatory explanations offered after the fact, that he ill advised petitioner prior to their meeting with the Assistant Superintendent, does not negate the factual basis of the complaint. Mr. D'Alessandro would have been well advised to counsel with his attorney before he

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instructed petitioner that she was not to volunteer any information in response to the Assistant Superintendent's inquiries. Petitioner's failure to set the record straight and to disclose that she had, in fact, visited her physician on December 16, 1982, constitutes a withholding of information sought and is sufficient to sustain the complaint.

COMPLAINTS NOS. 1 AND 5

These complaints, alleged and submitted by the Assistant Superintendent of Personnel to the Board for its consideration with respect to its action to withhold petitioner's salary and adjustment increment, are set forth as follows:

> 1. [Petitioner's] criticism of superiors in front of a group of parents on January 17, 1983;
>
> ....
>
> 5. [Petitioner], upon receiving complaints from certain parents, failed to communicate those complaints to her superiors in order that they may be investigated, but instead called various individuals in the State Department of Education relative to the complaints.
>
> [P-24]

In order to place those complaints into proper perspective, certain events preceding the alleged conduct committed by petitioner must necessarily be addressed at this juncture.

Early in January 1983, petitioner was advised by way of a form letter, of a workshop conducted by the PIC to be held on January 19, 1983, in conjunction with the SYEP. Petitioner made a request to attend the workshop. Subsequent to receipt of the PIC letter and prior to its January 19, 1983 workshop, petitioner was requested to attend a meeting on January 14, 1983, with several of the school district administrators. Included among those administrators in attendance were the Assistant Superintendent for Personnel, the Supervisor of Special Education, the Director of Guidance, the Principal of High School North and, the Assistant Superintendent for Curriculum/Pupil Personnel Services. As a consequence of the confusion as to petitioner's job duties and responsibilities, as exhibited by both petitioner and the district administrators,

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petitioner's assignment and responsibilities were formalized at the January 14, 1983 meeting. Petitioner's assignment was specified as High School North and her duties were confined to the administration of vocational tests and the completion of evaluations of people assigned to her. Petitioner was specifically advised, among other things, that she would not be involved in the SYEP for the district's high school pupils and, therefore, was not permitted to attend the January 19, 1983 PIC workshop.

The specific issue with regard to Complaint No. 1 involved an incident at a regular monthly meeting of the Board held on January 17, 1983, subseqent to the January 14, 1983 administrative meeting at which petitioner had been advised that she was not to participate in the 1983 SYEP for high school pupils.

By way of background, a parent, guardian and teacher aide, all of whom have handicapped children attending the the Board's schools, testified that each had received a telephone call prior to the Board's January 17, 1983 regular meeting encouraging them and other parents of handicapped pupils to attend the meeting for the purpose of discussing the SYEP with the Board. One such witness asserted that she had been contacted by a teacher and a teacher aide with the information that petitioner would not coordinate the summer program. All of the three witnesses asserted that they each attended the January 17, 1983 Board meeting to support petitioner's position with the summer youth program. Petitioner, however, contended that she was unaware of the teachers' and parents' activities on her behalf until the afternoon of January 17, 1983, when she received a telephone call from a fellow teacher advising her to attend the Board meeting.

In any event, during a closed session of the Board, a group of parents, administrators, and teachers, including petitioner, assembled in a corridor outside of the Board meeting room. During this period of time there was a verbal exchange between petitioner and the Supervisor of Special Eduation. Petitioner contends that this exchange was initiated by the Supervisor whereby the Supervisor accused petitioner of having called the parents to attend the Board meeting. Petitioner denied that she had called the parents; however, she asserted that they had the right to attend the meeting and, she further asserted, that she was upset with the Supervisor in taking the position of the administrators to remove petitioner from the SYEP. Petitioner contends that her remarks to the Supervisor were made in response to an accusation and in a calm natural tone of voice. Petitioner testified that she believed she could respond to the Supervisor in such a manner because of their close relationship.

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The Supervisor, on the other hand, asserts that petitioner responded in a loud, strident voice, accusing the Supervisor of siding with the administrators against petitioner at the January 14, 1983 meeting. The Supervisor was embarrassed and upset by petitioner's conduct in the presence of the parents and discontinued the verbal exchange.

A supplemental teacher in the Board's employ who attended the January 17, 1983 Board meeting and who was called to the hearing to testify on petitioner's behalf, testified that she witnessed the exchange between petitioner and the Supervisor on January 17, 1983. The teacher asserted that petitioner was upset and crying and that she responded to the Supervisor in an emotional tone of voice. She testified the verbal exchange took place in full view and in the presence of parents and that one male parent was extremely aggressive in his remarks to the Supervisor.

Petitioner does not deny that a verbal exchange between herself and the Supervisor occurred in the presence of parents of handicapped pupils at the January 17, 1983 Board of Education meeting.

With regard to Complaint No. 5, petitioner admitted on the record that she telephoned the New Jersey State Department of Education, Branch of Special Education, and indicated to the office of Dr. Paul Winkler, Deputy Assistant Commissioner, that she was calling for the Concerned Parents. Petitioner asserted that the purpose of her telephone call was at the request of the Concerned Parents to locate the individual to whom the Concerned Parents could contact with regard to their complaints about the Board's handicapped pupil program. Subsequently, certain parents filed complaints with Dr. Winkler and, thereafter, Dr. Winkler telephoned petitioner to inquire as to the reasons and nature of the complaints. Petitioner asserted that she advised the Supervisor of Special Education about the Concerned Parents' complaints and about her involvement in supplying the parents with Dr. Winkler's telephone number and business address. The Supervisor denied that petitioner had volunteered any such information.

A parent of a handicapped pupil testified that she requested petitioner to contact the State Department of Education, and petitioner subsequently advised the parent as to whom to contact for the filing of a complaint. The parent asserted that she and others were advised by the administration that the SYEP would be continued; however, it would be under the direction of someone other than petitioner. The parent testified she telephoned Dr. Winkler to complain that petitioner would not be in charge of the 1983 SYEP and that the parent wanted only the petitioner to be the program director.

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The parent further testified that petitioner alleged to the parent that the Board might be misusing its "flow-through" funds. The parent also testified that she had no personal knowledge about the Board's "flow-through" funds; nonetheless, she wrote a letter to Dr. Winkler alleging the Board's misuse of such funds.

FINDINGS OF FACT WITH REGARD TO COMPLAINTS NOS. 1 AND 5

The record herein demonstrates that on January 17, 1983, petitioner had an emotional verbal exchange with her supervisor, the Supervisor of Special Education. This verbal exchange occurred at a regular Board of Education meeting at which parents of handicapped pupils were present, who observed petitioner's demeanor and conduct toward her supervisor. I **FIND** petitioner's assertions that her conduct was calm and even-tempered to be incredible in view of the testimony of the Supervisor and supported by the testimony of a fellow teaching staff member called as a witness on petitioner's behalf. From the testimony of the Superviosr and the fellow teacher it can be reasonably inferred that petitioner's remarks to her supervisor were emotionally charged and in the form of criticism of the supervisor.

The record also demonstrates, and petitioner so admitted, she telephoned the New Jersey Department of Education to acquire the name of Dr. Paul Winkler, the then Deputy Assistant Commissioner of the Branch of Special Education, for the purpose of transmitting his name, business address and telephone number to certain individuals in the group known as the Concerned Parents. The Concerned Parents knew at the time petitioner gave them the information concerning Dr. Winkler that petitioner was not to direct the SYEP for high school pupils. The testimony of one of the parents demonstrated that the purpose of acquiring the name and address of Dr. Winkler was for the purpose of registering a complaint on petitioner's behalf at the State level. The parent further testified petitioner had alleged that the Board might have misused State monies known as "flow-through" funds. Despite the parent's lack of knowledge as to what "flow-through" funds were and the purpose for their use, the parent alleged to Dr. Winkler that the misuse of the funds was taking place.

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There is no evidence on the record, other than petitioner's testimony, that petitioner informed the Board or its agents about the concerns or complaints of the Concerned Parents. Nor is there proof that petitioner, as she asserted, informed or advised the school administrators of her personal contacts with the Department of Education and Dr. Winkler. I **FIND** petitioner's assertions that she so advised the administration to be totally incredible and not to be believed. Close v. Kordulak Bros., supra.

DISCUSSION WITH RESPECT TO ISSUE NUMBER 1

Issue No. 1 herein is concerned with the question as to, "Whether the Board had good cause to withhold the employment and adjustment increment of petitioner?" The authority for a board of education to so withhold is found at N.J.S.A. 18A:29-14, which provides, in part, that:

> 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. . . .
>
> [emphasis added]

The Board herein determined that the five complaints lodged against petitioner by its Assistant Superintendent formed reasonable and sufficient grounds for "other good cause" to withhold her employment and adjustment increment. Petitioner, contrawise, argues that the Board's reasons to withhold shows an arbitrary, capricious and unreasonable action on its part. Our courts have held that the standard of "reasonableness" is the standard boards of education must apply to withhold the annual employment and/or adjustment increment of an employee member. The courts have further held that the burden of proving "unreasonableness" is upon petitioner. Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288 (App. Div. 1960).

In a de novo hearing such as this, it is not this tribunal's role to determine whether the Board's complaints against petitioner are true in fact, but, rather whether the Board's action to withhold petitioner's increment meets the reasonable standard and, further, whether petitioner has met her burden to prove the Board's action to be unreasonable. Kopera, supra.

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The Board herein has prevailed, by way of sufficient credible evidence, to sustain its actions grounded upon the reasonable standard. Petitioner, to the contrary, has failed to carry her burden to prove, by a preponderance of the credible evidence, that the Board's action was unreasonable. This is so from a close scrutiny of the facts:

1. Petitioner's demonstrable caprice by knowingly and wantonly leaving the school building without permission when explicitly advised by the principal of High School North that such permission was required (Complaint No. 2).

2. Petitioner's lack of credibility, in the face of contradictory and credible evidence, that she used a school field trip for the purposes of visiting her personal physician in New York City and failed to perform her duties as a chaperone for handicapped pupils (Complaint No. 3).

3. Petitioner's complete lack of candor and her failure to explain fully to the Assistant Superintendent the circumstances for her leaving the field trip group in New York City in order to visit her personal physician when the Assistant Superintendent was under the misapprehension that petitioner had left the group to visit a dentist (Complaint No. 4).

4. By petitioner's own admission, she had a verbal exchange with the Supervisor of Special Education in the presence of parents of handicapped pupils at a highly emotionally charged Board of Education meeting. It may fairly be inferred, from the contradictory testimony, that petitioner's remarks to her superior were in the nature of criticism directed to the Supervisor in full view of those parents present at the meeting (Complaint No. 1).

5. Without informing or advising the Board's administrative staff, petitioner sought and acquired the name, address and telephone number of an official in the New Jersey State Department of Education to whom parents could address complaints and allegations against the Board's handicapped pupil program. The information sought by petitioner was readily available to her in the Board's offices, yet she chose to ignore the appropriate line-staff relationship and failed to communicate to her

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> superiors the nature and substance of the parents' complaints in order for the Board's agents to conduct an investigation as to the validity of the complaints. In addition, petitioner committed a serious breach of professional ethics by alleging to a parent, rather than to her superiors, the possible misuse of Board "flow-through" funds. The parent, ignorant of the source and use of "flow-through" funds, nevertheless set forth petitioner's allegation before the officials of the State Department of of Education without a basis in fact (Complaint No. 5).

Notwithstanding petitioner's protected rights of freedom of expression, such rights are not absolute. As Mr. Justice Powell announced in Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-340, "Under the First Amendment there is no such thing as a false idea. . . . But there is no constitutional value in false statements of fact (emphasis added).

Based upon the facts adduced at hearing, I **CONCLUDE** that the Board had reasonable grounds upon which to base and sustain its actions to withhold petitioner's employment and adjustment increment for the 1983-84 school year.

I further **CONCLUDE** that petitioner has failed to prove, by a preponderance of the reliable and credible evidence, that the Board's action to so withhold was unreasonable under the facts and circumstances of this matter. Thomas v. Morris Tp. Bd. of Ed., 89 N.J. Super. 327, 332 (App. Div. 1965).

Other issues were raised by petitioner with respect to her employment which were not pleaded nor addressed as issues to be determined by this tribunal at the prehearing conference. I **CONCLUDE** that such issues are not relevant to the complaints which formed the basis of the Board's action to withhold petitioner's increment and, therefore, are beyond the scope of the matters in controversy and will not be considered here.

ISSUE NUMBER TWO

Petitioner contends that the action of the Board to withhold her increment at its regular monthly meeting held on May 2, 1983, is void, alleging it was in violation of the New Jersey Open Public Meetings Act, N.J.S.A. 10:4-6 et seq. Petitioner observes that the Act provides, except in limited circumstances, that all meetings of public bodies shall be open to the public at all times. N.J.S.A. 10:4-7. The acknowledged exception to the Act's mandate is found at N.J.S.A. 10:4-12b(8), which provides:

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> b. A public body may exclude the public only from that portion of a meeting at which the public body discusses:
>
> ....
>
> (8) Any matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of, promotion or disciplining of any specific prospective public officer or employee or current public officer or employee or employed or appointed by the public body, unless all the individual employees or appointees whose rights could be adversely affected request in writing that such matter or matters be discussed at a public meeting.

Petitioner asserts that the plain implication of the above-cited exception provides for an employee whose rights could be adversely affected must have reasonable advance notice in order to exercise his or her right to have the discussion made in public and to prepare and present an appropriate request in writing. Rice v. Union County Regional High School Bd. of Ed., 155 N.J. Super. 64 (App. Div. 1977); Oliveri v. Carlstadt-East Rutherford Regional Bd. of Ed., 160 N.J. Super. 131 (App. Div. 1978).

Petitioner contends that she did not receive written notice of the Board's pending action to withhold her increment on May 2, 1983. Petitioner testified, however, that on Friday, April 28, 1983, she had a telephone conversation with the Assistant Superintendent for Personnel who advised her that the Board would take such action to withhold on May 2, 1983. Petitioner testified the Assistant Superintendent advised her that she did not have the right to a hearing before the Board's action to withhold. Petitioner further testified that she was in attendance at the meeting on May 2, 1983, when the Board took its action.

The MTEA president also testified that he attended the Board meeting held on May 2, 1983, and addressed the Board prior to its taking the action to withhold petitioner's increment. He requested the Board to defer and take no action upon the recommendation to withhold, urging the Board to grant petitioner the opportunity to rebut the complaints lodged against her. The Board went into closed session and subsequently returned to open session at which it voted to withhold petitioner's increments.

The Board asserts there was ample testimony from witnesses produced by both parties to establish that the meeting of May 2, 1983 was in fact a public meeting and that the Board's action in withholding the petitioner's increment on the evening of May 2, 1983

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was taken in open public session. The petitioner has never established that the withholding of her increment was not a listed agenda item on the evening in question. Thus, a violation of the Open Public Meeting Act was never triggered.

The Board concedes that had it discussed the petitioner's terms and conditions of employment while in closed session without notifying her or giving her opportunity to require that the meeting take place in open session, there would have been a violation of the Act. The legislative findings and declaration regarding the Open Public Meetings Act as set out in N.J.S.A. 10:4-7 reads in pertinent part:

> The Legislature finds and declares that the right of the public to be present at all meetings of public bodies, and to witness in full detail all phases of the deliberation, policy formulation, and decision making of public bodies, is vital to the enhancement and proper functioning of the democratic process; that secrecy in public affairs undermines the faith of the public in government and the public's effectiveness in fulfilling its role in a democratic society, and hereby declares it to be the public policy of this State to insure the right of its citizens to have adequate advance notice of and the right to attend all meetings of public bodies at which any business affecting the public is discussed or acted upon in any way . . .

The Board contends the meeting in question was open to the public. The action was taken in public, the vote of the Board members was voiced and recorded in public, and the tabulation appears in the certified copy of the minutes which contained the resolution authorizing the withholding of the increment. The latter had been forwarded to the petitioner the day following the Board meeting.

The Board argues that the lack of notice issue is without substance. The petitioner never alleged nor proved that the meeting was anything other than a regularly scheduled Board meeting. There were no proofs to establish that "adequate notice" of the meeting was not provided in accordance with the definition of that term as it appears in N.J.S.A. 10:4-12b(8).

Petitioner's further allegation that she was prevented from making a decision as to the desirability of public discussion on the question of her witheld increment is incongruous. This case is not governed by what was enunciated in Rice v. Union County Regional, 155 N.J. Super. 64 (App. Div. 1977). In Rice, the Board's discussion occurred in closed session. The teachers had received no notice in advance of the meeting. In the current case, the action was taken in public and the teacher had, in fact, been noticed.

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The Board asserts there was testimony from the petitioner's union representative and the Board's Assistant Superintendent that clearly established that both the union representative and the petitioner were notified on Thursday, April 28, 1983, that the Board would consider as an agenda item the withholding of the petitioner's increment at its May 2, 1983 meeting.

It is the Board's position that inasmuch as this action was to be taken public at a meeting which was the regularly scheduled monthly meeting that had been duly advertised, the foregoing notice was gratuitous. In any event, there was additional testimony that not only was the petitioner present at the meeting of May 2, 1983, but that she was accompanied by her union representative and both of them addressed the question of the increment withholding in public prior to the Board acting on that item of its agenda. Thus, under any circumstance, there was no violation of the Open Public Meetings Act.

FINDINGS OF FACT WITH REGARD TO ISSUE NUMBER TWO

Having considered the testimony and other evidence relative to this issue, and having given fair weight thereto, I **FIND** the following to be true, in fact:

1. By petitioner's own testimony, she was advised and notified on April 28, 1983, by the Board's Assistant Superintendent that the Board intended to take action to withhold her employment and adjustment increments for the 1983-84 school year. The record shows that the president of MTEA was also given such notice.

2. At no time did petitioner request in writing to the Board that its deliberations be discussed in open public meeting. N.J.S.A. 10:4-12 b(8).

3. The meeting of May 2, 1983, which was a regular monthly meeting of the Board, duly noticed, pursuant to N.J.S.A. 10:4-9, contained the agenda item to withhold petitioner's increment.

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4. Petitioner's representative, the president of MTEA, addressed the Board prior to its action, requesting the Board to take no action until such time as petitioner could be afforded an opportunity to rebut the complaints against her.

5. The Board took its action to withhold petitioner's increments in open public meeting.

6. Petitioner and her representative were present at the May 2, 1983 regular Board meeting at which the Board took action to withhold.

DISCUSSIONS AND CONCLUSIONS

It is clear from the facts adduced at hearing that petitioner and her representative were both given notice by the Assistant Superintendent on April 28, 1983, of the Board's intent to take action to withold petitioner's increments on May 2, 1983. The facts further demonstrate that both petitioner and her representative attended the regular monthly meeting on May 2, 1983, at which the Board acted in open public meeting. Petitioner has failed to demonstrate any infirmity of the Board's conduct with respect to the Open Public Meetings Act. If an infirmity is to be found, it lies not with the Board but, rather, with petitioner's failure to give the Board written notice. In any event, the record clearly demonstrates that the Board took its action in open public session in compliance with N.J.S.A. 10:4-6 et seq. and pursuant to N.J.S.A. 18A:29-14.

For all of those reasons found and expressed herein, I **CONCLUDE** that the Board's determination to withhold petitioner's increment for the 1983-84 schol year is **AFFIRMED**, and that the Petition of Appeal is hereby **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.

12 April 1984
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

4/16/84
DATE

Receipt Aeknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

April 18, 1984
DATE

Ronald L. Lakewood
OFFICE OF ADMINISTRATIVE LAW

ij/ee

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PETITIONER'S EXHIBITS

P-1A-Z	Request to be Absent From Duty (26 copies)
P-2	Administrative Bulletin No. 3, August 1980, Assignment for 1980-81 school year
P-3	Memorandum - Office of Special Education to Dr. Fred Ball, from Mrs. A.M. Noto, Re: Melinda Shafran
P-4	Memorandum, November 21, 1980, to Dr. E.A. Bartholomew from Mrs. A.M. Noto, Re: Melinda Shafran's Job Description
P-5	Middletown Township Public Schools, Performance Report, April 21, 1981
P-6	Middletown Township Public Schools, Performance Report, May 29, 1981
P-7	Administrative Bulletin No. 3, Assignments for the 1981-82 school year
P-8	Memorandum, February 2, 1982, to Mrs. Victoria Taylor from Mrs. Abigail Noto, Re: Melinda Shafran
P-9	Letter dated March 23, 1982, to Ms. Melinda Shafran from Frederick W. Ball, Assistant Superintendent
P-10	Certification dated March 23, 1983
P-11	Letter dated May 12, 1982, addressed to Paul W. Bennett from Frank D'Alessandro
P-12	Memorandum to Dr. Frederick Ball from Paul W. Bennett, Re: Employment of Melinda Shafran 1982-83
P-13	Letter dated May 27, 1982, to Board Members from Frank D. Alessandro
P-14	Letter dated June 23, 1982, to Mrs. Melinda Shafran from Frederick W. Ball
P-15	Administrative Bulletin No. 3, Assignment for 1982-83 school year
P-16	Letter, October 7, 1982, to Shafran from Linda S. DeBartolis
P-17	Building Professional Day Only, 9/29/82 for October 1, 1982
P-18	Building Professional Day Only, 10/4/82 for October 5, 1982
P-19	Request to Work Outside of District, dated October 13, 1982, with attachment, dated October 13, 1982

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P-20 Memorandum, December 29, 1982, to Ms. Shafran from Linda S. DeBartolis

P-21 Grievance No. 83-7, dated January 19, 1983

P-22 Letter to Mr. Paul W. Bennett from Judith Stansky, Re: Grievance No. 83-15, April 8, 1983

P-23 Memorandum to Ms. Mindy Shafran from William A. Gillcrist, Re: Your Evaluator, dated April 6, 1983

P-24 Letter, May 3, 1983, to Ms. Melinda Shafran from Paul W. Bennett, Board Secretary - School Business Administrator, with attachments: Resolution of regular meeting of the Board, May 2, 1983; Letter April 26, 1983, to all Board Members, from Frederick Ball, Re: Melinda Shafran - Withholding of Increment

P-25 Letter, March 24, 1983, to Ms. Melinda Shafran from Frederick W. Ball

P-26 Letter, April 7, 1983, to Ms. Melinda Shafran from Frederick W. Ball

P-27 Letter, October 20, 1983, To Whom It May Concern from Ward F. Cunningham-Rundles, M.D.

P-28 Request to be Absent From Duty for the 1980-81 school year (14 pages)

P-29 Request to be Absent From Duty for the 1981-82 school year (12 pages)

P-30 Application for School Trip November 5, 1982, for December 16, 1982

P-31 Note, dated January 1, 1983, to Frank from Mindy

P-32 Memorandum to Judy Stansky from Frederick Ball dated March 7, 1983, Re: Grievance 83-7

P-33 Memorandum to Judy Stansky from Frederick Ball, dated April 5, 1983, Re: Grievance 83-7

P-34 Memorandum to Judy Stansky/Melinda Shafran from Frederick Ball, dated May 3, 1983, Re: Grievance 83-7

P-35 Agreement between the Middletown Township Education Association and the Middletown Township Board of Education, 1982-1984

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P-36 Note dated April 12, 1983, to Frank (not signed)

P-37 Request for Submissions of a Panel of Arbitrators dated June 22, 1983

P-38 Letter dated May 28, 1983, to Mr. William Boyle from Frederick W. Ball

P-39 Increments and Special Bonuses for Professional Staff, No. 311

P-40 Letter, May 27, 1983, to Mr. Frank D'Alessandro from Julia Ann Nagy, President

P-41 Letter, June 1, 1983, to Board of Education from Frank D'Alessandro

P-42 Handwritten Statement to the Board, May 2, 1983, by Frank D'Alessandro

P-43 Letter, May 9, 1983, to Dear Concerned Parents from Frank D'Alessandro

P-44 Statement, June 27, 1983, signed by Frank D'Alessandro

P-45 Letter to Dr. Paul Winkler, April 11, 1983, from Frank D'Alessandro

P-46 Report dated November 3, 1982

RESPONDENT'S EXHIBITS

R-1 Report of Alleged Complaints - Melinda Shafran prepared by F.W. Ball (10 pages)

R-2 Diagram (Identification Only)

R-3 Application for School Trip, dated December 16, 1982, Bayshore School

R-4 Application for School Trip, dated December 16, 1982, High School South

R-5 Middletown Township Board of Education - Transportation Office - Trip Confirmation, dated November 27, 1982

R-6 Interrogatories

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MELINDA SHAFRAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

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

It is observed that no exceptions to the initial decision have been filed by the parties pursuant to N.J.A.C. 1:1-16.4a, b and c.

The Commissioner concurs with those recommended findings and conclusions rendered by the judge in the initial decision and hereby adopts them as his own.

Accordingly, it is found and determined that petitioner's allegations pertaining to the Board's withholding of her employment and adjustment increment for 1983-84 school year are without merit.

It is hereby ordered that the instant Petition of Appeal be dismissed with prejudice.

MAY 31, 1984 COMMISSIONER OF EDUCATIOI

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INITIAL DECISION
OAL DKT. NO. EDU 4546-83
AGENCY DKT. NO. 116-4/83A

FRANK ROBERTS, LESTER HORTON
and VINCENT McFADDEN,
Petitioners,

v.

BOARD OF EDUCATION OF THE
HUDSON COUNTY AREA VOCATIONAL-TECHNICAL
SCHOOL DISTRICT,
Respondent.

APPEARANCES:

Frank DeStefano, Esq, for respondent
(Schumann, Hession, Kennelly & Dorment, attorneys)

Bruce D. Leder, Esq., for petitioners
(Schneider, Cohen & Solomon, attorneys)

Record Closed: March 9, 1984 Decided: March 23, 1984

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OAL DKT. NO. EDU 4546-83

BEFORE NAOMI DOWER-LaBASTILLE, ALJ:

Jeanette Corbin, Charles Matthews, Joseph Panepinto, Veronica Romano, Michael Symzcak and Kathleen Wallace withdrew their petitions prior to trial in this matter leaving Frank Roberts, Lester Horton and Vincent McFadden to prosecute their claims. Petitioners began service for respondent in the 1980-81 school year, having previously been employed by the Jersey City Board. They allege that the Board illegally rescinded tenure granted them by resolution at its June 18, 1981 meeting. Lester Horton and Vincent McFadden remain in Board employ. Frank Roberts' position was abolished and his employment was terminated. He claims that the Board has illegally failed to pay him for accrued vacation and sick days and that his position was abolished in bad faith for political reasons.

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. Hearings were held on January 23, 24 and 25, and the record closed with receipt of the last brief on March 9, 1984. A list of exhibits entered into evidence is attached to this decision.

Each petitioner testified and presented documentary support for his position. The District's Business Administrator, Joseph Sirangelo; Superintendent Earl W. Byrd, and three Board members, Sebastian D'Amico, Charles Epps and James A. Fife testified. The Board subpoenaed Edward A. Kent, the chief auditor for the Department of Education, who testified concerning his audit report of district operations during the period July 1, 1980 through January 18, 1983 (R-5). The Board cited conversations with Mr. Kent and his report as the moving force behind its reorganization which resulted in the abolishment and shifting of a number of positions including that of Frank Roberts.

Many facts, particularly those supported by documentation, are essentially undisputed. I FIND these background facts to be true. In the spring of 1980, the Board began establishing additional positions and hiring personnel in anticipation of opening its second school in September 1980. Frank Roberts was the President of the Board at this time. He was a Board member from 1977 through December 1, 1980. The Board has six members which then included Roberts and Sebastian D'Amico, who succeeded Roberts as

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president. D'Amico was the only other witness before me who was on the Board in 1980. Fife was appointed in November 1981 and Epps in February 1983. Roberts had been employed as a social studies teacher by the Jersey City Board but was employed in other governmental positions prior to being hired by respondent. A number of the new staff members hired in the summer of 1980 were recruited from Jersey City, including petitioners McFadden and Horton.

Vincent McFadden

Findings of Fact

1. McFadden was properly certified for the teaching of economics, bookkeeping, accounting and data processing and taught these subjects in Jersey City, acquiring tenure in 1971.

2. McFadden has an M.B.A., plus 32 credits.

3. Prior to 1980, McFadden became Treasurer and then Data Entry Manager of Operations for the Jersey City Board.

4. In 1980, McFadden received two job offers: one from Jersey City for a programmer position in which he was told he would retain his tenure rights and one from respondent for a position of Director of Data Processing and Management Information Systems.

5. McFadden asked respondent's then Secretary-Business Manager, John Powers, whether he would get tenure. Powers told him it would be no problem and stated in a letter of August 18, 1980, ". . . it is the intent of the Board, based on your action in resigning your position with another system, to vest tenure upon your hiring." (P-26).

6. Power's letter stated that McFadden was hired August 1, 1980, as Director of Information and Services.

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7. Although McFadden once saw a job description, no duly adopted job description was produced for the position held by him which was subsequently referred to as Director of Management Information Service (P-27) and Director of Data Processing. In a Board resolution of June 24, 1982, hiring McFadden for 1982-83, the position was listed under instructional personnel (R-4), but respondent Board now claims that the Director position is in noninstructional administration.

8. Although his job description did not call for teaching, the District did not have sufficient staff to teach data processing, and McFadden performed direct teaching functions as well as curriculum development functions for the Department of Data Processing throughout his employment from August 1, 1980 to the date of hearing (1983-84 school year).

9. McFadden devised data processing programs for administrative purposes such as budgeting, a student application system including State Registers and personnel record programs, taught the students to do what they were capable of performing with respect to data processing and eventually supervised them when they were hired for work-study educational programs. (See January 23 transcript, pp. 29 through 35).

10. Instructional and supervisory personnel well qualified in the data processing and programming field are difficult for school districts to retain because private industry offers more attractive benefits.

11. On June 18, 1981, after satisfactory evaluations in the usual form had been completed, the Board granted McFadden, Horton and five others tenure as individuals, without reference to the positions each held. (R-1, p. 9).

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12. After receipt of letters from the County Superintendent, Louis C. Acocella in the fall of 1981, questioning the grant of tenure to individuals rather than positions, the Board rescinded the grant of tenure on January 27, 1983.

13. Although McFadden performed a substantial amount of administrative work, a majority of the time he functioned as a teaching staff member; his teaching, curriculum development, supervision of work-study, grant drafting and departmental chairperson functions were so intertwined with and related to administrative tasks that it is not possible to assign to them a specific part-time value on the present record except to find that his work was instructional for a majority of the time.

CONCLUSIONS OF LAW

Since McFadden functioned as a teacher of data processing for a majority of his time from August 1980 through the date of hearing, January 23, 1984, and was properly certified as a teacher of data processing when hired and throughout that period, pursuant to N.J.S.A.18A:28-5, McFadden attained tenure in that position in August 1983 by operation of law. It is not necessary to address seniority since McFadden continues to be employed. Since the Board did not adopt a rule of general application to all teachers of data processing or all directors, the resolution of June 18, 1981, which purported to grant tenure to McFadden, was ineffective as not within the Board's power and the rescission of January 27, 1983 was valid. Rall v. Bd. of Ed. of City of Bayonne, 54 N.J. 373 (1969). Although some of the persons granted early tenure held unique titles, the resolution made it perfectly clear that the grant of tenure was to individuals and the rescission resolution confirmed that such was the intent of the Board. All the testimony other than the self-interested opinions of petitioners supports a finding that the grant was to individuals, not positions.

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McFadden's business administrative work may not require certification and if not, it is not tenurable under N.J.S.A. 18A:28-5. It is, however, tenurable under N.J.S.A.18A:17-2 and McFadden attained tenure in August 1983 at the same time as he attained tenure as a teaching staff member. Seniority is not applicable to tenured nonteaching staff. I use the words "may not" because an accurate job description should be submitted to the County Superintendent for determination of the certification requirements. It is the County Superintendent, and not an adminstrative law judge, who has jurisdiction to make that determination with respect to an unrecognized title. N.J.A.C. 6:11-3.6(b). A job description must be adopted prior to submission to the County. Since I have found a majority of McFadden's work is instructional and since there was no proof that McFadden's present job description was adopted by the Board, respondent should draft and officially adopt such description. Although McFadden does not hold administrative certification at this time, he may be eligible for a supervisory position in data processing under special certification because of the scarcity of qualified persons in the field.

Lester W. Horton

Findings of Facts

1. Horton was a tenured learning disabilities teacher-consultant to the Child Study Team in Jersey City prior to his employment with respondent which began on September 1, 1980.

2. In addition to his instructional and educational services certification, Horton held administrative certification with endorsements as school administrator, assistant executive superintendent in supervision and curriculum, principal and supervisor.

3. Respondent's then secretary, John J. Powers, advised Horton his position was "Supervisor-Academics" (P-28) but the superintendent advised him shortly thereafter that his position was entitled "Supervisor, Special Needs" and would be "ratified" at the "next regular meeting" of the Board in September 1980.

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4. After his interview with the Board's personnel committee which included its president, Frank Roberts, and the superintendent, Horton believed that he "would be given automatic tenure" because he had tenure in another district.

5. The District hired two supervisors for 1980-81, one for vocational education and one for other areas including special education and academics, but no proof was offered that the job descriptions for these positions were adopted by resolution of the Board on a date certain.

6. The job description which existed in 1980-81 (P-41) was for a supervisor of special education. It was revised by the assistant superintendent and entitled Supervisor of Special Education - Academic for the 1981-82 school year (P-40).

7. Although Horton began work in September 1980, the Board did not vote to appoint him until its November meeting and the superintendent called his position, "Supervisor-Academics." (P-30).

8. After satisfactory evaluation in the usual form, the Board voted to grant Horton tenure in its resolution of June 18, 1981. Roberts so advised Horton whose position he called "supervisor of special education."

9. In 1981-82 Horton performed the same supervisory work, but due to budget overruns and growing deficits which were the subject of a state audit, the Board gave notice to many employees including Horton on April 27, 1982 that their employment would not be continued after June 30, 1982. (P-32).

10. In his report, Chief Auditor Kent called Horton's position "Director of Special Needs" and questioned the need for ten supervisory positions in a two school system. (R-5 at page 11).

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11. Horton was rehired in the same position for 1982-83 which was entitled "supervisor" in the June 24, 1982 resolution, and in January 1983 he was notified that his tenure was rescinded under the same circumstances described above with respect to McFadden.

12. In April 1983, Horton was advised that he "will not be offered employment in . . . [his] present position, Supv/Acad." (P-34).

13. Horton asked the reason for his termination and was told that it was because enrollment projections were incomplete and the budget had not been approved by the freeholders. (P-36).

14. On June 24, 1983, the superintendent advised Horton that two positions of "Supervisor Academics, Special Needs" would be discussed at the June 29, 1983 meeting. (P-37); Horton's position was abolished on July 14, 1983.

15. In August 1983, Horton was offered and accepted the position of vice-principal of one school for the 1983-84 school year. The other supervisor's position was not abolished and his employment continued in 1983-84, but the title was changed to Supervisor-Vocational Information. (T63-64).

16. As a supervisor, Horton was paid $30,500 for 1982-83 and he would have made $32,470 in 1983-84 whereas his salary as a vice-principal was $31,700 for 1983-84.

17. The vice-principal position was not district-wide and was not a continuation of the supervisor position under a different title.

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CONCLUSIONS OF LAW

Horton was employed and properly certified as a supervisor from September 1980 to June 1983, three academic years, but did not serve an additional day of a fourth year and thus did not obtain tenure by operation of law pursuant to N.J.S.A. 18A:28-5. Since the Board did not adopt a rule of general application to all supervisors, the resolution of June 18, 1981, which purported to grant tenure to Horton and others as individuals was ineffective as not within the Board's power and the rescission of January 27, 1983 was valid. Rall supra. Since Horton was not tenured, his April 1983 notice of termination of employment in the supervisor position premised on questions of the availability of funds and the need for such position, was valid. The ongoing reorganizations which ensued as a result of the observations of Chief Auditor Kent and his report bolster a conclusion that the Board's actions were in good faith, both as to the termination and subsequent abolishment of the supervisor's position on July 14, 1983.

In August 1983, Horton was offered a new position, that of a vice-principal, for 1983-84. The exact time is not of record. Since he had been terminated from his supervisor position as of June 30, 1983 and it was abolished on July 14, 1983, I CONCLUDE that Horton was not transferred but, rather, was rehired to commence employment in a different position at the start of the school year in September 1983. N.J.S.A. 18A:28-67 concerning tenure when a tenured employee is transferred or promoted with his consent is therefore not applicable to Horton and his petition must be DISMISSED.

Frank G. Roberts

Findings of Fact

1. Between 1968 and 1977, Frank G. Roberts was employed by the Jersey City Board of Education as a teacher of social studies with fencing and football coaching duties.

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2. In 1977, Roberts obtained a leave of absence to accept a post as assistant business administrator with the administration of Mayor Thomas Smith in Jersey City for whom he had campaigned. In February 1978, Roberts became personal secretary to Mayor Smith.

3. In 1977, Roberts was also appointed to respondent's Board of Education and was elected president in the same year.

4. From March to December 1980, Roberts was employed as a coordinator of inter-municipal operations for the Hudson County Utilities Authority. He continued throughout his governmental employments to receive extensions of his leave of absence from the Jersey City Board.

5. In the spring of 1980, under the presidency of Roberts, respondent Board decided to create a number of new positions including one entitled First Assistant Superintendent for Personnel.

6. The Board hired seven of the eight petitioners in this case to fill the new positions in the summer of 1980, but the position of First Assistant Superintendent of Personnel was not filled. Job descriptions for the administrative positions had not as yet been adopted by the Board when the positions were advertised.

7. The Board's two or three member personnel committee had the duty to recommend candidates for employment to the Board as a whole. In 1980, Roberts was chairman of this committee and Sebastian D'Amico was a member.

8. Superintendent Byrd and Board Secretary John Powers screened or interviewed two applicants for the First Assistant position which had been advertised solely in the Jersey City Journal, but reported that they had not found anyone interesting or qualified enough.

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9. The First Assistant position required a Master's degree and a principal or administrator certificate neither of which Roberts possessed in the summer of 1980 but which he expected to have by the end of 1980. The duties listed on the job description were almost entirely related to personnel work.

10. In November 1980, while Roberts was still president of the Board and a member of the personnel committee, and just after he voted to establish a salary of up to $41,250 for the job (R-4), he applied for the First Assistant Superintendent position; when Byrd interviewed him he stated that he intended to resign from the Board when he got the job and assured Byrd that he held the required credentials.

11. By December 1, 1980, when he wrote his letter of resignation as a member of the Board of Education, Roberts had every reason to believe that he would be hired as First Assistant Superintendent by the Board at its December 4, 1980 meeting.

12. At the December 4 meeting, Roberts did not sit with the Board or vote on any item. Although the minutes list his name at times, this was an error, and the name of Charles Roberts, another board member, should have been listed, not that of Frank Roberts.

13. After a one hour recess to discuss personnel, at about 9:20 p.m., the Board voted to accept Roberts' resignation and immediately thereafter elected Sebastian D'Amico as president.

14. D'Amico, who had also been on the personnel committee, was a long time family friend of Roberts. Roberts' mother was D'Amico's secretary. D'Amico knew Roberts for many years.

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15. D'Amico introduced a resolution to appoint Roberts First Assistant Superintendent in charge of personnel "with duties as set forth in the job description attached hereto and made a part of this resolution;" the appointment to take effect December 8, 1980, which was the following Monday. No job description was actually attached to the records of the resolution. The resolution (P-2, p. 22), which passed unanimously, also stated that the appointment was subject to an evaluation to be performed upon the expiration of sixty days and authorized the Board to pay for three years' of pension credit for Roberts.

16. When Roberts reported for work on the 8th or 9th, he did not have the appropriate certification and he did not have his M.A., which was to be officially awarded in about two months.

17. Superintendent Byrd would not place Roberts on staff until he physically received the appropriate credentials. Byrd asked Roberts for his credentials almost on a daily basis, but Roberts was not able to supply them until December 22, 1980, when he supplied a two-month certificate he obtained in the interim until he was able to get a permanent certificate, for which the award of his M.A. was required.

18. Roberts was designated for payroll purposes as "Director of Personnel" and paid for the period December 8 to 22, 1980. Subsequently, the Board referred to the effective date of his hiring as December 22, 1980. Roberts submitted no proof that the Board took official action to regularize his employment for this period.

19. The 60-day evaluation provision in the resolution hiring Roberts was placed there at Roberts' request since he told the Board he had to give up his Jersey City tenure and thus wanted tenure from respondent as soon as possible. Roberts believed he would get a satisfactory evaluation in 60 days, but, in fact, the Board did not consider the matter until about six months after Roberts was hired.

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20. Prior to a Board meeting in June 1981, the Board's personnel committee recommended that Roberts be given tenure. With respect to the other petitioners who received tenure at the same time, Superintendent Byrd submitted the resolution on his agenda.

21. Roberts drafted his own resolution and its form is significantly different from that referable to the other petitioners. It says (P-8):

> WHEREAS, Frank Roberts was hired as 1st Assistant Superintendent on December 22, 1980 and WHEREAS, Mr. Roberts resolution called for an evaluation of his performance after the expiration in 60 days, WHEREAS, that time passed. NOW THEREFORE BE IT RESOLVED, that based upon Mr. Roberts satisfactory performance, Mr. Roberts is hereby granted a satisfactory evaluation and granted tenure as 1st Assistant Superintendent.

The other resolution uses the language, "Whereas the Superintendent of Schools has certified to the Board that these employees have performed well in this district." Roberts' resolution purports to have the Board itself grant a satisfactory evalution.

22. Superintendent Byrd was not at the personnel committee meeting at which tenure for Roberts was discussed, he was not consulted about it (Transcript January 25, 1984 at 109) by the Board, he completed no standard evaluation form for Roberts as he did for the other petitioners, and he did not recommend Roberts be given early tenure.

23. At the Board meeting on June 18, 1981, Superintendent Byrd was present. President D'Amico asked him in public at the meeting whether Roberts' performance was satisfactory and he replied "Yes" whereupon the Board passed the resolution.

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24. At the time when the grants of early tenure were passed, the Board already knew it was running a substantial deficit, that it was preparing layoffs for about 45 people and that the State was auditing its business practices and fiscal operations, since State audit staff member Kent was assigned to respondent on May 4, 1981.

25. At the same meeting on June 18, 1981, the Board adopted a package of job descriptions including those for the two assistant superintendents (P-10 and 11). There was no proof that the County Superintendent subsequently approved the one for First Assistant Superintendent in charge of personnel, which is an unrecognized title. Roberts held this title in 1981-82.

26. On June 24 and July 27, 1981, the County Superintendent requested the Board provide him with documentary items concerning its grants of early tenure at the June 18, 1981 meeting. Byrd replied August 6, 1981 (R-1).

27. On June 24, 1982, the Board appointed Roberts "Assistant Superintendent" for 1982-83 and adopted a new job description for it (R-4). The prior holder of that title, David Rowlands, had been convicted of Federal charges and terminated.

28. Throughout the period late 1980 through June 1981, Roberts was actively involved with the coordination of the mayorality campaign of Walter Shiel who lost to Mayor McCann. Roberts alleges that this work was the reason why his employment with respondent went sour and he was eventually excluded from Board personnel meetings in 1981-82.

29. Despite Roberts' admission of devoting all his spare time to running the Shiel campaign including appearing at various public functions,

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Roberts claims he only used up one of his 22 vacation days between July 1, 1980 and June 30, 1981. He alone, as personnel director, kept the records of his time off. His testimony on this point was not credible but the fact is irrelevant in light of my conclusion below.

30. On January 27, 1983, respondent held a special meeting at which it rescinded tenure for all individuals to whom tenure was granted in June 1981 stating it did not intend to grant tenure to the respective positions in general and on April 19, 1983 the Board voted to terminate on June 30, 1983, numerous nontenured employees including Roberts.

31. On May 2, 1983, Roberts wrote to the Board claiming failure to receive notice 48 hours in advance of the April 19 meeting at which the Board voted to terminate a number of nontenured employees, asking the reason for termination and advising the Board that he held tenure and therefore could not be terminated absent abolishment of his position (P-14).

32. On May 6, Byrd cited incomplete enrollment projections and failure to pass budget as reasons for notices of termination (P-15).

33. On June 20, 1983, Roberts claimed he held both the First Assistant and Assistant Superintendent positions since November 1982 and claimed that he retained the First Assistant Superintendent position since they had only terminated him from the second position (P-16).

34. On June 24, the Superintendent advised Roberts that both assistant superintendent positions would be discussed at the June 29, 1983 meeting (P-17) and, in fact, both were abolished by resolution on that date which cited reorganizations as the reason. The Board voted again to terminate Roberts as of June 30, 1983 (P-18, 19, 20).

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35. On July 6, 1983, Roberts claimed that he was improperly terminated because he had not been given 60-days notice (P-21).

36. Roberts used two organizational charts, neither of which appears to have been officially adopted and discussed the 1983 shifts in job titles in an attempt to show that the Board had treated him differently from others who were still employed and that the reorganization did not save significant dollars. The testimony offered by Roberts as proof that the Board's actions were in bad faith and not for purposes of reorganization for reasons of economy and efficiency were insufficient to support such a finding. The principal change was elimination of highly paid assistant superintendent positions in favor of direct reporting of principals, and use of vice-principals.

37. The Board has not officially adopted policy concerning the number of vacations, sick and personal days for its top officials not covered by the negotiated contracts or for their accrual from year-to-year and payment therefore upon separation.

38. There was a known Board practice, according to Superintendent Byrd, whereby he and other top employees were allowed per year 15 sick days, 22 vacation days and 2 personal days on their 12 month contracts.

39. It was not proved that the Board had a business practice of accruing all allowed days and paying top employees for them upon separation: on the contrary, if not covered by contract, the issue was handled on an ad hoc basis and most of the examples given by Roberts in his testimony were not analogous to his situation since they included retirements (where the usual practice is often to pay for one half of accrued sick days) terminations due to conviction and incarceration or forfeiture of office, and settlements after initiation of court actions or grievance procedures.

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40. Roberts relied on the records made by him of days he used as shown on an exhibit (P-45) produced by the Business Manager, Mr. Sirangelo. He noted that at the beginning of each year all employees received a letter from the superintendent's office which listed accrued and used days.

41. Since Roberts was not hired until late in December 1980, serving only one-half of that school year, absent contract, resolution of the Board, policy or practice, the days allowed for that year on P-45 are incorrect and must be reduced by half, but this fact is not operative in light of my conclusion below.

42. Board records show that Roberts used 9 of his 13 vacation days for 1982-83 and the value of these days is $187.34 per day according to the Board's business manager.

Conclusory Findings

43. In the 1980-81 school year, the purported establishment of the title of First Assistant Superintendent, the choice of an unrecognized title, the failure to adopt a job description and to submit same to the County Superintendent prior to appointment, the timing of the vote for a salary range and application of Roberts for the job, the failure to make any real search for candidates, the resignation of Roberts from the Board and his immediate appointment to the position, the clear plan of the Board to permit a grant of tenure within 60 days, Roberts' lack of the appropriate credentials at the time the title was devised and through the time of appointment, the grant of tenure absent a thorough evaluation in writing in the usual form, and the coercive action of the Board president to wring from the Superintendent a public statement that Roberts' work was satisfactory, all these facts and more bespeak a concerted plan intended to deliver and secure to Roberts alone a well-

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paid position, a plan conceived by Roberts himself and accomplished as a result of his perceived political influence.

Conclusions of Law

In 1981, the Legislature expressly prohibited the kind of conduct which occurred in this case, namely, a Board's appointment of a newly resigned member to a paid office in the school system. N.J.S.A. 18A:12-1.1 eff. Jan. 9, 1982. In 1980, N.J.S.A. 18A:12-2 was in effect. It prohibits any member of a Board from being interested directly or indirectly in any contract with the Board. At the November 1980 Board meeting, when Roberts voted for the resolution setting forth the salary range for the First Assistant Superintendent position, he knew full well that the job was his. Within the next week or two he officially applied for the position and he did not resign until December 1, 1980, a few days before the vote was taken to appoint him.

A public officer has the duty of serving the public with undivided loyalty, uninfluenced in his official actions by any private interest or motive whatsoever. S & L. Associates Inc. v. Washington Tp., 61 N.J. Super, 312 (App. Div. 1960). "The members of a Board of Education . . . are public officers holding positions of public trust. They stand in a fiduciary relationship to the people whom they have been appointed or elected to serve." Visotcky v. Garfield City Council, 113 N.J. Super. 263, 266 (App. Div. 1971). "'Fiduciary relationship' necessarily requires not only actions of propriety but having the appearance of propriety." Jones v. East Windsor Reg. Bd. of Ed., 143 N.J. Super. 182, 194 (Law. Div. 1976). This is not a case, however, where the voiding of one vote will resolve the issue, since no member of the Board voted against the appointment and grant of early tenure to Roberts and he himself was not a voting member after December 1, 1980.

First Assistant Superintendent of Schools, the title used in a Board resolution determining salary range in November 1980, is a title not recognized under N.J.A.C. 6:11-10.1 et seq. In its resolution of December 4, 1980, the Board used the title of First Assistant Superintendent in charge of personnel. This title is similarly unrecognized. N.J.A.C. 6:11-3.6 mandates that Boards wishing to assign unrecognized titles shall submit a

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written request for approval which includes a detailed job description to the County Superintendent prior to making appointment. No job description was adopted prior to June 1981. The title was never approved by the County Superintendent. Although the position was not established in accordance with law, and although Roberts did not hold the required certification when appointed and did not obtain it until several weeks later, it has been held by the Commissioner that if a petitioner is eligible for a specific endorsement, he can be employed although he does not yet have the endorsement in hand. Reinish v. Bd. of Ed. of Cliffside Park, 1965 S.L.D. 50. Additionally, the tenure statute N.J.S.A.18A:28-5 contains no exception premised on irregularity in the establishment of the position in which the teaching staff member has served.

It is patently clear on the testimony and the face of the resolution, that the Board intended to grant early tenure to Roberts and other petitoners as individuals. In fact, I have little doubt that there was no intention to grant early tenure to assistant superintendents generally since Rowlands, who held that title at the time, was already in legal difficulties and left Board employment in the Spring of 1981. Throughout the 1980-81 school year, all actions of the Board with respect to Roberts and his position were intended to benefit him individually and personally. Although the Board also attempted to grant early tenure to the other individual petitioners, Horton and MacFadden, they at least possessed impressive credentials and experience for their positions and had been recommended for tenure by the Superintendent after a complete evaluation.

I CONCLUDE under Rall, supra, that the Board was without power to grant tenure to Roberts and the rescission of January 27, 1983 was valid. Roberts held the First Assistant title from late December 1980 through the end of the 1981-82 school year, but on June 24, 1982 he was appointed to and accepted the Assistant Superintendent position. Under N.J.S.A.18A:28-6, he needed at least two years in that position to attain tenure, but since he was transferred to it with his consent, his time as Assistant Superintendent must be added to that he served as First Assistant for determining tenure under the latter title. He was properly given notice in April 1983 that his employment as Assistant Superintendent would be terminated June 30. He was not tenured in any position then, nor did he achieve tenure as First Assistant by June 30, 1983, having served only a total of two

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and one-half years. The Board was under no obligation to give Roberts notice in April with respect to termination as First Assistant since he no longer held that position.

While many of the Board's actions throughout 1980-83 were irregular and not in compliance with applicable regulations, the testimony of Superintendent Byrd, and newer members Epps and Fife, clearly supports the Board's contention that continuing reorganization was taking place in an attempt to cut expenses and deficiencies noted by Chief Auditor Kent. The abolishment of both assistant superintendent titles was in good faith and even if Roberts had held tenure, he was properly terminated under N.J.S.A. 18A:28-9. The reorganization and the shifts of administrative personnel were reasonable actions within the management prerogatives of the Board.

Roberts claims he is owed lump sum payment for accrued sick and vacation days. He also stated he was owed a 60-day paid notice period after abolishment of his position so that he could use up accrued days. Roberts cites no law granting such right. I have not found that the Board had any practice let alone an adopted policy with respect to payment for accrued days. Roberts claims he was not covered by any negotiated contract. I found this to be true. Absent an employment contract provision for payment for accrued vacation leave or provision for salary in lieu of vacation leave, and absent a policy or practice of the Board, petitioner's claim is not supported. See cases cited in Arzberger v. Bd. of Ed. of Tp. of Neptune, 1976 S.L.D. 835 aff'd 1977 S.L.D. 1271. The situation is even more clear with respect to accrued sick days which can be transferred as credits in the event of new employment and are often treated as a basis for one-half payment only at retirement.

While no law supports lump-sum payment for accrued vacation days, a question remains as to the paid vacation leave of 22 days for 1982-83 (this was the practice for top administrators) in light of the fact that petitioner was terminated on June 30, 1983 and would ordinarily, under his 12 month contract, be permitted to take paid vacation leave in the summer. While the circumstances in Onorovale v. Bd. of Ed. of Englewood, 1974 S.L.D. 1261 were somewhat different, the Commissioner held in that case that vacation leave with pay is an earned benefit. Onorevole gave notice of his resignation at the beginning of July to take effect at the end of that month, and was required to work for

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the entire month instead of running out his vacation days earned during the school year ending in June. Onorevole had taken vacation in July of the next school year for a number of years. The Commissioner noted that such an arrangement is common in the schools of New Jersey.

In the instant case, Roberts used 9 of his 23 vacation days for 1982-83 and had 13 remaining. I CONCLUDE that Roberts earned paid leave for these 13 days and the Board should pay him the sum he would have received for them or $2,435.42 according to the calculation of the Board's business manager. In all other respects, Roberts' petition is DENIED.

ORDER

It is, therefore, ORDERED that respondent Board recognize Vincent McFadden as tenured in both his teaching and noninstructional positions as of August 1983; and

that the petition of Lester Horton be DISMISSED; and

that the Board pay Frank Roberts $2,435.42 in lieu of the remaining 13 days of paid vacation leave which he earned in 1982-83; and in all other respects, the petition of Frank Roberts be DISMISSED.

It is also ORDERED, pursuant to the Commissioner's general supervisory powers, that the Board submit duly adopted job descriptions for all presently existing unrecognized titles to the County Superintendent for approval; that it adopt a policy covering accrual of sick and vacation days and conditions of payment for such days, if any, for non-negotiated-contract personnel and that it update and adopt an organization chart to conform with existing titles not later than July 1, 1984.

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

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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.

March 22, 1984
DATE

Naomi Dower-LaBastille
NAOMI DOWER-LaBASTILLE, ALJ

Receipt Acknowledged:

March 26, 1984
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

March 28, 1984
DATE

Ronald L. Lakenfelt
FOR OFFICE OF ADMINISTRATIVE LAW

jrp

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LIST OF EXHIBITS

P-1 Withdrawal of petition of Veronica Romano
P-2 Withdrawal of petition of Jeanette Corbin
P-3 Withdrawal of petition of Michael Symzcak
P-4 Withdrawal of petition of Charles Matthews
P-5 Withdrawal of petition of Kathleen Wallace (Purcell)
P-6 Resignation of Frank Roberts dated December 1, 1980
P-7 Resolution appointing Roberts on December 4, 1980
P-8 Form of Resolution to grant tenure to Roberts
P-9 Form of Resolution to grant tenure to Horton and McFadden
P-10 Job Description of First Assistant Superintendent in Charge of Personnel
P-11 Job Description of Assistant Superintendent
P-12 Resolution rescinding tenure, January 27, 1983
P-13 April 27, 1983 letter of Superintendent
P-14 May 2, 1983 letter of Roberts
P-15 May 6, 1983 letter of Superintendent
P-16 June 20, 1983 letter of Roberts
P-17 June 24, 1983 letter of Superintendent
P-18 Resolution to abolish position of First Assistant Superintendent of Personnel
P-19 Resolution to abolish position of Assistant Superintendent
P-20 Resolution to terminate Roberts' employment
P-21 July 6, 1983 letter of Roberts
P-22 August 12, 1983 letter of Superintendent
P-23 August 26, 1983 letter of Superintendent
P-24 Another August 26, 1983 letter of Superintendent
P-25 July 10, 1979 letter of Board Secretary

Re: Vincent McFadden
P-26 ugust 18, 1980 letter of Board Secretary
P-27 June 22, 1981 letter of Roberts

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Re: Lester Horton

P-28 August 18, 1980 letter of Board Secretary
P-29 August 29, 1980 letter of Superintendent
P-30 November 20, 1980 letter of Superintendent
P-31 June 22, 1981 letter of Roberts
P-32 April 27, 1982 letter of Superintendent
P-33 January 31, 1983 letter of Superintendent
P-34 April 27, 1983 letter of Superintendent
P-35 May 2, 1983 letter of Horton
P-36 May 9, 1983 letter of Superintendent
P-37 June 24, 1983 letter of Superintendent
P-38 Agenda for June 29, 1983
P-39 Resolution abolishing Supervisor, Special Needs, Academics
P-40 Job Description for position of Supervisor of Special Education-Academic
P-41 Job Description for position of Supervisor of Special Education
P-42 Horton's Resume
P-43 For identification only Memorandum with attached salary guides
P-44 Table of Organization
P-45 Roberts' vacation and sick day record

R-1 Documents concerning granting and rescinding tenure
R-2 Documents concerning establishment of position
R-3 Qualification of Frank Roberts
R-4 Job Description
R-5 Audit Report
R-6 Minutes of June 29, 1983
R-7 Table of Organization
R-8 Documents concerning Lester Horton

New Jersey State Department of Education
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